SUPREME COURT NO. 91944-1

COURT OF APPEALS NO. 70901-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JEFFREY R. McKEE,

Petitioner,

v.

KING COUNTY,

Respondent.

APPEAL FROM THE SUPERIOR COURT OF KING COUNTY

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

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I. ISSUE PRESENTED

Should the Petition for Review be denied where Petitioner fails to show the Court of Appeals' opinion conflicts with a decision of this Court or any division of the Court of Appeals in this state?

II. STATEMENT OF THE CASE

This case concerns Jeffrey R. McKee's 2011 public disclosure request to the King County Prosecutor's Office (County) for copies of documents in the Prosecutor's litigation file for McKee's criminal case, *State v. McKee*, No. 03-1-1734-1 KNT. CP 40. In response to the request, the County collected, reviewed, and scanned 2,177 pages to a CD. CP 37, 48, 54. Though the documents were made available to McKee in December 2011, to this day, he still has not paid for the records. CP 37, 54.

Instead, McKee sued the County under the Public Records Act (PRA). McKee argued the County's scanning fee was too high, that the County did not timely respond to his request, and that many of the documents listed on the County's exemption log were improperly withheld from disclosure. CP 89-90, 63-64. The trial court dismissed all these claims and in an unpublished opinion the Court of Appeals affirmed. CP 63-64, 5-6; App. A (Unpublished Opinion).

The sole issue raised in McKee's Petition for Review concerns access to a two-page jail booking record. This record was listed on the County's exemption log which McKee received in December 2011. CP 59. The County listed the record, citing the confidentiality requirements in RCW 70.48.100, which state that jail booking records can only be released for specified purposes or "upon the written permission of the person." CP 59.

Despite knowing that the jail booking record was listed on the County's exemption log, McKee did not specifically reference it in his complaint. CP 89-90. Neither did he mention it in his response to the County's first summary judgment motion. And on February 28, 2013, when the County served McKee with a single interrogatory asking him to identify the documents he believed were improperly withheld from disclosure, McKee was silent. CP 60-61, 69-72.

It was only later, in response to the County's second summary judgment motion *a year and half after* he received the County's exemption log listing the jail booking record, that McKee referred to the record and argued the County had his written authorization to release a copy of the record to him, citing *Sargent v. Seattle Police Department*, 167 Wn. App. 1, 260 P.3d 1006 (2011), *aff'd in part and rev'd in part,*

179 Wn.2d 376, 314 P.3d 1093 (2013).[1] CP 29. Even though McKee had not paid for copies, the County immediately mailed a copy of the record to McKee, including it with the County's reply. CP 23.

At a hearing on July 18, 2013, the trial court dismissed this case in its entirety with prejudice. CP 5-6. The Court of Appeals affirmed that dismissal on May 18, 2015 in an unpublished decision and later denied McKee's motion for reconsideration. App. A (Unpublished Opinion); APP C (Order Denying Motion for Reconsideration). McKee timely filed this Petition for Review.

III. ARGUMENT

An award of costs related to the jail booking record is the only issue presented by McKee in this Petition for Review. It is a particularly

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[1] *Sargent v. Seattle Police Department* was issued just three months before the County sent McKee the exemption log. *Sargent* clarified that when the subject of a jail booking record requests it through public disclosure, the statutory requirement of written permission is met. Prior to *Sargent*, the only published decision interpreting RCW 70.48.100 in the context of a PRA request was *Cowles Publ'g Co. v. Spokane Police Department*. 139 Wn.2d 472, 481, 987 P.2d 620 (1999). In that case, the Court emphasized the mandate for confidentiality imposed by RCW 70.48.100.

> We conclude the specific language of RCW 70.48.100(2) limits the use of booking photos to legitimate law enforcement purposes only. We affirm the Court of Appeals on this issue and hold that booking photographs do not fall within the disclosure mandate of the PDA.

Cowles, 139 Wn.2d at 481(emphasis added).

ironic claim because the only reason McKee now has a copy of the jail booking record is precisely *because* the County mistakenly listed it on the exemption log. Had the County not mistakenly listed it, it would today be sitting on the CD with the 2,177 other pages of nonexempt records McKee requested but refused to pay for.

