

No. 72256-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WASHINGTON DEPARTMENT OF CORRECTIONS,

Appellant,

v.

ROBERT NORTHUP,

Respondent/Appellee.

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RESPONSE/OPENING BRIEF OF
APPELLEE/RESPONDENT NORTHUP

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ORIGINAL

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I. INTRODUCTION

In 2010, Northup had agreed to be debriefed on his prior membership in a prison gang. He made a request later in the year pursuant to the Public Records Act (“PRA”) for any document containing information on the debriefing session. Such possession was denied by the Department of Corrections (“the Department”). In 2012, the Department of Corrections provided an unredacted copy of an email detailing the debriefing session to a third party and Northup’s life was threatened. He was placed in solitary confinement for his protection. Northup then requested pursuant to the PRA a copy of the debriefing email and other documents he believed related to his life being threatened.

Although he lost on the 2010 request based upon the statute of limitations, Northup prevailed at summary judgment on two issues: First, the debriefing email labeled Group I was not timely provided and it was improperly redacted, Second, the Department failed to timely turn a set of emails.

The superior court made an error when it denied the application of the discovery rule. A second error was made when it limited the number of days that penalties being awarded for the wrongfully withheld debriefing email.

II. ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR.

1. The superior court erred in granting the Department of Correction's partial summary judgment motion on January 14, 2014 when it denied Northup's defense to the statute of limitations that the discovery rule permitted the court to decide whether or not the Department's response to his October 14, 2010 request was a violation of the PRA.
2. The superior court erred when granting Northup's summary judgment motion on May 16, 2014 when it failed to give Northup penalties starting from April 29, 2014 for the Group I documents?
3. The superior court erred when granting Northup's summary judgment motion on May 16, 2014 when it failed to give Northup penalties past April 16, 2014 for the Group I documents?

B. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR.

1. Can the discovery rule set an accrual date past the statute of limitations in Public Records Act cases when the requester has no knowledge that a document does exist and the agency has denied the existence of that document? (Assignment of Error 1.)
2. Should the starting date for penalties awarded pursuant to RCW 42.56.550(4) be the date when a reasonable search and possible redaction should have been completed? (Assignment of Error 2.)
3. Should the ending date for penalties awarded pursuant to RCW 42.56.550(4) be the final date the records are finally provided the requester? (Assignment of Error 3.)

III. RESTATEMENT OF THE CASE

Northup wanted to get away from his prior gang activity in prison. To do so, he would have to agree to be debriefed on his gang activity. CP 341-44. Northup counted on the removal of the Security Threat Group (“STG”) or gang designation to give him a chance for a lower custody level and greater programming opportunities like work, school and prison industries. It would also protect him from guilt by association if one of the gang members breaks a prison rule. CP 349-352.

To get rid of his STG designation, Northup was debriefed by various individuals from the Department of Corrections, Federal Bureau of Investigations and state law enforcement in July, 2010. Northup was informed that he would be removed from STG status. He was also assured that nothing about the meeting would be put in writing because if it became public knowledge, his life would be in danger. *Id.* Contrary to what he had been promised, an email was written summarizing the debrief. CP 504-19

Northup made a Public Records Act request on October 14, 2010. He asked if there was any document “describing the details of any formal ‘deal’ or ‘agreement’ between [himself] & the Dept of Corr (or) [himself] & government officials.” CP 430. On November 3, 2010 Northup was informed that there were no responsive records. CP 435.

An individual, Amanda Coss, submitted a request dated January 25, 2011. She asked for various records that would pertain to Northup from January 1, 2010 to December 31, 2010. CP 445. The Department subsequently released various records about Northup including a 16 page unredacted email which documented the details of Northup's STG debrief. CP 446.¹

Northup was placed in administrative segregation on July 19, 2012. *Id.* After a few days, he was informed by the Department that a debriefing document existed and it had been released unredacted to a third party. Because of this blunder by the Public Records Unit, there were threats on his life. Timothy Thrasher from investigations at headquarters then visited Northup August 17, 2012. He told Northup that the Department had made a big mistake releasing the debriefing document. Northup then requested a copy of the document so he could see what information had been disseminated but Thrasher refused to let him see the document. CP 349-352.

This was the first time Northup learned a written record existed of the debriefing session. He previously had not been concerned because he had been told such a document did not exist in 2010. If he had known the

¹The Department could have notified Northup at that time that the request had been made so that he possibly could have taken legal action but it did not.

document had existed, he would have tried to get it sealed in a court file so it could not be disclosed and get him killed. *Id.* He repeatedly asking for a copy of the document so he could see what had been written down. After being continually denied, Northup filed this lawsuit December 10, 2012, while still in administrative segregation. CP 561-565. In the lawsuit, he challenged the denial that any records existed to meet the criteria of his October 14, 2010 request. *Id.*

Northup then made another PRA request on February 14, 2013. CP 437. In this request he asked for various documents including the debriefing email from FBI Agent Rollins to STG specialist William Rielly (Riley) and emails sent to the Department by Agent Rollins. He warned that any attempt to either redact or withhold the document, in light of the events related to the release of this document, would demonstrate bad faith on the part of the Department. *Id.*

Northup was notified on April 29, 2013 that documents responsive to items six and seven were available. CP 454-55. After receiving these documents, he informed the Department it was unreasonable that items 1-4 and 7-9 were still not compiled. CP 457. He notified the Department that April 29th was the due date for each item. Northup wrote a second letter stating the Department should have turned over all the records by then. He

emphasized that he needed items numbered one through three more than the rest. CP 459-60.

Northup moved to amend the complaint on June 21, 2013 based upon the failure of the Department to provide the debriefing email. CP 554-60. The motion was granted and a first amended complaint was filed. CP 545-549.

Jamie Gerken from the Department's Public Disclosure Office searched for emails sent by Agent Rollins. CP 198, p. 8. On July 9, 2013, Gerken emailed Denise Vaughan, informing her that she had found 27 responsive emails and that she would like to include Item 1, the debriefing email, which had previously approved redactions. CP 206.

