NO. 32596-2-III
NO. 32532-6-III
CONSOLIDATED

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION III

STEVEN P. KOZOL,

Plaintiff-Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Defendant-Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This Public Records Act (PRA) case involves prisoner Steven Kozol's 22 individual requests for separate offender grievance records. The Washington State Department of Corrections (hereinafter "the Department") properly responded to each request by providing Kozol with the responsive record in its possession.

The offender grievance form is a single document with a front and back page. The front page of the form contains a place for the offender to state the grievance, and for the Department to write its response to the grievance. The back page of the form is simply boilerplate instructions on how to complete the front page of the form. The Department's standard practice is to scan and maintain only the front page of the completed forms. The Department does not retain the back page, and it does not consider the back instructional page to be part of the offender's grievance record.

Kozol submitted 22 separate requests to the Department. Each request asked for a copy of an individual grievance. The Department timely responded to each request by providing Kozol with the requested grievance as maintained by the Department. As part of its responses, the Department provided the front page of each requested grievance form. Kozol later filed these actions, asserting the Department violated the PRA

by not providing him with the back page of the grievance forms. The trial court found Kozol failed to file some of his claims within the applicable statute of limitations and dismissed the remaining claims for failure to state a claim under the PRA. Because Kozol's claims are untimely and he does not show a violation of the PRA, the Court should affirm the dismissal of his claims.[1]

II. STATEMENT OF THE CASE

A. Statement of Facts

Under the Department's Grievance Program, offenders can file complaints related to multiple issues. CP 752. An offender initiates a grievance using the form DOC 05-165, Offender Complaint form. CP 752. The offender writes the grievance on the front page of the form. CP 752. The back page of the form simply provides boilerplate instructions on how to fill out the front page of the form. CP 745-746.

After the Department has received and responded to an offender grievance, the grievance coordinator scans and maintains a copy of the front page of the grievance form as required by DOC Policy 550.100. CP 743. None of the information on the back page of the grievance form is used to process the offender's grievance and it is not considered to be part of the grievance record. Therefore, the grievance coordinator does not

[1] Although Kozol was granted approval to file two separate briefs to address each case individually, the Department will address all issues in one response brief.

scan and maintain the back page of the form as part of the official grievance record. CP 743.

On April 15, 2011, the Department's Public Disclosure Unit received 22 separate requests from Kozol for records related to 22 individual offender grievances. CP 140, 630-650. Five business days later, the Department issued a response letter indicating his requests were assigned tracking numbers PDU 15229 through PDU 15250. CP 9, 175, 651-671. Kozol was also informed he would receive a response to his requests on or before June 28, 2011. CP 651-671.

Because the grievances were filed at the Washington State Penitentiary, the request for all responsive records was sent to the Washington State Penitentiary's grievance coordinator to gather documents responsive to the 22 separate requests. CP 748-749. The grievance coordinator responded by attaching scanned copies of the front page of all of the 22 requested grievance forms as part of the offender grievance record. CP 748. The back instruction page, which was not considered part of the grievance or maintained by the Department, was not included in the responsive documents. CP 743.

On June 16, 2011, June 24, 2011 and June 28, 2011, the Department issued Kozol three letters indicating documents responsive to his requests were identified, available and he would be provided copies of

the records upon receipt of payment. CP 9, 672-692. More than five months later, the Department received a response letter from Kozol requesting each response be emailed separately to StevenKozolIsInnocent@gmail.com. CP 693. The Department acknowledged Kozol's email receipt request. CP 694. On January 3, 2012, the Department emailed the responsive documents to StevenKozolIsInnocent@gmail.com and informed him his requests were closed. CP 695-738. Four of those emails included exemption logs citing information which was redacted. CP 616. Several weeks later, Kozol asked for written confirmation the requests had been emailed. CP 739. The Department sent written confirmation on February 29, 2012. CP 740. There were no additional records provided to Kozol after the Department sent the records on January 3, 2012.

Kozol then sent several letters to the Department's counsel complaining of "multiple silent withholdings." CP 604-605. Kozol eventually sent a letter directly to the Department in November 2013, more than 18 months after he received the requested records, alleging the Department withheld records in response to his 22 requests. CP 605. The Department sent an acknowledgement to his letter on December 12, 2013. CP 789.

