

NO. 72256-5-I

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Appellant,

v.

ROBERT NORTHUP,

Appellee.

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**APPELLANT'S REPLY BRIEF AND  
RESPONSE TO APPELLEE'S CROSS APPEAL**

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## I. COUNTERSTATEMENT OF FACTS<sup>1</sup>

In October 2010, the Department of Corrections (Department) received a public records request from Northup seeking in part “A copy of any document if it exists describing the details of any formal ‘deal’ or ‘agreement’ between myself & the Dept of Corr [OR] myself & government officials.” CP 430. His request also sought five copies of his request and any response. CP 430. After acknowledging Northup’s request, the Department assigned it tracking number PDU-12939 and informed him that further response would occur on or before January 5, 2011. CP 433. In this same letter, the Department notified Northup that the five copies of his initial request and the Department’s initial response, as he requested in part two of his request, would be mailed to him upon receipt of payment in the amount of \$3.05. CP 433.

On November 3, 2010, the Department notified Mr. Northup that a Department search had identified no records responsive to his request for any record/document describing the details of any formal deal/agreement between the Department and Northup. CP 435. In this same letter, the Department again notified Northup that the five copies of his request and

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<sup>1</sup> The Department’s Opening Brief included a statement of facts related to the issues it raised on appeal. This Counterstatement of Facts contains only the facts relevant to the issues raised by Northup’s Cross Appeal of his 2010 public records request. The Department’s Opening Brief provides the factual background related to Northup’s 2013 request and it does not repeat those facts here.

the Department's initial response would be sent to him upon receipt of payment in the amount of \$3.05. CP 435. Northup neither paid for these documents nor did he pursue the Department's administrative appeals process. CP 421. This completed the Department's response to PDU-12939.

## II. ARGUMENT

The Department's redaction of the 16-page debrief did not violate the Public Records Act (PRA) because the information redacted from the debrief was exempt under RCW 42.56.240(1) and/or was exempt under RCW 42.56.240(12). Northup does not contest that the Department demonstrated the three elements required for information to be exempt under the investigative records exemption (RCW 42.56.240(1)), but he argues that the exemption does not apply to the "general information" contained in the debrief.

Northup argues that the Security Threat Group (STG) exemption (RCW 42.56.240(12)) does not apply because Northup knows the information in the debrief. However, the Department properly redacted the names, identifying information, and activities of STG or prison gang members. Finally, in a new argument, Northup argues that public policy warrants disclosure, but Northup waived such arguments and he fails to cite any authority to support them. Examining the unredacted debrief—

which was filed under seal—and applying the plain meaning of those provisions, the information redacted by the Department was exempt under RCW 42.56.240(1) and (12), and the trial court erred in concluding otherwise.

The Department also appealed the trial court's determination that the disclosure of certain emails produced on March 5, 2014, violated the PRA because the Department had failed to produce these emails in an earlier installment. Northup's opening brief does not address any of the Department's arguments regarding this alleged violation.

The Department appealed the trial court's award of penalties to Northup, an incarcerated individual. The trial court's written order lacks any specific finding of bad faith under RCW 42.56.565(1) and this alone is grounds for reversal. Although the trial court discussed bad faith in the context of the *Yousoufian* factors, any use of those factors to determine bad faith under RCW 42.56.565(1) would be error. Furthermore, the trial court did not apply the correct interpretation of bad faith and no finding of bad faith can be supported on the facts before the trial court.

In Northup's cross appeal, he challenges the trial court's calculation of penalty days. If a penalty had been justified, which the Department does not concede, the trial court properly calculated the

penalty period based on its determination of the number of days that Northup was wrongfully denied the right to inspect or copy a record.

Northup argues that the dismissal of his 2010 claims was error, but he failed to designate the order that dismissed his 2010 claims in his notice of cross appeal and the Court should decline review on that basis. Moreover, Northup's claims were barred under either the two-year catch all statute of limitations or the PRA's one-year statute of limitations. Finally, Northup argues that the Court should adopt a discovery rule for PRA claims. Such a rule is not warranted because the statutory language does not include a discovery rule and a discovery rule for PRA claims is not necessary to prevent any grave injustice.

**A. Standard Of Review**

Case law requires and the parties agree that appellate review of an agency's liability under the PRA is reviewed de novo. *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 385, 314 P.3d 1093 (2013); *Ames v. City of Fircrest*, 71 Wn. App. 284, 292, 857 P.2d 1083 (1993). However, the parties dispute the appropriate standard to apply to a trial court's penalty determination and the determination that an agency acted in bad faith under RCW 42.56.565(1).

Northup appears to argue all of the trial court's decisions are reviewed de novo because the case was resolved on summary judgment.

Response/Opening Brief of Appellee/Respondent Northup (Northup's Brief), at 10-11. A PRA penalty determination, however, is reviewed for abuse of discretion. *Yousoufian v. Office of Ron Sims (Yousoufian V)*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010). Courts have made no exception for cases decided on summary judgment. *See Sanders v. State*, 169 Wn.2d 827, 839, 240 P.3d 120 (2010) (applying abuse of discretion to issues of penalties, costs, and attorney's fees under PRA despite the case having been resolved on cross motions for summary judgment); *Gronquist v. Wash. State Dep't of Licensing*, 175 Wn. App. 729, 742, 309 P.3d 538 (2013) (citations omitted) ("Although we review agency action under the PRA and summary judgment orders de novo, we review the amount of a trial court's penalty under the PRA for abuse of discretion.").

A mixed standard of review applies to the trial court's application of RCW 42.56.565(1). The trial court's interpretation of the meaning of "bad faith" in that provision is reviewed de novo because it is a question of statutory interpretation. *See Telford v. Thurston Cnty. Bd. of Com'rs*, 95 Wn. App. 149, 157, 974 P.2d 886 (1999). The ultimate determination that an agency acted in bad faith, however, is a discretionary decision that should be subject to review for abuse of discretion.

RCW 42.56.565(1) was adopted by the legislature in light of existing principles of PRA law. At the time of its adoption in 2011, it was

established that the trial courts have significant discretion in awarding penalties and such a determination is reviewed for abuse of discretion. *See Yousoufian v. Office of Ron Sims (Yousoufian I)*, 152 Wn.2d 421, 430-31, 98 P.3d 463 (2004); *King Cnty. v. Sheehan*, 114 Wn. App. 325, 357, 57 P.3d 307 (2002). There is no indication that in adopting this provision the legislature intended to take away the traditional discretion afforded to trial courts when it comes to awarding penalties under the PRA. The bad faith provision is simply an additional requirement when courts exercise such discretion. As such, RCW 42.56.565(1) should not be interpreted as disturbing the trial court's discretion to award penalties, and an abuse of discretion standard should apply.

Finally, the trial court's dismissal of Northup's claims related to his 2010 public records request as barred by the statute of limitations is reviewed de novo. *Bartz v. Dep't Corr. Pub. Disclosure Unit*, 173 Wn. App. 522, 534, 297 P.3d 737 (2013).

