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WASHINGTON STATE  
SUPREME COURT

NO. 93418.5

Supreme Court of the State of Washington

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KEVIN ANDERSON, Petitioner

v.

WALLA WALLA POLICE DEPARTMENT, Respondent

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**PETITION FOR DISCRETIONARY REVIEW**

**COURT OF APPEALS, DIVISION III, NO. 33783-9**

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A) IDENTITY OF PETITIONER

Kevin Anderson, plaintiff in the underlying action, seeks review of the decision described in Part B, below.

B) COURT OF APPEALS DECISION

Mr. Anderson requests this Court accept review of the Washington State Court of Appeals, Division III's June 30, 2016 unpublished opinion in *Anderson v. Walla Walla Police Dept.*, Case No. 33783-9-III, which affirmed the dismissal of *Anderson v. Walla Walla Police Dept.*, Walla Walla County Superior Court Case No. 15-2-00103-6.

C) ISSUES PRESENTED FOR REVIEW

1. Should this Court grant review where an opinion of a Court of Appeals panel found RCW 42.56.565(1) to deny any relief to an inmate Public Records Act requester absent a showing of bad faith, rather than simply denying penalties being awarded to such a requester, in conflict with other decisions of the Court of Appeals? RAP 13.4(b)(2).
2. Assuming this Court accepts review, is Mr. Anderson entitled to costs, including reasonable attorney fees, incurred in connection with seeking this review?

D) STATEMENT OF THE CASE

Petitioner Kevin Anderson, while an inmate at Coyote Ridge Corrections Center, requested the Respondent Walla Walla Police Department copy public records. CP 22, 25, 28, 163. Specifically, Mr. Anderson requested copies of “[a]ny records related to [him]self (Kevin Allen Anderson, DOB: January 27, 1974).” CP 25, 163. The Department responded by indicating “[w]e have no Walla Walla Police report records on file for you. However a current order of protection is on file. Copies can be obtained by/through Walla Walla District Court.” CP 25, 163-64.

Mr. Anderson brought a judicial review in Walla Walla Superior Court, alleging the Department violated the Public Records Act. CP 1-4. On the Department's motion, the trial court dismissed Mr. Anderson's action. CP 162-66. The trial court concluded the Department's “records response...cannot reasonably be interpreted in context as a refusal to provide responsive records to Kevin Anderson” and therefore that “response...does not constitute a denial of an opportunity to inspect or copy a public record.” CP 164. The trial court made no findings about whether the Department was in possession of responsive public records. *See* CP 162-66. The trial court made no findings about whether the Department acted in bad faith. *See id.*

Mr. Anderson appealed. CP 167-68. The Department did not cross appeal. The Washington State Court of Appeals, Division 3 issued an unpublished opinion, affirming the trial court's dismissal. *Anderson v. Walla Walla Police Dept.*, No. 33783-9-III, slip op. at 8 (Ct. App. June 30, 2016); appx. 8. The Court of Appeals declined to address whether a particular record at issue “is a public record that should have been disclosed...because [it]...resolve[d] Anderson's claims under RCW 42.56.565(1).” Appx. at 6. The Court of Appeals opined that RCW 42.56.565(1) “den[ies] relief to an inmate unless he or she proves bad faith.” *Id.*

Discretionary review is now sought under RAP 13.4(b)(2).

#### E) ARGUMENT

- 1. This Court grant review where the decision of the Court of Appeals held RCW 42.56.565(1) denied any relief to an inmate Public Records Act requester absent a showing of bad faith, as opposed to denying relief in the form of statutory penalites, because that decision is in conflict with other decisions of the Court of Appeals.**

“A petition for review will be accepted by the Supreme Court only:  
(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals.” RAP 13.4(b). Here, the Court of

Appeals ruled RCW 42.56.565(1) “den[ies] relief to an inmate [requester of public records] unless he or she proves bad faith,” a holding that is in conflict with the plain meaning of the statute and decisions of each Division of the Court of Appeals.

