

No. 33191-1-III

**FILED**

MAY 20 2015

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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KEVIN ANDERSON

Appellant

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,

Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR  
FRANKLIN COUNTY

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APPELLANT'S OPENING BRIEF

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## **I. INTRODUCTION**

Anderson attempted to view his central file after his arrival back in prison. The Department of Corrections (“Department”) first withheld his Rap Sheets and misplaced the other binding of his central file containing records from his prior sentence. Anderson then requested to view his file again and this time, the Department moved records from his central file to another location and told him he could view them elsewhere. In the mean time, it claimed exemptions for the records it had removed and said he could view elsewhere.

The trial court upheld all the Department’s claims including a statute of limitations claim, an evidentiary claim and a claim that the complaint did not provide sufficient evidence to support Anderson’s claims. He disagreed and filed this appeal.

## **II. ASSIGNMENTS OF ERROR**

### **A. ASSIGNMENTS OF ERROR**

1. The trial court erred in entering its order granting summary judgment on February 9, 2015:

- a) The trial court erred in entering order number 2;
- b) The trial court erred in entering order number 3;
- c) The trial court erred in entering order number 4;
- d) The trial court erred in entering order number 5;
- e) The trial court erred in entering order number 6; and
- f) The trial court erred in entering order number 9.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court error when it ruled that Anderson's claims related to his February 9, 2012 central file review was barred by RCW 42.56.550(6)'s one year statute of limitations and it failed to consider that the records were produced as part of an installment production and the lawsuit was timely filed pursuant to the mailbox rule of GR 3.1? (Assignment of error number 2.)

2. Did the trial court error when it ruled that Anderson's claims related to his May 31, 2012 central file review was barred by RCW 42.56.550(6)'s one year statute of limitations and it failed to consider that the records were produced as part of an installment production and the lawsuit was timely filed pursuant to the mailbox rule of GR 3.1? (Assignment of error number 3.)

3. Did the trial court error when it ruled that the Department of Corrections did not violate the Public Records Act when it removed records from Anderson's central file after he requested them but before he could view them and when it claimed an exemption for these medical records that it would not raise if the documents were in Anderson's medical file? (Assignment of error number 4.)

4. Did Anderson provides sufficient facts to support his claims under the Public Records Act in his complaint under the notice pleading standard in Washington? (Assignment of error number 5.)

5. Did the trial court error when it did not rule that the Department of Corrections' failure to conduct discovery on Anderson's

claims vitiated any legal argument the Department could have made that Anderson's claims were outside the scope of his complaint? (Assignment of error No. 1.) (Assignment of error number 5.)

6. Should the trial court have granted the Department of Corrections' claim that most of the evidence provided by Anderson's counsel in his declaration was not authenticated if it had been provided in discovery? (Assignment of error number 6.)

7. Should the trial court have granted the Department of Corrections claim that two emails were hearsay when they were provided in discovery? (Assignment of error number 6.)

8. Did the trial court error when it denied Anderson's argument that the Department had waived authentication in a prior lawsuit? (Assignment of error number 6.)

9. Did the trial court error when it ruled that the Department of Corrections was not liable for violating the Public Records Act and as a result, did not rule the Department of Corrections was liable? (Assignment of error number 1.)

10. Did the trial court error when it ruled that the Department of Corrections was not liable for violating the Public Records Act and as a result, did not rule the Department of Corrections acted in bad faith and Anderson was entitled to penalties? (Assignment of error number 1.)

11. Did the trial court error when it ruled that the Department of Corrections was not liable for violating the Public Records Act and as a

result, did not rule that Anderson was entitled to attorneys fees, and costs?  
(Assignment of error number 9.)

### **III. STATEMENT OF THE CASE**

#### **A. STATEMENT OF FACTS**

Kevin Anderson arrived at Airway Heights Corrections Center in February, 2011. After his arrival, he submitted a inmate kite to review his central file on January 4, 2012. It was received, acknowledged, and Records technician Deanna Leyerle prepared the file for review. CP 284. 74 pages were reviewed. CP 217. Anderson reviewed his central file on February 9, 2012. The request had a designated tracking number of 12-007. CP 285. On the log, it listed four documents as having been redacted and two documents as having been withheld in their entirety. The two documents being withheld were the Washington State Patrol (“WSP”) and Federal Bureau of Investigation (“FBI”) Rap Sheets. The exemption claimed cited to 28 CFR Section 513.11(a)(1) and .20(b). It also cited to RCW 10.97.050, 28 U.S.C. § 534 and 28 CFR Part 20. CP 288. The Criminal Conviction Record dated December 22, 2010 and the Analyze Prison Calculations dated February 15, 2011 were redacted pursuant to RCW 42.56.240 based on victim identification. *Id.*

After viewing the central file, Anderson sent a kite to Central Records on February 25, 2012 stating that the was missing some documents that he knew existed. CP 289. Anderson also filed an appeal with the Public Disclosure Unit in Olympia. CP 290. He appealed the redaction of the access interface message, the nondisclosure of his Rap

Sheets, and other documents missing from the central file. He again kited the records department March 2, 2012 with a letter attached, informing central records that he had a prior history in the Department but there were no documents from that time period. CP 291-92. He expressed his concerns because information in his central file is used by the Department for many purposes including housing, programming and eventual release. CP 294. In response to the kite, Leyerle sent Anderson a letter stating he could only review the records that were on hand. CP 293.

