

NO. 32012-0-III

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION III**

JAMES V. ADAMS,

Respondent/Cross-Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Appellant/Cross-Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

This Public Records Act (PRA) case involves prisoner James Adams request to review his offender central file. In response to the request, the Department of Corrections allowed Adams to review the central file, but the Department withheld Adams' criminal history information as directed by the Washington State Patrol (WSP) and the Federal Bureau of Investigations (FBI). The trial court found the Department violated the PRA by withholding the criminal history information. The trial court then found the Department had acted in bad faith under RCW 42.56.565. Because the Department withheld the record in a good faith attempt to comply with the WSP's and FBI's regulations concerning disclosure of criminal history information, the Court should reverse the finding of bad faith and award of penalties.

II. ASSIGNMENTS OF ERROR

- 1. The trial court erred when it held the Department's withholding of Adams' ACCESS Interstate Identification Index criminal history record amounted to bad faith under RCW 42.56.565.**
- 2. The trial court erred when it held the Department's withholding of Adams' ACCESS Washington State criminal history record amounted to bad faith under RCW 42.56.565.**
- 3. The trial court erred when it held the Department's failure to apply a superior court's non-final decision regarding fingerprint based criminal history**

information amounted to bad faith under RCW 42.56.565.

III. STATEMENT OF THE CASE

A. The Department Obtains an Offender's Criminal History Information Either Through a Fingerprint Card Request or Through the ACCESS System

The Department obtains an offender's criminal history information to ensure the offender is classified correctly and to determine the offender's accurate risk levels. CP at 348. The Department obtains this criminal history information through agreements with the WSP and FBI. CP at 348. The Department obtains the criminal history information either through the fingerprint card request, or through the computerized ACCESS system.

When the offender is first admitted to the Department's custody, the Department initially obtains the offender's criminal history information by submitting the offender's fingerprint cards to the WSP. CP 348. The Department keeps one fingerprint card for the Department's records, and submits two fingerprint cards to the WSP. CP at 348. The WSP maintains one card, and forwards the other fingerprint card to the FBI. CP at 348. After the fingerprint cards are processed, the WSP and FBI provide the offender's criminal history information to the Department. Once the offender's criminal history is obtained from the WSP and FBI,

the Department updates the offender's information in the Department's records, including the offender's central file. CP at 348.

After initially obtaining the offender's criminal history information using the offender's fingerprint cards, the Department subsequently obtains criminal history information concerning the offender as part of an annual review using the ACCESS system. CP at 348. ACCESS is a computerized system controlled by and located at the WSP Information Technology Division. CP at 409. ACCESS allows authorized criminal justice agencies, including the Department, to obtain criminal history information by submitting the person's name and date of birth. CP 409-10. ACCESS provides criminal history information from multiple repositories such as the Washington Crime Information Center, the National Crime Information Center, the Washington Department of Licensing, the Washington State Parks, and the Department of Corrections Offender file. CP at 409. One of these repositories is the Interstate Identification Index, maintained by the FBI that contains information regarding out-of-state conviction and non-conviction data. CP 410.

B. The Agreement to Use the ACCESS System Limits the Department's Dissemination of Criminal History Information Obtained Through ACCESS

The Chief of the WSP is vested with statutory authority to administer all operating phases of the ACCESS system. CP 409-10. Local

agencies must strictly adhere to regulations and WSP directives related to the use of the ACCESS system. CP at 409-410. The use of the ACCESS system and the distribution of information obtain from ACCESS is limited exclusively to criminal justice agencies for the administration of criminal justice. CP at 410. Furnishing sensitive information obtained from ACCESS outside of the agency or to a person for personal use is prohibited. CP at 410.

As part of its agreement with the WSP and the FBI, the Department is authorized to use ACCESS to submit name and date of birth queries to the Interstate Identification Index. This index is a database comprising of national criminal history records of arrest and prosecution information. CP at 410. Under the ACCESS agreement, the Department's queries of the Interstate Index must be limited to criminal justice purposes. CP at 410. Therefore, when the Department obtains criminal history information from a name and date of birth query submitted to the Interstate Index, the FBI's position was that the information should not be disseminated outside of the agency, not even to the subject. CP at 410.