Gerken made a search of the email archive vault was made using search terms. CP 198, p. 7-8.² On July 15, 2013, Gerken tasked Vaughan to review her redactions of the emails responsive to Item 2. CP 207. In response to a letter from Ms. Gerken dated July 10, 2013, Northup asked for a specific deadline for Item 1. CP 478. Northup was subsequently informed when he received the Item 2 documents that the Item 1 document was next for disclosure and the Department would respond by September 3, 2013. CP

²Gerken started with the document that were the "easiest to gather and provide." CP 198, p. 6. These included the emails since they were redacted by July.

482. Because she could not get her redactions verified, she just sent Northup the unredacted documents to Item 2. CP 201, p. 14. There were 16 responsive documents provided. CP 208-24. Northup again wrote warning the Department not to redact or withhold the document. He threatened legal action because it had already been released to his detriment without his knowledge or permission and its existence previously denied. CP 484. On August 27, 2013, Gerken emailed Vaughan asking if she can now deny the debrief in its entirety. She stated that she needed to do one or the other. CP 225.

The Department informed Northup by letter dated September 3, 2013, that the records were available. CP 486-87. On September 4, 2013 his attorney, Michael Kahrs, sent a check for the records. CP 489. Northup was informed by letter dated September 16, 2013 that he would not be receiving Item 1 because it needed to be reviewed, even though the document had already been redacted. CP 491.

Northup moved to file a Second Amended Complaint based upon the failure of the Department to timely provide the debriefing email. Upon receiving this response, Northup's attorney emailed counsel for the Department on September 18, 2013, and informed her that the Department was expected to provide the 16-page document by September 20, 2013. CP 447. The amended complaint was filed October 10, 2013. CP 528-532.

A letter was sent to Northup care of Northup's attorney dated October 14, 2013, informing him that the 16 pages were ready for reviewing. CP 495-96. The Department was sent a check by Northup's attorney by letter dated October 17, 2013. In this letter, he advised that he expected the Department not to make redactions to the debriefing email. CP 498. The Department ignored both Northup and Northup's attorney and heavily redacted the email. CP 504-19. Although Northup was the subject of the email and was obviously mentioned in it, his name was redacted throughout. *Id.* Even the name of the sender was redacted, even though the email was requested specifically using the name of the sender.

The exemption log attached to a letter dated October 24, 2013 cited two exemptions. CP 226-27. One for investigative information pursuant to RCW 42.56.240(1) and the other for STG information pursuant to RCW 42.56.240(12).

The Department filed a summary judgment motion. CP 395-500. After considering the arguments of the parties, it granted the Department's motion pertaining to the October 14, 2010 request. CP 334-35.

The Department sent three more disclosures to Northup. The March 5, 2014 disclosures were responsive to Item 2, whose unredacted documents

were provided July 17, 2013, almost eight months prior. CP 230.³ The exemption log listed some records as being withheld in their entirety and other records were redacted based almost exclusively upon the STG exemption. CP 231-33. These records were not timely released August 5, 2013, because it took all these months to review the redactions done in July, 2013. CP 223, p. 23-24.

After considering both parties' dispositive motions, the trial court partially granted Northup's summary judgment motion on the Rollins emails on April 16, 2014. At the same time, it granted the motion for in camera review of the debriefing email. On May 16, 2014, the trial court ruled that there were two groups – the debrief email and the emails to the Department by Agent Rollins. 2VRP 9.⁴ Group I, the debrief email, was given the start date of July 15, 2013 and the end date of April 16, 2014, for a total of 276 days. 2VRP 9-10. Group II, the emails sent by Agent Rollins was given the start date of July 17 and the end date of April 16, 2014, for a total of 231

³An additional 69 pages were provided once all pages containing metadata were removed from the disclosure.

⁴There are two hearing dates, April 16, 2014 and May 16, 2014. The first hearing date, April 16, 2014, shall be referred to as the first verbatim report of proceedings ("1VRP"). May 14, 2014 date shall be referred to as the second verbatim report of proceedings ("2VRP").

days. The order was signed June 12, 2014. CP 64-68. The Department's motion for reconsideration was denied. CP 15.16. A timely notice of appeal was filed. CP 1-12. A timely cross-appeal was filed. CP 566-69.

IV. ARGUMENT

Northup will first show that the first order denying the October 14, 2011 request was wrongly decided because the discovery rule must apply to PRA requests when the requester is told the record does not exist. He will then show the start and end dates of the penalty periods are wrong.

It will then be shown that the Department was wrong and the trial court is right that the Department operated in bad faith in responding to the requests of Northup.

A. THE STANDARD OF REVIEW OF A SUMMARY JUDGMENT MOTION SUPPORTED SOLELY BY AFFIDAVITS IS *DE NOVO*.

Summary judgment is appropriate when the pleadings, affidavits, interrogatories, depositions and exhibits show there are no genuine issues of material fact and the moving party is entitled to judgment on the issues presented as a matter of law. *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 177, 876 P.2d 435 (1994). "When reviewing an order of summary judgment, this Court conducts the same inquiry as the trial court." *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000). When reasonable minds could reach but one conclusion regarding the claims of disputed facts,

such questions may be determined as a matter of law. *Corbally v. Kennewick School Dist.*, 94 Wn. App. 736, 740, 937 P.2d 1074 (1999). “All questions of law are reviewed de novo.” *Berger v. Sonneland*, 144 Wn.2d 91, 103, 26 P.3d 257 (2001).

B. THE TRIAL COURT ERRED WHEN IT DISMISSED THE OCTOBER 14, 2010 CLAIM BASED ON THE STATUTE OF LIMITATIONS WITHOUT FINDING THE DISCOVERY RULE APPLIES TO THE PRA.

When the Department argued the statute of limitations prevented consideration of the October 14, 2010 request, Northup responded that since the Department had denied that any document existed, when he discovered such a document did exist, the accrual date must be that date of discovery. While no statutory exemption exists permitting the subsequent discovery of a requested document reset the accrual date, our courts have often permitted its use in similar situations when called for. The use of the “discovery rule” has been expanded to include situations involving a special relationship between the parties or the inability to learn of a violation without the assistance of the violator. Both are relevant here and this Court should apply the discovery rule.