The Public Disclosure Unit's appeals officer, Barbara Parry, responded to Anderson's appeal in a letter dated March 30, 2012. CP 295-96. In her response, Parry stated that "the decision to withhold both Rap Sheets was appropriate when it was made" and that "[n]o further action [was] required." *Id.* She informed Anderson then since his request was made, the Department had changed how inmates can access their Rap Sheets. She told him that he would have to submit a new request to see his. *Id.* Parry also emailed the letter to Leyerle and reminded her this changed the date of the last action for retention. CP 218.

In response, Anderson informed Parry in a letter dated April 3, 2012 that he had been previously incarcerated and that his recent file review did not incorporate any of the prior records. CP 297-98. He apologized for any trouble he was causing but explained that the process had been very frustrating. *Id.*

It took the Department approximately three months to reach the conclusion that part of Anderson's central file had not been received at

AHCC when he arrived. On May 11, 2012, Parry emailed the Department's statewide records department in Tacoma to try to locate it. CP 219-20. After locating it, Parry emailed Leyerle and informed her it had been found at Washington Corrections Center. Parry told Leyerle she would have to prepare and schedule a file review with Anderson. *Id.* Parry then sent a letter to Anderson dated May 15, 2012 informing that he was right about the missing documents and that the file had been located. CP 299-300. He was informed that facility staff would schedule a review. *Id.*

On May 21, 2012, Leyerle sent a letter to Anderson informing him she had received the second volume of his central file and she was preparing it for review. CP 301. Since the letter had different review number Anderson replied with a kite stating that he had requested his file review back in January and that the upcoming file review was part of the original request, not part of a new request. CP 302. There was no response to Anderson's charge. *Id.*

Anderson put in for a postage transfer to have his summons and complaint sent to Franklin County Superior Court on May 21, 2013. CP 320-321. The date these documents were processed by the institution for mailing was May 22, 2013. CP 319.

On May 31, Anderson reviewed the missing volume of his central file. There were two exemption logs provided. This review was given a new tracking number, PD 12-107. CP 303-06. One log showed one redacted document and the other showed eleven redacted documents. *Id.*

405 pages were reviewed and the request was a follow-up to original file review dated January 4, 2012, numbered 12-007. CP 221.

Anderson next made a request to review his central file on July 24, 2012. CP 307. Anderson reviewed both folders in his central file on August 14, 2012. The tracking number was designated PD 12-173 on the exemption log. CP 310-15. There were 21 sets of documents listed as redacted. Seven documents were listed as being removed from the central file and sent to medical records on August 8, 2012. They were listed under the Department's medical exemption. Anderson was informed that he wanted to review these documents, he would have to kite medical. *Id.* 503 pages were reviewed. CP 222. He viewed his Rap Sheets at this time. He received his medical documents during discovery on September 3, 2014.

#### B. PROCEDURAL POSTURE

Anderson filed his motion for summary judgment on December 5, 2014.<sup>1</sup> CP 27-212. Anderson filed a reply. CP 13-26. The trial court granted the Department's motion and denied Plaintiff's. CP 10-12. It also struck documents attached to the Kahrs declarations and ruled some issues were not raised in the complaint. A timely appeal was filed. CP 4-9.

#### IV. SUMMARY OF THE ARGUMENT

Anderson will first show that the Department was on notice of the claims he was pursuing. He will next show that he timely filed his lawsuit

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<sup>1</sup>Appellant has not included the Department's motion as not relevant to this appeal.

in Franklin County. He will then show that the trial court abused its discretion when it struck exhibits attached to Declarations by Michael C. Kahrs. Anderson will then show that the Department violated the Public Records Act and acted in bad faith entitling him to penalties. Finally he will argue for attorney fees and costs.

## V. ARGUMENT

### A. STANDARDS OF REVIEW

Appellate courts review agency actions under the PRA *de novo*. RCW 42.56.550(3). This Court “stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence.” *Progressive Animal Welfare Soc’y v. Univ. of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1995) (“PAWS”). Therefore, it is not bound by the trial court’s factual findings on whether or not an agency violated the PRA.

Granting summary judgment is appropriate when the pleadings, affidavits, interrogatories, depositions and exhibits show there are no genuine issues of material fact. The moving party is then entitled to judgment on the issues presented as a matter of law. *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 177, 876 P.2d 435 (1994). When reasonable minds could reach but one conclusion regarding the claims of disputed facts, such questions may be determined as a matter of law. *Corbally v. Kennewick School Dist.*, 94 Wn. App. 736, 740, 937 P.2d 1074 (1999). Any doubt as to existence of genuine issue of material fact will be resolved against the movant. *Magula v. Benton Franklin Title Co.*, 131

Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact is a fact upon which the outcome of case depends, in whole or in part. *Clements v. Travelers Indem. Co.*, 121 Wn.2d. 243, 249, 850 P.2d 1298 (1993) (citation omitted). When a trial court makes a evidentiary determination on summary judgment the appellate court conducts the same inquiry as the trial court. *Folsom v. Burger King*, 135 Wn .2d 658, 663, 958 P.2d 301 (1998).