The WSP also considered dissemination of the information obtained from the Interstate Index, even in response to a public records request, to be a violation of the ACCESS agreement, 28 U.S.C. § 538, and the applicable federal regulations. CP at 410. The WSP would consider

public disclosure of the information obtained from the Interstate Index to be a misuse of ACCESS, and a violation of the ACCESS agreement. If the information was publicly disclosed, the WSP would subject the Department to an audit and possible sanctions, up to possible loss of its ACCESS privileges. CP at 410. The WSP informed the Department that for an offender to obtain a copy of criminal history information obtained from the Interstate Index, instead of making a public records request to the Department, the offender must request a copy of the criminal history information through 28 CFR § 16.30 (a fingerprint submission process). CP at 410.

In addition, the WSP position provided that RCW 10.97.080 allows for a subject of record to review a copy of his Washington State criminal history information through a certified criminal justice agency and the WSP Criminal Records Division through a fingerprint submission process. CP at 410. RCW 10.97.080 also allows for the subject of record to request and retain a copy of his personal nonconviction data information on file from the WSP Criminal Records Division, for a fee. CP at 411. Although Washington State criminal history record information is not generally obtained through Interstate Index, it can be obtained via a name and date of birth query of the ACCESS database. CP at 411. When the Department obtains a Washington State criminal history record from a

name and date of birth query through ACCESS, the WSP's understanding from the FBI is that this information would not implicate 28 U.S.C. § 538 and the applicable federal regulations, provided that it is limited to Washington State information. CP at 411. Thus, the WSP asserted dissemination of the Washington State information only to an offender would not constitute a violation of the ACCESS agreement, although such information could still potentially be exempt from disclosure under chapter 42.56 RCW as these records are not fingerprint based as required by RCW 10.97.080. CP at 411.

C. The Department Withheld the ACCESS Information When Adams' Requested to Review His Offender Central File

The Department maintains a central file on all incarcerated offenders. CP at 335-336. One of the records maintained in the offender's central file includes the offender's criminal history information obtained from the ACCESS system. CP at 336. In light of the ACCESS agreement, and the regulations and procedures established by the WSP and the FBI, the Department believed that criminal history information obtained from ACCESS could not be publicly disclosed even to the offender. CP at 402.

On July 6, 2011, Adams submitted a request to review his central file. CP at 336. The same day, a response was issued advising Adams to watch the call out log for his scheduled appointment to review the file.

CP at 340-341. In preparation of the appointment, the Correctional Records Supervisor reviewed Adams' central file and removed all documents she believed were to be withheld from review because they were exempt from disclosure. CP at 336. This included a two page Defendant Case History report and a criminal history record obtained through ACCESS that contained the Washington State rap sheet information, as well as records of FBI and out-of-state¹ criminal history information. CP at 336. An exemption log was prepared noting the withholding of the documents and was signed by Adams upon receipt during his offender central file review on July 14, 2011. CP at 343. On October 31, 2011, Adams filed his lawsuit alleging violations of the PRA for the withholding of the two page Defendant Case History report and the ACCESS criminal history information. CP at 485-490.

On February 1, 2012, the Department sought specific clarification from the WSP regarding Adams' criminal history information at issue in this case. CP at 129. The Department requested the WSP to clarify whether the criminal history information from ACCESS contained out-of-state information because the Department wanted to ensure that any dissemination did not violate the terms of the ACCESS agreement. CP at

¹ A review of the out of state portion of the ACCESS printout indicate they are the criminal history records for another offender which were placed in Adams' offender central file in error.

129. In order to obtain the WSP's position, a copy of Adams' ACCESS printout was forwarded for WSP's review and input. CP at 129. On March 5, 2012 the Department sought further clarification regarding the ACCESS printout and the WSP reiterated their position. CP at 280. Upon reviewing Adams' criminal history information, the Department again sought clarification from the WSP on August 9, 2012. CP at 278-280. At that time, the WSP confirmed the Washington State portion of Adams' criminal history could be released to Adams without any implications. Therefore, on August 16, 2012, the Correctional Records Supervisor scheduled Adams for a review of the two page Defendant Case History report and the ACCESS printout. CP at 337. Adams did not appear for the appointment. CP at 337. He was then re-scheduled for another appointment on August 23, 2012. CP at 337. At that time, Adams appeared but declined to view the records. CP at 337 and 345.

