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No. 96286-3

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

Court of Appeals No. 35091-6-III

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RANDALL HOFFMAN,

Petitioner,

v.

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

Respondents.

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**SUPPLEMENTAL BRIEF OF PETITIONER  
RANDALL HOFFMAN**

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## **INTRODUCTION**

Carolyn Hayes, the Kittitas County Sheriff Office's longtime Public Records Officer, intentionally withheld public records from Plaintiff Randall Hoffman. The parties agree that this withholding violated the Public Records Act (PRA). Yet, in this litigation, Hayes not only gave no reason for the withholding, but denied under oath that she withheld records at all.

This Court should hold that where, as here, an agency intentionally withholds public records knowing that the withholding is unjustifiable, it withholds records in bad faith. Because the trial court concluded otherwise, the Court should remand for recalculation of the PRA penalty.

## **ISSUES PRESENTED FOR REVIEW**

- 1.** In a PRA case, when a trial court has made a decision on a purely written record and the relevant facts are not contested on appeal, should an appellate court review de novo whether an agency withheld public records in bad faith?
- 2.** When an agency has intentionally withheld responsive public records with the knowledge that the withholding is unreasonable, has it withheld records in bad faith?
- 3.** When a trial court bases its PRA penalty on an erroneous determination that the agency withheld records in good faith, should the case be remanded for a new penalty calculation?

## STATEMENT OF THE CASE

### I. Facts<sup>1</sup>

Plaintiff Randall Hoffman wanted to show that a certain Erin Schnebly had a pattern of reckless behavior. In July 2015 he submitted a records request to the Kittitas County Sheriff's Office asking for "[a]ll police reports and other info available" on Schnebly. CP 13; CP 891, ¶ 2.

Carolyn Hayes, the Sheriff Office's designated Public Records Officer, fielded Hoffman's request. CP 891, ¶ 3. She had been fulfilling public records requests for ten years and had attended numerous trainings on the PRA. CP 397 at 6:1–4, 6:15–23; CP 496. The most common kind of request she received was for police reports. CP 399 at 8:12–16.

Hayes searched for records on the Office's document-management system and identified seven police reports, but no photos or videos. Hayes then called Hoffman. She told him that because he was not "a party involved" in the police reports, "privacy interests" prevented her from giving him the full reports. CP 891, ¶ 5. She said she could give him only the police reports' "face sheets," showing the type of incident reported, the date, and the location. *Id.* Relying on what Hayes had told him, Hoffman said that he would accept just the face sheets. CP 896, ¶ 4.

Under oath, Hayes has denied that this ever happened. She claims

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<sup>1</sup> These facts are based on the trial court's findings, supplemented by undisputed testimony from the County's own employees.

she never told Hoffman he could not receive the police reports. CP 419 at 28:11–16. Nevertheless, the trial court found that she *did* tell him he could not receive the reports, *see* CP 896, ¶ 4; CP 891, ¶ 5, and on appeal no party disputes that finding.

The parties also do not dispute that Hayes’s response to Hoffman’s request was legally wrong. CP 351. It has long been settled that the right to privacy of someone involved in a police report cannot justify the withholding of that report. *Hudgens v. City of Renton*, 49 Wn. App. 842, 846, 746 P.2d 320 (1987), *abrogated on other grounds by Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 259 P.3d 190 (2011). Nor was it enough for Hayes simply to invoke the “right of privacy,” because the PRA provision defining privacy does not by itself allow withholding. *See* RCW 42.56.050; *City of Lakewood v. Koenig*, 182 Wn.2d 87, 93, 343 P.3d 335 (2014).

When Hayes responded to Hoffman’s request, she was training Kallee Knudson to replace her. CP 892, ¶ 7. Knudson had been training for about a month. *Id.* Knudson overheard parts of what Hayes told Hoffman, *id.*, including that the Office could not provide Hoffman with most of the documents he was requesting. CP 519–20.

Knudson had never heard Hayes say anything like this in response to a request for police reports, so she asked why she was not providing the

reports. CP 459 at 9:22–24; CP 520. The ensuing conversation “went on for at least 15 minutes,” because Knudson had “a hard time understanding why [Hayes] was doing this particular request so differently than what I had been trained on.” CP 520.

