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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

JEFFREY R. McKEE,

Appellant,

v.

KING COUNTY,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This lawsuit concerns a Public Records Act ("PRA") request submitted by Jeffrey McKee ("McKee") to the King County Prosecutor's Office ("County") in 2011. Despite the fact that McKee's lawsuit was brought as a challenge to the County's scanning fee for copies, he has now abandoned his claims related to the fee on appeal. At issue in this appeal are his claims related to the County's exemption log.

As explained below, the trial court properly dismissed McKee's claims regarding the exemption log. It is clear from the pleadings that the documents at issue are attorney work product and exempt under RCW 42.56.290. *In camera* review of the documents themselves is unnecessary in this case, and the trial court's decision not to conduct such a review should be upheld. Moreover, to the extent any documents were improperly listed on the log, McKee is not entitled to relief under the PRA. Not only did he fail to pay for the documents, but as an inmate McKee must show bad faith for an award of penalties, something he cannot do in this case.

For the reasons set forth below, the County respectfully requests that the trial court's order dismissing McKee's claims be upheld.

II. STATEMENT OF THE ISSUES

1. Did the trial court properly exercise its discretion to decline *in camera* review where the pleadings on file in this case clearly show that the documents are exempt from disclosure under the PRA as attorney work product?

2. Did the County properly withhold emails from disclosure where the content of the email was attorney work product?

3. Did the trial court properly dismiss claims regarding the jail record where McKee would not be entitled to penalties even if the record was improperly withheld?

III. STATEMENT OF THE CASE

McKee's April 1, 2011 request called for documents held by the Prosecutor's Office in its litigation file for McKee's criminal case. CP 40. The County timely responded to McKee's request, taking the time needed to gather, review, and scan the responsive documents to a CD Rom as requested by McKee. CP 37, 48, 54. Though the County timely made the documents available to McKee, he never paid for them and they were therefore not provided to him. CP 37, 54.

McKee filed this lawsuit on November 29, 2012 in Snohomish County Superior Court. CP 89. The complaint centered on his claim that the County charged him too much for scanned copies. CP 89-90. The Honorable Bruce Weiss dismissed this claim on the County's motion for summary judgment. CP 63-64. In a May 16, 2013 order, Judge Weiss

held that the fee charged to McKee was reasonable and appropriate. CP 66-67. McKee did not appeal Judge Weiss's order or assign error to the ruling, and the scanning fee is therefore not at issue in this appeal. As of the date of this response, McKee still has not paid the scanning fee, and the requested documents have not been provided to him.[1]

In rejecting McKee's claims on the scanning fee, Judge Weiss reserved ruling on two issues that McKee raised at the hearing: (1) the timeliness of the Prosecutor's April 2011 five-day letter and the related statute of limitations; and (2) McKee's general claim that documents were improperly exempted. CP 63-64. On June 18, 2013, the County filed a second motion for summary judgment on these remaining issues. CP 73-82.

In his response to the County's second motion for summary judgment, McKee abandoned his claim that the County's five-day letter was untimely, which also made the statute of limitations issue moot. CP 26-34. Instead, McKee's response focused on the exemption log provided by the County on December 27, 2011. CP 26-34. For the first time in this case, and more than a year and a half after he received the exemption log,

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[1] The only document provided to McKee was a two-page of jail record as explained below.

McKee finally identified the specific documents he believed were improperly withheld.[2] (Even McKee's complaint was completely silent on the issue of exemptions. CP 89-124.) It was not until this eleventh hour challenge to 31 of the 41 entries on the exemption log that the County had any notice of these claims.[3]

One of the exempted documents challenged by McKee was a two-page jail record pertaining to McKee's booking at the King County Department of Adult Detention. CP 29. The County listed the record on its exemption log, citing the confidentiality requirements in RCW 70.48.100, which states that jail records can only be released for specified purposes or "upon the written permission of the person." CP 59. In his response to the County's second motion for summary judgment (a year and a half after he received the exemption log), McKee referred to the jail record and argued that the County had his written authorization to release a copy of the record to him. CP 29. Even though McKee still had not paid for copies, the County mailed a copy of the record to McKee,

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[2] Though McKee challenged 31 of the documents on the County's exemption log, as explained herein, one of those documents, the jail record, was mailed to McKee and removed from the exemption log. As a result, only 30 of the challenged documents remain on the exemption log for purposes of this appeal.

