COA Nos. 32596-2-III
32643-8-IIIXX

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STEVEN P. KOZOL,

Appellant,

vs.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WALLA WALLA COUNTY
HONORABLE JOHN W. LOHRMANN

APPELLANT STEVEN P. KOZOL'S OPENING BRIEF

(COA No. 32596-2-III)

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INTRODUCTION

Under the Public Records Act, when a requestor submits same-subject follow-up requests to obtain silently withheld records responsive to the initial request, the statute of limitations accrues from the date of the agency's last response thereto.

Under the Public Records Act, an agency violates the Act by destroying oringinal responsive records after being specifically requested, but before the requestor has completed statutorily-permitted judicial review.

Under Civil Rule 41(a)(1)(B), once a plaintiff first moves for voluntary dismissal, the court must grant the dismissal, without prejudice.

When an agency's actions violate the Public Records Act, yet are not one of the two actions that trigger the one-year statute of limitations under RCW 42.56.550(6), a requestor, if seeking statutory penalties, has three years to bring suit under RCW 4.16.115.

ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred in granting dismissal of Plaintiff's claims.

Assignment of Error No. 2: The trial court erred in denying Plaintiff's motions for CR 42(a) consolidation or CR 41(a)(1)(B) dismissal.

ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

Assignment of Error No. 1:

Issue No. 1: Does the Public Records Act, chapter 42.56 RCW, allow a defendant agency to impose a burden-shifting mechanism of a "show cause" procedure upon a plaintiff requestor?

Issue No. 2: Whether Civil Rule 12(c) or summary judgment standard of review applies?

Issue No. 3: Was there a prima facie showing that Defendant violated the Public Records Act?

Issue No. 4: Did accrual of the statute of limitations begin from Defendant's response to Plaintiff's last same-subject follow-up request, rendering Plaintiff's claims timely?

Issue No. 5: Did Defendant's 21 destructions of responsive records violate the Public Records Act, constituting additional claims, which were amended into the pleadings under CR 15(b), and begin accrual of the statute of limitations?

Issue No. 6: Does the discovery rule apply to toll accrual of the statute of limitations in this case?

Issue No. 7: Was there a genuine dispute of material fact that precluded summary judgment of Plaintiff's claims?

Assignment of Error No. 2:

Issue No. 1: Should the motion for consolidation have been granted?

Issue No. 2: Should the motion for voluntary dismissal have been granted without prejudice upon amendment of claims?

STATEMENT OF THE FACTS

On April 8, 2011, Plaintiff submitted 22 separate Public Records Act requests to Defendant seeking any and all records of 22 different, individually numbered grievances filed at the Washington State Penitentiary in Walla Walla, Washington.[1] Each request specifically asked for the original grievance/complaint form. CP 630-50; CP 256-77. All 22 requests were mailed to Defendant in the same envelope. CP 757.

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[1] Plaintiff initially submitted 22 separate requests. He filed suit upon one of the requests, No. PDU-15229 on April 5, 2012 (GR3.1) upon learning by a page-count discrepancy that Defendant had not produced at least one responsive page. Supp. CP ____ (Deposition of Steven P. Kozol). That action, Kozol v. WDOC, WWCSC No. 12-2-00285-2, is also under appeal, COA No. 32643-8-III, and review of these two appeals has been consolidated. Because all request correspondence submitted by Plaintiff pertained to 53 requests, this factual recitation refers to 22 requests for purposes of this case.

On April 19, 2011, DOC employee Debra Tracy sent an email to DOC employee Lee Young requesting that she conduct a search at the Washington State Penitentiary for a request seeking "Any and all documents related to each of the following Grievances (22)," as requested by Plaintiff. CP 748-49. The same day, Lee Young "sent a response attaching scanned copies of all 22 complete grievance packets." CP 743.

On April 22, 2011, Defendant issued 22 separate initial responses assigning sequential tracking numbers PDU-15229 to PDU-15250. In each response Defendant expressly confirmed that Plaintiff sought the original complaint/grievance form.[2] CP 282-302, 651-71.

On June 16, 2011, June 24, 2011, and June 28, 2011, Defendant issued 22 separate letters, each identifying the number of responsive pages and cost estimate. Each of these 22 letters again confirmed that Plaintiff had requested the orignal grievance/complaint form. CP 304-24, 672-92.

On December 8, 2011, Plaintiff sent a letter to Defendant asking for all responsive records in requests nos. PDU-15229 to PDU-15250 to be emailed to his personal email account in the community: StevenKozolIsInnocent@gmail.com. CP 326, 693.

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[2] Defendant refused in discovery in the companion case to produce a copy of its April 22, 2011 response to request no. PDU-15229 (grievance#1017109).

Defendant then sent what it purported to be all responsive records for all 22 requests to Plaintiff via a series of emails dated January 3, 2013, January 9, 2012, January 31, 2012, February 16, 2012, and February 23, 2012. Again, Defendant confirmed in these letters that each of Plaintiff's 22 requests sought the original complaint/grievance form. CP 95-132, 330-71, 372, 695-732.

Plaintiff had the emailed records printed out and forwarded to his attorney, Michael C. Kahrs. It took several months of conferring with his attorney, but Plaintiff eventually learned through conversations with his attorney that the Defendant had not identified or produced all responsive pages in all 22 requests. Supp. CP _____ (Deposition of Steven P. Kozol).

On March 25, 2013, Plaintiff sent a follow-up letter to Defendant through its counsel of record,[3] notifying the Defendant of multiple "silent withholdings" of records responsive to 53 of Plaintiff's requests. CP 603. On April 10, 2013, Defendant's counsel sent a letter responding to Plaintiff's March 25, 2013 follow-up request, wherein the Defendant requested to be provided with proof of the "silent withholdings". CP 603.

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[3] Plaintiff had already initiated litigation against Defendant as to one of these requests, no. PDU-15229, so additional correspondence was sent to Defendant's counsel of record who had already entered a notice of appearance in the companion case, WWCSC No. 12-2-00285-2.

On April 12, 2013, Plaintiff sent a follow-up request letter to Defendant's counsel specifically identifying responsive record pages that appeared to be silently withheld in 53 of Plaintiff's requests. CP 603-04. On May 2, 2013, Plaintiff sent a follow-up request letter to Defendant's counsel seeking confirmation of receipt of Plaintiff's April 22, 2013 follow-up request that identified the silently withheld record pages in each request. CP 604.

On May 19, 2013, Plaintiff sent another follow-up request letter to Defendant's counsel notifying Defendant that it had still not provided Plaintiff with any of the silently withheld records identified in prior follow-up request letters. CP 604. On June 6, 2013, Plaintiff sent another follow-up request letter to Defendant's counsel as notice that none of the identified silently-withheld records had been provided. CP 604.