Subsequently, Kozol filed a new public disclosure request with the Department, seeking specifically the "back page of the grievance forms" from grievances filed at the Washington State Penitentiary. In response to that request, Kozol was provided with the back page of grievance forms. Appendix A, Attachments 1-2[2]. Several of the pages contained writing with names of the grievance coordinators and/or codes including W-40. Appendix A, Attachments 1-2. Most offenders at the Washington State Penitentiary have access to a locked grievance box in their housing unit in which to place their grievances. Exhibit 1, Attachment C. However, offenders housed in the Intensive Management Unit do not have access to a grievance box. Exhibit 1, Attachment C. In order to facilitate the processing on their grievances, the grievance documents are collected directly from the offender. Exhibit 1, Attachment C. At times, an offender may fold his grievance in half, causing the "back page" of the grievance to become the outside/envelope of the grievance. Exhibit 1, Attachment C. The collecting staff member may write the grievance office mailbox number "W40" or the grievance officer's name on the outside of the grievance to ensure the grievance is delivered to the grievance office for

[2] On May 27, 2015, the Commissioner granted Kozol's request to submit additional evidence. Kozol's additional evidence is referred to as Appendix A (see Kozol's opening brief COA No. 32643-8-III). The Department's additional responsive evidence is referred to as Exhibit 1 with Attachments (see Department's Response to Kozol's RAP 9.11 Motion for Additional Evidence on Review).

processing. Exhibit 1, Attachment C. This information is not deemed to be relevant to the grievance complaint itself and would not be used to investigate the offender's complaint. Exhibit 1, Attachment C. Nor would the fact that the grievance mailbox number or the grievance officer's name be maintained for any purpose related to the offender's grievance complaint. Exhibit 1, Attachment C. The back page of the grievance is not scanned and saved for use in maintaining the offender's grievance record and the grievance coordinator would not consider it to be responsive to a request for a copy of an offender's grievance packet. Exhibit 1, Attachment C.

B. Statement of Procedural History

1. *Kozol v. DOC,* Walla Walla Superior Court Cause No. 12-2-00285-2

During his ongoing correspondence with Department's counsel, on July 18, 2012, Kozol filed a PRA Complaint alleging failure to respond within the time frames of the PRA and "silent withholding" of records. CP 3-4. After the Department's request for a more definite statement, Kozol filed his First Amended Complaint noting his claim was solely related to his request under the Department's tracking number PDU-15229. CP 8-9. Sixteen months later, Kozol moved to amend his Complaint to add the remaining 21 requests for offender grievances from

the Washington State Penitentiary as well as another 31 separate PRA requests Kozol had filed with the Department seeking grievance records for offender grievances filed at the Airway Heights Corrections Center and Stafford Creek Corrections Center. CP 14-55. The Department objected and the trial court denied the motion to amend the Complaint. CP 56-68, 89, 95, 108. Kozol subsequently filed two additional motions to amend his complaint to only add the 21 requests for offender grievances at the Washington State Penitentiary and a motion to consolidate his claims with his case under Kozol v. DOC, Walla Walla Superior Court Cause No. 13-2-00938-8. CP 174-228, 464-479. The trial court denied Kozol's motions. CP 237-239.

Kozol then moved for partial summary judgment. CP 109-127, 240-404. The Department filed a cross motion for summary judgment arguing Kozol failed to state claim under the PRA as the back page of the grievance form was not responsive to his request. CP 410-452. The trial court granted the Department's motion for summary judgment, noting Kozol's complaint was frivolous and malicious as the request for records was a "scheme" that Kozol set up knowing he would not receive the back page of the grievance form in response to his request. CP 570-572, 596-600.

