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

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RANDALL HOFFMAN,

Appellant,

v.

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

Respondents.

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**CORRECTED REPLY BRIEF OF APPELLANT**

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## INTRODUCTION AND SUMMARY

When determining penalties under the Public Records Act, the trial court erred as a matter of law. It committed its most significant error when it concluded that Defendants Kittitas County and the Kittitas County Sheriff's Office (collectively, the "County") did not deny Plaintiff Randall Hoffman's public records request in bad faith.

The County defends the result below in three main ways.

1. Its first defense is procedural. The County says that the trial court's decision must be reviewed deferentially, because the parties disputed certain factual issues below and the trial court then resolved those disputes. But it is whether those disputes are rehashed *on appeal* that determines the relevant standard of review. And here, neither party challenges the trial court's factual findings, or otherwise disputes the underlying facts. Only the legal effect of those facts is disputed on appeal—which is a question of law reviewed *de novo*.

2. The County also makes a scattershot defense of its purported good faith. It claims that Carolyn Hayes's response to Hoffman's records request abided by normal policy and procedure, but this claim defies the trial court's findings and the undisputed facts in the record. Next, the County says that the trial court found that Hayes's two supervisors *knew* that she had denied Hoffman's initial request for police reports, and that

Hoffman, relying on that erroneous denial, then narrowed his request. If that is true, the supervisors' knowledge of those facts would *strengthen* the legal case for bad faith—and hence for reversal and remand. The better reading of the trial court's findings, however, is that Hayes concealed the truth from her supervisors. That concealment, moreover, cannot enable the County to evade responsibility for Hayes's bad faith.

3. Finally, the County argues that the trial court rightly concluded that it gave Hoffman a timely response because its initial response, although highly inaccurate, was prompt. Under the case law, however, the right question is whether the County timely produced *the records that it initially withheld*. In light of the County's 246-day delay in producing those records, the only answer to that question can be "no."

### ARGUMENT IN REPLY

**I. The standard of review is de novo because the parties do not challenge the trial court's underlying factual findings or otherwise dispute the facts on appeal—instead, only the correct legal standard is at issue.**

The County maintains that the relevant standard of review here is not de novo. *See, e.g.*, Br. of Resp'ts 18, 19. This position is wrong for several independent reasons.

**A. Because Hoffman is not challenging the trial court’s underlying factual findings and has relied solely on undisputed record evidence, review is de novo.**

The rule in Washington is well settled: Where the underlying facts are undisputed on appeal, and only the legal effect of those facts is at issue, the proper standard of review is de novo. *See, e.g., Happy Bunch, LLC v. Grandview North, LLC*, 142 Wn. App. 81, 88, 173 P.3d 959 (2007); *Hogan v. Sacred Heart Med. Ctr.*, 101 Wn. App. 43, 49, 2 P.3d 968 (2000). This rule is only logical. If legal questions are solely at issue, then review must be de novo, since Washington appellate courts *always* review legal questions de novo. *See, e.g., In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 536, 869 P.2d 1045 (1994).

Here, Hoffman has relied solely on the trial court’s factual findings—which neither party challenges on appeal—and on undisputed facts in the record. This is true for every critical fact:

- To show Hayes’s experience, training, and job duties, Hoffman has relied on the trial court’s findings,<sup>1</sup> a sworn declaration from Knudson,<sup>2</sup> Hayes’s sworn declaration,<sup>3</sup> Hayes’s undisputed deposition testimony about her own experience,<sup>4</sup> and a document from County records.<sup>5</sup>

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<sup>1</sup> CP 891 ¶ 3 and CP 902 ¶ 4, which are cited at Br. of Appellant 8, 29, 40.

<sup>2</sup> CP 519, cited at Br. of Appellant 8.

<sup>3</sup> CP 530 ¶ 2, cited at Br. of Appellant 29.

<sup>4</sup> CP 397 at 6:1–4, 6:9–13, 6:15–23 and CP 399 at 8:12–16, which are cited at Br. of Appellant 9, 29, 30.

<sup>5</sup> CP 496, cited at Br. of Appellant 9, 29.