On June 11, 2013, Plaintiff sent another follow-up request letter to Defendant's counsel notifying the Department that it was continually failing to provide any of the identified responsive records that it had silently withheld in responding to Plaintiff's requests. CP 604. On July 2, 2013, Defendant's counsel sent a letter to Plaintiff declining to resolve the issues of silently withheld records to avoid litigation. The letter failed to offer to provide, or address to any degree, the 53 identified silently withheld responsive records. CP 604.

On July 5, 2013, Plaintiff sent a letter to Defendant's counsel notifying the Department that the ongoing failure to provide the identified silently-withheld responsive records contributed to the agency's bad faith in these matters. CP 605. On November 22, 2013, Plaintiff sent another follow-up request letter to Defendant, again identifying specific responsive records being silently withheld in response to his 53 requests. CP 605.

Having received no response to his November 27, 2013 letter, Plaintiff filed an action on December 15, 2013 (GR 3.1), bringing 21 claims of violations of the Public Records Act. CP 605, 607. After filing suit, Plaintiff received a December 12, 2013 response letter Defendant had mailed to reply to Plaintiff's last follow-up request. CP 789.

PROCEDURAL HISTORY

On January 30, 2014, the Defendant filed its Answer. CP 609-14. On April 16, 2014, the Defendant filed a motion to "show cause", seeking to require Plaintiff to establish proof that the PRA was violated. In its motion, Defendant argued that Plaintiff's 21 claims were time-barred under RCW 42.56.550(6), and argued that it did not violate the PRA. Defendant also sought a finding that Plaintiff's claims were frivolous, and as a result it was entitled to an award of costs and fees. CP 615-23.

On April 26, 2014, Plaintiff filed (GR 3.1) a motion for CR 42(a) consolidation and/or CR 41(a)(1)(B) dismissal, in which he sought to either consolidate the instant 21 claims with the related single-claim action, Kozol v. WDOC, WWCSC No. 12-2-00285-2, or, to voluntarily dismiss these 21 claims without prejudice pending their CR 15 amendment into Case No. 12-2-00285-2. CP 750-58.

On May 3, 2013, Plaintiff filed (GR 3.1) an opposition to the show cause motion, in which he argued that: (a) a defendant agency does not have standing/ability to employ a burden-shifting mechanism of a show-cause motion against a plaintiff requestor; (b) there existed a prima facie showing that the PRA was violated; (c) the numerous follow-up request letters tolled accrual of any statute of limitations; and (d) the Defendant's statute of limitations argument was moot in light of Plaintiff's pending motion to consolidate or dismiss, and the motion to amend filed in Case No. 12-2-00285-2. CP 759-71.

On May 12, 2014, the Superior Court heard Defendant's motion on show cause, Plaintiff's CR 42(a) motion for consolidation and CR 41(a) motion to dismiss, all without oral argument. The court entered an order denying Plaintiff's motions for consolidation and dismissal, and granted Defendant's motion for show cause/dismissal. CP 809-11.

On May 17, 2014, Plaintiff timely filed and served a CR 59 motion for reconsideration. CP 812-20. Plaintiff then filed and served an amended CR 59 motion for reconsideration on May 26, 2014. CP 821-34. Defendant filed its response to the CR 59 motion on June 2, 2014. CP 835-41. Plaintiff filed his reply on the motion for reconsideration on June 5, 2014. CP 842-65. On June 19, 2014, the court conducted a hearing on reconsideration. RP 3. On June 19, 2014, the court signed an order denying Plaintiff's motion for reconsideration. CP 866.

ARGUMENT

A. The Trial Court Erred in Granting Dismissal of Plaintiff's PRA Claims

1. RCW 42.56.550 does not permit a defendant agency to shift the statutory burden upon a plaintiff requestor to prove a PRA violation occurred

Defendant brought its motion to show cause under RCW 42.56.550. CP 615. However, RCW 42.56.550 expressly places the burden upon the agency to prove it did not violate the PRA. While other mechanisms exist under the statute for an agency to enjoin disclosure, e.g., RCW 42.56.540, RCW 42.56.565(2)(a), they, too, still place the burden of proof upon the agency. CP 762.

Defendant's motion under RCW 42.56.550 improperly shifted the burden upon Plaintiff to show that the agency violated the PRA. Accordingly, Plaintiff moved to strike the "show cause" motion. CP 794. The trial court erred as a matter of law in not striking the motion, as there was no discretion involved: it could not place the burden of proof upon Plaintiff. It was error to enter the order granting Defendant's motion that expressly shifted the burden onto Plaintiff.

2. CR 12(c) / summary judgment standard of review

In its May 12, 2014 Decision and Order, the trial court classified Respondent's motion to show cause as "essentially a CR 12(b)(6) motion to dismiss."[4] CP 810.

Appellate courts review a CR 12(c) dismissal de novo. PE Systems LLC v. CPI Corp., 176 Wn.2d 198, 203, 289 P.3d 638 (2012).

A trial court can consider materials outside the pleadings presented by both the moving and nonmoving party in a CR 12 motion. Kelley v. Pierce County, 179 Wn.App. 566, 319 P.3d 74, 77 (2014); see St. Yves v. Mid State Bank, 111 Wn.2d 374, 377, 757 P.2d 1384 (1988)(court considered evidence outside pleadings in deciding CR 12 motion); Hope v. Larry's Markets, 108 Wn.App. 185, 29 P.3d 1268 (2001)(same); PE Systems, 164 Wn.App. at 364 (same).

[4] Such a motion, absent improper burden-shifting, would technically be a CR 12(c) motion in light of Defendant's Answer. CP 609-14. However, both are reviewed under the identical standard. PE Systems, 176 Wn.2d at 203.

> "In some cases, a party moving to dismiss under CR 12(b)(6), or responding to such a motion, will need to present evidence outside the pleadings. The parties may do so, but the motion then becomes essentially a motion for summary judgment, and will be treated as such by the court. CR 12(b)."

Karl B. Tegland, 3A Washington Practice - Rules Practice: CR 12 (6th ed. 2013) p. 2929.

Because the trial court's May 12, 2014 order indicated it considered the declaration filed by Defendant (CP 810), the motion was to be converted to a motion for summary judgment. Thus, on review the burden of proof is required to be on the Defendant, and all evidence is to be viewed in the light most favorable to Plaintiff, with all questions of law reviewed de novo. Berrocal v. Fernandez, 155 Wn.2d 585, 590, 121 P.3d 82 (2005).

3. There was a prima facie showing Defendant violated the PRA

As fully detailed in the companion briefing, there was substantial proof that Defendant violated the PRA. Absent a claimed exemption, Defendant was required to identify and produce the requested original (double-sided) grievance/complaint forms in their entirety, as they were identifiable public records. Defendant silently withheld responsive records. Defendant failed to conduct an adequate search. Defendant failed to provide the fullest assistance. Defendant unlawfully destroyed responsive records. Defendant

wrongfully modified the records requests without Plaintiff's consent. See COA No. 32643-8-III, Opening Brief of Appellant, at 27-40.