Despite this conversation, Hayes did not change her decision to withhold the full police reports from Hoffman. CP 892, ¶ 7. She sent him seven incident face sheets, improperly redacting even those documents. CP 892, ¶ 6.

About three months after Hayes’s withholding, Knudson was cleaning out a desk and found a copy of Hoffman’s request. CP 520. She brought her concerns about Hayes’s response to her supervisors, who instructed Knudson and Hayes to contact Hoffman “to determine if he got what he needed from the request.” CP 902, ¶ 4.

Hoffman told Knudson that “he did get his request,” but Knudson did not share her concerns with Hoffman or tell him that she thought he was entitled to more documents. CP 893–94, ¶ 10. Hayes also contacted Hoffman, who told her that he had received what he needed, but that he was still curious about other incidents that he thought might not be reflected in what he received. CP 894, ¶ 11. Like Knudson, Hayes never told him that he was entitled to the full police reports. CP 426 at 35:2–5.

Hoffman returned to the Sheriff’s Office in February 2016.

CP 894, ¶ 12. Saying he was entitled to more documents, he resubmitted his original request, which was properly processed. CP 894–95, ¶¶ 12–13. Along with the full police reports, Hoffman received responsive photos and videos that Hayes had failed to locate. CP 891, ¶ 4; 896–97, ¶ 7. If Hayes had conducted a reasonable search in response to Hoffman’s initial request, she would have found numerous photographs and two videos. CP 896–97, ¶ 7.

## **II. Procedural history**

The trial court determined that Hayes’s withholding violated the PRA. Stating that a PRA penalty depends “primarily” on “whether the agency acted in bad faith,” the trial court concluded that the withholding here was negligent, not in bad faith. CP 910, ¶¶ 2, 4. It therefore chose a penalty on the low end of the statutory range of \$0 to \$100 per day, RCW 42.56.550(4): a penalty of 50¢ per day for each of the 126 records that had been improperly redacted or withheld. CP 912. The records had been redacted or withheld for 246 days, so the total penalty was \$15,498. *Id.*

On appeal, Hoffman did not challenge the trial court’s underlying factual findings. *Hoffman v. Kittitas County*, 4 Wn. App. 2d 489, 498, 422 P.3d 466 (2018). Instead, he argued that the trial court had misapplied the standard for bad faith. The County likewise has not challenged the trial court’s findings for purposes of appeal. COA Resp’t Br. 18.

The Court of Appeals affirmed. The majority reviewed the trial court’s determination about bad faith for abuse of discretion. It also held that the “label” that the trial court put on the Sheriff Office’s culpability was immaterial and thus could not justify reversal. *Hoffman*, 4 Wn. App. 2d at 497–98. Indeed, it held that a trial court need not make *any* factual findings to support a PRA penalty. *Id.* at 495 & n.2.

A separate concurrence “agree[d] that the evidence supports the trial court’s culpability findings,” but disagreed with the majority’s holding that “culpability determinations are mere labels” in PRA litigation. *Id.* at 500, 502 (Lawrence-Berrey, C.J., concurring in result). Rather, “the absence or incorrectness of a culpability finding warrants remand.” *Id.* at 502. Such a “finding,” the concurrence maintained, is reviewed for substantial evidence. *Id.* at 503–04.

## **ARGUMENT**

### **I. De novo review applies to the trial court’s determination that the records had been withheld in good faith.**

Several strands of this Court’s case law point independently to the conclusion that the trial court’s decision should be reviewed de novo.

***A. Because bad faith is a mixed question of law and fact and the relevant facts are undisputed, the trial court's decision on bad faith is reviewed de novo.***

The proper standard of review turns on whether an issue presents a question of law, fact, or a hybrid of both. *See, e.g., Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 440, 191 P.3d 879 (2008).