**B. The Department Properly Redacted Information In The Debrief As Specific Investigative Records And Intelligence Information Under RCW 42.56.240(1)**

The Department properly redacted information from the 16-page debrief document under RCW 42.56.240(1) because such information was exempt as specific investigative records or intelligence information the nondisclosure of which is essential to effective law enforcement. As the

Department explained in its opening brief, the debrief document (1) was investigative in nature and contained specific intelligence information; (2) was compiled by an investigative, law enforcement, or penology agency; and (3) the nondisclosure of the information redacted from the debrief was essential to effective law enforcement. Department's Brief, at 15-20; *See Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712, 728, 748 P.2d 597 (1988).

Northup does not dispute that the debrief was compiled by a penology agency or that the nondisclosure of the redacted information is essential to effective law enforcement. Northup's Brief, at 23-25. Nor does he specifically contest that the record is an investigative record or that it contains intelligence information. Instead, Northup argues that the exemption applies only to active and ongoing investigations. *Id.* at 24-25.

The application of RCW 42.56.240(1) applies beyond active and ongoing investigations. Northup's argument confuses the categorical exemption established in *Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712 (1997), and refined in *Cowles Publ'g Co. v. Spokane Police Department*, 139 Wn.2d 472, 987 P.2d 620 (1999), with other applications of the exemption. In *Newman*, the court held that an investigation that was open and ongoing was categorically exempt from disclosure. *Newman*, 133 Wn.2d at 575. This meant the agency could withhold the entire

investigative file in response to a public records request and did not need to show that each individual redaction or withholding was essential to effective law enforcement. *Id.*; accord *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 387, 314 P.3d 1093 (2013).

However, in cases where the categorical exemption does not apply, the agency can still claim the exemption as long as the agency demonstrates that the withholding of specific documents or information was essential to effective law enforcement. *Sargent*, 179 Wn.2d at 390. This is exactly the approach taken by the Department when it produced the debrief at issue here. It did not withhold the entire debrief. Instead, it meticulously evaluated the debrief and redacted specific information that raised specific concerns if produced. CP 147-48, 427-28, 504-19, 526-27. Specifically, the Department made 799 narrowly tailored redactions throughout the 16-page highly sensitive record. As discussed in its opening brief, the nondisclosure of this information is essential to effective law enforcement. Department's Brief, at 15-16. Making no arguments to the contrary, Northup concedes as much.

Northup's argument that the Department previously conceded that this exemption does not apply to generalized STG information is also flawed. Northup's Brief, at 25-26. He cites and includes in an Appendix a Senate Bill Report that purports to summarize testimony from Dan

Pacholke, Deputy Secretary for the Department. First, a general statement by the Department to the legislature that particular information is not exempt under the PRA does not bind the Department in this litigation. Moreover, such statements fall short of legally establishing that the information redacted from the debrief was not covered by any PRA exemption that existed at the time of these statements. This is particularly true here where the statement referenced is not an actual statement by the individual but a purported summary of the statement. Rather, this court only needs to look to the plain meaning of the statute when interpreting its meaning; the prior statements or interpretation of a provision by an agency employee does not change that plain meaning. As explained in the Department's opening brief, the information redacted from the debrief unambiguously falls within the plain language of RCW 42.56.240(1). *See* Department's Brief, at 14-20.

Furthermore, the statements purportedly made by the Department during the legislative session do not contradict any position taken in this litigation. The statements by Mr. Pacholke referred generally to information contained in the STG database, which is described as "a centralized database" maintained by the Department's headquarters, as not being covered by existing PRA exemptions. Northup's Brief, at Appendix. The debrief at issue in this case was not pulled from the STG database but

was contained in an email between the Department and other law enforcement officials. Although Northup claims that “[t]he information gleaned from the debriefing would be placed in the STG database maintained by the Department in Olympia,” Northup’s Brief at 25, he provides no support for this statement and there is no evidence this email was part of the STG database discussed by Mr. Pacholke. Northup is simply incorrect in arguing that Mr. Pacholke’s statements are contradictory to the Department’s arguments in this litigation. Applying the plain language of RCW 42.56.240(1) as interpreted by the courts, the information redacted from the debrief was exempt under that provision. Northup does not dispute as much.

Northup has not countered the Department’s reasoned explanation for redacting information in the debrief that was exempt under RCW 42.56.240(1). For the reasons explained in the Department’s opening brief, the trial court erred in determining that the Department violated the PRA in redacting that information.

**C. The Department Properly Redacted Information In The Debrief As STG Information Under RCW 42.56.240(12)**

Information in the debrief also was exempt under RCW 42.56.240(12) as “[i]nformation that could lead to the identification of a person’s security threat group status, affiliation, or activities” and/or

“information that reveals specific security threats associated with the operation and activities of security threat groups.” The information the Department redacted under this exemption was properly redacted because it consists of information such as the names of prison gang members, their gang affiliation, and activities. Department’s Brief, at 20-25. All of this information is exempt under the plain language of RCW 42.56.240(12).

Northup argues that the exemption does not apply to his request because he provided the information and releasing the email would not lead to him discovering any new information. Northup’s Brief, at 27. As an initial matter, Northup’s assertion that the document would not reveal any new information to Northup is unsupported speculation that appears to be inconsistent with his own statements during this litigation. The requested document was not written or reviewed by Northup. Instead, it was written by a law enforcement official to attempt to summarize information provided by a confidential informant.<sup>2</sup> It is not a complete transcript of the interview but a summary of information that law enforcement officers presumably found important. Northup’s speculation

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<sup>2</sup> In the beginning of these proceedings, the Department attempted to be careful in discussing the identity of the confidential informant. At this point, Northup has repeatedly identified himself as this confidential informant. Northup’s counsel has also made various statements about the Department putting Northup’s life in danger as a result of the inadvertent release of the debrief to another requester. Issues related to the inadvertent release of the debrief were the subject of another lawsuit filed by Northup and voluntarily dismissed in July 2014 without any settlement between the parties. *Northup v. Department of Corrections*, Snohomish County Cause No. 14-2-02673-9.

that he knows everything in the debrief is unsupported. It is also inconsistent with his arguments that he needed to see the debrief “so he could see what information” was contained in the debrief, Northup’s Brief, at 4, or that he needed to see the debrief because he “want[ed] to know what exactly they know.” CP 351.

More importantly, Northup’s argument is inconsistent with fundamental principles of the PRA and the plain language of the provision. The statute protects “information that could lead to the identification of a person’s security threat group status, affiliation, or activities.” RCW 42.56.240(12)(a) (emphasis added). Northup argues that the information could not lead to anything because he provided it. Northup’s Brief, at 27-28. Similarly, Northup argues that no information can be identified because Northup is the one who did the identifying. *Id.* In doing so, he ignores that the phrase “could lead to” indicates that the information only needs to possibly lead to the identification of a person’s STG status, affiliation, or activities not that it actually lead to such identification. Northup’s Brief, at 28. This ignores the plain meaning of the word “identification.” Because the debrief contains the names and other identifying information of prison gang members, such information could clearly lead to the identification of prison gang members.

Furthermore, under Northup's interpretation, an agency would be required to speculate about the subjective knowledge of each individual requester to claim the exemption. Instead, when determining whether an exemption applies, courts look to the document itself to evaluate the exemptions not the subjective knowledge of the requester. *See Koenig v. City of Des Moines*, 158 Wn.2d 173, 183, 142 P.3d 162 (2006). Here, the debrief itself could lead to the identification of people's security threat group status, affiliation, or activities.

