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SUPREME COURT  
STATE OF WASHINGTON  
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BY SUSAN L. CARLSON  
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No. 96286-3

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON  
Court of Appeals No. 35091-6-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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**RESPONDENTS' BRIEFING - ISSUE ACCEPTED FOR REVIEW**

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## **INTRODUCTION AND SUMMARY**

The Petitioner Randall Hoffman (Hoffman) seeks review of the penalty award granted by the trial court based upon a finding that an employee of the Kittitas County Sheriff's Office (County) wrongfully failed to produce records under the Public Records Act (PRA), but that such failure did not amount to bad faith. Hoffman is a private citizen and was not an inmate of a correctional facility, so he was not required to prove bad faith to obtain an assessment of penalties and attorney fees. He alleged bad faith as part of his request for a large penalty against the County.

This case was not decided by summary judgment action but rather was resolved by a stipulated bench trial, wherein the parties submitted agreed upon exhibits and competing factual affidavits in support of their respective positions as to whether a violation had occurred and to support arguments as to the level of a penalty if a violation had occurred. Because the trial court judge had to make factual determinations and weigh the credibility of witnesses, the arguments concerning the applicable standards of review came into play in this appeal.

The County asked that the findings and conclusions of the trial court be reviewed using the substantial evidence test rather than de novo

review, given that the facts were not agreed and discretion was involved in reaching the findings and conclusions. The County opined, as to the review of the award of a penalty to Hoffman by the Court of Appeals, that the proper standard of review was the abuse of discretion standard.

Hoffman appeared to attack findings of fact and conclusions of law, but he and the Court of Appeals settled upon (it appears) agreeing that he was not attacking the findings of fact as much as he was attacking the trial court's determination that bad faith was not proven. It is Hoffman's claim that this finding (bad faith or no bad faith – level of culpability) is a matter to be reviewed de novo as a mixed factual and legal issue.

A unanimous Court of Appeals held the award of penalties and attorney fees in this case to be reasonable based upon the facts and conclusions reached by the trial court. The majority focused upon a two-phase approach: Was there a violation, yes or no; and if there was a violation was the penalty to be assessed based upon culpability of responding agency reasonable under prevailing case law. Because neither party contested the finding of a violation, the majority determined that this was an appeal solely focused upon the penalty assessed, and they correctly applied the abuse of discretion standard to their review of the penalty

awarded. Judge Lawrence-Berrey, writing in concurrence with the decision, laid out an opinion that every PRA case, not just prisoner litigation has three phases: Violation, yes or no; culpability – determine level; assess penalty based upon culpability.

This Court was asked to accept review on a number of issues, but appears to have focused upon the claims that there are differences in how different divisions of the Courts of Appeals are applying standards of review. The County is of the opinion that the standards of review have been satisfactorily established and followed, and that the only confusion in this case is that the Petitioner, Hoffman and one Court of Appeals Judge appear to be conflating the standard for reviewing a claim of “bad faith” from the prisoner litigation of PRA cases into a non-prisoner PRA case.

#### **IDENTITY OF RESPONDENTS**

Kittitas County is a municipal corporation and defined as a local agency for PRA purposes. The Kittitas County Sheriff’s Office is a division of Kittitas County government led by an independently elected Sheriff, and is also defined as a local agency for PRA purposes.

## **CITATION TO COURT OF APPEALS DECISION**

The published Court of Appeals decision was filed July 24, 2018 and amended August 20, 2018. The Court of Appeals decision is attached as Appendix A. The order amending the decision is attached as Appendix B. These documents are attached to this brief for ease of reference and because the County desires to adopt the statement of the case as set forth in the Court of Appeals decision to reduce duplication and effort.

## **PETITIONER'S REQUESTS IN SUPPORT OF REVIEW BY THIS COURT**

Hoffman requested that review be accepted because he believes the Court of Appeals statements that bad faith is not the sole principal factor in determining an award of a penalty created a conflict with precedence. The Court's framing of the issue suggests this was not accepted for review.

Hoffman also asked for review related to the Court of Appeals dicta concerning the need for (or lack of need for) written findings of fact and conclusions of law (Dicta because in this case they were present). The Court's framing of the issue suggests this was not accepted for review.

And finally, Hoffman requested this Court to accept review to define the legal standard for "bad faith" under the PRA (accomplished for

prisoner PRA litigation but not general PRA litigation). The Court's framing of the issue suggests that this was also not accepted for review.

### **STATEMENT OF THE CASE**

The Court of Appeals generated a statement of the case based upon the trial court's uncontested findings. That court's decision has been attached as an appendix to this brief. That statement of the case is sufficiently detailed and accurate for purposes of this review, and it is adopted and incorporated by reference as the County's statement of the case for all pertinent purposes.

### **ISSUE ACCEPTED FOR REVIEW**

This Court appears to have framed the issue accepted for review under RAP 13.4(b) as follows:

Whether in a Public Records Act case, the proper standard of review of factual findings underlying a penalty assessment based solely on written evidence is abuse of discretion, substantial evidence, or de novo.

### **ARGUMENT RELATED TO STANDARDS OF REVIEW**

#### **1. LEGISLATIVE PRONOUNCEMENT ON REVIEW OF AGENCY ACTION BY TRIAL COURTS:**

The legislature is capable of creating standards for judicial review of agency actions, sometimes granting deference to the actions and

interpretations of agencies tasked with implementing laws passed by the legislature. In the context of the PRA, the legislature did not give deference to agencies in complying with the mandates of the act. RCW 42.56.550(3) indicates that judicial review of all agency actions shall be de novo. Put another way, a trial court is allowed to review an agency's actions and compliance without consideration of the determinations made by the agency. The statute, however, does not speak to a standard of review applicable to an appellate court reviewing a trial court's determinations.

