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No. 101689-1

**SUPREME COURT
OF THE STATE OF WASHINGTON**

JEREMY CONKLIN, DO, an individual, Appellant,

v.

UNIVERSITY OF WASHINGTON SCHOOL OF
MEDICINE, a Washington public educational institution;
UNIVERSITY OF WASHINGTON MEDICINE, a
Washington public health system; and UNIVERSITY OF
WASHINGTON MEDICAL CENTER,
a Washington public hospital,
Respondents.

***AMICUS CURIAE* MEMORANDUM BY WASHINGTON
COALITION FOR OPEN GOVERNMENT IN SUPPORT
PETITION FOR REVIEW**

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TABLE OF CONTENTS

I.	Introduction	1
II.	Identity of Amicus Party	2
III.	Statement of the Case.....	3
IV.	Argument.....	3
	A. Public Agencies have the Legal Duty to Respond to PRA Requests in a Timely Manner	3
	B. UW Deliberately Shirks its PRA Duties.....	7
	C. UW Should be Penalized for its Self-Inflicted Inability to Respond to PRA requests on a timely basis	11
V.	Conclusion.....	12

TABLE OF AUTHORITIES

Cases

<i>Amren v City of Kalama</i> , 131 Wn. 2d 25, 929 P. 2d 389 (1997).....	12
<i>Andrews v. Wash. State Patrol</i> , 183 Wn. App. 644, 334 P.3d 94 (2014)	4,5
<i>Cantu v. Yakima Sch. Dist. No. 7</i> , 23 Wn. App. 2d 57, 514 P.3d 661 (2022),.....	10
<i>Forbes v. City of Gold Bar</i> , 171 WN. App. 857, 288 P. 3d 384 (2012).....	5
<i>Freedom Found. v. Dep’t of Soc. & Health Servs.</i> , 9 Wn. App. 2d 654, 445 P. 3d 971 (2019).....	4,5
<i>Francis v. Wash. State Dep’t of Corr.</i> , 178 Wn. App. 42, 313 P. 3d 457	11
<i>Health Pros Nw., Inc. v. State</i> , 10 Wn. App. 2d 605, 621, 449 P.3d 303 (2019), <i>review denied</i> , 194 Wn.2d 1025 (2020).....	4
<i>Hikel v. Cty of Lakewood</i> , 197 Wn. App. 366, 389 P. 3d 677 (2016).....	5
<i>O’Dea v. City of Tacoma</i> , 19 Wn. App. 2d 67, 493 P. 3d 1245 (2021).....	11
<i>Rental Hous. Ass’n v. City of Des Moines</i> , 165 Wn. 2d, 535, 199 P. 3d 393 (2009).....	7
<i>Rufin v. City of Seattle</i> , 199 Wn. App. 348, 398 P.3d 1237 (2017).....	4
<i>Twin Harbors Fish & Wildlife Advoc. v.</i> <i>Wash. Dep’t of Fish & Wildlife</i> , 21 Wn. App. 2d 1003, 2022 WL 538366 (2022).....	5
<i>West v. Dep’t of Fish & Wildlife</i> , _____ Wn. App. 2d _____, 2022 WL 369984 (2022).....	8
<i>Yousoufian v. Office of Ron Sims</i> , 168 Wn. 2d 444,	

229 P. 3d 735 (2010).....	11
<i>Zink v. City of Mesa</i> , 140 Wn. App. 328, 166 P.3d 738 (2007)	8,9

Statutes

RCW 42.56.080(2).....	6, 7
RCW 42.56.100	1, 5
RCW 42.56.520	5
RCW 42.56.520(1).....	6
RCW 42.56.520(1)(d)	7
RCW 42.56.520(2).....	7
RCW 42.56.550	5, 14
RCW 42.56.550(2).....	1, 6, 7
Washington Public Records Act (“PRA”) (RCW 42.56)	<i>passim</i>

Regulations

WAC 44-14-04003(3).....	10
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I. INTRODUCTION

The Washington Coalition for Open Government (“WCOG”) respectfully submits this memorandum as *amicus curiae* in support of Dr. Jeremy Conklin’s Petition for Review and reversal of the trial court’s written decision (CP. 1417-87) (“Decision”). This Court should hold that the University of Washington (“UW”) violated the Washington Public Records Act (“PRA”), RCW 42.56.100 and 42.56.550(2), when it delayed installments of records in response to each of Dr. Jeremy Conklin’s PRA requests for up to 917 days. Delays of this magnitude are simply unacceptable under the PRA.

