NO. 103271-4

SUPREME COURT OF THE STATE OF WASHINGTON

ROGER W. FLOOK JR.,

Appellant,

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Roger Flook's disagreement with the Court of Appeals does not warrant this Court's review. The Petition does not include any citation to the Rules of Appellate Procedure (RAPs), or any discussion of which consideration in RAP 13.4(b) supports acceptance of review. Thus, Mr. Flook has entirely failed to demonstrate that this Court's review is appropriate.

Mr. Flook filed a lawsuit against the Department of Corrections under the Public Records Act (PRA). Mr. Flook's record request was assigned to a new staff member who misunderstood Department policy. Because of staff member's misunderstanding, she incorrectly responded to Mr. Flook that no records existed. Mr. Flook submitted a second request for the exact same record, which was assigned to a more experienced staff member who promptly provided the record to Mr. Flook. About six weeks later, Mr. Flook filed suit against the Department for violating the PRA in response to his first request.

Nothing here warrants this Court's review. The Court of Appeals' opinion follows established precedent in finding that the Department did not deny Mr. Flook a record in bad faith. Mr. Flook fails to identify any error in the court's reasoning or application of the law; his Petition reflects only his disagreement with the court's conclusion. This Court should deny review.

II. STATEMENT OF THE ISSUES

1. **Whether the Court of Appeals correctly held that the Department of Corrections did not deny Mr. Flook a public record in bad faith when a staff member made a mistake in responding to a record request?**

III. STATEMENT OF THE CASE

In April 2021, the Department contracted with JPay, a private vendor, to provide e-messaging, video visitation, and music downloads to incarcerated individuals. CP 272. The JPay contract was readily available to the public on the Department's website. CP 474.

Messages sent to and from incarcerated persons through JPay are housed on JPay's servers, which are not used for agency

business, are not agency public records, and therefore are not subject to disclosure under the PRA. CP 314. Because JPay records are not agency public records, they do not need to be gathered from the JPay system in response to a public records request. CP 314.

A. Mr. Flook's First Request for the JPay Contract (P-20190)

On April 20, 2021, the Department's Public Records Unit (PRU) received a public records request from Mr. Flook. CP 317. He requested JPay messages and the JPay contract. CP 317. The Department received the request, assigned it tracking number P-20190, and assigned it to Public Records Specialist Lori Jones.[1] CP 296.

[1] Ms. Jones was one of the newest staff members with the PRU, having joined the office approximately six months earlier, in September 2020. CP 296. At the time, the PRU was understaffed with only twelve of its sixteen records specialists' positions filled. CP 296. As a result, all public records specialists had larger than normal caseloads. CP 296. The week Ms. Jones received Mr. Flook's request, she had a total of 140 active records requests. CP 296-97.

Before receiving Mr. Flook's request, Ms. Jones had never processed a public records request for the JPay contract. CP 337. At the time of this request, Ms. Jones misunderstood the Department's Newsbrief[2] for JPay records, and incorrectly believed that all JPay records were housed on the JPay system and therefore were not public records held by the Department for purposes of disclosure under the PRA. CP 337. Ms. Jones understood the JPay contract to be a JPay record. CP 337.

Because Ms. Jones misunderstood the Department's policy for JPay records, she believed that she did not need to conduct a search for responsive records. CP 337. Ms. Jones' misunderstanding is evident in her note in GovQA, the Department's request tracking system: "Review request, requestor needs to obtain records from the JPay system for the

[2] Because of the large number of records it maintains, the Department supplements its standard public records policy with NewsBriefs, which are directives from the Department as to how to respond to specific requests for records. *See* CP 294.

archived and incoming emails along with the contract. Closed request as no records exist. 4/21/21" CP 321.

That same day, Ms. Jones mailed a response letter to Mr. Flook. Ms. Jones copied the exact language provided in the Newsbrief, which included language that a search had been conducted and no responsive records were found, and that the requestor must request records from JPay directly. CP 324. Ms. Jones included information on how to request the records directly from JPay and concluded the letter by inviting Mr. Flook to follow up if he believed an error had occurred in the Department's response. CP 324. Although he admitted to knowing about the JPay contract for "some years," Mr. Flook never responded to the letter, nor did he file an appeal. CP 347; *see* CP 297.