D. Additional PRA Litigation Regarding Offender Criminal History Records

In 2011, the Department was named as a Defendant in *Chester v. Department of Corrections*, Spokane County Cause Number 11-2-00329-3. CP at 127. In *Chester*, the plaintiff alleged a PRA violation for failure to allow him access to his criminal history information during a review of his central file. CP at 25 and 127. However, unlike the records in Adams'

case, the criminal history information sought in the *Chester* case included records obtained through the fingerprint card submission for information. CP at 25. On November 18, 2011, the *Chester* court issued its order denying the Department's request for reconsideration and ruled the plaintiff was entitled to access his criminal records. CP at 127. Due to the implications raised as a result of the order, the Department sought clarification and began discussions with the WSP and FBI regarding the dissemination of an offender's criminal history information. CP at 128. On December 6, 2011, the Department received a response indicating that despite the court's ruling, the FBI and WSP believed the documents were still exempt from public disclosure. CP at 132-135.

During these discussions, it also came to the Department's attention that there were different dissemination implications based on whether the criminal history information was obtained through fingerprint submission or through the use of ACCESS. CP at 128. The FBI and WSP indicated that dissemination of fingerprint based "rap sheets" would not result in a violation of the agreements that govern such criminal history records, nor would dissemination implicate any misuse under the terms of the ACCESS agreement. CP at 128. In addition on December 14, 2011, the FBI advised the Department that information from the Interstate Identification Index "cannot be given to the inmate." CP at 137. On the

same date, the WSP informed the Department that in the event it began to disclose the Interstate Index information to offenders in response to public records requests, the “WSP would consider the disclosure a misuse” and provided the Department with the WSP reference guide and procedures for ACCESS audits. CP at 128. The Department was also informed that the audit process would be onerous and if the FBI audits the Department and learns about the dissemination, the FBI could send letters to the Governor’s Office regarding the misuse. CP at 129. The Department was informed that if it engaged in “misuse,” the FBI or the WSP could revoke the Department’s authorization to use the ACCESS system. CP at 129.

The Department continued to seek additional clarification from the WSP and FBI regarding dissemination of criminal history records obtained through ACCESS. CP at 239-276. On January 31, 2012, the WSP changed its position and indicated that if the ACCESS printout contained Washington State information only, it could be disseminated to the subject. CP at 255. However that such review was still subject to the restrictions in RCW 10.97 and if the report contained Interstate Index information, it could not be disseminated. CP at 255. The FBI also reiterated this position to the Department. CP at 260.

As the criminal history information in *Chester* were finger print based records, and the Department was informed that these documents

could be disseminated, the Department had no reason to appeal the *Chester* court's decision.

E. The Trial Court Found the Department Acted In Bad Faith When It Relied On the WSP and FBI Instructions Not to Disclose Information Obtained From ACCESS

The Department moved for a show cause hearing, arguing withholding of Adams' ACCESS criminal history information did not amount to a violation of the PRA in light of the federal and state regulations exempting production². In its ruling, the trial court found there were no regulations that prevented dissemination of the ACCESS printout as part of any agreement between the Department and the WSP or the FBI. CP at 291. The trial court further found Adams was entitled to the federal portion of his criminal records pursuant to 28 CFR § 16.30-§ 16.34 and the Washington State portion of his criminal records pursuant to RCW 10.97.080 and WAC 446-20-090. CP at 292. Therefore, the trial court found the Department's withholding of the ACCESS criminal history information to be in violation of the PRA. CP at 292.

At the penalty hearing, the trial court ruled the Department withheld the records from Adams in bad faith pursuant to RCW 42.56.565. CP at 29-33. As part of its decision the trial court held that there was no statutory basis for the withholding of the ACCESS printout, the

² The Department conceded the two-page Defendant Case History report was withheld in error.

Department's position was legally indefensible, and the Department's reliance on the controlling agency's advice as opposed to a previous decision of another trial court in a different case amounted to bad faith. CP at 31-32. The trial court noted if the Department did not agree with the *Chester* court's holding, it should have filed an interlocutory appeal or a declaratory action.³ CP at 32. The trial court further held that the Department's refusal, as a member of the executive branch, to follow the decision of the judicial branch warranted a substantial penalty. CP at 32. The trial court then issued a penalty amount of \$35 per day until the date of the hearing, which resulted in a 701 day penalty calculation of \$24,535.00⁴. CP at 33.

IV. ARGUMENT

A. The Department Did Not Act in Bad Faith When It Reasonably Relied on the WSP's and the FBI's Interpretation of the Federal Law Governing the Dissemination of Information Obtained through the Interstate Identification Index

Pursuant to RCW 42.56.565(1), a court shall not award penalties to a person serving a criminal sentence on the date his request was made,

³ However, at the time of the trial court's decision, there had yet to be a final order issued in *Chester v. DOC*, Spokane County Superior Court Cause No. 11-2-00329-3. CP at 25. The *Chester* case eventually settled without the need for appellate review.

