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No. 96286-3

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

Court of Appeals No. 35091-6-III

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RANDALL HOFFMAN,

Petitioner,

v.

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

Respondents.

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**PETITIONER'S ANSWER  
TO BRIEF OF AMICUS CURIAE**

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## INTRODUCTION AND SUMMARY

Hoffman agrees with much of what the Department of Corrections (Department) says in its brief. He has no objection to the standard for bad faith that the Department urges, since that standard is *lower* than the standard he has proposed. If the Department's standard is applied to the facts here, it becomes only clearer that the trial court committed legal error in determining that the Kittitas County Sheriff's Office withheld public records in good faith. Hoffman also agrees with the Department that bad faith is not the *controlling* factor under *Yousoufian*.<sup>1</sup> But it is, as the Department concedes, an *important* factor—and a factor on which the trial court relied heavily in imposing a penalty. Because the trial court's penalty decision was infected with legal error, this case should be remanded for a new penalty calculation.

The Department, however, argues that this Court need not be concerned about the trial court's legal error. It says that the correct legal standard for bad faith is not presented by this case, and in any event a legal error on bad faith does not require reversal. The Department is wrong.

***First***, contrary to what the Department asserts, the legal standard for bad faith is properly—indeed, necessarily—presented by this case.

***Second***, the Department is wrong to argue that the trial court's

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<sup>1</sup> *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010).

legal error about bad faith doesn't matter. The reasons for rejecting that argument may be found in its own brief. The Department does not dispute that bad faith involves a legal issue that is reviewed de novo. DOC Br. 16. And it explicitly concedes that bad faith is an "important" consideration in determining a PRA penalty. *Id.* at 17. Indeed, it *must* be an important consideration, since smoking out bad-faith record denials is essential to deterring PRA violations. A legal error on this important legal issue is necessarily an abuse of discretion and requires reversal. In arguing otherwise, the Department simply ignores how this Court has consistently defined an abuse of discretion.

***Third***, under the Department's lower standard for bad faith, Hoffman's request for public records was denied in bad faith. The trial court's contrary determination was an erroneous application of the Department's bad-faith standard to the undisputed facts of this case. That error requires the trial court to recalculate its PRA penalty.

***Fourth***, many of the Department's legal contortions can be traced to monetary concerns. An inmate can be awarded a PRA penalty only if the Department has responded to the inmate's request in bad faith. RCW 42.56.565(1). The Department is worried that if bad faith favors a higher penalty, *its* PRA penalties will always be high. As Hoffman will explain, however, these worries are needless.

## ARGUMENT

### **I. The legal standard for bad faith has been properly presented for decision.**

The Department maintains that this Court need not address the legal standard for bad faith because it was not raised below. The Department is wrong.

“An issue that is raised and argued below and accepted for review by this court is properly before us.” *NOVA Contracting, Inc. v. City of Olympia*, 191 Wn.2d 854, 870, 426 P.3d 685 (2018). Here, the standard for bad faith was raised and argued below. In his briefing before the trial court and before the Court of Appeals, Hoffman raised and discussed the legal standard for bad faith. *See* COA Appellant Br. 22–23, 24, 26–27, 31; CP 327, 832–36, 854–55. In his Petition for Review, Hoffman asked the Court to decide the legal standard. Pet. for Review 18–19. The Court granted Hoffman’s Petition without limitation. *See* Order, *Hoffman v. Kittitas Cnty.*, No. 96286-3 (Jan. 9, 2019).

The Department says the Court should not decide the legal standard because Kittitas County failed to discuss it in its Supplemental Brief. DOC Amicus Br. 6. The County failed to discuss it because it relied on the issue statement posted on the Court’s website. *See* Resp’t Suppl. Br. 4–5. In its order granting review, however, this Court “did not limit review in any way.” *State v. Lamb*, 175 Wn.2d 121, 126 n.3, 285 P.3d 27

(2012). And “[t]he scope of review is determined by the order granting review, not any other source.” *Id.*<sup>2</sup> The issue of bad faith is before this Court, even if the County decided not to brief it. *See id.* at 126 & n.3.

The Department also seems to argue that the issue is not before the Court because Hoffman asked the Court of Appeals to apply its own bad-faith standard to this case. *See* DOC Amicus Br. 9. The Department is again incorrect. Before this Court, Hoffman has argued that this Court need not endorse the Court of Appeals’ standard for bad faith because Kittitas County’s denial of records satisfies a *more demanding* standard. *See* Hoffman Suppl. Br. 16 (“To decide this case, this Court need not definitively set the outer limits of bad faith.”); *see also infra* 10 (explaining why Hoffman’s standard is more demanding). By arguing for a more demanding standard below, Hoffman has necessarily preserved the more modest argument he has made before this Court.