In addition, the Department properly made redactions of "information that reveals specific security threats associated with the operation and activities of security threat groups." RCW 42.56.240(12)(b). Northup argues that the debrief would not reveal anything to Northup. However, this interpretation of the word "reveals" is too narrow. The plain meaning of the word "reveals" does not require the information be secret and includes simply disclosing information. *See Webster's Third New International Dictionary* 1942 (2002) ("REVEAL indicates a making known or setting forth sometimes comparable to unveiling; it may apply to supernatural or inspired revelation, to simple disclosure, or to indication by signs, symptoms, or similar evidence." (emphasis added)). Again, the Court should look to the document itself to determine the applicability of the exemption. *See Koenig*, 158 Wn.2d 173 at 183.

Finally, Northup's and the trial court's interpretation is inconsistent with the PRA's basic principles. The PRA prevents agencies from distinguishing among requesters. RCW 42.56.080. Northup's interpretation would require the Department to distinguish between the inmate who provided the information and other inmates. It would also presumably require the Department to disclose an individual's prison gang status to that individual. Under Northup's interpretation, an offender could always seek and receive his own STG status. Such an approach would be contrary to the purposes of the statute because it would allow inmates who are STG members to make public records requests to determine whether or not the Department knows that they are a member of a specific STG. This interpretation would also not address the Department's concerns that an individual could be strong-armed to make a request to demonstrate that they are not a confidential informant. CP 147. Finally, it also would result in requests from certain requesters being treated differently than others; this is contrary to the PRA. *See King Cnty. v. Sheehan*, 114 Wn. App. 325, 341 & n. 4, 57 P.3d 307 (2002). Without an explicit basis for distinguishing among requesters in this exemption, this Court should not interpret the statute in a way that leads to such a result.

Because the information redacted from the debrief was exempt under the plain language of RCW 42.56.240(12), the trial court erred in finding that this exemption did not apply.

**D. Northup Has Waived Any Argument For A Judicial Override Under RCW 42.56.210(2), And Public Policy Provides No Basis For Finding An Otherwise Valid Exemption Inapplicable**

Scattered throughout Northup's brief are arguments that the Court should find the claimed exemptions do not apply because Northup has demonstrated that the exemption is "clearly unnecessary" to protect any privacy rights or vital government interests or public policy dictates such a result. Northup's Brief, at 21-23, 29. Northup waived both of these arguments because he failed to adequately raise them below. With respect to the public policy argument, Northup has cited no case law to support his argument that courts can order the disclosure of documents based on public policy—outside of RCW 42.56.210(2)—and the Court should not create such a public policy exception.

First, Northup appears to be invoking the judicial override provision found in RCW 42.56.210(2). *See Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 439, 327 P.3d 600 (2013). That provision allows the court in rare cases to determine that the application of an otherwise appropriate exemption is "clearly unnecessary to protect any individual's right of privacy or any vital governmental function." RCW

42.56.210(2). The burden is on the party seeking to obtain a judicial override to make such a showing. *Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 567-68, 618 P.2d 76 (1980).

Although Northup refers to the judicial override provision in RCW 42.56.210(2), it is unclear whether he is actually raising the issue on appeal. Northup's Brief, at 29. Regardless, Northup waived such an argument both by failing to appropriately raise it below and then by appearing to explicitly disclaim any reliance upon such an argument. *See Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) (noting failure to raise an issue before the trial court generally precludes a party from raising it on appeal); *Green v. Normandy Park*, 137 Wn. App. 665, 688, 151 P.3d 1038 (2007) (same). Northup did not mention the judicial override in any of his three complaints. CP 528-32, 545-48, 563-65. The first time he mentioned it in the trial court was in his reply brief to the Department's response to Northup's cross motion for summary judgment. CP 90. At the summary judgment hearing, when the Department argued that Northup had waived such an argument, Northup's counsel appeared to disclaim—albeit rather ambiguously—any reliance on RCW 42.56.210(2). I RP 36. In reaching its decision, the trial court explicitly indicated that its decision was not based on a judicial override. II RP 4.

The Department was prejudiced by this failure to raise the issue until Northup's reply. The Department never had an opportunity to provide factual evidence or additional briefing on whether the application of these exemptions was clearly unnecessary to protect any privacy rights or vital government interests. Instead, Northup's attempt to raise the issue at the eleventh hour in the trial court prevented the Department from doing so. Therefore, this Court should deem the argument waived based on Northup's failure to adequately raise the issue below.<sup>3</sup>

Similarly, Northup attempts to argue that public policy dictates that he receive these records. Northup's Brief, at 21-23. Northup again waived this argument by failing to raise it in the trial court, and again he cites no cases holding that a court can ignore an otherwise applicable exemption based on public policy grounds. The Court should therefore decline to consider such an argument. *Brownfield v. City of Yakima*, 178 Wn. App. 850, 876, 316 P.3d 520 (2014) (appellate court will not consider conclusory arguments that are unsupported by citation to authority), and *Regan v. McLachlan*, 163 Wn. App. 171, 178, 257 P.3d 1122 (2011) (same). Furthermore, Northup's theory would render RCW 42.56.210(2) superfluous; that subsection provides an explicit mechanism for courts to

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<sup>3</sup> Even if he had properly raised the issue, the trial court explicitly declined to judicially override these exemptions. Based on the existing evidence in the record, Northup failed to make the necessary showing for a judicial override. CP 523-527.

override an otherwise applicable exemption under certain conditions. *See Progressive Animal Welfare Society v. Univ. of Wash.*, 125 Wn.2d 243, 260, 884 P.2d 592 (1994) (declining to interpret a section of the PRA in a manner that renders other portions of the statute superfluous). Therefore, the Court should decline Northup's invitation to adopt a public policy exception for otherwise applicable PRA exemptions.

Because Northup waived any argument based on RCW 42.56.210(2) and public policy and such arguments do not provide a basis for overriding the exemptions in this case, these arguments do not provide a basis for affirming the trial court's decision.

**E. The Trial Court Did Not Apply The Correct Standard When It Determined The Department Acted In Bad Faith Under RCW 42.56.565(1) And It Unreasonably Applied That Incorrect Standard To These Facts**

The trial court did not correctly interpret and apply RCW 42.56.565(1) in imposing penalties on the Department. First, it did not enter an order with a finding of bad faith under that provision, and its oral ruling and written findings indicate that it did not apply the standard of bad faith established in *Faulkner v. Washington Department of Corrections*, 183 Wn. App. 93, 332 P.3d 1136, 1141 (2014).

In an attempt to address the trial court's failure to enter a written finding of bad faith under RCW 42.56.565(1), Northup argues that the trial

court used the *Yousoufian* factors to determine whether the Department acted in bad faith under RCW 42.56.565(1). Northup's Brief, at 34-35. However, the record as a whole does not support such a recharacterization of the trial court's ruling. Instead, the record indicates that the trial court simply moved to penalties during its oral ruling after finding the Department violated the PRA, and it did not explicitly indicate that it intended to use the *Yousoufian* factors to determine bad faith under RCW 42.56.565(1). II RP 5. The transcript and order of the Court's ruling reveals that the trial court did not meaningfully engage in a bad faith analysis as required under RCW 42.56.565(1). The written order also reflects this fact. CP 4-8.

