NO. 48186-3-II (consolidated with 48311-4-II, 48326-2-II, and 48372-6-II)

In the Court of Appeals of the State of Washington
Division II

CHRISTOPHER COOK, Respondent,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,
Appellant.

BRIEF OF RESPONDENT

Christopher Taylor
Attorney for Respondent
CR Taylor Law, P.S.
203 4th Ave E Ste 407
Olympia, WA 98501
Voice: (360) 352-8004
Fax: (360) 570-1006
Email: taylor@crtaylorlaw.com

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A) STATEMENT OF THE CASE

Respondent Christopher Cook requested, pursuant to the Public Records Act, that Appellant Department of Corrections produce "all phone records showing the dates, times, locations, and numbers called" associated with his own inmate phone PIN. CP 43.

At the time of Mr. Cook's request, the Department had a policy, Newsbrief 13-01, that indicated "[r]ecords maintained within the GTL system"—i.e. records maintained by "Global Tel Link," which "manage[s] and provide[s] inmate phone services"—"are not agency public records and are therefore not subject to disclosure" and "do not need to be gathered and retained in response to a public records request." CP 34. The policy also indicated that "records pulled from the GTL system for use in agency business (i.e. as an exhibit attached to an investigation) may be subject to disclosure and in this case would need to be pulled and provided in response to any public records request and reviewed for potential release." *Id.* The policy also instructed the Department's public records officers, "[i]f [they] receive[d] a request from any requester for a copy of inmate telephone logs," to include in the response "the following language": "The Department's phone system is run and maintained by an outside vendor and the phone call records you request are not public records created, used or maintained by the department; therefore, the

records are not disclosable under the Public Records Act, RCW 42.56." *Id.*

The Department's response to Mr. Cook's request included the language required by the policy. CP 45. The Department's response to Mr. Cook, however, did not include any language about "records pulled from the GTL system for use in agency business." *Id.*

The Department stipulated and conceded its response constituted a denial of Mr. Cook's request, and that its denial "violated the Public Records Act" in that "the phone logs requested by [Mr.] Cook were public records and should have been produced at the time of the request." CP 148; *see also* CP 6.

The trial court found the Department's denial of Mr. Cook's request was "in accordance with its policy." CP 148. Additionally, the trial court found that the Department's policy required the Department's public records officers "to conduct an adequate search for responsive records." *Id.* That is, the trial court found the Department's policy required that a search for "records pulled from the GTL system for use in agency business" be performed, although not a search of the "GTL system" itself. *See* CP 148, 34, 184-85. The Department did not assign error to this finding of fact. *See* Opening Consolidated Brief of Appellant at 3. Furthermore, the trial court found that the Department violated its policy

by "fail[ing] to conduct an adequate search for responsive records." CP 148. The Department did not assign error to this finding of fact. *See* Opening Consolidated Brief of Appellant at 3.

The trial court also found "bad faith" based upon the Department's "failing to describe the terms of [its] policy to [Mr.] Cook in its response, together with its failure to conduct an adequate search for responsive records in accordance with its policy." *Id.*

After the trial court entered an order finding the Department acted in bad faith, the Department moved for reconsideration of that bad faith conclusion "pursuant to CR 59(a)(7) and (9)." CP 156-65. The Department appended three additional declarations to that motion. CP 166-216. The trial court did not explicitly consider those additional declarations in denying reconsideration. CP 236-37.

B) ARGUMENT

1. RCW 42.56.565(1) Requires Bad Faith in Course of Denial, Not Causation.

A trial court may award a requester penalties against an agency who violates the Public Records Act under certain circumstances. RCW 42.56.550(4). The trial court's authority to award penalties to an *inmate* requester, however, is restricted to a narrower set of circumstances. RCW 42.56.565(1); *see also Francis v. Dept. of Corrections*, 178 Wn. App. 42,

60 (2013). Specifically, the trial court may "award penalties...to a person who was serving a sentence in a state...correctional facility on the date the request for public records was made" only when "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 "statute's plain meaning" must be "consider[ed]" "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." *Francis*, 178 Wn. App. at 59 (internal citation omitted). The phrase "acted in bad faith in denying...the opportunity to inspect or copy a public record" from RCW 42.56.565(1) must be read in light of the explicitly-cited generally-applicable cost and penalty provision found in RCW 42.56.550(4).

