NO. 103601-9

SUPREME COURT OF THE STATE OF WASHINGTON

DEREK E. GRONQUIST,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

THE DEPARTMENT OF CORRECTIONS' ANSWER TO AMICUS BRIEF OF HUMAN RIGHTS DEFENSE CENTER, WASHINGTON COALITION FOR OPEN GOVERNMENT, AND ALLIED DAILY NEWSPAPERS

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I. INTRODUCTION

Amici present no persuasive reason for this Court to accept review. Gronquist has not proven that the Department of Corrections (DOC) has acted in bad faith. Ignoring that fact, Amici instead focus on public policy concerns and hypothetical scenarios that they believe warrant review. When examined closely, those concerns have little to do with the issues presented by Gronquist's petition.

Because Gronquist cannot show more than negligence under the Public Records Act (PRA), this case is not appropriate for review of the definition of bad faith in RCW 42.56.565(1). Review of that issue would not change the outcome of Gronquist's PRA claim. Negligence is insufficient to find bad faith under RCW 42.56.565(1) The Court should deny review.[1]

[1] Amici do not include in their Motion that Petitioner Derek Gronquist works for the Human Rights Defense Center. https://www.humanrightsdefensecenter.org/about/staff/

II. RESPONSE TO ARGUMENTS OF AMICI

Throughout this case, Gronquist has continually failed to prove DOC acted in bad faith in responding to his request for records, a prerequisite to award him PRA penalties. Because Gronquist has shown at most negligence, the facts of this case do not warrant review on the issue of bad faith in RCW 42.56.565(1). Amici's discussion of the bad faith framework is not tethered to the facts of Gronquist's records request. The fact that Gronquist is represented by counsel also does not justify review.

Amici do not show that the Court of Appeals' opinion presents a divisional split warranting review, is in conflict with a Supreme Court decision, is a significant question of law under the Constitution of the State of Washington or of the United States, or is an issue of substantial public interest as required by RAP 13.4(b).

A. Gronquist Failed to Show DOC Acted in Bad Faith Under Any Standard

Despite Amici's assertion that this case "provides an excellent vehicle" for guidance on the PRA bad faith standard, it presents no such opportunity. Brief at 3. Gronquist has never shown bad faith under any standard, and so a ruling by this Court on the bad faith standard would not change the outcome of Gronquist's public records claim below. In such a case, review is not warranted.

Although the trial court initially found that DOC acted in bad faith, the trial court reversed itself after reviewing *Hoffman v. Kittitas County*, 194 Wn.2d 217, 449 P.3d 277 (2019), and *Faulkner v. Washington Department of Corrections*, 183 Wn. App. 93, 332 P.3d 1136 (2014). VRP 2/3/2023, 4:22-5:12. The trial court then found that Gronquist could show only gross negligence by DOC. VRP 2/10/23, 7:1-3. The Court of Appeals agreed with the trial court, concluding that Gronquist could not meet the bad faith standard as he could show no more than negligence. Slip Op. at 2. The Court of Appeals determined that

"[a] finding that an agency acted in bad faith under the PRA does not require the commission of some intentional, wrongful act, but it does require the requestor to show more than negligence, which is all that Gronquist has done." Slip Op. at 15.

Amici do not engage with the facts of this case to contradict this point. Amici's only argument to the contrary is, "[i]f this case does not meet the standard for bad faith, it is hard to imagine that any case ever will." Brief at 12. This claim is wholly conclusory and unsupported. Given the consistency of Gronquist's inability to show more than negligence, as recognized by both the superior court and Court of Appeals, this case is not an appropriate vehicle for this Court's review of the bad faith standard in RCW 42.56.565(1).