Even if this Court were to accept Northup's post hoc characterization of the trial court's interpretation of RCW 42.56.565(1), the use of the *Yousoufian* factors to determine whether an agency acted in bad faith under RCW 42.56.565(1) was error. The factors established in *Yousoufian v. Office of Ron Sims (Yousoufian V)*, 168 Wn.2d 444, 466, 229 P.3d 735 (2010), were designed solely to determine the appropriate amount of penalties under the PRA. These factors encompass concepts well beyond the historical definition of bad faith and include such irrelevant considerations as the public importance of the issue to which the request is related, the economic loss to the requester, and the lack of

clarity of the request. *See id.*; accord *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 398, 314 P.3d 1093 (2013). Furthermore, because bad faith is actually one of the *Yousoufian* factors, it would make little sense to require trial courts to use the *Yousoufian* factors to evaluate bad faith under RCW 42.56.565(1). Finally, RCW 42.56.565(1) was adopted after the Supreme Court decided *Yousoufian V*. Had the legislature intended to use the *Yousoufian* factors as part of the initial determination of whether an inmate is entitled to penalties, it could have done so explicitly. It did not; instead, it required a distinct finding of bad faith. Therefore, it would be error for a trial court to determine bad faith under RCW 42.56.565(1) by using the *Yousoufian* factors.

Even if this Court were to accept Northup's recharacterization of the trial court's approach, the trial court's written order and oral ruling indicate that it applied the wrong legal standard in interpreting "bad faith" and such a finding is unsupported by the factual record. The trial court's award of penalties should be reversed as a result.

**1. Under The Standards Applied In *Faulkner*, The Trial Court Abused Its Discretion In Concluding The Department Denied Northup The Debrief In Bad Faith**

The trial court erred in finding bad faith related to the debrief because it did not find the Department acted willfully or wantonly. CP 6: *Faulkner*, 332 P.3d at 1141 (requiring a willful or wanton act for bad

faith). Instead, the trial court's written findings indicate that it found the Department did not act recklessly. CP 6. Based on this finding, the Department's conduct did not rise to the level of bad faith as established in *Faulkner* which held that bad faith requires "a wanton or willful act or omission by the agency." *Faulkner*, 332 P.3d at 1141. A wanton act is one where the agency unreasonably or maliciously risks harm while being utterly indifferent to the consequences. *Id.* This standard is higher than simple or casual negligence. *Faulkner*, 332 P.3d at 1141. Therefore, the trial court's finding that the Department did not act with reckless noncompliance precludes a finding of bad faith.<sup>4</sup>

Northup incorrectly argues that the trial court found the Department acted recklessly in its nondisclosure of the debrief and that such a finding is sufficient to support bad faith. In fact, the trial court's written order states that "The Department did *not* intentionally act with reckless noncompliance." CP 6 (emphasis added); see *Shellenbarger v. Brigman*, 101 Wn. App. 339, 346, 3 P.3d 211 (2000) (noting written order controls over any inconsistency with oral ruling). Based on this finding, the trial court rejected any recklessness on the Department's part.

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<sup>4</sup> Additionally, the *Faulkner* court implied that wantonness is actually a higher standard than recklessness. *Faulkner*, 332 P.3d at 1140. Because the trial court did not find that the Department acted recklessly, this Court need not address whether a finding of recklessness would be sufficient for bad faith under RCW 42.56.565(1).

But even if the trial court had applied the proper interpretation of bad faith to its factual findings, the trial court's finding of bad faith would be an abuse of discretion because no reasonable person would find bad faith under the circumstances. *See Yousoufian V*, 168 Wn. 2d at 458-59 (noting a trial court abuses its discretion when it takes a view no reasonable person would take). The Department's redaction of sensitive prison gang information from the debrief of a confidential informant was not a willful or wanton act or omission. These redactions were made based on a reasonable interpretation of the statutory exemptions and case law — even if the Court ultimately were to find that interpretation to be in error— and were conducted in a good faith attempt to protect legitimate security concerns. *See King Cnty. v. Sheehan*, 114 Wn. App. 325, 356-57, 57 P.3d 307 (2002). No reasonable person could find that an agency that carefully reviews a 16-page sensitive document and makes precise redactions based on a reasonable view of the statutory exemptions acted in bad faith. The trial court abused its discretion in finding bad faith with respect to the debrief.

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**2. Under the Standards Applied in *Faulkner*, The Trial Court Abused Its Discretion In Concluding That The Department Denied Northup The March 5, 2014 Emails In Bad Faith**

The trial court's finding of bad faith related to the March 5, 2014 emails also was based on an incorrect interpretation of bad faith. Specifically, the trial court found bad faith based on its finding that the Department was negligent in providing the emails. CP 7. Negligence is insufficient to support a finding of bad faith under *Faulkner*.

Northup recognizes that the trial court referred to negligence when discussing this violation, and he argues that the trial court simply misspoke because "she understood that negligence is insufficient to make a finding of bad faith and she made a finding of bad faith for both groups." Northup's Brief, at 38. Northup cites II RP 13 in support, but nothing on that page supports his argument. And nothing in the transcript of the trial court's oral ruling states the standard that the court applied to determine bad faith or indicates that the trial court understood that negligence was insufficient to establish bad faith.

Moreover, the trial court's written order controls over any apparent inconsistencies with its oral ruling. *See e.g., Shellenbarger*, 101 Wn. App. at 346. The written order is unequivocal when it states "There was negligence in failing to produce these records in a timely manner. The

Court finds bad faith on that basis.” CP 7. Based on the trial court’s finding that the Department was simply negligent in its production of the emails, the trial court incorrectly determined that the Department acted in bad faith under *Faulkner*.

Once again, even had the trial court applied the correct standard, it abused its discretion by taking a view of the facts that no reasonable person would take. The Department did not willfully or wantonly delay the production of the March 5, 2014 emails. Instead, it took appropriate care to review the emails before producing them. And any delay in producing the emails was the result of the Department’s need to carefully review these sensitive documents in the course of handling a voluminous and complicated public records request, while timely providing hundreds of other pages responsive to this request, and while also meeting its obligations under the PRA with respect to other public records requests. Based on the evidence presented, no reasonable person would find that the delay in the production of the March 5, 2014 emails constituted bad faith.

**F. Northup’s Claims Related To His 2013 Request Were Premature Because There Was No Final Agency Action**

Northup’s claims related to his 2013 request are premature because a cause of action under the PRA does not arise until the agency has taken final agency action. *Hobbs v. State*, --- Wn. App. ---, 335 P.3d 1004, 1009

(2014). In the trial court, the Department repeatedly explained that Northup was challenging the ongoing production of records responsive to a large and complex public records request. Although the Department couched this argument as a ripeness issue, the Department anticipated the rationale of the *Hobbs* court when it argued that the Department's action was not final and, therefore, not ripe for judicial determination. CP 132, 411. Northup's claims were premature.

Northup argues that *Hobbs* does not apply because every action Northup took was in response to the Department's actions. Northup's Brief, at 40. This argument is not supported by *Hobbs*. *Hobbs*, 335 P.3d 1004. In *Hobbs*, the court looked to the plain language of RCW 42.56.520 and determined that a requester was not permitted to initiate an action until the agency has taken some form of final action in denying the request. *Hobbs*, 335 P.3d at 1009. The factual record demonstrates that Northup's action here, like the action in *Hobbs*, was premature.

