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NO. 96286-3

SUPREME COURT OF THE STATE OF WASHINGTON

RANDALL HOFFMAN,

Petitioner,

v.

KITTITAS COUNTY, a local agency, and the KITTITAS COUNTY
SHERIFF'S OFFICE, a local agency,

Respondents.

**AMICUS CURIAE BRIEF OF THE WASHINGTON
DEPARTMENT OF CORRECTIONS**

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APPENDIX

I. INTRODUCTION

Trial courts exercise significant discretion in awarding penalties to requesters under the Public Records Act (PRA). A non-incarcerated requester need not show bad faith to receive PRA penalties. The same is not true for incarcerated requesters. In 2011, to address abusive public records requests by incarcerated individuals, the Legislature amended RCW 42.56.565(1) to require a showing of bad faith before an incarcerated individual may receive penalties. Although this case involves a non-incarcerated requester, a decision on the issues raised by the parties could have a significant impact on the availability of PRA penalties to incarcerated individuals. Because of the Department of Corrections' (Department's) unique role in responding to requests and litigation by incarcerated individuals, the Department submits this amicus brief to inform the Court of the potential impact this case may have on the Department. In this case, Hoffman invites this Court to adopt a novel interpretation of bad faith that he did not argue in the court of appeals or in his Petition for Review. Because the definition of bad faith was not raised properly below, the Court need not address the issue. If the Court decides to define bad faith under the PRA, it should reject Hoffman's definition and affirm the willful or wanton standard of bad faith that all divisions of the court of appeals have accepted.

Hoffman also invites the Court to make bad faith the controlling factor in the penalty assessment. Such a decision would be inconsistent with this Court's precedent and would unnecessarily limit the broad discretion afforded trial courts in awarding penalties. Although an agency's culpability is an important factor, it is not necessarily the controlling factor in assessing the appropriate penalty amount because of a trial court's significant discretion in this area. This is particularly true for incarcerated requesters, who must always show bad faith to receive penalties. And unless a party can show that the trial court's penalty award is manifestly unreasonable in light of the entire factual circumstances, a trial court's exercise of discretion should be affirmed.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Department is one of the three largest state agencies, and it handles one of the highest volumes of public records requests in the state. Because of the nature of its work, a significant number of these requests come from incarcerated individuals. The Department is also regularly named in PRA lawsuits filed by both incarcerated and non-incarcerated individuals. By some estimates, the Department is the target of nearly one-third of all PRA litigation filed against state and local agencies.¹

¹ According to information gathered by the Joint Legislative Audit and Research Center (JLARC), the Department was the target of approximately 31 percent of all PRA cases filed against state and local agencies in 2017.

Unless the Court explicitly says otherwise, a decision defining bad faith in this case will likely impact courts' analysis of "bad faith" in RCW 42.56.565(1), and will necessarily impact the Department. Furthermore, if this Court alters the penalty analysis and makes the presence or absence of bad faith the controlling factor in assessing penalties, such a decision could impact the Department because it will likely result in higher penalty awards to incarcerated individuals.

III. ISSUES PRESENTED BY AMICUS

1. If the Court addresses the definition of bad faith, whether it should adopt the interpretation of bad faith accepted by all three divisions of the court of appeals that requires willful or wanton conduct.
2. Whether the Court should elevate the presence or absence of bad faith to be the controlling factor in the PRA penalty assessment.

IV. ARGUMENT

A. **Any Decision Interpreting the Meaning of Bad Faith Will Have the Potential to Significantly Impact the Department and Other Agencies Who Receive Requests from Incarcerated Individuals**

For nearly thirty years, courts have discussed the concept of bad faith in the PRA context. *See Amren v. City of Kalama*, 131 Wn.2d 25, 35-36, 929 P.2d 389 (1997); *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 301, 825 P.2d 324 (1992). However, the term "bad faith" has never

been included as a statutory requirement in the PRA's penalty provision, RCW 42.56.550(4). This Court also has rejected the idea that a showing of bad faith is required to receive daily penalties. *Amren*, 131 Wn.2d at 36 (“The award provision does not require a showing of bad faith for the imposition of a penalty.”). As such, non-incarcerated individuals can receive daily penalties, under some circumstances, even if they do not show bad faith.

