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STATE OF WASHINGTON
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NO. 102149-6

SUPREME COURT OF THE STATE OF WASHINGTON

DONALD HERRICK,

Petitioner.

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES'
SPECIAL COMMITMENT CENTER,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This Court should not grant review of the unpublished Court of Appeals decision in this case, which simply applied established Public Records Act jurisprudence to the facts of this case. While one issue was resolved in Herrick's favor, the Department of Social and Health Services (Department) does not seek cross-review.

In 2015 and 2016, the Department provided records in response to Herrick's three requests. The requests sought records related to the investigation of a Special Commitment Center (SCC) employee, a general SCC mail log, and an individual mail log. While the Department did not keep individual mail logs, it provided existing responsive records. In a prior appeal, the Department conceded that it incorrectly redacted an employee photograph and has since provided an unredacted copy. The superior court, considering the relevant factors, imposed a penalty against the Department. In this appeal, Herrick objects to the quality of the photograph, the adequacy of the general mail

log (for which he previously narrowed his request), and the amount of the penalties.

Following existing law and creating no new precedent, the Court of Appeals correctly rejected each of his arguments, and the issues do not satisfy any of the RAP 13.4(b) factors. This Court should deny review.

II. IDENTITY OF RESPONDENT

Respondent is the Department of Social and Health Services' Special Commitment Center.

III. DECISION BELOW

The decision of which Herrick seeks review is an unpublished opinion filed on February 22, 2023, by Division II of the Washington State Court of Appeals, *Herrick v. Dep't of Soc. & Health Servs.*, 25 Wn. App. 2d 1048 (2023). Herrick's motion for reconsideration was denied on June 5, 2023.

IV. COUNTERSTATEMENT OF THE ISSUES

1. Did the Department comply with the PRA when, after clarification, it produced a general mail log that contained information responsive to Herrick's

request for his individual mail log, which does not exist?

2. Did the Department come into compliance with the PRA once it produced an unredacted copy of an employee photograph that it had previously provided only in a redacted form?
3. Did the trial court comply with the PRA when it utilized the *Yousoufian* factors to assess the Department a \$1 per day penalty for incorrectly redacting the employee photograph?

V. COUNTERSTATEMENT OF THE CASE

Herrick was held at the SCC from December 7, 2010 until February 11, 2019. CP 93.

Throughout his detention, Herrick was one of the facility's most demanding residents in terms of the burden his public records requests placed on the SCC. CP 4-6. Herrick made extensive requests, often from various sources, causing confusion for SCC's Records and Public Disclosure Unit. *Id.* His diverse requests, in addition to letters, grievances, subpoenas, and lawsuits, led to overlapping and circular demands. *Id.* Herrick's requests were often needlessly complicated and broad,

requiring production of records multiple times in response to multiple requests. *Id.* The SCC handled around 31 requests from Mr. Herrick until the SCC's motion to show cause, highlighting the substantial volume and complexity of his demands. *Id.*

On December 23, 2015, Herrick made an 8-part request for records, including “[a]ny and all videos, photographs etc. that have been used, or viewed as part of the above requests/investigations in any way. All videos and photographs should be in original color format[.]” CP 33. Responses were requested electronically. *Id.* That day, SCC acknowledged this request and assigned it #201512-PRR-889. CP 34. SCC produced 48 pages of records responsive to request #201512-PRR-889. CP 24. SCC withheld no records, but produced a redacted employee photograph. *Id.*

SCC keeps a mail log for all residents but does not keep separate mail logs for individual residents. CP 22. On April 28, 2016, Herrick requested the SCC mail log. CP 95. That day, SCC assigned this request #201604-PRR-1274 and asked for

clarification of the timeframe of sought records. CP 96. On May 6, 2016, Herrick clarified the timeframe requested was “01-01-2011 to present is fine.” On May 23, 2016 SCC produced the requested records with the clarified timeframe. CP 22, 100, 101.