4. Plaintiff's 21 claims were not time-barred, because same-subject matter follow-up request letters, or Defendant's responses thereto, commenced accrual of the statute of limitations

In its motion to show cause, the Defendant argued that Plaintiff's 21 claims (PDU-15230 to PDU-15250) were time-barred because they were beyond the one-year statute of limitations in RCW 42.56.550(6), and beyond the two-year statute of limitations in RCW 4.16.130. CP 617-19. The Defendant is incorrect.

As pled in the First Amended Complaint, Plaintiff submitted no less than 8 same-subject matter follow-up requests to Defendant specifically identifying that the original "DOC 05-165 Back" pages of the grievance forms were not produced, and requesting they be produced. These follow-up requests, and the Defendant's responses thereto spanned from March 25, 2013 to November 22, 2013. CP 603-05. Defendant admitted to these follow-up requests and responses thereto. CP 609-14. Further, Plaintiff eventually received a December 12, 2013 response from Defendant to his November 27, 2013 follow-up request. CP 788-89.

While Defendant argued that Plaintiff's 21 claims were time-barred under the Division Two Court of Appeals' holding in Bartz v. Department of Corrections, 173 Wn.App. 522, 536, 297 P.3d 737 (2013), such reliance is misplaced, as the specific holding does not apply to the facts of the instant case. In Bartz, the requestor did not submit a series of same-subject follow-up requests to effectuate disclosure before having to resort to litigation.

Under the Division Two Court of Appeals' holding in Johnson v. Department of Corrections, 164 Wn.App. 769, 265 P.3d 216 (2011), Plaintiff's action is not time-barred, as any statute of limitations "began to run when prisoner received letter from DOC on his follow-up request." Appendix A.

Johnson is strikingly similar to the instant case, as the requestor in Johnson submitted an initial record request dated August 21, 2006, followed by three follow-up requests dated September 10, 2006, October 19, 2006, and March 27, 2007. Johnson, 164 Wn.App. at 771-74. The follow-up letters were "requesting the same information he had requested" in the previous letter, id., at 772, and were "apparently a request for the same documents he had requested originally" but felt had been withheld. Id., at 773.

While the agency issued responses to each of Johnson's four letters, the Division Two Court ultimately ruled that the latest possible date on which Johnson's action accrued was one week after (to allow 5 days for mailing) the agency's August 27, 2007 response to Johnson's last same-subject matter follow-up request. Johnson, 164 Wn.App. at 778-79.

Therefore, under Johnson, when a requestor submits additional follow-up request(s) to an agency in an ongoing attempt to obtain records that are responsive to the initial request, the accrual of the one-year statute of limitations under RCW 42.56.550(6), or the two-year "catch-all" period in RCW 4.16.130, does not begin until (1) the agency last responds to the requestor's last follow-up request, or (2) from the date the agency should have received the requestor's last same-subject follow-up request, to which there was no agency response.[5]

Here, as sometimes occurs in PRA cases, the request and response correspondence exchanged between Plaintiff and Defendant extended beyond the date that the Defendant now claims it first made the records available. Defendant contends that statutory accrual commenced in June 2011. CP 119. However, this calculation is misguided because it selectively relies on an incomplete dateline representation.

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[5] In actuality, the court in Johnson, and ostensibly Tobin v. Worden, 156 Wn.App. 507, 233 P.3d 906 (2010), misapplied RCW 4.16.130. In the event agency action does not trigger the one-year period in 42.56.550(6), the correct statute of limitations is RCW 4.16.115, if seeking penalties under the PRA. See infra.

Because it required 8 follow-up request letters to Defendant, seeking pages responsive to the initial request(s), and ultimately commencement of litigation before Defendant, for the first time, identified the pages and refused to produce them, the follow-up requests were a necessary continuation and integral part of the initial requests.

This Court should continue to implement judicial oversight aligned with the best interest of the public whom the PRA was designed to serve, and either find Johnson controls, or render a similar holding. Not only is this sound policy and in accordance with the purpose of the PRA, but it essentially dovetails with the existing applications of the discovery rule, which as discussed below in this brief, tolls the date of accrual "until the plaintiff knew or, through exercise of due diligence, should have known all the facts necessary to establish a legal claim." Martin v. Dematic, 178 Wn.App. 646, 659, 315 P.3d 1126 (2013).

As in Plaintiff's case here, often a requestor must employ several follow-up requests before all responsive records are identified. Here, Defendant without question silently withheld responsive record pages, yet it was not until Plaintiff initiated litigation that Defendant was compelled to identify the silently withheld records, and the fact that they had been unlawfully destroyed some 20 months after they were initially requested.

Because the only way, aside from bringing suit, for Plaintiff to know what further responsive records the Defendant had was for him to submit follow-up requests, this Court adopting the holding in Johnson, or one similar, would align with existing discovery rule principles, as Plaintiff's follow-up requests constitute his "exercising due diligence" where he "lacked the means or ability to ascertain that a legal cause of action accrued." Martin, supra.

Therefore, either Johnson controls, or, based upon the above similar companion principles, Plaintiff asks this Court to hold that the Defendant's last response to his last same-subject follow-up request began accrual of any statute of limitations. This accrual date would be approximately 5 days after Defendant mailed its December 12, 2013 response letter.[6] CP 789.

5. Destruction of responsive records violated the PRA, constituting additional claims, which were amended into the pleadings under CR 15(b), and began accrual of the statute of limitations

i. Destruction constitutes new PRA violation that precludes dismissal

[6] At the time of its December 12, 2013 response letter, the Defendant apparently misunderstood Plaintiff to have initiated litigation on all 53 requests identified in his November 22, 2013 letter. In actuality, he had only commenced litigation on one request, no. PDU-15229. At the time of his November 22, 2013 letter, Plaintiff had not yet been forced to resort to litigation to obtain the withheld records in the remaining requests.

Defendant received Plaintiff's 22 requests on April 15, 2011. CP 256-77. Each request, by separate sentence, expressly requested the original complaint/grievance form. Id. Defendant destroyed at least 21 of the 22 original (double-sided) grievance forms in December 2012 and February 2013, after Plaintiff requested them. CP 783-84.

Under RCW 42.56.100, an agency is prohibited from destroying records scheduled for destruction if the agency receives a public record request "at a time when such record exists." Fisher Broadcasting - Seattle TV LLC v. City of Seattle, ___ Wn.2d ___, 326 P.3d 688, 701 (2014)(en banc). "Destruction of a requested record violates the PRA and can lead to the imposition of penalties." Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 750, 261 P.3d 119 (2011)(Madsen, C.J., concurring).

Here, Defendant identified in sworn discovery responses that it shredded at least 21 of the (double-sided) original paper grievance forms at a time after it received Plaintiff's requests for the records. Because each of these original forms is a double-sided page, it is physically impossible to shred, or otherwise generally destroy, only one side of the form. It is therefore immaterial whether Defendant argued, or if the trial court found, that only the front page of each form had to be produced, because Defendant's destruction of both sides of each of the 21 original forms, after being requested, violated the Public Records Act.

