Supreme Court No. No. 103601-9
(COA No. 58808-1-II)

IN THE SUPREME COURT
OF WASHINGTON

DEREK E. GRONQUIST,

Petitioner/Plaintiff,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent/Defendant.

AMICI'S MEMORANDUM IN SUPPORT OF SUPREME COURT REVIEW

Brian W. Esler
Estera Gordon
Miller Nash LLP
605 5th Ave S, Ste 900
Seattle, WA 98104
Attorneys for Human Rights Defense Center

Eric M. Stahl
Davis Wright Tremaine LLP
920 5th Ave, Ste 3300
Seattle, WA 98104-1610
Attorneys for Washington Coalition for Open Government

Katherine George
Johnston George LLP
2800 First Ave Ste 226
Seattle, WA 98121
Attorneys for Allied Daily Newspapers

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. IDENTITY OF AMICI AND SUMMARY OF ARGUMENT

The *amici* joining in this memorandum are Human Rights Defense Center ("HRDC"), Washington Coalition for Open Government ("WCOG"), and Allied Daily Newspapers of Washington ("Allied").[1]

Both the trial court and the Court of Appeals confirmed that respondent the Washington State Department of Corrections ("WSDOC") violated Washington's Public Records Act, RCW Ch. 42.56 ("PRA"). Those courts concluded that WSDOC's response to petitioner Gronquist's records request was neither timely nor adequate, which is well-supported by the evidentiary record and does not merit review. But the Court of Appeals erred when it affirmed that WSDOC did not act in "bad faith" for purposes of RCW 42.56.565(1), which statute denies

[1] The National Police Accountability Project ("NPAP") also supports review here but was unable to obtain local Washington counsel by the filing deadline so as to join in this memorandum.

PRA penalties to prisoner requesters unless the "agency acted in bad faith in denying the person the opportunity to inspect or copy a public record."

The Legislature passed the "bad faith" exception for prisoner requests in 2011. Laws of 2011, Ch. 300, s. 1. Since then, the Courts of Appeals have formulated a variety of different standards for "bad faith," with the current case adopting yet another new standard. In 2019, this Court acknowledged that it had "not yet had occasion to review the Court of Appeals' inmate PRA holdings" regarding the definition of "bad faith" under RCW 42.56.565(1). *Hoffman v. Kittitas County*, 194 Wn.2d 217, 226-227, 449 P.3d 277, 282 (2019). It is now time for this Court to take such review. The purposes of the PRA are better served when this Court provides definitive guidance to the lower courts. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735, 745 (2010) ("*Yousoufian II*").[2]

[2] *Yousoufian II* established aggravating and mitigating factors for determining penalties under 42.56.550(4). The

This case provides an excellent vehicle for that guidance. RCW 42.56.565(1) applies only to incarcerated requestors, who are often proceeding *pro se*. Indeed, every previous appellate decision on the "bad faith" exception was prosecuted by *pro se* prisoners. *See discussion infra*, at 5-9. Here, petitioner

---

mitigating factors are (1) a lack of clarity in the PRA request; (2) the agency's prompt response or legitimate follow-up inquiry for clarification; (3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions; (4) proper training and supervision of the agency's personnel; (5) the reasonableness of any explanation for noncompliance by the agency; (6) the helpfulness of the agency to the requestor; and (7) the existence of agency systems to track and retrieve public records. The aggravating factors are (1) a delayed response by the agency, especially in circumstances making time of the essence; (2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions; (3) lack of proper training and supervision of the agency's personnel; (4) unreasonableness of any explanation for noncompliance by the agency; (5) negligent, reckless, wanton, bad faith, or intentional non-compliance with the PRA by the agency; (6) agency dishonesty; (7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency; (8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency; and (9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case. *Yousoufian II*, 168 Wn.2d at 467-468, 229 P.3d at 747-748.

Gronquist is represented by experienced counsel and supported by *amici* with a deep appreciation for and knowledge of the PRA.