"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 costs, including reasonable attorney fees, incurred in connection with such legal action." RCW 42.56.550(4) (emphasis added). In other words, a prevailing party shall be awarded *costs* under *either* RCW 42.56.550(1)'s "deni[al of] an opportunity to

inspect or copy" show cause procedure *or* RCW 42.56.550(2)'s failure to "ma[ke] a reasonable estimate of time" show cause procedure.

"In addition, it shall be within the discretion of the court to award" the prevailing party penalties. RCW 42.56.550(4). The trial court may assess penalties against agencies that "den[y] an opportunity to inspect or copy a public record" *or* fail to "ma[ke] a reasonable estimate of the time that the agency requires to respond to [the] request." *Id.*; *see also West v. Wash. State Dept. of Natural Resources*, 163 Wn. App. 235, 243-44 (2011). For example, when an agency "fail[s] to acknowledge a request for records within five business days" as required by RCW 42.56.520, that failure "constitute[s] a violation of the PRA" that may, standing alone, "entitle[] the requester to a penalties award." *Id.* at 244.

In contrast to non-inmate requesters, "[a] court shall not award penalties under RCW 42.56.550(4) to a person who was serving a criminal sentence in a state...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). Reading RCW 42.56.565(1) in the context of RCW 42.56.550(4), the trial court is prevented from awarding penalties in two respects.

First, although the trial court may still award penalties to an inmate requester who brings a judicial review action under RCW 42.56.550(1)'s "deni[al of] an opportunity to inspect or copy" show cause procedure; the trial court is prevented from award penalties to in inmate requester who brings a judicial review action under RCW 42.56.550(2)'s failure to "ma[ke] a reasonable estimate of time" show cause procedure. In other words, although a non-inmate requester may recover penalties for *either* a "denial" violation *or* a "time" violation, an inmate requester may recover penalties only for a "denial" violation.

Second, a trial court may award penalties to a non-inmate requester in the absence of bad faith. RCW 42.56.550(4); *see also Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 459 (2010) ("no showing of bad faith is necessary before a penalty is imposed on an agency"). However, a trial court is prevented from awarding penalties to an inmate requester in the absence of bad faith. RCW 42.56.565(1); *see also Francis*, 178 Wn. App. at 60.

Here, the Department proposes an additional restriction to RCW 42.56.565(1)—that the bad faith must *cause* the denial—that is contrary to the plain meaning of the statute. *See* Opening Consolidated Brief of Appellant at 15. The statute does contemplate that the agency's bad faith

must occur in the context of, or in the course of, a denial. RCW 42.56.565(1). But the statute says nothing about "causation."

Furthermore, those cases interpreting this statutory provision do not discuss, and moreover are inconsistent with, the Department's proposed additional "causation" requirement.

The *Francis* court, which interpreted RCW 42.56.565(1), considered a number of factors related to the bad faith of the Department of Corrections, but said nothing about those factors having caused a denial. 178 Wn. App. at 63-64. Furthermore, many of those factors either could not have caused the denial, or may not have caused the denial. *Id.* Specifically, "(1) a delayed response by the Department, even after Francis filed suit; (2) lack of compliance with the PRA procedural requirements; (3) lack of proper training and supervision; (4) negligence or gross negligence; and (5) sufficient clarity in Francis's request" were also found to be "logically relevant to the reasonableness of the Department's response *and its bad faith*." *Id.* (internal citations omitted, emphasis added). Furthermore, the *Francis* court discussed the fact that (1) the Department "spent no more than 15 minutes considering Francis's request;" (2) the Department "did not check any of the usual record storage locations;" (3) the Department "sent Francis documents plainly not

responsive to his request;" and (4) "the Department did not produce the relevant policy until eight months after Francis filed suit." *Id.* at 64.

A delayed response does not ordinarily constitute a denial. *See Hobbs v. Wash. State Auditor's Office*, 183 Wn. App. 925, 936 (2014). Furthermore, although the *shortness* of the search and the *locations* of the search were factors in finding the search inadequate, and therefore evidence of bad faith, the *Francis* court did not examine or conclude whether the search's shortness or location or both *caused* the denial. 178 Wn. App. at 64. Moreover, sending non-responsive records could not have caused a denial.

Another factor considered regarding whether bad faith is present under RCW 42.56.565(1) was that the agency failed "to produce [a responsive record] as soon as it was acquired," as opposed to "held...until it completed its investigation into the remainder of [the] records request." *Faulkner v. Dept. of Corrections*, 183 Wn. App. 93, 107 (2014). The *Faulkner* court noted "[t]he PRA does not require piecemeal production of documents" and that the Department "gave Mr. Faulkner a reasonable timeline for producing documents and complied with this timeline" in finding this did *not* support a bad faith finding. *Id.* The failure to piecemeal could not have caused a denial; the Court, however, declined to use that as a rationale for finding an absence of bad faith.