In fact, Northup actually filed the lawsuit prior to submitting the PRA request at issue in this appeal. CP 563-65. During the litigation, Northup apparently submitted the request "[a]fter hearing the Department claim that the debriefing email was not responsive to my 2010 request." CP 351. This new nine-part request was extremely broad. CP 50, 437-39. Prior to even receiving the first installment of records, Northup moved to

amend his complaint to challenge the 2013 request. CP 424, 554-56. On June 19, 2013, nine days after the Department produced its first installment of records responsive to Northup's 2013 request, Northup filed an amended complaint. CP 545-548. At that point, there was no final agency action. The Department was continuing to produce records in installments. Then after being informed that the 16-page debrief was going to be produced—and prior to actually seeing the redactions claimed by the Department—Northup moved to amend his complaint to challenge the Department's production of the debrief. CP 426, 537-544. In fact, the Department was still producing regular installments at the time of the final hearing in the trial court. CP 49-50.

This case demonstrates the untenable position that public agencies are placed in when a requester challenges a response to a voluminous request while the response is ongoing. In such cases, the requester's claims are a moving target. Almost a year after Northup filed this action, the Department sought to move this case along by filing a motion for summary judgment, CP 395-416, but Northup wanted additional time to conduct discovery on some of his claims. CP 121. Three months later, when he filed his cross motion for summary judgment, Northup also challenged an installment, the March 5 emails, that had been produced less than three weeks prior to his cross motion. It is inefficient for courts to

monitor requests which are ongoing and for which the agency is continuing to produce records. This approach results in piecemeal litigation that is inefficient for courts and the parties. Such an approach is inconsistent with the PRA that encourages cooperation between the agency and the requestor rather than gamesmanship. *See Hobbs*, 335 P.3d at 1011 n.4. Because Northup's claims related to his 2013 request were premature, the trial court erred in denying the Department's motion for summary judgment and granting Northup cross-motion for summary judgment.

**G. If The Court Finds The Department Violated The PRA And Acted In Bad Faith, The Trial Court Did Not Abuse Its Discretion In Setting The Penalty Amount**

RCW 42.56.550(4) gives courts discretion "to award [a requestor] 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." The award of penalties is reviewed for abuse of discretion. *Yousoufian v. Office of Ron Sims (Yousoufian I)*, 152 Wn.2d 421, 430-31, 98 P.3d 463 (2004). Here, the trial court despite not finding bad faith under RCW 42.56.565(1), exercised its discretion under RCW 42.56.550(4) to award penalties for the denial of two groups of records. CP 83. After considering the *Yousoufian* factors, the court exercised its discretion to award penalties for the withholding of the 16-page debrief. CP 83-84. It determined that the

appropriate penalty period for the debrief was July 15, 2013, until April 16, 2014. CP 83-84, II RP 9-10. Northup has appealed the trial court's determination of the range of penalty days but not the actual per day penalty. Northup's Brief, at 19-21, 37-38.

Northup cites *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421 (*Yousoufian I*) (2004), for his argument that the trial court was required to award penalties for each day a record was wrongfully withheld. Northup's Brief, at 19-21. In *Yousoufian I*, the Supreme Court concluded that because RCW 42.56.550 required a penalty for each day, a trial court could not reduce the number of penalty days. *Yousoufian I*, 152 Wn.2d at 438.

The statute *Yousoufian I* interpreted was amended in 2011 to remove the minimum penalty requirement. Laws of 2011, ch. 273, § 1. This provision now gives courts significant discretion to award penalties, including the ability to award zero dollars in penalties per day. RCW 42.56.550(6). Just as a trial court has discretion to award zero penalties, it now has the discretion to reduce the number of penalty days because a reduction in penalty days is the equivalent of awarding zero dollars for a given time period. To conclude otherwise would require trial courts to engage in unnecessarily formalistic calculation of penalties to account for days for which the court, in its discretion, would award zero penalties.

Northup's argument relies on the faulty premise that a court must award penalties for each day that a record is wrongfully withheld. After the amendment of RCW 42.56.550, this is no longer the case. Because the trial court properly exercised its discretion in determining that a penalty was appropriate only from July 15, 2013, until April 16, 2014, based on the *Yousoufian* factors, it did not abuse its discretion.

Northup also takes issue with both the trial court's starting and ending date for penalties. The trial court used a start date of July 15, 2013. CP 6. This date was supposedly the date that the Department sent a cost letter for the second installment of records and the same day that Jamie Gerken sent an email to Denise Vaughan asking for review of the redactions. CP 206, 475; II RP 9-10.<sup>5</sup> The trial court appeared to conclude that this date was the date that the debrief should have been provided. II RP 9-10.

The Department does not concede that any penalty should have been awarded. But if a penalty had been warranted, this start date was not an abuse of discretion. Penalties can be awarded for days that a requester was wrongfully denied the right to inspect or copy the record. RCW

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<sup>5</sup> In actuality the date of the email was July 17, 2013. CP 206. The date used by the trial court was the date that Ms. Gerken sent Denise Vaughan a task to review some other emails. CP 207. The trial court inadvertently included 2 extra penalty days in its calculation. Because the Department did not appeal the order and Northup actually benefits from the trial court's miscalculation, this is not a justification for reversal.

42.56.550(4). As explained above, the trial court found the debrief should have been provided in July 2013, and the Department's withholding of the debrief became wrongful after it failed to provide it then. This approach is consistent with other PRA case law. *See Zink v. City of Mesa*, 162 Wn. App. 688, 712-13, 256 P.3d 384 (2011). It is also consistent with statements in Northup's cross motion for summary judgment that appear to concede that July would be an appropriate starting point for penalties related to the debrief. CP 330. Finally, this is also consistent with the trial court's method in calculating penalty days for the March 5, 2014 emails; Northup's does not contest such an approach was appropriate for those emails even though the trial court used the same logic.

Although Northup argues that the trial court should have used a start date of April 29, 2013,<sup>6</sup> Northup's Brief, at 20, Northup presents no evidence that the debrief could have been reasonably available for production on that day. Indeed, the only evidence before the trial court establishes that the Department was still reviewing the document to determine what information was exempt from disclosure. CP 147-48. Therefore, the trial court did not abuse its discretion in setting a start date for penalties of July 15, 2013.

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<sup>6</sup> This was the date was the Department's letter to Northup with the cost of the first installment. CP 423.

Northup also argues that the trial court abused its discretion in making the April 16, 2014, the ending point for penalties. Northup's Brief, at 20-21. The trial court determined that penalties should end on that day because that was the day of the hearing on the parties' motions for summary judgment, and the trial court did not include the 30-day period it took for the trial court to render its decision. II RP 9-10. This approach was appropriate because agencies should not be penalized for delays that are not attributable to them or for exercising their appeal rights. Relying on *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010), Northup argues that this approach was in error. However, *Sanders* also was decided before the 2011 amendment to RCW 42.56.550. As the Court recognized in *Sanders*, penalizing an agency for a delay caused by another party or the court is harsh. *Sanders*, 169 Wn.2d at 864. With the amendment to RCW 42.56.550, trial courts now have the discretion to ameliorate this harsh result, and the trial court in this case appropriately exercised its discretion to do so.