“A court shall not award penalties under RCW 42.56.550(4) to a person who was serving a criminal sentence in a state...correctional facility on the date the request 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). “According to the legislative committee reports, the bill underlying RCW 42.56.565(1) was introduced 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 v. Dept. of Corr.*, 183 Wn. App. 93, 105 (2014) (internal citation omitted) (emphasis added). “[T]he legislature plainly intended to afford prisoners an effective records search, while insulating agencies from *penalties* as long as they did not act in bad faith.” *Francis v. Dept. of Corr.*, 178, Wn. App. 42, 60 (2013) (emphasis added). “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.” *Adams v. Dept. of Corr.*, 189 Wn. App. 925, 938 (2015) (internal citation omitted) (emphasis added).

In other words, all three Divisions of the Court of Appeals agree that RCW 42.56.565(1) only serves to prevent *penalty* awards to inmate requesters under certain circumstances, not prevent all relief.

“Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record....*shall be awarded* all costs...incurred in connection with such legal action.” *Francis*, 178 Wn. App. at 67 (citing RCW 42.56.550(4)) (emphasis in original). The right to or “amount of the penalty has no bearing on a prevailing party's right to costs.” *Id.* “[T]he PRA's cost-shifting provision is mandatory.” *Id.* at 48; *see also West v. Port of Olympia*, 183 Wn. App. 306, 318 (2014) (“an award of attorney fees to a prevailing party in a PRA action is mandatory [although] a penalty award under RCW 42.56.550(4) is within the trial court's discretion”).

Here, the Court of Appeals declined to resolve whether a particular record “is a public record that should have been disclosed.” Appx. at 6. In essence, the Court of Appeals declined to determine whether the Department's response constituted a denial, and whether Mr. Anderson is the prevailing party.

Instead, the Court of Appeals considered whether the Department had acted in bad faith. Appx. at 6-7. The Court of Appeals considered the issue of bad faith, despite the trial court's silence on the subject, and

despite the absence of a cross appeal by the Department. *See* CP 162-66. The Court of Appeals did so under the mistaken belief that absence of bad faith constituted a “defen[se] against Anderson's request for relief,” or a “ground” on which to “affirm.” Appx. at 7-8. The bad faith determination only affects whether the trial court could or should assess *penalties*. A bad faith determination has no bearing on whether the Department denied Mr. Anderson's public records request, or whether Mr. Anderson is the prevailing party entitled to relief other than penalties, such as costs.

**2. Costs, Including Reasonable Attorney Fees, Should Be Awarded.**

“Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record...shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.” RCW 42.56.550(4). A prevailing party must also be awarded costs, including reasonable attorney fees, incurred in bringing an appeal or discretionary review. *Progressive Animal Welfare Soc. v. Univ. of Wash. (PAWS I)*, 114 Wn.2d 677, 690 (1990).

Here, Mr. Anderson will ultimately be determined to be the prevailing party. Thus, he is entitled to costs, including reasonable attorney fees. An affidavit of fees and expenses will be filed pursuant to RAP 18.1.

F) CONCLUSION

For the reasons stated above, petitioner Kevin Anderson respectfully requests the Court grant discretionary review under RAP 13.4(b)(2), and award costs, including attorney fees, incurred in this action.

DATED this 25th day of July, 2016.



/s/ Christopher Taylor  
Christopher Taylor, WSBA # 38413  
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on 25th day of July, 2016 I mailed, postage prepaid, a true copy of the foregoing PETITION FOR DISCRETIONARY REVIEW to

J Preston Frederickson  
Attorney for Respondent  
Walla Walla City Attorney's Office  
15 N 3<sup>rd</sup> Ave  
Walla Walla, WA 99362



/s/ Christopher Taylor  
Christopher Taylor

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**FILED**  
**JUNE 30, 2016**  
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

KEVIN ANDERSON,	)	
	)	No. 33783-9-III
Appellant,	)	
	)	
v.	)	
	)	
WALLA WALLA POLICE	)	UNPUBLISHED OPINION
DEPARTMENT,	)	
	)	
Respondent.	)	

FEARING, C.J. — We affirm the trial court’s denial of relief to Kevin Anderson under the Public Records Act, chapter 42.56 RCW.