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

The Public Records Act is set forth in RCW 42.56 et seq. “The purpose of the Public Records Act is to preserve 'the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.’” *O'Connor v. Dept. of Soc. & Health Servs.*, 143 Wn.2d 895, 25 P.3d 426 (2001) (quoting *PAWS*, 125 Wn.2d at 251).

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

RCW 42.56.030.

It is “a strongly worded mandate for broad disclosure of public records.” *Prison Legal News, Inc. v. Dept. of Corrections*, 154 Wn.2d

628, 635, 115 P.3d 316 (2005). The Public Records Act provides that "[j]udicial review of all agency actions taken or challenged under [RCW 42.56.030 through 42.56.520] shall be *de novo*." *O'Connor*, 143 Wn.2d at 904 (*quoting PAWS*, 125 Wn.2d at 252; RCW 42.56.550(3)).

Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.

RCW 42.56.550(1); *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 794, 791 P.2d 426 (1990) ("The agency must shoulder the burden of proving that one of the act's narrow exemptions shields the records it wishes to keep confidential.").

C. ANDERSON'S CLAIMS MADE IN HIS SUMMARY JUDGMENT MOTION WERE NOT NEW CLAIMS AND THE TRIAL COURT ERRED WHEN IT DISMISSED THEM.

The trial court wrongfully upheld the Department's claim that Anderson raised new claims in his Summary Judgment motion. Anderson's first complaint listed each relevant request and that the Department responded or failed to respond. Anderson provided sufficient notice because Washington is a notice pleading state.

CR 8(a) requires only that a plaintiff provide a "(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled." *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 175 Wn. App. 840, 865, 309 P.3d 555, 567 (2013), *review granted*

*sub nom* 179 Wn.2d 1008, 316 P.3d 495 (2014) *and aff'd*, 180 Wn.2d 954, 331 P.3d 29 (2014). Examination of the complaint shows that Anderson has provided both. CP 322-37. Anderson gave notice to the Department that he had claims under the Public Records Act and it was based on three reviews of his record that took place February 9, May 31, and August 14, 2012. He then demanded relief including penalties, attorney fees and costs. CP 327.

It is the discovery process which uncovers the evidence necessary for plaintiffs to pursue their claims. *Id.* at 866 (*citing Putman v. Wenatchee Valley Med. Ctr. PS*, 166 Wn.2d 974, 983, 216 P.3d 374 (2009)). Mr. Anderson appealed the denial of his rap sheets. CP 290. In litigation, Mr. Anderson asked about them in his interrogatories propounded during discovery in his December 14, 2013 requests to the Department. CP 340-41. He followed up with deposition questions to the Department's employee who handled his requests, Deanna Leyerle. CP 343-46 . The Department failed to avail itself of any discovery whatsoever. CP 337 Second Kahrs Decl. It had the opportunity to clarify what claims Anderson would pursue after investigating the facts through discovery and failed to do so. And, in the discovery requests made by Anderson, the Department was given notice of what issues Anderson was pursuing.<sup>2</sup> He pursued discovery on the rap sheets, including deposition

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<sup>2</sup>In his third set of interrogatories and requests for production, Anderson asked why the rap sheets identified in the exemption log were withheld.

questions. Anderson cannot be held at fault for the Department's own failure to investigate the nature of the claims further.

Anderson would further remind this Court that all documents pertaining to a request and response are always in the possession of the agency. He cannot be penalized for that which was allegedly hidden in plain sight. Anderson has the right to raise any factual claim based on the Public Records Act and the three central file reviews of 2012 that were so clearly the subject of the lawsuit.

D. THIS COURT MUST OVERTURN THE TRIAL COURT'S STRIKING OF EXHIBITS ATTACHED TO THE FIRST AND SECOND DECLARATION OF MICHAEL C. KAHR'S.

The Department made several evidentiary claims in its Response. CP 383-85. First, it claimed that Exhibits 1-5, 7-11 and 13-16 of the Declaration of Michael Kahrs were not authenticated. It next claimed Exhibits 6-16 were related to claims outside the scope of the complaint. *See* Section C, *supra*.<sup>3</sup> The Department also objected to two emails between Departmental employees provided in discovery as hearsay. Anderson respectfully disagrees with the Department's argument.

First, Anderson in his Fifth Declaration provided the personal knowledge necessary to authenticate the documents because they were addressed to or written by him. These documents cannot be questioned. As for the Declaration of Kahrs, most of these documents were received

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<sup>3</sup>Notwithstanding Anderson's failed attempt to clarify the pro se complaint, he still provided sufficient information combined with the Department's failure to conduct any discovery. (Emphasis added.)

during discovery from the Department as stated in the declaration and as shown on the document itself.

Anderson is only required to make a prima facie showing of authentication. *State v. Danielson*, 37 Wn. App. 469, 471, 681 P.2d 260 (1984). *Danielson* also permits authentication by a third party or even by the evidence itself. *Id.* Many of these documents were provided through the discovery process by the Department and each document for which this is claimed has an identifier in the lower right hand corner showing they were provided by the Department, thus each document contains its own authentication. The Department has not denied that each document is accurate. This is especially true of the exhibits of departmental policies.

Furthermore, authentication of identification can be provided by statute or court rule. ER 901(b)(10). A party filing discovery materials need only file that which are relied upon. CR 26(h). Finally, since most of the documents attached to Kahrs's Declaration were produced by the Department during discovery, they have been properly authenticated. As the Court of Appeals has declared, "[w]e adopt the federal interpretation of ER 901 and hold that authentication may be satisfied when the party challenging the document originally provided it through discovery." *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 748, 87 P.3d 774, 782 (2004).