- To show the search that Hayes performed in response to Hoffman’s June 2015 records request, Hoffman has relied on the trial court’s findings<sup>6</sup> and Hayes’s own undisputed deposition testimony.<sup>7</sup>
- To show the June 2015 phone conversation between Hoffman and Hayes, Hoffman has relied on the trial court’s findings.<sup>8</sup>
- To show what Knudson overheard Hayes say to Hoffman during the June 2015 phone call, as well as the ensuing conversation between Knudson and Hayes immediately after that call, Hoffman has relied on the trial court’s findings,<sup>9</sup> Knudson’s sworn declaration,<sup>10</sup> and Knudson’s own undisputed deposition testimony.<sup>11</sup>
- To demonstrate the County’s normal policies and procedures, Hoffman has relied on the trial court’s findings<sup>12</sup> and Hayes’s and Knudson’s own undisputed deposition testimony.<sup>13</sup>
- To show how and what Hayes produced in response to Hoffman’s request, Hoffman has relied on the trial court’s findings<sup>14</sup> and the exemption log that Hayes created.<sup>15</sup>
- To demonstrate Knudson’s concerns about Hayes’s response, Hoffman has relied on Knudson’s sworn declaration<sup>16</sup> as well as her undisputed deposition testimony.<sup>17</sup>

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<sup>6</sup> CP 891 ¶ 4, cited at Br. of Appellant 9.

<sup>7</sup> CP 402–03 at 11:23–12:4 and CP 417 at 26:3–7, 26:11–12, which are cited at Br. of Appellant 9, 25.

<sup>8</sup> CP 891 ¶ 5, CP 892 ¶ 6, CP 896 ¶ 4, and CP 905, which are cited at Br. of Appellant 9, 28.

<sup>9</sup> CP 892 ¶ 7, cited at Br. of Appellant 10, 37.

<sup>10</sup> CP 519, 520, cited at Br. of Appellant 10, 11, 36, 37, 41.

<sup>11</sup> CP 459 at 9:17–21, 9:22–24 and CP 462 at 12:6–9, which are cited at Br. of Appellant 10, 36, 37.

<sup>12</sup> CP 895–97 ¶¶ 3, 7 and CP 919 ¶ 4, which are cited at Br. of Appellant 26, 30.

<sup>13</sup> CP 400 at 9:8–13, 9:14–25, CP 409–10 at 18:6–19:4, CP 419 at 28:3–6, CP 455, CP 460–61 at 9:22–10:15, CP 474 at 24:15–17, CP 476 at 26:11–19, CP 481 at 31:16–22, and CP 483 at 33:22–24, which are cited at Br. of Appellant 13, 14, 25, 26, 30.

<sup>14</sup> CP 896 ¶ 5 and CP 904, which are cited at Br. of Appellant 11, 34.

<sup>15</sup> CP 524, cited at Br. of Appellant 11.

- For what Knudson did and did not do to follow up on her concerns about Hayes’s response, and for the ensuing discussions among Knudson, Hayes, and their supervisors, Hoffman has relied on the trial court’s findings,<sup>18</sup> a memorandum by Sergeant Steve Panattoni,<sup>19</sup> and Knudson’s sworn declarations<sup>20</sup> and undisputed deposition testimony.<sup>21</sup>
- For the phone conversation that Hayes and Hoffman had in the fall of 2015, Hoffman has relied on the trial court’s findings<sup>22</sup> and Hayes’s own undisputed deposition testimony.<sup>23</sup>

It is true, of course, that Hoffman assigned error to several statements that the trial court mislabeled as “findings of fact.” This does not mean that Hoffman is disputing the underlying facts. “A conclusion of law erroneously described as a finding of fact is reviewed as a conclusion of law,” *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986), and here the challenged “findings” are legal conclusions.

Assignment of Error 4 challenges the trial court’s legal conclusion that Hayes did not act in bad faith because she did not tell Hoffman a “knowing[] false[hood].” CP 901 ¶ 1(e). Bad faith requires not a deliberate lie or wrong, but merely that Hayes knew she was running an

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<sup>16</sup> CP 520, cited at Br. of Appellant 42.

<sup>17</sup> CP 459 at 9:22–24 and CP 465 at 15:11–15, which are cited at Br. of Appellant 10, 41.

<sup>18</sup> CP 934, ¶ 10, CP 894, ¶¶ 10, 11, and CP 902, ¶ 5, which are cited at Br. of Appellant 11, 12, 33, 37.

<sup>19</sup> CP 526, 527, cited at Br. of Appellant 12, 32, 37.

<sup>20</sup> CP 520, 533, cited at Br. of Appellant 11, 14, 32, 34.

