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Court of Appeals
Division III
State of Washington

No. 96286-3

No. 35091-6-III

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

RANDALL HOFFMAN,

Appellant,

v.

KITTITAS COUNTY, a local agency, and the KITTITAS COUNTY SHERIFF'S OFFICE, a local agency,

Respondents.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION AND SUMMARY 1

ASSIGNMENTS OF ERROR 5

I. Assignments of error 5

II. Issues pertaining to the assignments of error 6

STATEMENT OF THE CASE 8

I. Facts 8

A. Randall Hoffman submits a records request that Carolyn Hayes, the designated Public Records Clerk for the Kittitas County Sheriff's Office, incorrectly tells him cannot be fulfilled. 8

B. Hayes's response to Hoffman's request is immediately questioned by Kallee Knudson, a trainee. 10

C. Hayes sends Hoffman over-redacted face sheets. 11

D. Three months later, as a result of Knudson's concerns, Hayes and Knudson are instructed to call Hoffman about his request—but neither tells him that he should have been given the police reports he requested. 11

E. Hoffman finally receives his request. 13

II. Procedural history 14

STANDARD OF REVIEW 16

ARGUMENT 18

I. The legal standard governing penalties for PRA violations 18

II. As the trial court correctly concluded, Hoffman's initial request for videos, photographs, and full police reports remained legally operative until it was fulfilled 246 days after he submitted it. 20

III. Because its search for responsive videos and photos was unreasonable and violated its own policies, Kittitas County acted in bad faith when it failed to produce those videos and photos for 246 days. 22

A. The June 2015 search for videos and photos was unreasonable. 23

B. The June 2015 search for videos and photos was inconsistent with Sheriff Office policies. 25

IV. Kittitas County acted in bad faith when it denied Hoffman's request for full police reports. 26

A. In refusing to produce police reports to Hoffman, Hayes invoked a legally indefensible justification that was inconsistent with her experience and training as well as her own standard practices. 28

B. By concealing Hoffman's initial request and her response and by giving misleading testimony, Hayes showed consciousness of wrongdoing and indifference to harm. 31

1. Concealment from supervisors 32

2. Misleading testimony 35

C. Hayes was given more than one chance to correct her error, but instead she consciously chose to perpetuate it. 36

D. In justifying its conclusion that Kittitas County did not act in bad faith, the trial court made several reversible legal errors. 38

1. The actions taken by Hayes's supervisors did not override Hayes's—and the County's—bad faith. 39

2. Knudson was at least negligent. 41

3. Instead of applying this Court's standard for bad faith, the trial court inappropriately focused on motive and intent. 43

V. The trial court erred as a matter of law when it concluded that the County's response was timely. 45

VI. Hoffman should be awarded his reasonable attorneys' fees on appeal. 47

CONCLUSION 48

CERTIFICATE OF SERVICE 49

TABLE OF AUTHORITIES

Washington Cases

Adams v. Wash. State Dep't of Corr.,
189 Wn. App. 925, 361 P.3d 749 (2015)..... 23

Cedar Grove Composting Inc. v. City of Marysville,
188 Wn. App. 695, 354 P.3d 249 (2015)..... 46, 47

City of Lakewood v. Koenig,
182 Wn.2d 87, 343 P.3d 335 (2014) 28

Faulkner v. Wash. Dep't of Corr.,
183 Wn. App. 93, 332 P.3d 1136 (2014)..... *passim*

Francis v. Wash. State Dep't of Corr.,
178 Wn. App. 42, 313 P.3d 457 (2013) ..... *passim*

Goodeill v. Madison Real Estate,
191 Wn. App. 88, 362 P.3d 302 (2015) 6

Hearst Corp. v. Hoppe,
90 Wn.2d 123, 580 P.2d 246 (1978) 1, 22

Hudgens v. City of Renton,
49 Wn. App. 846, 746 P.2d 320 (1987) 28

In re Disciplinary Proceeding Against Preszler,
169 Wn.2d 1, 232 P.3d 1118 (2010) 31

In re Firestorm 1991,
129 Wn.2d 130, 916 P.2d 411 (1996) 17

State v. Luoma,
88 Wn.2d 28, 558 P.2d 756 (1977) 31

Mayer v. Sto Indus., Inc.,
156 Wn.2d 677, 132 P.3d 115 (2006) 17

O'Connor v. Wash. State Dep't of Soc. & Health Servs.,
143 Wn.2d 895, 25 P.3d 426 (2001) 48

Progressive Animal Welfare Soc'y v. Univ. of Wash.,
125 Wn.2d 243, 884 P.2d 592 (1994) 4, 16, 39, 40

Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,
122 Wn.2d 299, 858 P.2d 1054 (1993) 17

Worthington v. WestNET,
182 Wn.2d 500, 341 P.3d 995 (2015) 22

Yousoufian v. Office of Ron Sims,
168 Wn.2d 444, 229 P.3d 735 (2010) ..... *passim*

Zink v. City of Mesa,
162 Wn. App. 688, 256 P.3d 384 (2011)..... 19

Rules

RAP 10.2(a) 46

RAP 10.3 46

RAP 10.4 46

RAP 18.1(a) 48

RAP 18.1(b) 48

Statutes

RCW 42.56.050 .....9, 11, 28

RCW 42.56.550(4).....2, 18, 48

RCW 45.56.050 15

INTRODUCTION AND SUMMARY

Plaintiff Randall Hoffman wanted to show that a person named Erin Schnebly had a pattern of reckless behavior, so he asked the Kittitas County Sheriff's Office for all "police reports and other info available" for Schnebly, including photographs and videos. CP 13; CP 891, ¶ 2; CP 866, ¶ 11. He made this request under the Public Records Act (PRA), a "strongly worded mandate for broad disclosure of public records." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978).

Carolyn Hayes, the veteran Public Records Clerk for the Sheriff's Office, handled Hoffman's request. She called Hoffman and told him that there were no responsive photographs and videos. She also said that because Hoffman was not a party involved in the police reports, "privacy interests" prevented her from providing him with the full reports. CP 891, ¶ 5. She said that she could give him only the police reports' "face sheets," which would show the type of incident that was being reported, as well as its date and location. CP 891, ¶ 5. Relying on what Hayes told him, Hoffman said that he would accept just the face sheets. CP 896, ¶ 4.

Hayes's response, as everyone now agrees, was legally wrong. It has long been settled that the right to privacy of someone involved in a police report cannot justify the withholding of that report. Due to Hayes's

denial of his request, Hoffman did not receive the full police reports he had wanted until 246 days after his request.

Hoffman filed this action against Kittitas County and the Kittitas County Sheriff's Office (collectively, the "County"), seeking statutory penalties and a declaration that the County had violated the PRA. After the case was submitted to the trial court for final judgment on the papers, the court ruled that the County had improperly redacted and withheld 126 records for 246 days.

The PRA allows a court to award statutory penalties of up to $100 per day. RCW 42.56.550(4). Here, the trial court chose a penalty on the low end of the range, ordering the County to pay $0.50 per day for each of the 126 records it had failed to produce or had improperly redacted. To justify this penalty, the trial court relied heavily on its conclusion that the denial of records to Hoffman was not made in bad faith.

The principal question on appeal is whether the trial court erred in concluding that the denial of records was not made in bad faith. Under the PRA, an agency that acts in "bad faith" includes an agency that, in denying records, unreasonably risks harm while not caring whether harm results or not. *See Faulkner v. Wash. Dep't of Corr.*, 183 Wn. App. 93, 103, 332 P.3d 1136 (2014). If, as here, the underlying facts are not contested, an agency's bad faith presents a question of law. *Id.* at 102.

Here, there are four main reasons that, in denying police reports to Hoffman, the County unreasonably risked a violation of the PRA and did not care whether a violation actually occurred.

First, Hayes was a veteran Public Records Clerk, and the legal error she committed was egregious. No one—not even Hayes herself—has tried to defend her denial of the full police reports. In fact, that denial was inconsistent with her own standard practices in handling a request for police reports. There can be no question that Hayes was at least aware that what she was doing was unreasonable.

Second, the record shows that Hayes was not only aware that her denial was probably unlawful, but that she did not care. When her supervisors later asked her about her handling of Hoffman's request, she concealed from them the fact that she had denied his request for the full police reports on asserted privacy grounds. She continued to dissemble about that denial of records in her testimony in this litigation. This pattern of concealment reveals that she was conscious of her wrongdoing, but that she was more interested in exculpating herself than in averting harm to Hoffman or the PRA.

Third, Hayes had more than one opportunity to remedy her wrongdoing, but she chose to perpetuate rather than correct her error. Immediately after she denied the full police reports to Hoffman, a trainee

questioned her decision. Despite an ensuing 15-minute conversation between Hayes and the trainee, the trainee continued to be puzzled. Rather than reevaluating her actions given the length of the conversation and the confusion of the trainee, Hayes stayed the course. Then, three months later, when her supervisors questioned her about her response to Hoffman's request, Hayes not merely failed to correct her error, but actually *concealed* it by failing to tell the supervisors that she had denied Hoffman's request for the full police reports. Instead, she left them with the impression that Hoffman on his own had narrowed his request to the face sheets, without first being denied access to the full police reports.

Fourth, although Hayes's supervisors later questioned her about her response to Hoffman, her supervisors' actions cannot somehow mitigate Hayes's bad faith. As the Supreme Court has noted, "[a]n agency's compliance with the Public Records Act is only as reliable as the weakest link in the chain." *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 269, 884 P.2d 592 (1994). Here, the County's response was only as reliable, and therefore exactly as blameworthy, as the actions of Hayes, the weakest link in the chain. That is particularly true where, as here, there was an uninterrupted causal chain between Hayes's bad faith and the County's 246-day delay in producing the police reports.

The trial court erred as a matter of law by ruling that the County had not acted in bad faith when it denied Hoffman's public records request. For that reason and the other independently sufficient reasons laid out below, the trial court's penalty determination should be reversed and this case remanded for a new determination under the correct legal standard.

ASSIGNMENTS OF ERROR

I. Assignments of error

1. The trial court erred in entering conclusion of law 11 in the February 7, 2017 Order Granting Judgment[,] Penalties, and Attorney Fees in Favor of Randall Hoffman ("Judgment Order").

2. The trial court erred in entering conclusion of law 12 in the Judgment Order.

3. The trial court erred in entering penalties against Defendants of only $15,498 in its February 7, 2017 Order Determining Penalties and Ordering Attorney Fees in Favor of Randall Hoffman ("Penalties Order").