2. Kozol v. DOC, Walla Walla Superior Court Cause No. 13-2-00938-8

After his first motion to amend in the above case was denied, on December 18, 2013, Kozol filed another PRA Complaint alleging wrongful withholding of the additional 21 records for his requests under PDU-15230 through PDU-15250. CP 601-607. The Department then moved to show cause, asserting Kozol's claims were time barred, he failed to show a violation of the PRA, and his claims were also frivolous. CP 615-749. Kozol then filed a motion to consolidate this case with his other pending PRA matter. CP 750-758. Kozol also filed his opposition to the Department's show cause motion. CP 759-804. The trial court denied Kozol's motion to consolidate his cases and granted the Department's show cause motion. CP 809-811. In its ruling, the trial court noted Kozol's claims were barred by the statute of limitations and Kozol failed to state a claim under the PRA because the back page of the grievance form would not be responsive to his request. CP 810. Kozol's Complaint was dismissed with prejudice and also deemed to be frivolous and malicious. CP 811, 866.

III. STANDARD OF REVIEW

The Court reviews challenges to agency actions under the PRA *de novo*. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172

(2009); *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808, (2009), *review denied*, 169 Wn.2d 1007, 236 P.3d 206 (2010). Appellate courts stand in the same position as the trial courts when the record on a show cause motion consists only of affidavits, memoranda of law, and other documentary evidence. *Mitchell v. Washington State Dep't of Corr.*, 164 Wn. App. 597, 602, 277 P.3d 670 (2011), *as amended on reconsideration in part*.

The appellate court will not overturn a decision to deny an amendment unless it finds a showing of manifest abuse of discretion. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). However, the standard of review for Civil Rule 15(c) determinations is de novo. *Martin v. Dematic*, 340 P.3d 834 (2014).

IV. ARGUMENT[3]

A. Kozol's 21 Claims Related to PDU-15230 through PDU-15250 Were Barred by the Statute of Limitations

The trial court correctly held Kozol's claims were barred by the statute of limitations because Kozol's ongoing "follow-up" letters to the Department did not toll the statute of limitations. The clear statutory

[3] While Kozol stated several "issues" in his opening brief, the Department is only addressing those issues for which Kozol presented argument. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Because Kozol failed to present any argument related to several issues, he waived any assignment of error and cannot "cure" the defect by addressing the issues in his reply brief. *Id.* citing *Sacco v. Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990).

language of RCW 42.56.550(6) defines precisely when a cause of action accrues under the PRA and requires actions to be filed "within one year of the agency's claim of exemption or the last production of a record on a partial installment basis." Production of a single set of records also triggers the one year statute of limitations under RCW 42.56.550(6). *Bartz v. State Dept. of Corrections Public Disclosure Unit*, 173 Wn. App. 522, 536, 297 P.3d 737 (2013).

In Kozol's second case, the Department identified the responsive records under PDU-15230 through PDU-15250 and made them available to him on June 16, 2011, June 24, 2011 and June 28, 2011. CP 9, 672-692. Over 29 months later, Kozol filed his lawsuit on December 18, 2013, claiming "silent withholding" of records responsive to the 21 requests. Kozol's claims were untimely as he was required to file his claims no later than June 16, 2012, June 24, 2012 and June 28, 2012. RCW 42.56.550(6). In the alternative, his claims expired on June 16, 2013, June 14, 2013 and June 28, 2013. RCW 4.16.130. However Kozol's initial Complaint was filed well beyond both the one year statute of limitations and alternatively the "catch-all" two year statute of limitations thereby making his claims time-barred under both RCW 42.56.550(6) and RCW 4.16.130. Any attempt by Kozol to manipulate the tolling of his PRA claims should be disfavored and goes against the Legislative intent of the PRA.

Washington courts have long held that statutes of limitations begin to run against a cause of action on the date the plaintiff first becomes entitled to seek relief in the courts. *E.g.*, *Jones v. Jacobson*, 45 Wn.2d 265, 269, 273 P.2d 979 (1954); *Huff v. Roach*, 125 Wn. App. 724, 729, 106 P.3d 268 (2005), *review denied* 155 Wn.2d 1023, 126 P.3d 1279 (2005). Both the United States Supreme Court and the Washington Supreme Court recognize that statutes of limitations are intended to provide finality. *Reading Co. v. Koons*, 271 U.S. 58, 63, 46 S. Ct. 405, 70 L. Ed. 835 (1926); *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 382, 166 P.3d 662 (2007). The "obvious" purpose of such statutes is to set a definite limitation upon the time available to bring an action, without consideration of the otherwise underlying merit. *Dodson v. Continental Can Co.*, 159 Wash. 589, 594, 294 P. 265 (1930) (quoting *Reading Co.*, 271 U.S. 58). Statutes of limitations exist "to shield defendants and the judicial system from stale claims;" plaintiffs are not permitted to "sleep on their rights" because of the risk that "evidence may be lost and witnesses' memories may fade." *Crisman v. Crisman*, 85 Wn. App. 15, 19, 931 P.2d 163 (1997), *review denied* 132 Wn.2d 1008, 940 P.2d 653 (1997).