Because each of Plaintiff's 22 requests expressly requested the original complaint/grievance form, the destructions of these original double-sided records violated the PRA, triggered accrual of the statute of limitations, and precluded CR 12/summary judgment dismissal.

This case illustrates the precise reason why the prohibitive language was written into RCW 42.56.100 by the Legislature, because, even when operating under the trial court's acceptance of Defendant's argument that it did not consider the 22 back pages to be identified by Plaintiff's requests for the original grievance forms, Plaintiff still had the right to clarify or expand his request as necessary, including having a third-party representative personally inspect the double-sided original paper documents he requested. See Sappenfield v. Dept. of Corrections, 127 Wn.App. 83, 88-89, 110 P.3d 808 (2005), review denied, 156 Wn.2d 1013 (2006) (when a requestor cannot inspect records -- because of incarceration, for example -- the agency should allow a representative of the requestor to inspect them).

Moreover, no requestor could ever challenge or obtain judicial in-camera review of records under the PRA, if agencies provide a copy of an original record, yet then destroy the requested original.

Let there be no confusion, Plaintiff specifically requested "the original" records, not third-generation copies of a second-generation computer scan of the original records.

While copies produced by the Defendant may or may not be an accurate reproduction of the orignal front page of the grievance forms, it is impossible for Plaintiff to have a third-party representative, such as his attorney, now follow-up by personally inspecting "the original" grievance forms to see what was contained on the second/back pages, or to see if any improper redactions occurred on the front pages, e.g., staff "whiting-out" embarrassing, inculpatory, or prejudicial information before they scanned the pages into a database.

As a matter of law, full access to public records can never be provided under the PRA when an agency provides a copy of a requested record, and upon a requestor challenging that the copy is inaccurate, redacted, altered, or incomplete, there exists no means for judicial in-camera review under RCW 42.56.550(3) because the agency proceeded to destroy the original record(s) after receiving the records request. See Soter v. Cowles Publ'g Co., 162 Wn.2d 716, 744 n.14, 174 P.3d 60 (2007)(court noting it could determine disclosability of records without remanding to trial court because trial court had the records in camera when it made its conclusions).

Since the PRA expressly permits a private cause of action for a requestor to enforce/compel agency production of records withheld in whole or in part, the Department of

Corrections was prohibited by RCW 42.56.100 from destroying the original (double-sided) paper grievance forms, because the requests could not, as a matter of law, be considered "resolved" under 42.56.100 until all judicial review was completed.

"When a PRA request is made, a government agency must hold onto the records, including their metadata; they cannot be deleted." O'Neill v. City of Shoreline, 170 Wn.2d 138, 150, 240 P.3d 1149 (2010).

ii. Unlawful destruction claims amended into pleadings under CR 15(b)

Because Defendant had not yet revealed that these destructions took place, the 21 new claims of unlawful destruction were not initially pled in the complaint. CP 601-14. However, because they were raised in Plaintiff's responsive effort to "show cause" that the PRA was violated (CP 765-67), and because Defendant did not object, these claims were tried by express or implied consent, including the trial court issuing a ruling of subsequent dismissal. As such, the new claims of unlawful record destruction were amended into the pleadings under CR 15(b).[7]

CR 15(b) provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if

[7] Defendant elected to not file any reply to Plaintiff's Opposition to Defendant's Motion to Show Cause, and therefore did not object. The court heard the "show cause" motion without oral argument.

they had been raised in the pleadings." Mukilteo Retirement Apartments, LLC v. Mukilteo Investors, LP, 176 Wn.App. 244, 256, 310 P.3d 814 (2013). In determining whether the parties impliedly consented to the trial of an issue, "an appellate court will consider the record as a whole, including whether the issue was mentioned before the [summary judgment hearing], the evidence on the issue admitted at [the hearing], and the legal and factual support of the trial court's conclusion regarding the issue." Id. at 257 (citation omitted).

Pleadings may be deemed amended under CR 15(b) to conform to issues "tried" by the parties or when "the parties acknowledge existence of an issue during discovery or argument on pretrial motions." Karl B. Tegland, Vol.14 Washington Practice: Civil Procedure (6th ed. 2013) §12:38 at 895. "[T]he rule is essentially self-executing," requires that issues "shall be treated in all respects as if they had been raised in the pleadings," and provides that failure to formally amend pleadings "does not affect the result of the trial on the issues." Id.; CR 15(b).

Because Defendant did not object to these destruction claims, they amended under the first part of CR 15(b). Because the claims were tried by express or implied consent, they amended under the second part of CR 15(b).

iii. Destruction claims were not time-barred

Plaintiff's suit was not time-barred for several reasons. First, Plaintiff's complaint was filed (GR 3.1) on December 15, 2013. CP 601-07. The 21 unlawful destructions of responsive records were identified by Defendant as occurring sometime in "December 2012" and "February 2013." CP 783-84. There is no evidence in the record establishing whether any or all of these unlawful destructions occurred before or after December 15, 2012, the one-year date before Plaintiff's complaint was filed.

The party asserting a statute of limitations affirmative defense bears the burden of establishing the facts that support it. Under the proper summary judgment standard of review, all facts must be viewed in the light most favorable to Plaintiff, and therefore, it must be viewed that the complaint was filed within one year of the 21 unlawful destructions. As such, the suit was timely under RCW 42.56.550(6).

Alternately, this creates a genuine dispute of material fact as to when any statute of limitations accrued on the 21 new claims of unlawful destruction, precluding summary judgment. CR 56(c); Olson v. Siverling, 52 Wn.App. 221, 224, 758 P.2d 991 (1988). The statute of limitations is an affirmative defense on which the defendant bears the burden of proof. Haslund v. City of Seattle, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976).

Additionally, because the prohibition in RCW 42.56.100 is against destroying records that exist and have been requested, there must be an underlying request for the records before a destruction of the records could violate the Public Records Act. As such, the 21 unlawful destructions in December 2012 and February 2013 are a continuation of the ongoing Public Records Act violations pled in the complaint. The continuing violation would logically render this action timely, as long as one of the acts of continuing violation occurred within an applicable statute of limitations period.

As discussed further below, the fact that there was "concealment of information by the defendant" as to "claims [of record destruction] in which Plaintiff could not immediately know of [a cause of action]," would toll accrual of the statute of limitations to the date Plaintiff learned of these 21 unlawful destructions.

Second, if viewing the 21 unlawful destructions as new causes of action under the PRA, because they do not constitute either an "agency's claim of exemption" nor "the last production of a record on a partial or installment basis," the one-year statute of limitations in RCW 42.56.550(6) does not apply. Therefore, an alternate statute of limitations must apply. See Johnson, 164 Wn.App. at 769 n.15 ("Again, we reject Johnson's implied notion that no statute of limitations applied to his PRA action....")

