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Court of Appeals
Division III
State of Washington

NO. 32012-0-III

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION III**

JAMES V. ADAMS,

Respondent/Cross-Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Appellant/Cross-Respondent.

REPLY BRIEF OF THE DEPARTMENT OF CORRECTIONS

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II. ARGUMENT

A. The Department Did Not Act In Bad Faith When It Withheld Adams' ACCESS Information

Adams asserts the Court's holding in *Francis* supports a finding of bad faith in this case. *Francis v. Washington State Dept. of Corrections*, 178 Wn. App. 42, 313 P.3d 457 (2013). While the *Francis* Court held bad faith did not equate to an intentional misconduct, the Court further held a finding of bad faith would be based on whether the Department's conduct in response to the request was reasonable. *Francis*, 313 P.3d at 468. In support of its finding of bad faith, the *Francis* Court noted the Department spent no more than 15 minutes considering the request and did not check any of the usual record storage locations. *Id.* at 467.

On the contrary, the Department's response to Adams's request was reasonable and thorough. The Department not only sought guidance from the WSP and FBI but continued to seek clarification throughout the process to ensure its interpretation of the federal and state statutes and regulations applied to the ACCESS criminal history information. CP at 127- 290. In addition to seeking general information regarding the release of criminal history information, the Department also sought clarification from the WSP specifically regarding Adams' criminal history information at issue in this case. CP at 129. After receipt of the initial response, the

Department again sought further clarification regarding the ACCESS printout and the WSP reiterated their position. CP at 280. Subsequently, the Department yet again sought clarification from the WSP which then confirmed the Washington State portion of Adams' criminal history could be released to Adams without any implications. CP at 278-280. Despite the threat of audits and possible sanctions to include the termination of its ability to use ACCESS, the Department continued to push for clarification from both the WSP and FBI regarding release of offender criminal history information obtained through ACCESS. Such behavior does not amount to bad faith. Further, in light of the federal and state statutes governing and supporting the prohibition of release of criminal history information obtained through ACCESS, the Department's response to Adams' public records request was reasonable. Even if the agency erred in not disclosing a record, reliance on an invalid basis for nondisclosure does not result in a finding of bad faith, so long as the basis is not 'farfetched' or asserted with knowledge of its invalidity. *See King County v. Sheehan*, 114 Wn. App. 325, 357, 57 P.3d 307 (2002).

Adams also argues the Department's reliance on WSP instruction is not reasonable because "no documents antecedent of Mr. Adams' suit were produced." However, Adams ignores the timeline which triggered the Department's need to seek clarification from the WSP and FBI. Adams

filed his lawsuit on October 31, 2011. CP at 486-490. At that time, the Department had no reason to doubt its position of withholding offender criminal history information until the *Chester* Court issued its ruling on November 18, 2011, denying the Department's motion for reconsideration and finding the documents subject to disclosure. CP at 127. It was only at that point, the Department began discussions with the WSP and FBI regarding the implication of the *Chester* Court's ruling. CP at 128. Even in light of the *Chester* Court's ruling, the FBI and WSP maintained their position that the documents were exempt from public disclosure. CP at 132-135. As such nothing "antecedent" to Adams' lawsuit would have placed the Department on notice that its withholding of offender criminal history information was invalid.

Adams then asserts the Department's failure to abide by the *Chester* Court's ruling in his case amounts to a showing of bad faith because the Department was held in contempt for refusing to produce criminal history information. Adams argues such sanction warranted a finding of bad faith in this case. However, Adams assertion is blatantly wrong. In *Chester*, the plaintiff not only challenged the withholding of his criminal records but also the withholding of his chemical dependency records, medical records and his Criminal Conviction Record packet as well as redactions of his unverified social security number and his rape

victim's information. CP at 25. The *Chester* Court's order for sanction was based on the eventual production of *Chester's* Beta III Response scores¹ which the Department allowed *Chester* to view but not copy due to the notice of copyright contained on the document. CP at 70-72. The Beta III Response score is not criminal history information. Despite Adams' assertions, the Department was never sanctioned for improper withholding of *Chester's* criminal history information nor was there ever a bad faith finding issued.² Because the *Chester* contempt finding was in no way related to the release of criminal history information, it should not support a finding of bad faith in this case.