Statutes of limitations are strictly applied, and courts are reluctant to find an exception unless one is clearly articulated by the Legislature. *E.g.*, *Huff*, 125 Wn. App. at 732; *Bennett v. Dalton*, 120 Wn. App. 74, 85-

86, 84 P.3d 265 (2004); *Janicki Logging & Construction Company, Inc. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 662, 37 P.3d 309 (2001), *review denied* 146 Wn.2d 1019, 51 P.3d 88 (2002). Washington courts have also consistently rejected interpretations that would allow a party to manipulate the date an action accrues or the tolling of a statute of limitations. *E.g.*, *Atchison*, 161 Wn.2d at 381-82 (choice of personal representative should not be allowed to govern accrual of wrongful death action); *Huff*, 125 Wn. App. at 732 (rejecting an interpretation that would allow manipulation of accrual of legal malpractice claims). This is particularly true in cases governed by explicit statutory directives such as the PRA and not by the common law. *See Elliott v. Dep't of Labor and Indus.*, 151 Wn. App. 442, 447, 213 P.3d 44 (2009) (declining to apply the discovery rule to modify the accrual date of an industrial insurance claim where the plain language of the statute specified that a claim had to be brought within one year of the injury/accident).

The purpose of the PRA is to provide a mechanism by which citizens can obtain information about the functions of government. The penalty and cost provisions in RCW 42.56.550(4) provide a significant incentive to agencies to comply with the very strict requirements of the PRA. The one-year statute of limitations in RCW 42.56.550(6) ensures that actions are filed timely to serve the goal of prompt public disclosure

without resulting in disproportionate individual financial gain at the expense of other citizen taxpayers. In addition, unlike many statutes of limitations that act to prevent a potential litigant from all access to relief, the PRA does not preclude requestors from what they ultimately seek – disclosure of records. A requestor can always make a new request for records he believes were not included in the response to his original request. Requiring requestors to file a claim for penalties and costs within one year of production simply prevents a requestor from holding back and seeking higher penalties and provides finality and certainty for agencies and the taxpayers regarding liability for potential penalties and costs. Despite being barred from enriching himself at the taxpayers' expense, a requestor with a time-barred claim is still not deprived of an opportunity to access public records. To discard the Legislature's directive, as Kozol suggests, would subject agencies to stale claims that are many years old.

The statute of limitations began to toll when the Department issued its letters disclosing the number of records responsive to Kozol's request and making them available to him. Kozol's five month delay in providing the Department with an e-mail address to "park" the responses on, does not extend the statute of limitations. CP 904. Further, Kozol's subsequent letters to the Department disputing the responses to his requests does not toll the statute of limitations. *See Greenhalgh v. Department of*

Corrections, 170 Wn. App. 137, 151, 282 P.3d 1175 (2012). Despite Kozol's assertions, there is no authority to support his theory that his claims were extended by sending "follow-up" letters to the Department. Kozol was well aware his claims were time barred as he indicated he would "have to get everything filed by February, 2013" in order for his claims to be timely. CP 932.

Kozol cites *Johnson v. State Department of Corrections*, 164 Wn. App. 769, 265 P.3d 216 (2011), but the facts are very different here. In *Johnson*, the Department received the request on August 21, 2006 and provided Johnson with a response within three days. Johnson then sent a check to the Department to obtain the responsive document. *Id.* at 772. On September 20, 2006, Johnson filed a new "expanded request" directly to the McNeil Island Public Disclosure Coordinator requesting the same information he sought the prior month through the Department. The Department sent Johnson a response letter advising him it was forwarding his request to its Public Disclosure Office. Johnson claimed he never received the letter. *Id.* Johnson then sent the Department letters in October 2006 and March 2007 regarding the status of his requests. *Id.* at 772-773. Eventually on August 27, 2007, the Department informed Johnson he was provided the document in a previous request and there were no additional records responsive to his most recent request. *Id.* at 773.