[3] On February 28, 2013, the County served McKee with a discovery request that consisted of one interrogatory asking him to identify the documents he believed were improperly exempted from disclosure. McKee failed to respond to the discovery request. CP 60-61, 69-72.

including it with the County's reply. CP 23.

In its reply to the second motion for summary judgment, the County provided the court with factual information to show that the exempted documents challenged by McKee were properly withheld from disclosure. CP 17-25. The County also provided the court with copies of the documents along with the *in camera* index described in WAC 44-14-08004(6), in case the court determined *in camera* review was necessary. CP 17-18.

At a hearing on July 18, 2013, the Honorable George Appel determined that *in camera* review was unnecessary and dismissed all of McKee's remaining claims with prejudice. CP 5-6. McKee's motion for reconsideration was denied, and he timely filed this appeal. CP 7, 1-4.

IV. ARGUMENT

A. STANDARD OF REVIEW

The appellate courts review trial court decisions under the PRA *de novo* and in reviewing an order of summary judgment, the appellate court engages in the same inquiry as the trial court. *Progressive Animal Welfare Soc'y (PAWS) v. University of Washington*, 125 Wn.2d 243, 252-53, 251 P.2d 592 (1994). Where the record, as in this case, consists solely of affidavits, memoranda of law, and other documentary evidence, the

appellate court is not bound by the trial court's factual findings and stands in the same position as the trial court. *Id.* As discussed below, while the trial court's decisions under the PRA are reviewed *de novo*, its decision to conduct *in camera* review is reviewed for abuse of discretion. *Overlake Fund v. City of Bellevue*, 60 Wn. App. 787, 796-97, 810 P.2d 507, *review denied*, 117 Wn.2d 1022, 818 P.2d 1098 (1991).

B. *IN CAMERA* REVIEW IS WITHIN THE TRIAL COURT'S DISCRETION

While *in camera* review of withheld documents is permitted under the PRA, it is not required. RCW 42.56.550(3) states, "Courts *may* examine any record *in camera* in any proceeding brought under this section." (Emphasis added.)

Determining whether *in camera* inspection is required is left to the discretion of the trial court. *Overlake Fund*, 60 Wn. App. at 796-97. In deciding whether *in camera* review is necessary, courts consider the following factors: (1) judicial economy, (2) the conclusory nature of the agency affidavits, (3) bad faith on the part of the agency, (4) disputes concerning the contents of the documents, (5) whether the agency requests an *in camera* inspection, and (6) the strong public interest in disclosure. *Id.* (citing *Allen v. C.I.A.*, 636 F.2d 1287, 1298-99 (D.C. Cir. 1980) (overruled on other grounds in *Founding Church of Scientology v. Smith*,

721 F.2d 828 (D.C. Cir. 1983))[4]. Considered in light of these factors, *in camera* review is necessary only if a court cannot evaluate an asserted exemption based on the information contained in the government's affidavits. *Id.* (citing *Arieff v. United States Dep't of the Navy*, 712 F.2d 1462 (D.C. Cir. 1983)).

In *Harris v. Pierce County*, Division II affirmed the trial court's order on an exemption and found no error in the trial court's decision not to conduct *in camera* review. *Harris v. Pierce County*, 84 Wn. App. 222, 233-36, 928 P.2d 1111 (1996). The court agreed that the memorandum at issue was attorney work product and attorney-client privileged in its entirety.