Furthermore, the Department has waived its right to challenge anything about the documents in prior cases where the Department was a party, the documents had been submitted by plaintiff, and the Department

failed to object to authenticity. For example, the Department of Justice Order 556-73 was submitted in *Baker v. Department of Corrections*, Spokane County, No. 12-2-00294-5. CP 354-55. Because of no prior objection to authenticity by the Department, it cannot be objected to in this case.

Finally, the emails are not hearsay in that they were provided by the Department in discovery and they speak for themselves. The Department cited to *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986) for the general proposition that inadmissible evidence cannot be considered when ruling on summary judgment motions. But *Dunlap* is a general case, involving a hearsay statement by another, not about documents provided by the Department in answer to discovery which speak for themselves.

E. ANDERSON TIMELY FILED HIS CHALLENGE TO THE DEPARTMENT'S RESPONSES TO HIS JANUARY 4, 2012 REQUEST FOR RECORDS.

1. Anderson Is Entitled to the Presumption that His Lawsuit Was Timely.

There are two reasons why this lawsuit was timely filed to include both productions made by the Department in response to Anderson's January 4, 2012 request to review his central file. First, Anderson supplied not-challenged evidence with his declaration that he put the summons and complaint in the prison mail system on May 21, 2013. In his Declaration, Anderson stated under oath that on May 21, 2013, he placed the complaint and summons in this case in the internal legal mail

system of Coyote Ridge Corrections Center. He also stated under oath that he made arrangements for postage and gave the address he sent it to, which is the address of Franklin County Superior Court. He also provided uncontroverted evidence that the Department had processed his postage arrangement on May 22, 2013. CP 319. Either one, by itself, is sufficient to show the complaint and summons was timely filed pursuant to the mailbox rule. *In re Pers. Restraint of Quinn*, 154 Wn. App. 816, 226 P.3d 208 (2010).

Quinn had his motion stamped past the one year statute of limitations contained in RCW 10.73.090. *Quinn*, 154 Wn. App. at 826. He also supplied a variety of evidence including documents from the prison mail system showing the documents were timely filed. *Id.* After examining the requirements of GR 3.1, the appellate court concluded that Quinn had met his evidentiary burden to receive the benefit of GR 3.1. *Quinn*, 154 Wn. App. at 834. Given the evidence Anderson provided, this lawsuit was timely filed to challenge the Department's responses to his January 4, 2012 request to view his central file.

2. The Lawsuit Was Filed Less Than One Year After the Last Installment to the January 4, 2012 Request Was Produced.

This lawsuit was timely filed because there was no claimed exemption to the February 9, 2012 withheld documents and there were two productions of records in response to this request with the last production occurring less than one year after this lawsuit was filed. The statute of limitations is one year from an agency's claim of exemption or the last

production on a partial or installment basis. RCW 42.56.550(6). Anderson challenged the exemptions permitting the Department to deny his viewing his Rap Sheets. The exemptions were withdrawn during the pendency of his appeal. Because there was no exemption claim, the first prong of RCW 42.56.550(6) does not apply.

The Department also produced records twice to Anderson on a partial or installment basis in response to his January 4, 2012 request to view his central file. The February 9, 2012 review was the first and the May 29, 2012 review was the second partial disclosure or installment. Therefore, the statute of limitations must run from the last production or installment, which was May 29, 2012. Since the lawsuit was filed by the mailbox rule on May 22, 2013, Anderson is permitted to challenge the Rap Sheets not produced during the first partial disclosure or installment to his January 4, 2012 request.

F. THE DEPARTMENT VIOLATED THE PUBLIC RECORDS ACT BY WITHHOLDING DOCUMENTS FROM ANDERSON.

1. The Department Violated the Public Records Act When It Withheld Anderson's Rap Sheets From Him During the February 9, 2012 Review.

The Department withheld the FBI and WSR Rap Sheets during Anderson's February 9, 2012 review, citing several exemptions including 28 CFR Section 513.11(a)(1) and .20(b), RCW 10.97.050, 28 U.S.C. § 534 and 28 CFR Part 20. CP 288. In originally promulgating this exemption, the Department deliberately ignored the plain language of the companion statute RCW 10.97.080. RCW 10.97.080 states the following:

All criminal justice agencies shall permit an individual who is, or who believes that he or she may be, the subject of a criminal record maintained by that agency, to appear in person during normal business hours of that criminal justice agency and request to see the criminal history record information held by that agency pertaining to the individual.

Using statutory interpretation, the only conclusion is that the Department was obligated to permit Anderson to view his Rap Sheets. Words used in a statute are to be given their usual and ordinary meaning. *Garrison v. Washington State Nursing Board*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). Courts only look beyond the plain language of the statute if the language itself is ambiguous. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Undefined terms are given their plain, ordinary and popular meaning, and courts look to standard English language dictionaries to determine the ordinary meaning of such terms. *Boeing C. v. Aetna Cas & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1976). First, the use of the word “all” means exactly that – all agencies that qualify including the Department of Corrections. There is no question when looking at the language of both RCW 10.97.030(5) and in RCW 43.43.705 that the Department qualifies. It is an agency which performs “activities directly relating to the apprehension, prosecution, adjudication or rehabilitation of criminal offenders.” RCW 43.43.705. Or to put it another way, it is “a government agency which performs the administration of criminal justice pursuant to a statute or executive order and which allocates a substantial part of its annual budget to the administration of criminal justice.” RCW 10.97.030(5).