B. The Court of Appeals Built on Existing Precedent in Clarifying the Bad Faith Standard

After analyzing *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010), *Hoffman v. Kittitas County*, *Francis v. Washington State Department of Corrections*, 178 Wn. App. 42, 313 P.3d 457 (2013), *Faulkner*, and *Cedar Grove*

Composting, Inc. v. City of Marysville, 188 Wn. App. 695, 354 P.3d 249 (2015), the Court of Appeals built on this existing PRA case law to provide its clarified definition of the term bad faith as used in RCW 42.56.565(1). The court found that bad faith requires "evidence that the agency either intentionally conducted an inadequate search in a manner calculated to not discover the record or intentionally withheld a record for an improper purpose, with the knowledge that doing so violated the PRA." Slip Op. at 19. The Court of Appeals' decision here does not conflict with existing bad faith precedent.

Indeed, the court took note of the range of culpability identified by this Court in *Yousoufian*: "negligent, reckless, wanton, bad faith, or intentional noncompliance." Slip Op. at 17 (quoting *Yousoufian*, 168 Wn.2d at 468). The Court of Appeals concluded that "[f]rom the plain language of this range, it is clear that the [S]upreme [C]ourt considers bad faith to be the highest level of culpability other than intentional noncompliance, higher than negligent or even wanton conduct." Slip Op. at 17.

The court also considered *Faulkner*, which held that "[i]n the PRA context, bad faith incorporates a higher level of culpability than simple or casual negligence. . . . [To] establish bad faith, an inmate must demonstrate a wanton or willful act or omission by the agency." Slip Op. at 18 (quoting *Faulkner*, 183 Wn. App. at 103). The court noted that *Faulkner* holds that the bad faith requirement for the PRA "allows penalties for inmates only when the conduct of the agency defeats the purpose of the PRA and deserves harsh punishment." Slip Op. at 18 (quoting *Faulkner*, 183 Wn. App. at 106). The court then distinguished this case from the facts of *Francis*, where the agency did have sufficient clarity regarding the request, lacked proper training and supervision, and demonstrated a lack of compliance with PRA procedural requirements. Slip Op. at 18. After considering the definitions of bad faith put forth by these cases, the court concluded that "bad faith must constitute more than gross negligence or recklessness." Slip Op. at 19.

Amici state that Division II's opinion sows confusion and argue for a gross negligence standard of bad faith. Yet gross negligence is not the standard used to determine bad faith, and adopting this standard would create the confusion Amici seek to avoid. And a gross negligence standard would depart from the great weight of PRA jurisprudence.[2] Again, while Amici advocate for a gross negligence standard, they do not

[2] *See, e.g.*, *Adams v. Wash. State Dep't of Corr.*, 189 Wn. App. 925, 361 P.3d 749 (2015); *Curtis v. Wash. State Dep't of Corr.*, No. 54758-9-II, 2022 WL 1315654, at *4 (Wash. Ct. App. May 3, 2022) (unpublished); *Williams v. Dep't of Corr.*, 2 Wn. App. 2d 1043, 2018 WL 1004892 (Wash. Ct. App. Feb. 21, 2018) (unpublished); *Cook v. Wash. State Dep't of Corr.*, 197 Wn. App. 1061 (Wash. Ct. App. Feb. 06, 2017) (unpublished); *Wallin v. Wash. Dep't of Corr.*, 28 Wn. App. 2d 1009, 2023 WL 5932815, at *7 (Wash. Ct. App. Sept. 12, 2023) (unpublished); *Benitez v. Skagit Cnty.*, No. 79444-2-I, 2020 WL 1917453, 13 Wn. App. 2d 1019, at *11 (Wash. Ct. App. Apr. 20, 2020) (unpublished). Consistent with GR 14.1, the Department informs the Court that the unpublished decisions have no precedential value, are not binding on any court, and are cited only as persuasive authority as the Court deems appropriate. *Crosswhite v. Wash. State Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 544, 389 P.3d 731 (2017).

demonstrate that the facts of this case would meet a standard higher than negligence.