In 2011, to address the abuse of the PRA by incarcerated individuals, the Legislature passed what is now RCW 42.56.565(1). Part of the motivation behind the adoption of RCW 42.56.565(1) was to “discourage profit-driven inmate PRA litigation.” *See Dep't of Corr. v. McKee*, 199 Wn. App. 635, 399 P.3d 1187 (2017). Under this provision, incarcerated individuals must show that an agency acted “in bad faith in denying [them] the opportunity to inspect or copy a public record” in order to receive statutory penalties. *Id.* The court of appeals has decided a number of cases interpreting the meaning of bad faith in RCW 42.56.565(1), and this Court has not accepted review in any of them.

Because Hoffman is not incarcerated, RCW 42.56.565(1) does not apply. Hoffman, however, asks that the Court adopt a certain interpretation of bad faith and then reverse a trial court penalty award based solely on the trial court's failure to find bad faith. Absent an explicit

statement by the Court, a decision by this Court on these issues will likely impact the interpretation of bad faith in RCW 42.56.565(1) and the availability and amount of penalties awarded to incarcerated individuals. To further the Legislature's clearly stated policy, the Court should not decide this case in a way that will result in the expansion of available penalties to incarcerated individuals. RCW 42.56.565(1) was intended "to curb abuses by inmates who use the PRA to gain automatic penalty provisions when an agency fails to produce eligible records." *Faulkner v. Dep't of Corr.*, 183 Wn. App. 93, 105-06, 332 P.3d 1136 (2014). The provision was intended to restrict the circumstances in which inmates can receive PRA penalties. As such, the Court should avoid any interpretation of bad faith that will not serve those purposes or that will expand the availability of penalties to incarcerated individuals.²

B. To the Extent That the Court Addresses the Issue, the Court Should Adopt the Willful or Wanton Standard for Bad Faith That Has Been Adopted by All Divisions of the Court of Appeals

Despite not having raised the issue below, Hoffman invited the Court in a conclusory paragraph in his Petition for Review to define the

² In light of the fact that RCW 42.56.565(1) relies upon the statutory term "bad faith" and was passed to address a specific problem, i.e. the abuse of the PRA by inmates, the Court could conclude that bad faith in the *Yousoufian* factor context should be applied differently than bad faith in the context of RCW 42.56.565(1). If the Court does adopt this view, the Department requests that the Court expressly indicate that the term "bad faith" in RCW 42.56.565(1) is distinct from bad faith in the penalty context for non-incarcerated individuals.

appropriate standard for bad faith. Hoffman's Petition for Review, at 18. In his Supplemental Brief, Hoffman now offers a definition of bad faith but also seems to indicate that this definition is not a complete test for determining bad faith. *Compare* Hoffman's Supplemental Brief, at 12 (appearing to propose a test for bad faith), *with* Hoffman's Supplemental Brief, at 16-17 (suggesting that the Court just needs to conclude bad faith is present in this case and not provide further guidance). The County's briefing does not address the appropriate standard of bad faith. Under these circumstances, the Court should decline to reach the proper interpretation of bad faith. *See Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 37, 42 P.3d 1265 (2002) (courts do not generally address issues that were not raised below); *Saldin Sec., Inc. v. Snohomish Cty.*, 134 Wn.2d 288, 299, 949 P.2d 370 (1998) (courts do not generally address issues unless they are properly and adequately briefed).

If the Court decides to reach the issue, the Court should adopt the prevailing standard of bad faith in the court of appeals (and the one accepted by the parties below) that requires a party to show that the agency acted willfully or wantonly in denying the requester records. This definition incorporates legal standards that have been well defined and applied in the PRA context. In contrast, Hoffman's novel test is confusing and will be difficult for trial courts to apply.

1. If the Court Addresses the Issue, the Court Should Conclude That Bad Faith Requires Willful or Wanton Conduct

Because a showing of bad faith is a prerequisite to the award of PRA penalties to incarcerated individuals, the court of appeals decisions addressing the proper interpretation of “bad faith” primarily involve incarcerated individuals. There are three such published court of appeals cases interpreting the meaning of bad faith in RCW 42.56.565(1). In *Francis v. Department of Corrections*, Division II of the Court of Appeals rejected the idea that bad faith requires evidence of intentional, wrongful conduct. 178 Wn. App. 42, 57, 313 P.3d 457 (2013), *review denied*, 180 Wn.2d 1016 (2014). Instead, the *Francis* court affirmed the trial court’s finding of bad faith because the evidence before the trial court showed that the agency made a cursory search and delayed disclosure that was “well short of even a generous reading of what is reasonable under the PRA.” *Id.* at 63-64. The Court emphasized, however, that an agency does not act in bad faith by merely “making a mistake in a record search or for following a legal position that was subsequently reversed.” *Id.* at 63.