If a trial court finds that an agency violated the PRA, the legislature has granted discretion to the trial courts to assess a penalty under RCW 42.56.550(4). The legislature provides for an award of all costs including reasonable attorney fees to a party prevailing in an action under the PRA. As it relates to a "penalty", the legislature has granted broad discretion to the trial courts to set an appropriate penalty:

*In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.*

The legislature did not establish a level of deference/standard of review for appellate court review of the trial court's exercise of such discretion.

For most requestors under the PRA, a trial court judge entertains a two-step process: Was there a violation of the Act? If no, there is no

penalty and no award of costs and attorney fees. If yes, there is an award of costs and attorney fees and the trial court must exercise its discretion in setting a penalty for the violation.

Culpability in this scheme is a component of the penalty and is rather expansive. On the low end of the scale of culpability and penalty you find agency action undertaken in good faith but incorrectly - moving up the scale to the high end of culpability and penalty which entails bad faith in responding to a request. *Adams v. Wash. State Dep't. of Corr.*, 189 Wn. App. 925, 938, 361 P.3d 749 (2015).

In 2011, the Washington Legislature amended the PRA creating a second category of PRA cases – those brought by individuals who are incarcerated at the time of making a public disclosure request, and treating them differently than the average citizen requestor. Pursuant to RCW 42.56.565(1), a court shall not award penalties under RCW 42.56.550(4) to a person who was serving a criminal sentence in a state, local, or privately operated correctional facility on the date the request for public records was made, **unless** the agency acted in bad faith.

This change, based upon classification of requestor, also resulted in creating an additional step in the process to be undertaken by the trial courts, creating a 3-step process as opposed to a two-step process:

1. Did an agency violate the PRA? If there is no violation the case is over and no award of penalty and costs.
2. If there was a violation, and the requestor is serving a criminal sentence at the time of the request, the trial court must determine if the agency acted in “bad faith”. If the agency did not act in bad faith, the case is over and no award of a penalty and costs.
3. If the agency acted in “bad faith” then the trial court must exercise its discretion and impose a penalty and costs.

Accord, *Adams v. Wash. State Dep’t. of Corr.*, 189 Wn. App. 925, 938, 361 P.3d 749 (2015); *Faulkner v. Wash. Dep’t of Corr.*, 183 Wn. App. 93, 332 P.3d 1136 (2014); and *Francis v. Wash. State Dep’t of Corr.*, 178 Wn. App. 42, 313 P.3d 457 (2013).

The legislature did not help with the question concerning what it meant by “bad faith” as they did not define the term. Additionally, the legislature did not provide guidance as to what standard of review should be applied by an appellate court in reviewing a trial court’s determination as to whether or not a finding of bad faith was correctly determined by the trial court judge in the context of prisoner litigation.

## **2. JUDICIAL PRONOUNCEMENTS AS TO STANDARDS OF REVIEW IN CONTEXT OF PRA CASES**

This Court, in framing the issue appears to have narrowed the focus to the penalty award and the issue of written evidence versus live testimony.

Whether in a Public Records Act case, the proper standard of review of *factual findings underlying a penalty assessment based*

*solely on written evidence* is abuse of discretion, substantial evidence, or de novo.

It is the County's position, as it relates to an award of penalties under a non-prisoner PRA case, that the abuse of discretion standard applies to the award regardless of whether the court received evidence it relied upon from a summary judgment motion; from a stipulated facts case submitted via affidavits and exhibits, or from a trial with live testimony. This is so because the legislature granted broad discretion to trial court judges to assess an appropriate penalty and because this is the standard that the Supreme Court and Appellate Courts have settled upon in reviewing penalty awards under the PRA.

**a. FINDING OF VIOLATION OF PRA**

It is the County's position that the expression "based solely on written evidence" does not capture the historical deference that is provided to trial courts when required to make findings of fact based upon competing evidence, whether written or via live testimony. In the context of summary judgment motions, it is well settled that the standard of review is de novo. See, *Robbins Geller Rudman & Dowd, LLP v. Office of Attorney Gen.*, 179 Wn. App. 711, 328 P.3d 905 (2014); *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 285 p.3d 854 (2012); and *Dragonslayer*,

*Inc. v. Wash. State Gambling Comm'n*, 139 Wn. App. 433, 161 P.3d 428 (2007).

The reason de novo review is applied to summary judgment motions is because there are no genuine issues of material fact in dispute. If there were genuine issues of material fact in dispute summary judgment would be denied. And it is because there are no genuine issues of material fact that a reviewing court sits in the same position as the trial court when it comes to the facts of the case.

When, however, a case under the PRA cannot be decided by a summary judgment motion, because there are genuine issues of material fact in dispute, the appropriate trial court resolution is reached by a contested hearing. Whether such a hearing is conducted on a written record without live testimony, or whether there is live testimony as well as documentary evidence the form of the hearing is not controlling, it is the nature of the substance that is controlling. Where competing documentary evidence must be weighed and issues of credibility and conflicting evidence must be resolved and reconciled by a trial court judge, then the appropriate standard of review to apply is the substantial evidence standard. *State v. Kipp*, 179 Wn.2d 718, 317 P.3d 1029 (2014)(citing *Dolan v. King County*, 172 Wn2d 299, 258 P.3d 20 (2011)); *Progressive*

*Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1994); *Robbins Geller Rudman & Dowd, LLP v. Office of Attorney Gen.*, 179 Wn. App. 711, 328 P.3d 905 (2014);

In a similar fashion, when findings of fact are not challenged on appeal they are considered verities and they are accepted as true facts.

*Francis v. Wash. State Dep’t of Corr.*, 178 Wn. App. 42, 313 P.3d 457 (2013)(citing *Yousoufian v. Office of Ron Sims, King County Executive*, 168 Wn.2d 444, 229 P.3d 735 (2010)); *Adams v. Wash. State Dep’t of Corr.*, 189 Wn. App. 925, 361 P.3d 749 (2015).