On May 17, 2016, Herrick requested “his” SCC mail log. CP22. The following day, SCC assigned this request # 201605-PRR-833 and responded that no responsive records existed because the SCC does not maintain individual mail logs. *Id.*

Herrick filed a public records lawsuit against the Department on May 24, 2017, regarding SCC’s responses to requests #201605-PRR-833 and #201512-PRR-889. CP 2. Herrick appealed the trial court’s ruling on the redacted photograph. CP 3. The Court of Appeals concluded the photograph was improperly redacted. *Id.* The Court of Appeals also found the trial court erred in finding that the SCC should have produced an individual mail log, because the SCC did not keep a mail log for each resident. *Id.*

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On remand, the Department filed a motion to show cause that the SCC did not violate the PRA by not providing an individual mail log, and that a balance of the *Yousoufian* factors merited a minimal fine. CP 1-90. Herrick responded and cross-moved. CP 105-227. The trial court granted SCC's motion, ruled that its response to request #201605-PRR-833 was appropriate, and issued a \$1.00 per day penalty for the single redacted photograph from request #201512-PRR-889 for a total of \$636.00. CP 247-51.

VI. REASONS WHY REVIEW SHOULD BE DENIED

Mere disagreement with a decision of the Court of Appeals is insufficient grounds to invoke this Court's discretionary review. RAP 13.4 provides that discretionary review of a Court of Appeals decision terminating review will be accepted by the Supreme Court only if one of more of the following factors exist:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b)

As the party seeking review, Herrick bears the burden of demonstrating these factors apply. Herrick has failed his burden to establish that any of these grounds for review exist.

A. The Decision Below Finding the Department in Compliance with the PRA and Penalizing It for Prior Noncompliance Does Not Conflict with Any Decision of This Court or Published Decision of the Court of Appeals

Herrick’s characterization of the Court of Appeals decision is misleading, and his petition raises only fact-specific issues that do not warrant review.

Herrick’s reliance on *Cantu v. Yakima School District No. 7*, 23 Wn. App. 2d 57, 78, 514 P.3d 661, 673 (2022) is misplaced. In arguing that SCC was required to produce a high-quality photograph, Herrick points to the PRA’s oft-cited broad mandate of “full disclosure” in *Cantu*, 23 Wn. App. 2d at 78. But *Cantu*

does not hold that agencies must produce records that do not exist. And the Court of Appeals decision correctly recognized that the Department disclosed the photograph it identified. Herrick failed to rebut this with any evidence that the high-quality photograph he sought existed. Consistent with *Cantu*, the Department disclosed to Herrick the photograph used in the investigation, as he requested.

Herrick wrongly suggests that the SCC should be penalized for not producing a record which the Court of Appeals had no evidence of, as noted in Footnote 3. Rather, the Court of Appeals correctly concluded that the Department was not required to create a new record only alleged, without evidence, by Herrick. Herrick's dissatisfaction with the records produced does not create a conflict with existing precedent.

Similarly, Herrick's request for an individual mail log presents no conflict with *Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 522-23, 326 P.3d 688 (2014). The Court of Appeals cited *Fisher* and concluded that the denial

here was appropriate as there was no dispute that SCC doesn't keep individual mail logs. This follows *Fisher* and long-established precedent that the PRA does not require an agency to "create or produce a record that is nonexistent" *Id* (quoting *Gendler v. Batiste*, 174 Wn.2d 244, 252, 274 P.3d 346 (2012) (quoting *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004)).

The Court of Appeals affirmed the SCC's denial of Herrick's request for an individual mail log, agreeing it would necessitate record creation not mandated by the PRA. As in *Fisher*, Herrick requested a non-existent record, an individual mail log. Herrick also requested a complete mail log for every SCC resident, and then narrowed the timeframe of those records. Herrick was provided records within that timeframe. Herrick now contends that the agency should have provided records beyond those dates, despite his clarification. The SCC fulfilled his parallel request for the general facility mail log, using identical language, with Mr. Herrick clarifying the timeframe.