⁴ Since the time the trial court's final order was issued, the FBI, WSP and Department have come to an agreement which allows for the dissemination of Washington State and Interstate Identification Index information obtained through ACCESS if the offender's FBI number is obtained through the use of fingerprints and is used to conduct the ACCESS search.

unless the court finds the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record. Even if the agency erred in not disclosing a record, reliance on an invalid basis for nondisclosure does not result in a finding of bad faith, so long as the basis is not ‘farfetched’ or asserted with knowledge of its invalidity. *See King County v. Sheehan*, 114 Wn. App. 325, 357, 57 P.3d 307 (2002).

The trial court held the Department had no defensible statutory basis for the withholding of Adams’ criminal history records and therefore found its withholding to be in bad faith. However, a review of the applicable statutes reveals that the issue is not as simplistic as the trial court held. The Department has a strong penological interest in maintaining its ability to use the ACCESS system. The Department was reasonable to rely on the interpretation of the agency vested with the statutory authority to maintain and operate the ACCESS system. Further, the applicable statutes appeared to support the WSP’s and the FBI’s position prohibiting dissemination of information obtained using the ACCESS system. *See Sargent v. Seattle Police Dept.*, ___ Wn.2d ___, 314 P.3d 1093, 1104 (2013) (agency did not violate the Public Records Act by withholding non-conviction data records since state law requires a person requesting non-conviction data to allege the records contain an inaccuracy or oversight). As such, the Department’s reliance on both the statutes and

the positions of the FBI and WSP when making its determination to withhold the records was neither farfetched nor unreasonable.

1. Federal law indicates that criminal history information obtained through the interstate identification index should not be publicly disclosed.

Under the PRA, public agencies are required to provide inspection or copying of public records unless the record is specifically exempted from disclosure or a statute exempts or prohibits disclosure of the record. RCW 42.56.070(1). Federal regulations govern the dissemination of criminal history information. Federal regulations provide for the dissemination of information obtained from a fingerprint card based request, and prohibit the dissemination of information obtained from computerized systems accessing the Interstate Identification Index.

28 U.S.C. § 534 creates the exchange of criminal history information among “authorized officials of the Federal Government, the States, cities, and penal and other institutions.” 28 U.S.C. § 534(a)-(f). The National Crime Information Center (NCIC) is a nationwide computerized information system established as a service to criminal justice agencies. *See* 28 CFR § 20.3(n). It contains variety of information and criminal history information, including the Interstate Identification Index, collected by criminal justice agencies including criminal history information. 28 U.S.C. § 534(f). 28 CFR § 20.3 defines “criminal history record

information” to include “identifiable descriptions and notations of arrests, detentions, indictments, informations, of other formal criminal charges, and any disposition arising therefrom, sentencing, correctional supervision, and release.” 28 CFR § 20.3(d). Section 534(b) provides that the FBI’s exchange of criminal history information with any other agency is subject to cancellation “if dissemination is made outside the receiving departments or related agencies.” Section 534(b) does not explicitly deem information confidential; however, it evinces a congressional intent to protect the disclosure of criminal history information. *See U.S. Dep’t of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 764-65, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989). It was under this provision for which the WSP and FBI relied on its position of prohibiting dissemination of criminal records obtained through the use of ACCESS. The Department had no reason to doubt Section 534(b)’s applicability prohibiting the release of ACCESS criminal history records.

2. The regulation cited by the trial court did not apply to the information at issue in this case.

Dissemination of criminal history information obtained using the fingerprint card system is allowed by federal regulations. 28 CFR § 16.30 through § 16.34 addresses an FBI identification record, known as a “rap sheet” that lists “information taken from fingerprint submissions retained

by the FBI in connection with arrests.” 28 CFR § 16.31. Arrest data on the “rap sheet” is taken from fingerprint submissions and reports submitted by agencies “having criminal justice responsibilities.” 28 CFR § 16.31. The regulation explains how the FBI may disclose a copy of the “rap sheet” to the subject of the record, with proper identification, and how someone can challenge the information on the “rap sheet.” 28 CFR § 16.32-.34. However, the trial court incorrectly determined that dissemination of Adams’ records was governed by 28 CFR § 16.30 through § 16.34. The records at issue in this case were not obtained using the fingerprint card method for requesting criminal history information. Instead, Adams’ criminal history information at issue in this case was obtained through the ACCESS and contained both Washington State and the Interstate Identification Index criminal history information. Therefore, 28 CFR § 16.30 through § 16.34 do not apply. Instead, the record is governed by other federal regulations.