B. Mr. Flook's Second Request for the JPay Contract (P-24012)

Rather than notifying the Department that he believed it had erred in responding to his initial request, Mr. Flook submitted another record request for the JPay contract a few

months later in October 2021. CP 326. The PRU assigned this request tracking number P-24012 and assigned it to Public Records Specialist Lora Bronson. CP 297. Ms. Bronson provided Mr. Flook a copy of the JPay contract pursuant to this request on January 24, 2022. CP 330; CP 298. Six weeks later, Mr. Flook filed this lawsuit arguing that the Department violated the PRA in response to his first record request. CP 2.

C. The Department First Realized Its Error in Response to Mr. Flook's First Request (P-20190) When he Filed His Lawsuit

Mr. Flook filed this lawsuit on March 8, 2022, about six weeks *after* receiving the JPay contract in response to his second records request. CP 2. The original complaint challenged the Department's response to the entirety of the first request (P-20190). CP 2-4.

Once the Department received notice of the lawsuit, it investigated its response to the first request. CP 298. Denise Vaughan, the Information Governance Director and head of the PRU, reviewed the GovQA Report and spoke with Ms. Jones

regarding her response. CP 298; CP 337. Ms. Jones explained that she misunderstood the Department's policy and guidance regarding JPay records, incorrectly believing that all "JPay records" (including the JPay contract) were housed on JPay's system and therefore were not public records subject to disclosure under the PRA. CP 337; CP 298. In processing Mr. Flook's records request, Ms. Jones's intent was never to purposefully deny Mr. Flook access to the JPay contract. CP 338. Her response was based on her misunderstanding of the Newsbrief and the nature of JPay records. CP 338.

When asked about the response letter, which indicated that a search had been conducted, she explained that at the time she wrote the response letter, she believed the language in the Newsbrief instructed requestors that the records should be requested from JPay directly. CP 337; CP 324. Ms. Jones was first aware of her mistake when Mr. Flook filed his lawsuit. CP 337; CP 482.

Once Ms. Jones was made aware of her mistake, she immediately re-processed the request. CP 298; CP 337. Records show that Ms. Jones sent expedited search requests to a multitude of offices both at the prison where Mr. Flook is housed and Department Headquarters. CP 298-99; CP 337; CP 321-22. Once the Department confirmed that there were no responsive JPay messages, in May 2022, the Department mailed Mr. Flook another copy of the JPay contract in response to P-20190, free of charge. CP 338.

D. Procedural History

1. The Department admitted a PRA violation and the trial court found no bad faith

In August 2022, Mr. Flook moved for partial summary judgment on the limited issue of whether the Department violated the PRA in its response to his first request because it did not provide the JPay contract. *See* CP 83. The Department conceded that, under the facts of this case only, its unintentional error in processing the request did result in a violation of the

PRA. Supp. VRP 13:20-14:3.[3] The trial court granted Mr. Flook's unopposed motion. CP 442; *see also* Supp. VRP 14:4-20.

In November 2022, the Department filed a Motion for Judicial Review under RCW 42.56.550 and CR 7(c) seeking a determination of whether Mr. Flook was entitled to penalties. CP 269-353. After considering the parties' briefing and oral argument, the trial court ruled that Mr. Flook was not denied records in bad faith and therefore not entitled to penalties. CP 484-485.

2. The Court of Appeals affirmed the Superior Court's ruling that the Department did not deny Mr. Flook a record in bad faith

The Court of Appeals affirmed the trial court's determination that the Department did not deny Mr. Flook records in bad faith.

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[3] There are multiple iterations of the Verbatim Report of Proceedings in the record that contain overlapping transcripts. The filing dated 9/12/2023 contains all hearings. Citations to the Verbatim Report of Proceedings refer to the 9/12/23 filing.

The court found that Mr. Flook failed to show that the Department denied him records in bad faith because "[n]othing in the record suggests that Ms. Jones acted maliciously, unreasonably, or with the purpose of denying Mr. Flook a copy of the DOC's contract with JPay." Pet'r's App., at 13.