Herrick's dissatisfaction with those records does not create a conflict with existing precedent.

Herrick additionally cites to several Federal Freedom of Information Act cases. These are inapplicable to RAP 13.4 as they are neither Washington Supreme Court nor Court of Appeals opinions.

B. Whether the Department Complied with Herrick's PRA Request and What Penalties Should be Assessed for Noncompliance with the PRA are Not Questions that Raise a Significant Question of Law or Involve an Issue of Substantial Public Interest

Herrick's dissatisfaction with the PRA penalties awarded fails to raise an issue of substantial public interest warranting review by this Court. The Court should deny review.

Though Herrick disagrees with the result, he acknowledges that the Court of Appeals applied the correct factors in its analysis and that a trial court's penalties determination is reviewed for abuse of discretion. Pet. for Rev. at 11-12; *see also Yousoufian v. Off. of Ron Sims*, 152 Wn.2d 421, 431, 98 P.3d 463 (2004) (*Yousoufian I*) (holding

“that the trial court’s determination of appropriate daily penalties is properly reviewed for an abuse of discretion”).

A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A decision is ‘manifestly unreasonable’ if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take. *Id.* (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)(internal quotations omitted)).

Determining a PRA penalty is a two-step process: “(1) determine the amount of days the party was denied access and (2) determine the appropriate per day penalty between \$5 and \$100 depending on the agency’s actions.” *Yousoufian I*, 152 Wn.2d at 438. The legislature subsequently amended the PRA to provide no mandatory minimum. RCW 42.56.550(4).

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One page of Herrick’s complicated 8-part request contained an improper redaction. CP 239. The Court of Appeals observed that the trial court considered the appropriate factors.

Applying these factors to Herrick’s case confirms the Court of Appeals correctly assessed a minimal daily fine. The SCC promptly responded, provided training, and had efficient record systems, mitigating penalties. The SCC’s admitted redaction mistake is mitigated by no evidence of bad faith or intentional misconduct. The photograph’s public importance is minimal, and Herrick suffered no economic loss. Considering these factors, imposing a more significant fine for a one-time error was unnecessary. Herrick suggests an issue of substantial public interest because the trial court found no aggravating factors. However, courts aren’t required to find aggravating factors if there are none, are “not required to weigh each factor equally” and the [*Yousoufian*] factors are not an exclusive list of appropriate considerations. *Zink v. City of Mesa*, 4 Wn. App. 2d 112, 124, 419 P.3d 847 (2018) (citing *Yousoufian*

II, 168 Wn.2d 444, 468, 229 P.3d 735 (2010)). Since their introduction, Courts have held “the factors are for guidance; they are not exclusive, they may overlap, and they may or may not be important under the circumstances of individual cases.” *Cantu*, 23 Wn. App. 2d at 102.

Herrick disputes how the trial court applied the mitigating factors to the circumstances of this case, reasserting previously-made arguments. Herrick asks this Court to not only find an abuse of discretion, but to also arrive at an opposite result. Herrick’s dissatisfaction the courts’ analysis of the circumstances of his case does not raise an interest of substantial public importance.

There is no confusion in the law regarding how a Court establishes agency penalties under the PRA or a need for this Court to provide further direction.

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VII. CONCLUSION

Herrick has failed to demonstrate sufficient grounds to warrant review by this Court under RAP 13.4. His petition for review should be denied.

This document contains 2,343 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 20th day of December, 2023.

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I caused to be served a true and correct copy of the foregoing document on the following parties to this action, as indicated below:

Petitioner pro se

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By U.S. Mail - Postage Prepaid

By Hand Delivery via Staff at SCC

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

DATED this 20th day of December 2023, at Tumwater, Washington.



Michael Nigrey, AAG

SOCIAL AND HEALTH SERVICES DIVISION, ATTORNEY GENERALS OFFICE

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