As the Court of Appeals has repeatedly held, whether an agency has withheld public records in bad faith presents a mixed question of law and fact. *Adams v. Wash. State Dep't of Corr.*, 189 Wn. App. 925, 939, 361 P.3d 749 (2015); *Faulkner v. Wash. Dep't of Corr.*, 183 Wn. App. 93, 101–02, 332 P.3d 1136 (2014); *Francis v. Dep't of Corr.*, 178 Wn. App. 42, 51–52, 313 P.3d 457 (2013). It is a mixed question because “it requires the application of legal precepts (the definition of ‘bad faith’) to factual circumstances (the details of the PRA violation).” *Francis*, 178 Wn. App. at 51–52; *see also Erwin v. Cotter Health Ctrs.*, 161 Wn.2d 676, 687, 167 P.3d 1112 (2007) (a “mixed question . . . requires applying legal precepts . . . to factual circumstances”). Elsewhere in the law, bad faith has likewise been treated as a mixed question. *See Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 469, 938 P.2d 827 (1997) (whether a party has failed to negotiate in good faith raises “a mixed question of law and fact”).

These decisions are correct. Bad faith is a legal standard, not a raw fact about the world that exists independently of the law. Certain acts or

decisions may be described as taken “in bad faith,” but that is a legal description *applied* to a given set of facts. Thus, courts can determine whether an agency has withheld public records in bad faith only by first applying the legal standard for bad faith to the facts. That is why there is a legal standard for bad faith; if the question were purely factual, there could be no standard. *See Francis*, 178 Wn. App. at 62–63 (setting out standard).

“Analytically, resolving a mixed question of law and fact requires establishing the relevant facts, determining the applicable law, and then applying that law to the facts.” *Erwin*, 161 Wn.2d at 687 (quotation and citation omitted). When the trial court heard live testimony, *see id.* at 685, disputed findings on the “essential facts” are reviewed for substantial evidence. *Id.* at 687 & n.11. But “[t]he process of determining the applicable law and applying it to these facts is a question of law that we review de novo.” *Id.* at 687.

Applying these principles, the Court should review the trial court’s decision de novo. The historical facts of this case—the who, what, when, where, and how—are undisputed on appeal. Hoffman does not challenge the trial court’s underlying factual findings. *Hoffman*, 4 Wn. App. 2d at 498. Instead, to support his legal arguments, Hoffman has relied solely on those findings and undisputed record evidence (i.e., the writings and

deposition testimony of the County’s own employees).<sup>2</sup> The County, too, does not challenge the trial court’s factual findings. COA Resp’t Br. 18. The parties dispute only the applicable law and the legal conclusion that the trial court drew from applying the law to the facts: that the Sheriff’s Office had withheld public records negligently but in good faith. That conclusion is reviewed de novo. *Erwin*, 161 Wn.2d at 687.

***B. Where, as here, a PRA case is decided solely on a written record and competing documentary evidence or credibility is not at issue on appeal, a trial court’s decision is reviewed de novo.***

This State’s trial courts decide “[a]lmost all” PRA cases solely on a written record. Ramsey Ramerman & Eric M. Stahl, *Court Remedies to Obtain Disclosure* § 16.3(5) at 16-13, in *Public Records Act Deskbook: Washington’s Public Disclosure and Open Public Meetings Laws* (Ramsey Ramerman & Eric M. Stahl eds., 2d ed. 2014). Where they do so, this Court has said for 30 years that their decisions are reviewed without deference when “the credibility or competency of witnesses” or “conflicting evidence” are not at issue. *Spokane Police Guild v. Wash. State Liquor Control Bd.*, 112 Wn.2d 30, 35–36, 769 P.2d 283 (1989).<sup>3</sup>

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<sup>2</sup> This evidence could be “disputed” only if the County were to challenge the credibility of its own employees or the truth of their testimony. Understandably, it has challenged neither.

<sup>3</sup> *Accord Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 791, 246 P.3d 768 (2011); *Morgan v. City of Federal Way*, 166 Wn.2d 747, 753, 213 P.3d 596 (2009); *O’Connor v. Wash. Stat Dep’t of Soc. & Health Servs.*, 143 Wn.2d 895, 904, 25 P.3d 426 (2001); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 612, 963 P.2d 869 (1998); *Amren v. City of*

This standard is not unique to the PRA, but applies *whenever* a trial court’s decision rests on a written record and there are no conflicts in the evidence or credibility issues on appeal. *See State v. Kipp*, 179 Wn.2d 718, 727, 317 P.3d 1029 (2014).