4. The trial court erred in entering finding of fact[1] 1(e) in the Penalties Order.

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[1] Hoffman uses the term "finding of fact" because that is the term the trial court used. The "findings of fact" to which he is assigning error, however, are more accurately described as conclusions of law. When a trial court designates conclusions of law as

5. The trial court erred in entering finding of fact 8 in the Penalties Order.

6. The trial court erred in entering finding of fact 9 in the Penalties Order.

7. The trial court erred in entering finding of fact 11 in the Penalties Order.

8. The trial court erred in entering finding of fact 14 regarding *Yousoufian*[2] mitigating factors (b), (c), (d), and (f) and aggravating factors (a), (c), (d), (e), (f), and (i) in the Penalties Order.

9. The trial court erred in entering conclusion of law 3 in the Penalties Order.

10. The trial court erred in entering conclusion of law 4 in the Penalties Order.

II. Issues pertaining to the assignments of error

1. Carolyn Hayes, the designated Public Records Clerk in the Kittitas County Sheriff's Office, failed to follow standard practices when she searched for photos and videos that were responsive to Randall Hoffman's public records request. She also failed to search in places that even a newly hired employee knew might contain responsive photos and

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findings of fact, this Court still treats them as conclusions of law. *See, e.g., Goodeill v. Madison Real Estate*, 191 Wn. App. 88, 99, 362 P.3d 302 (2015).

[2] *Yousoufian v. Office of Ron Sims,* 168 Wn.2d 444, 229 P.3d 735 (2010).

videos. In these circumstances, did Kittitas County act in bad faith when it failed to produce the responsive photos and videos? (Assignments of error 1, 2, 3, 4, 5, 8, 9, and 10.)

2. Hoffman requested full police reports from the Kittitas County Sheriff's Office. In denying this request on privacy grounds, Hayes made a legal error that no party has even tried to defend and that was inconsistent with Hayes's training, experience, and standard practices. Hayes later concealed this denial of records from her supervisors, never corrected the denial despite being given opportunities to do so, and gave misleading testimony in this litigation about the denial. As a result, Kittitas County did not produce the reports to Hoffman for nearly nine months, until Hoffman submitted a new request to a different employee. Under these circumstances, did the County deny Hoffman's request for police reports in bad faith? (Assignments of error 1, 2, 3, 4, 5, 7, 8, 9, and 10.)

3. Rather than producing the full police reports that Hoffman had actually requested, Hayes improperly produced heavily redacted one-page "face sheets" that stated only the date and general kind of incident that was the subject of each police report. Kittitas County delayed producing the requested police reports for nearly nine months. In

determining that the County's response to Hoffman's request was not delayed, did the district court err? (Assignments of error 6 and 8.)

4. If this Court reverses the trial court's order on penalties and remands for recalculation in light of the errors listed above, should this Court award Hoffman his reasonable attorneys' fees on appeal?

STATEMENT OF THE CASE

I. Facts[3]

A. Randall Hoffman submits a records request that Carolyn Hayes, the designated Public Records Clerk for the Kittitas County Sheriff's Office, incorrectly tells him cannot be fulfilled.

In June 2015, Plaintiff Randall Hoffman submitted a public records request to the Kittitas County Sheriff's Office to exercise his rights under the Washington Public Records Act (PRA). CP 890. He requested "[a]ll police reports and other info available for ERIN SCHNEBLY" including "Pictures, Videos, Reports." CP 13; CP 891, ¶ 2. Hoffman wanted to show that Schnebly had a pattern of reckless behavior. *See* CP 866, ¶ 11.

Carolyn Hayes was working in the Sheriff's Office as the designated Public Records Clerk. CP 891, ¶ 3. She was very near retirement and was in the process of training her replacement, Kallee Knudson. *See* CP 519. Hayes had been fulfilling public records requests

[3] This Statement of the Case is based on the trial court's factual findings and on those portions of the record that are consistent with the trial court's factual findings.

for ten years. CP 397, at 6:1–4. She had attended numerous trainings on the PRA. CP 397, at 6:15–23; CP 496. Requests for police reports were the most common type of public records request that Hayes received. CP 399, at 8:12–16.

When Hayes received Hoffman's request, she looked up Erin Schnebly's name on Spillman, an electronic case management system. CP 891, ¶ 4; *see* CP 402–03, at 11:23–12:4. She claims—and the trial court agreed—that she found no photos or videos related to Schnebly. CP 417, at 26:3–7; CP 891, ¶ 4.

Having found no videos or photos, and concerned that Hoffman was not involved in the incidents that were the subject of the police reports, Hayes called Hoffman. CP 891, ¶ 5. She told him that because he was not "a party involved" in the police reports, "she could not provide him the majority of the documents" he wanted. CP 891, ¶ 5. In making this statement, "Hayes incorrectly relied upon" RCW 42.56.050, a provision "related to privacy interests." CP 892, ¶ 6. She told Hoffman that she could provide him with the police reports' "face sheets," which would show the type of incident that was being reported, as well as its date and location. CP 891, ¶ 5. Relying on Hayes's misinformation, Hoffman narrowed his request to the face sheets. CP 896, ¶ 4.

B. Hayes's response to Hoffman's request is immediately questioned by Kallee Knudson, a trainee.

Kallee Knudson, the clerk whom Hayes was training to replace her, overheard Hayes's half of the conversation with Hoffman. CP 892, ¶ 7. Knudson had begun her training earlier that month. CP 455 at 5:10-11. Knudson heard Hayes say that the Sheriff's Office "would not be able to provide the majority of documents per specific RCW's," but that the Office could provide Hoffman with face sheets. CP 519–20.

Knudson hadn't previously heard Hayes say anything like this in response to a request for police reports, CP 459 at 9:22–24, so Knudson asked about "her reasoning for not providing the reports and why she would only supply [Hoffman] with the face sheet." CP 520. The ensuing conversation "went on for at least 15 minutes," because Knudson "was having a hard time understanding why [Hayes] was doing this particular request so differently than what I had been trained on." CP 520. Hayes "restated a specific RCW that was very broad and explained that if" a record request makes "a broad request about a specific person," an agency "can refuse providing documents to protect that person." CP 520. Another coworker joined in the conversation. CP 520. She, too, couldn't understand what Hayes was saying. CP 462 at 12:6–9. Nevertheless,

Knudson deferred to Hayes's judgment, concluding that Hayes must simply know more than her. *See* CP 520.

C. Hayes sends Hoffman over-redacted face sheets.

The next day, Hayes sent Hoffman the face sheets. CP 904, 524. Hayes over-redacted even these face sheets, once again incorrectly relying on RCW 42.56.050. CP 896, ¶ 5. While her log noted her redactions of the face sheets, it did not note that Hayes had withheld the police reports that Hoffman had initially requested. CP 524.

D. Three months later, as a result of Knudson's concerns, Hayes and Knudson are instructed to call Hoffman about his request—but neither tells him that he should have been given the police reports he requested.

About three months later in September 2015, Kallee Knudson was cleaning out a desk that Hayes had been using and found a copy of Hoffman's request. CP 520. She was still troubled by how Hayes had handled it, so she brought the matter to the attention of her supervisors, Kim Dawson and Sergeant Steve Panattoni. CP 934, ¶ 10.

There is no evidence, however, that Knudson told Dawson or Panattoni that Hayes had denied Hoffman's initial request for the full police reports. *See* CP 526. The evidence shows only that Dawson and Panattoni were concerned about a note that Hayes had made on Hoffman's request—a note that read, "2009-2015 face sheet only." CP 517. They apparently did not understand the purpose of this note, since Hoffman had

asked for a broader set of records. *See* CP 526 ("While reviewing the request form[,] our attention was drawn to the lower left middle page where there was a hand written note[,] '2009-2015 face sheet only[.]'").

Dawson and Panattoni instructed Knudson to reach out to Hoffman. CP 934, ¶ 10. Knudson called Hoffman and had a "very short" conversation with him. CP 465 at 15:21. Hoffman told Knudson that "he did get his request," CP 521, but Knudson never told Hoffman that she was concerned about how his request had been fulfilled or informed him of her belief that he was entitled to more documents. CP 894, ¶ 10; CP 477 at 27:9–13.

Dawson and Pannattoni also asked Hayes about how she had handled the request. They instructed her to contact Hoffman. CP 894, ¶ 11. Although Hayes followed this instruction, she never told her supervisors that she had refused to produce the full police reports to Hoffman on privacy grounds. *See* CP 526–27. Hayes also concealed information from Hoffman. When she called him, she never told him that he was entitled to the police reports he had initially requested but had never received.[4] CP 426 at 35:2–5. Hoffman thus continued to believe that he wasn't entitled to more documents than he had received in June 2015.

[4] Hoffman also told Hayes that he was looking for an additional incident between Erin Shnebly and Stephanie Crowdy. CP 531. Hayes reports that she looked for information about this incident but could not find it. CP 531.

And so, because Hoffman didn't know that he was entitled to more documents than he had received from his narrowed request, he told Hayes that he had received what he requested. CP 906.

E. Hoffman finally receives his request.

Hoffman returned to the Sheriff's Office in February 2016 after hearing that Schnebly was arrested for DUI. CP 521. He told Knudson that he had learned that he was entitled to more documents than he received from his last request. CP 521. He collected a new public records form, and on February 29, 2016, he made a new request for all documents and media related to Erin Schnebly's DUI and resubmitted his old request for all other information, including police reports, photos, and videos. CP 521; CP 894, ¶ 12.

This time it was Knudson, not Hayes, who fielded Hoffman's request. CP 474 at 24:6–7. Knudson, unlike Hayes, found videos and photos. Knudson located videos that were responsive to Hoffman's request in a box in the records room. CP 468 at 18:6–10. Looking in that box was standard practice when somebody requested videos; indeed, that is what Knudson was trained to do. CP 474 at 24:15–17; CP 476 at 26:11–13. Knudson also found responsive photos on the Spillman system. CP 469 at 19:3–7. Those photos had been uploaded to Spillman at the same time as the police reports to which they were attached. CP 481 at 31:16–22. The

photos were referenced in those police reports, CP 895–97, ¶¶ 3, 7, and it was Knudson's practice to read the police reports when she got a request for them. CP 483 at 33:22–24.

Knudson also produced the full police reports with appropriate redactions. This full response, which Hoffman received on March 1, 2016—246 days after his original request—consisted of 126 records, including 95 photos and 2 videos. CP 894–95, ¶¶ 12–13; CP 907.

Later in March 2016, Dawson met with Hayes and Knudson about Hayes' handling of this request. CP 533. Even though the Sheriff's Office had already located responsive photos and videos, Hayes maintained that she did not provide this media because "there were no pictures or videos to provide." CP 533. Dawson also asked Hayes why she had redacted the face sheets so heavily. CP 533. Hayes claimed that she did this because Hoffman "did not want details" about the incidents. CP 533.

II. Procedural history

Hoffman filed suit against the County of Kittitas and the Kittitas County Sheriff's Department under the Washington Public Records Act on March 3, 2016. CP 1. He alleged that Hayes acted on behalf of the Sheriff's Office and acted in bad faith when she withheld the documents that he requested. CP 3, ¶ 11.

