89982-7

NO.

Court of Appeals Cause No. 42712-5-II

SUPREME COURT OF THE STATE OF WASHINGTON

SHAWN D. FRANCIS,

Plaintiff/Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Defendant/Respondent.

PETITION FOR REVIEW

SHAWN D. FRANCIS
Petitioner, Pro Se
DOC #749717
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

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* Yousoufian I through V refer to the cases titled Yousoufian v. Office of Ron Sims.

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I. IDENTITY OF PETITIONER

Petitioner, Shawn Francis, appearing pro se, is the Appellant/Cross-Respondent at the Court of Appeals.

II. COURT OF APPEALS DECISION

Mr. Francis seeks review of the published decision of the Court of Appeals, Division II, in Francis v. Dep't of Corrections, Cause No. 42712-5-II filed on November 19, 2013. A copy of the decision is attached as Appendix A. The Court of Appeals further denied both Francis' and the Department of Corrections' (DOC) Motion for Reconsideration by Order dated January 22, 2014, which is attached as Appendix B. However, in their order denying reconsideration, the court granted DOC's request for clarification in which they amended page 17, at line 17, of their original published opinion. See Id.

III. ISSUES PRESENTED FOR REVIEW

1. Does the trial court's finding of DOC's "bad faith" and "gross negligence", in response to a public records request, require a higher per-day penalty amount?

2. Did the trial court abuse its discretion in setting a low-end penalty award despite its findings of bad faith and several other aggravating factors?

3. Did the trial court erroneously interpret the PRA penalty scheme to be applied as "damages" rather than a penalty during its penalty assessment?

4. Is remand for imposition of a penalty based upon a proper reading of the statute necessary when a trial court relies on an erroneous interpretation of the PRA penalty scheme?

5. Does the overwhelming number of applicable aggravating factors, and the significant lack of mitigating ones, necessitate a higher per-day penalty against DOC?

6. Does the Court of Appeals' decision improperly suggest a default consideration, in that, the mere absence of an aggravating factor can automatically render it mitigating simply because of its absence?

7. Did the Court of Appeals err by failing to address Francis' other properly raised issues?

IV. STATEMENT OF THE CASE

Facts and Procedural History

On June 19, 2009, Francis sent a letter to DOC requesting:

> "any and all documents related to any reason and/or justification for the reason why inmates at [McNeil] are not allowed to retain fans and hot pots in their cells, as well as any policy that may be in place to substantiate such restrictions on these items."

Clerk's Papers (CP) at 11. DOC employee Brett Lorentson responded by sending Francis a letter promising to identify and gather responsive records and respond by July 30, 2009.

On July 10, 2009, Lorentson provided Francis with 15 pages of documents via e-mail, stating that "[s]ince all responsive records have been provided, this request is closed." CP at 115. The documents consisted solely of DOC's policy 440.000 with attachments. This policy provided that fans and hot pots were permitted "as authorized by [the] facility." CP at 31-32. None of the documents provided to Francis related to any prohibition against fans or hot pots.

In November 2009, however, Francis discovered the existence of documents concerning McNeil's policy prohibiting

fans and hot pots. On June 28, 2010, Francis filed suit in Pierce County Superior Court, alleging a violation of the PRA and requesting statutory penalties. On February 28, 2011, 8 months after filing suit (626 days after making the request), DOC finally provided Francis with the records he requested.

On June 7, 2011, Francis moved for summary judgment. DOC conceded to violating the PRA, but disputed the penalty amount proposed by Francis. The trial court granted Francis' motion as to liability, reserving judgment as to the penalty amount until a later hearing.

Prior to the hearing on penalties, a new law took effect prohibiting awards of PRA penalties based on record requests made by incarcerated persons, unless the court finds "that the agency acted in bad faith." Former RCW 42.56.565 (2009), amended by LAWS OF 2011, ch. 300, §§ 1, 2. The trial court ruled that this restriction applied to Francis' case, found bad faith by DOC, and awarded Francis a penalty. In doing so, the court applied the aggravating and mitigating factors set forth by our Supreme Court for PRA penalty determinations in Yousoufian V, 168 Wn.2d 444, 466-68, 229 P.3d 735 (2010).

In particular, the trial court relied on a "Public Disclosure Routing Slip" that Francis obtained through discovery. After Francis' request was shuffled through 7 DOC employees, an official at McNeil signed the routing slip verifying that "a thorough" search was conducted yielding no responsive documents. See Br. of Appellant at Ex. A. However,

despite the claim of a "thorough" search, the routing slip indicated that none of the 17 locations known to retain records had been searched, moreover, that between 7 agency employees, no more than "15" minutes total was spent searching for the requested documents. Id.

Although the trial court found no intentional non-compliance by DOC, it found 5 additional aggravating factors, including the Department's "gross negligence", further supporting its principal finding that DOC displayed bad faith. Report of Proceedings (RP) at 5-9. In striking contrast, the trial court found only 2 mitigating factors applicable to DOC's misconduct. RP at 8. Ultimatley, the trial court chose to adopt DOC's proposed penalty amount, imposing a penalty against DOC at $5 per-day for the 353 days that DOC violated the Act before Francis filed suit, and then $10 per-day for the 273 days that DOC violated the Act after Francis filed suit. The trial court also denied Francis' request for costs.

Francis timely appealed, asserting that the trial court abused its discretion in setting the penalty amount so low despite its finding that DOC responded in bad faith, and in denying costs. DOC cross-appealed, arguing that, because DOC did not withhold records intentionally, the trial court erred in finding bad faith. Ultimately, Division Two upheld the trial court's bad faith determination and award of a penalty, holding that under the rules of statutory construction and existing case law (1) a determination of bad faith under the PRA does not require commission of some intentional, wrongful act, and (2)

that the trial court's determination that DOC acted in bad faith was correct. Appendix A at 5, 19, & 23. Furthermore, the court affirmed the trial court's low-end penalty amount as "reasonable", however, remanded with instructions to award Francis all costs he incurred throughout litigation. Appendix A at 19, 23. The appellate court failed to address other issues properly raised by Francis.

The Court of Appeals denied both Francis' and DOC's Motions for Reconsideration by Order dated January 22, 2014. Appendix B. However, at the same time, the court clarified its opinion pursuant to DOC's request. Id. This Petition now follows and is timely pursuant to RAP 13.4(a).

V. ARGUMENT FOR ACCEPTANCE OF REVIEW

This case merits review as the Court of Appeals' holding is in conflict with this Court's prior holdings and rationale set forth in the several Yousoufian decisions, as well as in several other appellate court decisions regarding PRA penalty assessments. RAP 13.4(b)(1), (2). Furthermore, Division Two's holding presents issues of substantial public importance. RAP 13.4(b)(4). Also noteworthy, the Washington Supreme Court has never examined a PRA penalty assessment dispute involving a trial court's definitive finding of agency bad faith.

The Court of Appeals' decision essentially holds that even the most egregious level of culpability (i.e., "bad faith") can otherwise be assessed at the lower end of the penalty scale at levels typically reserved for much less egregious categorizations of culpability. Under that holding, an agency

that could be characterized as responding to a PRA request in the "most egregious" of manners could potentially be held less culpable in the penalty it receives in comparison to other agencies that receive a higher per-day penalty but may have responded negligently or in good faith. Such a holding is contrary to legislative intent when constructing the broad penalty scale. Furthermore, it departs from the axiom that agencies with higher levels of culpability be penalized harsher than those with lower levels.

Division Two's holding may have grave implications for PRA enforcement and penalty assessments in general, regardless of a requestor's social status. The decision effectively cripples the PRA's sole enforcement mechanism, furthermore, it threatens this Court's aim to provide both the requestor and the agency with reasonable predictability in penalty determinations.

A. When Penalties Are Imposed Against An Agency Under The PRA, Persons Requesting Public Records, State And Local Agencies, And Lower Courts All Have A Substantial Interest In A Predictable Assessment Of Penalties Guided By The Violating Agency's Categorized Level Of Culpability.