<sup>21</sup> CP 465 at 15:21 and CP 477 at 27:9–13, cited at Br. of Appellant 12.

<sup>22</sup> CP 906, cited at Br. of Appellant 13.

<sup>23</sup> CP 426 at 35:2–5, cited at Br. of Appellant 12, 38.

*unreasonable risk of committing a wrong and did not care.* Br. of Appellant 27, 29–31, 44.

Assignment of Error 5 challenges the legal conclusion that, on the facts as found, the County did not act in bad faith. *See Adams v. Wash. State Dep’t of Corr.*, 189 Wn. App. 925, 940 n.3, 361 P.3d 749 (2015).

Assignment of Error 6 challenges the legal conclusion that because Hayes’s erroneous response was prompt, the County’s response was timely. *See* Br. of Appellant 45–47.

Assignment of Error 7 challenges the legal conclusion that the County “diligently investigated the matter.” CP 903 ¶ 11. This point is discussed in more detail below. *See infra* pp. 18–22, 22–24.

Finally, Assignment of Error 8 does not dispute the trial court’s account of the facts, but merely its conclusions that the County’s response was timely, CP 904, 907, that it did not act in bad faith, CP 905, 906, 908, 909, and that the County’s investigation of Hayes’s response was sufficient to legally exonerate it of bad faith, CP 905–06, 908, 909.

***B. The proper standard of review depends on whether findings are contested on appeal, not whether they were contested below.***

The County misses the point when it argues that factual questions were disputed below. The standard of review depends not on whether facts were disputed before the trial court, but on whether facts are disputed

before *this* Court. If neither party on appeal challenges “the underlying findings,” review is “de novo.” *Francis v. Wash. State Dep’t of Corr.*, 178 Wn. App. 42, 52, 313 P.3d 457 (2013). The County does not challenge the trial court’s findings. Br. of Resp’ts 18.<sup>24</sup> Neither does Hoffman. The County mentions several facts disputed below, Br. of Resp’ts 17–18, but Hoffman does not dispute them on appeal. He accepts the trial court’s finding that on the June 2015 phone call, he modified his request in reliance on Hayes’s misinformation. CP 896 ¶ 4. He accepts the finding that he told both Hayes and Knudson in the fall of 2015 that “he had received what he requested.” CP 906. And he accepts the finding that he did not return to the Sheriff’s Office in July 2015 to follow up on his request. CP 893 ¶ 9. He disputes “only the legal effect of those facts,” so “the standard of review is de novo.” *Hogan*, 101 Wn. App. at 49.

***C. The standard of review is de novo for another reason as well: The trial court ruled on a paper record, rather than live testimony, and Hoffman is not challenging the trial court’s credibility determinations.***

There is another, independent reason that the proper standard of review here is de novo. As our Supreme Court has repeatedly stressed,

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<sup>24</sup> The County also says, however, that it does “not concede,” even “now,” that “Hayes’s response was legally wrong.” Br. of Resp’ts 2 (quotation marks omitted). This assertion is confusing. As the trial court found, the County conceded that Hayes was wrong to rely on a purported right of privacy when she denied Hoffman’s request for full police reports. CP 897 ¶ 9; CP 352. If the County is now renegeing on this concession, it should say so plainly—and it should explain why Hayes’s response was not legally wrong.

when, as here, a trial court decides a PRA case on the papers, review is de novo. *See, e.g., O'Connor v. Wash. State Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 904, 25 P.3d 426 (2001). This standard of review holds true even if the trial court's decision was *not* on a motion for summary judgment. *See Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 793–94, 791 P.2d 526 (1990) (reviewing de novo but refusing to treat a trial court's PRA decision based on affidavits as a summary-judgment order).

The only exception to de novo review under the PRA occurs when the trial court has reviewed testimony that “requir[es] it to assess the witnesses' credibility or competency.” *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 407, 259 P.3d 190 (2011). Here, however, Hoffman is not challenging the trial court's credibility or competency determinations. Indeed, when Hoffman has cited testimony, it is the undisputed testimony of the County's *own employees*—whose credibility the County naturally does not call into question.

To be sure, Hoffman has pointed out that a critical portion of Hayes's deposition testimony was misleading, Br. of Appellant 35, but in doing so he is *abiding by* the trial court's factual findings. In her testimony, Hayes did not try to defend her erroneous withholding of the full police reports—instead, the import of her testimony was that she had *not* refused Hoffman the full police reports. CP 418 at 27:7–16.