In determining the applicable statute of limitations in cases where RCW 42.56.550(6) is not triggered, decisions from both Division One and Division Two of this Court are helpful. In Johnson v. Dept. of Corrections, 164 Wn.App. 769, 265 P.3d 216 (Div.2, 2011) the Divison Two Court stated,

> "the legislature has provided no other PRA-specific statutes of limitations at all, arguably, leaving only the non-PRA-specific general RCW 4.16.130 to apply to PRA record productions that do not fall within the specific categories included in RCW 42.56.550(6)."

Johnson, 164 Wn.App. at 778.

The Division Two court echoed this assessment in Bartz v. Dept. of Corrections, 173 Wn.App. 522, 536, 297 P.3d 737 (2013)("...Johnson's claim was barred by a two-year catch-all statute of limitations, RCW 4.16.130.") (citing Johnson, 164 Wn.App. at 778).

Conversely, Division One's jurisprudence is apparently devoid of any specific application of RCW 4.16.130 in PRA cases where RCW 42.56.550(6) is not triggered. While the Division One court determined in Tobin v. Worden, 156 Wn.App. 507, 233 P.3d 906 (2010) that RCW 42.56.550(6) did not apply to the facts of that case, it never addressed whether RCW 4.16.130 should alternately apply. Cf. Johnson, 164 Wn.App. at 777 n.13.

When reviewing the statutes, it is clear that the Division Two court misapplied the two-year "catch-all" statute of limitations in RCW 4.16.130. As described by the court,

"[t]his longer general statute of limitations provides: An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued." Johnson, 164 Wn.App. at 788 (quoting RCW 4.16.130).

However, there exists a more specific statute that applies in PRA cases where RCW 42.56.550(6) is not triggered. RCW 4.16.115 - Special Provisions for an Action on Penalty, states in relevant part:

> "An action upon a statute for a penalty given in whole or in part to the person who may prosecute for the same, shall be commenced within three years after the commission of the offense...."

RCW 4.16.115.

Here, Plaintiff's complaint sought statutory penalty. CP 607. This penalty is provided for by statute, and may be given to a requestor prevailing in a civil action for a violation of the PRA: which in this case would be Plaintiff. RCW 42.56.550(4). Thus, the more specific language in 4.16.115 controls over the general language in 4.16.130.

Appellate courts follow general principles of statutory construction. City of Gig Harbor v. N. Pac. Design, Inc., 149 Wn.App. 159, 167, 201 P.3d 1096, review denied, 166 Wn.2d 1037, 217 P.3d 783 (2009). Courts first look to the plain language of the provisions at issue; and they strive to read them harmoniously to give effect to all, avoiding an

incongruous reading potentially nullifying other provisions. Id., at 170.

Where one provision treats a subject in general terms and another treats the same subject in a more detailed way, the specific prevails over the general absent a contrary legislative intent. See Wells Fargo Bank v. Dep't of Revenue, 166 Wn.App. 342, 358-59, 271 P.3d 268, review denied, 175 Wn.2d 1009, 285 P.3d 885 (2012).

"It is a standard maxim of statutory construction that '[a] specific statute will supersede a general one when both apply' in a given situation." Gerow v. Wash. St. Gambling Comm'n, ___ Wn.App. ___, 324 P.3d 800, 806 (2014) (quoting Waste Management of Seattle, Inc. v. Wash. Util. & Transp. Comm'n, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994). If two statutory provisions conflict, courts must give preference to the more specific statute. Bowles v. Wash. Dept. of Ret. Sys., 121 Wn.2d 52, 78, 847 P.2d 440 (1993).

Under these principles, the more specific RCW 4.16.115 controls in this case over the general "catch-all" provision in RCW 4.16.130. This is further borne out by .130's language of "an action for relief not hereinbefore provided for" (emphasis added), which according to the numerical hierarchy of the chapter, places .115 before .130. See Imperato v. Wenatchee Valley College, 160 Wn.App. 353, 360, 247 P.3d 816 (Div.3, 2011)("The [RCW 4.16.130] catch-all provision

provides a two-year statute of limitations for those claims not referenced elsewhere.")

Because RCW 4.16.115 applies to actions upon a statute for penalty given to a plaintiff, it is more specific to this instant Public Records Act case than the general provision of RCW 4.16.130. See, e.g., Gerow, 324 P.3d at 806 ("RCW 9.46.050(2)'s three-vote requirement is clearly more specific than any potential voting requirement that may be read into the definition of 'agency head' in RCW 34.05.010(4)....Accordingly, the more specific provision of RCW 9.46.050(2) would still control in these circumstances"); Merino v. State, 179 Wn.App. 889, 901 n.15, 320 P.3d 153 (2014) (determining that because RCW 42.43.040's disability scheme is specific to WSP officers, it prevails over the more general LEOFF law enforcement disability scheme in ch. 41.26 RCW).

Interpreting the statutes in pari materia, RCW 4.16.115 clearly is more specific to this PRA action seeking penalties than the general RCW 4.16.130, when the agency actions violating the PRA did not trigger accrual under RCW 42.56.550(6). Accordingly, Plaintiff's suit is not time-barred, as he filed it within the three year statute of limitations in RCW 4.16.115, or within the two-year statute of limitations in RCW 4.16.130 from either the December 2012 records destructions, or from the date he learned of these facts.

6. The discovery rule applies to toll accrual of the statute of limitations

Because this case incorporated newly discovered violations of the Public Records Act committed when Defendant unlawfully destroyed 21 responsive records in December 2012 and February 2013, but, due to Defendant's concealment Plaintiff did not learn of these facts until Defendant provided the information in its March 12, 2014 discovery responses, the accrual of the statute of limitations on these 21 destruction claims did not begin until the time Plaintiff learned of these new facts.

"[A] cause of action accrues at the time the plaintiff knew or should have known all of the essential elements of the cause of action. The rule of law postponing the accrual of the cause of action is known as the 'discovery rule.'" Phoenix Trading, Inc. v. Loops, LLC, 732 F.3d 936, 943 (9th Cir. 2013) (quoting White v. Johns-Mansville Corp., 103 Wn.2d 344, 693 P.2d 687, 691 (1985)). The discovery rule requires a plaintiff to use due diligence in discovering the basis for the cause of action. Id. (quoting Clare v. Saberhagen Holdings, Inc., 129 Wn.App. 599, 123 P.3d 465, 467 (2005)).

"Thus, when a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm. The Plaintiff is charged with

what a reasonable inquiry would have discovered." Id. (quoting Green v. A.P.C. (Am. Pharm. Co.), 136 Wn.2d 87, 960 P.2d 912, 916 (1998)).