Further, while the *Chester* Court's order did not differentiate between criminal history information obtained through fingerprint submission or ACCESS inquiry, the WSP and FBI subsequently provided the Department with clarification between the two different types of records. Once the Department became aware the records in *Chester*, fingerprint based criminal history information, was allowed and supported by the federal regulations set forth in 28 CFR § 16.30 through 28 CFR § 16.34, the Department had no reason to appeal the *Chester* court's

¹ Beta III testing is a clinical assessment which measures adult cognitive abilities. <http://www.pearsonclinical.com/education/products/100000240/beta-iii.html>

² There is no final ruling regarding penalties in the *Chester* case because the case settled prior to obtaining a signed ruling. However, at the oral argument, the *Chester* court specifically found the criminal records were **not** withheld in bad faith.

holding. Nor would the Department have applied the *Chester* court's holding to the records obtained through ACCESS, such as those at issue in this case. Accordingly, as the facts in *Chester* were significantly different than those presented in this case, the trial court's ruling in *Chester* should not be used as a basis for a finding of bad faith in this matter under RCW 42.56.565.

Adams' then asserts the bad faith finding should be upheld because there was no contractual clause between the Department and the WSP which provided an exemption from disclosure. However, while the WSP may have asserted the ACCESS agreement covered public disclosure requests, the Department has never taken the position that the ACCESS agreement provides such an exemption or that RCW 42.56 allots for a contractual exemption. The Department has argued that it has been placed in a precarious position because it does not have an interest in withholding the criminal history information itself. The Department's interest has, and continues to remain, its ability to use ACCESS to obtain offender criminal history information for security concerns such as sex offender leveling, Prison Rape Elimination Act screening, housing assignments, and offender programming. CP at 348. Therefore in order to avoid allegations of misuse which could result in losing its ACCESS privileges, the Department sought clarification from the WSP and FBI to ensure it was not violating

the terms of the ACCESS agreement. Further, while the trial court may have inquired as to whether there was such a contractual provision, the Department has always asserted the documents were exempt under RCW 42.56.070(1) because there were other statutory exemptions which prevented the documents release. The Department has also continually argued that its reliance on its discussions with the WSP and FBI, as well as the federal and statutory language which supported those agencies' positions, was a reasonable basis for withholding. Therefore, under the *Francis* Court's holdings, the Department did not act in bad faith.

As previously noted, Adams' ACCESS information was comprised of Interstate Identification Index records that were regulated by 28 CFR § 20. Specifically, the regulation states criminal history information contained in the Interstate Identification Index system may be available to "criminal justice agencies for criminal justice purposes," but criminal history records received from the Index system "shall be used only for the purpose requested and a current record should be requested when needed for a subsequent authorized use." 28 CFR § 20.33. An agency disseminating Interstate Identification Index information contrary to state and federal law is subject to cancellation of its access. 28 CFR § 20.38.

Adams argues the Department would have to "overcome" the authority of 28 CFR § 513. Adams correctly notes 28 CFR § 513.11(a)

allows for the dissemination of an offender's fingerprint card "rap sheet" to the subject directly from the prison's file. However, Adams records are not considered to be FBI identification records which are records obtained through finger print submission. As noted, the records at issue were obtained through ACCESS and are Interstate Identification Index (III). 28 CFR § 513.11(b) prohibits dissemination of an offender's information obtained from the Interstate Identification Index, and instructs all requests for Index information to be sent directly to the FBI. Additionally, 28 CFR § 513.20 addresses the agency's release of information to law enforcement agencies. The regulation prohibits any law enforcement agency from disseminating information it receives under the regulation. 28 CFR § 513.20(b).

Finally, Adams argues RCW 10.97.080 allows the subject to view the record and not necessarily obtain a copy of the record. Adams asserts "he simply wanted to view them at his central file." However, when provided with the eventual opportunity to review the record, Adams failed to appear for the first appointment and then refused to review the documents during his second appointment. CP at 337 and 347. Had Adams reviewed the records he claimed he "simply wanted to view" when he was presented with the opportunity to review them, he would have only

been entitled to 399 days of penalties.³ Instead, Adams was able to obtain a windfall through continuances in order to rack up 701 days of penalties. CP at 26 and 33. Adams fails to show how RCW 10.97.080 would have placed the Department on notice that it was wrongfully withholding his records and therefore does not amount to a showing of bad faith.