Here, neither the credibility nor the competency of witnesses, nor any conflict in the documentary evidence, is at issue in this appeal. Indeed, the relevant facts are undisputed. The “correct standard” is therefore “*de novo*.” *In re Marriage of Langham & Kolde*, 153 Wn.2d 553, 559, 106 P.3d 212 (2005) (*de novo* review “where the trial court commissioner relied solely on documentary evidence and credibility is not an issue,” and where “the parties do not dispute the underlying facts”).

Against all this authority, the County has argued that because the parties disputed certain underlying facts *before the trial court*, an appellate court must review the trial court’s determination about good faith for substantial evidence. COA Resp’t Br. 17–18. None of the trial court’s findings about those underlying facts, however, is disputed *on appeal*. COA Appellant Corr. Reply Br. 7. Those findings must thus be treated as verities. The only remaining issue is whether, given those findings, the trial court properly concluded that the County had withheld public records

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*Kalama*, 131 Wn.2d 25, 32, 929 P.2d 389 (1997); *Dawson v. Daly*, 120 Wn.2d 782, 788, 845 P.2d 995 (1993), *overruled on other grounds by Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1993) (PAWS).

in good faith. That application of law to fact is reviewed de novo, even when the trial court has also resolved certain disputed underlying facts. *See, e.g., Humphrey Indus., Ltd. v. Clay Street Assocs., LLC*, 170 Wn.2d 495, 501–02, 242 P.3d 846 (2010) (appeal from a bench trial); *Erwin*, 161 Wn.2d at 687 (same).

***C. An overall abuse-of-discretion standard still requires de novo review of the bad faith issue.***

The Court of Appeals majority erred by reviewing the trial court’s determination about bad faith for abuse of discretion. The ultimate penalty that a trial court selects under the PRA is reviewed for abuse of discretion. But that does not mean that all *subsidiary* issues—issues that influence the selection of the penalty—are reviewed for abuse of discretion. Rather, this Court has consistently held that underlying legal questions, including the trial court’s application of law to the facts, are reviewed de novo. *See* Pet. for Review 11–12 (citing cases).<sup>4</sup> Here, in imposing a penalty, the trial court relied heavily on its conclusion that the County had not withheld records in bad faith. CP 908, 910, 911. Because that conclusion required the application of law to facts, it is reviewed de novo.

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<sup>4</sup> *See also, e.g., State v. Parvin*, 184 Wn.2d 741, 752–53, 364 P.3d 94 (2015) (a decision to seal records is reviewed for abuse of discretion, but the trial court’s application of GR 15, governing sealing, is reviewed de novo); *Gildon v. Simon Prop. Grp., Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196 (2006) (dismissal for failure to join an indispensable party is reviewed for abuse of discretion, but underlying legal conclusions are reviewed de novo).

**II. Under the undisputed facts, the Sheriff’s Office withheld records in bad faith.**

**A. *Bad faith includes an intentional withholding of records with the knowledge that the withholding is unreasonable.***

Where, as here, an agency intentionally withholds records knowing that the withholding is unreasonable, it withholds records in bad faith.

This becomes evident from a survey of Washington case law.

1. The case law on bad faith

In *Amren*, this Court remanded for the trial court to make findings on the facts relevant to bad faith, but noted that the plaintiff’s “arguments . . . are compelling as potential evidence of bad faith.” *Amren*, 131 Wn.2d at 38. The plaintiff had argued that Kalama’s contention that PRA exemptions applied lacked a “reasonable basis in law,” that Kalama and its mayor had made misleading statements in the PRA litigation, that Kalama “was aware” that its arguments for PRA exemptions were incorrect, and that Kalama’s mayor labored under a conflict of interest. *Id.* at 38 n.11.

In *ACLU v. Blaine School District No. 503*, 95 Wn. App. 106, 975 P.2d 536 (1999), “it [was] clear” that the school district “did not act in good faith” when it made records available for pick up but refused to mail them to the requester. *Id.* at 115. This was so for two reasons. First, its interpretation of the PRA “was unreasonable.” *Id.* at 114. Second, a letter from the district superintendent indicated that the district handled the

request as it did because it wished to avoid the cost and inconvenience of complying. *See id.* at 112–14.