"The key consideration under the discovery rule is the factual, as opposed to the legal, basis of the cause of action." Cox v. Oasis Physical Therapy, PLLC, 153 Wn.App. 176, 190, 222 P.3d 119 (Div.3, 2009) (quoting Adcox v. Children's Orthopedic Hosp. & Med. Ctr., 123 Wn.2d 15, 35, 864 P.2d 921 (1993). "The discovery rule merely tolls the running of the statute of limitations until the plaintiff has knowledge of the 'facts' which give rise to the cause of action; it does not require knowledge of the existence of a legal cause of action itself." Cox, 153 Wn.App. at 189 (quoting Richardson v. Denend, 59 Wn.App. 92, 95-96, 795 P.2d 1192 (1990)).

"Whether an aggrieved party discovered or could have discovered such facts is a question of fact." Young v. Savidge, 155 Wn.App. 806, 824, 230 P.3d 222 (2010) (citing Sherbeck v. Estate of Lyman, 15 Wn.App. 866, 870, 552 P.2d 1076 (1976)). The time at which a plaintiff discovered the facts, thus triggering the running of the statute of limitations, is a material fact." Id. (citing Busenius v. Horan, 53 Wn.App. 662, 667, 769 P.2d 869 (1989)).

Here, the 21 unlawful destructions occurred in "December 2012" and "February 2013". CP 783-84. Plaintiff

submitted a total of 8 follow-up requests seeking the back pages that were silently withheld. CP 603-05, 788. Defendant has admitted to these letters. CP 610-12. None of Defendant's responses provided notice that any of these destructions occurred. CP 38, 51, 789. The only evidence that the Defendant notified Plaintiff of these destructions having occurred is the Defendant's March 12, 2014 Response to Interrogatory No. 1, at Table. CP 783-85.

Unless the evidence is undisputed or unless reasonable minds cannot differ, what a person knew or should have known at a given time is a question of fact." August v. U.S. Bancorp, 146 Wn.App. 328, 343, 190 P.3d 86 (Div.3, 2008) (citation omitted). "Whether a plaintiff has exercised due diligence under the discovery rule is a question of fact." Id. (citation omitted). Because the statute of limitations is an affirmative defense, the burden of proof is on the defendant. Id.

Defendant cannot meet such a burden, as Plaintiff did not learn of the unlawful record destructions until he received Defendant's March 12, 2014 discovery response. Unquestionably, Plaintiff exercised due diligence by submitting a lengthy series of follow-up requests for these specific records pages. Because Defendant elected to be less than forthright, chose to not provide the "fullest assistance" required by the PRA, and never mentioned until

March 12, 2014 that these 21 unlawful destructions occurred, this was the date when Plaintiff first learned of the facts that the 21 destructions of silently withheld records had occurred. Accordingly, accrual of the statute of limitations in this case began three days after March 12, 2014, to account for mailing.

7. A genuine dispute of material fact precluded summary judgment dismissal

On reconsideration, Defendant argued that consolidation or amendment would be futile because, "it does not cure the obvious defect that the back page of the grievance form is not considered to be part of the offender's grievance packet." CP 838. As explained in the companion briefing, such argument is legally untenable because it only exists upon the basis that Defendant impermissibly changed the wording of Plaintiff's 22 requests and never searched for the requested original complaint/grievance forms, nor reasonable alternate locations thereof, when conducting the lone search on April 19, 2011. CP 748-49. See COA No. 32643-8-III, Opening Brief of Appellant, at 37-40.

But further still, such argument cannot prevail because there existed a genuine dispute of material fact that precluded summary judgment dismissal. As explained in Plaintiff's reply on motion for CR 59 reconsideration (CP 821-34), there existed a genuine dispute of Lee Young's

declaration that attested "none of the information on the back page of DOC 05-165 is used to process the offender grievance and it is not considered to be part of the grievance record," and a dispute that original documents were destroyed after 6 months. To quite the contrary, Plaintiff presented the trial court with primia facie evidence that back pages of original grievance forms were used as part of the grievance process, and that original forms were retained for longer than 6 months. CP 845-46, 859-61.

Specifically, Plaintiff utilized additional public records requests to seek only second/back pages of original grievance forms for a 6-year period. In response, the Department produced a first installment of 100 original back pages, one of which contained another inmate's grievance information. In fact, it was upon the basis of containing another inmate's grievance information that Defendant's prison mailroom rejected the mail and blocked Plaintiff from receiving all the records contained in the batch. CP 861.

Plaintiff has now filed a motion pursuant to RAP 9.11 to include additional evidence in the record. This new evidence overwhelmingly proves the Declaration of Lee Young to be patently false. Under RAP 10.1(g) Plaintiff hereby incorporates pages 43-45, and Appendix A of the Opening Brief of Appellant in COA No. 32643-8-III.

B. The Trial Court Erred in Denying CR 42(a) Consolidation or CR 41(a)(1)(B) Dismissal

Prior to filing any response to Defendant's dispositive "show cause" motion, Plaintiff filed a motion for CR 41(a) consolidation and a motion for CR 41(a)(1)(B) dismissal. CP 750-58. Defendant filed its response opposing consolidation or voluntary dismissal. CP 805-08. The trial court then entered an order on May 12, 2014 denying consolidation and dismissal. CP 809-11. This denial was error for several reasons.

As the consolidated record in this appeal shows, Plaintiff had first moved to amend, inter alia, these instant 21 claims regarding requests nos. PDU-15230 to PDU-15250. CP 14-29.[8] Plaintiff also filed a supplemental declaration in support of the motion to amend. CP 30-55. Defendant filed its opposition to the motion. CP 56-68. Plaintiff then filed a reply on the motion to amend, and a motion to enlarge time to file the reply. CP 69-87. Plaintiff also filed a supplemental memorandum and a supplemental declaration in support of the motion to amend. CP 90-94.

The judge in that case issued a December 16, 2013 letter decision indicating the motion to amend would be denied. Notably, the judge did not identify any specific

[8] The motion contains a typographical error in the pages numbered "Motion to Amend Complaint - 5" and "Motion to Amend Complaint - 6". Motion page 6 (CP 19) is actually page 5, and Motion page 5 (CP 18) is actually page 6.

reason why the motion was denied, but directed an order to be presented. CP 95.

Defendant did not timely submit any proposed order, and as the absence of record shows, the judge consequently never entered an order denying Plaintiff's motion to amend.

As such, because Plaintiff was required to file the instant 21 claims within a staute of limitations period, he initiated the instant action, which the Court Clerk filed on December 18, 2013.[9] CP 601.

1. Denial of consolidation was error

In its May 12, 2014 order, the court denied consolidation because it felt it would allow Plaintiff's claims to be effectively amended into the other case even though another judge had denied the separate motion to amend there. CP 809-10. As a threshold issue, such reasoning is not supported by the Civil Rules' spirit of liberal application. The Civil Rules "shall be construed and administered to serve the just, speedy, and inexpensive determination of every action." CR 1. It could be fairly deduced from the May 12, 2014 order that Judge Lohrmann's written decision was somewhat intended to prevent Plaintiff's 21 claims from being reached on the merits.