**II. Due to the trial court’s error, the abuse-of-discretion standard requires remand for a new penalty calculation.**

**A. An abuse of discretion includes an error of law.**

Bad faith is not just properly presented—it is *necessarily* presented. That is because where, as here, the underlying facts are

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<sup>2</sup> This Court’s website warns that “the Justices have not reviewed or approved the issues or classifications” posted on the website, “and there can be no guarantee that the court’s opinions will address these precise questions.” Washington Courts, *Supreme Court Issues*, [https://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/issues](https://www.courts.wa.gov/appellate_trial_courts/supreme/issues).

undisputed, bad faith presents a legal question that is decided de novo. See Hoffman Suppl. Br. 8 (citing *Erwin v. Cotter Health Ctrs.*, 161 Wn.2d 676, 687, 167 P.3d 1112 (2007)); see also *id.* at 9–10. Notably, the Department does not deny that bad faith is a legal question decided de novo. See DOC Br. 16.

Because bad faith presents a legal question in these circumstances, the abuse-of-discretion standard requires addressing it. This Court has consistently explained that an abuse of discretion may occur in three ways: (1) when a “decision is manifestly unreasonable”; (2) when it “is exercised on untenable grounds”; or (3) when it is exercised “for untenable reasons.” *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (citing *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995) (Wiggins, J.) (describing abuse-of-discretion review as including “[t]hree steps”). Under the first prong, a decision is “manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard.” *Id.* Under the second prong, decision is based on “untenable grounds” if its “factual findings are unsupported in the record.” *Id.*

Finally, a decision is “based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *Id.* Thus, a court “necessarily abuses its discretion” if its

ruling “is based on an erroneous view of the law or involves application of an incorrect legal analysis.” *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

Here, the trial court’s decision involved application of an incorrect legal analysis—i.e., it wrongly applied the bad faith standard. For here, under the found and otherwise undisputed facts, the County denied public records to Hoffman in bad faith. *See, e.g.*, Hoffman Suppl. Br. 16–19. Because the trial court came to the opposite conclusion, and then based its PRA penalty heavily on that conclusion, it based its decision on untenable reasons and thus abused its discretion.

The Department, however, urges this Court to apply only the *first* prong of the abuse-of-discretion test—the “manifestly unreasonable” prong. Thus, the Department argues that this Court should ask merely whether the ultimate penalty was “manifestly unreasonable.” DOC Amicus Br. 16. But that is only *one* of the three ways a trial court may abuse its discretion. It may also abuse its discretion by basing its ultimate penalty on a legal error. Where a trial court does so, remand for

recalculation is the proper remedy. *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 399, 314 P.3d 1093 (2013).<sup>3</sup>

At bottom, the Department is arguing that abuse-of-discretion review licenses the Court to ignore the trial court's legal error, even though that legal error infected the trial court's ultimate penalty. It cites no authority to support such a proposition, and there is none. The Department can argue that the trial court did not abuse its discretion only by asking this Court to jettison the abuse-of-discretion standard it has applied for decades.

***B. Bad faith is an important factor in imposing a PRA penalty, and when a trial court's penalty relies heavily on an erroneous conclusion about bad faith, remand is required.***

The Department also appears to argue that even if the trial court made a legal error, that error *does not matter*. The Court can safely ignore the error, the Department says, because bad faith is not “the controlling factor in the penalty analysis,” and a PRA penalty should not be reversed “simply because [appellate courts] would have decided a specific [*Yousoufian* factor] a different way or weighed the factors differently.” DOC Br. 15, 17. There are several fatal problems with this argument.

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<sup>3</sup> To support its novel abuse-of-discretion standard, the Department cites *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010) (cited by DOC Amicus Br. 15). But *Sanders* did not solely analyze the ultimate penalty and hold that a legal error does not count as an abuse of discretion. It held that the trial court had not committed a legal error because its penalty analysis “adequately anticipated” the decision in *Yousoufian*. *Id.* at 859.

*First*, it ignores how this Court has consistently applied the abuse-of-discretion standard. An abuse of discretion, as Hoffman has pointed out, includes a legal error. Thus, if a trial court makes a legal error on a *Yousoufian* factor and bases its penalty on that error—as the trial court did here—the trial court abused its discretion and should be reversed. *See Humphrey Indus., Ltd. v. Clay Street Assocs., LLC*, 170 Wn.2d 495, 507, 242 P.3d 846 (2010); Hoffman Suppl. Br. 19–20.