Indeed, her testimony is better described as flatly untruthful, and not merely misleading. When asked whether she had “suggested that [Hoffman] get less than the full report,” she explicitly responded, “No.” CP 419 at 28:11–13. The trial court, however, found that she *had* refused Hoffman the full police reports on erroneous privacy grounds. CP 891 ¶ 5; CP 905. To call the relevant portion of Hayes’s testimony untruthful, then, is precisely *not* to challenge any of the trial court’s credibility determinations, but rather to follow out the necessary implications of the trial court’s own findings.

***D. While the parties dispute whether the trial court found that Hayes’s supervisors knew the full truth about her response to Hoffman, that dispute does not matter to the standard of review, which remains de novo.***

While neither side challenges the trial court’s factual findings, they do dispute whether it found Hayes’s supervisors to have known that she had refused to produce the full police reports on asserted privacy grounds. *Compare* Br. of Appellant 32–35, 42, *with* Br. of Resp’ts 35–37. This dispute, however, does not affect the standard of review—or indeed change the result of this appeal at all.

The dispute does not affect the standard of review for two different reasons. First, the dispute concerns not whether certain findings are erroneous, but what those findings *are*. Second, even if this dispute did

concern whether Hayes's supervisors knew that she had refused to produce the full police reports on asserted privacy grounds, that dispute would still be reviewed de novo. Where an issue in a PRA case turns on documentary evidence and affidavits, rather than the credibility or competency of witnesses, review is de novo. *See Bainbridge Island Police*, 172 Wn.2d at 407. And here, any putative dispute about what Hayes's supervisors knew turns on documentary evidence and affidavits, rather than on the credibility or competency of witnesses. That much is clear from what Hoffman has cited to show that Hayes's supervisors did not know the truth about her response to Hoffman: he has cited a memo written by Sgt. Panattoni, *see* CP 526–27 (cited by Br. of Appellant 32, 42), and Knudson's sworn declarations, *see* CP 533 (cited by Br. of Appellant 32); CP 519, 520 (cited by Br. of Appellant 41, 42). Unless the County wishes to question its own employees' credibility—and there is no indication that it does—the standard of review is de novo.

In any event, the resolution of this dispute is legally immaterial. As Hoffman will explain below, whichever way the dispute is resolved, the County acted in bad faith as a matter of law. *See infra* pp. 18–22.

***E. A trial court necessarily abuses its discretion when it errs on a question of law—and questions of law are reviewed de novo.***

Finally, the County points out that appellate courts review

PRA penalty determinations for abuse of discretion. That is true, but it does not change the standard of review that is relevant to this appeal.

When a trial court incorrectly applies the law, “it necessarily abuses its discretion.” *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). And this appeal asks in two main ways whether the trial court incorrectly applied the law. First, did the trial court, on the found and otherwise undisputed facts, commit legal error when it concluded that the County did not act in bad faith? *See Adams*, 189 Wn. App. 925 at 939 (in these circumstances, bad faith is a question of law). Second, did the trial court apply an incorrect legal standard in concluding that the County’s response was timely? *See Dix*, 160 Wn.2d at 833 (whether trial court applied the incorrect legal standard raises a question of law). Since these are questions of law, they are reviewed de novo. *Id.* at 833–34.

In a related move, the County maintains that the trial court’s ultimate per-day penalty is comparable to the per-day penalty assessed in *Wade’s Eastside Gun Shop, Inc. v. Department of Labor & Industries*, 185 Wn.2d 270, 372 P.3d 97 (2016). Br. of Resp’ts 22–25. One fatal problem with this argument, among others, is its assumption that *Wade’s* is analogous to this case. That assumption is false if, as Hoffman contends, the trial court erred in concluding that the County acted in good faith. For in *Wade’s*, the Supreme Court, although determining that the agency had

“violated the PRA,” also suggested that the agency had acted in good faith, quoting from another case that “good faith reliance on an exemption does not preclude imposition of [PRA] penalties.” 185 Wn.2d at 283 (quoting *Soter v. Cowles Publ’g Co.*, 162 Wn.2d 716, 751, 174 P.3d 60 (2007)). Before determining whether *Wade’s* supplies a useful comparison, the legal question of bad faith must first be reviewed de novo. In short, one cannot determine whether the trial court’s penalty was an abuse of discretion without first determining whether it came to an erroneous legal conclusion about bad faith.