The purpose of the PRA is to provide those who request public records with timely access to public records. RCW 42.56.520. The PRA provides a judicial remedy for persons who have been denied records that should have been disclosed. RCW 42.56.550. The purpose of providing for penalties and attorney fees in the PRA is to compel agency compliance with the PRA. Yousoufian II, 152 Wn.2d at 429-30. In adopting

mitigating and aggravating factors for penalty determinations, this Court sought to establish a penalty incentive that is reasonably predictable when considering an agency's misconduct. Yousoufian V, 168 Wn.2d at 468. Conversely, unpredictable penalty awards fail to promote the essential goals of a penalty award: deterrence and compliance. See Clausen v. Icicle Seafoods, Inc., 174 Wn.2d 70, 272 P.3d 827 (2012)("[A] penalty should be reasonably predictable in its severity, so that [the penalized party] can look ahead with some ability to know what the stakes are in choosing one course of action or another.")(internal citation and quotations omitted).

Although penalties are no longer mandatory, this Court has consistently held that when a court chooses to act upon its discretion and impose penalties under the PRA, such penalty must be assessed in an amount that properly reflects that agency's level of culpability as *categorized* by the lower court.[1] Yousoufian V, 168 Wn.2d at 460 (listing factors to aid in culpability determinations); Neighborhood Alliance v. City of Spokane, 172 Wn.2d 702, 717-18, 261 P.3d 119 (2011) ("In addition to good or bad faith, the agency's overall culpability is the focus of the penalty [amount] determination."). Because lower courts can impose penalties premised upon a wide range of factors and culpability levels, over a broad penalty scale, requestors and state agencies, along with lower courts have a substantial interest in understanding whereabouts categorized levels of misconduct

[1] Under the language provided in RCW 42.56.565(1), once the lower court found that DOC acted in bad faith when withholding documents from Francis, at that point, the imposition of penalties became mandatory.

should recognizably fall within the statutory scale. It is axiomatic that classified concepts ranging from simple negligence, to gross negligence, and all the way up to bad faith are simply all different concepts. More importantly, they are categorically different levels of culpability, and therefore, should be treated differently.

This Court has recognized that most PRA cases will lack a definitive good or bad faith finding, rather, that the majority of PRA cases will ultimately call for a penalty somewhere in the middle of the expansive penalty range based upon the consideration of mitigating and aggravating circumstances. Yousoufian IV, 165 Wn.2d at 454. As such, this Court reasoned that good and bad faith represent both the low and high ends of the statutory penalty scale. Id. Therefore, under this Court's holdings in the several Yousoufian decisions, which have provided significant guidance in resolving PRA penalty disputes, it stands to reason that, because "bad faith" categorically represents the top end of the penalty scale, when a trial court ultimately categorizes an agency's violating conduct as "bad faith", imposition of the per-day penalty should be assessed somewhere in the upper registers of the penalty scale. Id. at 459 ("[T]he legislature established a penalty range between $[0] and $100 a day to contrast between the least and most violative conduct, expecting extreme cases to fall at either end point with the rest falling in between.")

By upholding such a low penalty assessment, despite misconduct characterized by the trial court as "bad faith",

the Court of Appeals' decision in this case seemingly subverts this Court's aim to promote predictability and accountability in the imposition of penalties upon a violating agency. Consequently, Division Two's decision will notably affect future PRA penalty determinations, as well as likely deter aggrieved citizens from willingly investing the time, energy, and emotion necessary to serve as private attorneys general enforcing the Act. Essentially, this would leave the Act without an effective and meaningful enforcement mechanism as private attorneys general will simply not represent the public interest, as anticipated by the PRA, without a penalty incentive that is reasonable, as well as reasonably predictable.

B. The Court Of Appeals Erred When It Held That The Trial Court Applied The Correct Legal Standard When Assessing Its Penalty.

An appellate court will review a trial court's determination of PRA penalty amounts for abuse of discretion. Yousoufian V, 168 Wn.2d at 458. Under this standard, an appellate court will reverse if the trial court's "decision is manifestly unreasonable or based upon untenable grounds or reasons." Id. (internal citation omitted). Under the "untenable grounds" prong of this standard, a court acts on untenable grounds if the record does not support its factual findings, or *if it was an incorrect standard*, or the facts do not meet the requirements of the correct standard. State v. Rundquist, 79 Wn.App. 786, 793, 905 P.2d 922 (1995).

In its published opinion, the Court of Appeals held that

the trial court "applied the correct legal standard." Appendix A at 21. However, the appellate court failed to recognize several mischaracterizations by the trial court representing its penalty assessment to be "damages" for Mr. Francis, rather than as a "penalty" against DOC for its misconduct.[2] See RP 9, 11. In this Court's interpretation of legislative intent regarding the PRA penalty scheme, this Court held that the legislature clearly intended that any penalty award under the Act's penalty provision be imposed as punishment for an offending agency's misconduct, *not as compensation* to the requestor for damages. Yousoufian IV, 165 Wn.2d at 454-55.[3]

When it is determined that a court has relied on an impermissible basis in its penalty determination, as in this case, remand for imposition of a penalty based upon a proper reading or interpretation of the statute is necessary. See State v. McGill, 112 Wn.App. 95, 99-100, 47 P.3d 173 (2002)("Remand is often necessary where a sentence is based on a trial court's erroneous interpretation of or belief about the governing law."). Because it is clear that the trial court in this case erroneously assessed its penalty assessment as "damages" for Francis, rather than a "penalty" against DOC for its misconduct, the trial court failed to give proper effect to the legislature's plain meaning of the

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[2] Francis raised this issue in his Motion for Reconsideration in response to the appellate court's ruling that the trial court had applied the correct legal standard.

[3] In Yousoufian V, this Court held that a PRA penalty could in some sense be considered compensation when a lower court finds the requestor suffered economic loss. Yousoufian V, 168 Wn.2d at 461-62. However, this is not the case here.

statute. As such, the result is one based upon an incorrect legal standard. Therefore, remand is necessary to correct this error.

C. The Court Of Appeals Erred When It Failed To Look Beyond DOC's Statutory Compliance When Conducting Its "Manifestly Unreasonable" Analysis.

In continuing with the abuse of discretion standard, as outlined in the preceeding argument, the standard provides two separate prongs which, if either one is established, will result in an appellate court's finding that the lower court abused its discretion in a PRA penalty assessment. Yousoufian V, 168 Wn.2d at 458 (internal citation and quotation omitted). Under the "manifestly unreasonable" prong of the standard, a trial "court's 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. at 458-59 (internal citation and quotation omitted).

Even if this Court should find that the trial court's mischaracterizations of its penalty as "damages" for Mr. Francis was the correct legal standard, Division Two's review under the "manifestly unreasonable" prong of the standard was misplaced. In its analysis, the Court of Appeals found that the trial court's penalty amount was not manifestly unreasonable because a reasonable person could conclude that the lower court's penalty "satisfies the *requirements* of the PRA." Appendix A at 21 (emphasis added). Indeed, reasonable

compliance with PRA *procedural requirements* is not the proper basis for consideration when analyzing a PRA penalty award amount under the "manifestly unreasonable" prong of the standard. Rather, consideration should be directed to the point along the $0 - $100 statutory penalty scale at where the trial court chose to exercise its discretion, followed by a determination as to whether that chosen point reasonably represents DOC's level of misconduct as *categorized* by the trial court. See Yousoufian II, 152 Wn.2d at 435 ("the [PRA's] purpose [of] promot[ing] access to public records... is better served by increasing the penalty based on an agency's culpability"). Put another way, after recognizing a trial court's compliance with PRA procedural requirements and that the court did not act on untenable grounds, an appellate court must then determine whether the lower court's specific penalty amount is manifestly unreasonable.

The Court of Appeals' decision in this case seems to conflate both prongs of the abuse of discretion standard. At most, consideration into the trial court's procedural compliance would be reviewed under the "untenable grounds" prong of the standard. Either way, the Court of Appeals failed to properly review the trial court's penalty assessment for manifest unreasonableness.

D. The Court Of Appeals Erred When It Upheld The Trial Court's Low-End Penalty Award Despite DOC's Display Of "Bad Faith", And Several Other Aggravating Factors.