Washington first adopted the discovery rule in *Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969). This case involved a surgical sponge left in an abdominal cavity for 22 years. *Id.* at 662-63. Prior jurisprudence held

fast to the three year statute of limitations. *Id.* at 664 (citing *Lindquist v. Mullen*, 45 Wn.2d 675, 277 P.2d 724 (1954)). When considering to overrule prior case law, the Supreme Court asked the following question:

But what happens to the concepts of fundamental fairness and the common law's purpose to provide a remedy for every genuine wrong when, from the circumstances of the wrong, the injured party would not in the usual course of events know he had been injured until long after the statute of limitations had cut off his legal remedies?

Id. at 665. The Court's answer was to strike this balance by overturning *Lindquist* and apply the "discovery rule" to medical malpractice cases involving foreign objects left in the body cavity. *Id.* at 667. The Court was also quite clear that absolutely no element of fraudulent concealment was required and that both parties neither knew of the injury nor tried to conceal that knowledge. *Id.* at 667.

The theory of the discovery rule is that limitations statutes are not intended to foreclose a cause of action before the injury is known, and that the term "accrue" should not be interpreted to create such a consequence. *Id.* at 667-68. In making this determination, it matters not whether the plaintiff understood the legal basis for the claim. The action accrues when the plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action. *Gevaart v. Metco Const., Inc.*, 111 Wn.2d 499, 760 P.2d 348 (1988);

Cawdrey v. Hanson Chester Ludlow Drumheller, P.S., 129 Wn. App. 810, 120 P.3d 605 (2005). The burden is on the plaintiff to show that the facts giving rise to the claim were not discovered or could not be discovered by due diligence within the limitation period. *G.W. Constr. Corp. v. Prof'l Serv. Indus.*, 70 Wn. App. 360, 367, 853 P.2d 484 (1993).

1. The Discovery Rule Is Applied to Situations Where Self-Reporting Is Required.

Washington courts have consistently applied the discovery rule “to claims in which the plaintiffs could not have immediately known of their injuries due to professional malpractice, occupational diseases, self-reporting or concealment of information by the defendant.” *Matter of Estates of Hibbard*, 118 Wn.2d 737, 749-50, 826 P.2d 690 (1992). *U.S. Oil* is particularly illustrative as to why this Court should apply the discovery rule to this case. *U.S. Oil v. Department of Ecology*, 96 Wn.2d 85, 633 P.2d 1329 (1981).

In *U.S. Oil*, the Department of Ecology (DOE) was charged by statute with the duty to collect penalties for unlawful waste discharges. Under the waste regulatory scheme of RCW 90.48 the DOE had to rely on industry self-reporting to discover violations. *Id.* at 92. Not surprisingly, U.S. Oil failed to properly report its unlawful discharges. When the DOE suspected that monitoring reports were inaccurate and began investigating, it was finally

determined that U.S. Oil had unlawfully discharged waste. *Id.* Unfortunately, the DOE's discovery was subsequent to the expiration of the statute of limitations, preventing it from collecting penalties from U.S. Oil for its violations.

The Court found that without a discovery rule, industries could discharge pollutants and, by failing to report violations, escape penalties. *Id.* at 92. Analogizing to other cases where the plaintiff lacks the means or ability to ascertain that a wrong has been committed, the court reasoned:

Where self-reporting is involved, the probability increases that the plaintiff will be unaware of any cause of action, for the defendant has an incentive not to report it. Like the other cases which have employed the rule, this is a case where if the rule were not applied the plaintiff would be denied a meaningful opportunity to bring a suit. Like those plaintiffs, this plaintiff lacks the means and resources to detect wrongs within the applicable limitation period. Not applying the rule in this case would penalize the plaintiff and reward the clever defendant. Neither the purpose for statutes of limitation nor justice is served when the statute runs while the information concerning the injury is in the defendant's hands.

Id. at 93-94. *See also Kittinger v. Boeing Co.*, 21 Wn. App. 484, 585 P.2d 812 (1978) (discovery rule extended to libel action which arose out of confidential business memoranda where plaintiff had no means to discover that a cause of action existed). In a Public Records context, an agency has sole control over release of documents and there is no way, short of being informed by that agency or mental telepathy, for a requester to know whether

or not they have received all responsive documents. In this case, we have this very situation – an agency is the sole source of documents responsive to a PRA request. In such a situation, the accrual date must be the date of the request when the Department should have disclosed the existence of the missing documents.

2. An Agency Cannot Be Permitted to Benefit from Document Concealment.

It is also important to recognize another critical issue – namely the conflict between an agency’s duty to disclose and the possibility of penalties. The purpose of the penalties is to promote access to records and governmental transparency. *Yousoufian v. King County*, 152 Wn.2d 421, 435, 98 P.3d 463 (2004) (*Yousoufian I*). Just like *U.S. Oil*, an agency had an incentive not to report its failure to disclose records – statutory penalties. Our courts have held that a party cannot benefit from the concealment of facts which provide the basis for a cause of action. *See Kittinger v. Boeing*, 21 Wn. App. 484.

In *Kittinger*, the employee sued for libel after he heard that he has been accused of misconduct. He had been informed there had been a cut back in personnel. The suit was filed after the statute of limitations had run on his original dismissal but before it ran out after he found out about the allegations of misconduct. *Id.* at 485-86. As the Court stated:

Like the necessary trust between professionals and their clients, an employee necessarily relies on his employer for fair treatment. A contrary decision would impair this desired trust between employer and employee and would encourage employers to keep potentially libelous communications confidential.

Id. at 488. Similarly, permitting an agency to escape penalties for withholding documents would impair the trust between the citizen and his or her government. The Department clearly benefits from not being fully penalized because the discovery rule has not been applied. Especially if a Court were to find that the Department acted in bad faith. Agencies must be held accountable for its failure to timely disclosure all documents within the one year statute of limitations period by invoking the discovery rule.

3. A Special Relationship Exists Between the Agency and the Requester, Requiring the Discovery Rule to be applied.

Our courts have also extended the discovery rule to those cases where a special relationship exists between the plaintiff and the defendant. As far back as *Potter v. New Whatcom*, 20 Wash. 589, 590-91, 56 P. 394 (1899), our courts have acknowledged the special relationship between the government and the governed. A city was described as sustaining a trust relation with a member of the public. As such, the statute of limitations was held not to run on the warrant holder's claim to funds that were unlawfully converted until the warrant holder had notice or knowledge that the funds were misappropriated.