Few cases provide guidance on the reasonableness of a public agency’s delayed response to PRA requests. In this case this Court can provide such guidance on this issue of substantial public importance. RAP 13.4(b)(4).

Too often, public agencies create unnecessary and impermissible delays which *they* could have prevented. These agencies, like UW, do not devote sufficient resources to meet this

public duty, which they view as bothersome and peripheral to their missions. Lengthy delays deny citizens their right to access public records as much as outright unjustified denials.

WCOG agrees with Appellant that UW needs to be held accountable for violating the PRA's timeliness obligations. Here a major public agency failed to devote enough resources to fulfill its statutory duty. A serious course correction is required. This Court should grant review to clarify that the prompt responses required by the PRA have substantive meaning.

II. IDENTITY OF *AMICUS* PARTY

WCOG is a Washington nonprofit, nonpartisan organization dedicated to promoting and defending the public's right to know about the conduct of government and matters of public interest. WCOG's mission is to help foster the cornerstone of democracy: open government, supervised by an informed and engaged citizenry. Additional information regarding WCOG is provided in the motion that accompanies this memorandum.

III. STATEMENT OF THE CASE

WCOG adopts the statement of the case included in Dr. Conklin's petition for review. It is undisputed that UW delayed for 917, 307, and 206 days before *beginning* to respond to Dr. Conklin's three public records request, and it delayed between 131 to 282 days for additional installments. This memorandum addresses only the untimeliness of UW's response and the need to assess penalties and attorney's fees and costs under RCW 42.56.550 for UW's timeliness violations.

IV. ARGUMENT

A. *Public Agencies have the Legal Duty to Respond to PRA Requests in a Timely Manner*

The PRA demands that agencies respond promptly to a public records request. Timely responses are essential to the core purpose of the PRA, which is to shine light on government activities so the citizens of this state can stay informed, prevent corruption and illegal government activities, and maintain control over the officials and bodies entrusted with public affairs.

Review by this Court is necessary to ensure that the PRA's timeliness requirements have teeth, an issue of substantial public importance. Petition for Review at 13-21; RAP 13.4(b)(4).

The very language of the PRA requires the “most timely action possible.” RCW 42.56.080(2); .100; 520 and .550(2). *See also Rufin v. City of Seattle*, 199 Wn. App. 348, 359, 398 P.3d 1237 (2017), *review denied*, 189 Wn.2d 1034 (2018). The PRA requires agencies to provide the “fullest assistance” and the “most timely possible action on requests for information.” *Freedom Found. v. Dep’t of Soc. & Health Servs.*, 9 Wn. App. 2d 654, 673, 445 P. 3d 971 (2019) (quoting *Andrews v. Wash. State Patrol*, 183 Wn. App. 644, 651, 334 P.3d 94 (2014), *review denied*, 182 Wn.2d 1011 (2015)); “[T]he purpose of the PRA is for agencies to respond with reasonable thoroughness and diligence to public records requests.” *Andrews*, 183 Wn. App. at 653. *See also Health Pros Nw., Inc. v. State*, 10 Wn. App. 2d 605, 621, 449 P.3d 303 (2019), *review denied*, 194 Wn.2d 1025 (2020).