*Second*, the Department’s argument ignores the special weight this Court has given, and the trial court here gave, to the bad-faith factor. Bad faith is not the *controlling* factor under *Yousoufian*, but, as this Court has repeatedly said, it is the single most important factor in setting a PRA penalty. *See Neighborhood Alliance of Spokane Cty. v. Spokane Cty.*, 172 Wn.2d 702, 717, 261 P.3d 119 (2011) (“principal factor”); *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 460, 229 P.3d 735 (2010) (same); *Amren v. City of Kalama*, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997) (same). Accordingly, the trial court here relied more heavily on lack of bad faith than on any other single factor, *see* CP 908, 910–11, stating that the amount of a PRA penalty depends “primarily” on “whether the agency acted in bad faith,” CP 910, ¶ 2.

*Third*, it only makes sense that bad faith should be the single most important factor in imposing a PRA penalty. Consider two hypothetical

agencies. The first is trying to abide by the PRA. The second is behaving “unreasonably” and is “indifferent to” whether a PRA violation will result from its unreasonable actions. *Faulkner v. Wash. Dep’t of Corr.*, 183 Wn. App. 93, 103, 332 P.3d 1136 (2014) (citation and internal quotation marks omitted) (setting out the Department’s preferred legal standard for bad faith). The second agency, of course, is far more likely to violate the PRA than the first. To deter PRA violations, then, it is vital to impose a larger penalty in the case of the second agency than in the case of the first. *See Yousoufian*, 168 Wn.2d at 462–63 (PRA penalty’s purpose is “to deter improper denials of access to public records”); *see also Neighborhood Alliance of Spokane Cty. v. Spokane Cty.*, 172 Wn.2d 702, 718, 261 P.3d 119 (2011) (stating that an agency that “mistakenly overlooked a responsive document” should receive a lower penalty than one “that intentionally withheld known records and then lied in its response to avoid embarrassment”).

*Fourth*, Hoffman is not objecting to the *weight* that the trial court gave to a particular *Yousoufian* factor. *Cf.* DOC Br. 15. This case is not about that highly discretionary decision, but about whether the trial court correctly applied the law to the undisputed facts in determining the most important *Yousoufian* factor, good faith.

**III. Under the Department's less demanding standard for bad faith, the undisputed facts demonstrate that the Sheriff's Office withheld public records from Hoffman in bad faith.**

The Department asks the Court to adopt the legal standards for bad faith applied in *Adams v. Washington State Department of Corrections*, 189 Wn. App. 925, 361 P.3d 749 (2015) *Faulkner*, 183 Wn. App. 93, and *Francis v. Washington State Department of Corrections*, 178 Wn. App. 42, 313 P.3d 457 (2013). DOC Br. 7–9.

These cases apply lower standards for bad faith than the one advanced by Hoffman's. Unlike Hoffman's standard, *Francis* and *Faulkner* do not require a requester to prove that the agency intentionally withheld responsive documents. Hoffman Suppl. Br. 16–17. Even if the agency does not know of responsive documents, the agency has acted in bad faith if it conducted an unreasonable search that was inconsistent with its own proper policies. *See Francis*, 178 Wn. App. at 63; *accord Faulkner*, 183 Wn. App. at 103–04 (no requirement of intentional withholding). Nor do *Adams* or *Francis* require an agency to be consciously *aware* that it is acting unreasonably or indefensibly, as Hoffman's standard does. *See Adams*, 189 Wn. App. at 929; *Francis*, 178 Wn. App. at 63; Hoffman Suppl. Br. 16–17.

Hoffman, however, has no objection to the holdings of *Francis*, *Adams*, and *Faulkner*, and the undisputed facts here easily satisfy the standards for bad faith laid out in each decision.

*Francis* holds that there is bad faith if an agency “fails to carry out a record search consistently with its proper policies and within the broad canopy of reasonableness.” 178 Wn. App. at 63. Here, the trial court found that the Sheriff Office’s search for responsive documents was unreasonable, CP 896–97, ¶ 7, and the undisputed testimony of the Office’s own employees demonstrates that the search violated the Office’s policies, COA Br. of Appellant 25–26.

*Adams* holds that bad faith includes “an agency’s failure to engage in any serious independent analysis of the exempt status of documents it withholds.” 189 Wn. App. at 929. Here, as in *Adams*, the withholding of public records was “legally indefensible.” *Id.* And here, again as in *Adams*, the Sheriff’s Office did not seriously analyze whether the police reports were exempt from the PRA. Indeed, it *could not have*, since Public Records Officer Hayes, evidently believing they were *not* exempt, *normally produced them to requesters*. CP 409–10 at 18:6–19:4; CP 419 at 28:3–10. Even after a trainee questioned Hayes’s withholding, she did not change her course. CP 892, ¶ 7. And when Kallee Knudson brought her

concerns to supervisors, they engaged in no further analysis of Hayes's withholding. *See* CP 902, ¶ 4.