When conducting its abuse of discretion analysis, the Court of Appeals failed to balance the trial court's

mitigating and aggravating findings prior to ruling that the trial court's per-day penalty amount was reasonable. Here, the trial court's findings of aggravating factors *heavily* outweigh the mitigating factors. In addition to finding that DOC displayed "bad faith", the trial court also found the existence of 5 additional aggravating circumstances.[4] In stunning contrast, the trial court found the existence of only 2 mitigating factors,[5] and notably, by comparison, proffered very little discussion on the record as to the topic of mitigation. RP at 8. Here, Division Two's decision to uphold such a low per-day penalty is inconsistent with well settled PRA guidance and principles for several reasons.

First, in its analysis, the Court of Appeals completely disregarded the significant imbalance of established aggravating factors over mitigating ones. Instead, Division Two improperly chose to rely on the absence of specific aggravating factors to guide its examination of manifest unreasonableness. In doing so, the appellate court held that (1) because the trial court did not find DOC acted recklessly or intentionally; (2) because the trial court did not find the matter to be time sensitive or of public importance; and (3) because the trial court did not find that Francis suffered a personal economic loss, that the per-day penalty imposed by

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4 (1) Delayed response; (2) lack of strict compliance with "all" PRA requirements; (3) lack of proper training and supervision; (4) the request did not lack clarity; and (5) gross neligence. Appendix A at 7; see also RP at 5-9.

5 (1) DOC kept a constant dialogue with Mr. Francis, in that they responded to Francis' correspondence; and (2) because DOC provided no explanation whatsoever, there existed no unreasonableness in any explanation for their violation.

the trial court was reasonable. Appendix A at 21. This decision reads to improperly hold that the mere absence of an aggravating factor can, by default, automatically constitute a mitigating consideration simply because the aggravating factor is not necessarily applicable. Indeed, this type of default conclusion is improper. See In re Disciplinary Proceeding Against Preszler, 169 Wn.2d 1, 31, 232 P.3d 1118 (2010)("[C]ooperating with the disciplinary proceedings is not a mitigating factor, even though lack of cooperation may be an aggravating factor.")(internal citations and quotations omitted). Moreover, in recognizing that not every single aggravating or mitigating factor may apply in a PRA penalty determination, this Court has never suggested that the mere absence of a specific factor be given its opposite effect simply because of its inapplicability. See Yousoufian V, 168 Wn.2d at 468 ("We emphasize that the factors may overlap, are offered only as guidance, may not apply equally *or at all* in every case... ")(emphasis added). The untenable consequences of such default conclusions is that violating agencies would not be held accountable based upon the trial court's findings of actual misconduct, but rather, harm to the requestor would be minimized based upon the trial court's *lack of findings*. Such conclusions would clearly undermine the well held principle that a penalty be premised upon an agency's actual offending conduct, rather than on the lack thereof.

Second, Division Two's opinion seems to rely on its prior misreading of this Court's holding in Yousoufian V,

suggesting that, aside from the existence or absence of "bad faith", there exists three other factors which trial courts should view as "principal" factors when considering the penalty amount: 1) Public importance; 2) Economic loss to the requestor; and 3) Deterrence of future misconduct. Appendix A at 20 (citing Yousoufian V, 168 Wn.2d at 461-63).[6] However, this Court has explicitly held that the existence or absence of agency bad faith is "the" principal factor in a PRA penalty determination. Yousoufian V, 168 Wn.2d at 460. This Court has further held, as it relates to the issues of public importance, economic loss, or time sensitivity, that these issues do *not* mitigate "the harm suffered by PRA noncompliance", but rather, these factors are simply considerations which support "increasing" the penalty, however, that the absence of these aggravating factors do *not* warrant lowering the penalty. Yousoufian IV, 165 Wn.2d at 455.

Third, in its opinion, Division Two provided a lengthy discussion in support of its conclusion that "intentional noncompliance" is not a prerequisite to a finding of bad faith, and that bad faith may arise in a multitude of contexts despite the absence of intentional noncompliance. Appendix A at 8-13. While Petitioner views this holding to be correct, Division Two's holding seems to contradict itself by subsequently implying that DOC's displayed bad faith is

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6 See West v. Thurston County, 168 Wn.App. 162, 188-89, 275 P.3d 1200 (Div. 2, 2012). Here, Division Two's opinion improperly establishes the existence of "four principal factors for determining appropriate daily penalty". (internal quotation omitted).

partially mitigated simply because the trial court failed to find recklessness or intentional noncompliance. Appendix A at 21. Division Two's rationale reads to suggest different degrees of culpability within "bad faith" itself. Either way, misconduct characterized as bad faith is serious and egregious on all levels and should be treated as such.

Lastly, the trial court found the "principal" factor of bad faith to exist, in addition to 5 other aggravating factors (including "gross negligence"). When balanced against eachother, these factors heavily outweigh the 2 mitigating factors found by the trial court. There are several recent appellate decisions that provide a striking contradiction in regards to what constitutes reasonable reflections of culpability in PRA penalty assessments. See, e.g., Yousoufian V, 168 Wn.2d at 463 (Because King County's compliance with the PRA was "grossly negligent", $15 per-day penalty "is inappropriate and manifestly unreasonable"; ultimately holding $45 per-day penalty as properly reflecting grossly negligent conduct); West v. Thurston County, 168 Wn.App. 162, 275 P.3d 1200 (Div. 2, 2012)(finding of no agency bad faith, 1 aggravating factor of delay, and 7 mitigating factors warranted $30 per-day penalty); Bricker v. Dep't of L&I, 164 Wn.App. 16, 29, 262 P.3d 121 (Div. 2, 2011)(Upholding a $90 per-day penalty despite "no intentional noncompliance" or "bad faith" because of requestor's "need to institute legal action before agency adhered to its obligations under the law".); Yousoufian I, 114 Wn.App. 836, 60 P.3d 667 (Div. 1, 2003)(Holding that $5 per-day penalty did not properly reflect

King County's level of culpability as categorized by the trial court).

In Sanders v. State, 169 Wn.2d 827, 240 P.3d 120 (2010), this Court upheld an $8 per-day penalty where the trial court found that the AGO acted in good faith but merely failed to explain its claimed exemptions. By comparison, Washington appellate courts have upheld significantly higher penalty awards against agencies with much less egregious findings of misconduct than that found to have been displayed by DOC in this case. Moreover, compared to Sanders, id., the trial court here imposed a penalty against DOC for misconduct it characterized as "bad faith" in an amount lower than that imposed against an agency found to have acted in "good faith". Ultimately, by comparison, the penalty assessed against DOC is completely disproportionate.

The cases outlined above provide a clear illustration of penalty amounts that constitute *reasonable* reflections of lesser levels of culpability than that found in this case. In finding such an overwhelming majority of aggravating factors, and a "principal" finding of bad faith, a penalty assessment against DOC in the bottom 10% of the statutory penalty range is inappropriate and manifestly unreasonable.

E. The Court Of Appeals Erred When It Failed To Address Other Issues Raised By Francis.

In its opinion, the Court of Appeals failed to address several issues raised by Francis in his Opening Brief which he assigned error to - (1) "Did the trial court err in

awarding two separate per-day penalty amounts without distinguishing DOC's culpability between the penalty periods?"; and (2) "When adopting DOC's per-day penalty recommendation, did the trial court essentially penalize Mr. Francis by awarding a lower per-day penalty amount for the pre-lawsuit filing penalty period?". See Br. of Appellant at 1-2.

In raising these issues, Francis advanced sound legal arguments assigning error to the trial court's bifurcation of the penalty amounts without proffering any oral or written findings of fact on the matter. Because these issues have merit, and were properly raised, the Court of Appeals erred in failing to address these issues.