The agency maintains the burden of proof to show that its time estimates were reasonable. RCW 42.56.550(2); *see also Freedom Found.*, 9 Wn. App. 2d at 666. The PRA provides a cause of action “when an agency has not made a reasonable estimate of the time required to respond to the request.” *Andrews*, 183 Wn. App. at 651; RCW 42.56.550(2). Agencies bear the burden of justifying their time estimates so they must also bear the burden of proving that their responses were timely and prompt.

No cited case involves delays as long as UW here. *See, e.g. Hikel v. City of Lakewood*, 197 Wn. App. 366, 369, 389 P. 3d 677 (2016) (first response within 45 days); *West v. Dep’t of Fish & Wildlife*, 20 Wn. App. 2d 1074, 2022 WL 369984 at *1 (2022) (agency response within 71 days); *Twin Harbors Fish & Wildlife Advoc. v. Wash. Dep’t of Fish & Wildlife*, 21 Wn. App. 2d 1003, 2022 WL 538366 (2022) (agency response within 45 days); *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 288 P. 3d 384 (2012) (response within 145 days). Clearly other state agencies

can respond more quickly to complex PRA requests than UW.

UW's delayed initial responses to Dr. Conklin's PRA requests of up to 917 days are *per se* violations of the PRA's timeliness requirements, if those requirements mean anything at all, particularly where the record shows UW's inexcusable neglect of its statutory duties. Here UW's records officers gathered and provided to UW's Office of Public Records ("OPR") thousands of records that sat unreviewed for up to 470 days before release. CP 388-92; 397-402. This is inappropriate for document gathering and creation of an exemption log.

Division I's opinion condoning these delays would have disastrous consequences if left undisturbed. Agencies could withhold documents for years because review and exemption logging are "laborious" tasks. Investigative journalism would wither, as agencies withhold records until news cycles have passed. Political accountability would suffer, as politicians sit on PRA requests until a favorable election cycle passed. Initiative I-276, which enacted the PRA, required the fullest,

most timely assistance possible when responding to PRA requests. Review and reversal by this Court are necessary to course correct, and uphold the vital, important public fundamentals in the PRA. RAP 13.4(b)(4).

B. UW Deliberately Shirks its PRA Duties

In addition, to the *per se* shocking delays in this case, the record shows that the core reason for UW's unjustified delay is the devaluation of its PRA obligations as manifested by UW's failure to devote adequate resources to respond to public records requests. This Court should review and reverse to ensure that public agencies understand the serious requirements of the PRA, again an issue of substantial public importance. RAP 13.4(b)(4).

Responding to PRA requests is a duty of the government, no different than other duties a public agency must perform. WAC 44-14-04003(3). "The agency should recognize that fulfilling public records requests is one of the agency's duties, along with its others." Yet, as demonstrated by UW in this case, UW views its PRA duty as the proverbial "red-haired stepchild"

given little attention and inadequate resources.

UW, the most prestigious, largest public university in Washington received 5.8 billion dollars in revenue in 2021.¹ According to Dr. Conklin² UW budgeted only \$2,833,577 in 2018 and 2019 for the OPR after cutting \$600,000 from that budget the year before, for the 9-person OPR staff to cover more than fifty UW units.

UW tried to justify its delays due to an excessive backlog of 3.6 million pages for review, the difficulty of contacting numerous entities within the UW system and the complexity of Dr. Conklin's requests. UW claimed, "administrative difficulty" to justify its noncompliance but "[a]dministrative inconvenience or difficulty does not excuse strict compliance with the PRA." *Zink v. City of Mesa*, 140 Wn. App. 328, 337, 166 P.3d 738

¹https://finance.uw.edu/treasury/sites/default/files/webform/University_of_Washington_Audited_Financial_Statements_FY21.pdf.

² Reply Brief of Appellant, p. 15.

(2007); *Rental Hous. Ass'n v. City of Des Moines*, 165 Wn. 2d, 535, 199 P. 3d 393 (2009). *See also* RCW 42.56.550(3).