If the trial court did *not* apply the correct legal standard, then remand is the proper remedy. See *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 468–69, 229 P.3d 735 (2010). Remand respects the trial court’s discretionary authority by asking the trial court to re-exercise its discretion using the correct legal standard. The County invites this Court to determine the correct penalty itself, see Br. of Resp’ts 40–41, but the County forgets that “[i]t is generally not the function of an appellate court to set the penalty.” *Id.* at 469.

**II. Kittitas County acted in bad faith when it failed to produce responsive videos and photographs and denied Hoffman’s request for full police reports.**

The County defends itself against bad faith in three ways.

First, it asserts that Hayes followed normal policies and procedures

in responding to Hoffman’s initial records request. This assertion, on the trial court’s findings and the undisputed record, is flatly wrong.

Second, the County now maintains that Kim Dawson and Sgt. Steve Panattoni—Hayes’s supervisors—knew that Hayes had told Hoffman he was not entitled to the full police reports and that Hoffman, relying on Hayes’s denial, had narrowed his initial request for records. If true, the supervisors’ knowledge strengthens the case for bad faith.

Third, the County also maintains that the actions of Hayes’s supervisors should be considered in determining whether the County acted in bad faith. But if the County is correct that they knew the full truth about Hayes’s conversation with Hoffman, taking their actions into account only makes the case for bad faith stronger. If, on the other hand, Hayes concealed the truth from them, Hayes’s dishonesty cannot shield the County from full responsibility for Hayes’s bad faith.<sup>25</sup>

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<sup>25</sup> The County also says that after *Yousoufian*, bad faith “is no longer the principal factor” in determining an appropriate PRA penalty. Br. of Resp’ts 30. But *Yousoufian* itself says that an “agency’s bad faith *is the principal factor* which the trial court must consider.” 168 Wn.2d at 460 (quoting *Amren v. City of Kalama*, 131 Wn.2d 25, 37–38, 929 P.2d 389 (1997)) (emphasis added); see also *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 172 Wn.2d 702, 717, 261 P.3d 119 (2011) (“[B]ad faith *is the principal factor* in determining the amount of a penalty.” (emphasis added)). The Court should be taken at its word.

***A. Under the trial court’s factual findings and the undisputed facts, Hayes failed to follow normal policies and procedures when she responded to Hoffman’s records request.***

The County argues that Hayes followed normal policies and procedures when she responded to Hoffman’s records request. This argument ignores the trial court’s factual findings and undisputed record.

**1. Hayes’s search for photographs and videos violated normal policy and procedure.**

The County maintains that Hayes’s search for photographs and videos followed normal policy, because she used the County’s Spillman document management system, identified police records involving Erin Schnebly, but did not see photographs or videos. Br. of Resp’ts 33. Hoffman does not dispute that Hayes used the Spillman system and failed to see photos and videos. But as the trial court found:

A thorough review of the police reports in the Spillman system, would have revealed the existence of photographs and two videos. A subsequent search of a box where it was possible that videos might be located turned up two (2) videos for one of the incident reports.

CP 891 ¶ 4.

This finding has two logical implications. Each means that under the trial court’s findings, Hayes violated normal policy and procedure.

First, the finding necessarily means that Hayes did *not* conduct “[a] thorough review of the police reports in the Spillman system.”

CP 891 ¶ 4; *see also* CP 904–05 (Hayes “had not carefully examined the

incident reports”). In doing so, she departed from her normal policy. For according to the undisputed testimony of Hayes herself, her normal policy was to conduct a thorough review of the police reports—at the very least, a thorough enough review to determine what information needed to be redacted. CP 400 at 9:21–22; *see also* Br. of Resp’ts 33 (conceding that “[t]o the extent that implementation of the policies [was] in evidence[,] it was also through Knudson and Hayes”).

Second, the trial court’s finding also means that Hayes did *not* search in the “box where it was possible that videos might be located.” CP 891 ¶ 4; *see also* CP 417 at 26:11–12 (Hayes’s testimony that she did not search there). Yet, according to Knudson’s undisputed testimony, the normal practice was to check that box for videos in response to a request. CP 476 at 26:11–19; *see also* CP 482 at 32:5–8.