More recently, the discovery rule has been extended to an action for negligent cancellation of an insurance policy based on a fiduciary relationship. *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 543 P.2d 338 (1975). The court characterizing this extension as a “judicial policy determination.” *Id.* at 221. In making this extension, the court determined that application of the discovery rule was warranted because of the fiduciary relationship between the plaintiff policy holder and defendant insurance company. *Id.*⁵ Given the special relationship between the people and the public officials charged with the duty to protect the public trust and the extension of the discovery rule to situations where a special relationship exists, the discovery rule must be applied to this case.

This special relationship is the foundation of the Public Records Act. “The purpose of the Public Records Act is to preserve ‘the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.’” *O’Connor v. Dept. of Soc. & Health Serve.*, 143 Wn.2d 895, 25 P.3d 426 (2001)

⁵The discovery rule has since been applied to other similar professional relationships. See e.g. *Peters v. Simmons*, 87 Wn.2d 400, 552 P.2d 1053 (1976) (attorney); *Kundahl v. Barnett*, 5 Wn. App. 227, 486 P.2d 1164 (1971) (surveyor); *Hunter v. Knight, Vale & Gregory*, 18 Wn. App. 640, 571 P.2d 212 (1977) (accountant); *Herman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 17 Wn. App. 626, 564 P.2d 817 (1977) (stockbroker).

(quoting *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (“PAWS”)).

There is also a special relationship in this case. Northup is under the jurisdiction of the Department. What is contained in his central file is used by employees of the Department for many purposes related to Northup’s incarceration and it is in both Northup’s and the Department’s best interests to ensure all factual inaccuracies are corrected as soon as possible.

4. Facts Exist And Are Supported By the Complaint that the Department Failed to Put Northup on Notice of the Existence of Various Documents.

The original denial forms the basis of Northup’s knowledge and he was entitled to rely upon them. Under the facts of this case as set forth in the original complaint, Northup did not have reason to know there were additional documents responsive to his request because they were being silently withheld. Because the Department silently withheld the debrief email without listing it on the exemption log before Northup filed this lawsuit, Northup is entitled to rely on the Department’s assertion there were no responsive documents. Because Northup was unaware of the missing document underlying this cause of action until he was placed in protective custody, after the one year period in RCW 42.56.550(6) had expired, the discovery rule must be applied. Due to the Department’s silent withholding of documents, the accrual date for statute of limitations purposes must begin

in July of 2013 when Northup was first informed of the mistaken release of the debrief email.

C. THE DEPARTMENT MUST BE PENALIZED FOR EACH DAY A DOCUMENT WAS WRONGFULLY WITHHELD.

Northup is also challenging the trial court's determination of the dates used to calculate the total penalty amounts for each group. The Supreme Court is clear – the trial court must count every day that a requester has been unable to inspect or copy a nonexempt record.

Consistent with *Yousoufian I*, we should hold that the PRA requires the agency to pay a penalty for each day the requester is unable to inspect or copy a nonexempt record, regardless of whether the agency created the delay. This rule may seem harsh, but it is the unambiguous meaning of the statute.

Sanders v. State, 169 Wn.2d 827, 863-64, 240 P.3d 120, 139 (2010) (citing *Yousoufian I*, 152 Wn.2d at 437).

In *Yousoufian*, the trial court excluded 527 days because it felt *Yousoufian* was dilatory in filing the lawsuit. *Yousoufian I*, 152 Wn.2d at 427. This ruling was subsequently overturned. In overturning the appellate court, the Supreme Court interpreted the language of RCW 42.56.550(4), relying on the plain meaning of the statute.⁶ *Id.* at 437. In doing so, it determined the PRA “unambiguously requires a penalty ‘for each day’” and

⁶The former RCW 42.17.340(4).

overturned the prior appellate decision deducting days from the time calculation. *Id.*

1. Group I.

Group I consisted of the debriefing email. As previously mentioned, the trial court started the penalty period on July 17, 2013, the date in which Gerken's email to Vaughan acknowledged that the redactions had been completed for the debriefing email. However, it was also acknowledged in the same email that Northup was most interested in the email itself and the subsequent investigation into its release. By not placing a priority on its release, the Department violated the PRA by not providing the fullest assistance required by RCW 42.56.100. The start date should have been April 29, 2013, the date upon which Northup was informed of documents being available.

The end date is still undetermined. The trial court limited the end date to the date of the summary judgment hearing, April 16, 2014. This goes against the holding in *Sanders*. In *Sanders*, the Attorney General's Office argued that the time it took for the court to decide the matter could not be included in the penalty calculation. This was rejected based once again on the holding of *Yousoufian*. "The only limits on the plaintiff's ability to collect penalties after delay are the statute of limitations and, perhaps, laches." *Sanders*, 169 Wn.2d at 863 (citing *Yousoufian*, 152 Wn.2d at 436-

38). Therefore, the number of penalty days for Group I is still accruing.

2. Group II.

Group II consists of the emails sent by Agent Rollins to the Department. Unredacted documents were provided in July, 2013. Documents redacted and waiting for review at the same time were released after eight months. There is no excuse for the extremely late production of the documents on March 5, 2014. However, the time period assigned by the trial court was appropriate, given the evidence that the documents had been redacted and were just waiting approval – approval which took eight long months.

D. PUBLIC POLICY REQUIRES THE DEPARTMENT TO PROVIDE NORTHUP THE DEBRIEF EMAIL BECAUSE HE SUPPLIED THE INFORMATION AND HE IS ENTITLED TO KNOW WHAT WAS WRITTEN IN THE EMAIL THAT ENDANGERS HIS LIFE.

There might be a statutory exemption or exemptions that would apply to the debrief email that would be applicable to a third party, but they cannot be applicable to Northup because he was the source of the information. Furthermore, the Department provided this information to a third party resulting in threats on Northup's life and necessitating that the Department place Northup immediately in protective custody.

Logically, the Department cannot apply exemptions to the content of a document when providing that document to the individual who supplied the

information in the first place. This can be analogized to other types of exemptions which are exempt to a third party but are not exempt to the requester for whom the information belongs to, like health care information. The classic example is a document containing a social security number. While a social security number is usually exempt under the PRA, the Department does not redact the verified social security of an inmate when that inmate is requesting documents about him or herself and the social security number is on the documents.⁷ CP 236-37. The Department is quite familiar with handling records within these constraints.