The trial court properly dismissed this case in its entirety, the Court of Appeals properly affirmed, and for the reasons set forth below, McKee's Petition for Review should be denied.

A. McKee Is Not A Prevailing Party

In McKee's Petition for Review he claims he is entitled to remand and an award of costs because the Court of Appeals "essentially" held that he was a prevailing party. Petition at 5. That assertion is incorrect.

The Court of Appeals rejected McKee's PRA arguments, agreed with the County's position, and unequivocally affirmed the dismissal of the case. App. A (Unpublished Opinion) at 1, 6. And the Court of Appeals denied McKee's motion for reconsideration wherein he argued that he should "be properly designated the prevailing party." App. B (Motion for Reconsideration) at 4; App. C (Order Denying Motion for Reconsideration). There is no question that the Court of Appeals did not find McKee to be a prevailing party.

To be a prevailing party under the PRA, a requester must show that he or she prevailed in an action seeking the right to inspect or copy a public record. RCW 42.56.550. It is undisputed that McKee has never paid for the records responsive to his April 2011 PRA request although they have been available for well over three years. And although he originally filed this lawsuit to challenge the scanning fee charged by the County, those claims were dismissed long ago and McKee did not challenge them on appeal. Yet he still has not paid the scanning fee and therefore still has not been provided with the records he requested except, of course, the jail booking record.

McKee has a copy of the jail booking record only because immediately after he pointed out the County's error with respect to the record, the County mailed the record to him at no cost. Had the County not mistakenly listed the record on the exemption log, it would be sitting on the CD at the County's offices with the other thousands of pages of documents McKee requested but did not pay for. The County's mistake did not result in a denial of access; here, the County's mistake actually resulted in access to a record that McKee otherwise would not have had due to his own refusal to pay for the requested records. As the Court of Appeals stated, McKee's failure to pay for copies of the records he requested, "call[ed] into question whether he had a right to a copy of the

jail record even after he asserted that it had been wrongfully withheld." App. A (Unpublished Opinion) at 3.

As the Court of Appeals properly held, McKee is not a prevailing party under RCW 42.56.550. He is therefore not entitled to a remand of this case or an award of costs. Accordingly, the Court of Appeals' opinion is not in conflict with any opinion of the appellate courts in this state.

B. <u>There Is No Purpose For Remand</u>

As stated above, remand is not appropriate in this case because McKee is not a prevailing party. However, the Court of Appeals also made clear that the further proceedings requested by McKee would be pointless in any event because McKee would not be entitled to penalties.

Pursuant to RCW 42.56.565(1), an inmate may be awarded penalties under the PRA only if "the court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record." McKee was incarcerated at the time he made his PRA request and he has not challenged the Court of Appeals' holding that "there is no basis for finding that the County acted in bad faith by withholding the jail booking record." Therefore, regardless of whether he prevailed or not, McKee is not entitled to penalties and remanding the case would serve no purpose. (McKee would also not be entitled to attorney fees because he

represented himself *pro se* at the trial court.) *See Mitchell v. Dep't of Corrections*, 164 Wn. App. 597, 608, 277 P.3d 670 (2011).)

IV. CONCLUSION

The County respectfully requests this Court deny the Petition for Review. McKee is not a prevailing party. The Court of Appeals unequivocally affirmed the trial court's order of dismissal and denied McKee's motion for reconsideration, soundly rejecting McKee's claim that he had somehow "prevailed." In addition, as the Court of Appeals observed, remand in this case would be pointless anyway with respect to McKee's request for penalties because there was no evidence of bad faith. Accordingly, because the Court of Appeals correctly applied the law, McKee cannot demonstrate that the panel's unanimous opinion is in conflict with a decision of this Court or any division of the Court of Appeals.

DATED this 21st day of August, 2015.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Janine Joly
JANINE JOLY, WSBA 27314
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent

APPENDIX A
Unpublished Opinion

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEFFREY R. McKEE, Appellant, v. KING COUNTY, Respondent.	No. 70901-1-I DIVISION ONE UNPUBLISHED OPINION FILED: May 18, 2015

BECKER, J. — This appeal seeks reversal of a superior court decision to dismiss a Public Records Act case. We affirm the dismissal.