The County maintains, however, that because Hoffman narrowed his request, there was “no reason for [Hayes] to search further for photos or videos—the narrowed request did not seek them.” Br. of Resp’ts 35. This argument ignores the sequence of events that the trial court found. Under those findings, Hayes *first* misinformed Hoffman that there were no responsive photos or videos, and only then did Hoffman narrow his request in reliance on the misinformation:

Because [Hayes] had not carefully examined the incident reports before the telephone call, she misinformed Hoffman about the existence of photographs and videos relating to two of the seven incidents. . . . Hoffman modified his request . . . . [I]t is doubtful Hoffman could have ma[d]e an informed decision to modify his request when he was misinformed about the existence of photographs, videos or exemptions to disclosure for privacy concerns.

CP 904–05. Hayes told Hoffman that there were no responsive videos or photographs without first carefully viewing the police reports or checking the box where videos were located. That was a violation of normal policy and procedure. Hayes herself testified that her standard procedure was to call the requester *after* performing her search. *See* CP 400 at 9:22–23 (testifying that she would call the requester after searching for responsive records); *see also Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 172 Wn.2d 702, 724, 261 P.3d 119 (2011) (“An adequate search is a prerequisite to an adequate response . . . .”). If the County is arguing that Hayes planned to *defer* her search for photos and videos until after the call with Hoffman—an argument that has no support in the trial court’s findings or the record—that would itself violate her normal policy.

2. Hayes’s refusal to produce the full police reports on asserted privacy grounds violated normal policy and procedure.

The County fails to explain why Hayes’s refusal to produce the full police reports was in keeping with usual policy. That is understandable. If Hayes normally refused to produce full police reports on legally erroneous

privacy grounds, it would mean that Hayes routinely violated the PRA. As the trial court found, however, this was not Hayes's normal response—it was “an atypical response by a veteran public records officer.” CP 902 ¶ 4; *see also* CP 908 (“a non-standard response”). This finding finds ample support in the County employees' own undisputed testimony. Hayes herself testified that even if the requester was not involved in the incident, she would produce the full report about that incident to the requester with appropriate redactions. CP 409–10 at 18:6–19:4; *see also* CP 419 at 28:3–6. And Knudson testified that she has never encountered any other situation in which a requester has been refused a full police report. CP 459–60 at 9:22–10:15; *see also* CP 519 (“This request particularly stood out in my mind because of the process in which it was completed.”).

The County does not confront these findings. It simply responds that “[s]eeking clarification of a request is consistent with the policies” of the Sheriff's Office and “authorized under the PRA.” Br. of Resp'ts 3. This response has three deficiencies. First, it ignores Hoffman's central point. Even if Hayes normally asked for a clarification, her usual policy was *not* to withhold full police reports just because the requester wasn't an involved party; *that* is how she violated her own practices. Second, the County overlooks Hayes's uncontradicted testimony that she did *not* normally ask for a clarification when somebody requested police reports.

CP 420 at 29:11–15. Third and last, in arguing that Hayes abided by the PRA, the County forgets that the attorney general’s rules, to which courts routinely resort for guidance, *e.g.*, *Rental Hous. Ass’n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 539, 199 P.3d 393 (2009), provide that “[a]n agency can only seek a clarification when the request is objectively ‘unclear,’” WAC 44-14-04003(7). And, as the trial court found, Hoffman’s request was clear. CP 891, ¶ 3.

***B. If, as the County now claims, Sergeant Panattoni and Administrative Assistant Kim Dawson knew that Hayes had refused to produce the full police reports to Hoffman, that would make the County more culpable, not less.***

The undisputed facts show—and the trial court implicitly found—that Hayes and Knudson failed to tell the full truth to their supervisors. Specifically, neither disclosed that in the June 2015 phone call, Hayes told Hoffman that there were no responsive photographs and videos, that he was not entitled to the full police reports because of “privacy” issues, and that only *then*, in reliance on Hayes’s misinformation, did Hoffman narrow his request. Br. of Appellant 32–35, 41–42.

Surprisingly, however, the County argues that the trial court found Knudson to have told her supervisors everything.<sup>26</sup> Br. of Resp’ts 35–36.

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<sup>26</sup> Yet the County appears not to contend that *Hayes*, as opposed to Knudson, confessed the full truth to her supervisors. And for good reason. In her deposition, Hayes insisted—falsely—that she did not deny Hoffman the full police reports. CP 419 at 28:11–13. It would be strange if Hayes in September 2015 had claimed the opposite

While this is not the best reading of the trial court’s findings, *see infra* p. 22, Hoffman will assume *arguendo* that the County is correct.