The plain language of RCW 10.97.080 also requires all criminal justice agencies, including the Department, to permit those individuals who is the subject of any criminal records they keep a means to inspect the criminal history records in the Department's possession. The Department has been classified as a criminal justice agency since 1972. WAC 446-20-050 states the following:

- (1) The following agencies will be considered criminal justice agencies for the purpose of chapter 10.97 RCW and these regulations.
  - (c) State, county, or municipal agencies that have responsibility for the detention, pretrial release, post trial release, correctional supervision, or rehabilitation of accused persons or criminal offenders;

WSP's criminal identification and history section was established in 1972. RCW 43.43.700. As part of this same legislation, the statutory scheme made it possible for any individual the subject of a criminal history could inspect or request a copy of the criminal history record information on file with the section. RCW 43.43.730. Thus WSP has been providing access to each individual who wished to view their criminal history for over forty years.

Likewise, the FBI rap sheet is also disclosable. The FBI was ordered in September 24, 1973 by U.S. Department of Justice to publish rules to permit the subject of rap sheets to request a copy for the purposes of correcting or updating the records. CP 240-41. States are only limited on dissemination of nonconviction data as authorized by that state's own statute. 28 CFR § 20.21(b)(2). The Department can easily redact any non-

conviction data that it cannot divulge due to any state's rules. Again, the Department acted without regard for the rights of the subject of a rap sheet.

Anderson finally was able to view the Rap Sheets on August 14, 2012. This is because the Rap Sheets were in the first volume of the central file and he did not view them on May 31, 2012. In calculating the time period, this Court should count the days from the request to when he actually viewed them, which is 223 days.

2. The Department Violated the Public Records Act By Not Disclosing Documents In Its Possession.

On July 24, 2012, Anderson requested to review his central file. Seven documents were then withheld in their entirety by the Department and sent to medical records. The records were present in the central file when Anderson requested them because the Department listed two of the records on the May 31, 2012 exemption log. An agency is required to disclose all public records responsive to a request unless it falls within an enumerated exception. RCW 42.56.070(1). The Department seriously violated the PRA when it took these records out of the file and sent them to medical records without letting Anderson view them first. This action cannot be justified because otherwise an agency can continue to transfer documents between files without ever having to produce them to a requestor.

Anderson was finally given these documents during discovery on September 3, 2014. The Department should be penalized from August 14, 2012 to September 3, 2014, which is 750 calendar days.

3. The Department Violated the Public Records Act By Claiming Exemptions for Medical Records that Anderson Is Entitled to View.

In refusing to provide Anderson access to his own medical records, the Department's exemption claim cited to RCW 70.02.020(1), RCW 42.56.070(1) and .360(2), RCW 70.96A.150(1)(3) and 42 CFR. However, these exemptions do not apply because the subject of the records was Anderson.<sup>4</sup> RCW 42.56.070(1) is a general exemption and like all general statements about privacy, a statement without enforceability. See *PAWS*, 125 Wn.2d 243. RCW 70.02.030 permits a patient to authorize health care information, just like RCW 70.02.020(1). Likewise, RCW 70.96A.150(1)(3) permit the release with prior written consent. When an inmate requests to view his central or medical file, he has the absolute right to do so. The exemptions listed only apply to third parties, not the patient. The Department admitted that the records are disclosable to Anderson by stating on the exemption log that he could see the records if he kited medical records. CP 311-12. Again, this is 750 calendar days.

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<sup>4</sup>This basic fact is shown by the language on the forensic psychological reports prepared by Gene Stroobants, employed by the Department. On the front page, under the header of "Confidentially," it states that "[t]he inmate may request a copy of this report." CP 239.

G. THE DEPARTMENT IS LIABLE FOR PENALTIES  
BECAUSE IT ACTED IN BAD FAITH.

A “person who prevails” has been defined by the Washington Supreme Court as a person who must seek judicial review to determine that the documents were wrongly withheld. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005). The Spokane Research Court held that filing need not be the direct cause of the disclosure, so long as a court determines that disclosure had been wrongfully denied at the time the suit was brought. *Id.* The disclosure of documents prior to judgment does not moot the issue. Fees and costs are still mandatory for the period of time that disclosure was improperly denied from the time of request to disclosure. *Id.*, at 102. Good faith is not a defense. *Amren v. City of Kalama*, 131 Wn.2d 25, 35, 929 P.2d 389 (1997).

The Supreme Court in *PAWS* emphasized that “[a]gencies have a duty to provide ‘the fullest assistance to inquirers and the most timely possible action on requests for information.’” *PAWS*, 125 Wn.2d at 252 (quoting RCW 42.17.290 (now RCW 42.56.100)). This duty exists, despite the fact that “such examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3). And it is abundantly clear that it is not for the agency to interpret the act: “[L]eaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 131, 580 P.2d 246 (1978). There is no wiggle room for an

agency – it must fulfill its obligations under the PRA. If there is any question, the agency must seek clarification from the requestor.