The following year, Division III of the Court of Appeals further clarified the meaning of bad faith. *Faulkner v. Dep’t of Corr.*, 183 Wn. App. 93, 103, 332 P.3d 1136 (2014), *review denied*, 182 Wn.2d 1004 (2015). In *Faulkner*, the court of appeals indicated that bad faith is a

“higher level of culpability than simple or casual negligence.” 183 Wn. App. at 103. Instead, bad faith requires a showing of “a wanton or willful act or omission by the agency.” *Faulkner*, 183 Wn. App. at 103. The court further defined wanton as “[u]reasonably or maliciously risking harm while being utterly indifferent to the consequences.” *Id.* at 103-04. The court noted that *Francis* was an example of a wanton act made in bad faith. *Faulkner*, 183 Wn. App. at 105. Under this standard, the *Faulkner* court determined that the trial court had appropriately declined to award penalties to the requester because the error was the result of an inadvertent mistake in summarizing the request. *Id.* at 107-08.

Division III applied this willful or wanton standard again in *Adams v. Department of Corrections*, 189 Wn. App. 925, 361 P.3d 749 (2015). In doing so, the court concluded that an agency also acts in bad faith when it fails to engage in any serious independent analysis of the exempt documents that it withholds. *Adams*, 189 Wn. App. at 929. The *Adams* court reiterated that the bad faith requirement in RCW 42.56.565(1) allows for penalties “only when the conduct of the agency defeats the purpose of the PRA and deserves harsh punishment.” *Id.* at 938 (quoting *Faulkner*, 183 Wn. App. at 106).

Since these three decisions, the *Faulkner* court’s willful or wanton standard has become the prevailing standard in the court of appeals. All

three divisions of the court of appeals have now adopted the willful or wanton standard in published or unpublished decisions. *See, e.g., Cook v. Dep't of Corr.*, 197 Wn. App. 1061, 2017 WL 478321 (2017) (Division I); *Williams v. Dep't of Corr.*, 2 Wn. App. 2d 1043, 2018 WL 1004892 (2018) (Division II); *Zellmer v. King Cty.*, 4 Wn. App. 2d 1047, 2018 WL 3447740, (2018) (Division I), *Benitez v. Skagit Cty.*, 193 Wn App 1026, 2016 WL 1566780 (2016) (Division I).³

Therefore, to the extent that the Court addresses the issue, the Court should adopt the willful or wanton definition of bad faith that has been accepted by the court of appeals in past decisions and the parties to this case in the proceedings below.

2. The Court Should Reject Hoffman's Novel Definition of Bad Faith Because It Is Confusing and Will Create Uncertainty

In the proceedings below, Hoffman argued that the County acted in bad faith by using the prevailing standard in the court of appeals of willful or wanton misconduct. In his Supplemental Brief, Hoffman presents a novel standard that would ask courts to consider whether an agency

³. Consistent with GR 14.1, the Department recognizes that these cases are unpublished, that the opinions are not binding on any court, and that the opinions have no precedential value. *See* General Rule 14.1(a) (allowing citation to unpublished opinions); *Crosswhite v. Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 544, 389 P.3d 731 (2017).

“intentionally withholds records knowing that the withholding is unreasonable.” Hoffman’s Supplemental Brief, at 12.

This standard is novel and no court has adopted such a standard. Assessing an agency’s intent is already somewhat difficult. *Cf. Francis*, 178 Wn. App. at 61 (remarking that it is notoriously difficult to assess an agency’s intent from a prison cell). Hoffman’s proposed standard would require a court to assess three different mental states (intentional, knowing, and unreasonable). These mental states will prove very difficult for courts to apply. For example, what does it mean for an agency to “intentionally withhold” documents? And how is a court to determine these various intents for the agency? Does the court consider the intent of the individual employees involved or the agency as a whole? Can a court consider different employees’ intent for each different element of the test? Hoffman’s novel and untested definition of bad faith will require trial courts to decide these thorny issues in the coming years.