If so, this becomes only a clearer case of bad faith. *See* Br. of Appellant 41 n.6. In arguing that the supervisors knew the full truth about Hayes’s phone call with Hoffman, the County fails to consider the implications of its own argument.

If the County is right, then Knudson would have told her supervisors the full story of Hayes’s phone call: she told Hoffman that because he was not a “party involved[,] . . . we would not be able to provide the majority of documents per specific RCWs, [but also told] him that we could provide what our office calls a face sheet.” CP 519–20 (Knudson’s sworn declaration). Knudson would also have told her supervisors that she thought that Hayes’s statement to Hoffman on the phone had been legally incorrect. CP 521 (stating that in September 2015, she brought the response to her supervisors’ attention because she “did not feel that it [had been] completed correctly”); *see also* CP 465 at 15:9–15.

At this point, the supervisors could do only one thing if they wished to avoid an unreasonable risk of harm to Hoffman and the PRA. The only way to avoid perpetuating an ongoing PRA violation was to direct Knudson to produce the full police reports to Hoffman. If, along

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before her supervisors. In any event, Hoffman’s arguments in this section do not depend on whether Hayes concealed the truth from her supervisors.

with Knudson, they believed that Hayes’s initial response to Hoffman was legally incorrect or ran a serious risk of being incorrect,<sup>27</sup> then, by failing to correct that response, they were aware of an unreasonable risk but demonstrated indifference to whether harm resulted or not. That is the definition of bad faith. *Faulkner v. Wash. Dep’t of Corr.*, 183 Wn. App. 93, 104, 332 P.3d 1136 (2014). Thus, by maintaining that the supervisors knew the full truth about Hayes’s conversation with Hoffman, the County effectively ascribes bad faith to them. And if the supervisors were guilty of bad faith, the County was too.

It was not enough for the supervisors merely to tell Knudson and Hayes to ask Hoffman whether he had “received what he requested.” CP 902 ¶ 4. For if the County is right that Knudson told her supervisors the whole truth, they thereby learned that Hoffman had *modified his initial request in reliance on Hayes’s misinformation*. In these circumstances, asking whether Hoffman “received what he requested” or “got what he needed from the request,” CP 902 ¶¶ 4, 5, created an obvious risk that Hoffman would think that he was being asked about his request *as modified*, rather than about his initial, legally operative request. And if the

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<sup>27</sup> Conceivably, if the two supervisors had doubts about whether Hayes had violated the PRA by telling Hoffman that he could not have the full police reports, they could have consulted County attorneys. *See* CP 457 at 7:10–12. Nothing in the trial court’s findings or in the record indicates that the supervisors disagreed with anything Knudson said. Nor is there any evidence that they consulted an attorney.

supervisors rested content with that obvious risk, they acted with indifference to whether harm resulted from an unreasonable risk—i.e., they acted in bad faith. *Faulkner*, 183 Wn. App. at 104.

Indeed, it was *highly likely* that Hoffman thought that Hayes and Knudson, in the fall of 2015, were asking about his request as narrowed. Neither Hayes nor Knudson corrected Hayes’s earlier misinformation and told Hoffman that he was entitled to the full police reports. Hence, as far as Hoffman knew, his initial request could not lawfully be fulfilled. Why would the agency be asking him about a request for documents that he had been told he could never receive? The natural conclusion for Hoffman to draw was that Hayes and Knudson were asking him about his narrowed request rather than about his initial request.

It is no answer to say that “Hayes continued to believe that the request had been narrowed.” Br. of Resp’ts 36. If the supervisors had learned the truth, they would have known that Hoffman had narrowed his request only *after* Hayes had wrongly told him that he was not entitled to the full police reports. Thus, as the trial court correctly concluded,<sup>28</sup> ***Hoffman’s initial request was still legally operative.*** Br. of Appellant 21–22. Correcting Hayes’s response to that initial request required the supervisors to direct Knudson to produce the full police reports.

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<sup>28</sup> The County nowhere challenges this conclusion.

If the County is suggesting that the supervisors could reasonably have *believed* that Hoffman’s initial request was no longer legally operative, the County is wrong. An agency cannot reasonably conclude that a requester’s initial request has become inoperative just because the requester has “narrowed” it in reliance on a response that the agency itself knows violated the PRA. *See* Br. of Appellant 21–22. If the agency treats such a request as inoperative, it is not acting in good faith—it is being willfully blind.