The case was submitted to the trial court for final judgment on the papers. CP 349. The trial court found in Hoffman's favor, ruling the Kittitas County Sheriff's Office improperly redacted and withheld 126 records for 246 days. CP 895, ¶ 13; *see also* CP 928–29.

As part of this ruling, the trial court found that Hoffman had narrowed his June 2015 request to the police reports' face sheets—but that he had done so in reliance on the misinformation that Hayes had provided him. CP 896, ¶ 4. This misinformation was of two basic kinds. First, Hayes erroneously told Hoffman that responsive photos and videos did not exist. CP 895–96, ¶ 3. Second, she was wrong to tell Hoffman that RCW 45.56.050 prevented him from accessing the police reports. CP 896, ¶ 4. On top of these errors, Hayes also over-redacted the face sheets that she *did* provide. CP 892, ¶ 6.

The trial court concluded, however, that Hayes' error was a result of negligence and not bad faith. CP 922, ¶ 2. Knudson, the court also concluded, was not even negligent, because she appropriately raised her concerns with her supervisors. CP 908. The court also stressed that Hayes and Knudson had reached out to Hoffman three months after his initial request to ask him whether he had received what he wanted. *See, e.g.*, CP 905–06.

The court ordered the County to pay $0.50 per day for each of the 126 records the County failed to produce or improperly redacted. CP 927, ¶ 15. Therefore, the court entered judgment payable to Hoffman in the amount of $15,498.00 and awarded Hoffman reasonable attorney's fees. CP 929. This timely appeal followed.

STANDARD OF REVIEW

Both the overall posture of this appeal, and the issues that Hoffman raises, call for a de novo standard of review.

1. Overall standard. "[W]here the record both at trial and on appeal consists entirely of written and graphic material," and conflicting testimony and credibility determinations are not at issue, the appellate court reviews the trial court de novo. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994) (citation omitted). That is precisely the case here, so a de novo standard of review applies.

2. Bad faith. Principal among the *Yousoufian* factors—the factors examined when determining the appropriate PRA penalty—is whether the agency acted in bad faith. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 460, 229 P.3d 735 (2010). "Whether an agency acted in bad faith under the PRA presents a mixed question of law and fact," requiring a court to apply "legal precepts (the definition of 'bad faith') to factual

circumstances (the details of the PRA violation)." *Faulkner v. Wash. Dep't of Corr.*, 183 Wn. App. 93, 101–02, 332 P.3d 1136 (2014) (citation and internal quotation marks omitted). This means that insofar as "underlying facts are uncontested, we apply de novo review to ascertain whether the facts amount to bad faith." *Id.* at 102. Here, as the record and Hoffman's argument will reveal, the relevant facts are uncontested, so this Court's review of the bad-faith issue is de novo.

3. Timeliness. Another *Yousoufian* factor is whether the agency's response to a public records request was timely. *Yousoufian*, 168 Wn.2d at 467. The trial court determined that the County's response to Hoffman's request was timely but inaccurate. CP 904. On appeal, Hoffman does not contest the factual findings relevant to timeliness. Rather, it is the trial court's legal standard for timeliness that Hoffman is challenging. That is a question of law that is reviewed de novo. *See, e.g.*, *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (citing *In re Firestorm 1991*, 129 Wn.2d 130, 135, 916 P.2d 411 (1996); *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

ARGUMENT

I. The legal standard governing penalties for PRA violations

When an agency violates the PRA, a trial court has the discretion to impose a penalty on the agency of up to $100 per day. RCW 42.56.550(4). The exercise of that discretion is governed by the standard set out in *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010). *Yousoufian* establishes a "multifactor framework[]" for trial courts to consider in setting a per-day penalty. *Id.* at 465.

Under this framework, the "principal factor" is "the existence or absence of [an] agency's bad faith." *Id.* at 460 (citation and quotation marks omitted). There are also other mitigating and aggravating factors that may decrease or increase the penalty. Mitigating factors include:

> (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.

Id. at 467 (footnotes omitted). Aggravating factors—several of which are simply the mirror images of the mitigating factors—include:

> (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.

Id. at 467–68. When a trial court misapplies the *Yousoufian* standard, "the usual procedure is to remand to the trial court for imposition of the appropriate penalty." *Id.* at 468; *see also Zink v. City of Mesa*, 162 Wn. App. 688, 704–05, 256 P.3d 384 (2011).

As Hoffman's argument below will make clear, the factor most relevant to this appeal is the factor that *Yousoufian* deems the most critical: bad faith. In concluding that the County did not act in bad faith, the trial court erred as a matter of law. Hoffman will also discuss why the trial court also erred in concluding that the agency's response was timely. He asks this Court to reverse the trial court's penalty determination and remand for imposition of an appropriate penalty.

II. As the trial court correctly concluded, Hoffman's initial request for videos, photographs, and full police reports remained legally operative until it was fulfilled 246 days after he submitted it.

Before Hoffman discusses the respects in which the trial court erred, he must touch on one conclusion that the trial court correctly reached. That conclusion is fundamental to this appeal, because it goes to the nature of Hoffman's request for public records. Before one can determine whether the County acted in bad faith or delayed its response to Hoffman's request, one must have a firm grasp on what Hoffman's request *was*.

In the trial court, the parties disagreed about whether Hoffman had—as a matter of fact, not law—agreed to narrow his request for public records when Carolyn Hayes called him in June 2015. According to the County, Hoffman narrowed his request to simply the police reports' face sheets. CP 374. Hoffman, by contrast, maintained that he had not narrowed his request in that way. CP 828–30. The trial court found that Hoffman had indeed narrowed his request to "the nature of the incidents, dates and location." CP 896, ¶ 4. It also found, however, that Hoffman had narrowed his request in reliance on what Hayes told him—i.e., he relied on Hayes's statements that he was not entitled to the full police reports and that there were no responsive photographs or videos. *See* CP 896, ¶ 4

("Hoffman limited his request for information to the face sheets based upon [the] misinformation [provided by Hayes].").

Presumably because Hoffman had narrowed his request in reliance on Hayes's misinformation, the trial court deemed Hoffman never to have withdrawn his initial request for the full police reports. That is why the court considered the full police reports in determining the number of documents that the County had wrongly withheld. CP 895, ¶ 13. That is also why it ruled that those documents had been withheld for 246 days—the period beginning on June 29, 2015, when Hoffman had submitted his initial request for "[a]ll police reports and other info available for ERIN SCHNEBLY," and ending on March 1, 2016, when he received all responsive documents. *See* CP 891, ¶ 5; CP 894, ¶ 12; CP 907.

The trial court was right to treat Hoffman's initial request as legally operative and having never been withdrawn. As that court noted, due to the legal and factual misinformation that Hayes provided him, Hoffman was unable to "make an informed decision" about whether to "modify his request." CP 905. A court therefore cannot treat Hoffman as having, in any legal sense, modified his request for public records. It would be perverse if an agency could reduce the period during which it is assessed per-day PRA penalties by first supplying a requester with misinformation and then, based on that misinformation, prompting him to

narrow his request. That would allow an agency to use its own misconduct to avoid paying a full penalty. Such a result cannot be squared with the "purpose of the [PRA's] penalty scheme," which "is to 'discourage improper denial of access to public records and [promote] adherence to the goals and procedures' of the statute." *Francis v. Wash. State Dep't of Corr.*, 178 Wn. App. 42, 61, 313 P.3d 457 (2013) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978)); *see also Worthington v. WestNET*, 182 Wn.2d 500, 341 P.3d 995 (2015) ("[C]ourts must avoid interpreting the PRA in a way that would tend to frustrate [its] purpose.").

III. Because its search for responsive videos and photos was unreasonable and violated its own policies, Kittitas County acted in bad faith when it failed to produce those videos and photos for 246 days.

A sufficiently flawed search for records constitutes bad faith as a matter of law. That conclusion flows from both common sense and case law. Common sense suggests that if, in responding to a request, an agency departs markedly from reasonable and standard practices, it is behaving with a high level of culpability. This common-sense conclusion is also the law of Washington. "In addition to other species of bad faith, an agency will be liable . . . if it fails to carry out a record search consistently with its proper policies and within the broad canopy of reasonableness." *Francis v. Wash. State Dep't of Corr.*, 178 Wn. App. 42, 63, 313 P.3d 457 (2013);

see also id. at 63 n.5 (holding "that, among other potential circumstances, bad faith is present . . . if the agency fails to conduct a search that is both reasonable and consistent with its policies."); *Adams v. Wash. State Dep't of Corr.*, 189 Wn. App. 925, 938, 361 P.3d 749 (2015) (approving the holding of *Francis*).

Here, Carolyn Hayes's search for videos and photos responsive to Hoffman's request was both unreasonable and inconsistent with the Sheriff Office's policies. As a matter of law, therefore, it was in bad faith. The trial court's contrary decision was legally erroneous.

A. The June 2015 search for videos and photos was unreasonable.

The trial court itself found that Hayes's June 2015 search for videos and photos was unreasonable. It stated that "the responsive records should have been located in the Spillman system"—the Sheriff Office's document management system—"and the system should have referenced the existence of photos and videos. The search was unreasonable because a review of the incident reports would have disclosed the existence of numerous photographs and two videos related to the requested information." CP 896–97, ¶ 7.

The record strongly supports this finding. Looking at the police reports that Hoffman requested would have revealed the photographs. *See* CP 481 at 31:16–22. In addition, by failing to look outside the Spillman

system for videos, CP 417 at 26:11–12, Hayes likewise behaved unreasonably, since she should have known that videos were retained on the Spillman system for only 90 days after being initially uploaded. *See* CP 476 at 26:8–10 ("Q . . . So were you trained that videos are retained on the server for 90 days? A. On the 911 upload, yes.").

The conclusion that Hayes's search was unreasonable finds further support in other facts that the *Francis* court deemed "logically relevant to the reasonableness" of a records search. *Francis*, 178 Wn. App. at 64. As the trial court found, Hoffman's request was clear: he explicitly asked for "[p]ictures" and "[v]ideos" related to Erin Schnebly. CP 517; CP 895, ¶ 2; *see also Francis*, 178 Wn. App. at 64 (noting that the request had "sufficient clarity"). This explicit request should have prompted a more than cursory search for pictures and videos. Not until 246 days later, however, did the County perform an adequate search for such records. *See Francis*, 178 Wn. App. at 63–64 (noting "a delayed response by the Department"). In addition, Hayes failed to check the box in the record room for videos—even though, as Knudson testified, "[a]ll of us clerks, we know that that's where the videos are." CP 482 at 32:3–4; *see Francis*, 178 Wn. App. at 64 (noting that the agency "did not check any of the usual record storage locations").