Furthermore, given that the Department put Northup's life in danger, he is entitled to see what was provided to the third party so he can be aware of the information and protect himself and others. The Department has chosen to ignore just who supplied the information for the document. One need only look at the subject line of the email, "The Debrief," and read the first line where it said "_____ was interviewed at the _____" to see that the Department's position is simply illogical.⁸ CP 504. They even exempted Northup's name from the _____

⁷The Department claims that it cannot distinguish among requesters, but it does this all the time.

⁸Northup believes his name would be used to fill in the blank but

document when providing the extremely redacted document to him. For sound public policy reasons, the debrief email must be provided to Northup with all information he supplied unredacted.⁹

E. THE DEBRIEF EMAIL DOES NOT QUALIFY FOR INVESTIGATIVE, LAW ENFORCEMENT, AND CRIME VICTIMS EXEMPTIONS.

The Department has chosen to argue for the redactions based upon two statutory exemptions. The first claim, based on RCW 42.56.240(1), does not apply no matter who requested the document. The second claim, based on RCW 42.56.240(12), would apply to any requester other than Northup. Therefore, since neither statutory exemption applies to Northup, all information supplied by Northup to these police organizations must be unredacted.

1. RCW 42.56.240(1) Does Not Apply Because No Active Investigation was ongoing.

Our courts, based on the plain language of RCW 42.56.240(1), have determined that it only applies to active and open investigations. The plain

since he has not seen the unredacted email, this is just an assumption at this time based on a reasonable inference. Once this Court obtains the unredacted email for review, it can fill in the blank with the actual name.

⁹The debriefing email may have other STG information, possibly obtained through other sources. It is possible that some of the information might fall under one of these exemptions but none of the information that Northup provided to the Department is exempt.

language of the statute mandates this interpretation.

The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:

(1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy;

RCW 42.56.240(1). The plain language of this statute limits the exemption to information which is part of an investigation into wrong doing. It is most definitely not about just any investigation but a particularized type of investigation.

The investigative exemption applies to active and open investigations. *See e.g. Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712 (1997). However, once the investigation is concluded this exemption generally no longer applies. *Cowles Pub. Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 987 P.2d 620 (1999). In *Cowles*, a reporter requested a copy of a police report following an incident involving an attorney who was arrested for driving under the influence. *Id.* at 475. The focus of the report was on what had happened it and was found to be disclosable once a charging decision was made. What is most critical to these cases is that this exemption is

discussed in the context of an ongoing investigation into a particular matter.¹⁰

The interview of Northup was not for the purposes of disciplining a member of a profession. Nor was it a particularized investigation “to ferret out criminal activity or shed light some other allegation of malfeasance.” *Koenig v. Thurston County*, 175 Wn.2d 837, 287 P.3d 523 (2012) (quoting *Columbian Publ'g Co. v. City of Vancouver*, 36 Wash. App. 25, 31, 671 P.2d 280 (1983)). This fact is emphasized by the plain language of the statute that focuses on specific intelligence information and investigative records, but not on general intelligence information gleaned through an interview mandated by a policy.

2. By the Department’s Own Admission, the Claimed Exemption Pursuant to RCW 42.56.240(1) Does Not Apply to Generalized STG Information Gathering.

The information gleaned from the debriefing of Northup would be placed in the STG database maintained by the Department in Olympia. The Department requested the passage of law protecting the contents of its STG database during the 2013 legislative session. Senate Bill Report SB 5810 (Appendix A). In the bill report, the Department admits that “[t]he current

¹⁰The Supreme Court did acknowledge that under “special circumstances” police records may be withheld but that any such decision must be made by the courts. *Cowles Pub. Co.*, 139 Wn.2d at 478-79. Because Northup supplied the information in the first place, no such special circumstances exist.

list of exemptions does not include information contained in DOC's STG database.” *Id.* Dan Pacholke, currently Deputy Secretary for operations, testified on behalf of the Department. According to the staff summary of his testimony, Pacholke stated that “[u]nder current law, this information is not exempt from public disclosure and this bill would protect it from being disclosed. *Id.* By the Department’s own admission, RCW 42.56.240(1) does not apply to STG information gleaned from individuals like Northup.

3. The Plain Language of RCW 42.56.240(12) Does Not Exempt Information Provided by Northup to the Department from Disclosure to Northup.

The second exemption claimed, RCW 42.56.240(12), also does not apply to the request Northup made for the debriefing email. It does not apply because the plain language of the statute is clear that it does not. The statute states the following:

The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:

(12) The following security threat group information collected and maintained by the department of corrections pursuant to RCW 72.09.745: (a) Information that could lead to the identification of a person's security threat group status, affiliation, or activities; (b) information that reveals specific security threats associated with the operation and activities of security threat groups; and (c) information that identifies the number of security threat group members, affiliates, or associates.

When a statute's plain language is subject to only one interpretation, the inquiry stops because no explanation is necessary. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Statutory construction also requires that an act be read as a whole with each part being given its full effect. *City of Bellevue v. E. Bellevue Cmty. Council*, 138 Wn.2d 937, 946, 983 P.2d 602 (1999). A statutory construction that renders meaningless or superfluous any part of a statute must be avoided. *Burlington N., Inc. v. Johnson*, 89 Wn.2d 321, 326, 572 P.2d 1085 (1997). The most basic tenants of statutory construction mandates RCW 42.56.240(12) only be interpreted one way – Northup's request is not covered by this exemption because he was the it was he who was debriefed and has knowledge of what may have been written in the debriefing email.

There are three limitations on disclosure in the statute. The first limits information being provided to a requester which could lead to the identification of an inmate's STG status, affiliation or activities. Since Northup provided the information, providing him the email would not lead to him discovering new information. Because it would not lead him to discover any new information, this first limitation does not apply.

The second limitation is on information that reveals specific STG security threats. Again, since Northup would not be provided information about threats that he was not already aware of, this limitation does not apply.

The third and final limitation is on information identifying STG members and associates. For the third and final time, Northup supplied the identifying information to the Department, not the other way around.