***C. If—as the trial court implicitly found—Hayes and Knudson failed to tell their supervisors the whole truth, the supervisors’ actions cannot override Hayes’s bad faith.***

The County’s reading of the trial court’s findings is unconvincing. According to the County, the trial court found that Knudson informed her supervisors that Hayes had denied Hoffman the full police reports, and that Hoffman had then narrowed his request in reliance on that denial. Findings of fact, however, “must be construed in a manner which will support the trial court’s conclusions of law.” *Lincoln Shiloh Assocs. v. Mukilteo Water Dist.*, 45 Wn. App. 123, 131, 724 P.2d 1083 (1986). And the conclusion that “there was proper supervision” (CP 922) makes any sense at all only if the two supervisors did not know that Hayes had denied Hoffman the full police reports. As Hoffman has explained, if they *did* know this, then the supervisors themselves acted in bad faith.

So the best reading of the findings is that Hayes and Knudson failed to tell their supervisors that Hoffman had changed his request only after Hayes had wrongly denied him the full police reports. For Knudson, this failure was at least negligent; for Hayes, her concealment provides further evidence of bad faith. Br. of Appellant 32–35, 41–43.

The County appears to argue that if Hayes’s two supervisors were ignorant of what Hayes told Hoffman in June 2015, their lower personal culpability may override Hayes’s bad faith for PRA purposes. After all, the County says, *Yousoufian* told courts to determine an agency’s culpability, not an individual’s. Br. of Resp’ts 31–32. This argument has three fatal flaws.

First, the County’s argument, stated baldly, is that if a designated public records officer like Hayes conceals the truth from her supervisors, the agency employing the public records officer need not be held fully responsible for the officer’s dishonesty. This perverse result would allow an agency to escape higher penalties not in spite of, but *because of*, a public records officer’s dishonesty. An agency should not be able to use its public records officer’s dishonesty as a shield.

Second, the County overlooks the important role that public records officers play under the PRA. They are tasked with special responsibility for “oversee[ing] the agency’s compliance with the public

records disclosure requirements of this chapter.” RCW 42.56.580(1).

Given this role, it would be contrary to the PRA for an agency to escape full responsibility for a public records officer’s bad faith merely because that officer fails to tell the truth to her superiors.

Third and last, the County’s argument, if accepted, would create an exception to the usual rule of vicarious responsibility under Washington law. The usual rule is that an employer must be held fully responsible even if only *one* of its employees is culpable. *See, e.g., Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wn.2d 136, 147, 341 P.3d 261 (2014) (noting that the employer was legally responsible even if only one employee breached the standard of care). That rule should also apply to the PRA, particularly where, as here, the culpable employee is the public records officer.

**III. The trial court erred as a matter of law when it concluded that the County’s response was timely.**

The trial court concluded that the County’s response to Hoffman’s records request was timely because Hayes’s response was prompt, even though it failed to include the overwhelming majority of the records that were responsive to his initial request. The County defends this conclusion, reasoning that the timeliness of Hayes’s response is analytically distinct from its correctness. Br. of Resp’ts 37–38.

The County’s argument fails to identify the relevant delay,

however. The relevant delay is not the short period between Hoffman's initial request and Hayes's production of seven highly redacted face sheets. The relevant delay, rather, is the 246-day interval between Hoffman's initial request and the County's full production of the police reports along with photographs and videos. Because it is those records that were initially withheld, it is the delay in producing those records that is relevant to assessing penalties. See *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 728, 354 P.3d 249 (2015) ("[A] court assesses penalties on the basis of what documents the government withheld, not what it produced.").<sup>29</sup> Because that is the relevant delay, the County may not use its initial faulty production to claim timeliness.

### CONCLUSION

The trial court's award of penalties should be reversed, and this case remanded for a new penalty determination under the correct legal standard. Hoffman should also be awarded attorneys' fees and costs.

RESPECTFULLY SUBMITTED this 12th day of December, 2017.

KELLER ROHRBACK L.L.P.



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**Attorney for Appellant Randall Hoffman**

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<sup>29</sup> Instead of explaining why *Cedar Grove Composting* does not control here, the County does not mention the case at all. See Br. of Appellant 46-47 (explain why it controls).

**CERTIFICATE OF SERVICE**

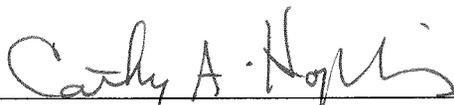
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