The lengthy *Yousoufian* litigation also touched on the meaning of bad faith. In the first appeal, the Court of Appeals agreed with the trial court’s determination that the County had been “grossly negligent,” and that its response had “not [been] a good faith effort.” *Yousoufian v. Office of Ron Sims (Yousoufian I)*, 114 Wn. App. 836, 853, 60 P.3d 667 (2003), *aff’d in part and rev’d in part on other grounds*, 152 Wn.2d 421, 98 P.3d 463 (2004). But it also agreed that the County had not been guilty of “bad faith in the sense of intentional nondisclosure.” *Id.* This Court did not reverse or otherwise dispute these holdings in either the first or the second appeal. *See Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010); Pet. for Review 17–18.

More recently, a trio of Court of Appeals decisions further defined bad faith.<sup>5</sup> First, in *Francis*, the agency responded to an inmate’s request with nonresponsive documents, spent “no more than 15 minutes” on the request, and “did not check any of the usual record storage locations.”

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<sup>5</sup> These three cases all arose from a prison inmate’s PRA request, so each was governed by the provision allowing penalties to an imprisoned requester only if an agency has “acted in bad faith.” RCW 42.56.565(1). The majority opinion below thought that the “singular importance of bad faith” to prison inmates made these decisions irrelevant. *Hoffman*, 4 Wn. App. 2d at 498. But it did not argue that special importance of bad faith to inmates meant a *more demanding legal standard for bad faith* should govern requests from the general public. Rather, the majority was wrongly arguing that bad faith had become irrelevant outside of requests from inmates. *See infra* Argument, § III.

*Francis*, 178 Wn. App. at 64. The Court of Appeals held that “intentional wrongdoing” was not necessary to show bad faith. *Id.* at 59. Rather, bad faith included the “fail[ure] to carry out a record search consistently with its proper policies and within the broad canopy of reasonableness.” *Id.* at 63. The agency thus acted in bad faith.

Next, in *Faulkner*, the Court of Appeals held that bad faith requires “a wanton or willful act or omission by the agency.” *Faulkner*, 183 Wn. App. at 103. This means an agency acts in bad faith when it acts unreasonably and “is indifferent to whether harm results or not.” *Id.* at 104 (quotation and citation omitted). The agency in *Faulkner* was not guilty of bad faith. It initially produced an incomplete version of the requested document, but did so because the agency employee who passed along the request inadvertently omitted two words—an omission that the employee did not realize would change the nature of the request. *See id.* at 107. This was a reasonable mistake. *See id.* at 107–08.

Finally, in *Adams*, the inmate had requested his central file from his prison, including his criminal record (“rap sheets”). The agency withheld the rap sheets. The Court of Appeals concluded that the withholding was in bad faith because the agency’s justification for withholding was legally indefensible. Thus, bad faith includes

“an agency’s failure to engage in any serious independent analysis of the exempt status of documents it withholds.” *Adams*, 189 Wn. App. at 929.

2. What the case law shows

*Amren* and *Blaine School District* suggest that an agency is guilty of bad faith if it intentionally withholds responsive documents with the knowledge that its withholding is incorrect, *see Amren*, 131 Wn.2d at 38 n.11, or with the knowledge that it lacks a legitimate reason, *see Blaine Sch. Dist.*, 95 Wn. App. at 113–14. In both cases, there was also evidence of dishonesty or improper motives, although neither case hints that such evidence is required to show bad faith. *See Amren*, 131 Wn.2d at 38 n.11; *Blaine Sch. Dist.*, 95 Wn. App. at 113.

In *Yousoufian I*, the agency had not been deceitful—indeed, it had not even intentionally failed to disclose responsive documents. Rather, its response was so grossly negligent that it amounted to bad faith.<sup>6</sup> This standard is consistent with how “bad faith” has been used historically. *See Francis*, 178 Wn. App. at 54–57. Over a century ago, when interpreting a statute about appellate procedure, this Court recognized that even gross negligence can rise to the level of bad faith: “The statement [of facts on appeal] should be stricken in the first instance on where it is manifest that the party proposing it has been guilty of bad faith or *such gross negligence*

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<sup>6</sup> While *Yousoufian I* speaks of a lack of good faith, rather than of bad faith, it does not appear to draw some abstruse distinction between bad faith and a lack of good faith.