FACTS

On May 17, 2012, the Walla Walla County District Court entered a temporary order of protection against Kevin Anderson in favor of Laura Gregory. The order barred Anderson from contacting Gregory or from being within five hundred feet of Gregory.

The order read, in part:

It is further ordered that the clerk of court shall forward a copy of this order on or before the next judicial day to: . . . [the] Walla Walla Police Department WHERE PETITIONER LIVES which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants.

Clerk’s Papers (CP) at 65. Kevin Anderson then resided at Airway Heights Correctional

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Center. On May 30, 2012, the district court entered an order of protection extending the protections afforded Laura Gregory until May 30, 2014. The May 30 order also directed the district court clerk to forward a copy to the Walla Walla Police Department.

On March 26, 2014, Kevin Allen Anderson served a criminal sentence at Coyote Ridge Correctional Center. On that day, Anderson submitted a public records request to the Walla Walla Police Department. The request sought “[a]ny records related to myself (Kevin Allen Anderson, DOB: January 27, 1974).” CP at 163. The police department received the request on March 28, 2014.

Dana Hood, the Walla Walla Police Department records clerk, processed the request on March 31, 2014. Hood typed the name Kevin Anderson into the police department’s records computer management system. The screen, with the heading “jacket activity,” that then appeared listed no police records, and, thus, Hood concluded the police department possessed no records about Kevin Anderson or responsive to Anderson’s public records act request. The screen, however, showed the existence of an order of protection against Anderson entered by the Walla Walla District Court in a suit on May 17, 2012. On March 31, Hood printed a copy of the screen. We will refer to the copy of the screen as a “jacket activity.”

Dana Hood handwrote a response on Anderson’s request letter and returned the letter to him on March 31, 2014. The note read:

Kevin,

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We have no Walla Walla Police report records on file for you. However, a current order of protection is on file. Copies can be obtained by/through Walla Walla District Court.

CP at 25. The note directed Anderson to contact the district court because Hood understood that the court might be the only location of an accurate and current copy of the order. Anderson did not then look to determine if the police department possessed a copy of the court order. By March 31 and before receiving the response from the Walla Walla Police Department, Anderson had already obtained a copy of the order and other court records from Walla Walla District Court.

#### PROCEDURE

Kevin Anderson, without any contact with the police department after March 31, 2014, filed this lawsuit against the Walla Walla Police Department on February 17, 2015. Dana Hood, Walla Walla Police Department records clerk, then reviewed the department's records again and confirmed that the department lacked a copy of the district court order. Hood, nonetheless, retrieved a copy of the court file from the district court and, on March 10, 2015, the department delivered the copy to Anderson's attorney.

The Walla Walla Police Department moved the court to dismiss this case. The superior court granted the motion and entered the following conclusions of law:

3.1 The March 31, 2014 records response by the Walla Walla Police Department cannot reasonably be interpreted in context as a refusal to provide responsive records to Kevin Anderson or as an indication that it would provide no further assistance to him. The actions taken by the Walla Walla Police Department on March 31, 2014 were prompt and meant to

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provide access to responsive records.

3.2 The March 31, 2014 records response by the Walla Walla Police Department to Kevin Anderson's March 26, 2014 records request does not constitute a denial of an opportunity to inspect or copy a public record.

CP at 164.

### LAW AND ANALYSIS

On appeal, Kevin Anderson challenges the Walla Walla Police Department's failure to produce, in response to his public records act request, the Walla Walla District Court records and the "jacket activity" computer screen printed by Dana Hood in response to his request. The police department contends that Anderson did not seek the jacket activity and the jacket entry is not a "record," for purposes of the Public Records Act, but rather an index of records. The police department also argues that Kevin Anderson has not shown bad faith.

The Public Records Act requires all state and local agencies to disclose any public record on request unless the record falls within certain very specific exemptions.

*Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 250, 884 P.2d 592 (1994) (*PAWS II*). "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. RCW 42.56.010(3). An agency has five business days to respond to a request, and must respond either by providing the record, providing an

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Internet address or link to the record, informing the party that additional time is necessary, or denying the request. RCW 42.56.520. If an agency denies a request, it must include a written statement of the specific reasons for the denial. RCW 42.56.520.

An agency need not produce a document that does not exist. *Sperr v. City of Spokane*, 123 Wn. App. 132, 133, 96 P.3d 1012 (2004). The agency need not create a record that is otherwise nonexistent. *Smith v. Okanogan County*, 100 Wn. App. 7, 13-14, 994 P.2d 857 (2000) (citing *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-62, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975)). Nor must an agency comply with an overly broad request. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004). At a minimum, a person seeking documents under the Public Records Act must identify the documents with sufficient clarity to allow the agency to locate them. *Hangartner*, 151 Wn.2d at 447. Agencies are not required to be mind readers. *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998).

A search must be reasonably calculated to uncover all relevant documents. *Neigh. All. of Spokane County v. County of Spokane*, 172 Wn.2d 702, 720, 261 P.3d 119 (2011). Reasonableness will be considered on the facts of each case. *Neigh. All. of Spokane County*, 172 Wn.2d at 720. An inadequate search is comparable to a denial. *Neigh. All. of Spokane County*, 172 Wn.2d at 721.

Kevin Anderson requested any records pertaining to him. He contends that the Walla Walla Police Department violated this request by failing to produce at least two

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discrete records: (1) the Walla Walla County District court records of the protection order, and (2) the jacket activity printout.

The Walla Walla Police Department denies that it possessed any district court records. Kevin Anderson notes that Dana Hood did not expressly review police department records to discern if the department possessed the court records until he filed suit. He argues that the police department could have held a copy of the court records earlier since Hood's search occurred after the expiration of the order of protection. We do not know such and will not speculate. The police department held no obligation to produce a record that did not exist or to gather records kept by another agency.

Kevin Anderson contends that the jacket activity printout is a public record that should have been disclosed. We need not and do not address this contention because we may resolve Anderson's claims under RCW 42.56.565(1).

In 2011, the Washington Legislature, in response to escalating public records requests from jail inmates, amended the Public Records Act to deny relief to an inmate unless he or she proves bad faith. The amendment, codified at RCW 42.56.565(1), reads:

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.

Whether an agency acted in bad faith under the Public Records Act presents a mixed question of law and fact, in that it requires the application of legal precepts, the

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definition of "bad faith," to factual circumstances, the details of the alleged Public Records Act violation. *Faulkner v. Dep't of Corr.*, 183 Wn. App. 93, 101-02, 332 P.3d 1136 (2014), *review denied*, 182 Wn.2d 1004, 342 P.3d 327 (2015). An offender does not establish bad faith by an agency simply for making a mistake in a record search. *Francis v. Dep't of Corr.*, 178 Wn. App. 42, 63, 313 P.3d 457 (2013), *review denied*, 180 Wn.2d 1016, 327 P.3d 55 (2014).

After reviewing the entire record, we agree with the trial court that actions taken by the Walla Walla Police Department, on March 31, 2014, were prompt and meant to provide access to responsive records. Dana Hood concluded in good faith that the Walla Walla Police Department lacked records responsive to Kevin Anderson's request. Her suggestion to Kevin Anderson that he contact the district court exhibited a desire to be helpful to Anderson rather than to preclude his access to records.

Kevin Anderson claims that we cannot address the question of bad faith because the Walla Walla Police Department did not cross appeal. Anderson emphasizes the principle that, when a respondent neither files the required notice of appeal nor independently demonstrates a basis for relieving it of the requirements of RAP 2.4, it may not obtain "affirmative relief." *Happy Bunch, LLC v. Grandview N., LLC*, 142 Wn. App. 81, 90 n.2, 173 P.3d 959 (2007). The police department's claim of good faith does not seek affirmative relief, but rather defends against Anderson's request for relief. Also, this

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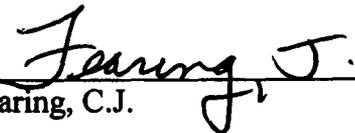
court may affirm on any ground supported by the record. *Syrov v. Alpine Res., Inc.*, 80

Wn. App. 50, 54-55, 906 P.2d 377 (1995).