RCW 42.56.565, the statute which requires bad faith on the part of the agency before a court can grant penalties to an inmate does not define what bad faith is. Our courts have determined that a showing of bad faith need not require an intentional bad act. *See Francis v. Dept. of Corrections*, 178 Wn. App. 42, 313 P.3d 457 (2013). In discussing bad faith, Division II focused on various cases in the PRA context to support its position. *Id.* at 463 (citations omitted). It also looked at cases outside the PRA. *Id.* at 464 (citations omitted). It then considered excerpts from the Restatement (Second) of Contracts § 205 cmt. d (1981), quoted in Black’s Law Dictionary 159 (9<sup>th</sup> ed. 2009). Finally, it looked to the federal Freedom of Information Act (“FOIA”) for possible persuasive authority. After consideration, the *Francis* Court stated, “FOIA cases have no bearing on the meaning of bad faith in this appeal.” *Francis*, 178 Wn. App. at 465. Having rejected this argument, it looked to statutory interpretation of RCW 42.56.565.

In rejecting the intentional bad act requirement, the *Francis* Court looked at the purpose of the PRA and the people’s sovereignty. It also looked at how it is interpreted for the requestor to protect the public interest. *Francis*, 178 Wn. App. at 466. It concluded that inmates are entitled to penalties when an agency does not conduct a reasonable search but not when making a simple mistake or following the law as it existed at the time. *Id.* at 467.

This Court was next to interpret RCW 42.56.565. See *Faulkner v. Wash. Dept. of Corrections*, 183 Wn. App. 93, 332 P.3d 1136 (2014). In *Faulkner*, this Court provided further guidelines on what defines bad faith. *Faulkner* held that “[b]ad faith is associated with the most culpable acts by an agency.” *Id.* at 105. It seconded the bad faith finding in *Francis* that a cursory search and delayed disclosure fell “well short of even a generous reading of what is reasonable under the PRA.” *Id.* (citing *Francis*, 178 Wn. App. at 63). *Faulkner* holds that a finding of bad faith requires a finding of a higher level of culpability than negligence – it requires a finding of wanton or willful act or omission by the agency. *Id.* The *Faulkner* Court applied Black’s Law Dictionary to define these terms.

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

*Id.* at 103-04 (citing *Black’s Law Dictionary*, 1719–20 (9<sup>th</sup> ed. 2009) (quoting Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 879–80 (3d ed. 1982))). Putting it more succinctly, “[p]enalties are owed when an agency acts unreasonably with utter indifference to the purpose of the PRA.” *Id.* at 105. The *Faulkner* Court endorsed the decision in *Francis*:

“*Francis* is an example of a wanton act made in bad faith—the agency knew it had a duty to conduct an adequate search for the requested records but instead performed a “cursory search and delayed disclosure well

short of even a generous reading of what is reasonable under the PRA.”

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

When evaluating penalties, courts use the standard mitigating and aggravating factors promulgated by the Supreme Court in *Yousoufian v. King County*, 168 Wn.2d 444, 229 P.3d 735 (2010) (*Yousoufian IV*).<sup>5</sup> The *Yousoufian* mitigating facts are as follows:

(1) a lack of clarity in the PRA request, (2) the agency's prompt response or legitimate follow-up inquiry for clarification, (3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions, (4) proper training and supervision of the agency's personnel, (5) the reasonableness of any explanation for noncompliance by the agency, (6) the helpfulness of the agency to the requestor, and (7) the existence of agency systems to track and retrieve public records.

The *Yousoufian* aggravating factors are as follows:

(1) a delayed response by the agency, especially in circumstances making time of the essence, (2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions, (3) lack of proper training and supervision of the agency's personnel, (4) unreasonableness of any explanation for noncompliance by the agency, (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency, (6) agency dishonesty, (7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency, (8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency, and (9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.

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<sup>5</sup>While these are listed, *Yousoufian IV* Court stated it was not an exclusive list. “We emphasize that the factors may overlap, are offered only as guidance, may not apply equally or at all in every case, and are not an exclusive list of appropriate considerations.” *Id.* at 468.

*Id.* at 467-68.

Although these are the listed factors, the *Yousoufian IV* Court made it clear that it was a non-exclusive list. We emphasize that the factors may overlap, are offered only as guidance, may not apply equally or at all in every case, and are not an exclusive list of appropriate considerations. Additionally, no one factor should control. These factors should not infringe upon the considerable discretion of trial courts to determine PRA penalties.

*Id.* at 427.

Anderson will first show why he is entitled to penalties based on the Department's bad faith exemption claim which denial him his statutory right to review his own Rap Sheets during his February 9, 2014 review. He will then show why the Department's moving the medical documents that were in the central file at the time of the request was done in bad faith. Anderson will finally show that, like the Rap Sheets, the Department withheld medical documents from the subject who was statutorily entitled to see them and he is entitled to penalties for the medical records violations.

1. There Are Two Logical Groupings of Documents.

Grouping documents when evaluating penalties is a standard approach to handling cases with more than one violation or involve the withholding of more than one document. How a trial court handles its penalty calculation can only be overturned for an abuse of discretion. *Lindberg v. Kitsap County*, 133 Wn.2d 729, 747, 948 P.2d 805 (1997). Groupings can be based on different factors including how many requests were made, the time it took to produce them, subject matter, among others.