*as will amount to bad faith.” State v. Steiner*, 51 Wash. 239, 240–41, 98 P. 609 (1908) (emphasis added); *see also, e.g., Miebach v. Colasurdo*, 102 Wn.2d 170, 175, 685 P.2d 1074 (1984) (constructive knowledge can disqualify purchaser as bona fide, i.e., can amount to lack of good faith).

*Francis*, *Adams*, and *Faulkner* help to clarify this point. *Francis* holds that an agency acts in bad faith even if it does not intentionally withhold responsive records, as long as its response is unreasonable and inconsistent with normal policy. *Adams* holds that when an agency withholds records indefensibly, it acts in bad faith. And *Faulkner* says that when an agency acts unreasonably and without caring that harm may result, it acts in bad faith.

Thus, bad faith does not require an agency to act with a dishonest or malicious purpose. Indeed, the agency need not even intentionally withhold responsive documents. It need only know it is acting unreasonably and with indifference to the risk that it is violating the PRA.

***B. The County intentionally withheld documents knowing it lacked any reasonable basis for doing so.***

To decide this case, this Court need not definitively set the outer limits of bad faith. While the case law recognizes that bad faith does not require the intentional withholding of documents, here, the agency *did*

intentionally withhold documents. Hayes knew that the responsive police reports existed, having located them. Yet she intentionally withheld them.

Hayes also knew she lacked a reasonable basis for withholding the police reports. Hayes was an experienced veteran.<sup>7</sup> But when asked about the withholding, she gave no reason for it. She did not even *try* to give a reason. Instead, she denied that she had withheld the police reports at all. When asked whether she had “suggested that [Hoffman] get less than the full report,” she answered, “No.” CP 419 at 28:11–13. This is direct evidence that Hayes knew she was acting unreasonably in the most basic sense: she could not give *any reason*, let alone a flimsy one, for her action. Hayes even testified that her normal practice was to produce full police reports to requesters. CP 409–10 at 18:6–19:4; CP 419 at 28:3–10. She never explained why she treated Hoffman’s request unlike others.

In fact, no one, including the County, has tried to justify Hayes’s withholding. CP 351. Even a trainee thought the withholding was wrong. CP 465 at 15:9–15. Yet when this trainee questioned Hayes at length, alerting her to the indefensibility of her conduct and giving her a chance to reconsider, Hayes refused to relent. CP 892, ¶ 7. Even three months

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<sup>7</sup> She had been a records clerk for more than 15 years, CP 530, ¶ 2, and in the years immediately preceding Hoffman’s request, she had spent “probably 60 to 70 percent of [her] time” responding to records requests, CP 397 at 6:9–13, the most common being a request for police reports, CP 399 at 8:12–16.

later, given another chance to correct her withholding, Hayes remained indifferent to the risk of harm. *See* COA Br. of Appellant 37–38.

Even if bad faith required some degree of dishonesty, this case would satisfy that standard. As in *Amren*, an agency employee—here, Hayes—testified dishonestly under oath. *Compare* CP 419 at 28:11–13 (dishonesty about withholding), *with Amren*, 131 Wn.2d at 38 n.11.

The Court of Appeals suggested, however, that Hayes’s “individual fault” was not dispositive, because the trial court could look to the supposedly lower culpability of other employees within the agency. *Hoffman*, 4 Wn. App. 2d at 498. But the actions of other County employees failed to cure the PRA violation and correct Hayes’s bad-faith withholding.<sup>8</sup> It took a renewed request by Hoffman to produce the full police reports. If the actions of other employees have no effect on a bad-faith PRA violation, those actions logically cannot affect whether that violation was in bad faith. The Court of Appeals’ reasoning also carves out a special exception for the PRA from the usual rule that an employer