*Faulkner* states that bad faith includes “unreasonably or maliciously risking harm while being utterly indifferent to the consequences.” 183 Wn. App. at 103 (citation and internal quotation marks omitted). Here, the Sheriff Office's withholding of police reports was so obviously wrong that it “unreasonably . . . risked” a PRA violation. Hayes's justification for withholding has long been pronounced erroneous, Hoffman Suppl. Br. 3, and was so patently wrong that the County has declined to defend it, a trainee knew it to be incorrect, and Hayes herself prevaricated about it, *id.* at 17. The Sheriff's Office was also utterly indifferent to whether Hayes's actions resulted in an erroneous withholding. The fact that Hayes could give no reason for the withholding by itself shows her indifference to whether the withholding violated the PRA or not. *Id.* at 17. This evidence is bolstered by her refusal to correct the withholding even after being given two obvious opportunities to do so. She did not correct the response after either Knudson's questioning, CP 892, ¶ 7, or her supervisors', CP 426 at 35:2–5.

As for Knudson and the supervisors, they did not merely know of an unreasonable *risk* of harm, *see Faulkner*, 183 Wn. App. at 103. They knew that Hayes had *actually violated* the PRA. *See* CP 893, ¶ 10

(Knudson was “troubled” about the withholding and “explain[ed] her concerns” to the supervisors). But instead of ordering the police reports to be produced, or just asking Hayes to correct the misinformation that she had given Hoffman earlier, they told Hayes and Knudson to ask Hoffman whether he had “received what he had requested.” CP 902, ¶ 4. Asking Hoffman this question did nothing to solve the problem. Hoffman *had* received what he requested, since he had narrowed his request precisely because Hayes had wrongly told him that “privacy interests” prevented the disclosure of the police reports. CP 891, ¶ 5; CP 896, ¶ 4. Thus, the behavior of Knudson and the supervisors, to the extent it is even relevant, *see* Hoffman Suppl. Br. 18–19, also betrays indifference to the PRA violation.

**IV. The monetary concerns that motivate the Department’s legal position are unfounded.**

The strained legal position that the Department takes in its brief likely stems from pecuniary concerns. Because an inmate can be awarded a PRA penalty only if the Department has responded to the inmate’s request in bad faith, RCW 42.56.565(1), the Department is concerned that if bad faith favors a higher penalty, its PRA penalties will nearly always be high. DOC Br. 18–19.

These worries are misplaced, or at the very least do not bear on this case. The Department's concerns assume that the *Yousoufian* framework, under which bad faith is "the principal" consideration, 168 Wn.2d at 460 (quotation and citation omitted), applies to incarcerated requesters. That assumption is dubious. Under the *Yousoufian* framework, while bad faith is a crucially important determinant of the *amount* of the penalty, "no showing of bad faith is necessary before a penalty is imposed on an agency." *Id.* By contrast, incarcerated requesters *must* show bad faith before any penalty at all is imposed. The *Yousoufian* framework, then, directly conflicts with the statutory scheme governing incarcerated requesters. For that reason, it seems doubtful that *Yousoufian* can apply to such requesters. At the very least, the decision the Court issues in this case need not control the cases of incarcerated requesters. The Court may wish to make that point clear in its opinion. *See* DOC Br. 19.

## CONCLUSION

The PRA helps to preserve popular sovereignty and governmental accountability in the State of Washington. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994). The Department undermines those vital purposes by arguing that bad faith does not matter when setting a PRA penalty. Because bad-faith responses are highly likely to violate the PRA, it is singularly important to deter them

with penalties. Adopting the Department's position on bad faith would thus serve to encourage PRA violations, "defeat[ing] the very purpose of the PRA," which is "to achieve broad public access to agency records." *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 540, 199 P.3d 393 (2009).

The Department's position should be rejected. Instead, this Court should reverse the Court of Appeals and remand this case for a new penalty determination. It should also award Hoffman his reasonable attorneys' fees on appeal, as well as his costs.

RESPECTFULLY SUBMITTED this 19th of April, 2019.

**KELLER ROHRBACK L.L.P.**



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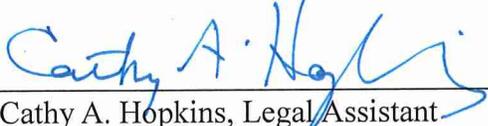
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I certify under penalty of perjury of the laws of the State of Washington that on April 19, 2019, I caused a true and correct copy of the foregoing PETITIONER'S ANSWER TO BRIEF OF AMICUS CURIAE to be served on the following via email, pursuant to RAP 18.5(a) and CR 5(b)(7):

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