101769-3

No. 56996-5-II

SUPREME COURT OF THE STATE OF WASHINGTON

TERRY COUSINS, as personal representative of the ESTATE OF RENEE FIELD, deceased,

Appellant,

v.

STATE OF WASHINGTON and DEPARTMENT OF CORRECTIONS,

Appellee.

AMENDED PETITION FOR DISCRETIONARY REVIEW

Joe Shaeffer WSBA #33273
MacDONALD HOAGUE & BAYLESS
705 2nd Avenue, Suite 1500
Seattle, WA 98104
(206) 622-1604
ATTORNEYS FOR APPELLANT

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Silent withholding of public records is contrary to fundamental tenets of open government and can never be acceptable. Whether the reason for withholding is negligence or bad faith, a government agency cannot thwart the public's right to access public records by failing to reveal the very existence of those records on an exemption log. Yet Division II's holding below and in prior cases authorizes, and arguably encourages, such withholding of records so long as an agency is silent for more than one year after nominally "closing" a public records request, language that appears nowhere in the Public Records Act. RCW 42.56.

Because Division II's decision in the present case and *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 464 P.3d 563 (2020) conflicts with this Court's decisions in *Belenksi v. Jefferson County*, 186 Wn.2d 452, 378 P.3d 178 (2016) and *U.S. Oil & Ref. Co. v. State Dep't of Ecology*, 96 Wn.2d 85, 93, 633 P.2d 1329, 1334 (1981), RAP 13.4(b)(1), and because this petition involves an issue of substantial public interest, RAP 13.4(b)(4), this Court should grant discretionary review, reverse the decision below, and overrule *Dotson* and its progeny.

I. IDENTITY OF PETITIONER

Petitioner Terry Cousins, both individually and as the personal representative of her sister's estate, was the Plaintiff and Appellant in the proceedings below. She had requested documents related to the death of Ms. Cousins' sister while in the custody of the Department of Corrections.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner Terry Cousins seeks review of the published decision of the Court of Appeals, Division II, filed on January 31, 2023. That 2-1 decision (Glasgow, J., dissenting) is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

The issues presented for review in this petition are as follows:

1. The Court of Appeals affirmed the dismissal of this case based on the statute of limitations, holding that an agency's "closing" of a request is the "final definitive response" that starts the statute of limitations period even where the agency later produces responsive records. Here, the Department "reopened" Ms. Cousins' request and produced more than 1,000 pages of documents under the same request

number. Is the Court of Appeals decision, which followed Division II's holding in *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 464 P.3d 563 (2020), in conflict with this Court's holding in *Belenksi v. Jefferson County*, 186 Wn.2d 452, 378 P.3d 178 (2016) and contrary to the plain language of the statute, which states that the statute of limitations runs from an agency's "last production of records"?

2. The "bright line" rule of *Dotson* is that when an agency "closes" a request for public records, that word starts the statute of limitations period of one year. That rule has led to a series of decisions in which agencies have silently withheld documents for substantial periods of time without consequence or accountability and with serious prejudice to requestors, including *Earl v. City of Tacoma*, COA No. 56160-3-II, Unpublished Decision of July 12, 2022, and *Ehrhart v. King County*, COA No. 55498-4-II, Unpublished Decision of August 30, 2022. Does this "bright line" rule present an issue of substantial public interest that should be reviewed by this Court?

3. The Court of Appeals below and in *Dotson* held

that the "discovery rule" does not apply to Public Records Act cases, instead relying on the doctrine of equitable tolling, which requires a showing of bad faith on the part of the agency. Is that holding in conflict with this Court's holding in *U.S. Oil & Ref. Co. v. State Dep't of Ecology*, 96 Wn.2d 85, 93, 633 P.2d 1329, 1334 (1981), and does the rejection of the "discovery rule" in PRA cases present issue of substantial public interest that should be reviewed by this Court?

IV. STATEMENT OF THE CASE

Renee Field was in DOC custody in January 2016 at Mission Creek Corrections Center for Women when she reported a medical emergency regarding a sudden onset of neck and head pain. CP 102 lns 18-22. Over the course of the next two months, Ms. Field reported increasingly worrisome symptoms. CP 102:22-103:1. CP 103 lns 4-5. Rather than sending her to the Emergency Department, medical staff sent her back to her unit in a wheelchair where she suffered a seizure. CP 103 lns. 5-7. Medical staff then transferred her to Women's Correctional Center for Women, where she was immediately sent to the Emergency Department. CP 103 lns 7-

8. Scans showed Ms. Field had a large brain hemorrhage and aneurysm. CP 103 lns 9-10. She died one week later on March 14, 2016.

Since that time, Terry Cousins, sister of Renee Field and Personal Representative for her Estate, has been trying to understand what happened to her sister and whether and why the medical staff failed to properly diagnose and treat Renee. 106:20-107:7. On July 21, 2016, Ms. Cousins, through an attorney made a public records request to the DOC for "any and all records regarding Renee A. Field…from January 1, 2014 to present." CP 103 lns 19-22.

The DOC acknowledged the request and produced installments one and two through the next ten (10) months. CP 103 lns 22-23; CP 104 lns 4-6. Based on the first and second installment of records, Ms. Cousins and her attorney wrote to the records specialist handling the request to alert her to several records they had noticed that had been referred to in the prior installments, but not produced. CP 490-92. These included:

- An incident report relating to an altercation noted in a Primary Encounter Report, the day Ms. Field declared the first

medical emergency, written by the nurse who initially evaluated M. Field. CP 491.

- Five attachments referred to in a memorandum from Sgt. M. Curneen to a Supt. E Vernell that discuss conducting an internal review. CP 492.
- The complete file of "IR Investigation 01-169-16," including all investigation/incident reports, statements, handwritten notes, memos, emails, correspondence, and all other records, related in any way to IR Investigation 01-169-16. CP 492.
- Letters written by Ms. Field's fiancée addressed to two different offenders. CP 492.

The Department responded and stated that the request was still open and responsive records would be produced in future installments. CP 499. The Department subsequently produced four more installments between July 26, 2017, and September 20, 2018. CP 104 lns 12-13. None of the installments contained the specific responsive records described above, and many contained duplicate and unresponsive records. CP 104 lns 14-15. On October 31, 2018, the DOC emailed Ms.

Cousins alerting her that the seventh installment was ready and would be produced upon receiving payment. CP 104 16-19.

On January 4, 2019, Ms. Cousins emailed the records specialist asking for an update as to the status of the seventh installment. CP 501-502. She received a response that same day informing her that the DOC had yet to receive payment for the installment. CP 502. This came as news to Ms. Cousins, as she had previously sent a check on November 20, 2018, for the full amount. CP 104 lns 20-21. Regardless, she promptly resent the check to the Department. CP 507. The Department sent the seventh installment to Ms. Cousins on January 17, 2019. CP 507. The DOC included a cover letter with the seventh installment that stated Ms. Cousins' request "is now closed." CP 507. The Department closed her request on December 10, 2018, for failure to pay. CP 590.

Five days later, Ms. Cousins wrote the Department inquiring both about medical and chemical dependency records and about the documents she had specifically noted were missing after the second installment. CP 513. Cousins also believed there were additional records that had yet to be

produced, especially with regard to her sister's medical emergency in March 2016. CP 662. At this point, of the seven installments the DOC had produced, one yielded only financial records, another contained documents that had already been produced, and still another included erroneous records from outside the scope of the request. CP 661 lns. 7-10; 17-24.

In response to Ms. Cousins' email, the records specialist handling the request stated she would look into the status of the medical and chemical dependency records but did not address the missing documents. CP 513. Ms. Cousins reiterated her request for the missing documents in addition to the medical and chemical dependency reports. CP 512 -513. On January 23, 2019, the DOC directed Ms. Cousins to the location of the medical and chemical dependency records but again did not address the missing documents. CP 512. Once more, Ms. Cousins asked about them. CP 511. A week later, after hearing nothing back from the Department, Ms. Cousins followed up again, this time stating that this was a time-sensitive issue because the deadline was approaching to file a tort claim for her sister's death and she needed those documents. CP 511. The

Department has admitted that it should have reopened Ms. Cousins' request at this point, but that it failed to do so. CP 580:17-81:4.

At this point, Ms. Cousins believed the DOC was continuing its search for the responsive records and that her request was still open. CP 105 lns 9-13. In the past, the DOC frequently did not communicate with Ms. Cousins for weeks or months between installments and until this point, each installment regularly took four to five months to be produced. CP 105 lns 9-13.

After hearing nothing for five months, in June 2019, Ms. Cousins called the records specialist handling the request and left a voicemail. CP 115. Unbeknownst to Ms. Cousins, that particular employee left the Department in April 2019. CP 558 lns. 2-4. No one from the Department returned Ms. Cousins' call. CP 105 ln. 15. On September 4, 2019, Ms. Cousins called again and left another voicemail. CP 116. Still no one returned her call. CP 105 ln. 15. She then sent an email to the Department on October 14, 2019. CP 105 lns.17-18. Ms. Cousins followed up again and called the records unit on

October 24, 2019, and again the next day on October 25, 2019. CP 117. Each time she left a voicemail asking that someone at the unit call her back regarding her request. CP 117.

Finally, on October 29, 2019, DOC Records Specialist Supervisor Paula Terrell emailed Ms. Cousins responding to Ms. Cousins' voicemail message about her public records request. CP 517. Ms. Terrell and Ms. Cousins then exchanged emails for the better part of the next month. CP 516-538. In each exchange, Ms. Terrell dispensed untrue information and placed barriers in Ms. Cousins' path to getting her records. CP 516-538. For instance, Ms. Terrell initially told Ms. Cousins she was not the requestor of her records request. CP 517. Once Ms. Cousins corrected her, she then told Ms. Cousins that the request is closed and attached the cover letter sent with the seventh installment. CP 518-22. Ms. Cousins informed Ms. Terrell that she received that cover letter but that she had followed up with the records specialist initially handling the request and alerted her to documents that were missing from production. CP 524-31.

Rather than reopen the request, Ms. Terrell told Ms.

Cousins her request had been closed because the Department had not received payment for the seventh installment. CP 528. Again, Ms. Cousins' corrected her and pointed her in the direction of the documents demonstrating as much and reiterating that she had still not received all the records as previously explained. CP 537-38. Ms. Terrell never responded to this email. CP 106 ln. 4. At deposition, Ms. Terrell could not explain why she had not responded, admitted there were still outstanding documents that needed to be produced and admitted that she should have reopened the request at that time. CP 572:21-73:21, 574:15-575:19, 579:16-25.

On July 7, 2020, Ms. Cousins wrote to Ms. Terrell saying she had not heard back from her regarding her unfinished records request and once again pointed to certain documents she was missing. CP 537. Eight days later, on July 15, 2020, Ms. Terrell **reopened Ms. Cousins' request** and told her that she would proceed accordingly and anticipated providing Ms. Cousins with the next installment of records within 30 business days. CP 535-36. At deposition, Ms. Terrell explained that she reopened the request because there were documents that had not

been produced. CP 578:20-79:25.

The Department then resumed sending Ms. Cousins installments from July 2020, until the last installment in August 2021. CP 106 lns 10-16. The Department did not require Ms. Cousins to resubmit a new request, nor did it assign the request a new number. CP 106 lns. 8-9. Instead, it picked up exactly where it left off in January 2019 and produced installment eight on October 1, 2020. CP 106 lns. 10-11. Within a year, the Department produced ten more installments and over 1,000 pages, many of which were documents Ms. Cousins had not previously received and which were core to her investigation into her sister's death. CP 106 lns. 17-19.

Notably, installment sixteen, produced on June 23, 2021, contained over 300 pages that had not been previously produced, most of which had a "print date" of August 30, 2016, indicating they had been collected in response to Ms. Cousins' request, but not provided for nearly five years. CP 106 lns. 12-13; 119-425. At that time, the Department stated Ms. Cousins' request was "now closed." CP 106 lns. 14-15. However, on August 18, 2021, the Department produced yet another

installment of responsive records that it had never before produced. CP 106 ln. 16.

Ms. Cousins filed this lawsuit against the Department, seeking accountability for failure to produce records for over 4 years. The Superior Court felt bound by the *Dotson* rule despite the fact that the Department in this case had "reopened" the request, and dismissed the case after finding that the Department had not acted in bad faith under an equitable tolling analysis. Division II affirmed on January 31, 2023, in a 2-1 decision, with the Honorable Rebecca Glasgow dissenting.

V. ARGUMENT

In passing the Public Records Act, the Washington Legislature expressly mandated that "[t]his chapter shall be liberally construed, and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected." RCW 42.56.030; *see also Wade's Eastside Gun Shop, Inc. v. Dep't of Labor and Indus.*, 185 Wn.2d 270, 277, 372 P.3d 97 (2016). It also required agencies to adopt and enforce reasonable rules and regulations that "provide for the fullest assistance to inquirers and the most

timely possible action on requests for information." See RCW 42.56.100; RCW 42.56.080 ("Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person… .);" see *also Spokane Research & Def. Fund v. City of Spokane*, 255 Wn.2d 89, 100, 117 P.3d 1117 (2005). In light of the statute's purpose, "courts must avoid interpreting the PRA in a way that would tend to frustrate that purpose." *Worthington v. Westnet*, 182 Wn.2d 500, 507, 341 P.3d 995 (2015). It is through this lens that the Court of Appeals decision must be viewed in this case.

A. Division II's Decisions Below and in Prior Cases Is Conflict with This Court's Decision in *Belenski* And The Plain Language of the Statute

The plain language of RCW 42.56.550(6) provides that a claim of action under the PRA "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." (emphasis added). This Court clarified that the one-year statute of limitations begins on an agency's "final, definitive response to a public records

request." *Belenski*, 186 Wn.2d at 460. In *Belenski*, this Court dealt with conflicting decisions among the Court of Appeals as to what is sufficient to trigger the statute of limitations. This Court held that reading RCW 42.56.550(6) to allow only two options to trigger the statute of limitations is too narrow and that there may be more than two ways in which an agency can answer a request. The Court then found that an agency's final, definitive response triggers the statute of limitations and stated the "theme of finality should apply to begin the statute of limitations for all possible responses under the PRA." *Belenski*, 186 Wn.2d. at 460. However, the Court opined that there are "legitimate concerns that allowing the statute of limitations to run based on an agency's dishonest response could incentivize agencies to intentionally withhold information and then avoid liability due to the expiration of the statute of limitations." *Belenski*, 186 Wn.2d at 461. The Court remanded the case for application of the doctrine of equitable tolling. As such, this Court expanded the ways in which an agency may respond to a PRA request but did not intend to limit an agency's liability.

In *Dotson v. Pierce County*, the Court of Appeals did just that, taking the holding in *Belenksi* a giant step further by holding that a "closing letter" alone suffices to bring finality to the request. 13 Wn.App. 455, 471, 464 P.3d 563 (2020). In other words, under the *Dotson* rule, a "closing letter" is dispositive in triggering the one-year statute of limitations by acting as *the* final, definitive, agency response. *Id.* at 472.

The *Dotson* court's holding elevates form over function, ignores the plain language of the statute, and is in direct conflict with this Court's reasoning in *Belenksi. Dotson* bestows preclusive effect on something called a "closing letter," a term that is found nowhere in the statute or regulations, even where the agency subsequently produces additional documents. In doing this, *Dotson* makes the statutory language "last production of a record" superfluous. At a minimum, the subsequent production of records renders the "closing letter" is at best incorrect and legally meaningless, and at worst is a dishonest response from the agency. And in this case the Department even "reopened" the request. That should have had the effect of negating the "closing letter," but even under those

circumstances Division II gave dispositive weight to the closing letter.

If the holding in *Doston* is allowed to stand, agencies will be able to arbitrarily "close" a public records request, triggering the statute of limitations, then silently withhold records (whether negligently or intentionally) for an indefinite period of time while the limitations period runs. As the DOC has done here, an agency could silently withhold records for over a year and escape liability from a suit altogether. This is demonstrative of this Court's concerns in *Belenski* and runs counter to the broad disclosure mandates and agency accountability under the PRA. A closing letter, when followed by additional installments of records, cannot act as the final, definitive response of an agency for the purposes of triggering the statute of limitations. *Dotson* should be overturned, and the judgment in this case reversed.

B. The *Dotson* Rule Has Already Been Used to Shield Public Agencies from Liability, And Presents an Issue of Substantial Public Interest

The negative consequences of *Dotson* rule are not

theoretical. Rather it is having very real and dire consequences. In the short period of time since Division II's decision in that case, at least three agencies have avoided liability after silently withholding documents for over a year, including the Department of Corrections in this case.

In *Earl v. City of Tacoma*, COA No. 56160-3-II, Unpublished Decision of July 12, 2022, Tacoma police shot motorist, Jackie Salyers, eight times, killing her with a shot to the head. Her mother Lisa Earl filed a public records act request to find out what happened. Tacoma produced a number of records and closed the request, stating "there are no other records responsive to your request." Taking that statement at face value, and having no reason to believe it wasn't true, Ms. Earl proceeded with a Federal civil rights case against the officer and the City.

More than two years later, after discovery had closed, the City produced something called a "Command Post Log," a public record containing a wealth of information core to her claims that had been created at the time of the shooting. There is no dispute that the Log was responsive to Ms. Earl's public

records request, but Tacoma had never produced it and had never listed it on any exemption log. Ms. Earl simply had no way to know that the record existed. She bought suit under the Public Records Act for this egregious silent withholding. The Superior Court dismissed the case under *Dotson*, and refused to apply the discovery rule. The Court of Appeals affirmed. Ms. Earl petitioned for review in this Court (attached as Appendix B), but her petition was rejected.

In *Ehrhart v. King County*, COA No. 55498-4-II, Unpublished Decision of August 30, 2022, Sandra Ehrhart wanted to know information about her husband's death caused by a Hantavirus infection. She made a public records request to King County regarding the County's response to Hantavirus cases, including her husband's. The County produced 521 records, and closed the request.

Ms. Ehrhart filed a wrongful death lawsuit some months later and propounded discovery with the Complaint. The County stonewalled and delayed for months, well beyond the one-year statute of limitations period for the Public Record Act case had lapsed. Along the way, the court sanctioned the

County for bad faith. After filing a motion for summary judgment, and one day before the plaintiff's response was due, the County produced 20,000 records, about 500 of which were unquestionably responsive to her original public records request. The County had never provided those documents to Ms. Ehrhart, nor had it disclosed them on an exemption log.

Mr. Ehrhart amended her complaint to include a Public Records Act claim for this egregious silent withholding. The Superior Court dismissed the claim based on the statute of limitations, and refused to apply the discovery rule. Division II affirmed. Ms. Ehrhart sought review in this Court (attached as Appendix C), but her petition was rejected.

Like those cases, Terry Cousins sought records related to the death of a loved one, here, records about her sister's in-custody death. As described above, the Department "closed" her request on more than one occasion, once for an alleged failure to pay that turned out to be false, despite Ms. Cousins repeatedly telling the Department that she had not received all responsive records and identifying specific ones the Department had not produced. Ms. Cousins persisted, and eventually the

third records officer to handle her request "reopened" the request and provided an additional approximately 1000 pages of records in several additional installments. Ms. Cousins brought a Public Records Act lawsuit, which was dismissed on statute of limitations grounds after concluding that the requirements under the doctrine of equitable tolling had not been met.

All three of these cases involve people seeking records to investigate the death of a loved one. All three of these cases involve an obvious implication that the agency holding the records would face potential liability for those deaths, giving the agencies palpable incentive to silently withhold documents. What these cases are teaching public agencies is this: if the agency has damning records that could support a lawsuit against it, the agency should "close" the request and silently withhold the records for at least a year, giving the requestor no reason to believe there are additional records. If the agency ends up having to disclose the records, it faces no exposure under the Act.

This is an issue of paramount public interest. Access to

public records is a cornerstone of open government and governmental accountability. This Court should accept discretionary review and correct the wrongs created by *Dotson*.

C. The Discovery Rule Should Apply in Public Records Act Cases

The discovery rule reflects Washington courts' "duty to construe and apply limitation statutes in a manner that furthers justice." *U.S. Oil & Ref. Co. v. State Dep't of Ecology*, 96 Wn.2d 85, 93, 633 P.2d 1329, 1334 (1981). Thus, "[i]n determining whether to apply the discovery rule, the possibility of stale claims must be balanced against the unfairness of precluding justified causes of action." *U.S. Oil & Ref. Co*., 96 Wn.2d at 93.

That case involved a quiet discharge of pollutants into a river. The defendant was under a legal obligation to "self-report," but failed to do so, leaving the plaintiff in the dark. After two years, the plaintiff learned of the discharge and sued for statutory penalties. If the statute of limitations was triggered by the discharge, then the suit was time-barred. But this Court correctly recognized the inequity of that outcome. Such a rule

would allow the polluter to benefit from its own unlawful failure to report the discharge. This Court also recognized the absurdity of assuming that the legislature wanted to bar plaintiffs from bringing suits in circumstances "where the plaintiff lacks the means or ability to ascertain that a wrong has been committed." *U.S. Oil,* 96 Wn.2d at 93. Accordingly, the discovery rule "dictated" that plaintiff's suit was not time barred.

The same principles should apply in Public Records Act cases. An agency has a statutory duty to disclose records, either through production or exemption log, which are responsive to a request. Prior to a suit being filed, only the agency knows whether it has complied with that duty. Even more than the plaintiff in *U.S. Oil* who may come across pollutants in a river, a requestor has no way to know whether the agency has complied with the Act.

The discovery rule would be a far more equitable approach than the current analysis under the doctrine of equitable tolling. Following this Court's analysis in *Belenski*, the *Dotson* held that the discovery rule does not apply in PRA

cases, leaving equitable tolling as the sole remedy for these situations. Equitable tolling requires a claimant to demonstrate bad faith, deception, or false assurances by the defendant, and the exercise of due diligence by the claimant.

In the situations that have arisen in *Belenski*, *Dotson*, *Earl, Ehrhart*, and now here, equitable tolling is an insufficient remedy. While Ms. Cousins asserts that she can and did meet the elements for equitable tolling, the elements a claimant must meet for equitable tolling to apply are unrealistic and unlikely to adequately capture an agency's liability for the purposes of establishing a PRA violation. For instance, in order for a claimant to demonstrate due diligence, they must first have a reason to suspect that the agency is withholding records. Most requestors have no reason to question an agency's claim that no records exist or that all records have been produced. If a requestor later discovers the agency was dishonest it may be difficult to prove the requestor was diligent simply because the requestor had no reason to be diligent.

In practical terms, this means requestors should not take an agency's response at face value. It incentivizes requestors to

mistrust agencies' responses and to move forward with a lawsuit just to ensure the agency's response is true by using the tools of civil discovery. Additionally, if an agency simply conducted an inadequate search, but did not do so for reasons relating to bad faith, deception, or false assurances, that similarly blocks requestors from prevailing on a claim if records are disclosed after an agency initially closes a request. But the issue of "bad faith" should come into play when considering a penalty analysis under *Yousoufian*. *Yousoufian v. King Cty. Exec., 152 Wash. 2d 421, 98 P.3d 463, 465 (2004)* . If silent withholding was truly due to an honest mistake or negligence, the Superior Court has the discretion to award minimal or zero penalties. And where the requestor can show bad faith, deception, or false assurances, the Superior Court has the discretion to punish the agency on a sliding scale of up to $100 per day per record withheld.

This was the case in *Dotson*. The Court of Appeals affirmed dismissal based on the statute of limitations, then held that the requestor was forced to rely on "equitable tolling." However, the requestor in *Dotson* had no reason to believe the

County had additional records after it closed the request. She had no reason to be "diligent," nor did it appear that the County withheld records for reasons relating to bad faith, deception, or false assurances. Equitable tolling would have likely done nothing in *Dotson*, despite the claimant waiving the argument on appeal. Instead, the claimant argued the discovery rule applied and that statute of limitations began to run when she discovered that the County had not disclosed all responsive records. The Court of Appeals held that "the discovery rule generally applies in cases where "the statute does not specify a time at which the cause of action accrues."" *Dotson*, 12 Wn.App. 2d at 472 (internal citations omitted). The Court reasoned that since the PRA statute of limitations contains a triggering event, interpreted to be the agency's "final, definitive response," the discovery rule does not apply.