Reading this statute's plain language can lead to only one conclusion – Northup is entitled to because he supplied and this exemption does not apply. Another way to look at it is a condition precedent that must be met before this exemption can be applied. Section (a) of RCW 42.56.240(12) requires the information lead to identification of an individual's status. Northup already knows his status so it cannot "lead" to anything. Section (b) also is about information leading to security threats. Nothing can be "revealed" to Northup if he initially provided the information. Finally, no information can be "identified" where Northup himself had done the identifying. It is the plain language of the statute which mandates the disclosure of this document. By so interpreting the statute, it still denies STG information to all third party requesters, just not the individual supplying the information and then, only to that information he or she provided the Department.

Finally, the Department is obligated to produce the email because they are at fault at placing his life in danger. Northup is entitled to read the email that was attributed to his debriefing to protect himself from harm. Again, because he provided the information, it does not fall under any particularized

exemption. Northup is unquestionably entitled to read the email in its entirety, unredacted, as it pertains to him.¹¹

Northup would also point out that the Supreme Court has classified various exemptions into types including categorical, and conditional exemption. *Residents Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 433-35, 300 P.3d 376 (2013). Northup would point out that even categorical exemptions have exceptions, and the Supreme Court agrees. In *Residents Action Council*, the Supreme Court was explicit that a categorical exemption only created a presumption. This presumption can be overcome if the requester shows it “is ‘clearly unnecessary’ to protect any privacy rights or vital governmental interests in a particular case.” *Id.* at 434 (*quoting* RCW 42.56.210(2)). Northup has shown exactly that. Applying the STG exemption is unnecessary to protect Northup’s privacy rights. It is also unnecessary to protect any vital governmental interests because the information was provided by Northup so there is no conflict of interest.¹²

¹¹This is assuming all information contained within the email is information provided by Northup. Any other information not provided by Northup and contained in the email may be redactable under the STG exemption.

¹²One can also argue that the train had already left the station on this issue when the Department released the unredacted document to a third party.

Finally, the Department argues that sometimes, requests are made for nefarious purposes. The Department seems to be making a public policy argument as to why this exception should apply to all. This is an argument that has no application to the facts of this case. The Department released the unredacted email to a third party. The document then ended up inside the prison system in the possession of STG members and Northup had to go into protective custody. If there is any public policy or equitable argument to be made, Northup is the one with the right to make the argument that he is entitled to an unredacted copy.¹³ The STG exemption does not apply to the circumstances present in this case.

F. THE DEPARTMENT'S ACTION WERE RECKLESS AND SUPPORT THE BAD FAITH FINDING BY THE TRIAL COURT.

The Washington Supreme Court defines a “person who prevails” has as someone who must seek judicial review to determine that the documents were wrongly withheld. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005). The court held that the filing need not be the direct cause of the disclosure, so long as a court determines that disclosure had been wrongfully denied at the time the suit was brought. *Id.* The disclosure of documents prior to judgment does not

¹³Any exemption log is required to provide the requester with sufficient information to permit a legal challenge.

moot the issue. Fees and costs are still mandatory for the period of time that disclosure was improperly denied from the time of request to disclosure. *Id.*, at 102. Good faith is not a defense. *Amren v. City of Kalama*, 131 Wn.2d 25, 35, 929 P.2d 389 (1997).

The Supreme Court in *PAWS* emphasized that “[a]gencies have a duty to provide ‘the fullest assistance to inquirers and the most timely possible action on requests for information.’” *PAWS*, 125 Wn.2d at 252 (quoting RCW 42.17.290 (now RCW 42.56.100)). This duty exists, despite the fact that “such examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.17.340(3) (now RCW 42.56.550(3)). And it is abundantly clear that it is not for the agency to interpret the act: “[L]eaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 131, 580 P.2d 246 (1978). There is no wiggle room for an agency – it must fulfill its obligations under the PRA. If there is any question, the agency must seek clarification from the requester.

RCW 42.56.565, the statute which requires bad faith on the part of the agency before a court can grant penalties to an inmate does not define what bad faith is. Our courts have determined that a showing of bad faith need not require an intentional bad act. See *Francis v. Dept. of Corrections*, 178 Wn. App. 42, 313 P.3d 457 (2013). In discussing bad faith, Division II focused

on various cases in the PRA context to support its position. *Id.* at 463 (citations omitted). It also looked at cases outside the PRA. *Id.* at 464 (citations omitted). Next on the agenda for the *Francis* Court was consideration of excerpts from the Restatement (Second) of Contracts § 205 cmt. d (*quoted in* Black’s Law Dictionary 159 (9th ed. 2009)). Finally, federal Freedom of Information Act (“FOIA”) cases were examined for possible persuasive authority. As the *Francis* Court stated, “FOIA cases have no bearing on the meaning of bad faith in this appeal.” *Id.* at 465. Having rejected the Department’s argument, it looked at the statutory interpretation of RCW 42.56.565.

In rejecting the intentional bad act requirement, the *Francis* Court looked at the purpose of the PRA and the people’s sovereignty. It also looked at how it is interpreted for the requester to protect the public interest. *Id.* at 466. It concluded that Francis was entitled to his penalties

To be more consistent with these sources of authority, we hold that failure to conduct a reasonable search for requested records also supports a finding of “bad faith” for purposes of awarding PRA penalties to incarcerated requestors. This standard does not make an agency liable for penalties to incarcerated persons simply for making a mistake in a record search or for following a legal position that was subsequently reversed. In addition to other species of bad faith, an agency will be liable, though, if it fails to carry out a record search consistently with its proper policies and within the broad canopy of reasonableness.

Id. at 467.

The next court to interpret RCW 42.56.565 is Division III. See *Faulkner v. Wash. Dept. of Corrections*, ___ Wn. App. ___, 332 P.3d 1136 (2014). In *Faulkner*, the appellate court examined what bad faith requires. The decision stated that “[b]ad faith is associated with the most culpable acts by an agency. Penalties are owed when an agency acts unreasonably with utter indifference to the purpose of the PRA.” *Id.* at 1141. It acknowledged the holding in *Francis* that a cursory search and delayed disclosure fell “well short of even a generous reading of what is reasonable under the PRA.” *Id.* (citing *Francis*, 178 Wn. App. at 63). *Faulkner* holds that a finding of bad faith requires a finding of a higher level of culpability than negligence – it requires a finding of wanton or willful act or omission by the agency. *Id.* The *Faulkner* Court then applied Black’s Law Dictionary to define these terms.