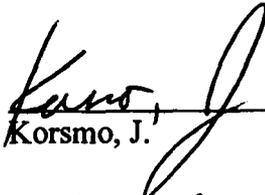
CONCLUSION

We affirm the superior court's dismissal of Kevin Anderson's suit under the Public Records Act.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
Fearing, C.J.

WE CONCUR:

  
Korsmo, J.

  
Siddoway, J.

**RCW 42.56.550****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 in the county in which a record is maintained 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. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or 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, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the 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, even though such examination may cause inconvenience or embarrassment to public officials or others. 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) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. 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.

(5) For actions under this section against counties, the venue provisions of RCW 36.01.050 apply.

(6) Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.

[ 2011 c 273 § 1. Prior: 2005 c 483 § 5; 2005 c 274 § 288; 1992 c 139 § 8; 1987 c 403 § 5; 1975 1st ex.s. c 294 § 20; 1973 c 1 § 34 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.340.]

**NOTES:**

**Intent—Severability—1987 c 403:** See notes following RCW 42.56.050.

*Application of chapter 300, Laws of 2011:* See note following RCW 42.56.565.

**RCW 42.56.565****Inspection or copying by persons serving criminal sentences—Injunction.**

(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 court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record.

(2) The inspection or copying of any nonexempt public record by persons serving criminal sentences in state, local, or privately operated correctional facilities may be enjoined pursuant to this section.

(a) The injunction may be requested by: (i) An agency or its representative; (ii) a person named in the record or his or her representative; or (iii) a person to whom the requests specifically pertains or his or her representative.

(b) The request must be filed in: (i) The superior court in which the movant resides; or (ii) the superior court in the county in which the record is maintained.

(c) In order to issue an injunction, the court must find that:

(i) The request was made to harass or intimidate the agency or its employees;

(ii) Fulfilling the request would likely threaten the security of correctional facilities;

(iii) Fulfilling the request would likely threaten the safety or security of staff, inmates, family members of staff, family members of other inmates, or any other person; or

(iv) Fulfilling the request may assist criminal activity.

(3) In deciding whether to enjoin a request under subsection (2) of this section, the court may consider all relevant factors including, but not limited to:

(a) Other requests by the requestor;

(b) The type of record or records sought;

(c) Statements offered by the requestor concerning the purpose for the request;

(d) Whether disclosure of the requested records would likely harm any person or vital government interest;

(e) Whether the request seeks a significant and burdensome number of documents;

(f) The impact of disclosure on correctional facility security and order, the safety or security of correctional facility staff, inmates, or others; and

(g) The deterrence of criminal activity.

(4) The motion proceeding described in this section shall be a summary proceeding based on affidavits or declarations, unless the court orders otherwise. Upon a showing by a preponderance of the evidence, the court may enjoin all or any part of a request or requests. Based on the evidence, the court may also enjoin, for a period of time the court deems reasonable, future requests by:

(a) The same requestor; or

(b) An entity owned or controlled in whole or in part by the same requestor.

(5) An agency shall not be liable for penalties under RCW 42.56.550(4) for any period during which an order under this section is in effect, including during an appeal of an order under this section, regardless of the outcome of the appeal.

[ 2011 c 300 § 1; 2009 c 10 § 1.]

**NOTES:**

**Application—2011 c 300:** "This act applies to all actions brought under RCW 42.56.550 in which final judgment has not been entered as of July 22, 2011." [ 2011 c 300 § 2.]

**Effective date—2009 c 10:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 20, 2009]." [ 2009 c 10 § 2.]

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**CR TAYLOR LAW, P.S.**

**July 26, 2016 - 9:05 AM**

**Transmittal Letter**

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**Comments:**

No Comments were entered.

Sender Name: Christopher Taylor - Email: [taylor@crtaylorlaw.com](mailto:taylor@crtaylorlaw.com)