Additionally, because Hoffman’s proposed definition involves three distinct mental states, courts will have to try to decide whether the standard is more akin to intentional misconduct, recklessness, or negligence. In light of the fact that the standard has elements of all three levels of culpability, courts will likely have widely different views about what the nature of the prevailing standard in the test is and courts will

ultimately reach widely different results in terms of whether the agency acted in bad faith under this standard. As such, this standard will prove difficult for courts to apply and will result in inconsistent and unpredictable decisions.

In contrast, the concepts of willfulness and wantonness have well-developed and extensive history in the law. *See, e.g., Adkisson v. City of Seattle*, 42 Wn.2d 676, 682-86, 258 P.2d 461 (1953) (discussing willfulness and wantonness). There are even pattern jury instructions that help define these standards. 6 *Washington Practice: Washington Pattern Jury Instructions Civil* § 14.01 (6th ed.). Additionally, as discussed above, these concepts are already well developed in the PRA context because courts have been applying them in the context of RCW 42.56.565(1). Hoffman presents no persuasive reason to abandon the willful or wanton standard, and the Court should reject Hoffman's novel standard.

C. This Court Should Confirm the Broad Discretion Afforded to Trial Courts in Making Penalty Determinations

Trial courts are vested with broad discretion in RCW 42.56.550(4) to assess PRA penalties based on the factual circumstances of any given case. Based on the Supplemental Brief, Hoffman's arguments about the importance of bad faith are somewhat unclear. Hoffman's essential argument appears to be that the trial court's determination that an agency

did not act in bad faith is so important to the penalty analysis that any error in finding a lack of bad faith necessitates a reversal of the penalty determination, even if the penalty is otherwise reasonable in light of the remaining *Yousoufian* factors. As such, Hoffman's Petition for Review argued that the court of appeals erred in failing to recognize that bad faith is the principal factor, Hoffman's Petition for Review, at 14-18, but in his Supplemental Brief, Hoffman seems to retreat from this position and suggests that this issue is not actually dispositive to the appeal. Hoffman's Supplemental Brief, at 19-20 ("Whether bad faith is the *principal* legal factor is not dispositive." (emphasis in original)). As such, the Court may not need to address this issue to resolve this appeal.

If the Court does address the issue, it should reject Hoffman's arguments on this issue. Hoffman's approach is inconsistent with the statutory language that vests significant discretion with trial courts and this Court's precedent interpreting the PRA. And it would have a particularly strange result in inmate cases because it may result in higher penalty awards to incarcerated individuals. This Court should reject Hoffman's argument and reaffirm that although agency culpability is an important factor in the penalty analysis, it is not the only factor in such an analysis.

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1. This Court Has Rejected The Idea That Bad Faith Is a Controlling Factor in the Penalty Analysis

Trial courts have broad discretion to determine the appropriate method of calculating a PRA penalty, including the appropriate per day penalty. *See, e.g., Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 278-79, 372 P.3d 97 (2016). This broad discretion comes from the statutory language in RCW 42.56.550(4), which states that “it shall be within the *discretion* of the court to award [a requester] an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy” a public record. RCW 42.56.550(4) (emphasis added). For years, this penalty provision limited trial court’s discretion by requiring the imposition of a minimum penalty of \$5 per day. But in 2011, the Legislature expanded that discretion by removing the minimum penalty requirement. Now, the only apparent limit to a trial court’s discretion in the statutory language is the maximum per day penalty.

The language of RCW 42.56.550(4) does not provide any guidance regarding a trial court’s consideration of factors in assessing penalties, nor does it refer to the presence or absence of bad faith. In *Yousoufian IV*, this Court provided significant guidance to trial courts about factors to consider in assessing a penalty that is best designed to discourage

improper denial of access to records and encourage agencies to adhere to the goals of the PRA. See *Yousoufian v. Office of Ron Sims (Yousoufian IV)* 168 Wn.2d 444, 459-60, 229 P.3d 735 (2010). The Court identified a number of non-exclusive factors, including the agency's culpability and a penalty sufficient to deter agency misconduct. *Id.* The Court stated that "[w]hen determining the amount of the penalty to be imposed 'the existence or absence of [an] agency's bad faith is the principal factor which the trial court must consider.'" *Id.* at 460 (quoting *Amren v. City of Kalama*, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997)). But this Court also recognized that "a strict and singular emphasis on good or bad faith is inadequate to fully consider a PRA penalty determination after our decision in *Yousoufian II.*" *Yousoufian IV*, 168 Wn.2d at 461.