> We hold the trial court did not err in refusing to review the requested memorandum *in camera* because the pleadings clearly showed that it was exempt from public disclosure.
> . . .
> The trial court could ascertain that the attorney-client privilege and the work product rule applied by viewing the parties' memoranda regarding the motion to compel and their supporting affidavits. Accordingly, it was not necessary for the court to view the document *in camera* before ruling on whether the memorandum was subject to disclosure. The court's refusal to do so was not an abuse of discretion; it was mindful of judicial economy.

Id.

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[4] Since the Washington PRA closely parallels the federal Freedom of Information Act (FOIA), Washington courts rely on judicial determinations of the federal act in construing the provisions of the PRA. *Hearst v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978).

In consideration of the factors set out in *Overlake Fund,* it is also clear that in the present case *in camera* review is not necessary to determine if the documents are exempt. In *Harris*, the court found that judicial economy was served by avoiding *in camera* review when only one memorandum was at issue. In the present case, there is one memorandum plus 29 emails. Additionally, the agency's declarations in this case provide relevant, factual information about the disputed records as discussed in Part B below; they are not simply conclusory statements that the exemption applies. There is also no evidence of bad faith on the part of the County in this case; and while McKee may dispute that the work product exemption applies, there can be no real dispute that the general content of the withheld documents concerns the litigation in his criminal case, *State v. McKee*. McKee's interest in the release of these documents also does not rise to the type of strong public interest contemplated by the federal court in *Allen v. C.I.A. Allen*, 636 F.2d at 1299 (information requests to ascertain whether a particular agency is properly serving its public function may call for a greater need for *in camera* inspection). And although in this case the County had no objection to *in camera* review, and even provided the documents and an *in camera* index to the court, the County never argued that such review was required.

As in *Harris*, *in camera* review was not necessary in the present case. As explained in detail below, the pleadings submitted by the County to the trial court clearly show that the documents challenged by McKee are attorney work product and exempt under RCW 42.56.290.

C. THE EXEMPTED DOCUMENTS ARE ATTORNEY WORK PRODUCT

In the present case, the trial court was presented with sufficient evidence and argument to determine that the documents at issue were properly exempt from disclosure as attorney work product. RCW 42.56.290 states:

> 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 are exempt from disclosure under this chapter.

To invoke the work product exemption under RCW 42.56.290, the records must relate to "completed, existing, or reasonably anticipated litigation" and they must be the work product of an agency's attorney. *Soter v. Cowles Pub'g Co.*, 162 Wn.2d 716, 723, 174 P.3d 60 (2007) (quoting *Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993)); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 605 (1998) (quoting *Dawson* at 789-90). As explained below, it is apparent from the record that the

emails and memorandum at issue in this appeal meet this definition of work product.

1. The documents relate to completed, existing, or reasonably anticipated litigation.

The emails and the memorandum at issue here unquestionably relate to anticipated litigation. The Prosecutor's Office received a referral from law enforcement, and based on that referral and the related investigation, criminal charges were filed. Each document withheld relates to that litigation. The records consist of communications between attorneys, investigators, and a victim advocate all directly related to the investigation and prosecution in *State v. McKee*, King County Superior Court No. 03-1-01734-1 KNT. The first part of RCW 42.56.290 is therefore met.

2. The documents are the King County Prosecutor's work product.

The PRA work product exemption has been interpreted to refer to the civil rules of discovery which protect not only an attorney's opinions, conclusions, and legal theories, but also the factual documents gathered by an attorney in anticipation of litigation. *Koenig v. Pierce County*, 151 Wn. App. 221, 230, 211 P.3d 423 (2009) (citing *Limstrom*, 136 Wn.2d at 609). In *Limstrom*, the Washington Supreme Court stated:

> CR 26(b)(4), which is based on the common law work product exemption, includes within the definition of work product factual information which is gathered by an attorney, as well as the attorney's legal research, theories, opinions and conclusions.

Limstrom at 605-606 (citing *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947)); Lewis H. Orland, *Observations on the Work Product Rule*, 20 GONZ. L. REV. 281, 282-83 (1993-94); *see also Soter*, 162 Wn.2d at 716.