Another way that appellate review can be limited is when a determination that a violation of the PRA has occurred and such finding is not challenged. In that circumstance, the appellate court’s review is limited to the award of a statutory penalty, and in the prisoner litigation context to the underlying bad faith determination. *Francis v. Wash. State Dep’t of Corr.*, 178 Wn. App. 42, 313 P.3d 457 (2013).

**b. PENALTY ASSESSMENT FOR VIOLATION OF PRA**

The preceding discussion was focused upon the standard of review applicable to challenges to a finding of a violation of the PRA. As stated earlier, the legislature and the judiciary have established processes for

standards of review that create a two-step process: violation and penalty. The legislature and the courts have created a three-step process as it relates to prisoner litigation, which has caused confusion for the Petitioner Hoffman and one member of the Court of Appeals, it appears.

When the trial court's penalty assessment is challenged on appeal, the standard of review is the "Abuse of Discretion Standard." *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 277, 372 P.3d 97 (2016):

A trial court's award of penalties for a PRA violation is reviewed for abuse of discretion. *Yousoufian v. Office of Ron Sims, King County Executive*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010). A court abuses its discretion only when it adopts a view "that no reasonable person would take" or when it bases its decision on "untenable grounds or reasons." *Id.* at 458-459 (internal quotation marks and additional citation omitted).

See also *Adams v. Wash. State Dep't of Corr.*, 189 Wn. App. 925, 953-954, 361 P.3d 749 (2015); *Sargent v. Seattle Police Dep't.*, 179 Wn.2d 376, 397, 314 P.3d 1093 (2013); and *Francis v. Wash. State Dep't of Corr.*, 178 Wn. App. 42, 65, 313 P.3d 457 (2013).

The cases discussing the standard of review for a penalty assessment have directed their attention to what they have described as the ample or broad discretion granted to trial courts to award penalties for a violation of the PRA, and noting that the legislature has expanded that discretion over time (\$5 - \$25 to current range of \$0 - \$100.00). For

example, see *Wade*'s at 278-279. And it is clear that even with guidance, the factors to be considered should not infringe upon the trial court's considerable discretion. *Wade*'s at 279. This grant of discretion is given because the trial court is in the best position to undertake an individual and fact specific inquiry into an appropriate penalty that accomplishes the goal of deterring unlawful nondisclosure. *Wade*'s at 280, see also *Yousoufian II*, 168 Wn.2d at 462-63. See also, *Neighborhood Alliance of Spokane, v. Spokane Cty.*, 172 Wn.2d 702, 726 261 P.3d 119 (2011); and *Yousoufian v. King County Executive*, 152 Wn.2d 421, 433, 98 P.3d 463 (2004).

### 3. **CONFUSION CREATED BY PRISONER LITIGATION CASES**

The legislature's intent to treat individuals serving a criminal sentence in an institution differently is apparent on the face of RCW 42.56.565. The legislature added an additional requirement – a specific finding of “bad faith” on the part of an agency before a penalty and costs would be imposed. Hoffman has argued that the prisoner litigation cases cannot be distinguished and that the “bad faith” de novo standard that has made its way into those cases applies to non-prisoner litigation as well. This is not the case. This de novo standard for “bad faith” only exists in the context of prisoner litigation and was articulated in *Francis v. Wash. State Dep't of Corr.*, 178 Wn. App. 42, 51-52, 313 P.3d 457 (2013):

Whether an agency acted in bad faith under the PRA presents a mixed question of law and fact, in that it requires the application of legal precepts (the definition of “bad faith”) to factual circumstances (the details of the PRA violation).

The *Francis* Court noted that the PRA does not have a definition of “bad faith, that they knew of no case defining the term, that they chose not to define “bad faith, and they demurred on whether weighing the 16 *Yousoufian* factors should apply in the prisoner litigation context of the PRA. *Id* at 53. That court simply held the *Yousoufian* factors were considered, that the trial court did not act for untenable reasons, and that a reasonable person based upon the court’s findings and evidence could conclude that the penalty assessed satisfied the PRA.

In *Faulkner v. Wash. Dep’t of Corr.*, 183 Wn. App. 93, 332 P.3d 1136 (2014), the Court provided a definition of “bad faith” for future clarification, finding that “bad faith” equates to a requirement of showing that an agency acted, or omitted an act, in a wanton or willful fashion. And in *Adams v. Wash. State Dep’t of Corr.*, 189 Wn. App. 925, 361 P.3d 749 (2015) the court stayed consistent with the earlier prisoner litigation cases, but clarified that the burden of proving “bad faith” belonged to the plaintiff alleging such “bad faith”. And they clarified that while a finding of “bad faith” must be made to obtain a penalty, a trial court must still

utilize the *Yousoufian* factors to determine a proper penalty **to deter future misconduct.**

This Court might wonder why a discussion of standards related to prisoner related PRA cases is included – the reasons are two-fold:

To attempt to clarify where the confusion may have been created as to the applicable standards in this case by the Court of Appeals Judge and the Petitioner Hoffman; and

To demonstrate that even if using a higher standard found in the prisoner litigation context, that Hoffman failed to meet his burden as to a showing of bad faith, but even if he had, or this court felt he had, this Court would still have to review the penalty award for an abuse of discretion (Absent a wholesale reversal of that standard).

## **CONCLUSION**

Because no party challenged the finding by the trial court that the County violated the PRA, the Court of Appeals was correct in treating this appeal as a penalty review only case. And because the appeal only dealt with the appropriateness of the penalty, the Court of Appeals was correct in applying the Abuse of Discretion Standard to the trial court's determination of an appropriate penalty to defer future errors. And because the trial court cannot be shown to have abused its discretion, the award of the penalty handed down should not be overturned on appeal.