VI. CONCLUSION

The penalty imposed against DOC is completely disproportionate to the trial court's categorized level of DOC's misconduct. Furthermore, not only does the penalty against DOC fail to promote the purpose of the PRA's penalty scheme, it fails to promote reasonable predictability in PRA penalty determinations. When categorizing DOC's level of misconduct, the trial court found the "principal" existence of "bad faith", in addition to 5 other aggravating factors (including "gross negligence"). Conversely, the trial court found only 2 mitigating circumstances applicable. When considering the facts, even the Court of Appeals characterized this as a case where DOC "engaged in obstinate conduct, specifically, *refusing* to conduct a reasonable search

despite a legitimate request, which required Francis to sue to obtain the records." Appendix A at 10 (emphasis added) (internal quotations omitted). Moreover, the Court of Appeals reasoned that the trial court's findings suggest that "[DOC] neglected to fulfill its duty to conduct a reasonable search because of its own interest in avoiding expense and inconvenience." Appendix A at 10. The appellate court then went on to characterize DOC's "cursory" search and delay as "well short of even a generous reading of what is reasonable under the PRA." Appendix A at 18. It was only after Francis filed suit that the wheels at DOC slowly began to turn. Shockingly, DOC still continued to delay production for an additional 8 months after Francis filed suit. In total, DOC delayed production for 626 days - nearly two years.

DOC's display of bad faith is consistent throughout their response, especially when considering that Francis' request was shuffled through 7 agency employees, yet, less than 15 minutes of total time was spent searching for the requested records. Moreover, despite having knowledge that not a single known record location had been searched, DOC knowingly misrepresented and "verified" that a "thorough" search had been conducted. Ultimately, these misrepresentations lead Francis to believe that no records existed when, in fact, they did exist. Furthermore, when finally conceding to its violations, DOC made no explanation whatsoever for its noncompliance. With proper diligence and attention, DOC could have responded accurately and within an

acceptable time period.

Finally, proper deterrence for DOC clearly requires a penalty at the higher end of the penalty scale. Considering that DOC is one of the largest agencies in the State, with a budget of over $1.5 billion, it is clear that the trial court did not properly consider deterrence as its penalty is more analagous to penalties received by much smaller agencies. See Yousoufian V, 168 Wn.2d at 463 ("The penalty needed to deter a small school district and that necessary to a large county may not be the same.").

Although the trial court recognized DOC's "gross[ly] negligen[t]" and "bad faith" noncompliance with "all" of the PRA requirements, it failed to impose a penalty proportionate to its own categorization of DOC's misconduct. Thus, the resulting penalty is manifestly unreasonable. Furthermore, the Court of Appeals erred in upholding the trial court's disproportionate penalty assessment.

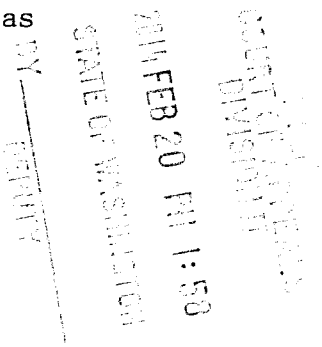
Therefore, for the reasons set forth herein, Mr. Francis respectfully requests that this Court accept and decide the issues raised for review herein. In the alternative, remand back to the Court of Appeals for further consideration.

RESPECTFULLY SUBMITTED this 18th day of February, 2014.

SHAWN D. FRANCIS
Petitioner, Pro Se
DOC #749717
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

CERTIFICATE OF SERVICE

I certify that on the below signed date I served and deposited into the internal legal mail system of the Stafford Creek Corrections Center a copy of the foregoing documents to be sent to all parties or their counsel of record, by U.S. First Class Mail, Postage Pre-Paid, as follows:



1) John C. Dittman
Assistant Attorney General
Corrections Division
PO Box 40116
Olympia, WA 98504-0116

EXECUTED this 18th day of February, 2014, at Aberdeen, Washington.

Shawn D. Francis

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SHAWN D. FRANCIS, Appellant/Cross-Respondent, v. WASHINGTON STATE DEPARTMENT OF CORRECTIONS, Respondent/Cross-Appellant.	No. 42712-5-II PUBLISHED OPINION

BJORGEN, J. — Shawn D. Francis, an inmate in the custody of the Washington State Department of Corrections (Department), sued the Department after he discovered that it had failed to provide documents responsive to a Public Records Act (PRA)[1] request he had made while incarcerated at the McNeil Island Corrections Center. The superior court granted summary judgment in Francis's favor on the issue of liability after the Department admitted that it had failed to provide documents responsive to the request. The court awarded Francis a monetary penalty near the low end of the statutory range, based on a determination that the Department acted in bad faith, but denied Francis's costs.

Francis timely appeals the penalty amount and denial of costs, arguing that the trial court abused its discretion in awarding a penalty at the low end of the statutory range.[2] The

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[1] Ch. 42.56 RCW.

[2] Francis also argued in his opening brief that he was entitled to attorney fees and that the Department's cross-appeal was untimely. In his reply brief, Francis properly concedes that (1) in light of our decision in *West v. Thurston County*, 169 Wn. App. 862, 282 P.3d 1150 (2012), he is not entitled to attorney fees, and (2) because November 11, 2011 was Veteran's Day, the Department's cross-appeal was timely filed.

Department cross-appeals the trial court's penalty award, arguing that the court erroneously interpreted the bad faith requirement of RCW 42.56.565 and that the court's findings did not support its determination that the Department acted in bad faith.

Because the factors considered by the trial court are relevant to bad faith, and the trial court's findings support both the bad faith determination and the penalty amount, we affirm the trial court's summary judgment and award of the penalty to Francis. Because the PRA's cost-shifting provision is mandatory, we reverse the trial court's denial of Francis's request for costs and remand for an award of the reasonable costs Francis incurred in litigating his claim, both in the trial court and on appeal.

FACTS AND PROCEDURAL HISTORY

On June 19, 2009, Francis sent a letter to Brett Lorentson, a public disclosure specialist with the Department, requesting

> any and all documents related to any reason and/or justification for the reason why inmates at [McNeil] are not allowed to retain fans and hot pots in their cells, as well as any policy that may be in place to substantiate such restrictions on these items.

Clerk's Papers (CP) at 11.[3] Lorentson sent Francis a letter promising to identify and gather responsive records and respond on or before July 30, 2009.

On July 10 Lorentson provided Francis with 15 pages of documents via e-mail, stating that "[s]ince all responsive records have been provided, this request is closed." CP at 115. The documents consisted of the Department's policy 440.000 with attachments. According to this

[3] Francis alleged below that the McNeil staff who denied him the use of these items, which he had previously purchased through the Department, cited a policy that they refused to produce and that Francis could not find in the prison library.

policy, inmates at McNeil and other minimum- or medium-security facilities were permitted a fan and, "as authorized by facility," a hot pot. CP at 31-32. None of the documents provided related to any prohibition against fans or hot pots.

In November 2009, however, another inmate showed Francis documents concerning McNeil's policy prohibiting fans and hot pots. Francis subsequently filed suit in Pierce County Superior Court, alleging a violation of the PRA and requesting statutory penalties. Over the course of the litigation, the Department provided Francis with additional documents, both through Lorentson and in response to Francis's discovery requests. On February 28, 2011, Francis received a copy of the policy in effect at the time of his request.

On June 7, 2011, Francis moved for summary judgment. The Department conceded that it had violated the PRA, but disputed the penalty amount Francis had proposed. The trial court granted Francis's motion for summary judgment as to liability, reserving judgment as to the penalty amount until a later hearing.

Prior to the hearing on the penalty amount, a new law took effect prohibiting awards of PRA penalties based on record requests made by incarcerated persons, unless the court finds "that the agency acted in bad faith." Former RCW 42.56.565 (2009), *amended by* LAWS OF 2011, ch. 300, §§ 1, 2. The trial court ruled that this restriction applied to Francis's case, found bad faith by the Department, and awarded Francis a penalty. In doing so, the court applied the aggravating and mitigating factors articulated by our Supreme Court for setting the amount of PRA penalties in *Yousoufian* V, 168 Wn.2d 444, 466-68, 229 P.3d 735 (2010).