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[9] As explained above, under Johnson v. DOC, 164 Wn.App. 769, 265 P.3d 216 (2011), any statute of limitations would accrue approximately 5 days after mailing of Defendant's December 12, 2013 response. CP 789.

From a procedural perspective, Judge Lohrmann would have seen that no order was ever entered denying Plaintiff's motion to amend, rather, just a letter decision, which is not a final order.

From a factual perspective, it appears to be impermissibly presumptive for Judge Lohrmann to have denied consolidation because of an assumption as to the reason why Judge Wolfram denied the motion to amend. Again, the letter decision in that case expressed no specific, appealable reason why the decision was made. CP 95

Moreover, Judge Lohrmann's conclusion that "Judge Wolfram accepted the arguments of the Defendant that such claims would be time-barred and futile" (CP 809), is an underlying decision that, even if it was explicitly stated and entered by Judge Wolfram -- which it was not -- was nevertheless legally untenable. As discussed in greater detail in the consolidated companion briefing, it was improper to find the 21 claims time-barred from amendment and futile.

As an overview, the 21 claims were timely under Johnson v. Dept. of Corrections, 164 Wn.App. 769, 265 P.3d 216 (2011). The 21 claims related-back under CR 15(c). The new claims of 21 unlawful public record destructions were timely under an alternate statute of limitations, or were tolled under the discovery rule. See COA No. 32643-8-III, Opening Brief of Appellant, at 8-12, 25-26.

Defendant, in opposition to both the instant motion to consolidate and the companion case's (second) CR 15(a),(c) motion to amend, argued that consolidation or amendment would have been futile. First, in the instant case, Defendant argued consolidation was futile because the 21 claims did not relate back under CR 15(c) because "each written request for records under the PRA is treated as a single request." CP 837. While Defendant cited to Greenhalgh v. Dept. of Corrections, 170 Wn.App. 137, 150, 282 P.3d 1175 (2012) for this proposition, Greenhalgh has no legal relevance because the portion of the decision cited by Defendant pertains to whether multiple requests for different records made simultaneously in the same written request constitute separate PRA requests. Greenhalgh, 170 Wn.App. at 149-50. Greenhalgh does not address nor reference CR 15(c) relation back, nor even a Plaintiff's amendment of claims, and therefore is not instructive whatsoever.

Second, Defendant's argument for futility that the 22 requests potentially being considered as separate requests for penalty calculation thereby precludes the same 22 requests from relating back under CR 15(c), is equally uncompelling. CP 838. Whether two or more claims "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading" (CR 15(c)), is not based upon a plaintiff's mindset at the time, of whether he wants

them to be the same. Rather, the determination of relation back is derived from facts.

"The question of whether an amendment relates back is an issue of law, reviewable de novo on appeal." Tegland, 14 Wash. Prac.:Civil Proc., §12:39. See Perrin v. Stensland, 158 Wn.App. 185, 193, 240 P.3d 1189 (2010), as amended (Nov.10, 2010)(the issue of whether an amendment should have been granted is reviewed for an abuse of discretion, but the issue of whether an amendment relates back is reviewed de novo.)

While a trial court should make a finding for each PRA request made (if the case involves more than one) as to whether the agency complied with the PRA for that request, Zink v. City of Mesa, 140 Wn.App. 328, 338-41, 166 P.3d 738 (2007), the required analysis for each request, however, does not mean multiple requests are automatically precluded from arising from the same conduct, transaction, or occurrence. Defendant's theory would produce an absurd result.

What is more, whether or not a trial court would exercise its discretion under the Public Records Act to award a penalty, is exactly that -- discretionary. Thus, how a court may decide to treat individual claims in the future for purposes of penalty imposition has no legal bearing upon whether all 22 claims arose out of the same conduct,

transaction, or occurrence, before the complaint was even filed, thus being timely claims capable of consolidation or amendment. If the trial court found 22 PRA violations but awarded zero statutory penalties, does this render the 22 claims to not be the same conduct, transaction, or occurrence? Certainly not. In sum, there was no futility of consolidation.

Finally, Defendant's opposition to consolidation argued that it would be prejudiced because a dispositive motion was already filed in Case No. 12-2-00285-2 and amendment/consolidation would cause undue delay and futility. CP 838. Again, such argument is baseless, as the instant 21 claims were brought in Plaintiff's amended motion for partial summary judgment, which were subsequently amended, without motion, into the pleadings under CR 15(b). CP 240-48; see also COA No. 32643-8-III, Opening Brief of Appellant, at 19-24. The 21 additional claims were filed in the amended partial summary judgment motion on May 11, 2014 (GR 3.1), well before Defendant made this argument opposing consolidation on June 2, 2014.

It is axiomatic that a nonmoving party cannot claim a statute of limitations as a reason to deny relation-back under CR 15(c). See RTC Transport, Inc. v. Walton, 72 Wn.App. 386, 864 P.2d 969 (Div.3, 1994). Contrary to Defendant's arguments, there was no futility of consolidation.

Because Judge Lohrmann denied consolidation on the basis that the 21 claims were already denied as time-barred by Judge Wolfram, yet the same claims clearly relate back under CR 15(c), or were timely brought as new claims of unlawful records destruction, the stated time bar reason to deny consolidation was legally untenable.

However, because this denial of consolidation, and specifically the reconsideration thereof, was made in conjunction with the court's decision on Defendant's motion for summary judgment, the de novo standard of review applies. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (de novo review standard applies to "all trial court rulings made in conjunction with a summary judgment motion"); Keck v. Collins, ___ Wn.App. ___, 325 P.3d 306 (Div.3, 2014).

2. Dismissal contingent upon amendment

In its May 12, 2014 order, the court denied Plaintiff's CR 41(a)(1)(B) motion to dismiss on the grounds that he made "his request for dismissal expressly contingent upon the Court's granting of the consolidation. The request for voluntary dismissal is therefore also denied." CP 810.

In actuality, Plaintiff's motion for dismissal was "contingent upon the Court granting leave to amend under CR 15(a) and (c) in the companion case," and "contingent upon leave to amend these 21 claims into the pleadings in the related case WWCSC No. 12-2-00285-2." CP 754-55.

On reconsideration, Plaintiff subsequently corrected a scrivener's error in his CR 41(a) motion for dismissal. Plaintiff notified the court that he had intended to move for voluntary dismissal contingent upon amendment in the related case under CR 15(a) or 15(b), not just 15(a), but because the court sua sponte struck Mr. Kozol's noted oral arguments, he never had the opportunity to clarify the contingency for voluntary dismissal. CP 827.