Hoffman has alleged that the wrong standard was used by the Court of Appeals because of his belief that a finding of “bad faith” is governed by de novo review. That is simply incorrect outside of the prisoner litigation context for PRA cases. Under the standard PRA case, a determination of culpability by the agency is part and parcel of determining the penalty to be applied, with guidance according to the *Yousoufian* factors. Because that determination of a penalty is vested with broad discretion, regardless of whether the findings were made in writing or orally, the Abuse of Discretion standard applies to those findings.

To summarize, it is the County’s position that the following standards apply in different circumstances:

Summary Judgment

De novo review as to existence of violation of PRA; and

Abuse of discretion as to penalty to impose for violation.

Contested Hearing (whether oral testimony or written testimony)

Substantial evidence test as to review of existence of violation;

Abuse of discretion as to penalty to impose for violation.

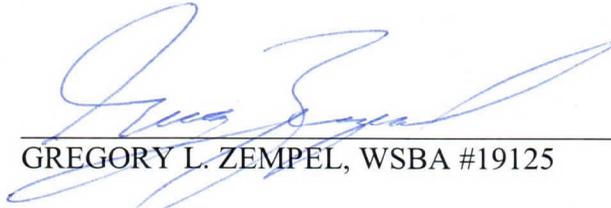
Prisoner litigation of PRA violations

Requires insertion of a separate ruling as to whether bad faith existed, which the courts have ruled is a de novo review. This step would insert itself after a finding of a violation of the PRA and prior to the imposition of a penalty. The insertion of this step

with its de novo review, does not impact the standards that have been articulated by the courts as applying in the context of a finding of a violation and the setting of a penalty.

The County respectfully requests this Court to determine that there is no uncertainty as to the applicable standards that apply in the context of PRA cases and no conflict in application between the divisions of the Court of Appeals or with this Court's precedence. The County respectfully requests this Court to uphold the rulings of the trial court and the Court of Appeals as to the award of a penalty and attorney fees and costs. Finally, the County requests a determination as to prevailing party on behalf of the County to potentially request attorney fees and costs.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of March, 2019.



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Attorney for Respondents Kittitas County and Kittitas  
County Sheriff's Office

DECLARATION OF SERVICE

On the day set forth below, I deposited in the U.S. Mail and via Email a true and accurate copy of:

- Respondent's Brief on issues accepted

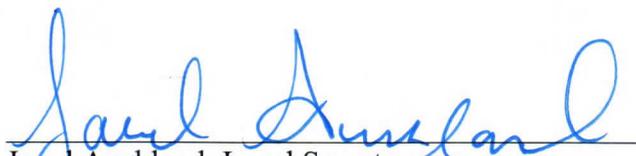
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this 11<sup>th</sup> day of March 2019, at Ellensburg, Washington.



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**APPENDIX 1**

**DECISION OF THE COURT OF APPEALS**

**FILED**  
**JULY 24, 2018**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

RANDALL HOFFMAN,	)	No. 35091-6-III
	)	
Appellant,	)	
	)	
v.	)	
	)	PUBLISHED OPINION
KITTITAS COUNTY, a local agency and	)	
the KITTITAS COUNTY SHERIFF'S	)	
OFFICE, a local agency,	)	
	)	
Respondents.	)	

PENNELL, J. — Trial courts have broad discretion to select appropriate penalties for violations of Washington’s Public Records Act (PRA), chapter 42.56 RCW. In limited cases, we will overturn a trial court’s exercise of authority on appeal. But this is not one of them. After finding Kittitas County and the Kittitas County Sheriff’s Office (collectively the County) violated the PRA, the trial court considered the relevant PRA penalty factors and, based on substantiated facts, selected a reasonable penalty assessment. Nothing more was required for a fair exercise of PRA penalty discretion. We therefore affirm.

## BACKGROUND

### *Facts*<sup>1</sup>

Randall Hoffman submitted a public records request to the Kittitas County Sheriff's Office on June 29, 2015. The request sought police reports referencing an individual named Erin Schnebly. The request was received by Carolyn Hayes, the designated public records clerk for the sheriff's office. Hayes had 10 years of experience and training responding to PRA requests directed to the sheriff.

Hayes conducted an initial search for records and identified seven incident reports. Her initial search did not locate photos or videos. A careful review would have revealed the existence of numerous photos and two videos responsive to the request.

Hayes called Hoffman about his request. Hayes's primary concern was that her review did not show Hoffman had any involvement in the seven incidents. Hayes told Hoffman that because he was not involved in the incidents, she could not provide him the majority of the documents he requested. As the parties now agree, this information was incorrect. Based on Hayes's misinformation, Hoffman limited his request to face sheets of reports, which identified the type of incident, date, and location.

Kallee Knudson, a records clerk who began training under Hayes in the sheriff's office earlier that June, overheard Hayes's phone call to Hoffman. She could hear what

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<sup>1</sup> The facts are based on the trial court's uncontested findings.

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Hayes said but not what Hoffman said. Specifically, Knudson heard Hayes tell Hoffman she “would not be able to provide the majority of documents” per specific statutes.

Clerk’s Papers (CP) at 15-16, 459. Knudson had never noticed Hayes saying anything similar to this before, and it did not make sense to her.

Knudson questioned Hayes about Hoffman’s request. Hayes discussed a statute that she believed supported her position. She also added that Hoffman had agreed to limit his request to the face sheets.

Hayes made the following notation on Hoffman’s PRA request: “2009-2015 face sheet only.” CP at 13. Hayes, relying on a statute that the parties now agree did not apply to the request, made significant and improper redactions to the face sheets. The next day, Hayes provided the redacted face sheets to Hoffman.

In early September 2015, Knudson was cleaning Hayes’s desk prior to Hayes’s pending retirement. Knudson saw a stack of PRA requests in Hayes’s desk, including Hoffman’s. Because she was still troubled by how Hayes handled Hoffman’s request, Knudson discussed the request with her two supervisors. Both supervisors instructed Knudson to call Hoffman, to tell him that she was reviewing past requests, and to determine whether Hoffman was satisfied with the response of the sheriff’s office.