In particular, the trial court relied on a "Public Disclosure Routing Slip" that Francis obtained through discovery. An official at McNeil had signed the routing slip form, which

states, "I verify that I have conducted a thorough staff search and I report that I do not have any responsive documents in regards to this request." Br. of Appellant at Ex. A. The form allows the preparer to check boxes indicating which of 17 record storage locations were searched, but no boxes were checked on Francis's form. Besides signing the form, the preparer wrote only the number "15" in a blank space, indicating that all staff at McNeil spent no more than 15 minutes searching for the documents. Br. of Appellant at Ex. A.

Although the trial court found no agency dishonesty, recklessness, or intentional noncompliance, it found that a number of aggravating factors, including the Department's "negligence or gross negligence," supported a determination of bad faith. Report of Proceedings (RP) at 8. However, because the trial court also found a number of mitigating factors present, it imposed a penalty near the low end of the statutory range, adopting the Department's recommendation. The court also denied Francis's request for costs.

Francis timely appeals, asserting that the trial court abused its discretion in awarding a penalty at the low end of the scale despite finding bad faith and in denying Francis costs. The Department cross-appeals, arguing that the trial court erred in finding bad faith.

ANALYSIS

The Department raises arguments in its cross-appeal that, if correct, preclude any penalty award to Francis. We therefore first address the Department's cross-appeal, then turn to the issues raised in Francis's appeal.

I. THE DEPARTMENT'S CROSS APPEAL

The Department contends that under RCW 42.56.565(1) a determination of bad faith requires that the agency have committed some intentional, wrongful act. The Department also asserts that the trial court erred because it erroneously applied the aggravating and mitigating factors articulated by our Supreme Court in *Yousoufian* V, 168 Wn.2d at 466-68, which factors "were designed for the sole purpose of determining the amount of penalties under the PRA," not for the purpose of finding bad faith sufficient to entitle an incarcerated person an award of penalties under the PRA. Br. of Resp't at 12 (emphasis omitted). We hold that under the rules of statutory construction and the case law (1) a determination of bad faith under RCW 42.56.565(1) does not require commission of some intentional, wrongful act, and (2) the trial court's determination that the Department acted in bad faith was correct without regard to the *Yousoufian* V factors. We therefore affirm the trial court's bad faith determination and its award of a penalty.

II. STANDARD OF REVIEW

The Department does not challenge the trial court's grant of summary judgment on the issue of whether a PRA violation occurred. We thus limit our review to the trial court's award of a statutory penalty and the underlying bad faith determination. RAP 2.4(a). Whether an agency acted in bad faith under the PRA presents a mixed question of law and fact, in that it requires the application of legal precepts (the definition of "bad faith") to factual circumstances (the details of the PRA violation). *See Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 469, 938 P.2d 827 (1997) (noting that "[w]hether a party has failed to negotiate in good faith, although

involving a substantial factual component, is a mixed question of law and fact."); *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402-03, 858 P.2d 494 (1993).

Where an appellant does not assign error to a trial court's factual findings, we consider those findings verities. *Yousoufian* V, 168 Wn.2d at 450 (citing *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980)). Here, the Department assigns error only to the trial court's determination that the agency acted in bad faith, not to any of the underlying findings on which the court below based that determination. Thus, we accept as true the facts on which the trial court relied in finding bad faith, but we review de novo the trial court's conclusion that those facts establish bad faith.

Finally, when findings of fact are not clearly articulated and distinguished from conclusions of law, we exercise discretion in determining what facts the trial court actually found. *Tapper*, 122 Wn.2d at 406 (citing *Kunkel v. Meridian Oil, Inc.*, 114 Wn.2d 896, 903, 792 P.2d 1254 (1990)). To supplement a trial court's written findings of fact, we may look to consistent language in the trial court's oral opinion. *Tyler v. Grange Ins. Ass'n*, 3 Wn. App. 167, 171, 473 P.2d 193 (1970) (citing *Vacca v. Steer, Inc.*, 73 Wn.2d 892, 441 P.2d 523 (1968)).

III. THE BAD FAITH REQUIREMENT FOR PRA AWARDS TO INCARCERATED PERSONS

RCW 42.56.565(1) mandates that

> [a] court shall not award penalties under RCW 42.56.550(4) to a person who was serving a criminal sentence in a state, local, or privately operated correctional facility on the date the request for public records was made, unless the court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record.

The PRA does not include a definition of "bad faith," and we know of no court that has yet interpreted the meaning of the bad faith requirement in the context of penalty awards based on PRA requests by incarcerated persons.

The trial court's written order states only that it "determined bad faith by applying the sixteen *Yousoufian* V mitigating and aggravating factors to the facts of this case." CP at 188-89. The court's oral ruling, however, makes clear that it looked at those factors only as "guidance in determining what bad faith actually is." RP at 4. The trial court found a number of facts that tend to support a finding of bad faith, specifically (1) delayed response by the agency; (2) lack of strict compliance with PRA procedural requirements; (3) lack of proper training and supervision; (4) "negligence or gross negligence"; and (5) sufficient clarity in Francis's request. RP at 5-8. The court also described the McNeil records request routing slip as "almost a rubber-stamp situation where you put in 15 minutes, don't tell anybody what you looked at or looked for and then send the routing slip on." RP at 6. Despite these findings, the trial court explicitly found no "recklessness or intentional noncompliance," no "intentional hiding or misrepresentation," and no "deceit" on the part of the Department. RP at 6, 7, 9.

In support of its argument that a determination of "bad faith" under RCW 42.56.565(1) requires an intentional, wrongful act, the Department directs our attention to three sources of authority: (1) precedents discussing bad faith as a factor in determining the amount of PRA penalties; (2) Washington cases discussing bad faith in other contexts; and (3) federal cases discussing bad faith in the context of the Federal Freedom of Information Act (FOIA). We consider each in turn.

a. PRA Cases Addressing Bad Faith

The Department asserts that precedents addressing PRA penalty amounts hold that an agency acts in bad faith only when it knows that it has responsive records but intentionally fails to disclose them, citing *Yousoufian v. King County Exec.* (*Yousoufian* I), 114 Wn. App. 836, 853, 60 P.3d 667 (2003), *rev'd on other grounds*, 152 Wn.2d 421, 98 P.3d 463 (2004) (*Yousoufian* II); *King County v. Sheehan*, 114 Wn. App. 325, 356-57, 57 P.3d 307 (2002). These precedents do not support the Department's assertion.

Although it distinguished cases where "the government agency knew it had responsive records that should have been disclosed, but purposely failed to disclose them," the *Yousoufian* I court explicitly agreed with the trial court that King County's response to Yousoufian's request was "not a good faith effort." *Yousoufian* I, 114 Wn. App. at 853. It then reversed the award and remanded with instructions to determine an appropriate penalty above the statutory minimum, stating that the minimum penalty "should be reserved for instances of less egregious agency conduct, such as those instances in which the agency has *acted in good faith*." *Yousoufian* I, 114 Wn. App. at 854 (emphasis added). Thus, contrary to the Department's reading of the case, the *Yousoufian* I court considered the County to have acted in "bad faith," or at least shown a lack of good faith,[4] even though it found no intentional misconduct. *Sheehan*, 114 Wn. App. at 356-57, held that the County's refusal to disclose the full names of all its police officers violated the PRA, but did not involve bad faith. In finding an absence of bad faith, the court noted the County's motivation to protect the safety and privacy of its officers and that its

[4] Whether a lack of good faith equates to bad faith presents an interesting question, one which we need not consider here.

arguments were "not so farfetched as to constitute bad faith." *Sheehan*, 114 Wn. App. at 356-57. The court also contrasted the facts of its case with those in *American Civil Liberties Union v. Blaine School District No. 503*, 95 Wn. App. 106, 111-15, 975 P.2d 536 (1999), where "it was clear that the agency did not act in good faith" because the school district's refusal to disclose the requested records was motivated by a desire "to avoid the cost and inconvenience of complying." *Sheehan*, 114 Wn. App. at 356 (citing *Blaine Sch. Dist. No. 503*, 95 Wn. App. at 111-15).