Under the PRA not only are an attorney's theories and opinions protected, but so is the factual information the attorney seeks to gather for purposes of litigation. For example, in *Koenig*, the court upheld the Pierce County Prosecutor's withholding of the script of a witness statement taken by a sheriff's detective. *Koenig*, 151 Wn. App. at 231. The prosecutor gathered and used the statement in determining whether criminal charges would be filed. *Id.* And while the factual statement might have been subject to disclosure in another context, the court found that it was a factual document gathered by the prosecutor in anticipation of litigation and was therefore properly withheld by the prosecutor as work product. *Id.*

In the present case a number of the withheld documents describe factual information the deputy prosecuting attorneys were gathering for purposes of the prosecution in *State v. McKee*. Other withheld documents

describe the attorneys' opinions and theories of the case. As explained in more detail below, each of these documents constitutes work product and was properly withheld from disclosure.

3. The pleadings provide sufficient information to show the exemption applies.

The exempted documents at issue in this appeal are one memorandum and 29 emails. As explained in the exemption log provided to McKee in December 2011, all of the documents are related to *State v. McKee* and pursuant to McKee's request, were part of that criminal litigation file. Though the exemption log provided to McKee contained the brief explanation of withholding required by the PRA, the pleadings presented to the trial court provided more information on each withheld document. CP 17-25.

a. Document 1 – The Cook Memorandum Regarding Further Investigation

Document 1 is a memorandum from one of the deputy prosecuting attorneys assigned to *State v. McKee,* to the King County Sheriff's Office detective who led the criminal investigation.[5] CP 24. The memorandum is a request by the deputy prosecuting attorney for further investigation to

[5] The memorandum was mistakenly listed on the December 2011 exemption log as being one page; it is two pages.

be completed "in order to proceed to trial on the charged count and to prepare additional counts." CP 24. The memorandum reveals the deputy prosecutor's mental impressions of the case and details the facts he sought to gather in anticipation of litigation.

b. Documents 2 – 6: Emails Regarding Arrest, Investigation, and Possible Charges

Documents 2 – 6 are a chain of emails between King County deputy prosecuting attorneys involved in the *State v. McKee* prosecution, the chief criminal deputy, and the elected Prosecutor. CP 24-25. The emails describe the criminal allegations against the defendant, aspects of the continuing investigation, the arrest, and the possible charges. The emails are communications between attorneys about the pending case. CP 24-25. Dan Donohoe, the Prosecutor's public information officer, was also copied on one of the emails because of possible media interest in the case. CP 25.

c. Documents 7 – 26: Factual Information Gathered by Attorneys in Anticipation of Litigation

Documents 7 – 26 show factual information sought by an attorney in anticipation of litigation. The emails show the factual information that deputy prosecuting attorneys assigned to *State v. McKee,* along with their paralegal, were gathering from different law enforcement agencies. CP

25. While information contained in these emails may be subject to disclosure in a different context, such as pursuant to a request from a law enforcement agency, here it is factual information gathered by an attorney in anticipation of litigation. Under *Limstrom* and *Koenig*, the documents constitute work product for purposes of RCW 42.56.290 and are exempt.

d. Documents 28 – 31: Factual Information Gathered Regarding Victims' Participation in Trial

In its exemption log provided to McKee in December 2011, documents 28 – 31[6] were listed as being withheld under RCW 5.60.060(8), which mandates the confidentiality of communications between a victim advocate and a victim. However, as the County's pleadings in the trial court stated, the emails are better described as attorney work product and should have been listed as such on the exemption log.[7] This string of four emails shows an exchange of information between Deputy Prosecuting Attorney Cook and the assigned victim advocate, Tabitha Yockey, concerning victims and their participation in trial. CP 25. One email also contains a direction from Mr.

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[6] Document 27 is the jail record, which as explained herein has been provided to McKee.