B. The June 2015 search for videos and photos was inconsistent with Sheriff Office policies.

The June 2015 search also meets the second prong of the *Francis* test for bad faith, because it was inconsistent with the Sheriff Office's policies.

First, Knudson confirmed that she was trained, presumably by Hayes, to look in the records room for videos—the same place where the responsive videos were ultimately found. CP 476 at 26:11–19; *see also* CP 455 at 5:16–20 (Knudson was trained by Hayes). And yet Hayes testified that she did not look there in response to Hoffman's request. CP 417 at 26:11–12. That failure to search was inconsistent with the practices that Hayes herself taught Knudson.

Second, Hayes testified about the standard way she had been trained to respond to requests for police records, and her training was inconsistent with her response to Hoffman's request. *See* CP 400 at 9:8–13. She testified that she would first search for and locate the police report in the Sheriff Office's document management system. *See* CP 400 at 9:15–19. Crucially, after locating the report, she would then "[r]eview it"—and do so carefully enough that she could "[r]edact the information that needed to be redacted." CP 400 at 9:20–22. Redacting the reports presumably required Hayes to go through the entire report line by line, or

at least section by section, to determine what information is exempt. If Hayes had followed this practice in responding to Hoffman's request, she would have come across the photos that were eventually produced to Hoffman the next year. After all, those photos had been uploaded to the document management system at the same time as the police reports themselves, CP 481 at 31:16–22, and were referenced in those police reports, CP 895–97, ¶¶ 3, 7. The fact that she told Hoffman that there were no photos means that she either did not review the police reports at all, or reviewed them so cursorily as to depart from what she admitted was her usual policy.

IV. Kittitas County acted in bad faith when it denied Hoffman's request for full police reports.

Bad faith in the withholding of a record is defined as "a wanton or willful act or omission by the agency." *Faulkner v. Wash. Dep't of Corr.*, 183 Wn. App. 93, 103, 332 P.3d 1136 (2014). "Wanton," as used here, means "unreasonably or maliciously risking harm while being utterly indifferent to the consequences." *Id.* (citation and internal quotation marks omitted). Wantonness is not distinguished by the amount of harm that the wanton wrongdoer is risking, since "[o]ne acting wantonly may be creating no greater risk of harm" than someone acting recklessly. *Id.* at 104 (citation and internal quotation marks omitted). Instead, wantonness is

distinguished by the state of mind that the wrongdoer bears toward that risk of harm. One acting wantonly "is not trying to avoid" the risk of harm "and is indifferent to whether harm results or not." *Id.* (citation and internal quotation marks omitted).

Bad faith, however, "does not require a showing of intentional wrongful conduct." *Francis v. Wash. State Dep't of Corr.*, 178 Wn. App. 42, 57, 313 P.3d 457 (2013). Put differently, bad faith does not require proof that the agency had a malicious motive or that it acted with the desire or purpose to withhold public records. An agency acting in bad faith may *simply not care*—may be "indifferent to"—whether its actions or omissions result in the unlawful withholding of public records. *Faulkner*, 183 Wn. App. at 104 (citation and internal quotation marks omitted).

Below, Hoffman will show that Hayes, the employee at the Sheriff's Office in charge of fielding public record requests:

(1) acted unreasonably when she unlawfully withheld full police reports from Hoffman—that is, she unreasonably risked harm to Hoffman and the PRA, *see infra* Argument, § IV.A;

(2) was fully aware that she was unreasonably risking an unlawful withholding of public records, *see infra* Argument, §§ IV.A-.B; and

(3) was, at best, indifferent as to whether the unlawful withholding of records resulted from her actions, *see infra* Argument, §§ IV.B, IV.C.

Hoffman will then address whether the actions of employees other than Hayes can somehow cancel out Hayes's bad faith, and will explain why they cannot. *See infra* Argument, § IV.D.

A. In refusing to produce police reports to Hoffman, Hayes invoked a legally indefensible justification that was inconsistent with her experience and training as well as her own standard practices.

As the trial court found, Hayes told Hoffman that since he was not a party involved in any of the incidents, CP 891, ¶ 5, she could not produce the requested police reports "because of a part[y's] right of privacy," CP 905. Everyone now agrees that there was not the slightest justification for this incorrect statement of the law. It has long been settled that the right to privacy of someone involved in a police report cannot justify the withholding of that report. *Hudgens v. City of Renton*, 49 Wn. App. 846, 746 P.2d 320 (1987), *abrogated on other grounds by Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 259 P.3d 190 (2011). Nor was it enough for Hayes simply to invoke the "right of privacy," because the PRA provision defining privacy does not by itself allow withholding. *See* RCW 42.56.050; *City of Lakewood v. Koenig*, 182 Wn.2d 87, 93, 96, 343 P.3d 335 (2014).

Hayes's justification for withholding was so indefensible that Kittitas County has expressly conceded that it was wrong. *See, e.g.*, CP 351. Nor did Kallee Knudson understand why Hayes withheld the full

police reports—in fact, she still does not understand it. CP 460–61 at 10:22–11:5. While still a trainee, she thought Hayes was wrong. CP 465 at 15:9–15. In fact, even Hayes herself has not tried to defend her withholding of the police reports. Instead, she has effectively denied telling Hoffman that he couldn't receive the full police reports. *See* CP 418 at 27:7–18. Hayes, in short, committed a legal error that has long been officially pronounced as erroneous, and was so obviously wrong that the County has refused to defend it, a trainee knew it to be incorrect, and Hayes has denied ever committing it. For these reasons, Hayes was "unreasonably . . . risking harm" when she withheld the full police reports. *Faulkner*, 183 Wn. App. at 103 (citation and internal quotation marks omitted).

But Hayes was not merely behaving unreasonably; her training and experience also made her *conscious* that she was behaving unreasonably. Hayes, as the trial court pointed out, was a "veteran." CP 902, ¶ 4. By June 2015, she had been a records clerk at the Sheriff's Office for more than 15 years. CP 530, ¶ 2. She had extensive training on the Public Records Act. CP 496. In the period leading up to her retirement later in 2015, she spent "probably 60 to 70 percent of [her] time" responding to public records requests. CP 397 at 6:9–13. And of the requests she

received, the most common was a request for police reports. CP 399 at 8:12–16.

Due to this experience and training, Hayes had developed a standard practice for responding to requests for police reports. She would search and locate the requests, redact them appropriately, create a log for the redactions, and then produce the reports to the requester. CP 400 at 9:14–25. She testified that even if the requester was not involved in the incident, she would produce the full report about that incident to the requester with appropriate redactions. CP 409–10 at 18:6–19:4; *see also* CP 419 at 28:3–6. This testimony is backed up by Knudson, who stated that she had not encountered—and *still* has not encountered—any other situation in which a requester has been refused a full police report. *See* CP 460–61 at 9:22–10:15.

So, in handling Hoffman's request, Hayes responded in a way that was inconsistent not only with her general experience and training, but also with her own standard practices in handling a request for police reports. Indeed, the trial court found that Hayes had departed from standard practice, *see* CP 919, ¶ 4 (describing it as "an atypical response"), but it failed to draw the correct legal conclusion from that fact. When an agency employee, in deciding to withhold documents, departs from the employee's own experience, training, and standard practices, that

employee must be fully aware—but indifferent to the fact—that she is running an unreasonable risk of harm. This conclusion follows directly from the bad-faith standard laid out in *Faulkner*. *See Faulkner*, 183 Wn. App. at 103 (bad faith includes unreasonably risking harm while being indifferent to the consequences).

This legal conclusion follows not only from the bad-faith standard laid out in *Faulkner*, but also from the holding of *Francis*, a case on which *Faulkner* heavily relied. *Francis*, as Hoffman noted earlier, held that an agency acts in bad faith when it engages in a records search that is both unreasonable and conflicts with the agency's own standard practices. *Francis*, 178 Wn. App. at 63. Likewise, a decision to withhold is taken in bad faith when, as here, it is both unreasonable and conflicts with standard practices.

B. By concealing Hoffman's initial request and her response and by giving misleading testimony, Hayes showed consciousness of wrongdoing and indifference to harm.

Concealment and false exculpatory statements show consciousness of wrongdoing, as both common sense and several different areas of the law acknowledge. *See, e.g.*, *In re Disciplinary Proceeding Against Preszler*, 169 Wn.2d 1, 25–26, 232 P.3d 1118 (2010); *State v. Luoma*, 88 Wn.2d 28, 39, 558 P.2d 756 (1977). Concealment of wrongdoing also demonstrates indifference to the harm that the wrongdoing may cause.

After all, if the wrongdoer wanted to minimize harm, he would try to remedy his wrong rather than concealing it and letting it fester.

Here, consistent with the trial court's own findings of fact, Hayes concealed what she had done from her supervisors and gave misleading exculpatory testimony. And yet the trial court not merely failed to explain why these actions do not show consciousness of wrongdoing and indifference to harm, but in fact entirely omitted these actions from its discussion of bad faith. *E.g.*, CP 904–05, 908–09. This was legally erroneous.

1. Concealment from supervisors

Hayes concealed crucial facts from her supervisors in both September 2015 and March 2016. In September 2015, Hayes's supervisors, Kim Dawson and Sergeant Steve Panattoni, questioned her about how she had responded to Hoffman's request three months earlier. When they asked about Hayes's June 2015 note on the request, which read "2009-2015 face sheet only," Hayes told them that when she called Hoffman, he said he wanted only the date, time, and location of the incidents involving Erin Schnebly. CP 526–27. When Hayes met with Kim Dawson and Kallee Knudson half a year later in March 2016, Hayes again said that Hoffman had told her that he wanted only the date, time, and location of the incidents. CP 533. There is no evidence, however, that

Hayes told her supervisors the truth: that she had refused to produce full police reports to Hoffman on privacy grounds, and that Hoffman had agreed to a narrower production based on her refusal. CP 891, ¶ 5; CP 896, ¶ 4; CP 905. Instead, Hayes's supervisors seem to have assumed that Hoffman narrowed his request on his own and without relying on any prior refusal by Hayes to produce full police reports.

The trial court, too, appears to have found that Hayes was silent about her refusal to produce the full police reports to Hoffman, since it concluded that Dawson and Sergeant Panattoni had "properly supervise[d] Hayes." CP 902, ¶ 5. This conclusion would make no sense—indeed, it would be egregiously wrong—if Dawson and Panattoni had known that Hayes had refused to produce full police reports and that Hoffman had narrowed his request based on that refusal. For, in that case, Dawson and Panattoni would have failed to direct Knudson or Hayes to produce those reports to Hoffman even though they knew that Hoffman had wanted the reports but Hayes had refused to produce them on indefensible grounds. The trial court, however, did not even hint that Dawson and Panattoni knew the truth about what Hayes had done three months earlier.