As shown in *Earl* and *Ehrhart,* showing bad faith is an incredibly high bar. Both cases involved sanctionable conduct, but the courts declined to find bad faith. In contrast, application of the discovery rule would resolve these issues and allow viable PRA claims to be brought once a requestor has

discovered that an agency violated the PRA if that discovery occurs after the one-year statute of limitations. This is particularly important in cases where there has been a silent withholding, regardless of whether such withholding is negligent or intentional.

Because the application of equitable tolling rather than the discovery rule is contrary to this Court's holding in *U.S. Oil & Ref. Co. v. State Dep't of Ecology*, 96 Wn.2d 85, 93, 633 P.2d 1329, 1334 (1981), and because holding agencies responsible for failure to disclose records is a matter of significant public interest, this Court should grant review in this case and hold that the discovery rule applies to Public Records Act cases.

This document contains 4,993 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 2nd day of March, 2023.

MacDONALD HOAGUE & BAYLESS

By: */s/Joseph Shaeffer*
Joseph Shaeffer
Attorney for Appellant
WSBA #33273

DECLARATION OF SERVICE

I hereby declare that on March 2, 2023, I electronically filed the foregoing Petition of Review with the Supreme Court of the State of Washington, and arranged for service of a copy of the same on the parties to this action as follows:

Attorneys for Respondent:	[X] Via WA State Courts' Portal
	[ ] Via Facsimile
Robert W Ferguson	[ ] Via First Class Mail
Attorney General	[ ] Via Email

Timothy J. Feulner
WSBA #45396
Assistant Attorney General
Corrections Division
OID #91025
P.O. Box 40116
Olympia, WA 98504
(360) 586-1445

DATED this 2nd day of March 2023, at Seattle, Washington.

s/Trish Weissmann
Trish Weissmann, Legal Assistant

APPENDIX A

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Washington State
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January 31, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TERRY COUSINS, Appellant, v. STATE OF WASHINGTON and DEPARTMENT OF CORRECTIONS, Respondent.	No. 56996-5-II PUBLISHED OPINION

MAXA, J. – Terry Cousins appeals the trial court's grant of summary judgment in favor of the Department of Corrections (DOC) in her lawsuit against DOC under the Public Records Act, chapter 42.56 RCW (PRA).

In 2016, Cousins made a request under the PRA to DOC relating to her sister's death while her sister was incarcerated. DOC provided records to Cousins on an installment basis. DOC's letter attaching the seventh installment in January 2019 stated that the request was closed. Cousins believed that records were missing from the installments she received, and she continued to correspond with DOC. In November 2019, DOC reiterated that the request was closed.

In July 2020, Cousins contacted DOC about records that she believed should have been produced. DOC subsequently reopened the request and produced additional installments of records totaling over 1,000 pages.

Cousins filed a PRA action in January 2021, contending that DOC's actions in responding to her request violated the PRA. The trial court granted DOC's summary judgment motion, ruling that Cousins' action was time barred by the PRA's one year statute of limitations.

In *Dotson v. Pierce County*, this court held that the PRA statute of limitations begins to run when an agency notifies the requester that the request is closed, even if the agency subsequently produces additional records. 13 Wn. App. 2d 455, 470-72, 464 P.3d 563, *review denied*, 196 Wn.2d 1018 (2020). Cousins argues that we either should distinguish *Dotson* on the ground that DOC here actually reopened her request or disregard the holding in *Dotson* regarding the start of the limitations period. The court in *Dotson* also held that the discovery rule is inapplicable to PRA actions, *id.* at 472, and Cousins argues that we should disregard that holding.

We follow *Dotson* and hold that DOC's January 2019 letter closing the request started the limitations period and that the subsequent production of additional records did not start a new limitations period. Therefore, we hold that the statute of limitations bars Cousins' PRA action because she did not file suit within a year after DOC closed the request. And we follow *Dotson* and hold that the discovery rule is inapplicable here. Accordingly, we affirm the trial court's grant of summary judgment in favor of DOC.

FACTS

Background

Renee Field was incarcerated in DOC custody beginning in February 2014. She died while in custody in March 2016. In July 2016, Cousins, Field's sister and personal representative of her estate, made a PRA request to DOC for all records regarding Field from

January 1, 2014 to the present. DOC acknowledged the request and stated that it would review and gather the records.

Production of Records and Closing Letter

DOC produced the first installment of records in November 2016 and produced a second installment in April 2017. In May 2017, Cousins' attorney wrote to Sheri Izatt, a public records specialist for DOC, noting several records that appeared to have been omitted in the first two installments. Izatt responded that the request was still open and that more records would be produced in future installments.

In July 2017, DOC produced a third installment of records that did not include the records that Cousins previously had referenced. DOC produced fourth, fifth, and sixth installments in December 2017, April 2018, and September 2018, respectively. None of the installments included the missing records that Cousins had referenced earlier.

On January 17, 2019, DOC produced the seventh installment. The letter enclosing the records stated that the request was "now closed." Clerk's Papers (CP) at 44.

Further Communications and Production

On January 22 and 23, 2019, Cousins exchanged emails with Izatt in which Cousins inquired about obtaining the records she had identified as missing after the second installment in May 2017. Izatt did not specifically respond to this inquiry. On February 1, Cousins emailed Izatt again about the missing records. Cousins did not receive a response from Izatt to this email. Cousins claimed that she called DOC over the next several months, but DOC did not return those calls. On October 14, she emailed Izatt and asked for a copy of her original request.

On October 29, Paula Terrell of DOC sent an email to Cousins responding to a voice mail message from Cousins. After a reply from Cousins, Terrell on November 4 responded with an

email to Cousins stating that Cousins' PRA request "is and remains closed." CP at 56. On November 14, Cousins emailed Terrell and indicated that not all requested records had been provided. On that same date, Terrell acknowledged the email and again explained that Cousins' PRA request "is and remains closed." CP at 69. Terrell further stated that "[s]ince this request is closed," Cousins was required to submit a PRA request if she wanted to request additional records from DOC.

Cousins responded on November 15 that her request was closed "due to your agencies [sic] assumption that my request was completely filled." CP at 65. Cousins stated that her request was not complete and reiterated that she had not received all of the records previously identified. Terrell did not respond to this email.

Even though Cousins still had not received specific records that she had identified as missing since May 2017 and she knew that DOC had closed its file, she did not file suit against DOC at that time.

On July 7, 2020, almost 18 months after DOC had closed her request, Cousins sent an email to Terrell stating that she had not heard back regarding her "unfinished pdr request" and again stating that she had not received all the requested documents. CP at 537. She stated, "I am again requesting that you send me the remaining documents for my public disclosure request from 2016." CP at 537. Terrell sent Cousins an email that listed the five requested categories of records previously identified as missing and stated, "Department staff are currently identifying and gathering records responsive to your request." CP at 536. In an internal record, Terrell stated, "Received email from requestor stating she did not receive all responsive records; therefore, I re-opened the request and will conduct an additional search." CP at 590.

Cousins followed up with a request of 29 additional categories of records that she had not received. Terrell acknowledged receipt of the request for additional records, and stated, "Department staff are currently identifying and gathering records responsive to your request." CP at 551. In an internal record, Terrell stated, "Requestor has indicated she did not receive all records to her request. Therefore, an additional search will be conducted and request re-opened." CP at 590. In her deposition, Terrell confirmed that her July 2020 email responding to Cousins' request for the missing records was a reopening of the original request.

DOC produced installments 8 through 16 from October 2020 through June 2021. In the June email containing installment 16, Terrell stated that this was the final installment and the request was closed. But DOC produced a 17th installment in August 2021. After Cousins' emails in July 2020, DOC produced 10 additional installments consisting of over 1,000 pages of records.

Trial Court Proceedings

Cousins filed suit against DOC in January 2021, before DOC finished producing all the additional records. She sought disclosure of the records she requested in 2016 and statutory penalties, attorney fees, and costs under the PRA. Cousins alleged in her complaint that none of the later installments contained the additional categories of records she identified as missing in July 2020.

After some discovery, DOC moved for summary judgment based on the PRA's one year statute of limitations because DOC had closed Cousins' request in January 2019.

Cousins opposed DOC's summary judgment motion, arguing that the statute of limitations period started again when DOC reopened her request in July 2020 or until the last record was produced in August 2021. In the alternative, Cousins argued that equitable tolling

should apply because DOC handled her request in bad faith. Cousins also stated in a footnote that the discovery rule would be a better remedy than equitable tolling in a silent withholding case.

The trial court granted DOC's summary judgment motion. The court ruled that under *Dotson*, the statute of limitations began to run in January 2019 when DOC stated that the request was closed. Cousins appeals the trial court's grant of summary judgment in favor of DOC.[1]

ANALYSIS

A. STANDARD OF REVIEW

The PRA is designed to provide for the broad disclosure of public records. *Ekelmann v. City of Poulsbo*, 22 Wn. App. 2d 798, 805, 513 P.3d 840 (2022). RCW 42.56.030 requires that the PRA be liberally construed in favor of disclosure unless disclosure is specifically exempt. *Id.*at 806.

We review an agency's action in responding to a PRA request de novo. *Id.* at 805. Summary judgment orders involving the PRA also are reviewed de novo. *Id.* When the record consists of only documentary evidence on PRA matters, we stand in the same position as the trial court. *Id.*

With a summary judgment motion, we view the evidence and apply all reasonable inferences in the light most favorable to the nonmoving party. *Lavington v. Hillier*, 22 Wn. App. 2d 134, 143, 510 P.3d 373, *review denied*, 200 Wn.2d 1010 (2022). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). There is a genuine issue of material fact only if

[1] Cousins initially sought direct review in the Supreme Court. The Supreme Court transferred the case to this court.

reasonable minds could disagree on the conclusion of a factual issue. *Lavington*, 22 Wn. App. 2d at 143. Further, if there are undisputed facts that do not allow for reasonable differences in opinion, then the question is one of law. *Harper v. State*, 192 Wn.2d 328, 346-47, 429 P.3d 1071 (2018).

B. PRA STATUTE OF LIMITATIONS

RCW 42.56.550(6) states, "Actions under [the PRA] 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."

In *Belenski v. Jefferson County*, the Supreme Court held that the PRA statute of limitations "begins to run on an agency's definitive, final response to a PRA request." 186 Wn.2d 452, 457, 378 P.3d 176 (2016). The court based this holding on its interpretation of RCW 42.56.550(6). *Id.* at 460. The court stated, "This theme of finality should apply to begin the statute of limitations for all possible responses under the PRA, not just the two expressly listed in RCW 42.56.550(6)." *Id.* "[T]o conclude otherwise would lead to absurd results – leaving either no statute of limitations or a different statute of limitations to apply based on how the agency responded." *Id.* at 460-61.

In *Belenski*, the county responded to a PRA request by stating that it had no responsive records. *Id.* at 455. Belenski ultimately discovered that the county did in fact have the requested records, and he filed suit over two years after the county's response. *Id.* The court stated that the county's response that it had no responsive records was a final, definitive response, "[r]egardless of whether [the] answer was truthful or correct." *Id.* at 461. The response sufficiently put Belenski on notice that the county neither intended to disclose any records nor further address the request. *Id.* Belenski could have sued the county as soon as he received its response instead

of waiting two years before bringing suit. *Id.* The court concluded that the county's response was sufficient to trigger the statute of limitations. *Id.* at 459.

Belenski and amici raised concerns regarding the incentive for agencies to intentionally withhold information and avoid liability if the statute of limitations was allowed to run based on an agency's dishonest response. *Id.* at 461. The Supreme Court recognized that such an incentive could be contrary to the PRA's broad disclosure mandates and fundamentally unfair in some circumstances. *Id.* Therefore, the court remanded for the trial court to determine whether the doctrine of equitable tolling applied. *Id.* at 462.

In *Dotson*, Dotson submitted a PRA request to the county's Planning and Land Services (PALS) Department for all records regarding Dotson's property. 13 Wn. App. 2d at 459. After producing the requested records, PALS sent a letter to Dotson in June 2016, stating, "As you have received responsive documents, I am closing your request." *Id.* at 461. PALS subsequently discovered records responsive to Dotson's PRA request on three separate occasions and sent the records to Dotson upon each discovery. *Id.* at 462-64. The first such disclosure was in October 2016. *Id.* at 462. Dotson filed a PRA complaint against the county in October 2017. *Id.* at 463.

This court held that the PRA statute of limitations barred Dotson's action because he did not file within one year of the county closing the request. *Id.* at 472. The court disagreed with Dotson's argument that the statute of limitations started when the county released the last of the additional records. *Id.* at 470. The court emphasized that the Supreme Court in *Belenski* had "explicitly found" that the PRA statute of limitations " 'begins to run on an agency's definitive, final response to a PRA request.' " *Id.* at 471 (quoting *Belenski*, 186 Wn.2d at 457). The court stated that the June 2016 letter "comprised a final, definitive response to Dotson's request, and started the statute of limitations." *Dotson*, 13 Wn. App. 2d at 471. The court also noted that no

facts supported concerns of gamesmanship by the county, and that the letter's closing language only intended to alert Dotson that there would be no forthcoming records. *Id.*

In addition, the court in *Dotson* held that the discovery rule – under which the statute of limitations does not start until the plaintiff knew or should have known the essential elements of the cause of action – does not apply to PRA actions. *Id.* at 472.

C. APPLICATION OF *DOTSON*

Cousins argues that we should either distinguish or disregard *Dotson* and hold that the statute of limitations did not start until DOC provided its last installment of records. We disagree, and we conclude that the PRA statute of limitations started in January 2019 when DOC informed Cousins that it was closing her request.

1. Distinguishing *Dotson*

Cousins argues that the facts of this case are distinguishable from *Dotson*. She claims that if closing a request starts the statute of limitations, a reopening of the request must restart the statute of limitations. We disagree.

Cousins is correct that the facts here are different than in *Dotson*. In *Dotson*, PALS did not reopen the PRA request and search for additional records. Instead, the additional records produced were discovered accidentally in the regular course of business and in response to Dotson's summary judgment motion. 13 Wn. App. 2d at 462-63. Here, DOC actually reopened the PRA request in July 2020 in response to a communication from Cousins, searched for additional records, and produced additional installments following the consecutive numbering of the previous installments. And after Cousins' emails in July 2020, DOC produced 10 additional installments consisting of over 1,000 pages.

However, the different facts do not change the result. As discussed above, the Supreme Court in *Belenski* adopted a bright line rule: the PRA statute of limitations "begins to run on an agency's definitive, final response to a PRA request." 186 Wn.2d at 457. This bright line rule requires a PRA requester to act promptly to file a PRA action, consistent with the one year statute of limitations. An agency's definitive, final response that the request is closed provides a requestor with sufficient notice that the agency no longer intends to disclose additional records or further address a request. *Belenski*, 186 Wn.2d at 461; *Dotson*, 13 Wn. App. 2d at 471. At that point, there is no reason to delay in filing suit. *Belenski*, 186 Wn.2d at 461; *Dotson*, 13 Wn. App. 2d at 471.

This court in *Dotson* applied the bright line rule established in *Belenski* even though the agency produced additional records after the request was closed. *Dotson*, 13 Wn. App. 2d at 470-72. The court expressly rejected the argument that the statute of limitations started on the date the agency released additional records. *Id.* at 470. Nothing in *Dotson* suggests that the result should be different if the agency "reopens" the request and actually searches for and produces additional records. Creating an exception in this situation would undermine *Belenski*'s bright line rule.

Here, it is undisputed that DOC in January 2019 gave a definitive, final response to Cousins that her PRA request was closed. Under *Belinski* and *Dotson*, this means that the statute of limitations started on that date. We conclude that the fact that DOC later reopened the request after the statute expired is immaterial.

2. Disregarding *Dotson*

Cousins argues that we should decline to follow *Dotson* and hold that closing a PRA request does not start the statute of limitations when the agency continues to produce records responsive to that request. We disagree.

First, Cousins argues that *Dotson* is inconsistent with RCW 42.56.550(6), which states that a PRA action must be filed within one year of "the agency's claim of exemption or the last production of a record." We acknowledge that the language of RCW 42.56.550(6) does suggest that the statute of limitations starts only when the agency produces the last record. But *Belenski* interpreted the statute as stating that the limitations period begins at an agency's final, definitive response. 186 Wn.2d at 460. And *Dotson* is not inconsistent with *Belenski* in holding that the closure of a PRA request is a final, definitive response.

Second, Cousins argues that the holding in *Dotson* that an agency's closing letter can be a final, definitive response even when the agency later produces responsive records is erroneous. She claims that this holding allows an agency to arbitrarily close a PRA request and then silently withhold records until the statute of limitations expires.

But we agree with *Dotson* that an unequivocal closing of a PRA claim is a final, conclusive response, which under *Belenski* starts the statute of limitations. And the court in *Belenski* stated that a final, definitive response started the statute of limitations even if the response was untruthful or incorrect. 186 Wn.2d at 461. The court acknowledged the potential problem that Cousins raises, but noted that a dishonest response may trigger application of equitable tolling. *Id.* at 461-62. That doctrine helps to alleviate Cousins' concerns about manipulative responses. And there is no indication in the record that DOC's response was an attempt at manipulation.

We recognize that when the requestor is not aware that the agency has failed to produce certain records, the application of the *Belenski* bright line rule may lead to a harsh result. But that is not the case here. Cousins knew as early as May 2017 – long before DOC closed the request – that some of the categories of records she had requested had not been produced. But she still had not received those records when DOC closed the request in January 2019. Cousins again stated that there were missing records in November 2019, but DOC twice reiterated that the request had been closed. Cousins could have and should have filed suit regarding what she believed to be DOC's deficient production before the statute of limitations expired in January 2020.

Further, it is important to recognize that a requestor can still obtain the requested records even if the statute of limitations precludes a PRA action on the original request. Nothing prevents a requestor from making a new records request for records that were not produced. Cousins chose not to make a second request, instead insisting that DOC respond to her original request.

We decline Cousins' invitation to disregard *Dotson*.

3. Discovery Rule

In the trial court, Cousins argued that equitable tolling should apply here. She does not make that argument on appeal. Instead, Cousins argues that we should apply the discovery rule. We disagree.

This court in *Dotson* held that the discovery rule did not apply to the PRA statute of limitations. 13 Wn, App. 2d at 472. The court stated,

> The discovery rule generally applies in cases where "the statute does not specify a time at which the cause of action accrues." However, the PRA statute of limitations contains triggering events that enable a requester to know that a cause of action has accrued, and the legislature enacted no discovery rule exception.

Id. (quoting *Douchette v. Bethel School Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991)). We agree with the holding in *Dotson*. Therefore, we reject this argument.

4. Summary

DOC's January 2019 email to Cousins stating that the PRA was closed was a final, definitive response that started the one year PRA statute of limitations. Cousins did not file her PRA action until January 2021, almost a year after the statute of limitations expired. Under *Belenski* and *Dotson*, the fact that DOC subsequently produced additional records did not restart the statute of limitations.

Accordingly, we hold that the statute of limitations bars Cousins' PRA action and that the trial court did not err in granting DOC's summary judgment motion.

CONCLUSION

We affirm the trial court's grant of summary judgment in favor of DOC.

MAXA, J.

I concur:

CRUSER, J.

GLASGOW, C.J. (dissenting in part)—Unlike the majority, I would distinguish this case from *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 464 P.3d 563, *review denied*, 196 Wn.2d 1018 (2020). I would hold instead that where Cousins consistently communicated to the Department that responsive records had not been provided, and where the Department had to reopen Cousins' request to search for, gather, review, and disclose an additional 1,000 pages of responsive records, the Department's initial closure of Cousins' request did not begin the statute of limitations period.

The majority's reasoning allows an agency to ignore a requester who is trying to follow up about missing records, wait one year from the agency's closing letter, and then demand that the court dismiss based on the statute of limitations. The agency could do so regardless of how many responsive records were initially improperly withheld, the agency's explanation, and the requester's diligence in pursuing the improperly withheld records. I do not believe this is what the legislature intended when it adopted the Public Records Act's one-year statute of limitations, nor do I believe this is what the Washington Supreme Court intended when it decided *Belenski v. Jefferson County*, 186 Wn.2d 452, 457, 378 P.3d 176 (2016).

I. THE DEPARTMENT EFFECTIVELY WITHDREW ITS PRIOR CLOSURE WHEN IT REOPENED COUSINS' REQUEST

As the majority explains, on January 17, 2019, the Department issued a letter closing its response to Cousins' public records request after disclosing its seventh installment. . Cousins corresponded with the Department at least seven times between the Department's closure letter and the reopening of the request. *See* Majority at 3-4. Cousins also called the Department several times during this time period. Cousins consistently and persistently maintained that the Department had not provided her with all of the records responsive to her request. *Id.* Cousins was specific in her descriptions of the records she believed existed but had not been disclosed.

Only after the one-year statute of limitations period expired did the Department begin the process of determining whether additional records responsive to her original request existed. A Department public records officer reopened Cousins' request to conduct additional searches, using the same tracking number. The Department then provided several additional installments, specifically installments eight through seventeen, consisting of over 1,000 pages, in response to Cousins' request.

II. *DOTSON* IS DISTINGUISHABLE

This case is distinguishable from *Dotson*, and applying RCW 42.56.550(6) and *Belenski* to these facts, I would conclude that our case warrants a different result.

A plaintiff must file an action under the PRA "within one year of the … last production of a record on a partial or installment basis." RCW 42.56.550(6). As the majority correctly explains, "in *Belenski v. Jefferson County*, the Supreme Court held that the PRA statute of limitations 'begins to run on an agency's definitive, final response to a PRA request.'" Majority at 7 (quoting *Belenski*, 186 Wn.2d at 457)). Under *Belenski*, it is the "theme of finality" that matters. *Id* at 460. In that case, the court concluded that the agency's response stating there were no responsive records put the requester on notice that it did not intend to disclose any records or further address the request. *Id.* at 461.

This court applied *Belenski* in *Dotson*, 13 Wn. App. 2d at 469. The *Dotson* panel concluded that an unequivocal closing letter from the agency triggered the statute of limitations period, even though the agency later located and disclosed a few additional records. *Dotson*, 13 Wn. App. 2d at 471-72. Specifically, the agency later disclosed a lobby visit record, two pages of responsive phone logs, and a copy of a 2007 Habitat Assessment Report. *Id.* at 462-63. The agency disclosed the additional records as soon as it became aware that they existed and had not yet been disclosed. *Id.*

I wholeheartedly agree with the majority's assessment that the facts in this case are different from those in *Dotson*. Majority at 9. The few additional records disclosed after the agency closed the request in *Dotson* were discovered in the normal course of business. The requester did not persistently and repeatedly complain to the agency that records were missing from the agency's response. *Id.*; *Dotson,* 13 Wn. App. 2d at 462-63. Here, the Department reopened Cousins' request to conduct additional searches after Cousins repeatedly communicated to public records officers for months that records were missing from its response to no avail. After reopening the request and conducting additional searches, the Department disclosed ten additional installments amounting to over 1,000 pages. It then issued another closing letter again closing Cousins' request.

Unlike the majority, I would conclude that these drastically different facts warrant a different result. Under the plain language of the statute of limitations provision in the Public Records Act, the statute of limitations does not accrue until the "last . . . installment." RCW 42.56.550(6). The Department's first closing letter on which the majority relies occurred nine installments before the last installment. Moreover, the Department effectively withdrew its closure when it reopened the request and took several additional months to conduct additional searches and complete its response. Under these facts, the Department's first closing letter cannot be the kind of "definitive, final response" that the *Belenski* court had in mind. Considering the entire arc of the Department's response, the Department's first closing letter was not final and I would conclude that it did not begin the statute of limitations period.

III. SEVERAL FACTORS SHOULD DETERMINE WHEN AN AGENCY'S RESPONSE BECAME FINAL

The majority's bright line rule has appeal, but it creates incentives that are contrary to the purpose of the Public Records Act. Strictly applying *Dotson*'s reasoning in all cases creates

incentives for agencies to delay full disclosure of responsive records when they discover a response was incomplete.

The Public Records Act's purpose is to promote broad disclosure of public records, and its penalty and attorney free provisions create a strong incentive for agencies to avoid improper withholding of records and delayed responses to public records requests. *See* RCW 42.56.030; RCW 42.56.550(4). We must consider the underlying policy of promoting free and open public examination of public records when applying the Public Records Act. RCW 42.56.550(3).