[7] The Washington Supreme Court has ruled that agencies are not required to argue all possible bases for exemption at the time of responding to a request "otherwise the goal of prompt agency response might well be subverted." *PAWS*, 125 Wn.2d at 253. Here, although the County admits it misidentified the exemption for documents 28 – 31, there has been no harm to McKee. The documents are still exempt, and he is not entitled to access.

Cook to his paralegal regarding a request for additional information to law enforcement. CP 25. As with Documents 7 – 26 described above, these emails show factual information gathered by the prosecutor for purposes of trial and under *Limstrom* and *Koenig*, they are exempt.

The documents described above are exempt under RCW 42.56.290. The documents relate to actual litigation, and they are the work product of an agency's attorney as that term has been defined by the Washington State Supreme Court for purposes of the PRA. The documents were therefore properly listed on the County's exemption log.

D. REDACTIONS OF WORK PRODUCT EMAILS WAS NOT REQUIRED

In addition to arguing that the withheld documents did not constitute attorney work product, McKee now argues for the first time on appeal that even if the entire body of an email was exempt from disclosure under the PRA, an agency must redact the body and produce the heading, which shows the date, time, subject of the email, and who it was to and from. McKee makes this argument even while conceding that all the header information was provided on the exemption log. Appellant's Brief at 11.

McKee's argument should be rejected because he is raising it for the first time on appeal. He did not plead or argue this issue to the trial

court and pursuant to RAP 9.12, he cannot now raise it on appeal. *See* RAP 9.12 ("On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court."); *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008), *review denied*, 165 Wn.2d 1017, 199 P.3d 411 (2009) (appellate court declined to consider arguments not raised before the trial court); *see also* CP 26-34 (McKee's Response to County's Second Motion for Summary Judgment).

Moreover, McKee's argument should also be rejected because applying it to all exempted documents under the PRA would lead to absurd results. *See Lowy v. Peacehealth*, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012) (citing *Wright v. Jeckle*, 158 Wn.2d 375, 379-80, 144 P.3d 301 (2006). ("It is fundamental that in construing any statute we avoid absurd results.")

Taking McKee's argument to its logical conclusion would mean that no document could be withheld in its entirety under the PRA. For example, in a legal memorandum from an attorney to a client, certainly the date at the top of the memo and in the header is not privileged nor is the name of the attorney or the page numbers in the footer. Under McKee's theory, the body of the memo could be redacted, but the agency would

have to produce each page of the memorandum so that the requestor could have a copy of the nonprivileged headers and footers containing the date and page numbers. No court in Washington has taken the PRA redaction requirement to this absurd length.

In *Koenig v. Pierce County*, this Court upheld the prosecutor's withholding of 44 pages of police reports and 139 pages of transcripts of witness interviews as attorney work product and found the prosecutor's summary description and explanation of the withholding to be sufficient under the PRA. *Koenig v. Pierce County*, 151 Wn. App. 221, 235, 211 P.3d 423 (2009). This Court did not require the prosecutor to redact the work product from each page of those records and release the remainder. Instead, the Court found the documents to be exempt in their entirety, and the Court upheld an explanation of withholding that was much less detailed that what the County provided to McKee here.

Additionally, in *Harris* the plaintiff argued the legal memorandum at issue had to be reviewed *in camera* to determine if portions of it could be disclosed. *Harris*, 84 Wn. App. at 235. The Court of Appeals not only upheld the trial court's ruling that the memorandum was exempt in its entirety, but as discussed above, it upheld the trial court's decision not to review the document *in camera*. *Id.*

Finally, while the PRA does not require the County to provide a copy of the wholly redacted emails in response to McKee's April 1, 2011 request, the County reiterates that McKee has had the exemption log for *over two and a half years,* and this is the first time he has indicated that he wants copies of these redacted emails. In that sense, the County did not fail to provide McKee with the redacted emails because he never requested them. As explained above, the documents McKee did request were properly withheld in their entirety and properly listed on the exemption log. There is no PRA violation.