The Court noted that Ms. Jones failed to conduct any search in response to Mr. Flook's first request and explained "such a search would have been futile due to her misunderstanding of the DOC's policy on JPay records." Pet'r's App., at. at 13. "[I]f a records specialist's understanding of the policy was that a requestor needed to request JPay records directly from JPay itself, it is reasonable the records specialist would not conduct a search." Pet'r's App., at 14. That Ms. Jones failed to search for "records that she believed [were] held by another entity does not show a malicious intent to deny a record." Pet'r's App., at 14 . Indeed, Ms. Jones declared that it was never her intent to deny Mr. Flook a record. Pet'r's App., at 13. Had it been the Department's intent to willfully and wantonly deny

Mr. Flook a record, it would have denied his second request. Pet'r's App., at 14.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

Mr. Flook has not shown any basis for this Court's review under RAP 13.4(b). Indeed, the Petition for Review is devoid of any reference to RAP 13.4(b) or any cogent argument as to why this Court should accept review. Accordingly, the Court should deny review.

A. Mr. Flook's Petition Does Not Warrant This Court's Review Under RAP 13.4

Mr. Flook's Petition does not mention the Rules of Appellate Procedure or the basis upon which he is entitled to this Court's review under RAP 13.4(b). *See* RAP 13.4(c)(7). Additionally, although Mr. Flook identifies five issues for this Court's review, the Petition addresses only three of the five. *See* Pet'r's Br., at 1-2 (no argument on issues four or five).

The Rules of Appellate Procedure are intended to enable the Court and the opposing party to efficiently and expeditiously

review the relevant legal authority. *Litho Color, Inc. v. Pac. Emps. Ins. Co*., 98 Wn. App. 286, 305-06, 991 P.2d 638 (1999). For this reason, courts should not consider issues that lack adequate, cogent argument and briefing. *Satomi Owners Ass'n v. Satomi*, *LLC*, 167 Wn.2d 781, 808, 225 P.3d 213 (2009).

Mr. Flook, a pro se litigant, is held to the same responsibility as an attorney. *In re Connick*, 144 Wn.2d 442, 455, 28 P.3d 729 (2001). Because his Petition does not identify any basis for review under RAP 13.4(b), the Court should deny the Petition on that basis alone. At the very least, the Court should not consider issues four and five identified in the Petition because Mr. Flook failed to support them with any argument or any legal authority.

B. None of the Considerations in RAP 13.4 Warrant Review

This case presents no basis for this Court's review. First, Mr. Flook has not identified how the Court of Appeals' decision conflicts with any case from this Court. RAP 13.4(b)(1). Second, this case does not conflict with any published case from the Court

of Appeals. RAP 13.4(b)(2). Third, Mr. Flook has not identified any significant questions of law arising under the federal or state Constitutions. RAP 13.4(b)(3). Fourth, Mr. Flook's disagreement with the Court of Appeal's decision is not an issue of substantial public interest warranting this Court's review. Accordingly, this Court should deny review.

1. The Court of Appeals' Opinion is not in conflict with any decision from this Court

Mr. Flook makes a passing remark that the Court of Appeals' decision "conflicts with case law and what this Court has stated." Pet'r's Br., at 15. But he does not identify, much less discuss, any case that conflicts with the Court of Appeals' decision.

Mr. Flook cites *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011), and *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005), though he does not argue that the Court of Appeals' decision conflicts with either opinion. *See* Pet'r's Br., at 19. Even if he made this argument, it is unavailing.

Neighborhood Alliance discussed a PRA violation, not bad faith under RCW 42.56.565(1). Indeed, RCW 42.56.565(1) was enacted just two months before this Court's decision in *Neighborhood Alliance*. However, here, the Department admitted that its unintentional error in processing Mr. Flook's first request resulted in a PRA violation. Supp. VRP 13:20-14:3. The Court of Appeals' decision therefore focused on bad faith under RCW 42.56.565(1), not whether the Department violated the PRA; a bad faith determination necessarily happens only after a court finds a violation. *See* Pet'r's App., at 10.

Similarly, *Spokane Research and Defense Fund* was decided in 2005, about six years before the Legislature enacted RCW 42.56.565(1). That case discussed costs and penalties for a nonincarcerated requester for a PRA violation; the case did not discuss the bad faith standard for an incarcerated requester seeking penalties.