Since *Yousoufian IV*, appellate courts and trial courts, including the trial court in this case, have been applying the non-exclusive *Yousoufian* factors. The *Yousoufian* factors require courts to consider the entire factual background behind a request. Often, an agency's culpability (negligence, gross negligence, bad faith) will be an important factor for trial courts to consider. Indeed, the bulk of the *Yousoufian* factors appear designed to assess the degree of an agency's culpability in handling a request and what type of penalty will serve the PRA's purpose by deterring agencies from violating the PRA. Some *Yousoufian* factors "may not apply equally or at

all in every case” and “no one factor should control.” *Yousoufian IV*, 168 Wn.2d at 468. Ultimately, the *Yousoufian* factors provide courts flexibility to fashion penalty amounts that serve their intended purpose, i.e. to deter the improper denial of records.

In recognition of the significant discretion that trial courts have in this area, appellate courts have applied an abuse of discretion standard of review that considers 1) whether the trial court considered the *Yousoufian* factors (i.e., the appropriate legal standard) and 2) whether a reasonable person could conclude that the total penalty amount awarded satisfies the purposes of the PRA in light of the *Yousoufian* factors and the entire factual background (i.e., manifestly unreasonable). *See, e.g., Zink v. City of Mesa*, 4 Wn. App. 2d 112, 128-29, 419 P.3d 847 (2018); *Adams*, 189 Wn. App. at 953; *Francis*, 178 Wn. App. at 66; *see also Sanders v. State*, 169 Wn.2d 827, 862-63, 240 P.3d 120 (2010) (affirming trial court penalty despite trial court not considering *Yousoufian* factors because the penalty amount was not an abuse of discretion). Such a standard preserves the broad discretion of trial courts and prevents appellate courts from reversing simply because they would have decided a specific factor a different way or weighed the factors differently.

The trial court in this case faithfully considered the *Yousoufian* factors. *See, e.g., Hoffman’s Court of Appeals Brief, Appendix 20* (“The

Court must weigh and consider each of the *Yousoufian* factors in reaching a decision, but courts are given discretion to determine whether the factors are supported by the evidence or not...). Similarly, the trial court recognized that the County's culpability was a factor, among other factors, to consider. *Id.* After considering the parties' arguments and the *Yousoufian* factors, the trial court awarded a penalty of \$63 per day⁴ for 246 days for what the trial court characterized as negligent conduct. The trial court imposed this penalty in light of the entire factual circumstances, which included the uncontested fact that Hoffman had received all responsive records prior to filing the lawsuit. Because that penalty was reasonable in light of the uncontested facts, it was not an abuse of discretion.

Hoffman attempts to overturn the trial court's discretionary decision by focusing on the presence or absence of bad faith. Hoffman's logic is that bad faith (one of the *Yousoufian* factors) is reviewed de novo; that the trial court erred in that finding; and that the penalty awarded must be reversed in its entirety based on this error. However, Hoffman does not argue that the per day penalty or the total penalty amount was manifestly unreasonable. Hoffman conducts no analysis of factually similar cases and

⁴ The trial court awarded a penalty on a per document basis as was permitted by this Court in *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 280, 372 P.3d 97 (2016). This amount reflected 50 cents per 126 documents, or \$63 per day.

does not explain why a larger penalty would serve the PRA's purposes of deterring the County from violating the PRA in the future.

Furthermore, the idea that bad faith should be the controlling factor in the penalty analysis is incorrect in light of this Court's case law. *Yousoufian IV* rejected the idea that the strict or singular focus of a trial court's penalty assessment is the presence or absence of bad faith. *Yousoufian IV*, 168 Wn.2d at 460-61. And in *Sargent v. Seattle Police Department*, this Court reversed a trial court decision in which the trial court failed to consider the range of *Yousoufian* factors and instead focused on the presence or absence of bad faith. 179 Wn.2d 376, 398, 314 P.3d 1093 (2013). In doing so, the Court said that "[a]lthough bad faith is an important consideration under *Yousoufian 2010*, it cannot be the only consideration...Although not all [*Yousoufian*] factors may apply in every case, 'no one factor should control' and the trial court here abused its discretion by not conducting its analysis within the *Yousoufian 2010* framework." *Sargent*, 179 Wn.2d at 398.

Undoubtedly, agency culpability is often an important factor in the *Yousoufian* analysis. Absent a showing of bad faith, it is often appropriate for a trial court to consider a penalty at the low end of the scale. But unless a party appealing a trial court's penalty determination shows that the

penalty decision was manifestly unreasonable, an appellate court should decline to reverse such a penalty determination.