Thus, the record indicates, and the trial court implicitly found, that Hayes concealed facts from her supervisors. In September 2015 and March 2016, she *knew* that she had denied Hoffman the police reports on

grounds of privacy.[5] She knew that it was only after this denial that Hoffman had said that face sheets were acceptable. These were the very facts that made her response to Hoffman's request legally improper. But it was these facts that she concealed from her supervisors, thereby depriving them of the capacity to monitor and correct her behavior. This knowing concealment provides strong evidence that Hayes had a guilty mind—that she *knew* her June 2015 response to Hoffman was wrong. It also shows that Hayes was indifferent to whether her actions resulted in wrongful withholding. She had no interest in correcting her error, and instead focused her efforts on avoiding blame.

But this was not the only way that Hayes concealed her wrongdoing. The trial court found that Hayes incorrectly relied on an asserted right of privacy to redact the face sheets that she provided Hoffman. CP 896, ¶ 5. Indeed, this was how she justified those redactions on her log. CP 524. But in March 2016, when she met with Knudson and Dawson, she claimed that she had redacted the face sheets "because [Hoffman] didn't want details." CP 533. This, too, was untrue; she made the redactions on privacy grounds. Once again, she was exhibiting her

[5] There is certainly no evidence that Hayes's memory was faulty. Nowhere in Hayes's testimony did she express doubts about what had happened in June 2015. Nor did the trial court make any factual finding that Hayes had memory problems.

consciousness of wrongdoing—and perpetuating the effects of that wrongdoing—by trying to cover it up.

2. Misleading testimony

Consistent with the trial court's own findings, Hayes gave testimony that was at best misleading. The trial court found that Hayes denied Hoffman's request for full police reports on legally erroneous "privacy" grounds. CP 891, ¶ 5; CP 905. Given this finding, however, Hayes—by logical necessity—testified deceptively about her exchange with Hoffman:

> Q. Did you also tell him that you couldn't provide him with the full police reports?
>
> A. I told him—I asked him—I told him the nature, and I said "Do you want the report or do you want just the nature?" "The nature is fine."

CP 418 at 27:7–13. Evading the question, Hayes did not explicitly deny that she refused Hoffman the full police reports. But the inference that any listener would inevitably draw from her testimony is that she never refused Hoffman's request for the full police reports. Yet that inference would be false; the truth is that she *did* tell Hoffman that he could not receive the full police reports. Her testimony was intended to obscure this fact and cover up an erroneous records denial.

That, however, was not the only deceptive statement that Hayes made under oath. She also provided sworn testimony that she redacted the

face sheets because Hoffman "did not want details of the incidents." CP 531, ¶ 8. This testimony is falsified by Hayes' own redaction log, which shows that she redacted the face sheets on privacy grounds. CP 524. Here, too, she was trying to cover up a decision that she knew had been wrong.

C. Hayes was given more than one chance to correct her error, but instead she consciously chose to perpetuate it.

Hayes passed up at least two obvious opportunities to correct her response to Hoffman and prevent or mitigate her violation of the PRA. Her failure to take those opportunities—and her choice to perpetuate her error—provides some of the surest proof that Hayes was aware that she was unreasonably risking a violation of the PRA but simply did not care.

Her first opportunity to correct her error came right after she got off the phone with Hoffman in June 2015. Knudson had overheard Hayes tell Hoffman that because he was not an involved party, he was not entitled to the full police reports and instead could receive only the face sheets. CP 519–20; CP 459 at 9:17–21. When the telephone call ended, Knudson asked Hayes "specifically what RCW covered her reasoning for not providing the reports and why she would only supply him with the face sheet." CP 520. The ensuing conversation went on for "at least 15 minutes," because Knudson "was having a hard time understanding why she was doing this particular request so differently than what I had been

trained on." CP 520. Another coworker who joined the conversation could not understand Hayes's reasoning either. CP 462 at 12:8–9. As the trial court found, though, "Hayes did not change her response to the request because of the conversation with Knudson." CP 892, ¶ 7.

This tortured conversation was one more thing alerting Hayes to the indefensibleness of her conduct. Even after 15 minutes, an intelligent trainee could not understand the rationale behind Hayes's refusal to produce the police reports to Hoffman. Perhaps even more importantly, the length of the conversation, combined with the evident fact that Knudson was confused by Hayes's reasoning, gave Hayes a natural opportunity to reexamine her conduct and correct that course she had taken. That she chose not to take that opportunity again demonstrates her indifference to the consequences.

Hayes's deliberate indifference is even better illustrated by how she reacted when she had another opportunity three months later to correct her mistake. In September 2015, her supervisors asked why she had provided Hoffman with only the face sheets of the police reports, CP 526–27, and also instructed her to follow up with Hoffman by phone, CP 894, ¶ 11. In response, Hayes did—or, more accurately, *failed* to do—two things. When she called Hoffman, she failed to correct her earlier mistake by telling him that he was entitled to the full police reports he had

originally corrected. CP 426 at 35:2–5. Far worse, she *actively covered up* her mistake from her supervisors by concealing from them her refusal to produce the full police reports to Hoffman on privacy grounds. Actively covering up a mistake rather than correcting it constitutes conscious indifference to the harm that may result from that mistake. It is, in short, bad faith.

D. In justifying its conclusion that Kittitas County did not act in bad faith, the trial court made several reversible legal errors.

The trial court, as has been seen, failed to draw the correct legal conclusions from its own findings of fact. In addition, it made several affirmative legal errors that also require reversal and remand. First, to the extent the trial court concluded that the actions of Hayes's supervisors overrode or mitigated her bad faith, the trial court erred as a matter of law. Second, the trial court erred as a matter of law when it concluded that Knudson was not negligent, further tainting its analysis of the County's culpability. Third, in relying heavily on its determination that Hayes lacked a motive to intentionally violate the PRA and did not act out of animosity, the trial court focused on matters that are legally irrelevant to the question of bad faith.

1. The actions taken by Hayes's supervisors did not override Hayes's—and the County's—bad faith.

In discussing whether the County acted in bad faith, the trial court considered not only Hayes's actions, but also "the actions of other members of the Sheriff's office." CP 908. Hoffman does not object to the consideration of those actions as part of the analysis of whether Hayes was properly supervised. But to the extent the trial court relied on the actions of those other employees specifically to conclude that the County *did not act in bad faith*, it erred as a matter of law. Its error conflicts with the Supreme Court's interpretation of the PRA and the facts of this case as the trial court itself found them.

The Supreme Court has made it clear that an agency's response to a PRA request is only as good as the agency's most culpable employee. In *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994) (*PAWS*), an organization asked the University of Washington to produce for a copy of a researcher's grant proposal. Ensuing litigation revealed that the researcher was unwilling to "respond to requests for information pursuant to the Public Records Act." *Id.* at 268. Based on that unwillingness, the Supreme Court remanded the case to the trial court to determine whether the researcher had silently withheld documents. In doing so, it reasoned: "An agency's compliance

with the Public Records Act is only as reliable as the weakest link in the chain. If any agency employee along the line fails to comply, the agency's response will be incomplete, if not illegal." *Id.* at 269 (footnote omitted).

Here, likewise, the County's response was only as reliable—and, consequently, exactly as blameworthy—as Hayes, the weakest link in its chain. That was true in *PAWS*, and it is all the truer here. Hayes was not like the researcher in that case, for whom responding to PRA requests was merely an incidental part of his job. Rather, Hayes's *explicit and designated task* was to respond to PRA requests. CP 891, ¶ 3. As the designated Public Records Clerk, Hayes had great control over how the Sheriff's Office handled requests for public records. Because Hayes denied Hoffman's request for full police records in bad faith, the Office necessarily denied those records in bad faith.

The specific facts of this case also demonstrate how Hayes's bad faith caused the County's response to be in bad faith. There is a straightforward causal connection between Hayes's bad faith and the 246-day delay in producing the full records to Hoffman. It was Hayes's initial bad-faith response in June 2015 that caused Hoffman to be denied the full police reports. Then, in September 2015, when Hayes's supervisors asked her about that response, Hayes concealed from them the fact that she had refused to produce the full police reports to Hoffman on the indefensible

"privacy" grounds. If they had known what she had done, it is reasonable to assume that they would have required her or Knudson to produce the full police reports.[6] Hayes's bad faith was the but-for cause of the 246-day delay in producing the police reports to Hoffman.

2. Knudson was at least negligent.

There is another reason that the trial court erred when it relied on the "actions of other members of the Sheriff's office" in concluding that the County did not deny Hoffman the police reports in bad faith. CP 908. As part of its analysis of the actions of other Sheriff's Office employees, the court concluded that Knudson did not act "in even a negligent fashion." CP 908. That conclusion was wrong.

Knudson's negligence stems from what she omitted to do in September 2015. She knew that Hayes had refused to produce the full police reports to Hoffman in June 2015. She had overheard Hayes telling Hoffman that he was not entitled to the full police reports because he was not an involved party. CP 519–20. She still believed that Hayes had not responded correctly. CP 465 at 15:11–15. And crucially, by September 2015, she had developed more confidence in her own judgment about the

[6] A contrary assumption—that they would *not* have required the production of the full police reports—would only increase the County's bad faith. Suppose that Hayes's supervisors *had* learned that she had denied the police reports to Hoffman on privacy grounds—i.e., on grounds that are objectively indefensible and that even Knudson, by September 2015, knew to be incorrect. If, in those circumstances, they had not required those police reports to be produced, they themselves would have acted in bad faith.

PRA. *See* CP 520 ("I began completing more requests on my own and felt comfortable with uploading and closing requests . . . .") Despite this additional knowledge and experience, as well as her conviction that Hayes had responded wrongly, Knudson failed to do two crucial things.

First, Knudson failed to tell her supervisors about Hayes's refusal to produce the full police reports. Instead, she appears to have left them with the impression that Hoffman had narrowed his request on his own, without relying on an initial refusal from Hayes. *See* CP 526 (Panattoni stating that in the meeting with Knudson, his "attention was drawn to the lower left middle page [of Hoffman's request,] where there was a hand written note [that read,] '2009-2015 face sheet only'"). Knudson's failure to give her supervisors the full story led them to give her incorrect directions. Since Sergeant Panattoni did not know about Hayes's initial refusal, he told Knudson to ask Hoffman if he had received what he wanted, rather than instructing her to produce the documents or to tell Hoffman that he was entitled to the full police reports. *See* CP 477 at 27:9–13. In light of what Knudson knew about Hayes's conversation with Hoffman, the experience she had gained in her new job, and her conviction that Hayes had been wrong, her failure to tell her supervisors the full story was at least negligent.