Sheehan's citation to *Blaine* does not imply a ruling that only the intentional refusal to disclose known responsive records can constitute bad faith. Rather, *Blaine* simply strengthened *Sheehan*'s holding by showing that the obvious bad faith in *Blaine* was not in play in *Sheehan*. In fact, *Sheehan*'s reliance on the motivation of the County and the plausibility of its arguments directly shows its view that bad faith may be present, even though the intentional wrongdoing of *Blaine* is not. Thus, *Sheehan* tends to undermine the Department's argument rather than support it.

b. Other Washington Cases Addressing Bad Faith

The Department next cites cases involving equitable awards of attorney fees and a case involving a will contest to support its position that a finding of bad faith here should require proof of an intentional, wrongful act. A court may make an equitable fee award based on "[s]ubstantive bad faith," the Department points out, only when "a party intentionally brings a frivolous claim, counterclaim, or defense with improper motive." *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 929, 982 P.2d 131 (1999). Similarly, we have held that contesting a will in bad faith involves "'actual or constructive fraud' or a 'neglect or refusal to fulfill some duty . . . not prompted by an honest mistake as to one's rights or duties, but by some

interested or sinister motive.'" *In re Estate of Mumby*, 97 Wn. App. 385, 394, 982 P.2d 1219 (1999) (quoting *Bentzen v. Demmons*, 68 Wn. App. 339, 349 n.8, 842 P.2d 1015 (1993)).

The Department's argument from these cases has a number of flaws. First, it omits certain portions of these precedents that tend to erode its argument. Notably, the Department omits reference to the discussion of other types of bad faith in *Rogerson*. *See Rogerson*, 96 Wn. App. at 928. In the equitable fee award context, procedural bad faith may also involve "obstinate conduct that necessitates legal action to enforce a clearly valid claim or right" or "vexatious conduct during the litigation." *Union Elevator & Warehouse Co., Inc. v. State ex rel. Dep't of Transp.*, 152 Wn. App. 199, 211, 215 P.3d 257 (2009). Here, the trial court's findings suggest that the Department engaged in "obstinate conduct," specifically, refusing to conduct a reasonable search despite a legitimate request, which required Francis to sue to obtain the records.

Second, under the characterization of bad faith set out above from *Mumby*, the will contest case the Department cites, the trial court's findings here appear to support its determination that the Department acted in bad faith. That is, the trial court's findings support the inference that the Department neglected to fulfill its duty to conduct a reasonable search because of its own interest in avoiding expense and inconvenience. *See Mumby*, 97 Wn. App. at 394.

Finally, Washington precedent allows a broader conception of bad faith in other contexts, recognizing a distinction between "intentional misconduct" and "bad faith." *See In re Marriage of James*, 79 Wn. App. 436, 441, 903 P.2d 470 (1995) (noting that "the trial court must first make a specific finding that the parent has acted in bad faith *or* committed intentional

misconduct") (emphasis added). Furthermore, over a century ago, our Supreme Court, in interpreting a statute governing the certification of a statement of facts on appeal, recognized that gross negligence could rise to the level of bad faith:

> The statement should be stricken in the first instance only where it is manifest that the party proposing it has been guilty of *bad faith or such gross negligence as will amount to bad faith:* [t]he remedy should not be invoked where there has been an attempt in good faith to comply with the statute.

State v. Steiner, 51 Wash. 239, 240-41, 98 Pac. 609 (1908) (emphasis added).

Francis directs our attention to the discussion of bad faith that appears in *Black's Law Dictionary*, excerpted from a comment to the *Restatement (Second) of Contracts*. The comment illustrates the difficulties that defining bad faith poses, but establishes that, at least in a contractual relationship, demonstrating bad faith does not require evidence of an intentional, wrongful act:

> *Good faith performance.* Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: *bad faith* may be overt or *may consist of inaction*, and fair dealing may require more than honesty. *A complete catalogue of types of bad faith is impossible, but the following types . . . have been recognized in judicial decisions*: evasion of the spirit of the bargain, *lack of diligence and slacking off*, willful rendering of imperfect performance, [etc.].

RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (emphasis added) (quoted in part in BLACK'S LAW DICTIONARY 159 (9th ed. 2009)). Thus, at least where a party owes some duty analogous to a contractual obligation, negligence or gross negligence suffices to support a finding of bad faith. The cumulative message of these precedents is that in multiple areas outside of the PRA, bad faith does not require a showing of intentional wrongful conduct.

c. FOIA Cases Addressing Bad Faith

Finally, the Department invites us to look to federal FOIA cases in interpreting the bad faith provision in RCW 42.56.565(1). The Department argues that, under FOIA, an agency's delay in providing records does not indicate an absence of good faith and that subsequent production does not prove that an agency's initial search was unreasonable or conducted in bad faith. For several reasons, this argument does not persuade.

Most importantly, Washington courts do not consider FOIA cases in interpreting PRA provisions that do not correspond to analogous FOIA provisions. *Kleven v. City of Des Moines*, 111 Wn. App. 284, 291, 44 P.3d 887 (2002). For example, our Supreme Court declined to consider FOIA cases in assessing attorney fee awards under the PRA because FOIA's attorney fee provision is discretionary while the PRA's provision is mandatory. *Amren v. City of Kalama*, 131 Wn.2d 25, 35, 929 P.2d 389 (1997). Unlike the PRA, the FOIA does not have a bad faith requirement for awarding penalties to incarcerated requestors: in fact, FOIA does not have a statutory penalty provision. *Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 717, 261 P.3d 119 (2011). Thus FOIA cases have no bearing on the meaning of bad faith in this appeal.

Were we to consider FOIA cases relevant to the analysis, however, the cases cited in its brief do not support the Department's argument. First, the Department points out that federal courts presume agencies act in good faith until evidence of bad faith overcomes the presumption. Br. of Resp't at 14 (citing *United States Dep't of State v. Ray*, 502 U.S. 164, 179, 112 S. Ct. 541, 116 L. Ed. 2d 526 (1991)). While correct, the assertion does not affect the present appeal because the trial court clearly placed the burden of establishing bad faith on Francis.

The Department further relies on a FOIA case to assert that "delay in the production of documents, even after the litigation commenced, 'cannot be said to indicate an absence of good faith.'" Br. of Resp't at 14 (quoting *Goland v. Cent. Intelligence Agency*, 607 F.2d 339, 355 (1978)). The brief selectively quotes the authority, however, in a way that obscures the intended meaning. The opinion actually holds that "the [agency's] delay *alone* cannot be said to indicate an absence of good faith." *Goland*, 607 F.2d at 355 (emphasis added). In no manner does this prohibit basing a finding of bad faith on delay, along with other evidence. To the contrary, *Goland*'s holding treats delay as a proper consideration in assessing bad faith.

Similarly, the fact that subsequent production of responsive documents does not *prove* the initial search unreasonable or in bad faith does not establish that subsequent production has no bearing at all on whether an agency performed a good-faith search. Thus, to the extent FOIA precedents have any relevance here, they indicate that the Department's delay in disclosing plainly responsive documents in its possession supports the trial court's determination of bad faith.

Contrary to the Department's assertions, the discussions of bad faith in cases considering the amount of PRA penalties, in cases from other areas of Washington law, and in federal FOIA cases, do not establish that a finding of bad faith under RCW 42.56.565(1) requires evidence of an intentional, wrongful act. If anything, these cases suggest that actions short of intentional wrongdoing in performing a record search may establish bad faith.

IV. STATUTORY INTERPRETATION OF THE PRA'S BAD FAITH REQUIREMENT

In the absence of a statutory definition or controlling case law, we turn to principles of statutory construction to determine the contours of bad faith in RCW 42.56.565(1). In interpreting a statute, we try to determine and give effect to the legislature's intent. *State v. Budik*, 173 Wn.2d 727, 733, 272 P.3d 816 (2012) (citing *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010)). First, we consider the statute's plain meaning by looking at the text of the provision at issue, as well as "'the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" *Ervin*, 169 Wn.2d at 820 (quoting *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). If a provision nonetheless remains susceptible to two or more reasonable interpretations, it is ambiguous; and we then consider "'the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent.'" *Budik*, 173 Wn.2d at 733 (quoting *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003)).