The Court of Appeals' decision promulgated a definition of "bad faith" that renders that standard virtually unreachable. And the Court of Appeals' decision then calls into question whether inmate requestors are "entitled to attorneys fees absent a finding that the agency acted in bad faith" (Slip Op., at 26), a statement that has no support in precedent and is contradicted by the PRA itself. RCW 42.56.550(4).

An award of PRA penalties is designed to "discourage improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978). Such access is never more important than for someone whose very freedom may depend on obtaining those public records. But because of the centrality of "bad faith" to the penalty determination in even non-inmate cases, a higher bad faith standard will affect all public records requestors, which is why

so many *amici* joined in this memorandum. By raising the standard for "bad faith" to an almost unreachable level for inmates and questioning their right to attorneys fees, the Court of Appeals' published decision will undermine the purposes of the PRA and encourage agency intransigence unless corrected by this Court.

II. STATEMENT OF THE CASE

Amici adopts petitioner Gronquist's Statement of the Case.

III. ARGUMENT

This case meets the criteria for review under RAP 13.4(b):

A. Competing Bad Faith Standards Sow Confusion.

The people of Washington state enacted the PRA by initiative in 1972. *Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.2d 389, 392 (1997). The PRA is a "strongly worded mandate for broad disclosure of public records." *Hearst Corp. v. Hoppe*,

90 Wn.2d 123, 127, 580 P.2d 246 (1978). It is to be liberally construed. RCW 42.56.030.

In 2011, the Legislature amended the PRA to restrict when inmates could recover "penalties" under the PRA: "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 court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record." RCW 42.56.565(1). The statutory section referenced in the amendment provides that a prevailing requestor "***shall*** be awarded all costs, including reasonable attorney fees" and in addition the court may award "such person an amount not to exceed one hundred dollars for each day he or she was denied the right to inspect or copy said public record." RCW 42.56.550(4) (emphasis added). This "additional, discretionary award is properly characterized as a penalty." *Hoffman*, 194 Wn.2d at 281, 449 P.3d at 224; *accord In re*

Rosier, 105 Wn.2d 606, 617, 717 P.2d 1353 (1986); *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 271, 884 P.2d 592 (1994) (*PAWS II*); *Amren*, 131 Wn.2d at 35-36, 929 P.2d at 395.

Since 2011, the Courts of Appeals have considered what the "bad faith" standard in RCW 42.56.565(1) means in four published opinions (this being the fourth). First, Division II decided that a finding of gross negligence was sufficient to find "bad faith," that "bad faith does not require a showing of intentional wrongful misconduct," and that bad faith exists if the agency fails to do a search that is both reasonable and consistent with its own policies. *Francis v. Department of Corrections*, 178 Wn. App. 42, 51-52, 63 n.5., 313 P.3d 457 (2013), *rev. denied* 180 Wn.2d 1016 (2014).

Division III later weighed in and decided that "bad faith" required "a higher level of culpability than simple or casual negligence" and instead required the agency to commit a "wanton or willful act or omission" to warrant penalties.

Faulkner v. Department of Corrections, 183 Wn. App. 93, 103, 105, 332 P.3d 1136 (2014), *rev. denied* 182 Wn.2d 1004 (2015). The following year, Division III revisited that standard. *Adams v. Department of Corrections*, 189 Wn. App. 925, 938-40, 361 P.3d 749 (2015). Division III explained how the "bad faith" requirement operates:

> Under RCW 42.56.565(1), the court must make a threshold determination that the agency acted in bad faith in denying a record requester the opportunity to inspect or copy a public record. If that threshold determination is made, the statute contemplates that the trial court will then exercise its discretion under RCW 42.56.550(4) "to award . . . an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy [the requested] record."

Adams, 189 Wn. App. at 953, 361 P.3d at 762. It affirmed that the trial court's *Yousoufian II* finding of two mitigating factors and three aggravating factors supported the bad faith finding and the imposition of a $35 per day penalty. *Adams*, 189 Wn. App. at 954-956, 361 P.3d at 762-763.