Because the trial court should not have awarded penalties, the court's decision to award penalties should be reversed. But if this Court determines that Northup was entitled to penalties, the trial court did not abuse its discretion in awarding penalties from July 15, 2013, until April 16, 2014.

**H. Northup Failed To Designate The January 2014 Order In His Notice Of Appeal And The Court Should Not Consider His Claims Related To His 2010 Public Records Request**

Under RAP 5.3, a notice of appeal must “designate the decision which the party wants reviewed.” An appellate court can review trial court decisions not designated in the notice of appeal if the decision 1) prejudicially affected the order designated in the notice of appeal, and 2) occurred before the court accepted review. RAP 2.4(b). A decision prejudicially affects an order if the order would not have happened but for the earlier decision. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002).

Here, Northup’s notice of cross appeal designates one order: the Order signed June 12, 2014, and entered June 13, 2014 granting Plaintiff’s summary judgment motion and denying Defendant’s summary judgment motion. CP 566. However, in his opening brief, Northup raises arguments about the trial court’s January 7, 2014 order. Northup’s Brief, at 11-19. That order dismissed Northup’s claims related to a 2010 public records request because the trial court found such claims barred by the statute of limitations. CP 334-35. The January order that Northup failed to designate in his notice of appeal does not prejudicially affect the subsequent June order that Northup actually designed in his notice of appeal. The claims and defenses related to the public records request addressed in the January

order were distinct from those at issue in the June order. Therefore, because Northup did not designate the January order in his notice of appeal, the court should not review the arguments made by Northup about that decision.

**I. The Trial Court Properly Dismissed Northup's Claims Related To His 2010 Request As Barred By The Statute of Limitations**

RCW 42.56.550(6) states that a claim under the PRA "must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis." Under the PRA, records are "produced" when they are "made available for inspection and copying." *Sanders v. State*, 169 Wn.2d 827, 836, 240 P.3d 120 (2010). In *Tobin v. Worden*, 156 Wn. App. 507, 514-15, 233 P.3d 906 (2010), this Court interpreted this provision narrowly and ruled that the one-year statute of limitations applies only when an agency claims an exemption or produces requested records in a piecemeal manner, not when an agency produces all requested records in a single production. *See Tobin*, 156 Wn. App. 514-15; *But see Bartz v. State Dep't of Corr. Public Disclosure Unit*, 173 Wn. App. 522, 538, 297 P.3d 737 (2013).

However, RCW 4.16.130 provides a "catch-all" statute of limitations that states "[a]n action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have

accrued.” RCW 4.16.130; see *Johnson v. DOC*, 164 Wn. App. 769, 778, 265 P.3d 216 (2011). In *Johnson*, this Court determined that the two-year statute of limitations in RCW 4.16.130 barred a claim related to a single production of records if the PRA’s one-year statute of limitations did not apply. *Id.* In this case, the trial court applied the two-year statute of limitations, but Northup’s claims would be barred under either statute of limitations.

**1. The Two-Year Statute Of Limitations Bars Northup’s Claims**

The trial court correctly concluded that Northup’s claims relating to his October 14, 2010 public records request were barred by the two-year statute of limitations. In *Johnson v. State Department of Corrections*, 164 Wn. App. 769 (2011), this Court discussed the application of the PRA’s statute of limitations found in RCW 42.56.550 and the two-year catch-all statute of limitations found in RCW 4.16.130 to a single production of documents. *Johnson*, 164 Wn. App. at 219-20. The *Johnson* Court concluded that the two-year statute of limitations applied in circumstances where the PRA’s one-year statute of limitations may not. *Id.* at 220.

As in *Johnson*, this Court does not need to address the application of the PRA’s one-year statute of limitations because Northup’s claims are

barred by the two-year catch-all statute of limitations. In response to Northup's 2010 request, the Department sent Northup a letter on November 3, 2010, notifying him that it did not find any responsive documents to part 1 of his request and providing a cost estimate for records responsive to part 2 of his request i.e. the five copies of his original request letter and the Department's initial response. CP 421. The Department never received payment for these five copies. CP 421. Northup did not file this action until December 10, 2012, more than two years later. CP 120. Therefore, as the trial court concluded, his claims related to the 2010 public records request are barred by the two-year statute of limitations.

**2. If The Court Does Not Apply The Two-Year Statute Of Limitations, The Court Should Apply The PRA's One-Year Statute Of Limitation**

If the Court disagrees with *Johnson* and does not apply a two-year statute of limitations, the Court should apply the PRA's one-year statute of limitations and find that Northup's claims are barred by that provision. *See Otis Housing Ass'n, Inc. v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009) (courts can affirm on any ground); *Gronquist v. State*, 177 Wn. App. 389, 396 n.8, 313 P.3d 416 (2013) (same). To the extent this holding would require the Court to reconsider its decision in *Tobin*, it should do so.

The PRA's statute of limitations requires claims to "be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis." RCW 42.56.550(6). In *Tobin*, this Court held that production of a single record that was the entirety of a records request response did not trigger the one-year statute of limitations set out in RCW 42.56.550(6). *Tobin*, 156 Wn. App. at 513. Stating that it must give effect to the plain meaning of the provision "as an expression of legislative intent," the Court held that the one-year statute of limitations can only be "triggered by one of two occurrences: (1) the agency's claim of an exemption or (2) the agency's last production of a record on a partial or installment basis." *Id.* Consequently, this Court reasoned that an agency's production of "a single document that is the entirety of the requested record" does not trigger the statute of limitations. *Id.* at 514.

However, this reading of RCW 42.56.550(6) renders the statute of limitations a nullity if an agency responds to a public records request by producing all responsive records in their entirety at one time. This nonsensical result cannot have been what the legislature intended when it amended RCW 42.56.550(6) to shorten the limitations period from five years to one year. In 2005, the legislature amended RCW 42.56.550(6) for the purpose of shortening the limitations period for actions brought under the PRA to one year. *Tobin*, 156 Wn. App. at 512 (citing RCW

42.56.550(6) (2005) (amended by Laws of 2005, ch. 483, § 5)). The *Tobin* decision essentially concludes that the legislature, in so doing, also intended to eliminate the statute of limitations entirely for situations in which an agency responded to a public disclosure request by providing the sole record responsive to the request, without redacting or claiming any exemptions. Such a result is absurd. *State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994) (noting that courts must construe statutes to avoid “unlikely, strange or absurd consequences.”); *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 6, 721 P.2d 1 (1986) (same). The Legislature clearly did not intend for this result when it deliberately reduced the statute of limitations from five years to one year.

The logical conclusion is that the Legislature intended all public records claims to be subject to the one-year statute of limitations and listed the two categories only to specify when the statute began to run—not to exclude a significant number of PRA cases from the one-year limitation. To conclude otherwise (absent the two-year catch-all statute of limitation recognized in *Johnson*) would yield unreasonable, illogical, and absurd consequences. First, *Tobin*’s approach would discourage state and local agencies from responding in full to records requests in a single production. Rather, to trigger a limitation period and to avoid the risk of excessive penalties associated with ancient claims, a prudent agency would be

motivated to produce records in installments regardless of the size of the production or the capacity to rapidly assemble the full production. While this approach is permitted by the PRA, it would engender additional administrative costs, delay responses, and inconvenience requestors by requiring multiple inspections or delaying receipt of copies that might otherwise have been made immediately available.