Johnson filed his lawsuit on December 16, 2009 alleging violations under the PRA. *Id.* at 774. The Court ruled Johnson failed to file his claim within the two year "catch all" statute of limitations under RCW 4.16.130 because the "latest possible date on which Johnson's single-document action accrued was September 3, 2007," one week (a reasonable time by which Johnson should have received the letter) after the Department issued its August 27, 2007 letter to Johnson disclosing there were no responsive records and closing his request. *Id.* at 778-779.

In this case, Kozol filed only one request for records for each of the 22 separate requests. He did not make a second, "expanded" request. Despite Kozol's contention, the last letter issued in the *Johnson* case was not a "follow-up" letter, but a letter responding to Johnson's second PRA request, disclosing there were no other records available. Such letter is akin to the Department's June 16, 2011, June 24, 2011 and June 28, 2011 letters disclosing the responsive records and making them available to Kozol. "A record is disclosed if its existence is revealed to the requestor in response to a PRA request, regardless of whether it is produced." *Sanders v. State*, 169 Wn.2d 827, 836, 240 P.3d 120 (2010). CP 9, 672-692. Under the reasoning in *Johnson*, Kozol's claims for violation of the PRA expired on June 16, 2012, June 24, 2012 and June 28, 2012 when the Department disclosed the number of pages responsive to his request.

In order to make his claims timely, Kozol then argues the three year statute of limitations under RCW 4.16.155 should apply because a PRA case is one which seeks a penalty. However, RCW 4.16.155 only applies to matters for which there is no clear statutory guideline dictating the applicable statute of limitations. RCW 4.16.005. Accrual of PRA actions are precisely defined in RCW 42.56.550(6) and require actions to be filed "within one year of the agency's claim of exemption or the last production of a record on a partial installment basis." Production of a single set of records also triggers the one year statute of limitations under RCW 42.56.550(6). *Bartz,* 173 Wn. App. At 536. Because RCW 42.56.550(6) provides clear statutory limitations on filing a PRA claim, RCW 4.16.115 is not applicable and Kozol's claims were untimely.

Kozol lastly makes the argument that the discovery rule applies to toll the accrual of the statute of limitations related to his unlawful destruction claims and he was not aware of this new cause of action until the Department produced its discovery responses in March, 2014. Such argument is without merit and goes against the clear statutory language of RCW 42.56.550(6) which defines precisely when a cause of action accrues under the PRA and the time within which a claim must be filed. For some causes of action the Legislature has directed that the statute of

limitations may be subject to the discovery rule[4], under which a cause of action accrues when the plaintiff knew or should have known enough facts existed to support a right to sue. However, the discovery rule does not apply in every case. *See, e.g.*, *O'Neil v. Estate of Murtha*, 89 Wn. App. 67, 72, 947 P.2d 1252 (1997). Indeed, if it intended for the rule to apply, the Legislature could have codified it in the PRA in 2005 when it amended the statute of limitations to one year, or even in 2011, when it made various legislative changes to the PRA, but it chose not to. Rather, the Legislature provided a precise trigger in RCW 42.56.550(6), which is manifestly clear to the public, agencies, and the courts. Even assuming arguendo the Court found the discovery rule applied in this case, Kozol still failed to bring forth his complaint timely. The discovery rule operates to "toll the date of accrual until the plaintiff knows or, through the exercise of due diligence, should have known all the facts necessary to establish a legal claim." *Crisman*, 85 Wn. App. at 20, (citing *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 [1992]). The key consideration under the discovery rule is the factual, not the legal, basis for the cause of action. *Allen*, 118 Wn.2d at 758. Thus, the "action accrues when the plaintiff knows or should know

[4] *See, e.g.*, *McLeod v. Northwest Alloys, Inc.*, 90 Wn. App. 30, 35, 969 P.2d 1066 (1998) (discussing the Uniform Trade Secrets Act); RCW 4.16.350(3) (medical negligence); and RCW 4.16.080(6) (official misappropriation of funds).