3. The regulations that govern Interstate Identification Index records support the Department’s position.

28 CFR § 20 is the regulation for the Department of Justice’s criminal justice information systems. *See* 28 CFR § 20 – Appendix, § 20.34. This regulation defines the Interstate Identification Index as “the cooperative federal-state system for the exchange of criminal history

records, and includes the National Identification Index, the National Fingerprint File, and, to the extent of their participation in such system, the criminal history record repositories of the states and the FBI.” 28 CFR § 20.3(m). The Index includes “serious and/or significant adult and juvenile offenses.” 28 CFR § 32.

The Interstate Identification Index is an automated system to provide for the interstate exchange of criminal history information. 28 CFR § 20(m). The Index is the mechanism by which participating jurisdictions share criminal history information through the NCIC. 28 CFR § 20(m)-(n). Additionally,

The [Triple I] System is an index pointer system that ties computerized criminal history record files of the FBI and the centralized files maintained by each III participating state into a national system. This system serves as the vehicle for data sharing and integration across the country. The final phase of III implementation is decentralization, whereby the FBI compiles a national criminal history record from participating state records.

<http://www.fbi.gov/about-us/cjis/cc/library/compact-frequently-asked-questions>, at 10.

Information shared with local governments through the Interstate Index is subject to the regulations promulgated by the U.S. Department of Justice regarding its use. *See* 28 CFR § 20.30. These regulations, codified as Title 28, chapter 1, part 20, subparts A and C, of the Code of Federal

Regulations were promulgated “to assure that criminal history information wherever it appears is collected, stored, and disseminated in a manner to insure the completeness, integrity, accuracy and security of such information and to protect individual privacy.” 28 CFR § 20.1.

The regulations applicable to “state and local criminal justice agencies to the extent that they utilize the services of the Department of Justice criminal history record information systems” provide for access by individuals to criminal history information maintained about him or her in a Department of Justice criminal history record information system. 28 CFR §§ 20.30, 20.34. Specifically, the regulation states criminal history information contained in the Interstate Identification Index system may be available to “criminal justice agencies for criminal justice purposes,” but criminal history records received from the Index system “shall be used only for the purpose requested and a current record should be requested when needed for a subsequent authorized use.” 28 CFR § 20.33. An agency disseminating Interstate Identification Index information contrary to state and federal law is subject to cancellation of its access. 28 CFR § 20.38.

The remote accessing of the Index for individual access and review is not allowed since states desire to follow individual state dissemination procedures for this purpose. *See also* e.g. NCIC 2000 Operating Manual,

Interstate Identification Index (III) at <http://www.leads.ohio.gov/manuals/ncic/iii.htm> (Exhibit 6). However, the subject of the record indexed in the Index may obtain a copy of his or her identification record if he has a *criminal record supported by fingerprints* and that record has been entered in the Index System. CFR Pt. 20, App. Then, if there is a criminal record supported by fingerprints, the person can submit a written request directly to the FBI to obtain information concerning his or her record. 28 CFR §§ 16.30-16.34; 28 CFR § 20.34; 28 CFR Pt. 20, App.⁵; *See also* NCIC 2000 Operating Manual, Interstate Identification Index (III), <http://www.leads.ohio.gov/manuals/ncic/iii.htm>.

The FBI also maintains a database of fingerprints, or other uniquely personal identifying information, known as the “National Fingerprint File” or “NFF.” 28 CFR § 20.3(o). This database is “maintained by the FBI to provide positive identification of record subjects indexed in the III System.” 28 CFR § 20.3(o).