*Yousoufian v. King County*, 114 Wn. App. 836, 848, 60 P.3d 667 (2003) (*Yousoufian I*) (rev'd on other grounds, *Yousoufian v. King County*, 152 Wn.2d 421, 437, 98 P.3d 463 (2004) (*Yousoufian II*)). *Yousoufian I and II* involved eighteen missing records grouped into ten groups. *Yousoufian II*, 152 Wn.2d 446 fn. 4. The groupings were separated into two types of documents. Four studies were withheld. The documents were separated into the number of days documents were made available to Yousoufian. The trial court did not abuse its discretion. *Yousoufian I*, 114 Wn. App. at 849.

Subsequently, this Court decided *Zink v. City of Mesa*, 162 Wn. App. 688, 256 P.3d 384 (2011). The decision involved a great number of different and overlapping requests. An important and relevant takeaway is that grouping based on a common legal error are not always supported when they do not have in common the same number of days they were withheld. *Id.* at 722. It is usually the trial court's discretion on this matter which drives the groupings, even if the grouping is done by subject matter. *See Sanders v. State*, 169 Wn.2d 827, 864, 240 P.3d 120 (2010).<sup>6</sup>

Documents can be grouped to look at the agency culpability, the type of withholding claimed, the number of days withheld, the nature of the document withheld, why it was withheld, and any other relevant consideration. Here, this Court is entitled to determine grouping because the trial court did not address this issue. The logical grouping is by the

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<sup>6</sup>Except when the trial court dismissed the case and did not have the opportunity to exert its discretion to make this decision.

number of days and type of documents withheld. Group I is the Rap Sheets, withheld for 223 days. Group II is the medical documents from the July 24, 2012 request that were withheld for 750 days.

2. The Department Must Be Penalized For Ignoring Statutory Schemes Which Permits the Subject of a Document to View It.

The Department acted in bad faith denying Anderson the right to see records for which he had a statutory right. It was based on a blanket exemption which totally ignored an important part of the statutory scheme of RCW 10.97. “Related statutes should be construed in relation to each other to give effect to each provision and should be read as complementary and not as conflicting.” *Fray v. Spokane County*, 134 Wn.2d 637, 649, 952 P.2d 601 (1998) (citations omitted). The Department violated this simple rule of statutory construction when it forbid Anderson to view his Rap Sheets.

During the pendency of Anderson’s appeal, the Department changed the policy governing when inmates can access their Rap Sheets. Under the new rules, Anderson was entitled to view the Rap Sheets which he finally did August 14, 2012. The point here is that even though the rule was changed before the appeal was finalized, the Department refused to reconsider its prior decision prohibiting him from viewing it based on the January 4, 2012 request. A rhetorical question must be asked: What is the purpose of the appellate process when a rules change does not affect a pending appeal? The Department failed to provide the fullest assistance as required by RCW 42.56.100.

In the first situation, the Department ignored its obvious statutory duty. Such an action is certainly wanton – the Department was utterly indifferent to the requirements of RCW 10.97.080. It is also most likely reckless because legal advisor to the Department would have to know that the statute in question creates a right of the subject to review the Rap Sheets. Either way, the Department most definitely acted with bad faith.

In the second situation when the Department ignored its own rule change, this is certainly wanton. The Department unreasonably risked harm and was indifferent to the consequences of denying an appeal after the grounds of the appeal were modified by the Department. Under both situations, the Department exhibited bad faith.

3. Applying the *Yousoufian IV* Factors Requires this Court to Penalize the Department for its Actions Denying Anderson Access to His Own Rap Sheets.

In determining penalties, this Court must now look at individual *Yousoufian IV* factors to calculate a per-day penalty.<sup>7</sup> Looking first at the *Yousoufian IV* mitigation factors for the Rap Sheets, the Department never delayed a response and procedurally it followed the rules except for its claim of exemptions. There was strict compliance with the PRA's procedural requirements but not substantive requirements. The responder Leyerle did what she was told. But at headquarters, it was a different

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<sup>7</sup>The trial court failed to grant any penalties. This Court must either decide them itself or remand to the trial court for a further determination. To avoid further litigation, Anderson asks this Court to make the determination. *See e.g. Yousoufian IV*, 168 Wn.2d at 468. In the alternative, Anderson asks this Court to make the determination on which factor is implicated and the severity of each implicated factor.

matter. There was a distinct lack of supervision. The appeals officer failed to provide Anderson the Rap Sheets during the pendency of the appeal when the Department changed its disclosure process. The noncompliance cannot be excused for reasonableness due to the statutory language the Department ignored. The responder Leyerle was helpful within her limited scope of duties and knowledge. Anderson admits the Department had a system to track and respond to all requests.

The aggravating factors for the Department's denial of Anderson's viewing of the Rap Sheets warrant a severe per-day penalty. Again, the administrative factors are not relevant. The Department did not delay and strictly complied with the procedural requirements. Substantively is another story. Leyerle was trained on current procedures and depended on the headquarters staff to provide proper instruction through the newsbriefs. This she did not get. The newsbrief she depended on was written totally ignoring those statutory provisions that provided the subject of a rap sheet to view that document for errors. There is no reasonable explanation for noncompliance – the Department acted wantonly and in bad faith. Anderson could not establish any individual's intentional dishonesty when drafting the newsbrief.<sup>8</sup> There was no personal economic loss but the misconduct from the Department is severe – ignoring statutory language giving Anderson the right to view his Rap Sheets is severe.