Knudson also failed to tell Hoffman that he was entitled to the documents he had originally requested. When she called him at her supervisors' request, Hoffman told Knudson that "he did get his request." CP 521. Hoffman's statement is exactly what Knudson should have expected, and it should not have prevented her from correcting the misinformation Hayes had earlier provided. As Knudson herself knew, Hoffman *had* narrowed his request, although only in reliance on the misinformation that Hayes had given him. He *had* received documents that were responsive to that narrowed request. Given what Knudson knew, she should have corrected the misinformation Hoffman had received. But she never told him that she thought his request had been completed wrongly or that he was entitled to the full police reports he had originally requested. CP 894, ¶ 10; CP 477 at 27:9–13. This, too, was at least negligent, because Knudson failed to correct a denial of public records that was objectively unreasonable and that she herself thought was wrong.

3. Instead of applying this Court's standard for bad faith, the trial court inappropriately focused on motive and intent.

In concluding that the County did not act in bad faith, the trial court relied heavily on its finding that Hayes had no animosity toward Hoffman and that she lacked a motive to intentionally deprive Hoffman of

records to which he was entitled.[7] In this reasoning, the trial court once again misapplied the bad-faith standard.

At most, the trial court's findings about motive show that Hayes lacked a motive to intentionally deprive Hoffman of records to which she knew he was entitled. Under the PRA, however, bad faith encompasses considerably more than an intentionally wrongful act. *See Faulkner*, 183 Wn. App. at 102 (discussing *Francis*, 178 Wn. App. at 52–63). It encompasses a denial of records that "[u]nreasonably . . . risk[s] harm while being utterly indifferent to the consequences." *Id.* at 103 (citation and internal quotation marks omitted).

Here, as discussed above, the trial court's factual findings, and those parts of the record that are consistent with those findings, show (at least) that Hayes was aware that her denial of the full police reports was unreasonable and that she simply did not care whether Hoffman got the records to which he was legally entitled. Indeed, in the aftermath of her refusal to produce the reports, Hayes cared only about extricating herself from blame by covering up what she had done. These actions and

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[7] *See* CP 901 ("no evidence . . . of a relationship between Hayes and Schnebly that would have biased Hayes in favor of Schnebly"; "no evidence present of any animosity"; "no evidence that the disclosure and production of records . . . would have embarrassed or harmed Hayes"; "no evidence . . . that the failure to disclose and produce the requested records . . . would have benefitted Hayes").

omissions are enough to satisfy the bad-faith standard without a showing of some other motive.

V. The trial court erred as a matter of law when it concluded that the County's response was timely.

The Supreme Court has identified "the agency's prompt response or legitimate follow-up inquiry for clarification" as one of the factors that can serve to decrease a penalty under the PRA. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 467, 229 P.3d 735 (2010). Here, the trial court concluded that this mitigating factor of timeliness was satisfied for two reasons. First, in June 2015, Hayes sent Hoffman the heavily redacted face sheets within five working days of his records request. CP 904. Second, when Hoffman's request was brought to the attention of Kim Dawson and Sergeant Panattoni three months later in September 2015, Knudson and Hayes both placed their respective phone calls to Hoffman immediately after each spoke with Dawson and Panattoni. CP 904. To be sure, the trial court *also* found that Hayes's June 2015 response to Hoffman's request was incorrect, CP 892, ¶ 6, and that despite the phone calls that Knudson and Hayes made to Hoffman in September 2015, the County did not fully comply with Hoffman's initial request until 246 days after he made it, CP 907. Nevertheless, the court thought that the incorrectness of the County's response to Hoffman's request was irrelevant to the question of timeliness,

because the "correctness of the response is to be considered under other criteria." CP 904.

In sum, the trial court concluded that the County had responded to Hoffman's request in a timely way even though it provided the overwhelming majority of the requested documents a full 246 days after he asked for them. In so concluding, the trial court erred as a matter of law.

It offends common sense to give an agency credit for timeliness when it responds with a prompt but utterly defective production of documents. To see why, it may help to consider analogous situations from everyday life. A customer is not likely to thank a restaurant for its prompt service if she orders steak, is promptly given fish, and then is forced wait two hours for the steak she originally ordered. Housepainters are not generally considered speedy if they are asked to paint a house green, promptly paint it red, and then come back months later to repaint the house correctly. And this Court is unlikely to compliment an attorney for timeliness if, in filing a brief, he complies with the time requirement of RAP 10.2(a), but utterly ignores every formal requirement of RAP 10.3 and 10.4 and then waits several months to correct his mistakes.

The verdict of common sense is confirmed by the case law. In *Cedar Grove Composting Inc. v. City of Marysville*, the trial court

concluded that the city was guilty of delay because it failed to promptly produce 192 documents. 188 Wn. App. 695, 725–26, 354 P.3d 249 (2015) (19 city documents plus 173 documents in the possession of the city's contractor). The city argued that the trial court's conclusion was wrong, because the documents it had delayed in producing represented a small fraction of the documents the city had produced to the requester. *See id.* at 727. The Court of Appeals rejected this argument, reasoning that "a court assesses penalties on the basis of what documents the government withheld, not what it produced." *Id.* at 728. That principle squarely applies here. The County was not prompt in its response to Hoffman's request for documents, because the *documents it wrongly withheld* were not produced promptly.

This Court should follow common sense and *Cedar Grove Composting*, and reverse the trial court's conclusion that the County's response to Hoffman was timely.

VI. Hoffman should be awarded his reasonable attorneys' fees on appeal.

The PRA provides that when a records requester "prevails against an agency in any action . . . seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time," the requester is entitled to "all costs,

including reasonable attorney fees." RCW 42.56.550(4). This provision entitles a records requester who prevails on appeal to recover attorneys' fees incurred in the course of that appeal. *E.g.*, *O'Connor v. Wash. State Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 911, 25 P.3d 426 (2001). Thus, Hoffman, pursuant to RAP 18.1(a) and (b), requests an award of his reasonable attorneys' fees on appeal.

CONCLUSION

The Court should reverse the trial court's award of penalties and remand for a new penalty determination in light of (1) the County's bad faith in denying Hoffman's request for responsive videos, photographs, and full police reports, and (2) the County's failure to make a timely production of those responsive records. The Court should also award Hoffman his reasonable attorneys' fees on appeal, as well as his costs.

RESPECTFULLY SUBMITTED this 29th day of August, 2017.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on August 29, 2017, I caused a true and correct copy of the foregoing BRIEF OF APPELLANT to be served on the following parties via email, pursuant to RAP 18.5(a) and CR 5(b)(7):

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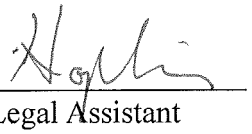

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APPENDIX

TABLE OF CONTENTS

Order Granting Judgment Penalties, and Attorney Fees
in Favor of Randall Hoffman.....1

Order Determining Penalties and Ordering Attorney Fees
in Favor of Randall Hoffman.....10

SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

RANDALL HOFFMAN, Plaintiff, vs. **KITTITAS COUNTY, a local agency and the KITTITAS COUNTY SHERIFF'S OFFICE, a local agency,** Defendants.	No. 16-2-00063-3 **ORDER GRANTING JUDGMENT PENALTIES, AND ATTORNEY FEES IN FAVOR OF RANDALL HOFFMAN**

I. ORDER GRANTING JUDGMENT TO PLAINTIFF RANDALL HOFFMAN:

This case came before the Court by agreement of the parties to resolve the issues based upon stipulated facts; agreed upon affidavits, exhibits, declarations, and deposition testimony. Briefs were submitted by the parties and oral argument was held before the Court on January 27, 2017.

The Court considered the following evidence:

1. The Declaration of Harry Williams IV and its attachments which were agreed upon for admittance by Kittitas County without objection or reservation;
2. The Joint Stipulation of Facts submitted by the parties including concessions;
3. The transcripts of depositions of Carolyn Hayes and Kallee Knudson;
4. The training record of Carolyn Hayes; and

The Court makes the following Findings of Fact:

1. Plaintiff Randall Hoffman submitted a public records request on June 29, 2015 to the Kittitas County Sheriff's Office.

2. The request asked for all police reports, including photos and videos, referencing Erin Schnebly. The request was on the County's form for public record requests.

3. The request was plain on its face and was subject to completion without clarification. The request was delivered to Carolyn Hayes, the designated Public Records Clerk for the Kittitas County Sheriff's Office.

4. Hayes conducted an initial search for records identifying seven (7) incident reports. She did not locate within the KCSO Spillman system a reference that photos and videos existed for any of the records. A thorough review of the police reports in the Spillman system, would have revealed the existence of photographs and two videos. A subsequent search of a box where it was possible that videos might be located turned up two (2) videos for one of the incident reports.

5. Carolyn Hayes, an employee of the Kittitas County Sheriff's Office, contacted Hoffman on June 29, 2015 regarding the request. She was concerned that she was missing something about the request because she was finding no involvements with Hoffman in any of the incidents and had not located photos or videos as requested. Hayes informed Hoffman that due to not being a party involved, she could not provide him the majority of the documents requested. She discussed with him her ability to provide copies of face sheets of the incidents which would provide him with the type of incident, date and location. Hayes testified Hoffman agreed to limit the request to face sheets only. Hoffman denied limiting the request. Hayes made a notation on the Request for Public Records, "2009-2015 face sheets only." Hayes sent copies of the incident face sheets to Hoffman in response to his Public Records request.

6. Hayes incorrectly relied upon an RCW related to privacy interests to inform Hoffman that because he was not a party he would not be allowed all of the police reports. Hayes, incorrectly relying upon RCW 42.56.050, over redacted the seven (7) face sheets in providing a response to Hoffman.

7. Kallee Knudson was a KCSO Clerk who had been training with Hayes for about a month. She heard parts of the conversation between Hoffman and Hayes, nothing that Hoffman said, but was confused by Hayes handling of the request. Knudson inquired as to the response, but then dropped the conversation. Hayes did not change her response to the request because of the conversation with Knudson. The next day Knudson assisted in uploading the finished request into the County's PRA request tracking system known as DART.

8. Hayes has maintained that Hoffman narrowed his request during their phone conversation and the evidence supports this position

   a. There was nothing about the reports that would cause embarrassment to the Sheriff's Office;

   b. There was nothing in the reports that would cause liability on the part of the Sheriff's Office;

   c. There was no evidence that Hayes had anything to gain by withholding the records as requested.

   d. There was no evidence that Hayes had a relationship with Schnebly that would bias her in favor of Schnebly and against Hoffman.

e. The evidence supports that when asked by Hayes and Knudson in September whether he had received what he needed that Hoffman answered that he had received what he needed.

f. There is no evidence that Knudson had anything to gain by withholding any records from Hoffman. And given that it was Knudson who was still curious as to the handling of the request, who went to her superiors to raise those concerns, and who made the first call to Hoffman, the evidence suggests that had Hoffman said he did not get the records he requested, that Knudson would have processed his request at that point in time.