Under these regulations, the Department reasonably believed the public disclosure of information obtained from the Interstate Index, even

⁵ “The procedures by which an individual may obtain a copy of his III System record are as follows: If an individual has a *criminal record supported by fingerprints* and that record has been entered in the III System, it is available to that individual for review, upon presentation of appropriate identification, and in accordance with applicable state and federal administrative and statutory regulations. Appropriate identification includes being fingerprinted for the purpose of insuring that he is the individual that he purports to be. The record on file will then be verified as his through comparison of fingerprints....” 28 CFR Pt. 20, App. (Emphasis Added).

to the offender, would violate the ACCESS agreement under 28 U.S.C. § 538 and the applicable federal regulations. *See* 28 CFR §§ 20.30-38; 28 CFR Pt. 20, App. In addition the Department was not prohibiting the offender from their only access to their records as an offender can still obtain a copy of the information by submitting the request through the FBI. *See* 28 CFR § 16.30. At the time, this was a reasonable interpretation of both state and federal law. *See Sargent*, 314 P.3d at 1104 (recognizing the Criminal Records Privacy Act limited a person's ability to access their own non-conviction data).

Such understanding is also evidenced by 28 CFR § 513 which prohibits the dissemination of information obtain using the Interstate Identification Index from the facility file of the Bureau of Prisons. Specifically 28 CFR § 513.11(a) allows for the dissemination of an offender's fingerprint card "rap sheet" to the subject directly from the prison's file. However, 28 CFR § 513.11(b) prohibits dissemination of an offender's information obtained from the Interstate Identification Index, and instructs all requests for Index information to be sent directly to the FBI. Additionally, 28 CFR § 513.20 addresses the agency's release of information to law enforcement agencies. The regulation prohibits any law enforcement agency from disseminating information it receives under the regulation. 28 CFR § 513.20(b).

Accordingly, it was reasonable for the Department to rely on the federal statutes which govern dissemination of the Interstate Identification Index information as supporting the directions given by the WSP and FBI. While the regulations allow for the dissemination of fingerprint based rap sheets, such documents are not at issue here. Adams' criminal history information obtained through ACCESS is what was withheld pursuant to 28 CFR § 20.38 and 28 CFR § 513.20(b).

In light of the federal statutes and regulations, and the authoritative instructions from the WSP and FBI, the Department had a good faith basis to withhold the criminal history information obtained through ACCESS. As such, the Department did not act in bad faith. The Court should reverse the trial court's finding that the Department's withholding of the ACCESS criminal history information was in bad faith, and should deny Adams penalties under RCW 42.56.565.

B. The Department Reasonably Relied on the Positions of the WSP and the FBI, When Interpreting the State and Federal Statutes Restricting Dissemination of the Washington State Criminal History Information

The trial court also held that Adams' in-state criminal history, obtained through ACCESS, was subject to the PRA pursuant to RCW 10.97.080 and WAC 446-20-090. CP at 292. Therefore, the trial court later determined the Department's withholding of this Washington

State criminal history to be legally indefensible and in bad faith. CP at 31-32. However, the Department's reliance on the WSP and FBI was reasonable.

When the Department withheld the criminal history information, the WSP and the FBI maintained that records of in-state criminal history obtained through ACCESS were subject to the same federal regulations under Section 534(b) that governed dissemination of out-of-state records. CP at 132. In addition, the WSP asserted the Washington State criminal history information was exempt from the PRA under RCW 10.97.050 and RCW 10.97.080. CP at 132. Therefore, the WSP indicated that release of the Washington State criminal history information obtained through ACCESS would result in consequences for the Department. CP at 132. As the WSP is vested with the authority to administer all operating phases of ACCESS and the Washington Crime Information Center which encompasses the records which are the subject of RCW 10.97, the Department was reasonable to rely on the WSP's position when making its determination to continue to withhold the Washington State criminal history information obtained through ACCESS. Nothing in the Department's response is indicative of knowledge that the WSP and FBI's interpretations were invalid.

In addition, while WAC 446-20-090 permits inspection of a criminal history record or non-conviction data, the rule sets forth specifications on how that process can be completed. WAC 446-20-090 provides that the individual submit a reasonable fee and review the records at the central records office of the criminal justice agency. The Department's central records office is located in Olympia, Washington. CP at 347-349. Adams' review took place at the Coyote Ridge Corrections Center in Connell, Washington. CP at 485-190. Further, WAC 446-20-090(3) only provides the "individual to visually examine criminal history information," and does not permit the subject to receive a copy of the record as WAC 446-20-090(5) requires the criminal justice agency to develop procedures to ensure that no individual retains or reproduces non-conviction data during the inspection process. Under the rules set forth in WAC 446-20-090, the Department's withholding of the records was reasonable in light of the positions of the WSP and the FBI. Further, the Department's eventual process of providing Adams with visual inspection of the records comported with WAC 446-20-090(3).