An agency that discovers it has improperly withheld records responsive to a closed request will benefit from doing exactly what the Department did here. Under the majority's bright line rule, the agency will benefit from ignoring a requester's inquiries about missing records until one year after the response was closed. I do not read *Belenski* to require this result. Instead, I would engage in an inquiry that considers factors that would encourage agencies to quickly disclose records they discover have been improperly withheld.

In determining the date when a public records response was truly final for purposes of applying the statute of limitations, I would consider multiple factors: (1) the extent of communications from the requester about the completeness of the agency response, (2) any other notice the agency may have had that its response was incomplete, (3) the extent of additional searches and disclosures that were necessary after the response was initially closed, (4) the nature of any agency communications with the requester about allegations of an incomplete response, and (5) whether the requester diligently pursued any missing records they were aware of.

Here, even though the Department reopened Cousins' request in this case rather than treating her ongoing inquiries as new requests, an agency's labelling should not be dispositive in every case and these factors do not rely on labelling. Under these factors, Cousins persistently and

repeatedly told the Department that its response was incomplete, and she diligently attempted to resolve the problem. The Department ultimately conducted extensive additional searches, disclosing 1,000 new pages over ten additional installments. The Department did not definitively and accurately explain to her at the time why it had not disclosed the records she believed were missing.[2] Even though Cousins could have brought a public records lawsuit within one year of the initial closing letter and did not, these factors weigh in favor of concluding the Department's response was not final at the time of its initial closing letter.

Multifactor considerations are more difficult to apply and they make results less predictable than a bright line rule; however, a more nuanced analysis would help ensure agencies prioritize prompt investigation of allegations that they have wrongfully withheld records. And agencies would have more incentive to promptly disclose wrongfully withheld records as soon as they are discovered. This is far more consistent with the underlying purpose of the Public Records Act.

For the reasons stated above, I respectfully dissent.

Glasgow, C.J.

[2] This does not necessarily mean that Cousins should prevail on the merits. That is a different question from whether the statute of limitations bars her claim.

APPENDIX B

Supreme Court No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 56160-3

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

LISA EARL,

Petitioner,

v.

CITY OF TACOMA,

Respondent

PETITION FOR REVIEW

James E. Lobsenz WSBA #8787
CARNEY BADLEY
SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104
lobsenz@carneylaw.com

Attorneys for Appellant

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Constitutional Provisions, Statutes and Court Rules

I. INTRODUCTION

The Court of Appeals affirmed the dismissal of a Public Records Act ["PRA"] case because it was not filed within the one-year statute of limitations period. Despite being repeatedly informed that in *In re Fowler*, 197 Wn.2d 46, 479 P.3d 1164 (2021) this Court recently decided that application of equitable tolling is ***not*** limited to situations where the opposing party engaged in bad faith, deception, or the making of deliberately false assurances, the Court of Appeals did not even acknowledge the existence of *Fowler*. Instead, directly contrary to *Fowler* it held that equitable tolling ***is*** so limited.

Similarly, despite being repeatedly this Court's decision in *U.S. Oil Refining Co. v. Department of Ecology* 96 Wash.2d 85, 633 P.2d 1329 (1981), the Court of Appeals also did not even acknowledge the existence of that directly relevant case. *U.S. Oil* holds that when a government agency has a legal obligation to "self-report" a fact, if it fails to report or disclose that fact, then the discovery rule applies and the statute of

limitations does not begin to run until the plaintiff learns the undisclosed fact. Plaintiff Earl argued that *U.S. Oil* controls this case, and that the discovery rule applies to all PRA suits. Although *U.S. Oil* was cited to the Court of Appeals and was discussed at length during oral argument, the Court of Appeals simply ignored it and rendered a decision which flatly contradicts its holding.

II. STATEMENT OF THE CASE

In the course of trying to arrest Kenneth Wright, who was seated in the passenger seat, a Tacoma police officer shot and killed the driver, Jackie Salyers. Salyers' mother, Lisa Earl, wanted to know why. Unbeknownst to Earl, within 90 minutes of the shooting, the Tacoma PD SWAT team was called out and dozens of police officers responded to the scene. These SWAT officers searched for Wright, detained five potential witnesses to the shooting, and turned them over to detectives for questioning. App. B-3. Detective Jack Nasworthy, the commander of the SWAT team's mobile "Command Post," went to retrieve video

from a police surveillance camera that had been erected and pointed at the exact spot where the shooting took place. Nasworthy maintained that the camera mysteriously failed to function that night and that there was no recorded video of the incident. App. A-4.

Lisa Earl wanted to know why a Tacoma officer fired eight shots at her daughter and killed her with a shot to the head. App. E, ¶3. She made a PRA request for "[a]ll documents related to the shooting death of" her daughter. App. A-4. Tacoma produced a number of records and told Earl that it had determined that "there are no other records responsive to your request." App. A-5. Having no reason to doubt that representation, and no way of checking to see if that was true, Lisa Earl believed that representation was true. App. A-6. She believed that she had received all the documents she requested. App. E, ¶9.

But Tacoma never produced the master record of the activities of the SWAT team, a record entitled the Command Post

Log. App. A-6. That document bore the same Tacoma Police Department case number as every document that was disclosed to her in response to her PRA request. App. A-6; App. F-10. Moreover, on every page of that document the "SITUATION" for the SWAT team callout was labeled "Officer-Involved-Shooting." App. B-2, B-3, and B-4.

Lisa Earl did not know any of the following facts: (1) that there was such a thing as a mobile Command Post for the Tacoma PD SWAT team; (2) that on the night that her daughter was shot and killed, the Tacoma Police Department sent the mobile "Command Post" to the neighborhood of the shooting; (3) that a person named Jack Nasworthy was employed by the Tacoma PD and was the officer in charge of the "Command Post" that night; (4) that Nasworthy was responsible for creating a log of the SWAT team's activities and of coordinating the actions of all the officers on the scene; (5) that Nasworthy did create such a Command Post Log; and (6) that the log recorded the fact that several potential witnesses who lived in the house located right

behind the spot where Salyers was shot, were ordered to come out of their house and were "taken into custody" by members of the SWAT team and transported to a police station for questioning. App. E, ¶¶ 10-14.

Believing that the shooting of her daughter was unjustified, Earl filed suit in federal court against the officer and the City. More than two years later, after the period of time for discovery had expired, and after Earl learned that Nasworthy claimed to have discovered that the police surveillance camera failed to record anything, Earl filed a motion asking the district court judge to reopen discovery so that she could depose Nasworthy. In response to Earl's motion, (which the district court granted), Tacoma filed an affidavit from Nasworthy in which he declared that he did not destroy or erase any video recorded on that camera. Attached to the affidavit was a copy of the SWAT team's Command Post Log. App. B. According to Nasworthy, this log showed that he could not possibly have destroyed any video. App. D-2, D-4.

Once Earl discovered that the SWAT Command Post Log existed, she filed suit against Tacoma for violation of the PRA. Tacoma responded that the suit was untimely because it was not filed within the one-year statute of limitations. Earl maintained that because Tacoma told her they had given her all responsive documents, the statute of limitations was equitably tolled. She also maintained that because she did not know the PRA had been violated and could not possibly have known until the Nasworthy affidavit was filed, that the discovery rule applied and that the one-year statute of limitations did not begin to run until she discovered that the PRA had been violated. The Superior Court rejected Earl's arguments. Ignoring this Court's decisions in *Fowler* and *U.S. Oil*, the Court of Appeals affirmed.

III. IDENTITY OF PETITIONER AND DECISION BELOW

Petitioner Lisa Earl seeks review of the decision issued below on July 12, 2022, attached as Appendix A.

IV. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err by holding that equitable tolling of a statute of limitations is limited to those situations where the plaintiff can show that the defendant deliberately mislead the plaintiff, contrary to this Court's recent decision in *Fowler* where this court held that there is no such limitation on equitable tolling?

2. Did the Court of Appeals err by holding that the discovery rule does not apply to statutory actions seeking to collect penalties for violations of the PRA, contrary to this Court's decision in *U.S. Oil* where this court reversed the Court of Appeals for refusing to apply the discovery rule to a statutory action to collect penalties for violation of a pollution statute?

3. Did the Court of Appeals err by dismissing a complaint for violation of the PRA where, in response to a request for all records relating to the shooting death of the plaintiff's daughter, the police agency failed to produce the SWAT team's Command Post Log which bore the words

"Officer Involved Shooting" on every page and documented the police action of taking potential witnesses to the shooting into custody so that they could be questioned as to what they had seen or heard?

4. Did the Court of Appeals err by dismissing a complaint for violation of the PRA for police department failure to conduct an adequate search for requested records where the police conceded that they don't even know where they searched and cannot represent that they ever searched the files kept at the SWAT team's separate office?

V. REASONS WHY REVIEW SHOULD BE GRANTED

A. The decision below is in direct conflict with this Court's recent decision in *In re Fowler*. (RAP 13.4(b)(1).

1. The Court of Appeals held that equitable tolling applies only when there is a showing that there was a deliberate attempt to mislead.

Relying on *Price v. Gonzalez*, 4 Wn.App.2d 67, 419 P.3d 858 (2018), the Court below held that Washington courts apply equitable tolling only when the defendant's conduct constitutes

"bad faith, deception, or false assurances," and only where the plaintiff can make "a showing that the defendant 'made a deliberate attempt to mislead" the plaintiff. App. A-15, citing *Price*, at 76. According to the Court of Appeals, although the City had given Earl an express assurance that it had given her a copy of every document that was responsive to her PRA request, and although this response may well have been false, since Earl had failed to show that this assurance was "deliberately" false, she could not satisfy the requirements for equitable tolling:

> [A]s explained above, Washington courts have applied the false assurances prong in narrow circumstances and have appeared to require a showing of the defendant's deliberate attempt to mislead the plaintiff. *Price*, 4 Wn. App.2d at 76. Therefore, the response *may* have turned out to be objectively false, but given that there is no evidence the City knew it was false and deliberately mislead Earl when it made the statement, the closing letter was not on its own a "false assurance" for the purposes of equitable tolling.

App. A-16 (italics in original).

2. **In *Fowler* and other cases, this Court has made clear that there is no such limitation on the applicability of equitable tolling.**

In her opening brief of appellant, Earl pointed out that "[i]n *Millay v. Cam,* 135 Wn.2d 193, 206, 955 P.2d 791 (1998)," the Supreme Court held that equitable tolling applies "upon a finding of fraud, oppression, *or other equitable circumstances.*" (Italics added). She also noted that although *Millay* mentioned "bad faith, deception or false assurances" as circumstances to which equitable tolling applies, this Court held equitable tolling applied even though none of those specified predicates were present.[1] Earl further noted that Division Two of the Court of Appeals had itself applied equitable tolling in a case where there had not been any bad faith, deception or false assurances. In *State v. Littlefair*, 112 Wn. App. 749, 762, 51 P.3d 116 (2002),

[1] In *Millay* the defendant "created confusion regarding the amount due" on a mortgage. *Id*. at 205. Despite the fact that there was no showing that the defendant *deliberately* created such confusion or that the defendant *intended* to mislead the plaintiff, this Court held that equitable tolling applied.

the court which accepted the defendant's guilty plea simply *failed* to tell him that he was pleading guilty to an offense for which deportation was a possible consequence. No one suggested that the plea judge, or anyone else, had acted with any *deliberate* intent to mislead the defendant. Nevertheless, equitable tolling applied because "due to a series of mistakes by his attorney, the court, and arguably the INS," the defendant did not know he would likely be deported if he plead guilty.

The *Millay* opinion states, "this court allows equitable tolling when justice requires." 135 Wn.2d at 206. The Court of Appeals ignored this statement, as well as the statement that equitable tolling applies "upon a finding of fraud, oppression, or other equitable circumstances." The Court below ignored these statements in *Millay* and the holding of that case that equitable tolling did apply despite the absence of any showing of a deliberate intent to mislead the plaintiff.

In her opening brief, Earl explicitly advised the Court of Appeals that the case of *In re Fowler*, 9 Wn. App.2d 158, 442

P.3d 647 (2019), *rev. granted*, 195 Wn.2d 1007 (2020) was pending before this Court.[2] Earl told the Court of Appeals that the issue in *Fowler* was whether equitable tolling applied in situations where the plaintiff received a false assurance which was made *without* any intent to mislead anyone.

Later, in her Reply Brief, Earl told the Court of Appeals that *Fowler* had been decided and that this Court had *rejected* the contention that the predicates for application of equitable tolling were limited to the three previously mentioned (bad faith, deception or false assurances).

In *Fowler* the Petitioner's former attorney assured him that he was preparing and would file a timely personal restraint petition. But that was not true, and the attorney never filed a PRP. There was no suggestion, however, that Fowler's attorney was acting in bad faith, or that he was *intentionally* deceiving Fowler. The attorney simply made a promise that he did not keep.

---

[2] *Br. of Appellant*, at 23, n. 12.

Subsequently, Fowler got a new attorney who filed a PRP and argued that even though it was not filed within the one-year statute of limitations, the assurances that Fowler had been given by his former attorney triggered equitable tolling. This Court agreed with Fowler and rejected the very same argument that the Court of Appeals accepted in this case. This Court said:

> ***We see no reason for such a limitation***. Such a limitation would undermine the purpose of equitable tolling – to ensure the fundamental fairness when extraordinary circumstances have stood in a petitioner's way. ***Accordingly, the Court of Appeals erred when it stated that "Washington courts require bad faith, deception, or false assurances caused by the opposing party or the court" in order to justify equitable tolling.***

Fowler, 197 Wn.2d at 55. (emphasis added). This Court held that Fowler reasonably relied on his attorney's assurance that he was preparing a timely PRP for him and that was enough to allow equitable tolling. Here, Earl reasonably relied on Tacoma's assurance that it had given her all documents responsive to her PRA request regarding the death of her daughter. There is no material difference. The Court of Appeals' decision that

equitable tolling does not apply because Earl cannot show that Tacoma *knew* that it was lying and intended to mislead her simply flies in the face of *Fowler* (and *Millay* and *Littlefair).*

The Court below never even mentioned *Fowler*. Ordinarily, one might assume this was simply an oversight. But that is not possible in this case. *Fowler* was drawn to the Court of Appeals' attention in both of Earl's briefs, and was explicitly mentioned by counsel during oral argument. App. F-11. The Court of Appeals simply refused to apply *Fowler* and premised its decision on a proposition that cannot be squared with *Fowler*..

B. The decision below is in conflict with *Thompson v. Wilson*. RAP 13.4(b)(2). Even assuming that Tacoma's false assurance must have been *deliberately* false in order for equitable tolling to apply, there is circumstantial evidence of that in this case.

Even assuming, *arguendo*, that it was incumbent upon Earl to show that Tacoma's assurance that it had given her everything responsive to her PRA request was deliberately false, there was evidence from which a trier of fact could easily find deliberate falseness and/or bad faith. Earl pointed to *Thompson*

v. Wilson, 142 Wn. App. 803, 175 P.3d 1149 (2008), another case where a mother was trying to get information about her adult daughter's death. In *Thompson* the mother believed that her daughter had been murdered by her husband, but the county coroner had ruled that her death was a suicide. The mother attempted to exercise her statutory right to meet with the coroner. The coroner repeatedly promised to meet with her, but he never did. By the time the mother filed suit to enforce her statutory right the ordinary statute of limitations period had expired. The appellate court, however, ruled that because the coroner "misled her" and he did "not dispute [the mother's] assertions of deception and misleading assurance," *id*. at 814, a rational fact finder could conclude that the coroner acted with deliberate deception. Therefore, the *Thompson* Court ruled that equitable tolling applied because there was either deception or false assurances. In this case the mother, Lisa Earl, tried to get all records relating to her daughter's death, which she believed was an unjustifiable murder committed by a police officer. She was

assured that she had been giving every document "responsive" to her request. The Court of Appeals purported to distinguish *Thompson* on the ground that Earl "present[ed] no evidence which ... would lead a reasonable trier of fact to conclude that the City deliberately made false, misleading assurances to her, thereby causing the limitations period to lapse." App. A-18.

For over a decade it has been established that an agency has the burden of proving beyond a material doubt that it conducted a reasonable search. *Neighborhood Alliance v. Spokane*, 172 Wn.2d 702, 720-21, 261 P.3d 119 (2011); *West v. City of Tacoma*, 12 Wn. App.2d 45, 80, 456 P.3d 894 (2020). Here, the agency represented to Earl that it had acted in good faith and that it had conducted a reasonable search. The record, however, shows that nothing could be further from the truth.

Earl presented undisputed evidence that shows that the Tacoma deliberately allows the SWAT commander to decide where to keep SWAT team police records. Thus, Tacoma *does* act in "bad faith." App. F-6. Tacoma allows the commander to

decide *not* to integrate SWAT records into the regular computerized electronic records database, and to put them instead into a file drawer in a separate building where the SWAT team has its office. Thus, Tacoma enables the commander to keep SWAT records where they are not likely to be found. CP 388-89; App. F-10 ("You can't leave it up to police departments to be able to sort of offshore" a SWAT record "where it can't be found.").

Moreover, in its interrogatory answers the City conceded that it does not know who actually searched for the requested records *or where they searched*. The City lamely asserts that whoever conducted the search "would have searched both electronic and paper records within their control where responsive records would have reasonably been thought to be located." CP 514. This assertion does not even come close to satisfying its burden of proof under *Neighborhood Alliance*. Here the City never claimed that it had searched the SWAT office files. Nasworthy acknowledged that no one ever asked him

to search for SWAT team records and he never did such a search. But when the Earl sued the City for civil rights violations the City had no trouble locating the SWAT Command Post Log and using it to support its defense.

These facts clearly do permit a rational fact-finder to conclude that the City *deliberately* gave a false assurance to Lisa Earl. Thus, even if the *Fowler* case had never been decided; and even if some evidence of deliberate deception was required, Lisa Earl *did* present such evidence. Thus, her case should never have been dismissed on summary judgment.

C. The decision below is in direct conflict with this Court's decision in *U.S. Oil.* RAP 13.4(b)(1). Application of the discovery rule is "dictated ... where the plaintiff lacks the means or ability to ascertain that a wrong has been committed." 96 Wn.2d at 93.

This Court has long recognized that "in some circumstances where the plaintiff is unaware of the harm [she has] sustained, a literal application of the statute of limitations could result in grave injustice. To avoid this injustice, courts have applied a discovery rule of accrual, under which the cause

of action accrues when the plaintiff discovers, or in the reasonable exercise of diligence should discover, the elements of the cause of action." *Virginia Limited Partnership v. Vertecs*, 158 Wn.2d 566, 575-76, 146 P.3d 423 (2006). For example in *Ruth v. Dight*, 75 Wn.2d 660, 665, 453 P.2d 631 (1969), 22 years after surgery a patient discovered her surgeon had left a sponge in her body. Although the statute of limitations was two years, this Court held that it would be inequitable to cut off the patient's legal remedies after two years because she had no way of knowing of the doctor's malpractice.

Because it is not possible for a patient to see inside her body, a patient cannot be faulted for failing to discover that she has suffered such an actionable wrong until after the limitations period has expired. Similarly, a records requester cannot go and search an agency's files and computers for records. She cannot be faulted for failing to know that the agency has failed to disclose a properly requested record, or failed to conduct a reasonably adequate search for requested records. In this case,

as in *Ruth*, the relevant information was located in a place that was impossible for the plaintiff to search. In both cases, the discovery rule should – and does – apply.

However, relying on the prior Division Two decision in *Dotson v. Pierce County*, 13 Wn. App.2d 455, 464 P.3d 563 (2020), the Court below held that the discovery rule does not apply to PRA cases. In oral argument, Earl asserted that the Court should not follow *Dotson* because it was wrongly decided. App. F-8. Judge Maxa acknowledged that the panel was not bound by *Dotson*, but commented, "you know, we like our colleagues. We try not to overrule them or disregard them without reason." App. F-8. Earl responded that *Dotson* should not be followed because it conflicted with *U.S. Oil*. There this Court held that "unfairness of precluding justified causes of action ... *dictated* the application of the [discovery] rule where the plaintiff lacks the means or ability to ascertain that a wrong has been committed." 96 Wn.2d at 93 (italics added).

In *U.S. Oil*, the plaintiff had no way of knowing that the

defendant had discharged pollutants into a river. The defendant was under a legal obligation to "self-report" such discharges, but it failed to do so. After the passage of two years, the plaintiff learned of the discharge and sued the company to recover statutory penalties. If the statute of limitations was deemed triggered by the discharge, then the suit was time-barred because the plaintiff did not learn of the discharge until well after the statute of limitations had expired. This Court recognized the inequity of requiring the plaintiff to bring suit before it knew of the unlawful discharges and noted that such a rule would allow the company to benefit from its unlawful failure to report the discharge. This Court also recognized the absurdity of assuming that the legislature wanted to bar plaintiffs from bringing suits in circumstances "where the plaintiff lacks the means or ability to ascertain that a wrong has been committed." 96 Wn.2d at 93. Accordingly, this Court held that application of the discovery rule was "dictated" and thus the plaintiff's suit was not time-barred. Earl cited this passage from *U.S. Oil* to the Court of

Appeals:

> In each [case where it was applied], had the discovery rule not been applied, the plaintiff would have been denied a meaningful opportunity to bring a warranted cause of action. In each, the premise underlying all limitations statutes was not applicable. Statutes of limitation operate upon the premise that "when an adult person has a justiciable grievance, he usually knows it and the law affords him ample opportunity to assert it in the courts."
>
> ***That premise is also inapplicable where the plaintiff must rely on the defendant's self-reporting.*** Where self-reporting is involved, the probability increases that the plaintiff will be unaware of any cause of action, for ***the defendant has an incentive not to report it.*** Like the other cases which have employed the rule, this is a case where if the rule were not applied the plaintiff would be denied a meaningful opportunity to bring a suit. Like those plaintiffs, this plaintiff lacks the means and resources to detect wrongs within the applicable limitation period. ***Not applying the rule in this case would penalize the plaintiff and reward the clever defendant. Neither the purpose for statutes of limitations nor justice is served when the statute runs while the information concerning the injury is in the defendant's hands***.

U.S. Oil, at 93-94 (emphasis added).

Tacoma argued that *U.S. Oil* was not a "tort case" and that the discovery rule only applies to tort cases "where an individual

has been harmed." App. F-19. Since "[a] PRA claim is not a tort claim" and since "the purpose" of a PRA action was merely to impose "a penalty against an agency for not complying with a statute," Tacoma argued that Earl's case was distinguishable from *U.S. Oil.* App. F-20. But Earl pointed out that *U.S. Oil* also was "not a tort case," also was not a case for damages, and was instead "[a] statutory cause of action for penalties," and thus was "exactly the same" kind of case as Earl's PRA case. App. F-24. In fact, *U.S. Oil* explicitly holds, "[w]e ... adopt the discovery rule for actions brought by DOE to collect penalties for unlawful waste discharges." *Id*. at 94. Earl argued that the panel was obligated to disavow *Dotson* and to follow this Court's binding decision in *U.S. Oil*. *See* App. F-5, *ll.* 4-13; App. F-7.

Instead, without even mentioning *U.S. Oil*, the Court below held, "Following *Dotson*, we hold that the discovery rule does not apply to PRA actions because the legislature has clearly specified the event that starts the running of the limitations period" (the date of the agency's final response to a PRA

request). App. A-11. But this reasoning simply ignores the decision in *U.S. Oil*. There is no reason to think that the Legislature wanted to enable government agencies to avoid compliance with the PRA and to escape penalties for PRA violations by successfully concealing records for more than one year.

D. This Court should grant review to decide an issue of substantial public interest: Whether the discovery rule applies to PRA cases because records requesters must rely on government agencies to accurately "self-report" what records they have and what places they have searched for them. (RAP 13.4(b)(4).

In *U.S. Oil*, the trial court held the discovery rule applied. The Court of Appeals then held that it did not. Finally, this Court reversed the Court of Appeals and agreed with the trial court. The following passage from *U.S. Oil* discusses the necessity of applying the discovery rule to make sure the pollution laws are obeyed. The same principle applies to compliance with the PRA:

> The Court of Appeals noted that the legislature specifically enacted a discovery rule in RCW 4.16.080(6). Thus, the court reasoned that had the legislature desired such a rule for the governing

> statute in this case, it would have enacted one.
>
> ***The waste regulatory scheme, however, mandates the application of a discovery rule.*** See RCW 90.48. DOE must rely on industry reporting to discovery violations. Since U.S. Oil did not properly report its discharges, discovery of the violations was delayed until DOE suspected that monitoring reports were inaccurate and investigated. ***Without a discovery rule, industries can discharge pollutants, and by failing to report the violation, can escape penalties***.