Knudson called Hoffman. After Hoffman told her he had received records responsive to his request, Knudson thanked him and ended the call. Knudson did not express her concerns to Hoffman about the handling of his request.

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Several days later, Hayes spoke with the same two supervisors about Hoffman's PRA request. Like what was told to Knudson, the supervisors instructed Hayes to call Hoffman to see if he was satisfied with what he received. Hayes called Hoffman to confirm he had received what he needed. Hoffman indicated that he had, but explained he had been looking for an incident where Schnebly allegedly ran someone over. Hayes remained on the phone with Hoffman while she looked for the report, but was unable to locate it.

On February 25, 2016, Hoffman returned to the sheriff's office. He told Knudson he should have received more documents in response to his June 2015 request, that he could sue, and that he might want to make another records request. Hoffman claimed Hayes and the person whom he sought information about, Schnebly, were drinking buddies, and this relationship was the reason he did not receive all appropriate records. Hoffman left with a blank PRA request form and said he needed to talk to some folks.

Although Hayes knew who Schnebly was, the two did not socialize. The fact that Hayes knew of Schnebly was not a factor in Hayes's handling of Hoffman's PRA request.

On February 29, 2016, Hoffman submitted a new request, which is not at issue in this appeal. The same day, he also resubmitted his old request. Knudson properly processed both requests and provided all documents to Hoffman on March 1, 2016. The documents relating to the resubmitted request total 126 records, and consist of 29 pages

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of reports, 2 videos, and 95 photos.

*Procedure*

Two days after receipt of the response to his final PRA request, Hoffman filed this PRA action against the County. He asserted that Hayes and the County acted in bad faith when Hayes withheld the records he requested.

Hoffman filed a motion for summary judgment, but it was never heard. Instead, the parties conducted limited discovery and then agreed to waive their right to a jury trial and submit the matter to a bench trial based on stipulated facts, concessions of the parties, exhibits, and testimony through depositions, affidavits or declarations.

After reviewing the written submissions of the parties and hearing argument of counsel, the trial court ruled in Hoffman's favor, finding the sheriff's office improperly redacted and withheld 126 records for 246 days. The court concluded, however, that Hayes's error was a result of negligence, not bad faith. The court found that Knudson had not acted negligently, that the sheriff's office had provided appropriate supervision, and that the response to Hoffman's PRA request was timely, though inadequate.

The trial court weighed the penalty factors set by the Supreme Court in *Yousoufian v. Office of Ron Sims, King County Exec.*, 168 Wn.2d 444, 229 P.3d 735 (2010) (*Yousoufian II*), and ordered the County to pay Hoffman his reasonable attorney fees and a penalty of \$0.50 per day for each document that the sheriff's office had failed to produce or improperly redacted. Because the penalty days totaled 246, and the number of

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records totaled 126, the penalty totaled \$15,498. Hoffman appeals the penalty award.

#### ANALYSIS

This case is governed by the applicable standard of review. Unlike a substantive PRA violation decision, a PRA penalty determination is reviewed for abuse of discretion. *Compare* RCW 42.56.550(3) (“Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo.”) *with* RCW 42.56.550(4) (“[I]t shall be within the discretion of the court to award” PRA penalties.); *Yousoufian v. Office of King County Exec.*, 152 Wn.2d 421, 431, 98 P.3d 463 (2004) (*Yousoufian I*) (“[T]he trial court’s determination of appropriate daily penalties is properly reviewed for an abuse of discretion.”).

The abuse of discretion standard is extremely deferential. *Wade’s Eastside Gun Shop, Inc. v. Dep’t of Labor & Indus.*, 185 Wn.2d 270, 279, 372 P.3d 97 (2016) (“The plain language and legislative history of the PRA support trial courts having broad discretion to set appropriate penalties.”). We will reverse a trial court decision under this standard only if the decision applies the wrong legal standard, relies on unsupported facts, or adopts a view that no reasonable person would take. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

The applicability of the abuse of discretion standard of review does not change because a trial judge, such as the judge here, decides to issue written findings of fact in support of a PRA penalty assessment. For one thing, there is no requirement that a trial

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judge make findings in this context. See *Yousoufian II*, 168 Wn.2d at 468-69 (Supreme Court imposed penalty of \$45 per day without issuing any findings or conclusions).<sup>2</sup> It would therefore be curious for us to engage in a heightened critique of a trial court's discretionary penalty decision simply because the court chose to articulate its decision in a way that was more transparent than necessary. But in addition, the abuse of discretion standard encompasses the ability to review a trial court's factual findings or assumptions. A trial court abuses its discretion when it relies on unsupported facts in issuing its decision. *Hundtofte v. Encarnación*, 181 Wn.2d 1, 7, 330 P.3d 168 (2014). An abuse of discretion also occurs if the factual assumptions made by a trial court do not meet the requirements of the governing legal standard. *Id.* As long as some factual basis exists to support a trial court's decision, the abuse of discretion standard is met and further scrutiny is unwarranted, regardless of how the trial court chooses to articulate its decision.

Viewed in the context of the applicable standard of review, Hoffman's main argument is that the trial court used the wrong legal standard in assessing PRA penalties. According to Hoffman, the primary consideration that must guide a trial court's PRA penalty assessment is the presence or absence of bad faith. Hoffman argues the record

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<sup>2</sup> In imposing a penalty assessment without accompanying findings of fact or conclusions of law, *Yousoufian II* deviated from a prior decision in *Armen v. City of Kalama*, 131 Wn.2d 25, 38, 929 P.2d 389 (1997), which held that a penalty decision should be supported by trial court findings.

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indisputably shows the County engaged in bad faith when processing his PRA request.

Thus, the trial court should have imposed a higher daily penalty amount.