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<sup>8</sup> The supervisors, the County has maintained, were “fully apprised” of Hayes’s withholding. COA Resp’t Br. 36. This makes their inaction worse. Faced with an unjustifiable withholding, the supervisors failed to take the easy step of correcting the ongoing PRA violation by requiring the full police reports to be produced. Instead, they told Knudson and Hayes to ask Hoffman whether he had “received what he requested.” CP 902, ¶ 4. Recall, however, that in reliance on Hayes’s misstatement that he was not entitled to the full police reports, Hoffman had “narrowed” his request to the police reports’ face sheets. CP 896, ¶ 4. Because the supervisors did not order Hayes to correct her misinformation, Hoffman naturally answered that he had received what he requested: namely, the face sheets. In the absence of correct information, that was the only answer he could give. *See generally* COA Appellant Corr. Reply Br. 18–22.

must be held fully responsible for even *one* of its employees' culpability. *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wn.2d 136, 147–48, 341 P.3d 261 (2014). That exception makes little sense, particularly where, as here, the culpable employee was the designated Public Records Officer. *See* RCW 42.56.152, 42.56.580(1) (setting out designated Public Records Officers' special responsibilities).

**III. When a trial court bases its PRA penalty on an erroneous determination about bad faith, an appellate court should remand for a new penalty determination.**

The Court of Appeals majority thought that even if the trial court had erred in its determination about bad faith, reversal was not required. It said that a “trial court’s choice of how to label agency noncompliance,” even if wrong, does not justify “reversing a penalty decision.” *Hoffman*, 4 Wn. App. 2d at 498. To support this assertion, the majority argued that despite this Court’s statements, bad faith was no longer “‘the principal factor’ to be considered in a PRA penalty determination.” *Id.* at 496 (citation omitted).

This argument is a non sequitur. Whether bad faith is the *principal* legal factor is not dispositive. It is enough (1) that bad faith is a *relevant* legal factor to a PRA penalty determination, *see Yousoufian*, 168 Wn.2d at 467–68; and (2) that the trial court here relied heavily on its determination

about bad faith when imposing a penalty.<sup>9</sup> When a trial court makes a discretionary decision based on an erroneous legal conclusion, as here, that discretionary decision must be reversed. *See Humphrey Indus.*, 170 Wn.2d at 507 (reversing a discretionary attorney-fee decision because it was based on an erroneous determination that a party substantially complied with a statute).

To affirm the Court of Appeals, then, this Court would have to hold that bad faith is legally *irrelevant* to a PRA penalty, even when the trial court relies on the absence of bad faith to set a PRA penalty. Neither precedent nor common sense supports such a strange holding. Proof of bad faith is, of course, not “necessary before a penalty is imposed on an agency.” *Yousoufian*, 168 Wn.2d at 460. When bad faith *is* present, however, it calls for a higher penalty than would otherwise be imposed.<sup>10</sup>

## CONCLUSION

This Court should reverse the Court of Appeals and remand this case for a new penalty determination. It should also award Hoffman his reasonable attorneys’ fees on appeal, as well as his costs.

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<sup>9</sup> See CP 908 (relying on determination that withholding was “negligent” but that the agency was not guilty of “a higher level of culpability”); CP 910 (focusing “primarily” on “whether the agency acted in bad faith”); CP 911 (relying on lack of bad faith).

<sup>10</sup> See *Neighborhood Alliance of Spokane Cty. v. Spokane Cty.*, 172 Wn.2d 702, 718, 261 P.3d 119 (2011) (contrasting “mistakenly overlook[ing] a responsive document” with “intentionally” withholding “known records and then l[ying]”).

RESPECTFULLY SUBMITTED this 11th of March, 2019.

**KELLER ROHRBACK L.L.P.**

A handwritten signature in black ink, appearing to read "Benjamin Gould", positioned above a horizontal line.

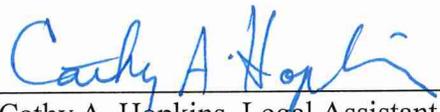
Benjamin Gould, WSBA #44093

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I certify under penalty of perjury of the laws of the State of Washington that on March 11, 2019, I caused a true and correct copy of the foregoing SUPPLEMENTAL BRIEF OF PETITIONER to be served on the following via email, pursuant to RAP 18.5(a) and CR 5(b)(7):

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