U.S. Oil, at 92 (emphasis added). Similarly, records requesters "must rely" on government agencies both to honestly report what records they have, and to conduct an adequate search for records responsive to a PRA request. "Without a discovery rule," Washington agencies, like police departments, "can escape [PRA] penalties" either by withholding responsive records, or by conducting a woefully incomplete and unreasonably cursory search for them. Here, as in *U.S. Oil*, the Court of Appeals erred in refusing to apply the discovery rule.

E. The decision below eviscerates the Public Records Act.

The result of the Court of Appeals' decision is that even if police agencies fail to disclose documents pertaining to police

officer killings of Washington citizens, so long as the records requester does not find out that such undisclosed documents exist, the agencies they will escape all liability for violating the PRA. As Judge Maxa recognized, if the discovery rule does not apply to the PRA, then police agencies do literally "get away with murder" so long as they succeed in deceiving records requesters for a period of more than one year. App. F-17-19.

Police agencies can decide to store sensitive records, like SWAT team records, separate and apart from all other records. Or they can simply fail to search in the places where such records are kept. Records requesters have no way of checking to see where the police looked for records, and no way of determining whether the search conducted was a reasonable search or a cursory and patently inadequate search. If the Court of Appeals' decision stands, then so long as the existence of a responsive record does not come to light within one year, even the most abysmally inadequate and negligently conducted records search will escape PRA judicial review and PRA liability. The Court of

Appeals holds that none of this matters. It's just "too bad." *See* App. F-22:7-10.

Tacoma has frequently been sued for the actions of its SWAT team which has killed and injured several people. *See, e.g.*, *Seaman v. Karr*, 114 Wn. App. 665, 59 P.3d 701 (2002); *Mancini v. Tacoma*, 188 Wn. App. 1006 (2015); *Estate of Cunningham v. Tacoma,* 2018 WL 1182239. If the police can avoid records disclosure for one day longer than one year from the date of a final response letter that falsely states that all responsive records have been produced, then they can avoid liability for the most egregious police misconduct.

VI. CONCLUSION

Failure to grant review in this case will allow police departments to violate the PRA at will. If police can get away with noncompliance with the PRA, they can also greatly improve their chances of – literally – getting away with murder. And if panels of the Court of Appeals can get away with simply ignoring the decisions of this Court which are called to their attention, then

the citizens will lose confidence in the courts as well.

This document contains 4,965 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 5th day of August, 2022.

CARNEY BADLEY SPELLMAN, P.S.

By *s/James E. Lobsenz*
James E. Lobsenz WSBA #8787
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ ESERVICE to the following:

Attorneys for Respondent
Michelle N. Yotter
747 Market Street Room 1120
Tacoma, WA 98402-3767
myotter@cityoftacoma.org

Attorneys for Amicus Curiae Washington Coalition for Open Government
Michele Earl-Hubbard
Allied Law Group LLC
P.O. Box 33644
Seattle, WA 98133
michele@alliedlawgroup.com

Judith Endejan
5109 23rd Ave W.
Everett, WA 98203-1526
jendejan@gmail.com

Attorneys for Amicus Curiae American Civil Liberties Union of Washington, Confederated Tribes and Bands of the Yakama Nation, Center for Indian Law and Policy, Center for Civil and Human Rights, Fred T. Korematsu Center for Law and Equity, Legal Voice, and Chief Seattle Club

ACLU-WA Cooperating Counsel
Bree R. Black Horse, WSBA #47803
Rob Roy Smith, WSBA # 33798
Kilpatrick Townsend & Stockton
1420 Fifth Avenue, Suite 3700
Seattle, WA 98101
BRBlackhorse@kilpatricktownsend.com
RRSmith@kilpatricktownsend.com

Jaime Cuevas, Jr., WBSA #51108
61 W Wapato, Rd., Wapato, WA 98951
Jr@ramseycompanies.com

ACLU OF WASHINGTON FOUNDATION
Yvonne Chin, WSBA #50389
Nancy Talner, WSBA #11196
Antoinette Davis, WSBA # 29821
PO Box 2728, Seattle, WA 98111
ychin@aclu-wa.org
talner@aclu-wa.org
tdavis@aclu-wa.org

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION

YAKAMA NATION OFFICE OF LEGAL COUNSEL
Derek Red Arrow Frank, WSBA #55090
Ethan Jones, WSBA #46911
P.O. BOX 150, Toppenish, WA 98948
Derek@yakamanation-olc.org

CENTER FOR INDIAN LAW & POLICY
AT SEATTLE UNIVERSITY SCHOOL OF LAW
Brooke Pinkham, WSBA #39865
901 12th Avenue, Seattle, WA 98122-1090
pinkhamb@seattleu.edu

Center for Civilian and Human Rights at Gonzaga Law
CIVIL AND HUMAN RIGHTS ADVOCACY CLINIC
GONZAGA UNIVERSITY SCHOOL OF LAW
Jason A. Gillmer, WSBA #57851
Mary Patricia Treuthart, PA Bar ID #29088
Brooks Holland, NY Reg. #2696443
721 N. Cincinnati St., P.O. Box 3528
Spokane, WA 99220
gillmer@gonzaga.edu
treuthart@gonzaga.edu
hollandb@gonzaga.edu

FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY
Robert S. Chang, WSBA #44083
Ronald A. Peterson Law Clinic
Seattle University School of Law
1112 East Columbia St., Seattle, WA 98122
changro@seattleu.edu

LEGAL VOICE
Catherine West, WSBA #35353
907 Pine Street, Ste. 500, Seattle, WA 98101
cwest@legalvoice.org

DATED this 5th day of August, 2022.

s/Deborah A. Groth
Deborah A. Groth, Legal Assistant

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

July 12, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LISA EARL, Appellant, v. CITY OF TACOMA, a political subdivision of Washington State, Respondent.	No. 56160-3-II UNPUBLISHED OPINION

VELJACIC, J. — A Tacoma police officer shot and killed Lisa Earl's daughter, Jacqueline Salyers, in January 2016. Earl made a request under the Public Records Act (PRA), chapter 42.56 RCW, to the City of Tacoma for records related to her daughter's death. The City disclosed records to Earl on an installment basis and, after providing Earl with the requested documents, issued a letter closing the request.

In the course of separate litigation, the City produced a record that was not disclosed in response to Earl's PRA request. Almost three years after the City's closing letter, Earl filed this action contending that the City violated the PRA by failing to conduct an adequate search and by failing to disclose responsive records. She also asked the court to enjoin the Tacoma Police Department (TPD) from keeping certain records separate and apart from other police records. Earl and the City filed cross-motions for summary judgment. The trial court ruled that Earl's action was untimely and granted the City's motion for summary judgment. Because the trial court

dismissed Earl's PRA claims on statute of limitations grounds, it did not address her motion for partial summary judgment.

Earl appeals the trial court's order granting the City's motion for summary judgment dismissal of her claims. Earl argues that the trial court erred by dismissing her PRA claims because the discovery rule and equitable tolling applied to make her complaint timely. She also asks us to order the trial court to grant her motion for partial summary judgment and hold that the City violated the PRA. She also requests attorney fees and costs on appeal.

Because the discovery rule does not apply to PRA cases, and because Earl fails to meet her burden of proof for equitable tolling, we affirm the trial court's order dismissing Earl's PRA claims as time barred under RCW 42.56.550(6). We also deny Earl's request for attorney fees and costs on appeal because she is not the prevailing party.

FACTS

I. BACKGROUND

On January 28, 2016, Tacoma police officers Scott Campbell and Aaron Joseph drove to the 3300 block of Sawyer Street in Tacoma because they received a tip concerning the location of Kenneth Wright. The informant also provided information on a vehicle that Wright was recently seen driving. The TPD was on a mission to locate Wright because he had a warrant out for his arrest for armed robbery, among other crimes.

The officers arrived at the Sawyer Street location at approximately 11:45 p.m. Once there, Campbell spotted a vehicle backed into a parking spot that matched the informant's tip. Campbell recognized Wright sitting inside the passenger side of the vehicle. Salyers was in the driver's seat.

Joseph stopped the patrol vehicle in front of the suspect vehicle. Both officers exited the patrol vehicle, drew their firearms, and moved towards the suspect vehicle. At some point, Salyers began to drive forward. Campbell stated that he was about 5-10 feet at a 45 degree angle from the front passenger side of the vehicle when it began to accelerate. Campbell then fired eight shots, killing Salyers.

After Campbell stopped shooting, the vehicle rolled to a stop. Wright exited the vehicle with a rifle and ran down an alley. The officers did not chase Wright because they were unsure if he took up a defensive position in the dark alley or if he continued fleeing the scene.

Shortly after midnight, the TPD called out its Special Weapons and Tactics (SWAT) team to search for Wright. Jack Nasworthy was one of the responding SWAT officers. Nasworthy's role that night was to serve on the Command Post Element, which provides intelligence to the other SWAT elements through radio and coordinates tactical operations.

Nasworthy learned that there was a pole camera installed at the 3300 block of Sawyer Street. He believed that the camera captured footage which could narrow down Wright's possible location. The Sawyer Street camera was installed on January 22 and appeared to be focused on the area where the shooting occurred. The camera is a motion activated device meaning that it will only record footage if some movement activates the recording function.

Nasworthy attempted to log into the View Commander system[1] to access the Sawyer Street pole camera. He was unable to log in with his Criminal Investigations Division (CID) password because the camera was a Special Investigations Division (SID) asset. He called Scott Shafner, who was also a responding SWAT officer that night, and obtained his login information. Because

[1] "View Commander" is the name of the software program that houses all camera footage, live or recorded, and controls access to any camera that was set up under its program.

Shafner was an administrator on the View Commander system, Nasworthy was able to gain access to the Sawyer Street camera. Only administrators have editing privileges for the View Commander system.

Once he had accessed View Commander, Nasworthy stated that he checked the live feed for the Sawyer Street camera. He stated that he was unable to see anything because of the darkness. Nasworthy then checked for a recording of the shooting, but stated that he could not find any recorded information.

Wright ended up escaping that night. He was arrested approximately two weeks later without incident.

II. EARL'S 2016 PRA REQUEST

The following morning, on January 29, Earl learned that a Tacoma police officer had shot and killed her daughter, Salyers. Earl wanted to know why the officer killed her daughter.

On June 30, Earl, through counsel, submitted a comprehensive, 16 item public records request to the City. Relevant here, Earl requested a copy of the following records:

> 1. All documents related to the shooting death of Jacqueline Salyers on January 27-28, 2016, including but not limited to the complete investigative report, and any and all follow-up reports, investigation materials, witness statements and officer's notes, photographs, DXF/CAD files, measurements, physical evidence, video/audio, dash cams, and the involved vehicle including any data downloads from that vehicle;
>
> 2. All documents (including photographs and video) related to the surveillance camera and the location of that surveillance camera identified as the Axis 214 camera installed in the covert box that was deployed at 3314 S. Sawyer.

Clerk's Papers (CP) at 255.

The City produced responsive records in two installments. The first installment was disclosed on October 7 and the second installment was disclosed on November 8. The records produced included reports written by Tacoma police officers and other reports that referred to the SWAT team's activities on the night Salyers was killed.

On November 23, the City closed Earl's request. The closing letter stated, "After searching further, it was determined there are no other records responsive to your request. As such, your request . . . is now considered closed. If you believe there are other records responsive, or this does not meet the scope of your request, please contact me at your earliest convenience." CP at 556. Earl did not respond to this letter.

III. THE COMMAND POST LOG

On April 28, 2017, Earl, Salyers' minor children, and the Estate of Jacqueline Salyers (hereinafter collectively referenced as "Earl") filed a complaint in the Western District of Washington against Campbell and the City based on the shooting death of Salyers. Specifically, Earl asserted claims of excessive force, a violation of substantive due process rights, and wrongful death.

In that case, Earl filed a motion to reopen discovery because she claimed that Nasworthy deleted a video recording of the shooting. On September 25, 2018, the City filed an affidavit from Nasworthy in response to Earl's motion. Nasworthy declared that he did not delete any video footage from the pole camera on Sawyer Street. As a member of the Command Post Element, Nasworthy stated that his responsibility on the night of the shooting was to prepare the "Command Post Log," which was attached to his affidavit. CP at 224.

The Command Post Log is a three-page document that compiles information pertaining to the SWAT team's movements. Relevant here, the first few lines of this document read,

> CASE # – 1602801965
> DATE – 1/29/2016
> LOCATION – 3300 Sawyer/3326 Sawyer susp address
> SUBJECT – Kenneth Wright
> SITUATION – Officer Involved Shooting

CP at 227. Sergeant Peter Habib, a responding SWAT officer on the night of the shooting, stated that the phrase "officer-involved shooting" means that "some officer discharged their firearm." CP at 659. The TPD case number that appears on the Command Post Log (No. 1602801965) is the same case number that appears on the police reports furnished to Earl in response to her 2016 PRA request. This was the only information in that three-page document that related to the shooting of Salyers.

However, the Command Post Log was not disclosed to Earl in her 2016 PRA request. Earl declared that "[she] believed the City when it said there were no other records responsive to my request." CP at 626. Earl also stated that "[t]he first time [she] ever knew that such a document existed was sometime after September 25, 2018." CP at 626. Earl further stated that "[i]f I had known that there was a SWAT Team Command Post Log that documented the activities of the SWAT Team on January 29, 2016, I would have objected to Tacoma's failure to give me a copy of it pursuant to my [PRA] request." CP at 626. Thus, the City's failure to disclose the Command Post Log in response to Earl's 2016 PRA request is at issue in this case.

IV. PROCEDURAL HISTORY

On August 29, 2019, Earl filed a complaint in Pierce County Superior Court alleging that the City violated the PRA. Earl filed a motion for partial summary judgment arguing that the City violated the PRA (1) by failing to disclose the Command Post Log and (2) by failing to perform an adequate search for responsive records. She also asked the court to enjoin the City from keeping SWAT team records separate and apart from other TPD records.

The City also filed a motion for summary judgment, arguing that Earl's complaint was barred by the PRA's one year statute of limitations. In response, Earl argued that the statute of limitations should be equitably tolled because the City falsely assured her that it possessed no other responsive records in its closing letter. Earl also contended that the discovery rule postponed the date that her PRA cause of action began to accrue to September 25, 2018, thus making her complaint timely.

The trial court agreed with the City and ruled that Earl's action was barred by the PRA's one year statute of limitations. It did not address the merits of Earl's motion for partial summary judgment. The court then issued an order granting the City's motion for summary judgment, denying Earl's motion for partial summary judgment, and dismissed Earl's PRA claims and request for injunctive relief.

Earl appeals the order granting the City's motion for summary judgment dismissal of her claims. She also argues that we should hold that the City violated the PRA, effectively asking us to make an initial ruling on her motion for partial summary judgment.

ANALYSIS[2]

Earl and the amici argue that the trial court erred by granting the City's motion for summary judgment because her action was timely filed. We disagree and hold that Earl's action was time barred.

[2] Amicus ACLU appears to advance policy arguments, based on studies demonstrating the historical and enduring systemic violence perpetrated against Native people by government officials, to support its contention that the discovery rule and equitable tolling should apply to PRA cases. While we recognize and are sensitive to this important social justice issue, such "[p]ublic policy arguments 'are more properly addressed to the Legislature, not to the courts.'" *McCaulley v. Dep't of Labor & Indus.*, 5 Wn. App. 2d 304, 316, 424 P.3d 221 (2018) (quoting *Blomster v. Nordstrom, Inc.*, 103 Wn. App. 252, 258, 11 P.3d 883 (2000)).

I. STANDARD OF REVIEW

"The PRA is a 'strongly worded mandate for broad disclosure of public records.'" *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 431, 327 P.3d 600 (2013) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). It requires governmental agencies to "'make available for public inspection and copying all public records, unless the record falls within the specific exemptions of [the PRA].'" *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 535, 199 P.3d 393 (2009) (quoting RCW 42.56.070(1)).

"The PRA's primary purpose is to foster governmental transparency and accountability by making public records available to Washington's citizens." *John Doe A v. Wash. State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63 (2016). The PRA mandates that its provisions "shall be liberally construed" to promote full access to public records. RCW 42.56.030; *John Doe A*, 185 Wn.2d at 371. We review challenges to agency actions under the PRA de novo. RCW 42.56.550(3).

"Grants of summary judgment are reviewed de novo, and we engage in the same inquiry as the trial court." *Neigh. All. of Spokane County v. Spokane County*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011). Summary judgment is appropriate "if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). "We review all evidence and reasonable inferences in the light most favorable to the nonmoving party and consider only the evidence that was brought to the trial court's attention." *O'Dea v. City of Tacoma*, 19 Wn. App. 2d 67, 79, 493 P.3d 1245 (2021).

II. STATUTE OF LIMITATIONS

Whether a claim is time barred is a legal question we review de novo. *Kelly v. Allainz Life Ins. Co. of N. Am.*, 178 Wn. App. 395, 399, 314 P.3d 755 (2013).

The PRA establishes a one year statute of limitations for judicial review of agency actions. RCW 42.56.550(6) provides that "[a]ctions under [the PRA] 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." "Our Supreme Court has held that this section reveals the legislature's intent to impose a one year statute of limitations 'beginning on an agency's final, definitive response to a public records request.'" *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 470, 464 P.3d 563 (quoting *Belenski v. Jefferson County*, 186 Wn.2d 452, 460, 378 P.3d 176 (2016)), *review denied*, 196 Wn.2d 1018 (2020). This final response includes a letter sent to the requester notifying him or her that the request has been closed. *Dotson*, 13 Wn. App. 2d at 471.

Amicus ACLU argues that the trial court erred by concluding that the statute of limitations began to run on the date of the City's closing letter, rather than the date the City disclosed the Command Post Log in Earl's federal lawsuit. Specifically, the ALCU contends that the City's disclosure of that document "equates to the agency's last production of a record on a partial or installment basis," thus making Earl's complaint timely. Br. of Amicus Curiae (ACLU et al) at 16. However, we rejected a similar argument in *Dotson*, 13 Wn. App. 2d at 470-72. So too here, this argument fails.

Here, the City sent a letter closing Earl's request on November 23, 2016. This action comprised a final, definitive response to Earl's request, and started the PRA's one year statute of limitations. Earl did not file her PRA complaint until August 29, 2019. Therefore, unless Earl can

show that the discovery rule applies to PRA actions or that equitable tolling applies to her case, her complaint was untimely.

III. DISCOVERY RULE

Earl and the amici argue that the statute of limitations began to run on September 25, 2018, when Earl discovered that the City had not disclosed the Command Post Log, which they contend was a responsive record to her PRA request. We reject Earl's attempt to apply the discovery rule to her PRA action.

A. Legal principles

"Under the discovery rule, a cause of action accrues when the plaintiff knew or should have known the essential elements of the cause of action." *Allen v. State*, 118 Wn.2d 753, 757-58, 826 P.2d 200 (1992) (footnote omitted). "[T]he discovery rule will postpone the running of a statute of limitations only until the time when a plaintiff, through the exercise of due diligence, should have discovered the basis for the cause of action. A cause of action will accrue on that date even if *actual* discovery did not occur until later." *Id.* at 758.

"The discovery rule does not alter the statute of limitations. It is . . . a rule for determining when a cause of action accrues and [when] the statute of limitations commences to run." *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 587, 146 P.3d 423 (2006). "[T]he discovery rule is not available where the legislature has clearly delineated the event that starts the running of the limitations period, for there is then no 'accrual' to interpret." *In re Parentage of C.S.*, 134 Wn. App. 141, 147, 139 P.3d 366 (2006); *see Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991) ("Where the statute does not specify a time at which the cause of action accrues, the general rule of law is that an action accrues when the plaintiff discovers or reasonably should discover all the essential elements of a cause of action.").

Recently, we have rejected the application of the discovery rule in PRA actions reasoning in part that, "the PRA statute of limitations contains triggering events that enable a requester to know that a cause of action has accrued, and the legislature enacted no discovery rule exception." *Dotson*, 13 Wn. App. 2d at 472.

B. The Discovery Rule Does Not Apply to PRA Actions

Following *Dotson*, we hold that the discovery rule does not apply to PRA actions because the legislature has clearly specified the event that starts the running of the limitations period in RCW 42.56.550(6), which is the agency's final, definitive response to a public records request. *Belenski*, 186 Wn.2d at 460; *C.S.*, 134 Wn. App. at 147. Therefore, the trial court did not err by declining to apply the discovery rule to Earl's cause of action.

Earl advances several arguments contending that *Dotson* incorrectly held that the discovery rule does not apply to PRA actions and that it should be overruled. We disagree with each contention.

First, Earl contends that *Dotson* incorrectly interpreted the Supreme Court's decision in *Douchette* to stand for the proposition that the discovery rule only applied to negligence actions. But *Dotson* stated no such thing. Rather, *Dotson* held in part that the discovery rule did not apply to PRA actions because RCW 42.56.550(6) specifies the time at which a requestor's cause of action accrues, which is a correct statement of the law. 13 Wn. App. 2d at 472. Accordingly, this argument fails.

Second, Earl argues that *Dotson* confuses knowledge of the law (the accrual date for a PRA cause of action) and knowledge of the facts (the fact that the government failed to disclose responsive records). Because knowledge of the law is irrelevant to the application of the discovery

rule, Earl contends that *Dotson* impermissibly conflicts with *Douchette*, and therefore, should be overruled. We disagree.

Earl points to the following language in the *Dotson* opinion:

> The discovery rule generally applies in cases where "the statute does not specify a time at which the cause of action accrues." [*Douchette*, 117 Wn.2d at 813]. However, the PRA statute of limitations contains triggering events that enable a requester to know that a cause of action has accrued, and the legislature enacted no discovery rule exception. And Dotson cites no authority for applying the discovery rule to PRA actions that, as interpreted in *Belenski*, arise under a statute that specifies the statute of limitations begins to run at the time of the agency's "final, definitive response." 186 Wn.2d at 461 []. We hold that the statute of limitations began to run in June 2016.

13 Wn. App. 2d at 472 (footnote omitted).

The language in *Douchette* that Earl alleges is conflicting states, "[t]he discovery rule does not require knowledge of the existence of a legal cause of action itself, but merely knowledge of the facts necessary to establish the elements of the claim." 117 Wn.2d at 814. There, the Supreme Court explained this to convey the well-established principle that the limitations period will begin to run under the discovery rule when a plaintiff should have discovered the salient facts of their cause of action; not when the plaintiff has actual knowledge of a legal claim. *Id*. at 814-15. Earl's reliance on this proposition fails because, while true, it has no bearing on the applicability of the discovery rule to a *statute* that specifies an accrual date for a plaintiff's cause of action.

Contrary to Earl's assertion, both *Dotson* and *Douchette* harmoniously recognize that the discovery rule generally applies in cases where the applicable statute does not specify a time at which the cause of action accrues. 117 Wn.2d at 813; 13 Wn. App. 2d at 472. Again, this is a correct statement of the law. Because these decisions are consistent with each other, we decline to overrule *Dotson* on this ground.

Third, Earl contends that *Dotson* declined to apply the discovery rule only because the appellant in that case failed to cite legal authority to support her contention that the rule applied to PRA cases. We disagree.

Contrary to Earl's contention, *Dotson* did not rest its holding on RAP 10.3. The *Dotson* court declined to apply the discovery rule to PRA cases (1) because RCW 42.56.550(6) contained triggering events that enable a requester to know that a cause of action has accrued and (2) because the appellant cited no authority for applying the discovery rule to PRA cases. 13 Wn. App. 2d at 472. Because *Dotson* did not decline to apply the discovery rule to PRA cases solely based on the appellant's failure to cite legal authority, we reject Earl's argument.