Hoffman's myopic focus on bad faith is misplaced. Prior to the Supreme Court's decision in *Yousoufian II*, bad faith was considered the "principal factor" to be considered in a PRA penalty determination. 168 Wn.2d at 460. However, the *Yousoufian II* court took a more nuanced approach. *Yousoufian II* reversed a trial court's penalty assessment because it was too reliant on the absence of bad faith. Rather than focus on the presence or absence of bad faith, the Supreme Court held that trial courts should be guided by a series of aggravating and mitigating factors, only some of which address a violator's level of culpability. *See also Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 398, 314 P.3d 1093 (2013) (reversing PRA penalty decision that focused solely on bad faith).

Not only did *Yousoufian II* hold that agency culpability is merely one of a series of factors to be taken into account in assessing a PRA penalty, the court also declined to recognize bad faith as the primary type of relevant culpability. Instead, the Supreme Court listed agency "good faith" as a relevant mitigating factor and an agency's "negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA" as a relevant aggravating factor. *Yousoufian II*, 168 Wn.2d at 467-68.

Although *Yousoufian II* listed various tiers of culpability that might be attributed to an agency's PRA violation, the court declined to define the contours of each different level of culpability. As explained by the court, "culpability definitions do not lend

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themselves to the complexity of PRA penalty analysis.” *Id.* at 463. Rather than define each type of agency culpability that might be relevant to a trial court’s penalty assessment, *Yousoufian II* took a broad approach and simply recognized that trial courts should impose “a penalty proportionate to the [agency’s] misconduct.” *Id.*

Given that *Yousoufian II* framed the issue of agency culpability in a broad, relative manner, we should not be overly critical of a trial court’s choice of how to label agency misconduct. Indeed, *Yousoufian II* did not engage in this type of scrutiny. The trial court in *Yousoufian II* determined the defendant agency had engaged in prolonged negligence that “‘amounted to a lack of good faith.’” *Id.* at 456. The trial also concluded “the [agency] did not act in ‘bad faith’ in the sense of intentional nondisclosure.” *Id.* On appeal, both this court and the Supreme Court treated the trial court’s conclusions as a determination of “gross negligence.” *Id.* at 457; *see id.* at 474 (Owens, J., dissenting) (criticizing the majority for not differentiating between negligence and gross negligence). Despite the competing nature of these assessments, *Yousoufian II* did not find fault with any of the various culpability classifications that had been attributed to the agency.<sup>3</sup> Instead, the Supreme Court assessed the trial court’s penalty decision holistically and

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<sup>3</sup> Had precise labels been important, one would expect the Supreme Court would have criticized the trial court for refusing to find bad faith based merely on the absence of intentional noncompliance. After all, the court itself listed “bad faith” and “intentional” noncompliance as distinctive levels of relative culpability. *Yousoufian II*, 168 Wn.2d at 468. Yet the Supreme Court specifically upheld the trial court’s finding of no bad faith in *Yousoufian I*. 152 Wn.2d at 435-36.

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found the trial court's assessment inadequate in light of the totality of relevant circumstances.

The lack of precise culpability findings in the general PRA context contrasts with what is required in the circumstances of a PRA claim brought by an incarcerated person. Under RCW 42.56.565(1), a court is prohibited from awarding PRA penalties to an incarcerated person unless the court makes a specific finding of bad faith. Given the singular importance of bad faith in the context of incarcerated persons, our courts have appropriately analyzed the contours of what constitutes bad faith in the context of RCW 42.56.565(1). See *Faulkner v. Dep't of Corr.*, 183 Wn. App. 93, 332 P.3d 1136 (2014); *Francis v. Dep't of Corr.*, 178 Wn. App. 42, 313 P.3d 457 (2013). However, such precision is simply not necessary in the general PRA context.

Based on the foregoing, a trial court's choice of how to label agency noncompliance should not be the basis for affirming or reversing a penalty decision. Instead, it is sufficient under *Yousoufian II* for a trial court to recognize that culpability exists in matters of degree and that more culpable conduct merits a higher PRA penalty than less culpable violations.

Having clarified the nature of the trial court's legal inquiry, we turn to its application in the present case. Because Hoffman does not challenge any of the factual findings underlying the trial court's penalty assessment, our review is limited to the legality of the trial court's approach and overall reasonableness of its selected remedy.

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We find no reversible error in the trial court's culpability assessment. Regardless of the exact nature of Hayes's individual fault, the trial court appropriately observed that the problems leading up to the County's PRA violation were attributable solely to Hayes and, given Hayes's retirement from employment, a large penalty would not be necessary to deter future PRA violations. Contrary to Hoffman's assertions, the trial court's culpability assessment need not have focused solely on Hayes's level of culpability. Hoffman cites *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 269, 884 P.2d 592 (1994) (*PAWS*) (plurality opinion) for the proposition that an agency's PRA violation should be assessed according to the agency's "weakest link." Br. of Appellant at 4. However, *PAWS* dealt only with issues of PRA liability, not a penalty. When it comes to liability, an agency's weakest link can cause a PRA violation. But because the question of penalty is guided by an overarching concern for deterrence, *Yousoufian II*, 168 Wn.2d at 462-63, it is appropriate for a trial court to consider an agency's overall level of culpability, not just the culpability of the worst actor. Looking at the County's overall level of culpability here, the trial court appropriately found that agency culpability was merely a moderately aggravating factor, thereby justifying a moderate penalty assessment.

In addition, the trial court fairly characterized the response of the sheriff's office to Hoffman's PRA request as "timely." CP at 903, 920. Unlike what may be true in some PRA violation cases, the sheriff's office maintained prompt contact with Hoffman

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throughout the pendency of his PRA inquiry. It responded to each of Hoffman's PRA requests within five working days. In addition, Hayes and Kundson both acted immediately when requested by their supervisors to contact Hoffman for follow-up. While the response of the sheriff's office to Hoffman's initial PRA request was incomplete, that was not an independent aggravating factor. It is instead what caused the PRA violation in the first place. Based on the failure of the sheriff's office to provide an accurate response, the trial court awarded Hoffman daily penalties for 246 days. No further enhancement was required based on a lack of timely compliance.