As our discussion above demonstrates, the plain meaning of the words used by the legislature does not tell us whether a court must find an intentional, wrongful act on the part of the agency in order to find bad faith under RCW 42.56.565(1). We must therefore look elsewhere to ascertain the legislative intent.

At first glance, the intent of the legislature that imposed the bad faith requirement for PRA awards to incarcerated requestors might seem clear from the title of the bill: "AN ACT Relating to making requests by or on behalf of an inmate under the public records act ineligible for penalties." LAWS OF 2011, ch. 300, SUBSTITUTE S.B. 5025, 62nd Leg., Reg. Sess. (Wash.

2011). Yet the fact that the law nonetheless provides for penalties on a finding of bad faith shows that it did not make inmates ineligible for penalties under all circumstances.

The legislative history illuminates the reason for this approach. As originally introduced, the bill precluded all penalty awards based on requests from or on behalf of incarcerated persons. S.B. 5025, 62nd Leg., Reg. Sess. (Wash. 2011). Public testimony on the bill, however, included concerns that the "bill would effectively end all public records requests by prisoners because an agency will face no penalties for not complying." S.B. REP. on SB 5025, 62nd Leg., Reg. Sess. (Wash. 2011). The bill that ultimately passed reflected these concerns by allowing penalties for bad faith actions by agencies. SUBSTITUTE S.B. 5025, 62nd Leg., Reg. Sess., ch. 300 (Wash. 2011). Thus, the legislature plainly intended to afford prisoners an effective records search, while insulating agencies from penalties as long as they did not act in bad faith.

In construing the PRA, we must "look at the Act in its entirety in order to enforce the law's overall purpose." *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009). We must consider, then, the legislative intent behind the PRA penalty scheme and the Act as a whole.

Our Supreme Court has described the PRA as a "'strongly worded mandate for broad disclosure of public records.'" *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 791, 246 P.3d 768 (2011) (quoting *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007)) (internal quotations omitted). "The purpose of the PRA is to 'ensure the sovereignty of the people and the accountability of the governmental agencies that serve them' by providing full access to information concerning the conduct of government." *Kitsap County Prosecuting Attorney's Guild v. Kitsap County*, 156 Wn. App. 110, 118, 231 P.3d 219 (2010) (quoting *Amren*

v. City of Kalama, 131 Wn.2d 25, 31, 929 P.2d 389 (1997)). The purpose of the penalty scheme is to "discourage improper denial of access to public records and [promote] adherence to the goals and procedures" of the statute. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978). The PRA "shall be liberally construed and its exemptions narrowly construed to promote this public policy" and to protect the public interest. RCW 42.56.030; *City of Federal Way v. Koenig*, 167 Wn.2d 341, 344-45, 217 P.3d 1172 (2009).

The strict interpretation of the bad faith requirement urged by the Department runs contrary to these policies and to the intent of the legislature that added the bad faith exception to the proposed ban on penalty awards to incarcerated requestors. As many scholars and jurists have observed, it is notoriously difficult to prove agency intent, particularly from inside a prison cell. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 841, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (noting in the Eighth Amendment context that "considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity"); BRITTANY GLIDDEN, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1835-37 (2012) (discussing various sources). Were we to accept the Department's interpretation, agencies could safely respond to record requests from incarcerated persons with cursory or superficial searches, knowing that inmates would find it difficult to determine whether records were overlooked and all but impossible to produce admissible evidence of wrongful intent. This runs directly counter to the legislative intent to provide prisoners a reasonable and effective records search, discussed above.

Furthermore, such a narrow reading is not necessary to prevent abuse of the PRA by incarcerated persons. Where an agency has proper procedures in place, it may avoid penalties

under the PRA by simply following them in a reasonable manner. In addition, the PRA already allows agencies to obtain expedited injunctions against attempts by prisoners to abuse it. RCW 42.56.565(2).

Finally, we must liberally construe the PRA to effect its purposes. The PRA provides that

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

RCW 42.56.030.

The legislative history of RCW 42.56.565(1), its statutory context, and the purposes of the PRA and this particular provision require a broader reading of the term "bad faith" than the Department proposes. To be more consistent with these sources of authority, we hold that failure to conduct a reasonable search for requested records also supports a finding of "bad faith" for purposes of awarding PRA penalties to incarcerated requestors. This standard does not make an agency liable for penalties to incarcerated persons simply for making a mistake in a record search or for following a legal position that was subsequently reversed. In addition to other species of bad faith, an agency will be liable, though, if it fails to carry out a record search consistently with its proper policies and within the broad canopy of reasonableness.

V. THE DEPARTMENT'S BAD FAITH IN RESPONDING TO FRANCIS'S PRA REQUEST

The Department argues that the trial court erred by applying the aggravating and mitigating factors our Supreme Court articulated in *Yousoufian* V to the question of bad faith. The Department notes that the *Yousoufian* V court laid out those factors for the "sole purpose of determining the *amount*" of PRA penalties, and that many of the factors "encompass concepts well beyond the historical definition of 'bad faith.'" Br. of Resp't at 12.

We may affirm the trial court on any grounds supported by the record. *In re Marriage of Rideout*, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003). Because the record in this appeal clearly discloses a cursory search and delayed disclosure well short of even a generous reading of what is reasonable under the PRA, we do not decide whether the *Yousoufian* V factors apply to the determination of bad faith in this context.

In support of its conclusion that the Department acted in bad faith, the trial court specifically found (1) a delayed response by the Department, even after Francis filed suit; (2) lack of compliance with PRA procedural requirements; (3) lack of proper training and supervision; (4) "negligence or gross negligence"; and (5) sufficient clarity in Francis's request. RP at 5-8. All of these are logically relevant to the reasonableness of the Department's actions and its bad faith.[5]

The evidence before the trial court showed that McNeil staff spent no more than 15 minutes considering Francis's request and did not check any of the usual record storage locations. Absent any countervailing evidence showing justification, this evidence shows that

[5] See *State v. Ortiz*, 119 Wn.2d 294, 302, 831 P.2d 1060 (1992) on relevance of compliance with procedures to question of good faith.

the Department did not act in good faith.[6] Furthermore, the title of one of the documents ultimately produced by the Department, "Personal Property for Offenders," by itself establishes the document's likely relevance to Francis's request, which was reasonable and specific. Nonetheless, the Department instead sent Francis documents plainly not responsive to his request.[7] Furthermore, the Department did not produce the relevant policy until eight months after Francis filed suit. On these facts, the court below did not err in finding bad faith.

The trial court's unchallenged findings of fact are verities on appeal and, alternatively, are based on substantial evidence in the record. These findings support the conclusion that the Department acted in bad faith. We therefore affirm the trial court's ruling that Francis is entitled to a penalty award based on this bad faith.

VI. FRANCIS'S APPEAL

Francis argues that the trial court erred in awarding a penalty near the bottom of the statutory range and in denying his request for costs. Because the PRA grants considerable discretion to trial courts in setting penalty awards, the court below properly considered the relevant factors set forth by our Supreme Court, and the amount is reasonable under the circumstances, we affirm the trial court's penalty award. Because the PRA cost-shifting provision is mandatory, however, we remand with instructions to award Francis the reasonable costs he incurred in litigating this matter.

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[6] We do not hold that 15 minutes or any other specific length of a records search conclusively shows an absence of good faith.

[7] Francis had requested documents concerning the *prohibition* against fans and hot pots, but the Department initially provided a copy of a policy *permitting* the disputed items.

a. The Trial Court's Discretion To Set the Penalty Amount

We review a trial court's determination of PRA penalty amounts for abuse of discretion. *Yousoufian* V, 168 Wn.2d at 458. Under this standard, we will reverse only if the trial court's "decision is manifestly unreasonable or based on untenable grounds or reasons." *Yousoufian* V, 168 Wn.2d at 458 (citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)). A court acts on untenable grounds if the record does not support its factual findings, and it acts for untenable reasons if it uses "an incorrect standard, or the facts do not meet the requirements of the correct standard." *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995). A trial "court's 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." *Yousoufian* V, 168 Wn.2d at 458-59 (quoting *Mayer*, 156 Wn.2d at 684) (internal quotation marks omitted).