Next, Earl relies on four cases to support her contention that the discovery rule applies to PRA cases. Specifically, Earl cites to *Reed v. City of Asotin*, 917 F. Supp. 2d 1156 (E.D. Wash. 2013); *Anthony v. Mason County*, 2014 WL 1413421 (W.D. Wash. 2014); *Mahmoud v. Snohomish County*, No. 70757-4-I (Wash. Ct. App. Oct. 27. 2014) (unpublished), https://www.courts.wa.gov/opinions/pdf/707574.pdf; and *Canha v. Dep't of Corr.*, No. 73965-4-I (Wash. Ct. App. Apr. 25, 2016) (unpublished), https://www.courts.wa.gov/opinions/pdf/739654.pdf. However, these cases are inapposite because none of them recognize that the discovery rule is inapplicable to a limitations statute where the legislature specifies an accrual event for a cause of action. *C.S.*, 134 Wn. App. at 147. Accordingly, Earl's reliance on these cases fails.

We recognize that our refusal to apply the discovery rule in the context of the PRA actions will preclude claims where, as here, the requestor did not know certain records existed until years after the agency's final closing letter. However, there has been a trend toward making violations and penalties less onerous on agencies. *See* Wash. State Bar Ass'n, PUBLIC RECORDS ACT

DESKBOOK: WASHINGTON'S PUBLIC DISCLOSURE AND OPEN PUBLIC MEETINGS LAWS § 18-4. For example, the legislature has amended the PRA to eliminate the $5.00 minimum per day penalty, allowing courts to conclude no penalty, or a small penalty of less than $5.00 per day is warranted, depending on the facts. LAWS OF 2011, ch. 273 § 1(4). And the legislature has made the specific policy decision to decrease the applicable limitations period for PRA claims. LAWS OF 1973, ch. 1 § 41 (original initiative establishing six year statute of limitations); LAWS OF 2005, ch. 483 § 5 (establishing current one year statute of limitations). We are not in a position to override the legislature's stated intent.[3]

Therefore, we follow *Dotson*'s holding that the discovery rule does not apply to PRA actions because the legislature has clearly specified the event that triggers the running of the limitations period: the agency's final, definitive response to a public records request. *Belenski*, 186 Wn.2d at 460; *C.S.*, 134 Wn. App. at 147. The statute of limitations for Earl's PRA claims began to run on November 23, 2016, which was date the City closed Earl's request. Earl filed her complaint on August 29, 2019. Accordingly, Earl's complaint is barred by the PRA's one year statute of limitations unless she can show that equitable tolling applies.

[3] If the legislature disagrees and instead believes that the discovery rule should apply, it is free to legislate accordingly.

IV. EQUITABLE TOLLING

Earl and the amici argue that the statute of limitations for her PRA claims should be equitably tolled.[4] We disagree.

A. Legal Principles

"Although we give deference to the trial court's factual determinations, we review a decision of whether to grant equitable relief de novo." *Trotzer v. Vig*, 149 Wn. App. 594, 607, 203 P.3d 1056 (2009).

"Equitable tolling permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed." *Price v. Gonzalez*, 4 Wn. App. 2d 67, 75, 419 P.3d 858 (2018). "The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff." *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). Washington courts have applied the false assurances prong in narrow circumstances and have appeared to require a showing that the defendant "made a deliberate attempt to mislead." *Price*, 4 Wn. App. 2d at 76. Furthermore, "[i]n Washington equitable tolling is appropriate when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations." *Millay*, 135 Wn.2d at 206.

"Courts typically permit equitable tolling to occur only sparingly, and should not extend it to a garden variety claim of excusable neglect." *Price*, 4 Wn. App. 2d at 76. "The party asserting

[4] The ACLU also argues that the doctrine of equitable estoppel applies to toll Earl's PRA claims. But equitable estoppel is not the appropriate test for tolling the statute of limitations. Rather, equitable estoppel works to prohibit a defendant from raising a statute of limitations defense when they made representations or promises to perform which lulled the plaintiff into delaying timely action. *Peterson v. Groves*, 111 Wn. App. 306, 310-11, 44 P.3d 894 (2002). Here, Earl does not dispute that the City can raise the defense; rather, she contends the limitations period was tolled. Thus, this argument fails.

that equitable tolling should apply bears the burden of proof." *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 379, 223 P.3d 1172 (2009).

B. Equitable Tolling Does Not Apply Here

Earl does not allege bad faith or deception. Instead, Earl and the amici argue that the first element of equitable tolling is met because the City made a false assurance that it possessed no other responsive records to her request in its closing letter. We disagree with the application of equitable tolling here because Earl fails to meet her burden of proof.

Here, the City closed Earl's PRA request on November 23, 2016, stating "[a]fter searching further, it was determined there are no other records responsive to your request. As such, your request . . . is now considered closed. If you believe there are other records responsive, or this does not meet the scope of your request, please contact me at your earliest convenience." CP at 556. But on September 25, 2018, the City disclosed the Command Post Log in the course of separate litigation.

Even assuming, without deciding, that the Command Post Log was responsive to her request, Earl presents no evidence to suggest that the City made deliberately false, misleading assurances which caused the one year limitations period to lapse. In her reply brief, Earl appears to argue that it is irrelevant as to whether the City's closing letter was "*deliberately* false." Reply Br. of Appellant at 13. But, as explained above, Washington courts have applied the false assurances prong in narrow circumstances and have appeared to require a showing of the defendant's deliberate attempt to mislead the plaintiff. *Price*, 4 Wn. App. 2d at 76. Therefore, the response *may* have turned out to be objectively false, but given that there is no evidence the City knew it was false and deliberately mislead Earl when it made the statement, the closing letter was not on its own a "false assurance" for the purposes of equitable tolling.

Such a showing was made by the requestor in *Belenski*. In that case, Belenski sent the County a PRA request asking to inspect the Internet Access Logs (IALs) from February 1, 2010 to September 27, 2010. *Belenski*, 186 Wn.2d at 455. On October 5, 2010, Belenski received a response stating that "the County has no responsive records." *Id*. Belenski explained that he was confused by the County's response because he had requested and received IAL data from the County in the past. *Id*. Eventually, Belenski discovered (through a separate public records response) e-mails between county employees sent shortly after his request admitting that the IALs existed during the relevant time period of Belenski's PRA request, but suggesting the County need not provide them because they are not "natively viewable" and would need to be "pulled out of a database and generated in a human readable format." *Id*. at 455-56. Belenski then filed a PRA complaint on November 19, 2012, which was well past the one year statute of limitations. *Id*. at 456. Because there were remaining factual issues concerning Belenski's diligence in pursuing his PRA claims, the Supreme Court remanded to the trial court to determine whether the doctrine of equitable tolling applied to toll the statute of limitations in that case. *Id*. at 461-62.

Requiring a PRA requestor to present evidence of an agency's deliberately false, misleading assurances will guarantee that the equitable tolling doctrine would be used "sparingly." *Price*, 4 Wn. App. 2d at 76. To hold otherwise would mean the statute of limitations would be tolled in every case where a requestor later obtains copies of records the agency claimed it did not

possess. That would not be sparing use of the doctrine. Therefore, the fact that Earl later received an alleged responsive record is not, by itself, sufficient to toll the one year statute of limitations.[5]

Earl contends that her case is akin to *Thompson v. Wilson*, 142 Wn. App. 803, 175 P.3d 1149 (2008), to support her argument that equitable tolling should apply here. We disagree.

In *Thompson*, the plaintiff repeatedly tried to meet with the defendant (the county coroner) to discuss the cause of her daughter's death, but when he finally agreed to meet with her, he misled her and only then did she seek judicial review. *Id*. at 814. The plaintiff asserted that defendant's actions caused the limitation period to lapse and the defendant "[did] not dispute these assertions of deception and misleading assurances." *Id*. Accordingly, we held that the limitations period was equitably tolled and commenced upon the defendant's good faith compliance with the statute at issue, which required the coroner to meet with the deceased's family upon request. *Id*. at 814-15.

Here, unlike *Thompson*, Earl presents no evidence which, when viewed in the light most favorable to her, would lead a reasonable trier of fact to conclude that the City deliberately made false, misleading assurances to her, thereby causing the limitations period to lapse. Therefore, Earl's reliance on *Thompson* fails.

Courts should apply the equitable tolling doctrine sparingly. Earl has the burden to show that equitable tolling applies. Earl fails to meet her burden of proof because, even considering the evidence in the light most favorable to her, she fails to show any evidence that the City made deliberately false, misleading assurances when it closed her PRA request without providing the

[5] This reasoning is consistent with Division One's unpublished decision in *Strickland v. Pierce County*, No. 75203-1-I (Wash. Ct. App. Jan. 29, 2018) (unpublished), http://www.courts.wa.gov/opinions/pdf/752031.pdf. There, Division One also held that "[w]hen a requester obtains copies of records that the agency previously claimed it did not possess, that circumstance, without more, is not sufficient to toll the running of the statute of limitations." *Strickland*, slip op. at 12.

one omitted record. Accordingly, we conclude that the trial court did not err by granting summary judgment in this case.

V. ATTORNEY FEES

Earl requests attorney fees and costs on appeal under RCW 42.56.550(4). We deny her request because Earl is not the prevailing party on appeal. RCW 42.56.550(4).

CONCLUSION

We affirm the trial court's order which granted the City's motion for summary judgment, denied Earl's motion for partial summary judgment, and dismissed Earl's PRA claims. We deny Earl's request for attorney fees on appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, J.

We concur:

Maxa, J.

Glasgow, C.J.

APPENDIX B

COMMAND POST LOG

CASE # - 1602801965
DATE – 1/29/2016
LOCATION – 3300 Sawyer/3326 Sawyer susp address
SUBJECT – Kenneth Wright
SITUATION – Officer Involved Shooting

0110hrs – SWAT Team showing up. SWAT 1 on scene
0114hrs - Guardian 1 departed. Radio from LERN to PC11. WSP has containment on I-5
0119hrs – Containment map below:

0123hrs – Bearcat-Habib, May, Wolfe, Kelley, Graham, Ovens. Bear-Tiffany, Koskovich, Shafner, Roberts, Verkoelen, Storwick
0124hrs – Bear and Bearcat moving to 3326 Sawyer
0131hrs – Media Staging at 38th and M. CP moving to 37 and M Street. Dispatch notified
0139hrs – Tiffany to Habib-Subjects moving inside house we are at
0141hrs – Two females in bedroom by door, possibly moving towards door
0143hrs – May-woman, baby, and young male inside 3326 Sawyer
0146hrs – Habib-no indications in yard
0147hrs – May-K9 track not working
0147hrs – Habib copy. Hold for now
0148hrs – Habib-no indications around the house, on the fence or alley

COMMAND POST LOG

CASE # - 1602801965
DATE – 1/29/2016
LOCATION – 3300 Sawyer/3326 Sawyer susp address
SUBJECT – Kenneth Wright
SITUATION – Officer Involved Shooting

0148hrs – Habib to Tiffany-they are coming around to your side of house. Tiffany-I might need another body
0148hrs – Hoschouer on scene
0151hrs – Shafner-turn off headlights in Bearcat
0152hrs – Graham to Habib-K9 wants to check house next door
0152hrs – Habib talking to witness. Suspect last seen in yard and dropped a personal item then fled. Have K9 try from here
0200hrs – K9 having no indication
0204hrs – May to Tiffany-move your crew back to Bearcat. Move Bearcat back to original scene
0204hrs – Team moving back to original locaiton to clear house to house
0205hrs – Quilio on scene
0208hrs – Habib-make announcements
0208hrs – May-3314 is a known house suspect is staying in
0210hrs – Habib-when you are ready make announcements
0210hrs – May to Habib-we need to push some people to alley to cover
0212hrs – Habib-what address is involved?
0213hrs – May to Bear-move vehicle broadside. Set up containment on front and back to cover all sides-Koskovich copy
0214hrs – Habib-Bearcat moving in alley
0215hrs – Tiffany-one looking out 1-1-1 window
0216hrs – Habib to Quilio-come east down alley
0217hrs – May to Habib-start making announcements yet? Habib-not yet need to shore up containment and clear some cars
0220hrs – Habib to Quilio-move forward. Moving
0224hrs – Habib to May-vehicles cleared moving back to alley
0225hrs – May-ready for announcement at 3314? Habib yes. Tiffany be ready with receiving team
0226hrs – Quilio-announcements loud and clear in alley
0227hrs – May- Five adults exiting 3314
0230hrs – Subjects from house cooperatie. Standing by for patrol to assist
0233hrs – Tiffany-five detained. 3 females and 2 males
0239hrs – May to Habib-debrief done. All subjects claim Wright has not been here at 3314 today.
0245hrs – May-prepare to contact 3318

COMMAND POST LOG

0246hrs – May moving in to clear 3318

CASE # - 1602801965
DATE – 1/29/2016
LOCATION – 3300 Sawyer/3326 Sawyer susp address
SUBJECT – Kenneth Wright
SITUATION – Officer Involved Shooting

0247hrs – May-opening exterior door
0249hrs – Patrol taking subjects from SWAT
0250hrs – 3318 is clear-May
0250hrs – Habib-will check 4017 Cushman on call of hearing noises
0251hrs – May, Wolfe and K9 moving up to check 3314 perimeter
0256hrs – Bearcat is on scene 4017 Cushman
0259hrs – K9 located crawl space. Clear
0300hrs – 4017 Cushman is clear
0304hrs – May to Tiffany-K9 didn't indicate anywhere around house at 3314. Security cameras observed. Perimiter of 3314 is secure.
0306hrs – May-K9 can clear
0306hrs – Tiffany-County K9 is clear
0308hrs – May-3318 is all clear. 3314 exterior and crawl space is clear. Need to clear inside
0310hrs – May-clear the house? Habib yes
0312hrs – May-will prep ThrowBot and prepare to breach and hold at back door.
0319hrs – Tiffany-ThrowBot is down. May-standby
0319hrs – May is in back with Wolfe, Tiffany is in front. Habib copy
0321hrs – Habib to May you can move
0321hrs – May to Tiffany- we will breach and delay. Then you can move and breach
0321hrs – Tiffany-moving
0322hrs – Tiffany-we are at front door. May-copy. We will breach back door. Back door breached
0323hrs – Tiffany-entry made into living room
0323hrs – May-removing security camera from exterior
0324hrs – Clearing
0330hrs – Moving upstairs
0332hrs – May-House is clear
0345hrs – Habib-Me, May, Tiffany, Hoschouer, Ovens, Wolfe will stay behind for security The rest of the team is securing. House ready to turn over to CID
0400hrs – Most of tactical back at CP
0436hrs – CID arriving

APPENDIX C

From: Anderson, Lisa [mailto:lisa.anderson@cityoftacoma.org]
Sent: Wednesday, November 23, 2016 2:47 PM
To: Groth, Debbie
Cc: Lobsenz, Jim
Subject: RE: Public Disclosure Request 16-10930 Carney Badley Spellman

Ms. Groth:

After searching further, it was determined there are no other records responsive to your request. As such, your request 16-10930 is now considered closed. If you believe there are other records responsive, or this does not meet the scope of your request, please contact me at your earliest convenience.

Regards,

Lisa Anderson

Public Disclosure Assistant

City of Tacoma

733 Market Street, Room 11

Tacoma, WA 98402

(253) 591-5188

APPENDIX D

THE HONORABLE BENJAMIN SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

LISA EARL; K.S., a minor child; K.W., a minor child; O.B., a minor child; I.B., a minor child; and THE ESTATE OF JACQUELINE SALYERS, by and through Lisa Earl, the Personal Representative of the Estate; Plaintiffs, v. SCOTT CAMPBELL; the marital community of Scott and Jane Doe Campbell; and the CITY OF TACOMA; Defendants.	NO. 3:17-cv-05315 AFFIDAVIT OF DETECTIVE JACK NASWORTHY IN RESPONSE TO PLAINTIFFS' MOTION TO REOPEN DISCOVERY Noted for consideration: September 28, 2018

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

JACK NASWORTHY, being first duly sworn upon oath deposes and says:

1. I am over the age of eighteen and am competent to testify herein.

2. I am currently a detective with the Tacoma Police Department, assigned to the Homicide Unit. I have been with the Homicide Unit since 2011, and have been a detective since 2006. I first joined the Tacoma Police Department in 1991. Prior to

Tacoma City Attorney
Civil Division
747 Market Street, Room 1120
Tacoma, WA 98402-3767
(253) 591-5885 / Fax 591-5755

becoming a detective, I worked both Patrol and Narcotics (Special Investigations Division, or SID).

3. I have been advised by the City Attorney's Office that the plaintiffs in this case are alleging that I deleted video footage from the pole camera on Sawyer Street, footage allegedly showing the officer involved shooting that occurred on January 29, 2016. That is not true. I did not delete anything and in fact, as explained below, when I attempted to pull the video up to view, there was nothing there to view.

4. On January 29, 2016, I was a member of the SWAT team. I first joined SWAT in 1994 and served on the Entry Element for 10 years. I left SWAT for about a year and then the Department created the Command Post Element of the team, so I came back to SWAT as a member of the Command Post Element. The Command Post Element works out of the command post vehicle, operates the radio and helps facilitate and coordinate tactical operations. This element provides intelligence to the other SWAT elements and coordinates resources (e.g., Patrol resources, emergency personnel, like the Tacoma Fire Department, and other tactical teams). I have been serving as a member of the Command Post Element since approximately 2005.

5. On the night of the officer involved shooting, I responded to the SWAT callout and was working in the Command Post. SWAT was deployed because Kenneth Wright had fled the scene and was known to be armed. Based on the available information, SWAT had identified and contained three different houses as possible locations for Kenneth Wright. Because of the multiple locations, resources were spread thin.

Tacoma City Attorney
Civil Division
747 Market Street, Room 1120
Tacoma, WA 98402-3767
(253) 591-5885 / Fax 591-5755

6. I learned that there was a pole camera in place for the 3300 block of Sawyer Street and believed that the footage may be able to narrow Wright's possible location. I had experience with the View Commander system because of a prior assignment to the Regional Intelligence Group (a joint law enforcement intelligence unit), so using the login information for the Criminal Investigations Division (CID) (the Division to which I was assigned), I logged into the View Commander System. However, the CID login did not give me access to the Sawyer Street pole camera, since it was an SID asset. I then called Detective Scott Shafner, who was also a member of SWAT and deployed on this call, and obtained his login information for the View Commander System. Because Detective Shafner was assigned to SID and an Administrator on the View Commander System for SID, his login information gave me access to the Sawyer Street camera.

7. When I accessed View Commander, the first thing I did was check the live feed from the camera. It was totally dark and the camera did not show anything. In order to access stored footage, you have to go to a separate tab to pull up recorded information, so that is what I did. When you access the tab for recorded information, it comes up in a calendar format and any date for which recorded information has been stored is highlighted. If there is no recorded information stored for a particular date, the date on the calender is not highlighted. When I accessed the tab in View Commander for the recorded information, the date of the shooting (January 28, 2016), was not highlighted, indicating that there was no recorded information. That is far as I went, since the system was saying that there was nothing recorded for the 28th.

Tacoma City Attorney
Civil Division
747 Market Street, Room 1120
Tacoma, WA 98402-3767
(253) 591-5885 / Fax 591-5755

8. Plaintiffs, in their motion, question why I did not write a report for my involvement in this call. The answer is simple. As a member of the Command Post Element, my responsibility was to prepare the Command Post Log and I did not have any direct involvement that required me to write a supplemental report. Attached hereto as Exhibit 1 is a true and correct copy of the Command Post Log that I prepared as a result of my involvement in this call out.

9. Plaintiffs also argue that my leaving the scene and then returning is somehow evidence that I deleted the video footage. Again, that is not true. I left the scene at around 5:30 am in order to get coffee and food for the Patrol officers and CID investigators on the scene and then brought it back to the scene. When I returned to the scene at about 7:30 am, I advised Dispatch to show me back on the scene with Detective Chris Shipp. Detective Shipp was a relatively new detective and he was doing the canvas of nearby houses. Because he was new, I went along on the canvas with him.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

JACK NASWORTHY

SUBSCRIBED and SWORN to before me this 24th day of September, 2018.

STACI L BLACK 171871 NOTARY PUBLIC COMM. EXPIRES 07-18-22 STATE OF WASHINGTON

Printed Name: Staci L Black
NOTARY PUBLIC in and for the State of Washington, residing at: Pierce Co
My commission expires: 7-18-22

Tacoma City Attorney
Civil Division
747 Market Street, Room 1120
Tacoma, WA 98402-3767
(253) 591-5885 / Fax 591-5755

APPENDIX E

Honorable Stanley J. Rumbaugh
Hearing Date: November 25, 2020

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF PIERCE

LISA EARL, Plaintiff, v. CITY OF TACOMA, a political subdivision of Washington State, Defendant.	NO. 19-2-10487-8 DECLARATION OF LISA EARL IN OPPOSITION TO THE CITY'S MOTION FOR SUMMARY JUDGMENT

I, LISA EARL, do hereby declare under penalty of perjury under the laws of the State of Washington that the following facts are true and correct:

1. I am the Plaintiff in this case. I have personal knowledge of the facts set forth here.
2. In the morning of January 29, 2016, I learned that a Tacoma police officer had shot and killed my daughter Jacqueline Salyers shortly before midnight on January 28, 2016.
3. I wanted to know why the officer killed my daughter.
4. At my request, attorney James Lobsenz made a Public Records Act request to the City of Tacoma for me. He sent a records request to the City on June 30, 2016.
5. The City eventually produced records in two installments.
6. On October 7, 2016, the City of Tacoma sent a first installment of records to my attorney at his law firm.

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(206) 622-8020

7. On November 8, 2016, the City sent a second installment of records to my attorney at his law firm and in an accompanying email told my attorney that any additional records should be ready by November 23, 2016.
8. On November 23, 2016, on behalf of the City a Ms. Anderson sent an email to my lawyer's law firm that stated: "After searching further, it was determined that there are no other records responsive to your request. As such, your request is now considered closed. If you believe there are other records responsive, or this does not meet the scope of your request, please contact me at your earliest convenience."
9. I believed the City when it said there were no other records responsive to my request.
10. I had no idea that a document called a Command Post Log existed.
11. I had no idea that the Tacoma Police SWAT team normally creates a Command Post Log when there is a SWAT team call out.
12. I did not know there was such a thing as a mobile Command Post for the Tacoma SWAT Team.
13. I had no knowledge that a Command Post Log had been created by the Tacoma police for the SWAT Team call out of January 29, 2016.
14. I had no idea that there was a person named Jack Nasworthy who worked for the Tacoma police department.
15. If I had known that there was a SWAT Team Command Post Log that documented the activities of the SWAT Team on January 29, 2016, I would have objected to Tacoma's failure to give me a copy of it pursuant to my Public Records Act request. I would have asked my attorney to demand that a copy be given to me.
16. The first time I ever knew that such a document existed was sometime after September 25, 2018. Sometime in the week or so after September 25 my attorney told me that a detective named Jack Nasworthy had filed an affidavit in federal court in my civil rights

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

lawsuit against the officer who killed my daughter and that detective Nasworthy had attached a copy of the document to his affidavit.

17. I had no idea that on the night my daughter was shot and killed by Officer Scott Campbell that the SWAT team had gone to the house at 3314 South Sawyer in Tacoma and had ordered all the people who were inside that house to exit the house.

18. Until I saw the document in late September or October of 2018, I had no idea that on the night my daughter was shot and killed by Officer Scott Campbell that the SWAT team had gone to the house at 3314 South Sawyer in Tacoma and had ordered all the people who were inside that house to exit the house.

19. Until I saw that document, I had no idea that SWAT team officers had entered that house and searched it.

20. The Command Post Log states that at 3:22 a.m. SWAT Team officers entered the house through the back door.

21. An entry on the Log for 3:23 a.m. states: "May-removing security camera from exterior".

22. Until I saw that document, I had no idea that SWAT Team police officers had disabled security video cameras that were mounted on the outside of the house at 3314 South Sawyer Street.

23. By the time I learned these things, more than two years had passed since my daughter's death and it was no longer possible to find the cameras that the SWAT Team had taken down from the house at 3314 South Sawyer Street.

DATED this 10th day of November, 2020.