E. THE JAIL RECORD WAS WITHHELD IN GOOD FAITH

As the pleadings in this case demonstrate, in its December 27, 2011 response to McKee's public disclosure request, the County listed a two-page jail record on its exemption log, asserting it was confidential under RCW 70.48.100. The statute provides:

> (2) Except as provided in subsection (3) of this section the records of a person confined in jail shall be held in confidence and shall be made available only to criminal justice agencies as defined in RCW 43.43.705; or
>
> (a) For use in inspections made pursuant to RCW 70.48.070;
>
> (b) In jail certification proceedings;
>
> (c) For use in court proceedings upon the written order of the court in which the proceedings are conducted;

> (d) To the Washington association of sheriffs and police chiefs;
>
> (e) To the Washington institute for public policy, research and data analysis division of the department of social and health services, higher education institutions of Washington state, Washington state health care authority, state auditor's office, caseload forecast council, office of financial management, or the successor entities of these organizations, for the purpose of research in the public interest. Data disclosed for research purposes must comply with relevant state and federal statutes; or
>
> (f) Upon the written permission of the person.

Just three months before the County sent McKee the exemption log, this Court issued a decision in *Sargent v. Seattle Police Department* clarifying that when the subject of a jail record requests it through public disclosure, the statutory requirement of written permission is met. *Sargent,* 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). Prior to that decision, 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*. In that case, the Washington Supreme 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 472, 481, 987 P.2d 620 (1999).

In July 2013, a year and a half after he received the County's exemption log listing the jail record as exempt, McKee argued in his response to the County's second motion for summary judgment that the County had his written authorization to release a copy of the jail record to him and he cited the *Sargent* decision. CP 29. Even though McKee still had not paid for copies of requested records, the County mailed the jail record to McKee, including it with the County's reply. CP 23.

Even assuming that the County erred in listing the jail record on the exemption log, for the reasons set forth below, McKee is still not entitled to relief under the PRA.

1. McKee never paid for copies of the records that were made available to him.

It is undisputed that McKee has not paid for copies of the records that were made available to him in response to his April 1, 2011 request. McKee filed this lawsuit challenging the County's scanning fee, and his claims regarding the fee were dismissed. Despite his decision not to appeal that order and the fact that the documents have been available to him *since December 27, 2011*, he still has not paid the fee. Yet he now asks this Court to find that the County is responsible for denying him access to public records.

McKee argues that the County erred in including the jail record on its exemption log, but even if McKee is correct, the error was to his benefit since the only reason he now has a copy of the jail record is *because* it was on the exemption log. The County provided McKee with a copy of the jail record in July 2013 when McKee first argued that his public disclosure request constituted the written permission required by RCW 70.48.100. Had the County not placed the jail record on its exemption log and instead made it available for disclosure, the record would now be sitting on the CD Rom with the other 2,177 pages of documents that have been held in the Prosecutor's file for two and a half years waiting for McKee's payment of the scanning fee. CP 54.

Even if the County erred in placing the jail record on its exemption log, the error did not result in a denial of access to records for McKee. He is not entitled to relief under the PRA since by his own failure to pay for the records he requested, he is not a person who has been "denied an opportunity to inspect or copy a public record". *See* RCW 42.56.550(1).

2. McKee cannot show that the County acted in bad faith.

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." It is undisputed that McKee was incarcerated in the Washington Department of Corrections system at the time he made his April 1, 2011 public disclosure request. Therefore, he may not be awarded penalties unless the Court finds the County acted in bad faith in denying him access to a public record.

Division III recently defined "bad faith" for purposes of RCW 42.56.565(1). In *Faulkner v. Washington Department of Corrections*, the court stated:

> For purposes of the PRA, bad faith incorporates a higher level of culpability than simple or casual negligence. We hold that to establish bad faith, an inmate must demonstrate a wanton or willful act or omission by the agency.