9. Hoffman testified by declaration that he returned to KCSO in July, 2015 and was told no further documents were available. Hoffman does not state what date he returned or the identity of the person he spoke with in the Sheriff's office. KCSO has no records of the contact with Hoffman in July but, has records of contacts with him on subsequent dates. KCSO denies any contact with Hoffman in July, 2015. The court finds from the preponderance of the evidence that no contact occurred in July, 2015.

10. Knudson was cleaning the desk of Hayes in early September of 2015 to prepare it for the next clerk. She observed the paper copy of the Hoffman request and was still troubled by how it was handled. She brought it to the attention of her supervisors, Kim Dawson and Sgt. Panattoni, explaining her concerns. They instructed her to reach out to Hoffman and let him know that she was reviewing past requests and doing follow up. During that phone call in September 2015, Hoffman informed Knudson that he did get his request and the phone call ended.

Knudson did not explain to Hoffman her concerns about how the request was fulfilled or her belief that he was entitled to more documents.

11. Hayes had a similar conversation with Dawson and Panattoni about September 14, 2015. As a result, Hayes also contacted Hoffman to confirm he had received what he needed. Hayes maintains that Hoffman answered that he had received what he needed, but was curious about incidents that he believed existed but were not reflected. While Hoffman was on the phone with Hayes, she searched her system to attempt to find this additional information, discussing the fact that incidents may have occurred but may not have been reported. Hoffman maintains that he informed Hayes that he had not received all the documents he wanted and Hayes spent about one half hour telling him about privacy rights preventing disclosure of the documents he requested. This is inconsistent with the conversation he had with Knudson and that conversation is not disputed by Hoffman.

12. Hoffman returned to the Sheriff's Office in February of 2016 and told Knudson he should have gotten more documents, that he could sue, and that he wanted to possibly make another request. Hoffman informed Knudson that Hayes and the person who he was obtaining information about were drinking buddies and that is why he did not get the documents he was entitled to before. Hoffman left with a blank request form indicating he needed to talk to some folks. Hoffman returned on February 29, 2016 and made a new request and re-submitted his first request. Both requests were fulfilled and provided to Hoffman without charge on March 1, 2016.

13. There is no complaint as to the legality of the response in March of 2016. The final production related to the request made June 29, 2015 consisted of 126 items: 29 pages of reports; 2 videos; and 95 photos. The additional request in February increased the numbers of documents produced, but are not subject to any calculation as there is no claim that there was an error in filling that 2nd request for an incident involving a DUI with Schnebly as a defendant that transpired in early February of 2016, as it was not available to be disclosed or produced in June of 2015.

The Court makes the following Conclusions of Law:

1. The Kittitas County Sheriff's Office is an agency subject to the Public Disclosure Act. As an agency under the act, the Sheriff's Office has an obligation to disclose and produce documents that are responsive to a public disclosure request that is made.
2. Hoffman's public records request was clear on its face and was not overly burdensome, although it did involve multiple records. While the request could have been completed without the need for clarification, neither the act nor case law provides an impediment to an agency making contact to confer with a requester about their request.
3. Hayes conducted a preliminary search of the Sheriff's records in their case management system, Spillman. This is the location that the evidence indicates would have been the most logical location to search for responsive records. It is

clear that Hayes did not see a reference to photos and videos if they existed in the system at the time, and that she did not examine the individual investigative reports or look in additional locations to see if they might exist. Based upon this, Hayes erroneously informed Hoffman that records that did exist did not.

4. The evidence supports that Hoffman narrowed his request based upon the conversation with Hayes in June of 2016, only wanting information about the nature of the incidents, dates and location. However, this was not confirmed in writing by either Hoffman or Hayes. Further, Hoffman was misinformed by Hayes that if he were not a party to the incidents investigated by KCSO, he would not be able to obtain the majority of the documents pursuant to statute, RCW 42.56.050. Hoffman limited his request for information to the face sheets based upon this misinformation.

5. Hayes agreed to send the face sheets to Hoffman. However, Hayes then incorrectly relied upon RCW 42.56.050 to overly redact the records that were provided to Hoffman – seven (7) incident face sheets.

6. The burden is upon the County under the PRA to prove that they did not fail to properly disclose and produce documents or that the exemption relied upon to withhold disclosure or production was correct. The County also has the burden of showing that their search was reasonable.

7. The County's search was not reasonable in that the responsive records should have been located in the Spillman system, and the system should have referenced the existence of photos and videos. The search was unreasonable because a

review of the incident reports would have disclosed the existence of numerous photographs and two videos related to the requested information.

8. The actual error was limited to two (2) of the seven (7) requests as the photos were only found as to two incidents (DUI and Gang graffiti) and the videos were only associated with a DUI investigation.

9. The county concedes the statute relied upon by Hayes to deny producing a majority of the documents requested by Hoffman is incorrect and does not prevent their release.

10. The County has conceded that Hayes over redacted the face sheets, utilizing an incorrect exemption citation. The burden of showing that this error was done in bad faith rested with Hoffman.

11. The weighing of the factors enunciated in *Yousoufian* favor finding fault on the part of the County, for negligence in: 1) failing to adequately search for requested reports, photographs and videos; 2) misinforming Hoffman that he would not be entitled to the majority of the reports because he was not a party to the incident and privacy exemptions, and: 3) redacting based upon reliance upon an incorrect exemption.

12. Hoffman has not met his burden of showing bad faith on the part of the County.

ORDER

It is ORDERED that judgment is entered in favor of Plaintiff Randall Hoffman for the County's negligence is responding to Hoffman's PRA request filed June 29, 2015. It is further

ordered that penalties and attorney's fees are appropriate and will be determined by a separate order.

Done in open court February 7, 2017.

RICHARD H. BARTHELD
Yakima County Superior Court Judge
(Sitting as a visiting Judge of the Kittitas County Superior Court)

SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

RANDALL HOFFMAN, Plaintiff, vs. **KITTITAS COUNTY, a local agency and the KITTITAS COUNTY SHERIFF'S OFFICE, a local agency,** Defendants.	No. 16-2-00063-3 **ORDER DETERMINING PENALTIES AND ORDERING ATTORNEY FEES IN FAVOR OF RANDALL HOFFMAN**

I. ORDER ON PENALTIES:

This case came before the Court by agreement of the parties to resolve the issues based upon stipulated facts; agreed upon affidavits, exhibits, declarations, and deposition testimony. Briefs were submitted by the parties and oral argument was held before the Court on January 27, 2017.

For purposes of determining the proper penalties and attorney fees in this matter, the Court considered the same evidence as referenced in the Order Granting Judgment to Plaintiff Randall Hoffman.

A. FINDINGS OF FACT:

The Court incorporates by reference all findings of fact as contained in the Order Granting Judgment to Plaintiff Randall Hoffman. The Court makes the following ADDITIONAL Findings of Fact related to an appropriate penalty and attorneys' fees:

1. There is no evidence that Sheriff's Clerk Hayes had a motive to improperly disclose or withhold records from Hoffman. Specifically, the Court finds:

a. There was no evidence presented of a relationship between Hayes and Schnebly that would have biased Hayes in favor of Schnebly.

b. There was no evidence presented of any animosity on the part of Hayes towards Hoffman.

c. There is no evidence that the disclosure and production of records to Hoffman would have embarrassed or harmed Hayes or the Sheriff's Office in any fashion.

d. There is no evidence presented that the failure to disclose and produce the requested records to Hoffman would have benefitted Hayes or the Sheriff's Office in any fashion.

e. There is no evidence that the response by Hayes during the phone call to Hoffman on June 30, 2015 was knowingly false. There is evidence that the response by Hayes during the phone call to Hoffman was inaccurate. Hayes' telephone call to Hoffman was to clarify whether or not he was a party to any of the incidents reported. There is no evidence of an attempt by Hayes to deliberately modify Hoffman's request for documents.

2. There is no evidence that Sheriff's Clerk Knudson had a motive to improperly disclose or withhold records from Hoffman. Specifically, the Court finds:

a. There was no evidence presented of a relationship between Knudson and Schnebly that would have biased Knudson in favor of Schnebly.

b. There was no evidence presented of any animosity on the part of Knudson towards Hoffman.

c. There is no evidence that the disclosure and production of records to Hoffman would have embarrassed or harmed Knudson or the Sheriff's Office in any fashion.

d. There is no evidence presented that the failure to disclose and produce the requested records to Hoffman would have benefitted Knudson or the Sheriff's Office in any fashion.

3. There is no evidence that Sgt. Panattoni or Administrative Assistant Dawson had a relationship with any of the parties that would provide a motive to improperly withhold the records requested by Hoffman.

4. The only evidence as to Panattoni and Dawson is that they were confronted with an atypical response by a veteran public records officer, and concerns presented by a relatively new records Clerk Knudson. They responded by requesting both Hayes and Knudson separately contact Hoffman to determine if he received what he requested.

5. There is no evidence that Panattoni or Dawson failed to properly supervise Hayes or Knudson. The evidence supports the finding that the response by Panattoni to direct first Knudson and then Hayes to contact Hoffman and ascertain if "he got what he needed from the request" was a proper course of action to take based upon the information that was presented to them.

6. The evidence supports the course of action taken by Panattoni based upon the follow-up communications with Hoffman. He was entitled to rely upon the representations of his employees relative to the responses provided by Hoffman.

7. There is evidence that Clerk Hayes should have followed up the June 29, 2015 telephone conversation with Hoffman with a writing setting forth the specific modifications to his Request for Public Records. A writing would have memorialized the agreement between Hayes and Hoffman or allowed the parties to follow up if the writing was not the agreement of the parties.

8. There is no evidence that the Sheriff's Office acted in bad faith in their actions surrounding the initial response or subsequent handling of Hoffman's request.

9. The evidence supports that the County timely responded to the initial request although conceded that Clerk Hayes overlooked photographs and videos, cited improper statutes which prevented release of reports for privacy reasons and applied the wrong exemption resulting in over redacted face sheets.

10. The evidence support that the County timely responded to the subsequent request by Hoffman, and there is no claim that the fulfillment of the subsequent request was in any way untimely or improper.

11. The evidence supports a finding that the County diligently investigated the matter in September 2015 and determined that Hoffman had received the information he had requested, not objecting to investigative police reports, photos and videos that were withheld.

12. The evidence supports a finding that Clerk Knudson, who replaced Clerk Hayes was properly instructed to follow up conversations concerning requests for documents by written communication.

13. The evidence supports a finding that the processing of Hoffman's request was not indicative of systemic problems in the processing of public disclosure requests by the County.

14. The Court has considered the *Yousoufian* mitigating factors and determined that there are mitigating factors:

YOUSOUFIAN MITIGATING FACTORS:

(a) A lack of clarity in the PRA request;

This is not a mitigating factor as the initial request was clear, unambiguous and not burdensome

(b) the agency's prompt response or legitimate follow-up inquiry for clarification;

This mitigating factor relates to the timeliness of the response. The evidence supports this as a mitigating factor given that both the initial response and subsequent response were processed within 5 working days. When the issue arose to the level of concern in September, again, the response was timely: Knudson immediately placed a phone call following the conversation with Panattoni and Dawson. Hayes immediately placed a phone call following the conversation with Panattoni and Dawson. The issue of correctness of the response is to be considered under other criteria.