The requester and appellant is Jeffrey R. McKee. On April 1, 2011, McKee requested documents held by the King County Prosecutor. McKee's request sought jail records and copies of documents held in the litigation file related to the State's case against him in State v. McKee, No. 03-1-01734-1 KNT. The prosecutor responded on April 13, 2011, initially stating that there were about 4,000 pages of records responsive to McKee's request. After some months of corresponding with McKee, the prosecutor narrowed that estimate down to 2,177 pages. On December 27, 2011, the prosecutor mailed a letter to McKee. The letter indicated that certain redactions had been made and stated that a privilege log detailing those redactions was being provided as an enclosure. The letter

also requested $266.55 for reproduction costs. McKee admits he never paid this fee and did not collect the records.

On November 29, 2012, McKee filed suit against King County under the Public Records Act, chapter 42.56 RCW. The County's first motion for summary judgment was granted, dismissing McKee's claim that the County's charge for reproducing the records was unreasonable. The County's second motion for summary judgment was filed on June 17, 2013, with respect to McKee's general claim that documents had been improperly exempted. McKee responded by identifying 31 records that he believed were improperly described as exempt. The County provided the trial court with copies of these documents in case the court determined an in camera review was necessary. After a hearing on July 18, 2013, the court decided an in camera review was unnecessary and dismissed McKee's case with prejudice. McKee appeals.

Judicial review of challenged agency action under the Public Records Act is de novo. RCW 42.56.55(3); Fisher Broad.-Seattle TV LLC v. City of Seattle, 180 Wn.2d 515, 522, 326 P.3d 688 (2014).

One of the records McKee requested was his own jail booking record. A person's jail records are generally exempt from disclosure under RCW 70.48.100 without the person's written permission. The County's privilege log identified RCW 70.48.100 as the reason for withholding McKee's booking record. In response to the County's second motion for summary judgment in July 2013, McKee stated that his request for the jail record was his written permission.

Even though McKee had not paid the copying and collection charges, the County sent him a copy of the jail booking record at that time.

A person's request for his own booking record amounts to written permission. Sargent v. Seattle Police Dep't, 167 Wn. App 1, 20, 260 P.3d 1006 (2011), aff'd in part and rev'd in part, 179 Wn.2d 376, 314 P.3d 1093 (2013). McKee contends the County's withholding of his nonexempt jail record between December 2011 and July 2013 was wrongful under Sargent and that the trial court therefore erred by granting summary judgment to the County. He asks that the case be remanded for further proceedings. The point of the further proceedings requested by McKee would be for an assessment of penalties against the County.

An inmate may be awarded penalties under the Public Records Act only if "the court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record." RCW 42.56.565(1).

McKee, who was an inmate when he made his request, did not raise an issue about the jail record when he received the privilege log. He did not pay for collection or copying, calling into question whether he had a right to a copy of the jail record even after he asserted that it had been wrongfully withheld. See RCW 42.56.120. After McKee filed suit in November 2012, the County sent him an interrogatory asking him to identify documents he believed had been exempted from disclosure. He did not answer. It was not until the County filed its final motion for summary judgment that McKee specifically identified the jail record as a document he believed was improperly exempted. The County immediately

provided him with a copy of it. Under these circumstances, there is no basis for a finding that the County acted in bad faith by withholding the jail booking record.

The remaining documents are one memorandum and 29 e-mails contained in the prosecutor's litigation file. They are all described in the privilege log as attorney work product, exempt under RCW 42.56.290. For each document, the identifying information included the type of record, date, number of pages, and the author and recipient.

Further descriptive information was provided to the court in an affidavit submitted by a senior prosecuting attorney in support of the motion for summary judgment. The memorandum is identified as a two-page memorandum from a deputy prosecutor, requesting further investigation by the lead detective in an investigation of McKee. Five e-mails are identified as communications among prosecutors that describe criminal allegations against McKee, aspects of an investigation of McKee, and McKee's arrest. Four e-mails are identified as communications between a prosecutor, his paralegal, and a victim advocate, discussing the victim's participation in criminal litigation involving McKee. Twenty e-mails are identified as communications between prosecutors, a paralegal, and persons from various police agencies, showing attempts by the attorneys and paralegal to gather factual information for trial.