Yet another factor considered regarding whether bad faith is present under RCW 42.56.565(1) was that the agency "reli[ed] on a farfetched basis for nondisclosure." *Adams v. Dept. of Corrections*, 189 Wn. App. 925, 941 (2015). A claim of exemption does cause a denial; however, that the claim of exemption is "farfetched" may not. The *Adams* court considered, for example, as evidence of bad faith that the Department "did not stop to reconsider its exemption claim" after a trial court "squarely and directly ruled that [certain responsive records were] not exempt from disclosure under the PRA." *Id.* at 951. The trial court specifically found:

> The Court also finds that no indication that the [DOC] has filed an interlocutory appeal or that it has filed a declaratory action. The Court further finds bad faith where the DOC, a department within the executive branch of government, has chosen to ignore decisions made by the judicial branch regarding rap sheet dissemination. [None of t]he DOC, the WSP [ ]or the FBI are privileged to ignore judicial decisions.

Id. at 940. In other words, part of what rendered the claim of exemption bad faith was the wanton refusal of the Department to follow court orders, or at least reexamine its position. The Court does not, however, conclude that this behavior *caused* the denial. To the contrary, the opinion seems to suggest that, for example, had the Department filed an interlocutory appeal

of the *Chester* decision and continued to deny Mr. Adams' request under its old policy, it might not have acted in bad faith. In other words, the *Adams* court read RCW 42.56.565(1) to require only that the agency act in bad faith in the course of denying the opportunity to inspect or copy a public record, not that that the agency's bad faith actually cause the denial.

2. Considering the Proper Record, Trial Court Properly Concluded Department Acted in Bad Faith.

(a) Department Policy Required Search, and Search Not Conducted.

"Where an appellant does not assign error to a trial court's factual findings...those findings [are] verities" on appeal. *Francis*, 178 Wn. App. at 52. A court of appeals must "accept as true the facts on which the trial court relied in finding bad faith, but...review[s] de novo the trial court's conclusion that those facts establish bad faith." *Id.*

Here, the trial court found that the Department's Newsbrief 13-01 policy required the Department's public records officers to adequately search for records responsive to a request for inmate telephone logs at least insofar as those records had been pulled from the GTL system for use in agency business. CP 34, 148. And the trial court found the Department failed to conduct that search. CP 148. The Department does not assign error to these findings of fact. *See* Opening Consolidated Brief of

Appellant at 3. Therefore, this Court should ignore any arguments of the Department that contradict those findings of fact

(b) Trial Court Did Not Consider Additional Declarations Appended to Reconsideration Motion; Therefore Those Declarations Not Part of Record.

Under the Public Records Act's "show cause proceeding," "the agency bears the burden of establishing that its refusal to produce records did not violate the PRA;" the "hearing may be held on affidavits...or as a trial-type hearing involving oral argument and live testimony;" and the "court may completely resolve PRA claims in the show cause proceeding." *West v. Gregoire*, 184 Wn. App. 164, 171 (2014) (internal citations omitted). "Given this procedure [the PRA's] show cause proceeding is, in effect, the PRA claimant's trial." *Id.* at 172.

"On a motion for reconsideration based on CR 59(a)(5)-(9), the court must base its decision on the evidence already heard at trial." *Holaday v. Merceri*, 49 Wn. App. 321, 330 (1987). "[T]he parties should generally not be given another chance to submit additional evidence." *Meridian Minerals Co. v. Burlington Northern Railroad Co.*, 61 Wn. App. 195 (1991). Although "[t]he decision to consider new or additional evidence presented with a motion for reconsideration is squarely within the trial court's discretion," "prejudice" is presumed "if the court considers

additional facts on reconsideration" after "trial." *Martini v. Post*, 178 Wn. App. 153, 162 (2013).

Here, the Department moved for reconsideration "pursuant to CR 59(a)(7) and (9)" after trial. CP 156-65. The Department appended three additional declarations to that motion. CP 166-216. There is no evidence the trial court considered those additional declarations in denying reconsideration. CP 236-37. Therefore, this Court should decline to consider those declarations as not properly part of the record on appeal.

(c) Trial Court Properly Concluded Department Acted in Bad Faith.