(c) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions;

The evidence supports Hoffman's contentions that the county's initial search was inadequate. Clerk Hayes received the request and reviewed case notes in Spillman concerning Schnebly. When she could not locate Hoffman as a party to these incidents, it prompted her to contact Hoffman to inquire about his request. Because she had not carefully examined the

incident reports before the telephone call, she misinformed Hoffman about the existence of photographs and videos relating to two of the seven incidents. She also misinformed Hoffman by telling him the incident reports would not be available to him because of a parties right of privacy. The evidence supports a finding that Hoffman modified his request, indicating the incident face sheets were sufficient for his inquiry. However, this was not memorialized by a writing. Further, it is doubtful Hoffman could have make an informed decision to modify his request when he was misinformed about the existence of photographs, videos or exemptions to disclosure for privacy concerns.

The evidence does not support a finding that the County acted in bad faith. The county had a duty to make an adequate investigation and respond to the request, strictly complying with the request in a timely manner. They breached that duty by inadequately searching the records and misinforming Hoffman that reports would be subject to a privacy exemption. Errors were made. However, the errors made were the result of negligence, not bad faith.

This is not a mitigating factor.

(d) proper training and supervision of the agency's personnel;

The evidence supports a finding of this as a mitigating factor as well. The evidence demonstrates an on-going and consistent process of education, supervision, and access to legal counsel to seek assistance. The evidence supports both internal and external training available to employees. While Hoffman contends the evidence shows malice on the part of Panattoni and Dawson, the Court believes that the evidence shows that there was proper supervision and checks and balances in place to attempt to comply with the PRA. The court cannot conclude the failure to inform Hoffman in September that other documents were available supports a finding

of malice or bad faith because both Hayes and Knudson contacted him to determine if he had in fact received what he had requested. He responded that he had received what he requested. The evidence also supports a finding that the county has implemented a procedure to follow up with a writing anytime requests are modified. When this procedure was implemented is unknown. Clerk Knudson testified in her deposition that she has been trained to do this in every instant.

(e) the reasonableness of any explanation for noncompliance by the agency;

The court has addressed reasons for the county's noncompliance, finding it arises out of negligence and resulted in misinformation to Hoffman and delay of 246 days in production of the information. This is not a mitigating factor.

(f) the helpfulness of the agency to the requestor; and

The evidence is this regards is neither mitigating or aggravating. The evidence is clear that errors were made. The evidence supports a finding that County personnel were attempting to be helpful. There responses were prompt, they answered questions about what they thought was available, they made attempts to ascertain if Hoffman got what he needed, they spent time with him answering additional questions and performing additional searches in September, and then promptly responded to his subsequent request in February of 2016 and responding to the errors made by Hayes, they did not charge him for fulfilling his request. Because of the errors however, Hoffman did not get the information originally requested, and so the helpfulness extended was thwarted by the failure.

(g) the existence of agency systems to track and retrieve public records.

The evidence is clear that the County IT department created an internal system geared to assisting with compliance with public disclosure requests. This independent system, separate and apart from the case management systems demonstrates a commitment on the part of the county to successfully providing proper responses in a timely fashion to public disclosure requests. This is a mitigating factor in this case because the error was human error, not a function of the agency systems.

***YOUSOUFIAN* AGGRAVATING FACTORS:**

(a) a delayed response by the agency, especially in circumstances making time of the essence;

The county responded timely to the request but was negligent in the adequacy of their search, misinformation concerning a privacy exemption that would prevent disclosure of incident reports and redacting more than they should have redacted from the incident face sheets. This led to a delay of 246 days releasing the information originally requested. There are no facts presented by Hoffman about the circumstances of his request that would make time of the essence.

(b) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions;

This aggravating factor is supported by the evidence. Errors were made and Hoffman's request for information was not fully complied with until March 1, 2016, a delay of 246 days. The court will not engage in speculation whether or not Hoffman would have modified his request if he had been properly informed about the extent of information available and properly applied exemptions and redactions. Procedurally, the County complied with the procedural

requirements of the PRA when Hoffman filed his second request for information on February 29, 2016.

(c) lack of proper training and supervision of the agency's personnel;

This aggravating factor is not supported by the evidence. The County produced evidence of a commitment to proper training and supervision of employees processing public disclosure requests, and the evidence from their internal audit of Hayes over the preceding one year indicated no systemic failures. (2 errors discovered in a years' worth of Hayes' work where 80% of her time was spent responding to PRA requests).

(d) unreasonableness of any explanation for noncompliance by the agency;

As noted above, the evidence does support this as an aggravating factor as it relates to the errors made by Clerk Hayes.

(e) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency;

The evidence supports negligent noncompliance with the PRA by Kittitas County because of the duties owed by Clerk Hayes and the breach of those duties, as discussed above. However, the evidence does not support a higher level of culpability. There was no evidence that she was reckless in her actions or that her actions were borne from animosity or disregard for the request of Hoffman.

As to the actions of other members of the Sheriff's office, it cannot be said that Knudson acted in even a negligent fashion. She continued to act appropriately in raising concerns and was entitled to rely upon Hoffman's response to her phone call. As to the involvement of Sgt. Panattoni and Ms. Dawson, internal deliberations about a non-standard response demonstrate

proper concern and supervision, especially coupled with reaching out to the requestor to ascertain if they got what he needed.

(f) agency dishonesty;

There is no evidence that supports a finding that the County acted dishonestly. There is no evidence that the agency or Hayes intentionally misled Hoffman as to the availability of records that it was aware of possessing. Hayes contacted him and let him know what she had and what she believed she did not have. Hayes negligent failure to adequately search and identify photos and videos resulted in misinformation to Mr. Hoffman, but there is no evidence that this was done dishonestly. The negligence of Hayes is imputed to the county.

(g) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency;

The evidence does not support finding this as an aggravating factor and the plaintiff failed to address this aggravating factor.

(h) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency; and

This is also a factor not addressed by the plaintiff. There is no evidence to support this as an aggravating factor.

(i) a penalty amount necessary to deter future misconduct by the agency.

The evidence does not support a finding that this is an egregious violation of the public records act. The evidence indicates that any award should be proportionate for purposes of deterrence with both the nature of the violation and the size of the agency.

Comparisons to results in reported cases in Washington are instructive in this regard, both as to the severity of the violation, the duration of the violation, the number of records in question, and the awards made by the Courts.

15. The Court believes for purposes of awarding a penalty of $0.50 per page per day for a period of 246 days is appropriate. By stipulation, the parties agree the responsive documents total 126 comprised of 29 pages of written material; 95 photos; and 2 videos.

B. CONCLUSIONS OF LAW:

The Court makes the following Conclusions of Law:

1. Every analysis of penalties for violation of the PRA are required to be made considering the whole spectrum of the scale, from no award of penalties to the maximum of $100.00 per day per record.

2. The Court must weigh and consider each of the *Yousoufian* factors in reaching a decision, but courts are given discretion to determine whether the factors are supported by the evidence or not, and must recognize that the aggravating and mitigating factors may overlap. These factors are not conclusive and there is no set result based upon adding the number of aggravating and mitigating factors – the factors simply help to focus the discretion of the court in determining the level of culpability of an agency, and primarily whether the agency acted in bad faith.

3. This is not the most egregious violation of the PRA. This is restated as it can be construed as a mixed finding and conclusion.

4. A weighing of the evidence supports that the County was negligent in the manner it responded to the public records request of Mr. Hoffman.

5. The Court is authorized to find that the County violated the PRA and enter a penalty, including a penalty of $0.00.

6. The Court is required, if it finds any violation of the act, to make an award of reasonable attorneys' fees for litigating the action. This is a mechanism established by the legislature to level the playing field and to assist litigants in enforcing disclosure by agencies, regardless of their level of culpability in their failure. If there is no error found, there is no award of attorneys' fees. If any error is found, reasonable attorneys' fees must be awarded.

7. "Bad faith" in the PRA context requires more than simple or casual negligence and is associated with the most culpable acts by an agency. *Adams* at 936. Bad faith requires a showing of wanton or willful act or omission by an agency. Id. Citing to Black's Law Dictionary 1719-20 (9th ed. 2009) the wanton is described as "unreasonably or maliciously risking harm while being utterly indifferent to the consequences. It 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.

8. Based upon the Findings and Conclusions, Washington case law is both instructive and dispositive on appropriate measures employed to establish an appropriate penalty.

C. ORDER AS TO PENALTY:

The Court has found that 126 records were not produced and/or overly redacted in violation of the PRA. The Court has found that records were not produced correctly for a period

of 246 days. The Court believes that an appropriate penalty for the county's negligence, is an amount of $.50 per document per day. The Court enters a judgment in favor of Hoffman in the amount of $15,498.00

The Court enters this Judgment fully cognizant that a penalty award is supposed to provide deterrence to future violations by an agency, in this case the County. The Court, in reviewing the evidence in this case believes that the deterrence necessary to deter the County from future wrong doing is minimal. This is based upon the evidence of adequate protocols and policies, training, supervision, and an independent system created to assist the County in responding to PRA requests. Further, the Court recognizes that the actor at the crux of the mistake in this case has retired from County employment and the employees who remain in charge of responding to public disclosure requests acted appropriately in their respective roles in this case, especially given that the plaintiff points to no errors in the processing of the subsequent requests handled by Knudson who is not the lead Public Record Officer for the Sheriff's Office.

II. ATTORNEY FEES TO PREVAILING PARTY:

Because the Court has found error on the part of the County and awarded a penalty to Hoffman, the Court is required to impose reasonable attorney fees in this matter. The parties shall exchange information as to the request for attorney fees and attempt to reach an agreement as to whether the fees are reasonable. Should the parties fail to reach an agreement, the plaintiff shall submit a motion for attorneys' fees and costs not later than April 1, 2017. The defendant shall have until April 12, 2017 to respond in writing, and a hearing shall be noted for a hearing on April 21, 2017, or as soon thereafter as practical given the schedules of the Kittitas County

and Yakima County Courts. The Kittitas County Court Administrator will work with both Courts to establish a date as near as practical to April 21, 2017 if necessary.

Done in open court February 7, 2017.

RICHARD H. BARTHELD
Yakima County Superior Court Judge
(Sitting as a visiting Judge of the Kittitas County Superior Court)

KELLER ROHRBACK LLP

August 31, 2017 - 2:42 PM

Transmittal Information

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Appellate Court Case Title:	Randall Hoffman v Kittitas County, et al
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