“Wanton” is defined as “[u]nreasonably or maliciously risking harm while being utterly indifferent to the consequences.” Further, “[w]anton differs from reckless both as to the actual state of mind and as to the degree of culpability. One who is acting recklessly is fully aware of the unreasonable risk he is creating, but may be trying and hoping to avoid any harm. One acting wantonly may be creating no greater risk of harm, but he is not trying to avoid it and is indifferent to whether harm results or not.”

Id. (citing *Black's Law Dictionary*, 1719–20 (9th ed. 2009) (quoting Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 879–80 (3d ed. 1982))). Putting it more succinctly, “[p]enalties are owed when an agency acts unreasonably

with utter indifference to the purpose of the PRA.” *Id.* at 1142. The *Faulkner* Court endorsed the decision in *Francis* stating that

“*Francis* is an example of a wanton act made in bad faith—the agency knew it had a duty to conduct an adequate search for the requested records but instead performed a “cursory search and delayed disclosure well short of even a generous reading of what is reasonable under the PRA.”

Id. (citing *Francis*, 178 Wn. App. at 63). Here the Department did exactly that, acted utterly indifferent to the requirements of the PRA by unreasonably prioritizing the requests and then delaying in producing the documents.

1. Group I.

The Department argues that the trial court failed to apply the correct standard when finding bad faith pursuant to RCW 42.56.565. This is wrong. Northup wanted to see a copy of the email to ascertain what type of information had been given to the STG members trying to kill him. Thrasher and the Department were both well aware of Northup’s concern. Thrasher was also in communication with the Public Disclosure Unit when he approved the redactions and it’s employees certainly had knowledge of the circumstances surrounding the unintended release of the unredacted email given the unintended consequences of its release. CP 207.

While it is a discretionary matter for the trial court to evaluate the degrees of culpability, culpability seems to track penalties. For this reason, the framework set forth in the forth *Yousoufian* case seems appropriate to

evaluate culpability for the purposes of determining bad faith and penalties.

Yousoufian v. King County, 168 Wn.2d 444, 229 P.3d 735 (2010)

(*Yousoufian II*). The non-exclusive factors a trial court must consider include

both mitigating and aggravating factors. The *Yousoufian* mitigating facts are:

- (1) a lack of clarity in the PRA request,
- (2) the agency's prompt response or legitimate follow-up inquiry for clarification,
- (3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions,
- (4) proper training and supervision of the agency's personnel,
- (5) the reasonableness of any explanation for noncompliance by the agency,
- (6) the helpfulness of the agency to the requestor, and
- (7) the existence of agency systems to track and retrieve public records.

The *Yousoufian* aggravating factors are:

- (1) a delayed response by the agency, especially in circumstances making time of the essence,
- (2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions,
- (3) lack of proper training and supervision of the agency's personnel,
- (4) unreasonableness of any explanation for noncompliance by the agency,
- (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency,
- (6) agency dishonesty,
- (7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency,
- (8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency, and
- (9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.

Id. at 467-68.

The trial court considered the *Yousoufian* factors when evaluating whether or not bad faith existed and what type of penalty to assert. It first

considered some of the mitigating factors. The request for the debriefing email was clear and not considered a mitigating factor. VRP 5. Gerken's follow-up inquiry and delegation was reasonable and appropriate. VRP 5-6. While acknowledging that the debriefing email was problematic to the Department, the trial court found the Department "took way too long for that process." There were issues with supervision because "[i]t was months and months and months" before the redacted copy was provided. 2VRP 7. Clearly, the mitigating factors only applied to the actions of Gerken and not her fellow employees.

The first aggravating factor was that time was of the essence. CP 66. The trial court emphasized that Northup has been placed in solitary confinement because his life was threatened.

He had his life threatened, and he was just requesting the information so he could figure out what was out there. DOC had already released an unredacted version of this to somebody else and he was just trying to find out what had gone out so he could do damage control. Time was of the essence in this situation.

VRP 7-8; CP 66.

At its oral ruling, it also found a lack of strict compliance with procedural requirements compounded by the unreasonableness of the explanation for why the Department was noncompliant. She then called the noncompliance reckless and it arose to bad faith. 2VRP 8, 13; CP 66. The

safety of an individual inmate was also deemed a matter of public importance because of the societal need to value an individual's life. *Id.* One need only examine the holding in *Francis* to see the similarities. While the email was eventually located, it was not prioritized thus the search could be described as cursory. Then there is the delayed production which is the fault not of Gerken but those she delegated the final assessment. CP 66.

Also contained in the trial court's ruling on bad faith is the failure of the Department to give Northup a copy of the email so that he could ascertain what the email said and how he would now live his life for the foreseeable future under the threat of eminent harm. The Department acted recklessly because it was fully aware of the possible harm that could befall Northup by not producing the debriefing email. *Faulkner*, 332 P.3d at 1141. Of course, Northup will have continually look over his shoulder for the rest of his life because of the actions of the Department.

The trial court, when considering all these factors, penalized the Department 20 dollars for each day the email was withheld. Under the abuse of discretion standard, \$20 per day is extremely reasonable. CP 66.

2. Group II.

When the trial court applied the Yousoufian factors to Group II, the nature of the request (broad) was acknowledged. 2VRP 10; CP 65. She also acknowledged the Department's initial response as fairly prompt. *Id.* Where

the Department failed was the lack of compliance with the PRA's procedural requirements. The unreasonable delay, without any good explanation for why, was a major aggravating factor. 2VRP 11; CP 67. While the trial court stated it sounded in negligence, clearly she 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.¹⁴ 2VRP 13.

When assigning penalties, the trial court looked at the facts of this case. There was a lawsuit pending. *Id.* There was no explanation for the long period between the redactions and the documents were released. *Id.* Five dollars a day is a reasonable sum and meets the standard of review.

G. NORTHUP'S CHALLENGES TO THE ACTIONS OF THE DEPARTMENT WERE ALL TIMELY FILED.

The Department has claimed that the superior court erred when it granted summary judgment when its response to Northup's requests was not complete. In support of its argument, it cites to *Hobbs v. State*, ___ Wn. App. ___, 335 P.3d 1004 (2014). The Department misapplies the holding of *Hobbs* to Northup's actions in this case.