Despite the WSP and FBI's initial positions regarding the Washington State criminal history information, the Department continued to push for further clarification in order to confirm the propriety of the withholding of the records. CP at 255 and 278-281. Eventually the WSP

indicated that if the ACCESS printout contained only Washington State information, it could be disseminated to the subject. However, the WSP also asserted the information was subject to restrictions set forth under RCW 10.97. CP at 125. Once the Department obtained permission from the WSP to disseminate the Washington State portion of Adams' criminal history, the Department made the documents available for Adams' review. CP at 337. However, Adams failed to attend the first appointment and then refused to review the records when they were made available to him. CP at 337 and 345.

The Department's actions are not indicative of bad faith behavior warranting penalties. Instead, the Department acted in good faith when it withheld the criminal history information based upon the representations of the WSP and the FBI, acted in good faith when it attempted to convince the WSP and the FBI to allow disclosure of the information, and acted in good faith when it allowed Adams to view the record (even though Adams then refused to review the record). Accordingly, the Department did not act in bad faith and the trial court's decision should be reversed.

C. The Department's Failure to Apply A Superior Court's Non-Final Decision Regarding A Different Type of Criminal History Information Does Not Amount to Bad Faith

In its ruling, the trial court also found the Department withheld the record in bad faith in light of the trial court's decision in *Chester v. DOC*,

Spokane County Superior Court Cause No. 11-2-00329-3. The trial court noted “it had no indication that the Department of Corrections has filed an interlocutory appeal or that it has filed a declaratory action to have this matter resolved.” Therefore, the trial court held that the Department’s choice of relying on the legal positions and advice of the FBI and WSP amounted to bad faith as it had “ignored” the decision in the *Chester* case finding the offender’s criminal records were subject to review. While on its face, Adams’ case is similar to *Chester* as it dealt with criminal history information withheld when an offender requested to review a central file, that is where the similarities end.

In *Chester*, the plaintiff not only challenged the withholding of his criminal records but also the withholding of his chemical dependency records, medical records and his Criminal Conviction Record packet as well as redactions of his unverified social security number and his rape victim’s information. CP at 25. Further, the criminal records at issue in *Chester* were fingerprint based rap sheets, not information obtained from the Interstate Identification Index as in this case. CP at 25. As noted, once the Department became aware of the different regulations governing the two types of criminal records, it was informed that the dissemination of fingerprint based criminal history information was allowed. Such position is also upheld by the federal regulations set forth in 28 CFR § 16.30

through § 16.34. Therefore, the Department would have no reason to appeal the *Chester* court's determination regarding the withholding of the fingerprint based records. Nor would the Department have applied the *Chester* court's holding to the records in Adams because Adams' records were not fingerprint based records. Accordingly, as the facts in *Chester* were significantly different than those presented in this case, the trial court's ruling in *Chester* should not be used as a basis for a finding of bad faith in this matter under RCW 42.56.565.

Moreover, the fact that the *Chester* case was pending at the same time is not determinative of whether the Department engaged in bad faith in Adams' request for documents. The mere existence of litigation that had not reached a final resolution and that was later settled without appellate review, does not show the Department engaged in bad faith in an unrelated matter.

Nor should the holding in *Chester* be used as a basis to support a bad faith finding in this case for the full amount of time of the withholding, as the *Chester* decision was not rendered until at least four months after Adams reviewed his offender central file.⁶ As such, the trial court's holding should be reversed and Adams should be denied penalties.

⁶ This results in an additional 127 days of withholding, providing Adams with \$4,445 in penalties at \$35/day of withholding.

V. CONCLUSION

The Department did not act in bad faith when it relied on the federal and state statutes, as well as the representations of the FBI and WSP, when it withheld Adams' criminal history records as exempt from public disclosure review under RCW 42.56.070(1). Therefore, the Court should reverse the trial court's holding in this matter and deny Adams penalties.

RESPECTFULLY SUBMITTED this 28th day of January, 2014.

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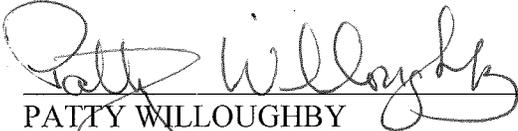
CERTIFICATE OF SERVICE

I certify that I served all parties, or their counsel of record, a true and correct copy of the Brief of Appellant by US Mail Postage Prepaid to the following addresses:

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

DATED this 28th day of January, 2014, at Spokane, Washington.


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