Lisa Earl

Lisa Earl, Plaintiff

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Court ESERVICE to the following:

Attorneys for Defendant
Margaret A. Elofson
CITY OF TACOMA
747 Market Street #1120
Tacoma, WA 98402-3726
margaret.elofson@cityoftacoma.org

DATED this 16th day of November, 2020.

s/Deborah A. Groth
Deborah A. Groth, Legal Assistant

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

APPENDIX F

IN THE COURT OF APPEALS OF WASHINGTON

DIVISION II

LISA EARL, Appellant, v. CITY OF TACOMA, Respondent.	)	COA Appeal No. 561603

ORAL ARGUMENT

Before The Honorable Rebecca Glasgow,

The Honorable Bradley Maxa,

The Honorable Bernard Veljacic

May 10, 2022

TRANSCRIBED BY: Reed Jackson Watkins
Court-Certified Transcription
206.624.3005

A P P E A R A N C E S

On Behalf of Appellant:

JAMES E. LOBSENZ

Carney Badley Spellman

701 5th Avenue, Suite 3600

Seattle, Washington 98104-7010

On Behalf of Respondent:

MICHELLE N. YOTTER

City of Tacoma

747 Market Street, Suite 1120

Tacoma, Washington 98402

I N D E X O F P R O C E E D I N G S

-o0o-

May 10, 2022

THE BAILIFF: All rise.

JUDGE GLASGOW: Please be seated.

THE BAILIFF: Court is reconvened.

JUDGE GLASGOW: Please be seated. Thank you.

Good morning, Counsel.

MR. LOBSENZ: Good morning, Judge.

JUDGE GLASGOW: We are here today for our second case, which is Earl v. City of Tacoma.

Mr. Lobsenz, I understand you've reserved five minutes for rebuttal?

MR. LOBSENZ: Yes.

JUDGE GLASGOW: Okay. Thank you. You may begin.

MR. LOBSENZ: Thank you, Your Honors. May it please the Court, I am Jim Lobsenz. I represent Lisa Earl. To give you an outline of what I maybe will hope to cover today are the following:

We submit that there are two independent reasons why the superior court erred in dismissing the case on statute of limitations grounds. We meet the requirements for equitable tolling, and we also think the discovery rule applies to Public Records Act cases and that this panel should not follow Dotson, which is incorrect, and that we should also

not have been dismissed because of the discovery rule.

We meet the equitable tolling rule for various reasons, including, among others, false assurances. We meet the discovery rule, and in the U.S. Oil case the Washington Supreme Court ruled that the discovery rule is dictated where the plaintiff lacks the means to know that a wrong has been committed against her. It's not a Public Records Act case, but I think it's -- I don't really think that's dicta. I mean, I think that's the rule, and it governs.

This is a case where it is impossible for a plaintiff to know whether or not a public agency has records that they haven't searched or given you; therefore, it is dictated, I think, that the discovery rule applied.

JUDGE MAXA: So there's also cases that suggest that the discovery rule only applies when accrual is uncertain. And here the legislature has specifically said it accrues when that last letter goes out.

MR. LOBSENZ: You -- the way you phrase it, I sort of have to agree. You say suggested, but I note that the City consistently leaves out the word "usually" from that sentence of Douchette. It says "usually" when the legislature has specified the accrual that that's it, and the discovery rule doesn't apply.

But the Supreme Court of Washington has also said that these rules apply when justice requires it. And they've

also said in U.S. Oil that it dictates it in these situations. So this isn't usual.

In the situations where the plaintiff can't know, it's nuts to say that, well, sorry, you had no way of knowing that you had a lawsuit. You had no way of knowing there was a Public Records Act violation. You couldn't go and search the records themselves. Sorry. If that becomes the rule, police agencies can just -- I want to distinguish here between intentional misconduct and just sort of bad searching. But they can do both. They can be lazy in their searching and do adequate [sic] searches and get away with it because nobody will find out for a long time, or they can be intentionally deceptive, or they can do what they do here, which is they park their SWAT records in a different place, and they leave it up to the SWAT team commander whether to even integrate them into their records system, which I submit is a form of bad faith.

But I don't think that --

JUDGE GLASGOW: So, Counsel, why isn't the legislature entitled to make that choice and say, well, we have a trigger for accrual. They did reduce the statute of limitations down to one year, so we know that they're making some judgments, and then leaving the safety valve to be equitable tolling, where you have pretty -- some pretty extreme circumstances that can leave you to -- to tolling

the statute of limitations.

Like, why -- why is that not a balancing that the legislature has established?

MR. LOBSENZ: Well, the legislature can do that.

JUDGE GLASGOW: Right.

MR. LOBSENZ: But I think the Washington Supreme Court and this court have both said that that doesn't relieve the judiciary of deciding whether justice requires that you not run the rule; that you not dismiss for expiration of the statute of limitations.

I think the sentences that I would return to -- equitable tolling, of course, is not in any way inconsistent with that really, is it? Because if there's equitable tolling --

JUDGE GLASGOW: Right.

MR. LOBSENZ: -- there's equitable tolling.

JUDGE GLASGOW: Right.

MR. LOBSENZ: It's only the discovery rule that runs into that issue. And the U.S. Oil case says they're doing -- in determining whether to apply the discovery rule, the possibility of stale claims must be balanced against the unfairness of precluding justified causes of action. That balancing test has dictated -- that means required, doesn't it? -- has dictated the application of "the" rule, the discovery rule, where the plaintiff lacks the means or ability to ascertain that a wrong has been committed.

Justice requires this court to decide whether the usual rule that the legislature has specified an accrual period, time, trigger, should apply or not. And I think the U.S. Oil case says not.

JUDGE MAXA: So we obviously have the Dotson case. We are not bound by the Dotson case. That's one of the quirks of our appellate system. But, you know, we like our colleagues. We try not to overrule them or disregard them without reason.

So what's the reason that we should disregard Dotson?

MR. LOBSENZ: Well, really the Dotson case, Your Honor -- I know it's not like the Ninth Circuit where I get to say the rule of interpanel accord binds one panel to another, and I think that's sort of a good thing about our system. It allows different panels to take different views, and then we leave it to the Supreme Court of Washington to figure out which panel is right.

Dotson is so clearly wrong. It relies in a sentence or two on Douchette, and Douchette says, flat out in a sentence on -- I forget which page -- "This is not a case where we need to decide whether the discovery rule applies." That's what Douchette says. If Douchette says that, how can Dotson look to it and say, well, we -- we have to say that the discovery rule doesn't apply because that's what Douchette says? That is not what Douchette says.

Second, Douchette has a long quote in it from U.S. Oil v. Department of Energy [sic]. It goes through all the -- it goes through the same analysis I basically just argued to you. Douchette lost because she knew the facts. She didn't fit within this U.S. Oil rule of lacks the ability to ascertain whether she had a case. She knew her own age, and she knew she was fired because they said you're too old. She knew the facts. That's why the court said in Douchette we don't have any occasion here to decide whether the discovery rule applies to this case.

But the Washington Supreme Court has said it's a judicial task to decide whether justice requires these things. It does. If you decide that Dotson is right and you're going to follow it, and you also say no to the equitable tolling, then police departments across this -- not just police departments, but police departments can just hide stuff. And maybe that gives me an opportunity to segue back to equitable tolling for a moment.

The City has said, I think, this isn't a case of intentional hiding of a document. How are we supposed to know? I don't know whether it's intentional or not. I do know that when you talk about the state of mind of a city, you have lots of different actors. There's Mr. -- I forget his name -- the civil attorney who delegated to other people to go searching. There's -- they don't even know who did

the searching. There's a list of people who likely did the searching. There's their states of mind. But I know one thing. Somebody made up this policy that Detective Nasworthy testified to, that they leave it to the commander of the SWAT team unit to decide whether to integrate SWAT team documents into the electronic files. Big surprise. They don't get there.

This document had the same incident number as every other police report that had anything to do with Jackie Salyers' death. It's got the same incident number. And, yet, they don't put these documents in the electronic file, so of course they don't get found.

There's language in -- in their briefing about -- I've lost my train of thought here for a minute -- oh, about target words, they said. I don't know where they come up with these target words. But they said if you use these four target words, this SWAT document doesn't come up. What about the word "shooting"? That was the first word in my request that I framed. We want all documents related to the shooting of Jackie Salyers on this date.

It says "officer involved shooting" on every single page of this document. Every single page. You can't leave it up to police departments to be able to sort of offshore. It's like keeping your income in Bermuda so it can't be taxed. If you keep it in the SWAT office where it can't be found

because you're not integrating, it's not going to be found. That's not right. And I would urge you to get to the injunctive issue, which I -- I'm not going to have really time to talk about here.

But I think in addition to reversing and ordering them to enter partial summary judgment and liability in Ms. Earl's favor, just figuring out penalties later. Penalties, we could -- it matters whether or not the violation was intentional or unintentional. I don't think it matters to the equitable tolling rule particularly whether it's intentional or not. If it's intentional, it's deception. And then, of course, it fits one of the three -- they're not limited to three categories, but one of the three named categories.

They also ignore the Fowler case decided six months before they wrote their brief that said it is not limited to these three categories. We see no reason to limit it. We will apply it where justice requires.

JUDGE MAXA: Fowler's a criminal case. Does that make a difference?

MR. LOBSENZ: No, absolutely not. I mean, I -- if it was going to make a difference, it would have made a different the other way and they would have said we'll be tighter about equitable tolling in criminal cases because finality is more important. But I think it weighs against them, not

for them.

Well, perhaps in jumping around, I've covered most everything. And I see I've used my ten minutes, so I will sit down.

JUDGE GLASGOW: Thank you, Counsel.

MS. YOTTER: Good morning. May it please the Court, Michelle Yotter on behalf of the City of Tacoma this morning.

The City is asking that this court dismiss the matter at bar, and there are two distinct reasons for that request.

First, the City asks that this court find the document in question -- and I want to be clear that there were thousands of documents produced, or at least a thousand documents produced in this matter, and we are here today talking about a single three-page document. It's the City's position that that document was never responsive to this PRA request, and that there was no PRA violation to begin with.

And to make that point I want to give you just a very brief background. The record in question is called a Command Post Log. That is a three-page document created by the SWAT team. And the only information contained in that log are the SWAT team's efforts to track a known violent felon by the name of Kenneth Wright.

The SWAT team ended up responding to the scene of this shooting not because there was a shooting, not because there

was a death. These aren't things the SWAT team would normally respond to. The SWAT team doesn't respond to investigate deaths, and they don't respond, typically, to officer-involved shootings. They respond to dangerous situations where special weapons and tactics are necessary.

JUDGE MAXA: So was the movement of Mr. Wright related to the shooting; right? "Related" is a very broad word.

MS. YOTTER: It is a very broad term. I agree with that. And so I want to give -- and that's where the background here becomes important. The Tacoma Police Department's violence reduction team had been conducting a manhunt for Kenneth Wright for several weeks prior to the shooting taking place.

On the night of the shooting, with two patrol officers in the area because they believed that there was a possibility Mr. Wright could be in the area, and, in fact, they spotted Mr. Wright. He was a passenger in the vehicle of Ms. Salyers. The officers on foot attempted to apprehend Mr. Wright. And in that attempt, Ms. Salyers, the driver, drove the car directly at one of the officers. He fired and killed her. After that occurred, Mr. Wright climbed across her body, had a long gun in his hand, and took off on foot.

The only reason the SWAT team responded was because the officers didn't know where Kenneth Wright had gone. And so the SWAT team response was to look for Mr. Wright, to see if

he was laying in wait and planning to shoot the officers. If he -- this is a residential neighborhood. If he'd gone into a residence and had taken people hostage. There was -- the officers on the scene had no idea.

The SWAT team did not respond, though, simply because there was an officer-involved shooting or because there was a fatality, and they had no role in that investigation. That's important because when we look to the specific language of the public records request, and the appellant points -- they did make a very extensive request. I believe it had 16 paragraphs. But the appellant points to paragraph number 1 as where the City should have responded with this SWAT document.

And what that paragraph requests is all documents related to the shooting death of Jacqueline Salyers on January 27 through 28, 2016, including, but not limited to, the complete investigative report, any and all follow-up reports, investigation materials, witness statements, and officers' notes, photographs, DXF CAD files, measurements, physical evidence, video, audio, dash cams, and the involved vehicle, including any downloads from the vehicle.

So based on that paragraph, the City did not interpret that to mean we want this log tracking Kenneth Wright. And in her reply brief --

JUDGE GLASGOW: So why wouldn't that be officer notes?

MS. YOTTER: So in -- well, in her reply brief -- it wasn't officer notes related to the shooting death or the investigation. That's, I think, where we make the distinction. All of the notes related to the investigation of the shooting and the officers that were there in response to the fatality, that information was all provided.

What we didn't provide was just this log that showed the tracking of Kenneth Wright. The City did not interpret that to be related to the shooting death.

And just to give a hypothetical example, had the shooting occurred, had the facts been the same except Kenneth Wright wasn't there, the SWAT team would never have been called. They would never have been a part of the investigation into that shooting.

And so in her reply brief, on page 4, Ms. Earl now contends what that request meant was she wanted documents about Wright was doing the day of the shooting, and the City didn't interpret that request to mean they should look for documents related to what eyewitnesses were doing throughout the day.

So for those reasons, the City didn't deem this single record to be responsive. They didn't search for it, and it was not produced. It was subsequently produced in the course of the civil case by the City voluntary.

So for those reasons we would ask that the Court find the

document not responsive, but --

JUDGE GLASGOW: But, Counsel, moving into the question of equitable tolling.

MS. YOTTER: Yes.

JUDGE GLASGOW: So it looks like what the response -- the final response email said was "After searching further, it was determined that there are no other records responsive to your request."

So assuming for a moment that we -- we don't agree, and we think that the records in question were responsive, so help me understand how that sentence -- how we apply equitable tolling with that sentence in mind.

MS. YOTTER: Absolutely. Thank you, Your Honor.

So that would be the second argument the City would have. So even if you were to find -- either not engage in the analysis as to whether the document was responsive or if you were to find that it was, the single document was responsive, this court should dismiss on the basis of statute of limitations. And there's no dispute as to the timeline here. And I'm happy to go through that if the court would like.

But the -- the lawsuit was filed almost three full years after the final definitive response by the City. We know from this Court's earlier decision in Dotson, in Zellmer, and in Wolf that missing a single document, even if

responsive, is not, in and of itself, enough to trigger the equitable tolling rule. In fact, Belenski is the only public records case that the City is aware of where equitable tolling is even considered. And you had a very distinct fact pattern there that isn't present here.

JUDGE MAXA: So why -- why isn't it equitable? So equitable tolling, obviously, is an equitable doctrine.

MS. YOTTER: Yes.

JUDGE MAXA: The City or any agency basically says, "Trust us. We've given you all the records." There's nothing that the requester can do to check that. And so if -- if they say "trust us," and they're wrong, it seems like you're saying, "Hey, you screwed up; you trusted us."

MS. YOTTER: So trust us we're wrong, if the requester comes back and says, "I asked for these specific documents and you didn't give them to me," I think that's a different fact pattern than what we have here where Ms. Earl is saying "anything related to." That's open to the interpretation of the City as to what's related to. And if the governmental entity makes a good faith, we truly believed that we had encapsulated everything she wanted and gave it to her, if there's a single document that later she says, "Oh, I also meant this. I didn't know," and the City also didn't know, there really shouldn't be equitable tolling because there isn't bad faith, there isn't deception, and there aren't

false assurances.

To hold that equitable tolling applies any time a governmental entity says "we've given you everything we believe to be responsive," then you --

JUDGE GLASGOW: But that's not what you said. You said "after searching further, it was determined that there are no other records responsive to your request." That's different than saying "We've searched. We've done a good-faith search and we believe we found everything responsive to your request." I know it's splitting hairs, but it's not the same.

MS. YOTTER: And I do agree. And I think --

JUDGE GLASGOW: Yeah.

MS. YOTTER: -- maybe I would say that our language was inartful.

JUDGE GLASGOW: Okay.

MS. YOTTER: I don't think that there was any bad faith, any deception, or any false assurances. I think the City truly believed that we had captured everything that this requester was seeking and we were providing it to her.

JUDGE MAXA: So let's move to the discovery rule, then. So, again, in every single opinion, including Dotson and including, I'm sure, a bunch that I've written, it says "the PRA is a broad mandate for the full disclosure of records." And, yet, if the discovery rule doesn't apply, we could have

a situation where -- and let's say it's not intentional. The City has a folder of a thousand pages. It's -- somehow it got misplaced. It wasn't produced. A year passes. The requester's out of luck, without a discovery rule.

How is that furthering the broad purposes of a PRA?

MS. YOTTER: So I don't have a specific answer to that question, other than my response would be should -- should we say a discovery rule applies to all PRA cases, and that, at any time in the future, a single document which could arguably have been responsive extends the statute of limitations because there's now a discovery rule? What you're essentially doing is nullifying RCW 42.56.550 and the legislature's enactment of the one-year statute.

Certainly this has been an ongoing issue in these types of cases, and the legislature could enact a discovery rule or they could modify their rule in 42.56.550, sub (6), saying there's a one-year statute of limitations.

And then the other thing I would point out, as the appellant relied on U.S. Oil and also In re Fowler, I'd be happy to comment on that, but in those cases -- well, particularly U.S. Oil and Douchette, those are tort cases. And you're talking about, in those situations, where an individual has been harmed. They've suffered harm, and the purpose of tort law is to make that individual whole for the harm that they have suffered. And PRA is distinguishable in

that.

A PRA claim is not a tort claim. The purpose of the penalty is not to assess harm to a requester and make them whole for a document or documents that were missed. It's actually quite contrary to that. It's a penalty against an agency for not complying with a statute.

JUDGE GLASGOW: So, Counsel, why doesn't the PRA sort of -- why wouldn't we say that it's designed to sort of take care of this good faith missing of a record on the back end? So instead of saying that the discovery rule is completely unavailable, in -- where a -- where an agency has made a good-faith search and they missed something, then, at the back end, the PRA accounts for that by saying, well, you don't necessarily get penalties if there was a good-faith search.

So why shouldn't we let it through the door and sort of have an expansive reading of the -- or a limited reading of the statute of limitations and let the -- that good faith situation be addressed on the back end, where there's actual proof from the agency that they did do a good-faith search?

MS. YOTTER: So I guess I'm a little bit confused about your question. I would want to distinguish, are you saying that would fall under more of a common law discovery rule or that that would be assessed more in terms of an equitable tolling rule --

JUDGE GLASGOW: Well --

MS. YOTTER: -- where there was something missed?

JUDGE GLASGOW: Yeah. I mean, I'm just sort of echoing what Judge Maxa said, which is we're supposed to take this expansive view of the Public Records Act; right? But we recognize that the legislature has pulled back on that some, by shortening the statute of limitations, by allowing zero penalties in some cases; right? So it's not as draconian as it used to be with the agencies; right?

So given that that's the case, if we have to apply this broad -- or this principle that we want to promote transparency and access to public records, why would we bar the door at the beginning as opposed to letting those solutions at the back end work when the agency puts actual facts on the table to show their good faith?

MS. YOTTER: Yeah. So I think I would point the Court to Neighborhood Alliance, which isn't quite on point. But I think there, when we're talking about adequate searches, I think this would run along the same lines. The test isn't perfection; the test is reasonableness.

When you're talking about governments who create, in the course of their business every day, thousands, if not hundreds of thousands of documents, and they're asked to sometimes interpret requests and to figure out what citizens mean, I don't think a level of perfection is possible.

So I think the analysis should be in line with adequate search, and that's a reasonableness. Was the government reasonable in their actions and in their production?

JUDGE MAXA: Although, that seems to suggest that we don't apply the statute strictly, because as Judge Glasgow suggested, the trial court can then assess reasonableness. We're -- right now, if we -- if we slam the door, it could be intentional, it could be deliberate, it could be fraudulent. And it's like, too bad. You -- you didn't know soon enough.

MS. YOTTER: And I agree with your comment, and I should probably have started my answer by saying I do think a hard line following of the RCW is the first appropriate step and the step that clearly legislature has outlined for us. But if the Court wanted to go in another direction and ignore the statute, then I think it would turn to a reasonableness standard.

I don't have a -- a better answer on how that could be evaluated, although I would, again, say it would be -- you're holding governments to an impossible level, if what you're saying is you must be perfect in every single search and provide every single document that the requester had in mind.

JUDGE MAXA: Do we need to consider the universe of cases or can we focus on this case?

So I -- this seems like a very valid public records request. I mean, this isn't, you know, a wacko going "give me every document you ever produced in the last 20 years" just because they want to try to get penalties.

I understand we -- you know, the wackos we want to keep out. But this is a very legitimate request on a very serious issue, so why should we slam the door on this one?

MS. YOTTER: I don't disagree. But I think when we look to Belenski, that's the first one that would guide us, we know that there is no discovery rule, but there's a possibility for equitable tolling. But this Court has been very consistent in its rulings in Dotson and Zellmer and in Wolf; that missing a document or a couple of documents in a good-faith search does not rise to the level to defeat the statute of the one-year statute of limitations.

So I would say this Court should stay consistent with its previous rulings. And then I would also just point out a couple of unpublished cases that are very recent out of Division I, which would be Gibson v. Snohomish and Strickland v. Pierce County where Division I's opinions have been right in line with this Court.

So my time is up, I believe. So, with that, I thank you for your time today and happy to answer any other questions or provide any supplemental briefing that would be of assistance for the court.

JUDGE GLASGOW: Thank you, Counsel.

Bailiff, will you add one minute to the rebuttal time, please.

Thank you.

MR. LOBSENZ: A couple points about precedent first. Counsel mentioned the Belenski case and suggested that it ruled that there was no such thing as a discovery rule in this context. Belenski is silent about the discovery rule. Says nothing about it whatsoever. It addresses solely equitable tolling. And I can't believe that Belenski silently overruled U.S. Oil.

As far as U.S. Oil is concerned, counsel said something about, well, this is a PRA case. It's not a tort case. So what? Among other things, they said that for a while and that was the reason for saying, oh, the -- none of this applies to a contracts case. The Western Supreme Court said, yes, it does. We didn't limit it to tort cases. And in the Vertecs case, they said it applies to contracts cases.

U.S. Oil is not a tort case or a contracts case. It's not a case where the Department of Energy [sic] is seeking damages for either one. It's a statutory cause of action for a penalty. Exactly the same as what this is. A statutory cause of action for penalties and for injunctive relief.

Counsel said that -- repeated this argument that the SWAT team was called out has absolutely nothing to do with investigating the shooting of Jackie Salyers, just looking for Kenneth Wright. I just want to go back and point out that the record is clear, you'll find at clerk's papers 324, one member of the SWAT team that was called out was Mr. Gary Roberts, who is an investigator for the Internal Affairs Division of the Tacoma Police Department. The Internal Affairs Division investigates misconduct by police. It investigates situations whether -- where there's a -- going to be anticipated, in this case there was, an allegation that he shouldn't have shot Jackie. Why is he going along? He's not going along to look for Kenneth Wright. He's with Internal Affairs.

A small point about false assurances, again, and the Thompson case. An intent. False assurances, I think, doesn't require an intent to deceive. If it did, this language would be awfully duplicative, to be talking about false assurances or deception. But in Thompson v. Wilson, which is, I think, a Division II decision, you have a similar situation. You have a mother trying to get information about why her daughter is dead. And in one case the assurances she was given for Ms. Thompson was, we will meet -- the coroner will meet with you, the coroner will meet with you, the coroner will meet with you. And the

coroner never met with her, and the statute of limitations expired. And in this case it's we were given --

JUDGE GLASGOW: So, Counsel, would that false assurances analysis be different if the language in the response letter were different? If they were -- if it were less absolute about there are no other records responsive to your request?

MR. LOBSENZ: Well, I think the best way I can answer that is to say I agree with you; that the language that was used was pretty over-the-top emphatic. If it hadn't been, my argument would be not as strong. But I would still be arguing because these are still false assurances. You're still saying it doesn't exist. Trust us.

I did want to say there is a consistent ignoring by the City of the independence of PRA violations for not producing responsive document and PRA violations for not doing an adequate search. Certainly I think you should rule -- I think you should rule this was responsive and there was a violation. But even if you didn't, there's still the separate and independent question of whether or not there was an adequate several, which itself is a violation, even if they don't -- if they -- if they've done an adequate search, if they searched all the SWAT documents and there didn't exist any and there was nothing missed, there would still be a violation.

JUDGE VELJACIC: Did U.S. Oil have a -- I apologize, Judge

Maxa.