2. The Court Should Reject the Idea That a Bad Faith Finding Necessitates a Penalty Award at the High End of the Scale for Incarcerated Requesters

As discussed above, incarcerated individuals are not entitled to penalties under the PRA unless they make a showing that the agency withheld a record in bad faith. RCW 42.56.565(1). If a trial court finds bad faith, the trial court then considers the *Yousoufian* factors in determining the appropriate per day penalty. Whatever the proper approach to a penalty award premised on an agency's bad faith with respect to non-incarcerated requesters, the court of appeals has rejected the idea that a finding of bad faith under RCW 42.56.565(1) necessitates a penalty at the top of the penalty range. *Francis*, 178 Wn. App. at 65-66.

In *Francis*, although the court of appeals affirmed the conclusion that the agency acted in bad faith and thus allowed a penalty to the inmate, the court of appeals rejected an inmate's cross appeal of a \$10 per day penalty. *Francis*, 178 Wn. App. at 65-66. In doing so, the *Francis* court recognized that the simple presence or absence of bad faith was inadequate to determine the proper penalty amount and that a penalty of \$10 per day in that case was not an abuse of discretion. *Id.* Because a reasonable person could have concluded that the penalty amount satisfied

the requirements of the PRA and was consistent with the *Yousoufian* factors, the trial court did not abuse its discretion in setting a penalty at the low end of the range. *Id.* at 66.

Such a result makes sense in terms of incarcerated requesters. In enacting RCW 42.56.565(1), the Legislature intended to limit the award of penalties to deter those inmates who were using the PRA for financial gain. *See* Senate Bill Report SB 5025 (proponents of the bill describing how inmates submit public records requests for the sole purpose of tripping up the agency).⁵ It would be odd to conclude that the Legislature restricted an inmate's ability to get a penalty award by imposing a bad faith requirement but necessitated a penalty award at the highest end of the range when penalties were awarded. Such an interpretation of RCW 42.56.565(1) would have the consequence of encouraging inmates to submit requests for financial gain with the hope and understanding that if they succeed in getting penalties, such a penalty award would be significant. Therefore, if the Court adopts a rule that contemplates an award of penalties at the top of the scale for an agency's bad faith conduct, it should expressly state that such a rule does not apply to incarcerated individuals because of RCW 42.56.565(1).

⁵ A copy of the Senate Bill Report is included in the Appendix. The Senate Bill report is also available at <http://lawfilesexternal.leg.wa.gov/biennium/2011-12/Pdf/Bill%20Reports/Senate/5025%20SBR%20HSC%2011.pdf>

V. CONCLUSION

The Department respectfully requests that, to the extent that the Court addresses the issue, the Court adopt a definition of bad faith that requires willful or wanton conduct. This definition has been accepted by all divisions of the court of appeals and Hoffman in his briefing before the court of appeals. The Department also requests that the Court reaffirm that the presence or an absence of bad faith is not the controlling factor in a trial court's penalty determination.

RESPECTFULLY SUBMITTED this 25th day of March, 2019.

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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 AMICUS CURIAE BRIEF OF THE WASHINGTON 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 25th day of March, 2019, at Olympia, Washington.

s/ Cherrie Melby
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APPENDIX

SENATE BILL REPORT

SB 5025

As Reported by Senate Committee On:
Human Services & Corrections, February 4, 2011

Title: An act relating to making requests by or on behalf of an inmate under the public records act ineligible for penalties.

Brief Description: Concerning making requests by or on behalf of an inmate under the public records act ineligible for penalties.

Sponsors: Senators Hargrove, Becker, Sheldon, Litzow, Haugen, Carrell, White, King, Honeyford, Shin, Kilmer, Regala, Parlette, Conway, Tom, Rockefeller, Roach and Holmquist Newbry; by request of Attorney General.

Brief History:

Committee Activity: Human Services & Corrections: 1/13/11, 2/04/11 [DPS].

SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

Majority Report: That Substitute Senate Bill No. 5025 be substituted therefor, and the substitute bill do pass.

Signed by Senators Hargrove, Chair; Regala, Vice Chair; Stevens, Ranking Minority Member; Carrell, Harper and McAuliffe.