All of those reported appellate cases were prosecuted by inmates proceeding *pro se*. This is the first opportunity since the "bad faith" exception was enacted thirteen years ago for this Court to have the assistance of experienced counsel to explore the definition of "bad faith" under RCW 42.56.565(1). It may be the last such opportunity for many years.

B. The Court of Appeals Got It Wrong.

1. The Court of Appeals' new bad faith standard has little support in case law or the PRA.

The trial court below seemed to agree that eight of the nine *Yousefian II* aggravating factors supported penalties and that there were no mitigating factors. CP 20-21, 1458, 1512–15; 1/20/23 RP 9–10. Based on *Adams*, that should have resulted in penalties. And initially, it did – the trial court imposed penalties totaling $456,910. CP 1458, 1512–15; 1/20/23 RP 9–10. But at a subsequent hearing, the trial court reversed course and imposed no penalties. 2/3/2023 RP 4-5.

This Court previously declined to opine on the three appellate decisions discussed above when asked to do so in a non-inmate case. *Hoffman*, 194 Wn.2d at 226-227, 449 P.3d at 282. The Court of Appeals took that exercise in judicial restraint as supporting a stricter "bad faith" standard: "We can therefore assume that the standard for bad faith in the context of inmate PRA requests is at least as severe as in the penalty context in non-inmate PRA cases, in light of the legislature's decision to limit an inmate's ability to recover penalties under the PRA to situations in which the inmate demonstrates bad faith on the part of the agency—a showing non-inmate requesters are not required to make." Slip Op., at 16-17. *Hoffman* does not support that conclusion.

The Court of Appeals concluded that penalties were unavailable because Gronquist sued rather than telling WSDOC that its production was incomplete. Slip Op., at 19. But that conclusion is contrary to this Court's previous holdings: "[t]here is no requirement in Washington law, statutory or otherwise, that

a party requesting public records must negotiate with the public agency involved." *Progressive Animal Welfare Soc. v. Univ. of Washington*, 114 Wn.2d 677, 681-682, 790 P.2d 604, 605 (1990)(*PAWS I*). Instead, the agency bears the burden of showing that it conducted an adequate search. *Neigh. All of Spokane County v. Spokane County*, 172 Wn.2d 702, 720-721, 261 P.3d 119 (2011).

Moreover, that conclusion is at odds with the statute. Prisoners cannot recover penalties "unless the court finds that ***the agency*** acted in bad faith . . ..". RCW 42.56.565(1) (emphasis added). Had the Legislature meant for penalties to depend on the requestor's actions, it would have said so.

The Court of Appeals' opinion goes on to reject both its own previous *Francis* standard as well as Division III's *Faulkner* standard in favor of a new bespoke standard:

> In our view, bad faith must constitute more than gross negligence or recklessness. In the context of inmate PRA requests, a finding of bad faith requires evidence that the agency either intentionally conducted an inadequate search in a manner

> calculated not to 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. This standard imposes an almost impossible standard for incarcerated individuals. If this case does not meet the standard for bad faith, it is hard to imagine that any case ever will.

2. Inmate requestors are entitled to attorneys fees regardless of bad faith.

The PRA states that "any person who prevails against an agency . . . shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action." RCW 42.56.550(4). Attorney fees are mandatory; only the penalties of up to $100 a day are discretionary. *Hoffman*, 194 Wn.2d at 224, 449 P.2d at 280.

Despite the statutory language and above precedent, the below decision also calls into question the right to attorneys fees: "Precedent is less clear on whether an inmate requestor is entitled to attorney fees absent a finding that the agency acted in bad

faith, as RCW 42.56.550 does not reflect the unique burden that inmate requestors carry to prevail in a PRA action." Slip Op., at 26. The Court of Appeals did not cite any such published precedent because there is none.

For the first time in half a century, a published appellate decision suggests that there may be circumstances in which prevailing PRA plaintiffs are not entitled to recover attorneys fees. That suggestion alone merits review.

C. The Definition of "Bad Faith" Matters To More Than Just Prisoners.

Since at least 1992, Washington courts have held that "the existence or absence of a governmental agency's bad faith" is a principal factor in determining the amount of a PRA penalty. *Yacobellis v. Bellingham*, 64 Wn. App. 295, 303, 825 P.2d 324 (1992) (adopted by *Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997)). So even in non-prisoner PRA cases, the definition of "bad faith" is important.