¹⁴*Francis* was argued at the trial court level and the trial court made it clear that it had reviewed the cases provided it. At the time, Francis was the only case which had examined what constitutes bad faith pursuant to RCW 42.56.565.

In *Hobbs*, the court held that “a cause of action under the PRA arises only after it reasonably appears the agency will not or will no longer provide responsive records.” Appellant’s Opening Brief, p. 29-30 (*citing* Hobbs, p. 9). Under this interpretation, Hobbs is easily distinguishable to this case.

Hobbs had filed the lawsuit two days after the first installment was ready. There was no reason in the record for Hobbs to have believed the agency was not going to provide him the records he sought. Contrast that to the present case.

Northup filed the original complaint against the Department when he learned that it had incorrectly stated there were no responsive records to his October 14, 2010 request. He then amended the complaint June 19, 2013 after not receiving a response about his prioritized requests for Items 1 and 3. Then, after still not timely receiving the debriefing email he filed a second amended complaint stating Item 1 had been wrongfully withheld because the Department was fully aware of this document and Northup’s request for it after he was placed in segregation several months previously.¹⁵

Northup filed or amended the complaint in direct response to an action taken by the Department. Because Northup’s actions were in response

¹⁵The motion to amend was granted after the heavily redacted debriefing email was provided Northup.

to the Department's actions, *Hobbs* is distinguishable. *Hobbs* states that "we hold that before a requestor initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records." *Id.* at 1009. Because every action taken by Northup was in response to the Department's actions, this cause of action cannot be dismissed based on the holding of *Hobbs*.

H. NORTHUP IS ENTITLED TO REASONABLE ATTORNEY FEES AND COSTS.

The stated purpose of the attorney fees provision "is to encourage broad disclosure and to deter agencies from improperly denying access to public records." *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 757, 958 P.2d 260 (1998) (citing *Lindberg v. Kitsap County*, 133 Wn.2d 729, 746, 948 P.2d 805 (1997)). The award of attorney fees and costs in accordance with RCW 42.56.550(4) are mandatory. *Amren*, 131 Wn.2d at 32. Mr. Northup as the prevailing party would be entitled to all reasonable attorney fees and costs. He need not show bad faith to be the prevailing party for attorney fees and costs. This includes fees and costs on appeal. RAP 18.1.

As for discerning whether or not findings of fact and conclusions of law are required, the basis for such a requirement is when there is an insufficient record on appeal. Northup's request was specific and was a

simple case, with one lawyer, at an hourly rate which the Department did not contest. CP 31, 63-68, 73-81. It was supported by a declaration from a qualified practitioner in this area, Michelle Earl Hubbard. CP 69-72. The Department provided a point by point response. CP 30-36. In those areas which the Department did contest, Northup considered each one in turn and modified his request. CP 25-29.

The modifications included taking into account the expedited cost of the transcript. It also included lowering the cost charged for transportation to and from superior court. Northup also pointed out that briefing for the successful summary judgment motion took only 17.4 hours, a very reasonable result. Therefore, the information is sufficient based on the final award to find that a formal findings of fact and conclusions of law is not required.¹⁶

V. CONCLUSION

For the reasons stated above, Northup asks this Court to remand this case back to the superior court to hear argument on the October 14, 2010 request. He also asks that the superior court award penalties for Group I from April 29, 2013 to when the unredacted debrief brief is finally provided Northup. Northup also asks this Court to affirm the superior court's ruling

¹⁶The Department should be glad that it is not required in this case because otherwise it would have to pay the fees required to draft the formal document.

on penalties for Group II and attorney fees and award attorney fees and costs
for this appeal.

Respectfully submitted this 12th day of December, 2014.

KAHRS LAW FIRM, P.S.



A handwritten signature in black ink, appearing to read 'Michael C. Kahrs', written over a horizontal line.

MICHAEL C. KAHRS, WSBA #27085
Attorney for Appellee/Respondent Northup

CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on December 12, 2041 in Seattle, County of King, State of Washington, I deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

1. RESPONSE/OPENING BRIEF OF APPELLEE/RESPONDENT

Timothy Feulner
Criminal Division
Attorney General's Office
P.O. Box 40116
Olympia, WA 98504-0116

By: 

MICHAEL C. KAHRIS

SEP 13 10 11 AM '27

APPENDIX A

SENATE BILL REPORT

SB 5810

As of February 19, 2013

Title: An act relating to exemption of information contained in the department of corrections' security threat group database.

Brief Description: Allowing the department of corrections to exempt information contained in the internal database on security threat group data from dissemination under the public records act.

Sponsors: Senators Darneille, Carrell and Shin; by request of Department of Corrections.

Brief History:

Committee Activity: Human Services & Corrections: 1/22/13.

SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

Staff: Shani Bauer (786-7468)

Background: The Special Investigations Services Unit (SISU) of the Department of Corrections (DOC) collects, evaluates, collates, and analyzes data and special investigative information concerning the existence, activities, and operation of security threat groups, drugs, and violence within DOC facilities. The SISU gathers intelligence and trains other correctional officers on offenders and possible gang affiliation.

The Security Threat Group (STG) at DOC is a system to identify and monitor the movement and activities of offenders and offender groups who pose a potential threat to the security or safety of employees, contract staff, volunteers, visitors, other offenders, criminal justice partners, and the community. The Headquarters STG maintains a centralized database which contains specific information pertaining to offenders who pose a security threat. Access to the STG database is restricted to authorized DOC employees. Authorized field employees have access to the database to add documentation or validation information concerning an offender. All other DOC employees have access to limited information from the database.

Upon request, an agency must make its public records available for public inspection and copying unless the records fall within a specific statutory exemption. The current list of exemptions does not include information contained in DOC's STG database.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Summary of Bill: The STG database and all its contents are confidential and exempt from public disclosure under RCW 42.56.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: Twenty-three percent of the population in correctional facilities are affiliated with gangs. 48 percent of the 23 percent are responsible for all violence that occurs in the facilities. DOC maintains the STG to track groups of offenders and to separate offenders from gang members to allow them to live in peace and help reintegrate into the general population. Some offenders are trying to figure out where the gang members are located and are submitting public disclosure requests to determine that information. Under current law, this information is not exempt from public disclosure and this bill would protect it from being disclosed.

Persons Testifying: PRO: Dan Pacholke, DOC.