McKee claims none of these materials are exempt from disclosure.

The privilege log states that the four e-mails discussing the victim's participation in McKee's criminal case were withheld under RCW 5.60.060(8). The County agrees that RCW 5.60.060(8) was not applicable. That statute

exempts communications between a victim and a victim advocate, not communications between a victim advocate and an attorney or paralegal. Those communications, the County claims, are nevertheless exempt as attorney work product under RCW 42.56.090, along with the memorandum and all the other e-mails.

The Public Records Act exempts from public disclosure records "that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts." RCW 42.56.290. "Work product under the public disclosure act is the same as work product under the civil rules." Soter v. Cowles Pub. Co., 131 Wn. App. 882, 893, 130 P.3d 840 (2006), aff'd, 162 Wn.2d 716, 174 P.3d 60 (2007).

The attorney work product doctrine protects materials prepared or collected in anticipation of litigation. Included within the definition of work product is factual information which is gathered by an attorney, as well as the attorney's legal research, theories, communications, opinions, and conclusions. Limstrom v. Ladenburg, 136 Wn.2d 595, 605-06, 963 P.2d 869 (1998); Koenig v. Pierce County, 151 Wn. App. 221, 230-31, 211 P.3d 423 (2009), review denied, 168 Wn.2d 1023 (2010).

The memorandum and the 29 e-mails McKee sought are encompassed by the attorney work product doctrine. As the attorney's declaration demonstrates, they memorialize an attorney's communications prepared in anticipation of litigation. Because these communications would be protected from civil

discovery, they are exempt from disclosure under the Public Records Act. RCW 42.56.290.

McKee contends the prosecutor should have redacted the memorandum and the 29 e-mails and produced them with only the header and footer showing, rather than withholding them altogether. Because McKee raises this argument for the first time on appeal, we decline to consider it. RAP 2.5(a).

Finally, McKee contends the trial court abused its discretion in declining to examine the documents in camera. Determining whether in camera inspection is required is left to the discretion of the trial court. Overlake Fund v. City of Bellevue, 60 Wn. App. 787, 796-97, 810 P.2d 507, review denied, 117 Wn.2d 1022 (1991). Without examining the documents themselves, the trial court could determine from the privilege log and the prosecutor's declaration that the documents were exempt as attorney work product. We find no abuse of discretion. Harris v. Pierce County, 84 Wn. App. 222, 235-36, 928 P.2d 1111 (1996).

Affirmed.

Becker, J.

WE CONCUR:

Cox, J

APPENDIX B
Motion for Reconsideration

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEFFREY R. McKEE, Appellant, vs. KING COUNTY, Respondent.	No.: 70901-1-I DIVISION ONE MOTION FOR RECONSIDERATION

I. MOTION

Jeffrey R. McKee, appellant, by and through his attorney of record, Christopher Taylor of FT Law, P.S., moves pursuant to RAP 12.4 for an order reconsidering its opinion that affirmed Snohomish County Superior Court's order granting respondent-defendant King County's motion for summary judgment and dismissing with prejudice Mr. McKee's Public Records Act case in *McKee v. King County*, Case No. 12-2-08128-8. Specifically, for the reasons set out below, Mr. McKee requests the Court reverse the trial court's order of dismissal, and remand for further proceedings.

II. ISSUE

Absence of Bad Faith Not Grounds to Dismiss Judicial Review under Public Records Act; and Further Proceedings Necessary to Award Costs.

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III. MEMORANDUM OF LAW AND ARGUMENT

"Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court...may require the responsible agency to show cause why it refused to allow inspection or copying of a specific public record or class of records." RCW 42.56.550(1). "The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." *Id.*

"Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record...shall be awarded costs, including reasonable attorney fees, incurred in connection with such legal action." RCW 42.56.550(4). "In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record." *Id.* However, "[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." RCW 42.56.565(1).