While "bad faith is the principal factor" a trial court must consider in setting PRA awards,

> a simple emphasis on the presence or absence of the agency's bad faith does little more than to suggest what the two poles are on the penalty range and is inadequate to guide the trial court's discretion in locating violations that call for a penalty somewhere in the middle of the [statutory] range.

Yousoufian V, 168 Wn.2d at 460, 461 n.7 (quoting *Yousoufian v. Office of Ron Sims*, 137 Wn. App. 69, 78-79, 151 P.3d 243 (2007)) (*Yousoufian* III) (internal quotation marks omitted). Trial courts must also consider the importance of the information to the public at large, whether the violation caused foreseeable economic loss to the requestor, and deterrence of future agency misconduct. *Yousoufian* V, 168 Wn.2d at 461-63.

Here, the trial court expressly considered all 16 *Yousoufian* V factors, including the Department's degree of culpability, the public importance and time sensitivity of the matter, any economic loss to Francis, and the amount necessary to deter future violations. The trial court found (1) "no recklessness or intentional noncompliance" on the part of the Department; (2) that the matter was not especially time-sensitive or of great public importance, but of interest to only a restricted class of incarcerated persons; (3) that Francis sustained no actual personal economic loss; and (4) that "the penalty amount is sufficient to put [the Department] on notice that this kind of delay is not acceptable." RP at 5, 7, 9. Although near the bottom of the range, the penalty imposed was more than the statutory minimum.

Because it applied the correct legal standard, the trial court did not act for untenable reasons. Because evidence before it supported the findings of facts, and the findings properly supported the penalty determination, the court did not act on untenable grounds. With the court's findings and the evidence to support them, a reasonable person could conclude that a $4,495 penalty satisfies the requirements of the PRA and is consistent with the *Yousoufian* V factors. We hold that the trial court did not abuse its discretion, and we affirm the penalty amount.

b. The Trial Court's Refusal To Award Francis Costs

We review PRA cost awards under the same abuse of discretion standard discussed above. *Kitsap County Prosecuting Attorney's Guild*, 156 Wn. App. at 120. The PRA contains a broadly worded, mandatory cost-shifting provision:

> Any person who prevails against an agency in any action in the courts 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 *shall be awarded* all costs . . . incurred in connection with such legal action.

RCW 42.56.550(4) (emphasis added). A party prevails if "the records should have been immediately disclosed on request." *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005).

Here, neither party disputes that the Department should have disclosed the records to Francis, but the trial court still denied Francis's request for costs. The trial court explained its reasoning only by stating, "I should add a footnote that, based on the award that I'm giving, I'm not going to include costs in that." RP at 11. However, the amount of the penalty has no bearing on a prevailing party's right to costs. *See* RCW 42.56.550(4) ("*In addition* [to all costs], it shall be within the discretion of the court to award such person" statutory penalties.) (emphasis added).

The Department directs our attention to a case where we held that a trial court did not abuse its discretion in limiting an inmate's costs to clerk's fees and postage because the trial court found that the inmate had used the PRA "as a vehicle [for] personal profit through false, inaccurate, [and] inflated costs." Br. of Resp't at 20 (citing *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 830, 225 P.3d 280 (2009)). That case is inapposite because the trial court here expressly found Francis's request "legitimate," did not discuss the reasonableness of any specific amounts, and denied Francis's request entirely rather than merely limiting it.

The Department also argues that Francis is not entitled to costs because he did not submit a cost bill to the trial court. According to CR 54(d),

> [i]f the party to whom costs are awarded does not file a cost bill or an affidavit detailing disbursements within 10 days after the entry of the judgment, the clerk shall tax costs and disbursements pursuant to CR 78(e).

CR 78(e), in turn, only allows limited types of costs if "the party to whom costs are awarded" fails to file a cost bill within the same 10-day period. As just noted, the trial court did not award costs to Francis. Therefore, neither of these provisions applies to him at this point. Further, we have held that "[a]bsent clear language to the contrary, we will not mechanically apply CR 78(e) to deprive a litigant of costs to which he is justly entitled." *Mitchell*, 153 Wn. App. at 823.

Francis was entitled to an award of costs under RCW 42.56.550(4), and he was under no duty to file a cost bill when the court denied him costs. We therefore reverse the denial of costs and remand with instructions to award Francis his reasonable costs incurred in litigating this matter.

c. Costs on Appeal

Francis also requests costs on appeal. A PRA penalty award in the trial court supports an award of costs or attorney fees on appeal. *See Yousoufian* V, 168 Wn.2d at 470. Francis has complied with the procedural requirements of RAP 18.1 and prevails on his claim that he was entitled to costs below. We therefore award Francis the reasonable costs he incurred in this appeal.

VII. SUMMARY OF HOLDINGS

We affirm the trial court's rulings on summary judgment that the Department acted in bad faith and that Francis is entitled to a penalty award under the PRA. We hold that the trial court did not abuse its discretion in setting the amount of the penalty award and uphold that amount. We reverse the trial court's denial of costs to Francis and remand with instructions to award him reasonable costs incurred in litigating this matter. Finally, we award Francis the

reasonable costs he incurred in this appeal.

BJORGEN, J.

We concur:

HUNT, P.J.

PENOYAR, J.

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SHAWN D. FRANCIS, Appellant/Cross-Respondent, v. WASHINGTON STATE DEPARTMENT OF CORRECTIONS, Respondent/Cross-Appellant.	No. 42712-5-II ORDER DENYING MOTIONS FOR RECONSIDERATION AND GRANTING MOTION FOR CLARIFICATION AND AMENDMENT OF OPINION

This matter was heard in oral argument on May 14, 2013. A published opinion was filed on November 19, 2013. Both parties have filed a motion for reconsideration. The State also filed a motion for clarification. After our review, it is hereby

ORDERED that the motions for reconsideration filed by Appellant/Cross-Respondent Shawn D. Francis and Respondent/Cross-Appellant Washington State Department of Corrections are hereby denied; it is further

ORDERED that the Respondent/Cross-Appellant's motion for clarification is granted, and the published opinion is amended as follows:

Page 17, line 17, after the word "reasonable," the following footnote shall be added:

> This is not to say that the failure to conduct a reasonable search or the failure to follow policies in a search by themselves necessarily constitutes bad faith. We hold below that, among other potential circumstances, bad faith is present under RCW 42.56.565(1) if the agency fails to conduct a search that is both reasonable and consistent with its policies. In determining reasonableness, we examine, among others, the circumstances discussed in Part V of this opinion.

No. 42712-5-II

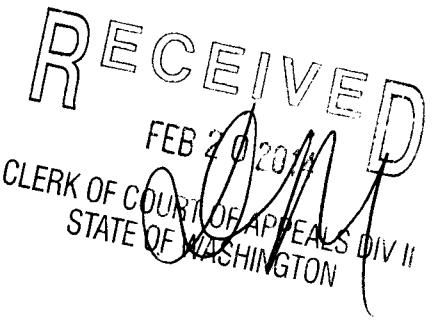
IT IS SO ORDERED.

DATED this 22ND day of JANUARY, 2014.

Bjorgen, J.

BJORGEN, J.

SHAWN D. FRANCIS
DOC #749717
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520



February 18, 2014

Clerk of the Court
Washington Court of Appeals
Division II
950 Broadway; STE 300
Tacoma, WA 98402-4454

RE: Petition for Review filing (Supreme Court Petition)

Francis v. Dep't of Corrections;
Court of Appeals Cause No. 42712-5-II

Dear Clerk:

Enclosed for filing with the Court, please find the original Petition for Review that I am filing for review by the Washington Supreme Court. I am filing this Petition for Review with this Court pursuant to RAP 13.4(a). My representative will be personally delivering the $200 filing fee subsequent to your receipt of this petition. You can expect payment of the filing fee no later than Friday, February 21, 2014.

Furthermore, please disregard my previously filed motion to file an overlength brief, since my petition is 20 pages, it is unnecessary.

Thank you for your attention to this matter.

Sincerely,

Shawn D. Francis
Petitioner, Pro Se