____ Wn. App. ____, ____ P.3d ____,WL 4086310 (2014).

The court went on to define wanton as "[u]nreasonably or maliciously risking harm while being utterly indifferent to the consequences." *Id.* (citing Black's Law Dictionary 1719–720 (9th ed.2009)). In arriving at a definition of bad faith, the court looked at the culpability tiers set forth by the Washington Supreme Court for setting penalty amounts under the PRA and determined that the agency's culpability should still be the focus of a bad faith determination under RCW 42.56.565(1). The court stated:

> Bad faith is associated with the most culpable acts by an agency. Penalties are owed when an agency acts unreasonably with utter indifference to the purpose of the PRA.

Id.

In *Faulkner*, the court found this definition of bad faith consistent with the Legislature's intent in enacting RCW 42.56.565(1), a bill that according to legislative committee reports was introduced as a measure to curb abuses of the PRA by inmates who would use the act to gain automatic penalties provisions when an agency fails to produce records. *Id.* (citing S.B. 5025, 62nd Leg., Reg. Sess. (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. By incorporating the bad faith requirement, the legislature allows penalties for inmates only when the conduct of the agency defeats the purpose of the PRA and deserves harsh punishment.

Id. (citing *Francis v. Dep't of Corr.*, 178 Wn. App. 42, 60, 313 P.3d 457 (2013) (internal citations omitted)).

In *Francis*, Division II found bad faith under RCW 42.56.565(1) due to an agency's failure to conduct a reasonable search for records in response to an inmate's request. In support of its finding of bad faith on the part of the Department of Corrections, the Court cited to a number of factors including that the Department spent no more than 15 minutes considering the request and did not check any of the usual record storage

locations. The Court also cited to the trial court's findings that there was a lack of compliance with PRA procedural requirements and a lack of proper training and supervision. *Francis*, 178 Wn. App. at 64.

The Court in *Francis* made it clear that its holding was not intended to punish agencies for mistakes. "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. *Francis*, 178 Wn. App. at 63.

The record before this Court reflects the type of good faith mistake the Court in *Francis* said should not lead to penalties. At the time the County's exemption log was issued, this Court's opinion on the written permission under RCW 70.48.100 was just recently issued and was subject to a motion for discretionary review in the Washington Supreme Court that was eventually granted. Moreover, as soon as McKee pointed out the County's error, the County immediately corrected it by sending McKee the document at no charge. CP 23. There is also nothing in the record to evidence any lack of adherence to the PRA's procedural requirements or a lack of proper training. In fact, while McKee initially claimed the County violated the PRA's five-day response requirement, he abandoned that argument and the claims related to it were dismissed. CP 26-31, 5-6.

McKee's claims that the County violated the fee provisions of the PRA were also dismissed, a ruling that he did not challenge on appeal. CP 63-64.

There is simply nothing in the record in this case that could lead to a finding of bad faith under RCW 42.56.565(1). The trial court properly dismissed McKee's claims related to the jail record, and this Court should do the same.

V. CONCLUSION

For the reasons set forth above, the County respectfully requests that this Court uphold the trial court's order dismissing this case. McKee fails to show that he is a person who has been denied access to public records under the PRA, and he is not entitled to relief.

DATED this 3rd day of September, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Linda Bondar, hereby certify and declare under penalty of perjury under the laws of the State of Washington as follows:

1. I am a paralegal employed by the King County Prosecutor's Office, am over the age of 18, am not a party to this action, and ma competent to testify herein.

2. On Septermber 3, 2014, I caused to be filed via ABC Legal Messenger with the Court of Appeals of Washington, Division I, the original and one copy of the Brief of Respondent and this Certificate of Service.

3. I did also cause true and correct copies of the same to be sent by First Class U.S. Mail, postage paid to:

Christopher Taylor
FT Law, P.S.
402 Legion Way SE, Ste. 101
Olympia, WA 98501
Attorney for Appellant

DATED this 3rd day of September, 2014 at Seattle, Washington.

Linda Bondar