UW's claim is not supported because UW has one of the poorest track records of state agencies in responding to PRA requests, in WCOG's experience. The record shows that state agencies closed PRA requests in 16 days on average across Washington State. CP 53895. While higher learning institutions may be slower to respond to PRA requests than other state agencies, UW still falls behind. Post-secondary education institutions took 38 days on average to close a PRA request in 2018 (CP 587) while UW took an average of 51 days in 2017 and 63 days in 2018 to complete a PRA request. CP 526-95. These numbers are consistent with the experience of many requesters who have filed PRA requests with UW, in WCOG's anecdotal experience. These numbers expose UW's deliberate refusal to adequately fund and staff its OPR, which illustrates UW's attitude towards its public record duties.

A public agency should not be allowed to argue

administrative burdens and/or inconvenience to shirk ability to mitigate that impediment with proper resources. RCW 42.56.550(3) . See *Cantu v. Yakima Sch. Dist. No. 7*, 23 Wn. App. 2d 57, 514 P.3d 661 (2022), a case decided while Dr. Conklin’s was on appeal. There, a 172-day delay violated the PRA due to the public agency’s “insufficient allocation of resources and lack of priorities.” *Id.* at 95. Because Division III in *Cantu* and Division I in this case create conflicting authorities this Court should also accept review under RAP 13.4(b)(2).

Agency justifications require strict scrutiny in cases of huge delay like here. Courts should impose a rebuttable presumption that these delays are unreasonable, violating the PRA. Courts should examine an agency’s role in creating these excessive delays. To justify those (up to 917 days!) UW must show that the agency’s inaction was not the real cause for the delay. Division I’s opinion completely misses this analysis, excusing UW’s egregious behavior and its policies, which discriminate against requesters, like Dr. Conklin, who submit

multiple requests. RCW 42.56.080(2).

Even if PRA requests are complex, numerous, and demanding, if other agencies can process them on a timely basis, UW should not be absolved for its flawed, underfunded, inadequate responses to Dr. Conklin's requests. This issue of substantial public importance will educate UW, a premier public institution in Washington, and other agencies that PRA compliance is mandatory, not permissive. RAP 13.4(b)(4).

C. *UW Should be Penalized for its Self-Inflicted Inability to Respond to PRA requests on a timely basis.*

UW has suggested that its timeliness failure is only a factor in the penalty analysis from *Yousoufian v. Office of Ron Sims*, 168 Wn. 2d 444, 229 P. 3d 735 (2010). Not so. The failure to provide timely responses is a stand-alone PRA violation, which should be penalized. *O'Dea v. City of Tacoma*, 19 Wn. App. 2d 67, 493 P. 3d 1245, 1256 (2021). “The purpose of the penalty scheme [in RCW 42.56.550] is to discourage improper denial of access to public records and promote adherence to *the goals and*

procedures of the PRA.” Francis v. Wash. State Dep’t of Corr., 178 Wn. App. 42, 61, 313 P. 3d 457, *review denied*, 180 Wn. 2d 1016 (2014). Upon remand, the trial court must impose appropriate penalties for UW’s statutory violation.

Penalties might incent UW to “wake-up” and fulfill its duties under the PRA. This Court is uniquely situated to rule on this issue of statewide public importance, to ensure that all public entities recognize that they must devote sufficient energy and resources to the PRA, and not shirk obligations that are key to open public government. RAP 13.4(b)(4).

V. CONCLUSION

“The purpose of the [PRA] is to ensure the sovereignty of the people and the accountability of the governmental agencies that serve them.” *Amren v City of Kalama*, 131 Wn. 2d 25, 31, 929 P. 2d 389 (1997). The PRA grants the right to receive public records to citizens *on a timely basis* to fulfill that purpose. If delays of 200, 300, or 917 days are permissible, then this right is

hollow and meaningless. This Court should grant review and reverse to prevent this result.

I certify the foregoing memorandum contains 2473 words in compliance with RAP 18.17(b).

Dated this 4th day of April 2023.

Respectfully submitted,

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