Here, the Court of Appeals found that regardless of whether the court applied the standard from *Francis* or from *Faulkner*, Gronquist failed to satisfy either standard. Slip Op. at 19. While the court disagreed with the bad faith definitions set out in *Francis* and *Faulkner*, which state that bad faith requires more than gross negligence or recklessness, the court's disagreement was dicta. Because the court immediately rejected Gronquist's claim under both of those decisions, the court did not need to go out of its way to disagree with *Francis* and *Faulkner* and establish an even higher standard.

C. Amici's Arguments Regarding Penalties are Misplaced

Amici make arguments about PRA penalties that misunderstand the posture of the decision below. *See* Brief at 9-11. At issue is whether the Court of Appeals appropriately found that Gronquist was not entitled to reach the issue of PRA penalties. Gronquist had not shown more than negligence by

DOC, meaning he could not demonstrate that DOC acted in bad faith. The issue of *Yousoufian* penalties arises only after a requestor has met their burden of demonstrating the agency's bad faith. Because Gronquist has not met the threshold requirement of showing bad faith under RCW 42.56.565(1), arguments regarding penalties are not appropriate.

Amici claim "[t]he trial court below seemed to agree that eight of the nine Yousefian [sic] II aggravating factors supported penalties and that there were no mitigating factors." Brief at 9. To support this statement, Amici cite Gronquist's brief filed at the trial court (CP 20-21), Court Hearing Minutes from January 20, 2023 (CP 1458), and the trial court's initial ruling before reversal (VRP 1/20/23). These statements about penalties from the trial court were made before the court reconsidered its own ruling regarding bad faith. Amici's discussion of aggravating factors under *Yousoufian* is not timely. Importantly, "[i[f—and only if—the trial court finds that the agency acted in bad faith, it then engages in the normal penalty assessment

analysis as guided by *Yousoufian II*." *Hoffman*, 194 Wn.2d at 226.

Further, Amici misstate the Court of Appeals' decision by claiming that the court "concluded that penalties were unavailable because Gronquist sued rather than telling WSDOC that its production was incomplete." Brief at 10. The Court of Appeals noted that DOC did not know the production was incomplete until Gronquist filed suit. Thus, "[b]y not informing DOC that the production was incomplete, Gronquist made it difficult to prove that the failure to produce certain documents was the result of anything but miscommunication and human error." It is Gronquist's burden to prove that DOC acted in bad faith in denying him the opportunity to inspect or copy a public record. RCW 42.56.565(1). Thus, the court found that "the failure to produce all of the relevant documents and the failure to request documents from contractors is not evidence of bad faith, but rather a result of a lack of communication between the parties." Slip Op. at 22. In other words, Gronquist's decision not

to communicate with DOC about documents not produced lends to the conclusion that DOC did not act in bad faith in responding to his request. Nothing about such a finding warrants this Court's review.

D. Amici Do Not Present an Issue Regarding Attorney Fees That Warrants This Court's Review

Amici argue that the Court of Appeals' decision calls into question the right to attorney fees under the PRA absent a showing of bad faith. While the Court of Appeals stated in dicta that "[p]recedent is less clear on whether an inmate requestor is entitled to attorney fees absent a finding that the agency acted in bad faith," the court did not decide this issue. Slip Op. at 26. Instead, it concluded that Gronquist improperly raised the issue for the first time in his reply brief and left the attorney fees awarded below undisturbed.

Gronquist did not properly raise this issue before the Court of Appeals, and it is therefore not properly before this Court. Further, Amici do not show how this issue meets any of the criteria under RAP 13.4(b) and warrants review by this Court.

III. CONCLUSION

Amici do not present any reason to grant Gronquist's petition for review. Accordingly, this Court should deny review.

This document contains 1,967 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 14th day of February, 2025.

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the foregoing response brief with the Clerk of the Court using the electronic filing system which will send notification to the following electronic filing participant:

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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 14th day of February, 2025 at Olympia, WA.

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