Take the recently decided case of *Valderrama v. City of Sammamish*, Case No. 86195-6-I, 2024 WL 5116865 (Wn. App. Dec. 16, 2024). In this non-prisoner case, the entire opinion deals with whether the City of Sammamish responded to public records requests in bad faith. Because "bad faith" is central to the penalty determination even in non-prisoner cases, agencies will latch on to any higher standard for finding "bad faith" to avoid the PRA's discretionary penalties.

IV. CONCLUSION

For prisoners, especially for those who may have been wrongly convicted, public records requests may be their only means to challenge their incarceration. By enacting an almost insurmountable bad faith standard, the Court of Appeals' decision makes it easier for agencies to hide critical documents without consequences and harder for those who are wrongfully convicted to uncover the evidence that may set them free.

But the definition of "bad faith" matters to more than just prisoners. The Court of Appeals' new bad faith standard will

inevitably be used by agencies to argue that all requestors now must meet a higher standard before being awarded penalties. This Court should take review.

I certify that this brief is in 14-point Times New Roman and contains 2,453 words in compliance with the Washington Rules of Appellate Procedure. RAP 18.17.

DATED: January 10, 2025.

MILLER NASH LLP

/s/ Brian W. Esler
Brian W. Esler
WSBA No. 22168
Estera Gordon
WSBA No. 12655
605 5th Ave S, Ste 900
Seattle, WA 98104
(206) 624-8300
brian.esler@millernash.com
estera.gordon@millernash.com
Attorneys for Human Rights Defense Center

DAVIS WRIGHT TREMAINE LLP

/s/ Eric M. Stahl
Eric M. Stahl
WSBA No. 27619
920 5th Ave, Ste 3300
Seattle, WA 98104-1610
(206) 757-8148
ericstahl@dwt.com
Attorneys for Washington Coalition for Open Government

JOHNSTON GEORGE LLP

/s/ Katherine George
Katherine George
WSBA No. 36288
2800 First Ave Ste 226
Seattle, WA 98121
(206) 832-1820
kathy@johnstongeorge.com
Attorneys for Allied Daily Newspapers

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I caused delivery of a true copy of the foregoing to the Clerk of this Court through electronic upload through the Court's e-service system to:

Braden Pence, WSBA #43495
Anika R. Ades, WSBA #60298
MacDONALD HOAGUE & BAYLESS
705 2nd Avenue, Suite 1500
Seattle, WA 98104
(206) 622-1604
anikaa@mhb.com
bradenp@mhb.com
Attorneys for Petitioner

ROBERT W. FERGUSON
Attorney General
Vanessa James, WSBA #56304
Assistant Attorney General
vanessa.james@atg.wa.gov
Attorneys for Respondent Washington State Department of Corrections

DATED this 10th day of January, 2025.

/s/ Kristin Martinez Clark
Kristin Martinez Clark

MILLER NASH LLP

January 10, 2025 - 3:54 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,601-9
Appellate Court Case Title:	Derek E. Gronquist v. WA State Department of Corrections
Superior Court Case Number:	22-2-00514-6

The following documents have been uploaded:

- 1036019_Motion_20250110155209SC632454_2158.pdf
  This File Contains:
  Motion 1 - Other
  The Original File Name was Motion to File Amicus Memorandum.pdf

A copy of the uploaded files will be sent to:

- LucasW@mhb.com
- anikaa@mhb.com
- bradenp@mhb.com
- vanessa.james@atg.wa.gov

Comments:

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION

Sender Name: Emily O'Neill - Email: emily.oneill@millernash.com
Filing on Behalf of: Brian William Esler - Email: brian.esler@millernash.com (Alternate Email: kristin.martinezclark@millernash.com)

Address:
605 5th Ave S, Ste 900
Seattle, WA, 98104
Phone: (206) 777-7542

Note: The Filing Id is 20250110155209SC632454