Staff: Shani Bauer (786-7468)

Background: Upon request, an agency must make its public records available for public inspection and copying unless the records fall within a specific statutory exemption. Within five business days of receiving a request, the agency must either provide the record, acknowledge receipt of the request and provide a reasonable time estimate of the time required to respond, or deny the request. A person whose request has been denied, may petition the court to determine whether the agency was correct in its denial. If the court determines that the agency was not correct, the person requesting the record must be awarded all costs, including reasonable attorney fees, incurred in bringing the court action. The court may also award the petitioner a penalty award of not less than \$5 and not more than \$100 for each day the petitioner was denied the right to inspect or copy the public records requested.

The court may prohibit the examination of a specific public record if, upon motion by the agency or agency representative, the court finds that such examination would clearly not be

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.

in the public interest and would substantially and irreparably damage any person or a vital government function. The court may also prohibit all or part of a public records request, as well as future requests, by a person serving a criminal sentence if the court finds:

- the request was made to harass or intimidate an agency or its employees;
- fulfilling the request would likely threaten the security of correctional facilities;
- fulfilling the request would likely threaten the safety or security of staff, inmates, family members of staff, family members of other inmates, or any other person; or
- fulfilling the request may assist criminal activity.

Summary of Bill (Recommended Substitute): Unless the court finds that an agency acted in bad faith in denying a public records request, the court may not award penalties to a person who was serving a criminal sentence in a state, local, or privately operated correctional facility on the date the public records request was made.

EFFECT OF CHANGES MADE BY HUMAN SERVICES & CORRECTIONS COMMITTEE (Recommended Substitute): Provisions limiting penalties for persons with a criminal sentence are moved to the statute addressing injunctions for those persons. The court is prohibited from awarding penalties to a person serving a criminal sentence for an agency's failure to provide records unless the records were denied in bad faith.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony on Original Bill: PRO: The biggest growth area in inmate litigation has been inmate public records litigation. Caseloads have quadrupled in the last few years with more than two-thirds of the public record lawsuits being brought by inmates. The Department of Corrections (DOC) has spent over 1400 hours of staff time responding to requests with a fiscal cost of \$500,000 for defense costs. There are limited instances where a good faith request has been made and the agency failed to comply. But, the majority of lawsuits have two motivations, one is strictly monetary. The offender structures the request for the sole purpose of tripping the department up in order to file a successful claim for damages. The second motivation is getting back at the system. This bill eliminates penalties for offenders but does not in any way limit requests or eliminate DOC's obligation to respond. When economic resources are scarce, does it make sense to cut services to needy citizens while subsidizing recreational lawsuits by offenders?

One particular offender has used his campaign and lawsuits to finance mechanisms to harass corrections officers and put their families in fear. Corrections officers are not getting a pay raise, yet money is going to these offenders for frivolous lawsuits. This is a business that the offenders have developed. They flood the system with requests and then get money for late public record requests when the system can't respond.

CON: This appears to be an extension of the bill that you passed last year that allows DOC to go to superior court and have a request from an inmate managed by a judge. Frivolous requests can be thrown out. This process has only been in effect for about six months or so. Let's give that a chance to work.

The current bill would prevent penalties if a request is made by or on behalf of a person who is incarcerated. A newspaper frequently makes requests on behalf of inmates because they have gotten a heads up about a certain issue or potential abuse. Costs and attorney fees will not cover the cost of bringing a lawsuit to require full disclosure. It is extremely rare that the petitioner will get full fees from the court, and the penalty provisions are needed to make up the difference. There should be a better way to winnow out those persons who have a legitimate request and those that are gaming the system. The penalty provision would be better as a subsection of RCW 9.42.56.565. If the public records door is shut, there is also a grave risk that parties will utilize the court discovery process as an alternative, which would be much more costly.

This bill is the broadest attempt to limit public records requests since passage of the Public Records Act (PRA). Families often have difficulties getting records from correctional facilities or agencies. This bill would effectively end all public records requests by prisoners because an agency will face no penalties for not complying. Many prisoners have legitimately used the PRA for legitimate litigation.

Persons Testifying: PRO: Tim Lang, Attorney General's Office; Scott Blonien, Department of Corrections; Greg Bellamy, Corrections Officer, Clallam Bay Corrections Center.

CON: Roland Thompson, Allied Daily Newspapers; Bill Will, Washington Newspaper Publishers and Washington Coalition for Open Government; Beth Colgan, Columbia Legal Services; Shankar Narayan, ACLU.

CORRECTIONS DIVISION ATTORNEY GENERAL'S OFFICE

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