Another consequence would be the difficulty or impossibility of agencies being able to defend stale—or even ancient—claims. An agency has the burden of proof to establish its compliance with the PRA, no matter how stale or ancient the claim. RCW 42.56.550(1), (2). However, public agencies do not retain all of their records indefinitely; they are authorized to destroy records that have reached the end of their designated retention period. *See generally* RCW 40.14. The reasoning of *Tobin* effectively nullifies retention schedules adopted under RCW 40.14, since any agency that failed to permanently retain all public records would be unable to defend itself against a claim filed years later alleging that not all records were properly located, assembled, and provided. This interpretation of RCW 42.56.550(6) would permit a requestor who receives a single, ostensibly final production of records to sue years, if not decades later, on an allegation that not all records were located, assembled

and provided.<sup>7</sup> The untenable consequence of that interpretation is not that agencies complying in good faith with RCW 40.14 would lose these suits, but, worse, that they would be unable to even attempt a defense.

Interpreting the one-year limitation period to apply to single installments of records without a claim of exemption is consistent with the decisions reached by other courts regarding the proper interpretation of RCW 42.56.550(6). In *Bartz v. State Department of Corrections Public Disclosure Unit*, 173 Wn. App. 522, 537-38, 297 P.3d 737 (2013), the court recognized that there were two potential alternatives in applying the PRA's statute of limitations to a single production of records: 1) the PRA's statute of limitations is triggered by a single production of records or 2) a plaintiff's claims related to a single production of records are not time bared because no statute of limitations applies to a PRA action based on an agency's production of a single installment. The Court rejected the second possibility because "[i]t would be absurd to conclude that the legislature intended to create a more lenient statute of limitations for one category of PRA requests in light of its 2005 deliberate and significant shortening of the time for filing a claim from five years . . . to one year." *Id.* at 536.

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<sup>7</sup> RCW 42.56.100 precludes an agency from destroying a record, in compliance with the applicable retention schedule, until a public record request is "resolved." Without a statute of limitations, a public records request can never be "resolved."

The *Bartz* court considered the *Tobin* decision but concluded the legislature intended RCW 42.56.550(6) to apply to PRA requests completed by an agency's single production of records. *Id.* at 538. The Court concluded situations in which a single record is produced with no exemptions fell within the scope of "last production on a . . . partial basis." *Id.* at 537-38. If the Court rejects application of the two-year statute of limitations recognized in *Johnson*, 164 Wn. App. at 777-79, this Court should follow *Bartz* and find Northup's claims are barred by the PRA's one-year statute of limitations. The Department produced a single installment of records on November 3, 2010, and Northup did not file this action until December 10, 2012. CP 120, 420-21. Northup's claims are barred under the PRA's one-year statute of limitations,

**3. The PRA's Statute of Limitations Does Not Warrant Application Of A Discovery Rule**

Northup does not contest that his claims would otherwise be barred by both the one- and two-year statute of limitations. Instead, he argues that the Court should adopt a discovery rule for the PRA. Northup's Brief, at 11-19.

This Court should decline the invitation to create a discovery rule for the PRA's statute of limitations. Statutes of limitations are intended to promote finality. *Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 382.

166 P.3d 662 (2007); see also *Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt P.C.*, 109 Wn. App. 655, 662, 37 P.3d 309 (2001). The “obvious” purpose of such statutes is to set a definite limitation on the time available to bring an action, without consideration of the merit of the underlying action. *Dodson v. Cont’l Can Co.*, 159 Wash. 589, 596, 294 P. 265 (1930); see also *Atchison*, 161 Wn.2d at 382. Statutes of limitations exist “to shield defendants and the judicial system from stale claims;” plaintiffs are not permitted to “sleep on their rights” because of the risk that “evidence may be lost and witnesses’ memories may fade.” *Crisman v. Crisman*, 85 Wn. App. 15, 19, 931 P.2d 163 (1997). “[C]ourts will not, as a general rule, read into statutes of limitation an exception which has not been embodied therein, however reasonable such an exception may seem, even though the exception would be an equitable one.” *O’Neil v. Estate of Murtha*, 89 Wn. App. 67, 74, 947 P.2d 1252 (1997).

The discovery rule does not apply in every case. *Id.* For a few causes of action the legislature has directed that the statute of limitations are subject to a discovery rule, under which a cause of action accrues when the plaintiff knew or should have known enough facts existed to support a right to sue. See e.g., *McLeod v. NW. Alloys, Inc.*, 90 Wn. App. 30, 35, 969 P.2d 1066 (1998) (discussing the Uniform Trade Secrets Act); RCW 4.16.350(3) (medical negligence); and RCW 4.16.080(6)

(misappropriation of funds). In those cases in which courts have applied a discovery rule, these courts frequently found support for the discovery rule in the statutory language of those provisions. *See e.g., McLeod*, 90 Wn. App. at 35-36; *Ruth v. Dight*, 75 Wn.2d 660, 666-68, 435 P.2d 631 (1969).

The legislature knows how to write a discovery rule into a statute of limitations. If it intended for a discovery rule to apply under the PRA, the legislature could have said so in 2005 when it amended the statute of limitations to one year, or in 2011, when it made various legislative changes to the PRA, but it chose not to. Rather, the legislature provided a precise trigger in RCW 42.56.550(6).

Northup raises three arguments as to why a discovery rule should be superimposed on the PRA. None of them present a persuasive reason for a discovery rule. First, Northup argues that a discovery rule is appropriate when a party must rely on an industry's self-reporting. Northup's Brief, at 13-14 (*citing U.S. Oil v. Dep't of Ecology*, 96 Wn.2d 85, 633 P.2d 1329 (1981)). Unlike the pollution regulations at issue in *U.S. Oil*, the PRA does not depend on self-reporting. PRA requests are initiated by persons seeking records, not by agencies holding records, and the PRA provides multiple tools for a person requesting records to force agency responses. For example, unlike the Department of Ecology in *U.S. Oil*, a requester is not precluded from bringing a suit until such time as he

or she receives a response from the agency—a requester can bring suit to compel a response, which places all burdens of proof on the agency. RCW 42.56.550. *U.S. Oil* is distinguishable as a result.

Second, Northup argues that agencies should not be permitted to benefit from concealment of records. Northup's Brief, at 15-16. This argument falsely assumes agencies benefit by avoiding the requirements of the PRA. An agency that disregards the requirements of the PRA is taking a sizeable political and financial risk. With the PRA's strict liability, daily penalties, and mandatory attorney's fees, public agencies have strong incentives to comply with the PRA's stringent requirements. Mistakes in compliance are inevitable, but they do not benefit the agency that errs. If an agency does conceal documents, its action can still be challenged and it will have to prove compliance; the requester simply must bring such an action within one year of the agency's last response. Northup's argument that a discovery rule is required because an agency benefits from concealment of public records or PRA violations is simply not accurate.