"Failure to conduct a reasonable search for requested records [may] support a finding of 'bad faith' for purposes of awarding PRA penalties to incarcerated requesters." *Francis*, 178 Wn. App. at 63. "[A]n agency will be liable...if it fails to carry out a record search consistently with its proper policies and within a broad canopy of reasonableness." *Id.* In *Francis*, the Court found it enough that the agency "spent no more than 15 minutes considering [the requester's] request and did not check any of the usual record storage locations." *Id.* at 64. "Absent any countervailing evidence showing justification, this evidence shows [the agency] did not act in good faith." *Id.*

Here, the Department failed so search *at all*, let alone conduct a reasonable search of the usual record storage locations. CP 40-41, 148. When a cursory and location-deficient search may constitute bad faith, as the *Francis* court held, a *non-existent* search must be capable of constituting bad faith. This is especially true where, as here, the Department's own policy was violated by that failure to search.

That an adequate search may not have yielded any additional responsive records is not properly part of the record. *See supra* at Section 2(b). Furthermore, the absence of a causal relationship between the Department's bad faith and the denial is not relevant, or at any rate dispositive, under the Public Records Act. *See supra* at Section 1.

"Agency responses, refusing, in whole or in part, inspection of any public record shall include...a brief explanation of how [an] exemption applies to the record withheld." RCW 42.56.210(3). "The purpose of the requirement [of the statement of the specific exemption and the brief explanation] is to inform the requester why the documents are being withheld and providing for meaningful judicial review of agency action." *City of Lakewood v. Koenig*, 182 Wn.2d 87, 94 (2014).

Although this "brief explanation" requirement only affirmatively applies to claims of exemption, as opposed to claims that a given record is not a public record, an agency's failure to provide an adequate explanation

frustrates the purpose of the Public Records Act. Specifically, by failing to inform a requester with sufficient particularity about the reasons for denying a request, a requester is left with a mistaken impression about what class of records the agency believes to be non-public.

Here, the trial court found the Department's failure to inform Mr. Cook about the actual policy contained in Newsbrief 13-01 to be a factor to be considered in finding bad faith. CP 148. The Department's only argument that this was an improper factor to consider in finding bad faith is that the statute "does not require agencies to notify requesters of every contour of the agency's position." Opening Consolidated Brief of Appellant at 26. However, courts have routinely approved of bad faith factors not explicitly contained within the Public Records Act. *See e.g. Francis*, 178 Wn. App. at 64 ("sen[ding]...documents plainly not responsive to [the] request" properly considered in bad faith determination); *Adams*, 189 Wn. App. at 929 ("agency's failure to engage in any serious independent analysis of the exempt status of documents it withholds" properly "includ[ed]" in "bad faith" determination). The trial court did not err in considering this factor in concluding the Department acted in bad faith.

3. Costs, Including Reasonable Attorney Fees, Should Be Awarded.

"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 all costs, including reasonable attorney fees, incurred in connection with such legal action." RCW 42.56.550(4). A prevailing party must also be awarded costs, including reasonable attorney fees, incurred in bringing an appeal. *Progressive Animal Welfare Soc. v. Univ. of Wash. (PAWS I)*, 114 Wn.2d 677, 690 (1990).

Here, Mr. Cook will ultimately be determined to be the prevailing party. Thus, he is entitled to costs, including reasonable attorney fees. An affidavit of fees and expenses will be filed pursuant to RAP 18.1.

C) CONCLUSION

In order to award penalties to an inmate requester under RCW 42.56.550(4) and RCW 42.56.565(1), the trial court must find an agency to have acted in bad faith in the course of denying a public records request, but need not find the bad faith caused the denial. The trial court properly considered two factors reasonably related to a bad faith determination, and found the Department acted in bad faith in denying Mr.

Cook's public records request. Therefore, this Court should affirm the trial court's order finding bad faith.

DATED this 31st day of May, 2016.

/s/ Christopher Taylor _____
Christopher Taylor, WSBA # 38413
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on May 31st, 2016, I caused to be electronically filed the foregoing BRIEF OF RESPONDENT with the Clerk of the Court using the electronic filing system and I delivered a true copy of the same to ABC Legal Messengers, with appropriate instructions to forward the same to counsel for the Appellant, TIMOTHY FEULNER, Assistant Attorney General, Corrections Division and counsel for Respondents Evans, Jones, and Robinson, MICHAEL KAHRS.

/s/ Christopher Taylor _____
Christopher Taylor

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