Neighborhood Alliance and *Spokane Research and Defense Fund* are inapposite here, and Mr. Flook cannot show

that the Court of Appeals' decision is in conflict with any decision of this Court or the Court of Appeals.

2. The Court of Appeals' Opinion is not in conflict with any published decision from the Court of Appeals

The Petition does not claim that the Court of Appeals' decision conflicts with any published case from the Court of Appeals. *See* Pet'r's Br; *see* RAP 13.4(b)(2).

3. There is no significant question of law under the Washington State or U.S. Constitution

The Petition does not raise any significant questions of law under the Washington State Constitution or the U.S. Constitution. *See* Pet'r's Br; *see* RAP 13.4(b)(3).

4. Mr. Flook's disagreement with the Trial Court and Court of Appeals is not an issue of substantial public interest that should be decided by the Supreme Court

The Petition makes clear that Mr. Flook disagrees with the trial court and Court of Appeals but offers no specific reason why this case involves an issue of substantial public interest. *See*

RAP 13.4(b)(4). As there is none, this case does not warrant review.

An issue of substantial public interest is one that "has the potential to affect a number of proceedings" and a decision from this Court "will avoid unnecessary litigation and confusion on a common issue." *In re Pers. Restraint of Flippo*, 185 Wn.2d 1032, 380 P.3d 413, 413-14 (2016). Here, Mr. Flook states that "[g]overnment agencies rarely fail to conduct a search for public records under the PRA[.]" Pet'r's Br., at 11. By Mr. Flook's own admission, this case does not present a "common issue" that is at risk of repeated and unnecessary litigation. *See Flippo*, 185 Wn.2d 1032. Even without Mr. Flook's concession, nothing in the Petition shows a substantial public interest requiring this Court's review.

a. The Court of Appeals correctly applied precedent in finding the Department did not deny Mr. Flook a record in bad faith

Mr. Flook claims that the Court of Appeals set a "concerning standard" when it found the Department did not act

in bad faith when Ms. Jones did not conduct a search for records because she misunderstood policy. Pet'r's Br., at 15. However, at most, Mr. Flook presents only his disagreement with the court's decision, not any conflict with prior precedent or a matter of substantial public interest.

First, the Court of Appeals' opinion is not published so it has no precedential value, is not binding on any court, and therefore cannot "set a standard." GR 14.1; Pet'r's Br., at 15.

Second, "simply establishing that the search was unreasonable is not sufficient, on its own, to show bad faith." *Gronquist v. Washington State Dep't of Corr.*, 32 Wn. App. 2d 617, 640, 557 P.3d 706, 722 (2024), *review denied*, No. 103601-9, 2025 WL 711152 (Wash. Mar. 5, 2025).

Third, the Court of Appeals followed established case law in determining that the Department did not act in bad faith. The Court of Appeals evaluated the Department's conduct as a whole, and correctly determined that the mistake in processing Mr. Flook's first request for the JPay contract was a reasonable

mistake made by one employee who misunderstood one subject-specific policy in responding to one public records request. Pet'r's App., at 13-15; CP 479-485. This was demonstrated when Mr. Flook submitted his second records request just months later, which was assigned to a different records specialist, and he received the JPay contract prior to filing this lawsuit. Pet'r's App., at 14; CP 484; Supp. VRP 60:9-61:2.

In contrast, Mr. Flook presented his own conclusory allegations only, claiming that Ms. Jones deliberately withheld the JPay contract, which was freely available on the Department's website, for some unidentified nefarious purpose.[4] *See* Pet'r's Br., at 15-17. But, as the Court of Appeals explained,

[4] Mr. Flook repeatedly misstates the superior court's findings by claiming that the superior court found bad faith because the Department did not conduct a search for records in response to his first request. *See* Pet'r's Br., at 13, 17. The superior court made so no such finding. The portions of the record cited by Mr. Flook include the superior court summarizing Mr. Flook's argument and explaining why the superior court disagreed. *See* Supp. VRP 59:3-10, 20-23.

"[n]othing in the record suggests that Ms. Jones acted maliciously, unreasonably, or with the purpose of denying Mr. Flook a copy of the DOC's contract with JPay." Pet'r's App., at 13.