As pointed out to Judge Lohrmann, Plaintiff amended the 21 claims in WWCSC No. 12-2-00285-2 when he filed them in his Amended Motion for Partial Summary Judgment on May 11, 2014. CP 240-48. Defendant then included the evidence of these 21 claims when it cross-moved for summary judgment on April 16, 2014. CP 410-15. Specifically, Defendant presented evidence that it was given notice as early as April 12, 2013 that responsive pages had been withheld in these 22 requests. CP 438-39. Defendant also presented evidence that it searched for responsive records in all 22 requests at the same time. CP 441-42, 447-48. Perhaps ultimately dispositive on the issue, the declaration evidence Defendant filed was captioned with the case number "13-2-00930-8", thereby effectively using evidence of the 21 claims in one case to support the summary judgment motion in the other (1 claim) case. CP 441.

The 21 new claims were presented without a timely objection, or were tried by the express or implied consent of the parties, and under CR 15(b) were required to be treated as if amended, or, should have been amended under CR 15(a).

Neither the briefing nor transcript in the companion case show any timely objection to the 21 new claims brought in Plaintiff's amended motion for partial summary judgment.

The 21 claims were amended without motion under CR 15(b), or should have been amended pursuant to Plaintiff's motions under CR 15(a),(c) and CR 15(b),(c), and upon this contingency the voluntary dismissal without prejudice should have been granted.

C. Appellant Should Be Awarded Costs

Adopting the arguments in the companion briefing, COA No. 32643-8, Appellant should be awarded all costs if he is the prevailing party in this appeal. If he retains counsel he should also be awarded all fees.

CONCLUSION

For all the foregoing reasons, Appellant respectfully submits that the trial court erred in granting Defendant's motion for show cause dismissal, and erred in denying Plaintiff's motion for consolidation or voluntary dismissal without prejudice.

RESPECTFULLY submitted this 15th day of April, 2015.

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APPENDIX – A

RELATED TOPICS

Records

General Statutory Disclosure Requirements

Administrative Appeal of Freedom of Information Act

Appeal and Error

Review

Trial Court and Basis

Johnson v. State Dept. of Corrections Distinguished by Earz v. State Dept. of Corrections Public Disclosure Unit, Wash.App. Div. 2, February 12, 2013
Court of Appeals of Washington, Division 2. November 8, 2011 164 Wash.App. 769 265 P.3d 216 *(Approx. 8 pages)*

Original Image of 265 P.3d 216 (PDF)

164 Wash.App. 769
Court of Appeals of Washington,
Division 2.

Robert Earle JOHNSON, Appellant,
v.
STATE of Washington DEPARTMENT OF CORRECTIONS, Respondent.

No. 40831–7–II. Nov. 8, 2011.

Synopsis

Background: Prisoner sought judicial review under Public Records Act, based on claim that Department of Corrections did not comply with his request for disclosure of all records relating to proposed amendment of family visitation policy to eliminate requirement that prisoner have positive prognosis of release. The Superior Court, Thurston County, Richard D. Hicks, J., dismissed complaint on limitations grounds, and prisoner appealed.

Holding: The Court of Appeals, Hunt, J., held that even if prisoner's action was governed by two-year "catch-all" limitations period, limitations period began to run when prisoner received letter from DOC on his follow-up request stating that there were no other documents responsive to his request.

Affirmed.

West Headnotes (3)

Change View

1 **Records**

The Court of Appeals reviews de novo challenges to agency actions under the Public Records Act, standing in the same position as the trial court where the record, consists only of affidavits, memoranda, and other documentary evidence. West's RCWA 42.56.001 et seq.

1 Case that cites this headnote

326	Records
326II	Public Access
326II(B)	General Statutory Disclosure Requirements
326k61	Proceedings for Disclosure
326k63	Judicial enforcement in general

2 **Records**

Even if prisoner's action for judicial review under Public Records Act, arising out of Department of Corrections' (DOC) alleged failure to disclose all documents related to amendment to family visitation policy that eliminated requirement that prisoner have positive prognosis of release, was governed two-year "catch-all" limitations period and not by one-year limitations period, prisoner's action accrued, and two-year limitations period

326	Records
326II	Public Access
326II(B)	General Statutory Disclosure Requirements
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began to run, when prisoner received letter from DOC Public Disclosure Unit on his follow-up request stating that there were no other documents responsive to his request other than single e-mail that had previously been delivered to him that indicated approval of proposed change. West's RCWA 42.56.550(6).

2 Cases that cite this headnote

3 **Appeal and Error**
An appellate court may affirm the trial court on any ground that the record supports.

2 Cases that cite this headnote

30	Appeal and Error
30XVI	Review
30XVI(A)	Scope, Standards, and Extent, in General
30k851	Theory and Grounds of Decision of Lower Court
30k854	Reasons for Decision
30k854(1)	In general

Attorneys and Law Firms

***216** Robert Earle Johnson (Appearing Pro Se), Connell, WA, for Appellant.

Sara J. Di Vittorio, Attorney General's Office, Timothy Norman Lang, Office of the Attorney General, Olympia, WA, for Respondent.

Opinion

HUNT, J.

*770 ¶ 1 Robert Earle Johnson appeals the superior court's dismissal of his Public Records Act (PRA)[1] action against the State of Washington Department of Corrections (DOC). He argues that the superior court erred in ruling *771 that the PRA's one-year statute of limitations, RCW 42.56.550(6), barred his action because the DOC did not engage in either of the statute's two triggering acts. We do not address whether RCW 42.56.550(6) applies or whether, in the alternative, RCW 4.16.130's general two-year "catch-all" statute of limitations applies because, even under RCW 4.16.130' s more lenient two-year statute of limitations, Johnson's action was time-barred. Accordingly, we affirm.

FACTS

I. Background

¶ 2 The DOC has an "Extended Family Visiting" (EFV) policy that "facilitates visits between an offender and his/her family in a **217 private visiting unit."[2] Under this policy, before June 8, 2006, prisoners could participate in the EFV program only if they had a "positive prognosis of release." Clerk's Papers (CP) at 20. Apparently, this meant that a prisoner was eligible for the EFV program only if he would "outlive his sentence." CP at 3.

¶ 3 Robert Johnson is a prisoner over 60 years old whose scheduled incarceration exceeds at least another 50 years. In 2005, he filed a complaint in federal district court alleging that "the denial of his participation in the [EFV program] was racially motivated." CP at 3. The DOC subsequently revised its policy, removing this "positive prognosis of release" eligibility requirement, effective June 8, 2006.[3] CP at 20.

A. August 16, 2006 PRA Request

¶ 4 On August 21, 2006, the DOC's Olympia Public Disclosure Unit received a letter from Johnson, dated August *772 16, 2006, requesting information about the DOC's draft policy revision that removed the "positive prognosis of release" criterion. CP at 22. Johnson asked for opinions, memos, research documents, and the names of the committee members who worked on the draft revision. Three days later, on August 24, the DOC sent a letter advising Johnson that (1) "the only information [the DOC] ha[s] is an email documenting approval of the change"; and (2) "[the DOC] [is] not required to maintain working files." CP at 24. On September 4, Johnson sent a $0.59 check for a copy of the one-page email, and the DOC sent him the document.