Is U.S. Oil, is that a situation where the legislature specifically articulated an accrual date, statutory accrual date?

MR. LOBSENZ: I can't really answer your question, Your Honor. I wish I could, but I don't think the opinion really clearly identifies that. The best I can say is it sort of seems to read like -- like the law makes the accrual date the discharge of the pollutants into the water, but I don't know that. I can't -- I can't tell you that the opinion really says that. It just sort of seems to me to apply that.

JUDGE VELJACIC: Thanks.

MR. LOBSENZ: I did want to say --

JUDGE MAXA: So -- excuse me. So let me ask you kind of the policy question that I asked counsel. So, I mean, we do have this broad mandate. But, on the other hand, we all know, and certainly it's not the case in this specific case, the PRA can be abused; right? And the legislature has struggled with that, particularly with prisoners and whatnot.

It seems like an argument could be made that the legislature intentionally wanted to tighten up this statute of limitations, no discovery rule, one year, just because so many cases are abused.

What are your thoughts about that?

MR. LOBSENZ: Well, if the legislature had wanted to say no discovery rule, they could have said so. If the legislature had wanted to say no equitable tolling, they could have said so. They didn't say that.

It would produce all kinds of other issues about separation of powers, I would think. If the legislature actually wrote "the courts are forbidden to apply equitable tolling or the discovery rule," I would argue that that's another case; that that violates separation of powers.

And I guess I would close and point you back to some language, again, in U.S. Oil. It's similar to language in the very first case. The very first case about the discovery rule was the sponge -- the surgery sponge case. A woman can't look inside her own body and see that there's a sponge in there. She brought suit 19 years after that sponge was left in her, and the court said she could do that. The legislature has not forbidden that. They've left the courts free to decide what justice requires.

And in U.S. Oil, the court said "neither the purpose for statute of limitations nor justice is served when the statute -- by this statute when the information concerning the injury is in the defendant's hands."

JUDGE GLASGOW: Thank you, Counsel. Your time has expired.

MR. LOBSENZ: Thank you.

JUDGE GLASGOW: Thank you, Counsel, for your helpful arguments this morning.

Bailiff, has Counsel checked in for the third case?

Yes. Okay. So we will take a moment to switch out counsel and -- for the third case.

(May 10, 2022, proceedings concluded)

C E R T I F I C A T E

STATE OF WASHINGTON)
)
COUNTY OF KING)

I, the undersigned, do hereby certify under penalty of perjury that the foregoing court proceedings or legal recordings were transcribed under my direction as a certified court reporter; and that the transcript is true and accurate to the best of my knowledge and ability, including changes, if any, made by the trial judge reviewing the transcript; that I received the electronic recording in the proprietary court format; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 2nd day of August, 2022.

Debra Riggs Torres

s/ Debra Riggs Torres, RPR, CCR No. 20122368
Reed Jackson Watkins, LLC
800 Fifth Avenue, Suite 101-183
Seattle, Washington 98104
Telephone: (206) 624-3005
E-mail: info@rjwtranscripts.com

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August 05, 2022 - 12:54 PM

Filing Petition for Review

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Appellate Court Case Title:	Lisa Earl, Appellant v. City of Tacoma, Respondent (561603)

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Address:
701 5th Ave, Suite 3600
Seattle, WA, 98104
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SARAH R. PENDLETON
DEPUTY CLERK/
CHIEF STAFF ATTORNEY

THE SUPREME COURT
STATE OF WASHINGTON

TEMPLE OF JUSTICE
P.O. BOX 40929
OLYMPIA, WA 98504-0929

(360) 357-2077
e-mail: supreme@courts.wa.gov
www.courts.wa.gov

August 8, 2022

LETTER SENT BY E-MAIL ONLY

James Elliot Lobsenz
Carney Badley Spellman
701 5th Ave Ste 3600
Seattle, WA 98104-7010
lobsenz@carneylaw.com

Michelle Nicole Yotter
Attorney at Law
747 Market Street, Suite 1120
Tacoma, WA 98402
myotter@cityoftacoma.org

Hon. Derek Byrne, Clerk
Court of Appeals, Division II
909 A Street, Suite 200
Tacoma, WA 98402

Re: Supreme Court No. 1011431–Lisa Earl v. City of Tacoma
Court of Appeals No. 561603–II

Clerk and Counsel:

The Court of Appeals forwarded to this Court the "PETITION FOR REVIEW" in the referenced matter. The $200 filing fee (check #304000) has also been received. The matter has been assigned the Supreme Court cause number indicated above.

The parties are directed to review the provisions set forth in RAP 13.4(d) regarding the filing of any answer to a petition for review and any reply to an answer.

The petition for review will be set for consideration without oral argument by a Department of the Court; see RAP 13.4(i). If the members of the Department do not unanimously agree on the manner of the disposition, consideration of the petition will be continued for determination by the En Banc Court.

Usually there is approximately three to four months between receipt of the petition for review in this Court and consideration of the petition. This amount of time is built into the process to allow an answer to the petition and for the Court's normal screening process. At this time it is not known on what date the matter will be determined by the Court. The parties will be advised when the Court makes a decision on the petition.

Any amicus curiae memorandum in support of or in opposition to a pending petition for review should be served and received by this Court and counsel of record for the parties and other amicus curiae by 60 days from the date the petition for review was filed; see RAP 13.4(h).

Counsel are referred to the provisions of General Rule 31(e) regarding the requirement to omit certain personal identifiers from all documents filed in this Court. This rule provides that parties "shall not include, and if present shall redact" social security numbers, financial account numbers and driver's license numbers. As indicated in the rule, the responsibility for redacting the personal identifiers rests solely with counsel and the parties. The Clerk's Office does not review documents for compliance with the rule. Because briefs and other documents in cases that are not sealed may be made available to the public on the court's internet website, or viewed in our office, it is imperative that such personal identifiers not be included in filed documents.

Counsel are advised that future correspondence from this Court regarding this matter will most likely only be sent by an e-mail attachment, not by regular mail. This office uses the e-mail address that appears on the Washington Bar Association lawyer directory. Counsel are responsible for maintaining a current business-related e-mail address in that directory.

Sincerely,

Sarah R. Pendleton
Supreme Court Deputy Clerk

SRP:drc

APPENDIX C

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 55498-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SANDRA EHRHART, individually and as personal representative of the Estate of Brian Ehrhart,

Petitioner,

v.

KING COUNTY, operating through its health department, Public Health - Seattle & King County,
Respondent.

SANDRA EHRHART'S PETITION FOR REVIEW

Adam Rosenberg, WSBA #39256
Daniel A. Brown, WSBA #22028
WILLIAMS KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Tel: (206) 628-6600 Fax: (206) 628-6611
Email:arosenberg@williamskastner.com
Email: dbrown@williamskastner.com

Theron A. Buck, WSBA #22029
FREY BUCK P.S.
1200 Fifth Avenue, Suite 1900
Seattle, WA 98101
Tel: (206) 486-8000 Fax: (206) 902-9660
Email: tbuck@freybuck.com
Counsel for Appellant Sandra Ehrhart

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I. INTRODUCTION

Seeking answers in the wake of her husband's death, Ms. Ehrhart requested documents under Washington's Public Records Act. Some were produced, and, it turned out, hundreds were silently withheld—especially the unflattering ones. This was both unknown, and unknowable, to Ms. Ehrhart. She did not learn about the hidden documents until receiving belated responses to discovery in a tort case just over a year later. Based on a body of law developed in Division II—which is antithetical to the legislature's "strongly worded mandate," *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978), as well as this Court's prior holdings—Ms. Ehrhart's claims were dismissed as time-barred.

This Court should accept review, overturn *Dotson v. Pierce Cty.*, 13 Wn. App. 2d 455, 472, 464 P.3d 563, *as amended* (July 8, 2020), and confirm that the discovery rule applies to silently withheld records under the PRA. The *Dotson* framework not only creates a perverse incentive structure—in which

government agencies *benefit* from favorable burden shifting and a "bad faith" standard—when they hide records for over a year, while conversely, the requesters is put in an impossible position. Ms. Ehrhart had no way of knowing she had a cause of action until a year elapsed. The only way to preserve her cause of action would be a blind lawsuit, in violation of CR 11, based upon records she had no idea were withheld at the time. The burden is now on the requester to ferret out secret wrongdoing, and the burden is *off* the agency to be transparent in the first place.

But Division II went even further than that. The County's defense—accepted by Division II—was that the "risk manager" who oversaw records collection did not, herself, do anything wrong:

> …there is no evidence that Larsen knowingly chose not to disclose responsive documents, as there was in *Belenski*. Although, in hindsight, it appears that not all responsive documents were disclosed, there is no evidence in the record that Larsen knew that those documents existed at the time she closed the request. Therefore, the response may have been objectively false, but given there is no evidence Larsen knew it was false nor is there any evidence

> that Larsen made a deliberate attempt to mislead; it was not deceptive or dishonest for the purposed of equitable tolling.

Op. at 8-9. It was undisputed that the actual records custodians withheld documents. Yet the case was dismissed on summary judgment because Ms. Larsen did not, herself, do anything "deceptive or dishonest." *Id.* By this logic, government can: (a) install a "records manager" who tells everybody to do a good job; (b) ignore whether record-holders are actually producing responsive records to the "records manager"; and (c) if government gets caught, emphasize that the "records manager" had no idea. The actual records holders can, as in this case, say nothing—and win, dispositively, by motion.

These issues are deeply significant—so much so that at least two other cases involving this precise issue are working their way through the appellate courts right now. *See Earl v. City of Tacoma* (Washington Supreme Court No. 101143-1); *Terry Cousins v. State of Washington* (Washington Supreme Court No. 100755-8).

Government is availing itself to the problematic incentive structure erected by *Dotson*. This Court should accept review and consider whether that is consistent with the PRA statute and public interest.

II. STATEMENT OF THE CASE

A. The County Withholds Hundreds of Documents Responsive to Ms. Ehrhart's Public Records Requests

Following her husband's death, his wife, Sandra, sought answers. On March 24, 2017,[1] Ms. Ehrhart, through counsel, submitted a public records request to King County requesting:

1. All records regarding Hantavirus incidents in 2016 or 2017;

2. All records in your possession regarding the hazards, dangers, and/or mortality rates of Hantavirus;

3. All communications—internal or external—about Hantavirus in 2017;

4. All documents reflecting any effort made by King County to make the public aware of Hantavirus in 2017;

[1] Ms. Ehrhart, through counsel, also submitted a public records request to the County in October 2017, which is not at issue in this appeal.

5. All documents reflecting any effort made by King County to make the public aware of Hantavirus in any year other than 2017;

6. All policies, practices and/or procedures pertaining to public awareness and notification of health hazards;

7. All documents reflecting or referring to a duty or obligation on the part of the county to advise the public of health hazards;

8. All communications with or about Maureen Waterbury;

9. All communications with or about Brian Ehrhart and/or his contraction of Hantavirus;

10. All studies, investigations you've performed, or conclusions rendered this year pertaining to Hantavirus or the county's response thereto;

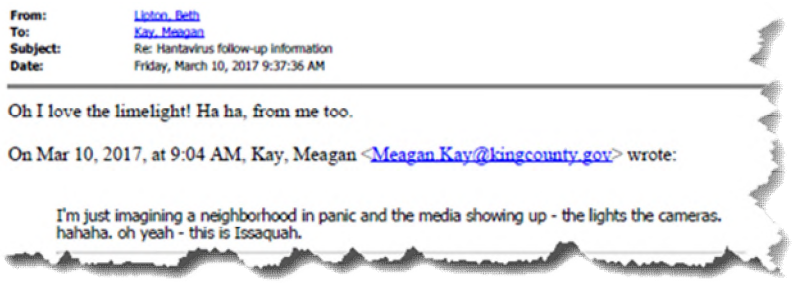
11. All statutory claims for damages filed against King County Public Health, pertaining in any way to a public health hazard; and

12. All settlement of any claims against King County Public Health pertaining in any way to its response to a public health hazard.

CP 5463-64. The request was routed to "Risk Management," which responded to it outside the normal processes for handling

PRA requests. The County, through Penny Larsen, sought out County employee, Meagan Kay, for guidance about key words and records custodians. CP 108-109; 114-115 (County Dep. Tr. 62:16-63:3; 82:21-83:7)).

This was an odd choice, to be sure. Dr. Kay had open disdain for the grieving family and panicked neighborhood:



From: Lipton, Beth
To: Kay, Meagan
Subject: Re: Hantavirus follow-up information
Date: Friday, March 10, 2017 9:37:36 AM

Oh I love the limelight! Ha ha, from me too.

On Mar 10, 2017, at 9:04 AM, Kay, Meagan <Meagan.Kay@kingcounty.gov> wrote:

I'm just imagining a neighborhood in panic and the media showing up - the lights the cameras. hahaha. oh yeah - this is Issaquah.

CP 120. Furthermore, Dr. Kay "was on scheduled family leave until mid-February. She was not even involved in Hantavirus investigations that occurred before that time…" CP 122. Thus, according to the County, she had nothing to do with the subject matter of the public records request she was now overseeing.

In any event, "three key words" were generated to produce records responsive to the entire request: Brian Ehrhart, Hantavirus, and Maureen Waterbury. CP 104; CP 315. The

custodians were expected to "use their judgment" as to whether records were responsive, and told to err on the side of "over disclosure." CP 105. But there was no tracking system to confirm what they did or withheld. CP 106-107.[2]

Over the next 4 or 5 months, the records came in several installments, ostensibly completing on **August 7, 2017** when the County informed Ms. Ehrhart that it considered the request closed. CP 254. In total, the County provided 521 documents. CP 5463-64.

B. Ms. Ehrhart Learns Of The Withheld Documents In Belated Responses To Written Discovery—Just After The One-Year Statute Elapsed

Ms. Ehrhart ultimately filed suit on June 21, 2018, and propounded written discovery with the Complaint. Responses were stonewalled and delayed for months, however. During this

[2] County personnel were not told to search personal devices or computers, despite apparent use of personal Gmail accounts. Nor did anybody check for records held by the Board of Health (the actual governing body) or Patty Hayes (the agency's director). Both were intimately involved with Hantavirus.

time-frame, the County was (1) sanctioned for "bad faith" and "gamesmanship"; (2) compelled to make witnesses available for deposition; and (3) subject to additional discovery sanctions, which the trial court reserved.

The County moved for summary judgment and, on **September 21, 2018**, one business day before the Ehrharts' response was due, the County disclosed roughly 20,000 documents.

This document dump included close to ***500 documents*** responsive to Ms. Ehrhart's public records requests, produced for the first time. CP 220, ¶ 4(a); CP 5468-78; CP 714-5462. Based on the voluminous documents the County improperly withheld, Ms. Ehrhart promptly amended her Complaint to add a claim for violating Washington's Public Records Act. CP 21-32.

The newly produced documents could not realistically make it into the record, and the trial court ruled on what was previously in front of it. "The court granted partial summary judgment for [Ms.] Ehrhart on the failure to enforce exception

[to the public duty doctrine], 'conditioned on a finding by the jury that [King] County's action was not appropriate.'" *Ehrhart v. King Cty.*, 195 Wn.2d 388, 395–96, 460 P.3d 612 (2020) (quoting Verbatim Transcript of Proceedings (Sept. 28, 2018), at p. 23).

The County moved for, and was granted, discretionary review by the Washington Supreme Court. Given their cruciality to the issues framed before the Court, Ms. Ehrhart tried to offer some documents she belatedly received from the County. The County brought two separate motions to strike them, which this Court granted under RAP 9.12. CP 80-95; CP 96-97.

This Court ultimately reversed Judge Speir and ordered that Ms. Ehrhart's tort claims against the County be dismissed based on the public duty doctrine. *Ehrhart*, 195 Wn.2d at 410.

C. Ms. Ehrhart's Public Records Act Claim is Dismissed On Summary Judgment As Time-Barred

On remand, only Ms. Ehrhart's Public Records Act claim remained. The parties cross-moved for summary judgment. The central issue was whether the one-year statute of limitations for

PRA claims set forth in RCW 42.56.550(6) should be tolled, given that Ms. Ehrhart had no way of knowing the County had, undisputedly, silently withheld close to 500 responsive.

At the summary judgment hearing, the trial court's tolling analysis largely focused on whether the withheld documents would have changed the outcome of the tort case. *See* CP 628 (beginning the hearing: "as I read the Supreme Court ruling, it seemed to me that it wouldn't have made any difference to the Supreme Court…"). Ultimately, it found tolling unavailable for the same reason:

> And I'm going to tie that back into this issue that I raised from the beginning, which was the Supreme Court's ruling on the public duty doctrine and finding as a matter of law, and would these documents have made any difference.
>
> Because it has been my personal experience as a judge and coincidentally, King County was the person or entity that had failed to disclose a smoking-gun document, if you will, in another case. And it was evident on the face of that document that that document was damning to the county, and because the public duty doctrine didn't apply….it would have created potentially much greater liability.

> So there on it, the face of the document, the Court could find equitable tolling because, you know, it's obvious why the county would not produce the document. If I look at some of these documents…I didn't see anything on the face of any document that would show me that the county was acting in bad faith, had deceived the plaintiff or plaintiff's counsel, or had made any assurances to the plaintiff or plaintiff's counsel….

CP 697-698. Based on the purported absence of a "smoking gun" document that would have changed the tort case, the trial court ruled that Ms. Ehrhart's "failure to file [her] claim within one year from the closing of the first request" dictated "summary judgment to King County on that basis." CP 698-99.

Ms. Ehrhart moved for reconsideration, emphasizing that there was no "smoking gun" standard, and that bad faith in this context is a factual issue when, as here, "a cursory search and delayed disclosure well short of even a generous reading of what is reasonable under the PRA." *See Francis v. Washington State Dep't of Corr.*, 178 Wn. App. 42, 63-64 (2013), *as amended on denial of reconsideration* (Jan. 22, 2014). Unfortunately, the hearing was largely for naught. The trial court expressed that it

"allowed this to go forward on reconsideration, in part," simply to "clarify [her prior] ruling" granting the County's cross motion for summary judgment. *See* Verbatim Report of Proceedings, 16:16-21.

Ms. Ehrhart timely appealed to Division II, which affirmed the trial court's dismissal, and afterward, denied reconsideration. Ms. Ehrhart now seeks review.

III. IDENTITY OF PETITIONER AND DECISION BELOW

Petitioner Sandra Ehrhart seeks review of Division II of the Court of Appeals' decision, attached as Appendix A.

IV. ISSUES PRESENTED FOR REVIEW

1. Whether the discovery rule should apply to silently withheld records under the PRA?

2. Alternatively, if *Dotson* applies rather than the discovery rule, should equitable tolling be applied under *Francis v. Washington State Dep't of Corr.*, 178 Wn. App. 42, 63-64 (2013), *as amended on denial of reconsideration* (Jan. 22, 2014) and *Belenski v. Jefferson Cnty.*, 186 Wn.2d 452, 456, 378 P.3d

176 (2016), when a substantial number of records are withheld without explanation (*i.e.*, who has the burden to explain the withholding and who is entitled to favorable inferences).

V. WHY REVIEW SHOULD BE GRANTED

A. *Dotson*—And By Extension The Decision Below—Conflict With This Court's Holding In *U.S. Oil* That The Discovery Rule Should Apply When "The Plaintiff Lacks The Means Or Ability To Ascertain That A Wrong Has Been Committed."

The discovery rule reflects Washington courts' "duty to construe and apply limitation statutes in a manner that furthers justice." *U.S. Oil & Ref. Co. v. State Dep't of Ecology*, 96 Wn.2d 85, 93, 633 P.2d 1329, 1334 (1981). Thus, "[i]n determining whether to apply the discovery rule, the possibility of stale claims must be balanced against the unfairness of precluding justified causes of action." *U.S. Oil & Ref. Co.*, 96 Wn.2d at 93.

Unfortunately, relying on its own precedent, *Dotson v. Pierce Cnty.*, 13 Wn. App.2d 455, 464 P.3d 563 (2020), Division II refused to apply the discovery rule. It reasoned "the legislature determined that allowing a one-year period to sue following the

closing of a request strikes an appropriate balance between ensuring compliance with the PRA through access to penalties and limiting the amount of PRA litigation." Op. at 12.

This statement is true in the literal sense, but does not answer the relevant question. A requester who, for example, receives a questionable redaction or is advised of a withheld record, certainly can think through her legal rights within a year. But the one-year period is quite irrelevant to a requester like Ms. Ehrhart, who had no idea anything was amiss in the first place (because she was told it was not).

This rationale was illustrated in *U.S. Oil*, when the wrong was a quiet discharge of pollutants into a river. The defendant was under a legal obligation to "self-report," but failed to do so, leaving the plaintiff in the dark. After two years, the plaintiff learned of the discharge and sued for statutory penalties. If the statute of limitations was triggered by the discharge, then the suit was time-barred. But this Court correctly recognized the inequity of that outcome. Such a rule would allow the

corporation to benefit from its own unlawful failure to report the discharge. This Court also recognized the absurdity of assuming that the legislature wanted to bar plaintiffs from bringing suits in circumstances "where the plaintiff lacks the means or ability to ascertain that a wrong has been committed." *U.S. Oil*, 96 Wn.2d at 93. Accordingly, the discovery rule "dictated" that plaintiff's suit was not time barred.

Though cited to Division II, *U.S. Oil* was not even mentioned in the decision. The unstated premise is, seemingly, that the legislative intent was to make government agencies *better off* by silently withholding records in violation of the PRA; and in turn, requesters *worse off* for failing to blindly file a lawsuit within the year, without contemporary knowledge of a wrong being done to them.

Stated plainly, *Dotson* was wrongly decided. This is a context in which the discovery rule is absolutely appropriate—

and in many cases, like this one, the *only* mechanism for a just outcome.[3]

B. Division II's Novel Approach To Equitable Tolling Is In Direct Conflict With This Court's Decision In *Belenski v. Jefferson County*

According to the Court of Appeals—although responsive documents were hidden, and although no justification was given—because there was no evidence *that Ms. Larsen knew* about it, there could be no tolling. Op. at 8-9.

This analysis finds no support in any case law or precedent. As juries across the state are correctly instructed, organizations act through their "officers and employees. Any act or omission of an officer or employee is the act or omission of

[3] The discovery rule is well-developed, and trial courts can easily weed out claims in which the requester has been dilatory. Wrongdoing on the part of the requester can also be addressed in the penalty phase of the PRA proceeding.

the [organization]." WPI 50.18. This is not limited to the "officers or employees" the defendant hand-picks.[4]

As a matter of both common sense and PRA precedent—in which the burden to prove a reasonable search is on the agency—this is wrong. It also defies this Court's prior holdings. In *Belenski v. Jefferson Cty.*, 186 Wn.2d 452 (2016), for example, Jefferson County responded to a public records request for internet access logs by incorrectly stating that it had no responsive records. *Id.* at 455. The requester knew the County's response was inaccurate because he had requested and received internet access logs from the County in the past. *Id.* It later emerged that the County possessed the records but "mistakenly" believed they did not need to produce them because "they are not 'natively viewable' and would need to be 'pulled out of a database and generated in a human readable format.'" *Id*. at 455-

[4] **None** of the 15 custodians, who actually collected the responsive documents, explained or acknowledged the missing records. *See* CP 315-316.

56. The requester brought a PRA claim against the County for failing to produce the requested logs.

This Court held that the action was technically untimely (especially since the requestor already had some of the wrongfully unproduced documents) but remanded for the trial court to determine whether tolling should apply:

> … allowing the statute of limitations to run based on an agency's dishonest response could incentivize agencies to intentionally withhold information and then avoid liability due to the expiration of the statute of limitations… such an incentive could be contrary to the broad disclosure mandates of the PRA and may be fundamentally unfair in certain circumstances

Id. at 461-62 (emphasis added).

This is exactly the point, here. A "dishonest response" ("mistaken" or otherwise), leading to withholding, can factually support equitable tolling under *Belenski*—as it should. Allowing public agencies to avoid liability by waiting out the one-year statute only incentivizes the exact conduct the PRA seeks to prohibit. *See Progressive Animal Welfare Soc. v. Univ. of*

Washington, 125 Wn.2d 243, 270, 884 P.2d 592 (1994) ("The Public Records Act clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request.").

