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.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

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

MACDONALD HOAGUE & BAYLESS

March 02, 2023 - 4:04 PM

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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, CJ

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.