In the end, the penalty chosen by the trial court was reasonable. Although the daily penalty was low, the court maximized the number of records eligible for the penalty by assessing an award for each individual page that had not been disclosed. In addition, the ultimate penalty of \$15,498.00 amounted to an assessment of almost \$3.00 per Kittitas County resident on a per capita basis.<sup>4</sup> This is commensurate with other PRA violation assessments. *See Zink v. City of Mesa*, \_\_\_ Wn.2d \_\_\_, 419 P.3d 847, 855 (2018). Given that Mr. Hoffman suffered no financial harm as a result of the County's PRA violation, and that the subject matter of Mr. Hoffman's PRA request was not of

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<sup>4</sup> We take judicial notice of the most recent estimates from the U.S. Census Bureau calculating the population of Kittitas County, Washington as 46,205. *Quick Facts: Kittitas County, Washington*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/kittitascountywashington,US/PST045217> (last visited July 18, 2018).

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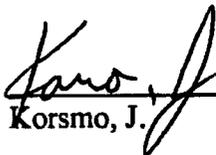
public importance, the trial court's overall penalty amount was not unreasonably small.<sup>5</sup> The award was commensurate with the County's PRA violation and sufficient to deter future violations. Based on this overall reasonableness, we lack any basis to disturb the trial court's assessment.

#### CONCLUSION

The trial court appropriately exercised its discretion in assessing PRA penalties against the County. The matter is affirmed. Hoffman's request for attorney fees on appeal is denied.

  
\_\_\_\_\_  
Pennell, J.

I CONCUR:

  
\_\_\_\_\_  
Korsmo, J.

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<sup>5</sup> Indeed, because the legislature has eliminated a statutory floor to PRA penalty assessments, the trial court could have refused to issue a penalty altogether. *Zink*, 419 P.3d at 855.

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LAWRENCE-BERREY, C.J. (concurring in result) — I agree that the evidence supports the trial court’s culpability findings and, because of this, its assessment of Public Records Act (PRA), chapter 42.56 RCW, penalties should be affirmed.

I write separately because the majority errs by reviewing culpability findings for an abuse of discretion. Findings are never reviewed for an abuse of discretion. Neither party argues for such a standard. Kittitas County (County) correctly argues that we should review culpability findings for substantial evidence.

- A. THE ABUSE OF DISCRETION STANDARD OF REVIEW PERTAINS ONLY TO THE TRIAL COURT’S ASSESSMENT OF THE PER DIEM PENALTY RANGE; IT DOES NOT EXTEND TO THE FACTUAL FINDINGS THAT IMPACT THE RANGE

The majority correctly notes that we review a trial court’s PRA penalty determinations for an abuse of discretion. *See, e.g., Yousoufian v. Office of King County Exec.*, 152 Wn.2d 421, 430-31, 98 P.3d 463 (2004) (*Yousoufian I*). *Yousoufian I* explains that the abuse of discretion standard comes from former RCW 42.17.340(4) (1992),<sup>1</sup> which provides in relevant part, “it shall be within the discretion of the court to award such person [a penalty range] for each day that he was denied the right to inspect or copy said public record.” *Id.* at 430. The majority errs by extending this deferential standard beyond the trial court’s assessment of the per diem penalty range. The majority extends

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<sup>1</sup> Recodified as RCW 42.56.550 per the Laws of 2005, chapter 274, section 103, effective July 1, 2006.

this deferential standard to any of the trial court's factual findings that impact the per diem penalty range, including the trial court's culpability findings. Nothing in RCW 42.56.550 supports this extension.

B. IN PRA LITIGATION, CULPABILITY FINDINGS ARE MORE THAN MERE LABELS

Hoffman assigns error to the trial court's findings<sup>2</sup> that the County acted negligently and that he failed to prove that the County acted in bad faith. Assignments of Error 1 & 2, Br. of Appellant at 5. Throughout his brief, Hoffman extensively argues that Carolyn Hayes's actions constituted bad faith, that Kallee Knudson's actions constituted bad faith or negligence, and that the County's culpability should have been assessed in accordance with the worst actor, Hayes. Br. of Appellant at 22-43. The County responds by addressing the facts that support the trial court's culpability findings. Br. of Resp't at 25-27. The majority mostly ignores the parties' arguments by minimizing the importance of the trial court's culpability findings. Specifically, the majority holds that culpability determinations are mere labels for assessing PRA penalties.

I disagree. In PRA litigation, an agency's culpability is an important factor in assessing PRA penalties.

"When 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."

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<sup>2</sup> Findings of fact erroneously denominated as conclusions of law are reviewed as findings of fact. *State v. Ross*, 141 Wn.2d 304, 309, 4 P.3d 130 (2000).

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*Yousoufian v. Office of Ron Sims, King County Exec.*, 168 Wn.2d 444, 460, 229 P.3d 735 (2010) (*Yousoufian II*) (alteration in original) (internal quotation marks omitted) (quoting *Amren v. City of Kalama*, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997)).

Nor is culpability a mere label. A determination of culpability is of sufficient consequence that the absence or incorrectness of a culpability finding warrants remand. This point was made clear in *Amren*.

The Appellant argues that certain actions by the City constitute bad faith and asks this court to determine the penalty amount . . . . [W]e decline to resolve this issue. A determination of the amount of the award necessitates a fact finding concerning the allegations made by the Appellant that the City has acted in bad faith and any potential evidence of economic loss incurred by the Appellant as a result of the delay. No findings of fact were made regarding these issues for this court to review on appeal. Since it is not the province of this court to engage in fact finding, we remand the issue of the proper penalty amount to the trial court to resolve.

*Amren*, 131 Wn.2d at 38.