B. The Requestor Bears the Burden of Establishing Agency Bad Faith

Adams argues the trial court erred, and thereby abused its discretion, when it ruled the requestor had the duty to show the Department acted in bad faith when it responded to his request. However, Adams points to no decision by the trial court which made this finding. In fact, after the trial court issued its ruling finding a PRA violation, the Court ordered the Department to provide supplemental briefing to support its position that it did not act in bad faith. CP at 291-292. Further, the trial court's ruling on penalties (which was drafted and submitted by Adams), is devoid of any ruling requiring Adams bear the burden of showing bad faith by the Department. As such, there is no "ruling" for the Court to reverse.

³ The number of days between July 14, 2011 (the date Adams submitted his request) through August 16, 2012 (the date Adams was scheduled to review the records) calculates to 399 days.

C. The Trial Court Did Not Abuse Its Discretion in Making Its Determination of Penalties Based on the Size of the Department

Adams asserts the trial court abused its discretion because it did not consider the size of the Department for the purposes of imposing penalties. Adams argues if the trial court considered the size of the Department, he should have been awarded a larger penalty amount. In support of this position, Adams includes the Department's 2013 biennial operations budget which would he asserts supports a "one-for-all penalty of \$210,300." Yet, Adams provides no statutory or case law to support a lump sum penalty in a PRA case.

In addition, this information was clearly presented to the trial court when Adams filed his supplemental briefing regarding penalties. CP at 51. In its decision, the trial court considered all of the factors set forth in *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010). CP at 32. While the penalty may not have been as high as Adams would have liked, it was well above the statutory minimum. While the *Francis* Court found the Department acted with bad faith, it still upheld an award of penalties on the low end of the statutory range because the trial court considered all of the penalty factors. *Francis*, 178 Wn. App at 470. The *Francis* Court noted that the "penalty amount is sufficient to put the Department on notice." *Id.* Similarly, the trial court considered all factors

when determining a penalty amount and believed its award of \$35 per day was substantial to deter the Department. CP at 29-33.

Adams has failed to show the trial court abused its discretion because the decision is neither manifestly unreasonable nor based on untenable grounds or reasons. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010) (citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 [2006]). Accordingly, in the event the Court finds the Department acted in bad faith, the trial court's penalty award should be upheld.

D. The Trial Court Considered the Exemption Log When It Made Its Determination of Penalties, and Thereby Did Not Abuse Its Discretion

Adams also argues the trial court abused its discretion when it did not consider the exemption log for purposes of calculating per diem penalties. Adams asserts the Department's failure to provide an adequate exemption log allowed it to "copious latitude" to change its position. However, the Department's position has never changed. Throughout its initial show cause motion, motion for reconsideration and this appeal, the Department has argued the documents were exempt from disclosure under RCW 42.56.070(1) because there were other statutory exemptions which were applicable. While the trial court may not have considered the lack of an explanation for the purposes of mitigation, the trial court did find an

aggravating factor was met when the Department failed to provide any reasonable explanation for its noncompliance. CP at 31. Again, while the penalty may not have been as high as Adams would have liked, it was well above the statutory minimum as the trial court considered all of the penalty factors when making its determination. CP at 29-33.

Adams has failed to show the trial court abused its discretion because the decision was neither manifestly unreasonable nor based on untenable grounds or reasons. CP at 29-33. Therefore, in the event the Court finds the Department acted in bad faith, the trial court's penalty award should be upheld.

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III. CONCLUSION

The Department did not act in bad faith when it relied on the federal and state statutes, as well as the representations of the FBI and WSP, when it withheld Adams' criminal history records as exempt from public disclosure review under RCW 42.56.070(1). Therefore, the Court should reverse the trial court's holding in this matter and deny Adams penalties. Alternatively, if the Court finds the Department acted in bad faith, the trial court's penalty award of \$35 per day should be upheld.

RESPECTFULLY SUBMITTED this 1st day of May, 2014.

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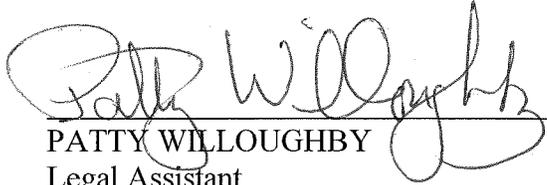
CERTIFICATE OF SERVICE

I certify that I served all parties, or their counsel of record, a true and correct copy of the Reply Brief of the Department of Corrections by US Mail Postage Prepaid to the following addresses:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 1st day of May, 2014, at Spokane, Washington.


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