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<sup>8</sup>It does not mean it does not exist but only that it could not be proven.

This is also a matter of great public importance. The Department promulgates policies for its employees. RCW 72.09.050. It uses a risk classification system to manage inmates under its jurisdiction which relies on the individual's criminal history. CP 242-46. When considering where to place inmates within the system, the Department uses a Facility Risk Management Team ("FRMT"). CP 247-266. The FRMT develops a facility plan and makes decisions on where to place the inmates. In making this decision, it depends on the inmate's risk assessment and criminal history. *Id.* All prisons have housing for various custody levels. Inmates can only be placed in a facility which matches their custody level unless they receive a custody override. CP 267-269. Often, the risk evaluation is the basis for such an override.

Most inmates have a requirement that their release residence be approved before being released. RCW 9.94A.703(2)(e). When evaluating their proposed residence, an individual's level of risk is relevant to whether or not their proposed residence is approved and they are timely released to the community. CP 270-277. This information is also used to evaluate whether they qualify as a career armed criminal under 18 U.S.C. § 924(e). Failure to permit individuals like Anderson to examine their criminal history used by the Department deprives them a chance to challenge any false crimes which affect their prison placement and can affect the day they are released from prison. Finally, the importance of providing this access to the criminal history was clearly foreseeable to the Department

because it is the Department's own policies which require the use of this information.

Given the actions of the Department were wanton, in bad faith, and violated important public policy concerns, this Court must send the message to the Department that it must change its corporate culture to not fight the release of records to an inmate when that inmate is the subject of the records requested. The Department's deliberate choice to ignore the law overrides all other concerns about minimizing any penalty. Anderson asked the trial court for penalty of \$75 per day. He asks this Court to award this amount or, if this case is remanded, instruct the trial court to provide an appropriate per-day penalty given the violations described above.

4. Applying the *Yousoufian IV* Factors Requires this Court to Penalize the Department for its Actions Denying Anderson Access to His Own Medical Records.

Looking next at the *Yousoufian IV* mitigation factors for the medical records, the Department never delayed a response. It violated the procedural rules when it moved them from the central file without permitting Anderson to view them. There was only strict compliance with the PRA's response time requirements and listing an exemption. The responder Leyerle apparently did what she was told. Using the incorrect exemption was either on Leyerle or her supervisor. Moving the records the same thing. Either way, the supervision was lacking. The non-compliance cannot be excused for reasonableness due to the statutory

language the Department ignored. Anderson admits the Department had a system to track and respond to all requests which did not prevent the Department from violating the PRA.

The aggravating factors for the Department's denial of Anderson's viewing of the medical records warrant a severe per-day penalty. The Department did not delay and strictly complied with the time requirements. Substantively is another story as the Department removed documents from the file that had been there when requested. Again, the Department ignored statutory language in its exemption claim permitting the subject of the medical record to review it even though it admitted in the exemption log that the exemption claim was false. There is no reasonable explanation for this dual noncompliance – the Department acted wantonly and in bad faith. There was no personal economic loss but the misconduct from the Department is severe – Anderson had the right to view any document in his central file that was present when he requested the review and again the Department removed documents and then ignored statutory language giving the subject of the medical record the right to look at it. There is an important public policy implications of removing documents from files without providing them to the requestor. If the Department was permitted to move documents to different storage locations without providing them to the requestor, such action could be done indefinitely to avoid providing the documents or pay a penalty for withholding.

There must be a penalty sufficient to deter future misconduct by the Department. Given the bad faith and the extreme nature of the violations, Anderson is entitled to a bad faith penalty of \$75 per day. He asks this Court to award this amount or, if this case is remanded, instruct the trial court to provide an appropriate per-day penalty given the violations described above.

**H. ANDERSON IS ENTITLED TO ATTORNEY FEES AND COSTS.**

If this Court find the Department had violated the PRA when responding to Anderson's request, Anderson asks that reasonable attorneys fees and cost be granted. RAP 18.1 permits attorneys fees and costs on appeal if the applicable law grants this right for an appeal. The Washington Supreme Court had determined that under the PRA, an individual who prevails against the agency is entitled to all costs, including reasonable attorney fees. RCW 42.56.550(4); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990). Anderson also asks this Court either grant reasonable attorney fees and costs for the trial court or remand for the trial court to determine these fees and costs.

**VI. CONCLUSION**

For the reasons stated above, this Court must find that the Department violated Anderson's rights under the Public Records Act. As the consequence, this Court should find Department acted in bad faith and

that penalties for both groups must be awarded Anderson along with reasonable attorney fees and costs.

DATED this 18<sup>th</sup> day of May, 2015.

Respectfully submitted,



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Attorney for Appellant Kevin Anderson

**CERTIFICATE OF SERVICE**

I certify under the penalty of perjury under the laws of the State of Washington that on May 18, 2015, in Seattle, County of King, State of Washington, I emailed and deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

1. APPELLANT'S OPENING BRIEF

Brian Considine  
Attorney General's Office  
Criminal Justice Division  
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By:   
MICHAEL C. KAHRs

Date: 5/18/15