Here, *Francis*, *Faulkner*, and *Gronquist* all support the Court of Appeals' decision. *Francis v. Washington State Dep't of Corr.*, 178 Wn.App. 42, 63, 313 P.3d 457 (2013) (an agency is not liable under a bad faith analysis "simply for making a mistake in a record search …"); *Faulkner v. Washington State Dep't of Corr.*, 183 Wn.App. 93, 108, 332 P.3d 1136 (2014) ("inadvertent mistake" in processing a record request does not meet the standard for bad faith); *Gronquist*, 32 Wn.App.2d at 642 ("human error" does not amount to bad faith).

Finally, Mr. Flook claims that the Court of Appeals incorrectly considered that Ms. Jones quickly corrected her mistake once she was made aware. Pet'r's Br., at 18-19; Pet'r's App., at 14. Mr. Flook argues that the PRA has "strict

compliance and DOC should be held accountable" even for this mistake. Pet'r's Br., at 19.

Mr. Flook is conflating a violation of the PRA, which the Department admitted, to a finding of bad faith. Furthermore, because Mr. Flook did not communicate with the Department regarding his belief that its response to his first request was incorrect, the Department was not aware of the mistake until he filed the lawsuit. "By not giving DOC a chance to cure its mistakes before proceeding to litigation," Mr. Flook cannot show that the failure to provide the JPay contract was anything other than "simply miscommunication and human error." *Gronquist*, 32 Wn.App.2d at 642. Indeed, "the purpose of the PRA is best served by communication between agencies and requesters, not by playing 'gotcha' with litigation." *Id*. at n.10 (citing *Hobbs v. State*, 183 Wn. App. 925, 941, 335 P.3d 1004, 1011 (2014)).

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b. Mr. Flook's petition does not involve an issue of substantial public interest because his proposed rule contravenes legislative intent

In the most generous reading of his Petition, Mr. Flook may suggest that a court must automatically find that an agency denied a record in bad faith under RCW 42.56.565(1) if the agency fails to perform a search for records. This argument contravenes precedent, which requires a case-by-case analysis of the facts, *see supra* pp. 17-20, and the Legislature's intent in passing RCW 42.56.565(1).

In 2011, the Legislature passed Substitute Senate Bill 5025, codified as RCW 42.56.565(1). The bill was passed "as a measure to curb abuses by inmates who use the PRA to gain automatic penalty provisions when an agency fails to produce eligible records." *Faulkner*, 183 Wn. App. at 105-06 (citing S.B. 5025, 62nd Leg. Reg. Sess. §1(5) (Wash. 2011)). "By incorporating the bad faith requirement, the legislature allows penalties for inmates only when the conduct of the agency

defeats the purpose of the PRA and deserves harsh punishment." *Id*. at 106.

"The purpose of statutory interpretation is to determine and give effect to the intent of the legislature." *State v. Dennis*, 191 Wn.2d 169, 172, 421 P.3d 944, 946 (2018) (internal citations omitted). If this Court were to accept Mr. Flook's argument that a failure to conduct a search automatically results in a finding of bad faith, RCW 42.56.565(1) would be rendered meaningless. Instead of the heightened bad faith standard intended by the Legislature, incarcerated individuals would be permitted penalties as soon as a violation is found, just as non-incarcerated requestors are. *Gronquist*, 32 Wn.App.2d at 638 ("[T]he legislature plainly sought to make it more burdensome for inmate requestors to obtain penalty awards than non-inmate requestors."). Because Mr. Flook's interpretation would undermine the legislative intent in RCW 42.56.565(1), it is not an issue of substantial public interest warranting this Court's review.

V. CONCLUSION

Mr. Flook failed to articulate any basis for this Court's review. The Court should deny his Petition.

VI. CERTIFICATION

This document contains 3699 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 24th day of March, 2025.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused the foregoing RESPONDENT'S ANSWER TO PETITION FOR REVIEW to be filed with the Clerk of the Court, and I certify that I served all parties, or their counsel of record, a true and correct copy of this document by United States Mail, postage prepaid, at the following addresses:

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

EXECUTED this 24th day of March, 2025 at Olympia, WA.

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