Northup's third argument is that a discovery rule is warranted because there is a special relationship between the public and its government. Northup's Brief, at 16-18. If it were true, it would require a discovery rule in any actions against state or local governments. Under

Northup's theory, there would never be finality for actions against state or local government, effectively invalidating all applicable statutes of limitations involving the government. Neither the courts nor the legislature have ever applied the discovery rule so broadly and Northup provides no compelling reason for this Court to be the first to do so

Furthermore, the application of a discovery rule is unnecessary to prevent any grave injustice. In evaluating the need for a discovery rule, courts have balanced the possibility of stale claims against the unfairness of precluding justified causes of actions. *See e.g., 1000 Va. Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 575, 146 P.3d 423 (2006). When the court balances these factors, the court should conclude that a discovery rule is unnecessary in the PRA context. Unlike cases in which courts have adopted a discovery rule, the requester in a PRA action knows the necessary facts required to determine whether the PRA may have been violated. The requester knows of the nature of the request as well as the full response by the agency. The requester also knows exactly when the statute of limitations on any PRA claim will run. For instance in this case, based on the language in the PRA's statute of limitation, Northup knew that any action challenging the Department's response would need to be filed by November 3, 2011. Such information is sufficient to allow a requester to challenge an agency's response to his PRA request.

Finally, the statute of limitation in the PRA context ensures that actions are filed in a timely manner to serve the goal of prompt public disclosure without resulting in disproportionate individual financial gain at the expense of other citizen taxpayers. The goal of the PRA, after all, is to provide access to records, not penalties. The PRA's statute of limitations does not preclude requestors from obtaining what they ultimately seek—disclosure of records. It simply prevents a requestor from obtaining daily penalties and attorney fees for noncompliance. A requestor can always make a new request for records he believes were not included in the response to his original request, and thereby initiate a new statute of limitations period as well. In fact, this case demonstrates that fact. When Northup allegedly discovered that there were additional records that he believed were responsive to the first request, he submitted a subsequent request.<sup>8</sup>

It is reasonable for the legislature to have established definite time limits on the ability to seek penalties and costs, both of which are borne ultimately by tax payers. Since penalties accumulate over time under the Act, requiring requestors to file a claim for penalties and costs within one year of production simply prevents a requestor from holding back and

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<sup>8</sup> The Department disputes that the debrief was actually responsive to Northup's 2010 request which sought any document describing the details of any formal deal or agreement between himself and the Department. An examination of the debrief demonstrates it would not be responsive to such a request.

seeking higher penalties as well as provides finality and certainty for agencies and the taxpayers regarding liability for potential penalties and costs. Under Northup's theory, agencies could be subject to PRA lawsuits decades down the road—beyond the retention schedule of applicable records—as long as the requester was not subjectively aware of the existence of other responsive records. This interpretation would prevent agencies from being able to defend against such lawsuits. Because the language in the PRA does not include a discovery rule and a discovery rule is not warranted, this Court should decline Northup's invitation to create one.

The trial court correctly concluded that Northup's claims related to his 2010 request were barred by the statute of limitations, and the Court should affirm the trial court's dismissal of those claims.

**J. Northup's Argument That Findings Of Fact And Conclusions Of Law Are Not Required In This Case Is Contrary To Well-Established Case Law**

The trial court erred by failing to enter findings of fact and conclusions of law in its order awarding attorney's fees to Northup. Department's Brief. at pp. 41-42.

Northup's response initially focuses on whether he is entitled to attorney's fees. The Department does not dispute that a requester who prevails in a PRA action is entitled to reasonable costs and attorney's fees

under RCW 42.56.550(4). But the Department does dispute the amount of fees awarded in this case. First, it argues that the fees must be adjusted appropriately if the Department prevails on appeal. Second, the trial court's failure to enter findings of fact and conclusions of law was error warranting reversal and remand.

Northup argues that findings of fact and conclusions of law are required only when there is an insufficient record on appeal. Northup's Brief, at 40-41. Northup cites no case to support this proposition, and it is contrary to well-established case law. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998), *abrogated on other grounds by Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 272 P.3d 802 (2012); *Day v. Santersola*, 118 Wn. App. 746, 770, 76 P.3d 1190 (2003); *Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828, 847-48, 9 P.3d 948 (2000); *Eagle Point Condominium Owners Ass'n v. Coy*, 102 Wn. App. 697, 715-16, 9 P.3d 898 (2000). Indeed, as *Mahler* indicates, findings of fact and conclusions are required to establish an adequate record on appeal. *Mahler*, 135 Wn.2d at 652. In other words, findings of fact and conclusions of law are the sine qua non of an adequate record on appeal.

Northup then goes on to suggest that the Department was not prejudiced by the trial court's failure to enter findings of fact and conclusions of law; he even suggests that the Department benefitted

because Northup's attorney would have been able to bill additional hours required to prepare such an order. Northup's Brief, at 41 n.16. In fact, the Department was prejudiced. The Department made five specific arguments about attorney's fees and costs to the trial court. CP 31-35. In response, Northup modified his request, conceding—at least in part—to three of those arguments. CP 25-27. However, Northup contested the other arguments made by the Department. CP 25-27. The trial court, without explanation or appropriate findings, awarded \$20,000 in attorney's fees. CP 11-12. This sum was not proposed by either party.

Because neither party was arguing for this amount, and because the trial court did not explain its award, it is impossible to determine the trial court's rationale in awarding these fees. The Department was prejudiced by this failure because the lack of findings of fact and conclusions of law prevents the Department from arguing before this Court that the trial court's decision to award an amount of fees was an abuse of discretion. Such arguments are foreclosed by the simple fact that the trial court's reasoning is a mystery. Therefore, at the very least, the Court must reverse and remand this order to the superior court to enter findings of fact and conclusions of law. If the Court reverses on the merits of the PRA violations as well, it should remand and order the trial court to dismiss the action without any payment of attorney's fees and costs.

### III. CONCLUSION

The Department did not violate the PRA in its handling of Northup's request and Northup is not entitled to daily penalties, attorney's fees, or costs. This Court should reverse the trial court's ruling on the parties' motions for summary judgment and remand to the trial court with instructions to enter an order finding the Department did not violate the PRA and dismissing Northup's claims with prejudice and without costs.

If the Court were to find that the Department violated the PRA, it should find that the Department did not act in bad faith in denying Northup records under RCW 42.56.565(1) and that Northup therefore is not entitled to daily penalties. In that circumstance, the Court should remand to the trial court with instructions to enter an order finding the Department did not act in bad faith and Northup is not entitled to daily penalties.

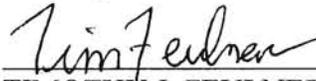
In either circumstance, this Court should additionally hold that the trial court did not err in dismissing Northup's claims related to his 2010 request because the trial court correctly concluded that these claims were barred by the statute of limitations.

Finally, if the Court determines there should be some award of attorney fees, the Court should remand to the trial court with instructions

to properly evaluate Northup's request for attorney's fees and enter the required findings of fact and conclusions of law.

RESPECTFULLY SUBMITTED this 14th day of January, 2015.

ROBERT W. FERGUSON  
Attorney General



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TIMOTHY J. FEULNER, WSBA #45396  
Assistant Attorney General

**CERTIFICATE OF SERVICE**

I certify that I served a copy of the foregoing document on all parties or their counsel of record as follows:

- US Mail Postage Prepaid
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I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED this 14th day of January, 2015, at Olympia, WA.

  
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CHERRIE MELBY  
Legal Assistant

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SPRINGFIELD, MA