"A showing of bad faith is not required nor does good faith reliance on an exemption exonerate an agency that mistakenly relies upon that exemption." *Spokane Research & Def. Fund*, 155 Wn.2d 89, 101 (2005). "[A]gencies may not resist disclosure of public records until a suit is filed and then avoid paying [costs] by disclosing them voluntarily thereafter. *Kitsap County Prosecuting Attorney's Guild v. Kitsap County*, 156 Wn. App. 110, 118 (2010). "If a court determines that the records do not fall within an exemption to the PRA, the prevailing party

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is entitled to costs...from the agency. *Id.* at 118-19. "Subsequent events do not affect the wrongfulness of the agency's initial withholding of records if the records were wrongfully withheld at the time. *Id.* at 119.

In other words, although the absence of bad faith on the part of the agency is grounds for denying an award of penalties to an inmate requester, the absence of bad faith has no bearing on whether a requester is properly designated as a prevailing party. Whether a requester is a prevailing party is a "legal question of whether the records should have been disclosed [and produced] on request." *Spokane Research & Def. Fund*, 155 Wn.2d at 103. The presence or absence of bad faith is simply irrelevant to the threshold question of whether the records were wrongfully withheld. Moreover, the presence or absence of bad faith is irrelevant to whether a prevailing party is entitled to costs.

Here, Mr. McKee requested "the complete case file in *State v. McKee*, King County Superior Court Cause No. 03-1-01734-1 KNT" of King County. CP 96. King County identified one two-page record responsive to that request—the KCDAD Booking Sheets, dated June 30, 2003—that was responsive to Mr. McKee's request. CP 59. King County also withheld that record in its entirety, claiming the record exempt under RCW 70.48.100.

Jail records "shall be made available...(f) Upon the written permission of the person" that is the subject of the records. RCW 70.48.100(2). And "when the subject of [jail] records seeks their disclosure" under the Public Records Act, the request "amounts to a [written] grant of permission." *Sargent v. Seattle Police Dept.*, 167 Wn. App. 1, 20 (2011). A claim of exemption under RCW 70.48.100 for jail records where the requester is the subject of the records is "improper." *Id.*

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Therefore, King County's claim of exemption regarding the Booking Sheets was improper. And therefore, at least with respect to the Booking Sheets, King County was not entitled to judgment as a matter of law, and thus summary judgment was inappropriate. To the contrary, because King County wrongfully withheld the Booking Sheets, Mr. McKee was and is entitled to judgment as a matter of law, and should be properly designated the prevailing party.

Furthermore, Mr. McKee requests this Court remand for further proceedings. Specifically, the Mr. McKee is entitled to be awarded costs pursuant to RCW 42.56.550(4).

RESPECTFULLY SUBMITTED this 4th day of June, 2015.

Christopher Taylor
Attorney for Appellant
WSBA # 38413

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MOTION FOR RECONSIDERATION was delivered this 4th day of June, 2015 to ABC Legal Messengers, with appropriate instructions to forward the same to counsel for the Respondent as follows:

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APPENDIX C
Order Denying Motion for Reconsideration

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

JEFFREY R. McKEE, Appellant, v. KING COUNTY, Respondent.	No. 70901-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Jeffrey R. McKee, has filed a motion for reconsideration of the opinion filed on May 18, 2015. The court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DONE this 22ND day of June, 2015.

FOR THE COURT:

Becker, J.
Judge

OFFICE RECEPTIONIST, CLERK

To: Bondar, Linda
Cc: Joly, Janine; taylor@ftlawps.com
Subject: RE: McKee v. King County - No. 91944-1 / Court of Appeals No. 70901-1-I

Rec'd on 8-21-15

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Sent: Friday, August 21, 2015 9:35 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Joly, Janine; taylor@ftlawps.com
Subject: McKee v. King County - No. 91944-1 / Court of Appeals No. 70901-1-I

Jeffrey R. McKee, Petitioner, v. King County, Respondent.
Supreme Court No. 91944-1
Court of Appeals No. 70901-1-I
Submitted by Janine Joly, Senor Deputy Prosecuting Attorney, (206) 296-0430, WSBA No. 27314
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Good morning,

Please accept the attached Respondent's Brief and Certificate of Service for filing in the above-referenced matter. Because the parties have not agreed to service by e-mail, hard-copies are being sent to Mr. Taylor, attorney for Petitioner, by U.S. Mail.

Please contact me if you have difficulty with transmission of these items.

Regards,

Linda Bondar | Paralegal
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