Indeed, *Belenski* and the decision below cannot coexist. In *Belenski*, the action was remanded to the trial court to determine whether equitable tolling should apply—even though the plaintiff knew about the problem from the beginning. Here, Ms. Ehrhart had no idea that the County had silently withheld nearly half of the responsive documents, yet her claims were dismissed as a matter of law. If anything, the reasoning of *Belenski* applies perforce to our case. The lack of diligence that gave the Court pause in *Belenski* is simply not present here.

At a minimum, Ms. Ehrhart demonstrated a factual issue.

C. The Decision Below Is Also Inconsistent With Division II's Own Precedent

In *Francis v. Washington State Dep't of Corr.*, 178 Wn. App. 42, 313 P.3d 457 (2013), bad faith was found when an agency spent 15 minutes searching for records and failed to

search all of its records storage locations. In so holding, the Court emphasized that an agency must have reasonable procedures in place and prove that it complied with them in a reasonable manner. *Id.* at 62.

In our case, the County offered no evidence of compliance by any of the more than a dozen records custodians. It, again, limited its analysis to a single "risk management" employee, who told everybody to do a good job and assumed they did so (when they, undisputedly, did not). This reasoning of course renders *Francis* a nullity; as now an agency can simply point to a records manager—who is perhaps blissfully ignorant and, like Ms. Larsen, uninvolved in the actual searching—while immunizing any degree of wrongdoing by the custodians. Division II's decision below holds that this is a *dispositive* defense to a PRA action.

Suffice to say, this is antithetical to the PRA and poor public policy. The burden should be on government to be honest

and transparent; not on widows like Ms. Ehrhart to sleuth out the wrongdoing, and then prove an evil motive.

Francis, if nothing else, holds that the benefit of question goes to the requester, not government. "Absent any countervailing evidence showing justification… shows that the [responding agency] did not act in good faith[.]" *Id*. at 64. The agency should not profit by its failure to explain its own failures. The issue should have been resolved in Ms. Ehrhart's favor; or at a minimum, resolved as a factual issue at trial.

D. This Is An Issue Of Substantial Public Importance

In a time of unprecedented distrust of public institutions, including and especially Public Health, allowing them to hide documents and operate in secrecy only exacerbates the divide. Sunlight is the best disinfectant, *Cogan v. Kidder, Mathews & Segner, Inc.*, 97 Wash.2d 658, 663, 648 P.2d 875 (1982) (quoting L. Brandeis, OTHER PEOPLE'S MONEY, ch. 15 (1914)), and that is precisely why the PRA exists. *See Doe ex rel. Roe v. Washington State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63, 66 (2016) ("The

PRA's primary purpose is to foster governmental transparency and accountability by making public records available to Washington's citizens.") (citing *City of Lakewood v. Koenig*, 182 Wash.2d 87, 93, 343 P.3d 335 (2014)). The statute itself directs that it be "liberally construed and its exemptions narrowly construed... to assure that the public interest will be fully protected." RCW 42.56.030. Courts therefore start with a presumption in favor of disclosure, not withholding. *See id.* ("affirmative duty").

There is nothing about a reward system for silent withholding, followed by a proceeding in which the burden of proof to show "bad faith" is on the requester, that tracks these principles. Moreover, people respond to incentives. And the structure created by *Dotson*, in which agencies benefit from silent withholding, will invariably lead good officials act less good; and bad officials to act worse.

This issue is not going away, *see Earl v. City of Tacoma* (Washington Supreme Court No. 101143-1); *Terry Cousins v.*

State of Washington (Washington Supreme Court No. 100755-8), because, respectfully, justice is not being done right now. Review should be granted to remedy this and reaffirm the importance of government transparency and openness.

VI. CONCLUSION

For the reasons above, review should be granted.

RESPECTFULLY SUBMITTED this 28th day of October, 2022.

I certify that this document contains less than 5,000 words in accordance with RAP 18.17.

s/Adam Rosenberg
Adam Rosenberg, WSBA #39256
Daniel A. Brown, WSBA #22028
WILLIAMS KASTNER & GIBBS
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Telephone: (206) 628-6600
Fax: (206) 628-6611
arosenberg@williamskastner.com
dbrown@williamskastner.com

Theron A. Buck, WSBA #22029
FREY BUCK P.S.
1200 Fifth Avenue, Suite 1900
Seattle, WA 98101
Tel: (206) 486-8000 Fax: (206) 902-9660
tbuck@freybuck.com

Counsel for Appellant Sandra Ehrhart

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that, on the date indicated below, a copy of the foregoing document was forwarded for service upon counsel of record in the manner indicated below:

Attorneys for Respondent King County:

Kymberly Evanson, WSBA #39973 Paul J. Lawrence, WSBA #13557 Shae Blood, WSBA #51889 Pacifica Law Group, LLP 1191 Second Avenue, Suite 2000 Seattle, WA 98101 Ph: 206-245-1700 Fax: 206-245-1750 Email: kymberly.evanson@pacificalawgroup.com paul.lawrence@pacificalawgroup.com shae.blood@pacificalawgroup.com sydney.henderson@pacificalawgroup.com	☑ Via Court's Electronic Service

Attorneys for Appellant Sandra Ehrhart

Theron A. Buck, WSBA # 22029 Frey Buck, P.S. 1200 5th Ave., Suite 1900 Seattle, WA 98101 Ph: 206-486-8000 Email: tbuck@freybuck.com ebariault@freybuck.com lfulgaro@greybuck.com	☑ Via Court's Electronic Service

DATED this 28th day of October, 2022.

s/Diane M. Bulis
Diane M. Bulis, Legal Assistant

APPENDIX

Pages:	*Description:*
A1 – A13	*Ehrhart v. King County* (8/30/22 Unpublished Opinion)
A-14	*Ehrhart v. King County* (9/28/22 Order Denying Motion for Reconsideration)

Filed
Washington State
Court of Appeals
Division Two

August 30, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SANDRA EHRHART, individually and as personal representative of the Estate of Brian Ehrhart, Appellant, v. KING COUNTY, operating through its health department, Public Health – Seattle & King County; SWEDISH HEALTH SERVICES, a non-profit entity; and JUSTIN WARREN REIF, an individual, Respondents.	No. 55498-4-II UNPUBLISHED OPINION

PRICE, J. — Sandra Ehrhart appeals the superior court's order granting King County's motion for summary judgment on her Public Records Act (PRA), chapter 42.56 RCW, claim related to a March 2017 PRA records request. Although Ehrhart's claim was filed more than one year after the March 2017 PRA request was closed, she argues that her claim should be permitted under equitable tolling and the discovery rule. Ehrhart has failed to meet her burden to establish equitable tolling applies, and the discovery rule does not apply to PRA claims. Accordingly, we affirm the superior court.

FACTS

In February 2017, Brian Ehrhart[1] tragically died of hantavirus. *Ehrhart v. King County*, 195 Wn.2d 388, 391, 393, 460 P.3d 612 (2020). In June 2018, Ehrhart sued King County, alleging its negligence in issuing public health advisories regarding hantavirus caused Brian's death. *Id.* at 394.

The parties filed cross motions for summary judgment regarding the public duty doctrine. *Id.* The superior court granted partial summary judgment to Ehrhart. *Id.* at 395-96. King County sought, and was granted, discretionary review from our Supreme Court. *Id.* at 396. On discretionary review, our Supreme Court held that, as a matter of law, the public duty doctrine barred Ehrhart's negligence claim against King County and ordered that Ehrhart's negligence claim be dismissed. *Id.* at 397, 410-11. In October 2018, while discretionary review of her negligence claim was pending, Ehrhart amended her complaint to include a PRA claim.

I. FACTS REGARDING PRA REQUEST

Ehrhart's attorney made a public records request in March 2017 that serves as a basis for the PRA claim. The request sought the following documents:

> -All records regarding Hantavirus incidents in 2016 or 2017;
>
> -All records in your possession regarding the hazards, dangers, and/or mortality rates of Hantavirus;
>
> -All communications—internal or external—about Hantavirus in 2017;
>
> -All documents reflecting any effort made by King County to make the public aware of Hantavirus in any year other than 2017;

[1] Brian was the spouse of appellant Sandra Ehrhart. *Ehrhart v. King County*, 195 Wn.2d 388, 391, 460 P.3d 612 (2020). Because Brian shared the same last name as Sandra Ehrhart, we will refer to him by his first name for clarity. We intend no disrespect.

> -All policies, practices and/or procedures pertaining to public awareness and notification of a health hazard;
>
> -All documents reflecting or referring to a duty or obligation on the part of the county to advise the public of health hazards;
>
> -All communication with or about Maureen Waterbury and/or her contraction of Hantavirus;
>
> -All communications with or about Brian Ehrhart and/or his contraction of Hantavirus;
>
> -All studies, investigations you've performed, or conclusions rendered this year pertaining to Hantavirus or the county's response thereto;
>
> -All statutory claims for damages filed against King County Public Health, pertaining in any way to its response to a public health hazard; and
>
> -All settlements of any claims against King County Public Health, pertaining in any way to its response to a public health hazard.

Clerk's Papers (CP) at 325-26. Penny Larsen, the senior public records analyst at King County's Office of Risk Management Services, estimated that a response to the records request would be completed in three weeks. Larsen also reproduced the items in the request into a numbered list to facilitate identifying the subparts of the request.

Larsen contacted three individuals in the Communicable Diseases and Epidemiology Department at Public Health — Seattle and King County in order to gather information on identifying appropriate records custodians and search terms. Larsen identified 15 potential custodians of records and identified search terms tailored to each subpart of the request. Larsen "directed the identified custodians to search their emails, network or hard drive files, paper files, notebooks, SharePoint, databases and any other locations where records may exist." CP at 315. Larsen also sent the custodians a guide to responding to PRA requests and instructed the custodians

to be overly-inclusive in their responses. Larsen repeatedly followed up with the custodians and offered to assist them with their searches.

On April 27, Larsen provided the first installment of responsive records. Larsen also informed Ehrhart's attorney that there had been an unexpected delay in searching for records because the staff members of the communicable disease work group were involved in "mission critical investigations." CP at 335. Larsen estimated that additional documents would be provided in three to four weeks. Additional responsive records were provided on May 5 and June 8. On August 7, Larsen mailed the final installment of records and notified Ehrhart's attorney that the records request was now considered closed.

On October 25, Ehrhart's attorney filed another public records request with King County. On October 31, Larsen responded to this request as well. The first installment of responsive records was provided on December 13. On February 14, 2018, Larsen sent a final installment of documents and notified Ehrhart's attorney the request would be closed unless he contacted Larsen within 30 days to clarify or discuss further research for responsive documents.

After filing her negligence claim in June 2018, Ehrhart sought discovery from King County. In response, King County produced thousands of documents. In reviewing these documents, Ehrhart identified 514 documents that appeared to be responsive to and existing at the time of her March 2017 PRA request. As a result, Ehrhart amended her complaint in October 2018 to include claims for PRA violations.

II. CROSS MOTIONS FOR SUMMARY JUDGMENT

Ehrhart moved for summary judgment and assessment of penalties under the PRA. Ehrhart asserted that King County's responses to discovery in the negligence claim produced over 1,000

documents that were responsive to her public records requests and had not been produced. Ehrhart also alleged she was "tricked" by King County because the responses to the March 2017 PRA request included some documents that were created after her request, leading her to believe that King County was producing all responsive documents created after her request. CP at 55. Specifically, Ehrhart claimed that there were 1,695 documents that were created between the time of her March 2017 PRA request and the time that the request was closed that were "culled" from production and withheld. CP at 55.

Throughout her motion, Ehrhart also repeatedly claimed that withholding of the documents impacted the outcome of her tort claim. Ehrhart specifically referenced "smoking-guns" in the allegedly withheld documents. CP at 48. In her argument regarding penalties, Ehrhart focused heavily on the argument that the county had escaped liability due to allegedly withholding the documents.

King County filed a cross motion for summary judgment. King County argued that Ehrhart's claim related to the March 2017 PRA request was barred by the statute of limitations. King County argued that Ehrhart failed to file the PRA complaint within one year of the date the request was closed—August 7, 2017. King County also argued that the discovery rule did not apply to toll the statute of limitations and that Ehrhart could not meet her burden to establish King County acted in bad faith for the purposes of establishing equitable tolling. And King County argued that it conducted an adequate search for both PRA requests.

King County supported its motion with Larsen's declaration detailing the search for records described above. In her declaration, Larsen also explained she began working on issues related to public records in 2005 and has received extensive training and certification in responding to PRA

requests. As senior public records analyst, Larsen provided training and mentoring to other public records officers and co-wrote the county's guide for responding to PRA requests. At the time of Ehrhart's request, the public records officer for Public Health was on special assignment, so Larsen was contracted by Risk Management to work on the request. Larsen specifically declared:

> At the time I fulfilled both of the requests, I had no knowledge of any intended or future lawsuit by the Ehrhart family against the County. I did not produce or withhold any records in anticipation of any litigation.

CP at 321. Larsen's declaration provided no discussion of, or explanation for, the documents Ehrhart argues were responsive and not disclosed, besides noting that any disclosure of documents that post-dated the request was inadvertent.

In reply, Ehrhart argued that equitable tolling was warranted because of King County's "egregious and deceptive conduct." CP at 441. Ehrhart argued that she "had no idea the County was holding back its smoking gun documents," and, therefore, it would be fundamentally unfair to allow King County to avoid liability based on the statute of limitations. CP at 443. Ehrhart also argued that applying the statute of limitations was inconsistent with the policy underlying the PRA. And Ehrhart asserted that "bad faith is established both by the sheer volume of documents improperly withheld, as well as the damning nature of those documents compared to the ones provided." CP at 445.

The superior court dismissed all claims arising out of the March 2017 PRA request as barred by the statute of limitations. The superior court also ruled that any claims based on documents that post-dated the request were dismissed. Ehrhart filed a motion for reconsideration, and the superior court denied it. Ehrhart then stipulated to dismissal of claims related to the October 2017 PRA request.

Ehrhart appeals the superior court's order granting King County's motion for summary judgment on claims arising out of the March 2017 PRA request.

ANALYSIS

Ehrhart argues that the superior court erred in dismissing her claims related to the March 2017 PRA request as untimely.[2] We disagree.

I. STANDARD OF REVIEW

We review summary judgment orders de novo.[3] *Sartin v. Est. of McPike*, 15 Wn. App. 2d 163, 172, 475 P.3d 522 (2020), *review denied*, 196 Wn.2d 1046 (2021). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A genuine issue of material fact exists if reasonable minds could disagree on the conclusion of a factual issue. *Sartin*, 15 Wn. App. 2d at 172. We review all facts and inferences in the light most favorable to the nonmoving party. *Id.*

[2] Ehrhart has abandoned her argument made to the superior court that the more than 1,600 documents created after the March 2017 PRA request were wrongfully withheld. Ehrhart makes no mention of these documents in her briefing and offers no argument or authority related to the superior court's dismissal of these claims. Therefore, we do not consider the superior court's order dismissing the claim related to documents that post-dated the March 2017 PRA request. *See Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290, *review denied*, 136 Wn.2d 1015 (1998) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.").

[3] At times on appeal, Ehrhart frames her argument in terms of whether the superior court abused its discretion in its reasons for granting King County's motion for summary judgment. Because we review summary judgment orders de novo, we do not review the superior court's reasoning for error. *See Chelan County Deputy Sheriff's Ass'n v. Chelan County*, 109 Wn.2d 282, 294 n.6, 745 P.2d 1 (1978) (findings of fact and conclusions of law are superfluous in summary judgment rulings and have no weight on appeal). Instead, we review the record de novo to determine whether Ehrhart has established that her claim was timely under either equitable tolling or the discovery rule.

The moving party "bears the initial burden to show there is no genuine issue of material fact." *Id.* The burden then shifts to the nonmoving party to "present specific facts that reveal a genuine issue of material fact." *Id.* If the nonmoving party fails to put forth sufficient evidence to create a genuine issue of material fact, then summary judgment is appropriate. *Id.*

II. STATUTE OF LIMITATIONS

"The PRA is a broad public mandate that allows citizens access to public records." *Belenski v. Jefferson County*, 186 Wn.2d 452, 456, 378 P.3d 176 (2016). The PRA provides citizens with a cause of action to challenge violations of the act. *Id.* at 457. However, those actions must be filed within one year:

> 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.

RCW 42.56.550(6).

Here, it is undisputed that Ehrhart's PRA claim was filed after the one-year statute of limitations had expired. King County responded to Ehrhart's March 2017 PRA request in installments. The last installment was provided on August 7, 2017. Under RCW 42.56.550(6), Ehrhart had one year—until August 7, 2018—to file a claim based on the March 2017 PRA request. Ehrhart did not file her PRA claim until October 2018, outside the statute of limitations. Therefore, there is no genuine issue of material fact that Ehrhart's claim was untimely under RCW 42.56.550(6).

Although Ehrhart's PRA claim was untimely under RCW 42.56.550(6), she argues that her claim should have been considered timely under the doctrine of equitable tolling or the discovery rule.

A. EQUITABLE TOLLING

RCW 42.56.550(6)'s one year statute of limitations may be subject to equitable tolling. *Belenski*, 186 Wn.2d at 461-62. We will allow equitable tolling when justice requires. *Price v. Gonzalez*, 4 Wn. App. 2d 67, 75, 419 P.3d 858 (2018). A party asserting equitable tolling bears the burden of pleading and proving " 'bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff.' " *Id.* (quoting *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (998)). Washington courts have applied the false assurances prong in narrow circumstances and have appeared to require a showing that the defendant "made a deliberate attempt to mislead." *Id.* at 76. "Courts typically permit equitable tolling to occur only sparingly, and should not extend it to a garden variety claim of excusable neglect." *Id.* We review decisions on whether to grant equitable relief de novo. *Trotzer v. Vig*, 149 Wn. App. 594, 607, 203 P.3d 1056, *review denied*, 166 Wn.2d 1023 (2009).

Here, Ehrhart first relies on *Belenski* to argue that King County's failure to disclose allegedly responsive documents warrants equitable tolling. But *Belenski* is distinguishable. In *Belenski*, the requester requested internet access logs. 186 Wn.2d at 455. Although the agency identified the records, it informed the requester there were no responsive documents because it believed it did not have to disclose documents that were not in a readable format. *Id.* at 455-56. Here, there is no evidence that Larsen knowingly chose not to disclose responsive documents, as there was in *Belenski*. Although, in hindsight, it appears that not all responsive documents were disclosed, there is no evidence in the record that Larsen knew that those documents existed at the time she closed the request. Therefore, the response may have been objectively false, but given there is no evidence Larsen knew it was false nor is there any evidence that Larsen made a

deliberate attempt to mislead; it was not deceptive or dishonest for the purposes of equitable tolling.

Second, Ehrhart supports her claim for equitable tolling by relying on *Francis v. Department of Corrections* to argue that King County's inadequate search is evidence of bad faith. 178 Wn. App. 42, 313 P.3d 457 (2013), *review denied*, 180 Wn.2d 1016 (2014). Like *Belenski*, *Francis* is distinguishable. In *Francis*, a prisoner requested records regarding prison policy. The agency spent only 15 minutes searching for records and apparently failed to search any of 17 records storage locations. *Id.* at 50. The court determined that the agency acted in bad faith because the record "clearly disclose[d] a cursory search and delayed disclosure well short of even a generous reading of what is reasonable under the PRA . . . ." *Id.* at 63. However, the court also recognized that an agency avoids the risk of a bad faith finding by having proper procedures in place and then complying with those procedures in a reasonable manner. *Id.* at 62.

Here, Ehrhart has not shown that King County disregarded its procedures or performed a mere cursory search, as in *Francis*. King County presented ample evidence establishing that King County performed more than a cursory search because King County documented the aspects of Larsen's search, including regular communication with Ehrhart's attorney, identifying multiple potential custodians of records, selecting various search terms, and providing explicit instructions on conducting searches and responding to PRA requests. As a result of the search, Larsen compiled multiple installments of documents in response to Ehrhart's March 2017 PRA request. This effort is a far cry from the cursory search performed in *Francis*. Further, there is no evidence that Larsen disregarded policies or procedures in responding to Ehrhart's March 2017 PRA request. Therefore, *Francis* does not support the conclusion that King County acted with bad faith.

Ultimately, it is Ehrhart's burden to show King County acted in bad faith and Ehrhart has shown nothing more than King County's response failed to include all responsive records. The failure to identify and produce all responsive documents under these facts is not proof of bad faith.[4]

Ehrhart failed to establish that King County responded to her March 2017 PRA request in bad faith or engaged in deception or false assurance in a deliberate attempt to mislead. Therefore, the superior court correctly ruled that the timeliness of Ehrhart's claims related to the March 2017 PRA request was not saved by operation of equitable tolling.

B. DISCOVERY RULE

" 'Under the discovery rule, a cause of action accrues when the plaintiff knew or should have known the essential elements of the cause of action.' " *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 472, 464 P.3d 563 (quoting *Allen v. State*, 118 Wn.2d 753, 757-58, 826 P.2d 200 (1992)), *review denied*, 196 Wn.2d 1018 (2020). In *Dotson*, we held that the discovery rule does not apply to PRA cases because the PRA's statute of limitations contains a clear triggering event for the statute of limitations:

> The discovery rule generally applies in cases where "the statute does not specify a time at which the cause of action accrues." *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991). However, the PRA statute of limitations contains triggering events that enable a requester to know that a cause of action has accrued, and the legislature enacted no discovery rule exception. And Dotson cites no authority for applying the discovery rule to PRA actions that, as interpreted in *Belenski*, arise under a statute that specifies the statute of limitations

[4] Ehrhart appears to argue that the amount of documents that were not disclosed proves that King County's search was inadequate and, therefore, King County acted in bad faith. However, more than an inadequate search must be required to establish equitable tolling. *See Price*, 4 Wn. App. 2d at 76 ("Courts typically permit equitable tolling to occur only sparingly, and should not extend it to a garden variety claim of excusable neglect."). Accordingly, we address only whether Ehrhart met her burden to demonstrate that King County conducted the search in bad faith, not whether the search was adequate.

> begins to run at the time of the agency's "final, definitive response." 186 Wn.2d at 461.

Dotson, 13 Wn. App. 2d at 472 (footnote omitted).

Ehrhart argues that we should reject *Dotson* in this case because it is unfair to allow the statute of limitations to run when she did not know she had a claim against King County. We recognize that refusing to apply the discovery rule to PRA claims may preclude some claims when the requester does not know the precise details of a cause of action until later. However, after years of a longer statute of limitations for PRA claims, the legislature determined that allowing a one-year period to sue following the closing of a request strikes an appropriate balance between ensuring compliance with the PRA through access to penalties and limiting the amount of PRA litigation. *See Francis*, 178 Wn. App. at 62; *see also* LAWS OF 1973, ch. 1 § 41 (original initiative establishing six year statute of limitations); LAWS OF 2005, ch. 483 § 5 (establishing current one year statute of limitations). The application of the discovery rule here would erode this legislative decision. Moreover, in the egregious case, when a plaintiff can actually make a showing of bad faith, the cause of action may still be pursued under the doctrine of equitable tolling.

We decline to reject *Dotson*. Therefore, we decline to apply the discovery rule to Ehrhart's PRA claim and, accordingly, Ehrhart's claims related to the March 2017 request were untimely. The superior court did not err in granting King County's motion for summary judgment on Ehrhart's March 2017 PRA request.[5] We affirm.

[5] Ehrhart also argues that the superior court abused its discretion by denying her motion to reconsider. However, because the superior court properly granted King County's motion for summary judgment, it could not have abused its discretion in denying Ehrhart's motion for reconsideration.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

PRICE, J.

We concur:

MAXA, P.J.

LEE, J.

Filed
Washington State
Court of Appeals
Division Two

September 28, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SANDRA EHRHART, individually and as personal representative of the Estate of Brian Ehrhart, Appellant, v. KING COUNTY, operating through its health department, Public Health – Seattle & King County; SWEDISH HEALTH SERVICES, a non-profit entity; and JUSTIN WARREN REIF, an individual, Respondents.	No. 55498-4-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the opinion filed August 30, 2022, in the above entitled matter. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj: MAXA, LEE, PRICE

FOR THE COURT:

PRICE, J.

WILLIAMS KASTNER

October 28, 2022 - 4:03 PM

Filing Petition for Review

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Appellate Court Case Number:	Case Initiation
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