C. IN PRA CASES DECIDED ON COMPETING WRITTEN EVIDENCE, WE REVIEW A TRIAL COURT'S FINDINGS OF FACT FOR SUBSTANTIAL EVIDENCE

The parties raise an important legal issue that is subject to reasonable debate: *In PRA cases decided on competing written evidence, what is the appropriate standard of factual review?* Hoffman argues that we must review a trial court's findings of fact de novo. The County argues that we must review the trial court's findings of fact for substantial evidence. Neither party argued for the abuse of discretion standard adopted by the majority. Nor, in my opinion, does any precedent support it.

The PRA states, “Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo.” RCW 42.56.550(3).

In *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994) (*PAWS*) (plurality opinion), the Supreme Court noted that the PRA permitted a trial court to decide the case based on competing documentary evidence. Citing former RCW 42.17.340(3)—RCW 42.56.550(3) as amended—and *Smith v. Skagit County*, 75 Wn.2d 715, 718-19, 453 P.2d 832 (1969), a plurality of the court held, “Under such circumstances, the reviewing court is not bound by the trial court’s findings on disputed factual issues.” *PAWS*, 125 Wn.2d at 253.

More recently, in *State v. Kipp*, 179 Wn.2d 718, 317 P.3d 1029 (2014), the Supreme Court construed *Smith* but arrived at a different standard for appellate review. The court held, “[W]here competing documentary evidence must be weighed and issues of credibility resolved, the substantial evidence standard is appropriate.” *Kipp*, 179 Wn.2d at 727 (quoting *Dolan v. King County*, 172 Wn.2d 299, 310, 258 P.3d 20 (2011)).

There is obvious tension between *PAWS* and *Kipp*. Both cases discuss appellate review of trial court findings based on competing documentary evidence. Both cases arrive at different standards of review. For two reasons, I believe *Kipp* is correct.

First, the statement in *PAWS* is dicta. There, the Supreme Court was not asked to review any findings of fact. Instead, the lower court granted summary judgment, and a plurality of the court reversed because it found there were genuine issues of material fact. *PAWS*, 125 Wn.2d at 253; see also *Fisher Broadcasting-Seattle TV LLC v. City of*

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*Seattle*, 180 Wn.2d 515, 521-22, 326 P.3d 688 (2014) (reviewing PRA summary judgment de novo); *Gendler v. Batiste*, 174 Wn.2d 244, 250-51, 274 P.3d 346 (2012) (reviewing PRA summary judgment de novo).

Second, RCW 42.56.550(3)'s grant of de novo review likely applies only to a superior court's review of an agency's actions. A court's goal in interpreting a statute is to effectuate the legislature's intent. *Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007). We effectuate the legislative intent by ascertaining the plain meaning of the statute. *Id.* "Plain meaning [of a statute] is discerned from viewing the words of a particular provision in the context of the statute in which they are found, together with related statutory provisions, and the statutory scheme as a whole." *Id.*

RCW 42.56.550 provides in relevant part:

**Judicial review of agency actions.** (1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, *the superior court* . . . may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. . . .

(2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request or a reasonable estimate of the charges to produce copies of public records, *the superior court* . . . may require the responsible agency to show that the estimate it provided is reasonable. . . .

(3) Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest . . . . *Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.*

(4) . . . [I]t shall be within the discretion of *the court* to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

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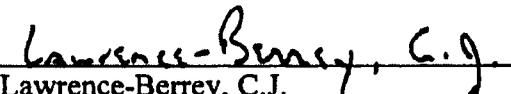
(Emphasis added.)

In discussing judicial review, subsections (1) and (2) explicitly describe superior court authority, not appellate court authority. Subsections (3) and (4) strongly imply superior court authority, not appellate court authority. *See also Yousoufian I*, 152 Wn.2d at 430-31 (construing former RCW 42.17.340(4), now RCW 42.56.550(4), as not describing appellate court authority).

Also, only superior courts review agency actions. Appellate courts review superior court decisions. If the legislature intended appellate courts to exercise de novo review, RCW 42.56.550(3) would read, "Judicial review of all agency actions *and trial court decisions* . . . shall be de novo." But RCW 42.56.550(3) does not say this.

For these reasons, I would construe RCW 42.56.550(3)'s grant of de novo review of agency actions as descriptive of superior court review, not appellate court review.

Here, the trial court made findings of fact after reviewing competing documentary evidence. In accordance with *Kipp*, I would review the trial court's challenged findings for substantial evidence. But the appropriate standard of review is open for judicial debate and awaits clarification from our highest court.

  
Lawrence-Berrey, C.J.

**APPENDIX 2**  
**ORDER AMENDING OPINION**

**FILED**  
**AUGUST 20, 2018**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

RANDALL HOFFMAN,	)	
	)	No. 35091-6-III
Appellant,	)	
	)	
v.	)	
	)	ORDER AMENDING OPINION
KITTITAS COUNTY, a local agency and	)	
the KITTITAS COUNTY SHERIFF'S	)	
OFFICE, a local agency,	)	
	)	
Respondents.	)	

IT IS ORDERED that the third, fourth and fifth sentences in the second paragraph on page 12 (lines 11 through 15) of the majority opinion filed July 24, 2018, are amended as follows: "In addition, the ultimate penalty of \$15,498.00 amounted to an assessment of almost \$0.34 per Kittitas County resident on a per capita basis.<sup>4</sup> This is commensurate with other PRA violation assessments. *See Zink v. City of Mesa*, 4 Wn. App. 2d 112, 128, 419 P.3d 847 (2018) (penalty assessment of \$0.19 per resident)."

PANEL: Judges Pennell, Korsmo, Lawrence-Berrey

FOR THE COURT:

  
ROBERT LAWRENCE-BERREY  
Chief Judge

**KITTITAS COUNTY PROSECUTOR'S OFFICE**

**March 11, 2019 - 1:56 PM**

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