the relevant facts whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action." *Id.*

In this matter, even if the Court was inclined to apply the discovery rule in a case brought under the PRA, Kozol's claims would still be time barred. The documents were made available to Kozol on June 16, 2011, June 24, 2011 and June 28, 2011. For reasons unknown, rather than obtain the documents when they were made available, Kozol purposely allowed the records to "park" in his email inbox before moving forward with litigation. A year later, on July 18, 2012, Kozol filed his first PRA complaint. CP 3-4. Kozol had ample time to conduct discovery regarding whether the original forms even existed. Kozol's failure to review the records when they were received in 2011 and additional failure to conduct any probative discovery does not toll the statute of limitations. Accordingly Kozol failed to timely file his lawsuit based on his 2011 public records requests related to PDU-15230 through PDU-15250 and the Court should affirm the dismissal of his claims.

B. The Trial Court Correctly Dismissed Kozol's Claims for Failing to State a Violation of the PRA

Kozol failed to state a claim under the PRA because the back page of the grievance form was not responsive to his request for offender grievance records.

The PRA requires agencies to make identifiable public records available for inspection and copying. RCW 42.56.080. An identifiable public record is "one for which the requestor has given a reasonable description enabling the government employee to locate the requested record." *Beal v. City of Seattle*, 150 Wn. App. 865, 872, 209 P.3d 872 (2009); *see also* WAC 44-14-04002(2) (an "identifiable record" is one agency staff can "reasonably locate"). In this regard, the PRA does not require agencies to be mind readers or to produce records that have not been requested. *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998), *review denied* 137 Wn.2d 1012, 978 P.2d 1099 (1999). To hold otherwise would put agencies in an untenable position. *Id.*

The adequacy of an agency's search for public records is separate from the question of whether the requested records are found. *Neighborhood Alliance v. County of Spokane*, 153 Wn. App. 241, 257, 224 P.3d 775 (2009), *affirmed in part, reversed on other grounds*, 172 Wn.2d 702, 261 P.3d 119 (2011). As the Court in *Neighborhood Alliance* explained, the standard for determining the adequacy of an agency's search is one of reasonableness:

> "The adequacy of the agency's search is judged by a standard of reasonableness, construing the facts in the light most favorable to the requestor." *Citizen's Comm'n on Human Rights v. Food & Drug Admin.*, 45 F.3d 1325, 1328 (9th Cir. 1995). An agency fulfills its obligations under the

> PRA if it can demonstrate beyond a material doubt that its search was "'reasonably calculated to uncover all relevant documents.'" *Weisberg v. U.S. Dept. of Justice*, 240 U.S. App. D.C. 339, 745 F.2d 1476, 1485 (1984). Moreover, the agency must show that it "made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dept. of Army*, U.S. App. D.C. 126, 920 F.2d 57, 68 (1990).

Id. at 257 (parenthetical citation omitted); *see also* WAC 44-14-04003(9) ("An agency must conduct an objectively reasonable search for responsive records."). Additionally, when a request uses inexact phrasing such as "all records relating to" a topic, the agency may interpret the request to be for records that directly and fairly address the topic. WAC 44-14-004002(2). The Washington Supreme Court has held that an agency is not required to search every possible place a record may be "conceivably stored, but only those places where it is reasonably *likely* to be found." *Neighborhood Alliance*, 172 Wn.2d at 719.

Under the PRA, public agencies are required to provide inspection or copying of public records. RCW 42.56.070. The purpose of the PRA is to provide full access to public records. RCW 42.17.010(11). If an agency denies a requestor "an opportunity to inspect or copy a public record" a requestor may proceed to court to require the agency to comply with the PRA. RCW 42.56.550(1). Under certain circumstances, the PRA shifts the burden of proof onto the agency to justify the actions taken. *See, e.g.*,

RCW 42.56.550(1) ("The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records."). However, the statute does not alleviate a plaintiff's burden of proof to show that there is a controversy at issue.

1. The Department did not purposefully withhold the back page of the grievance form and therefore cannot be deemed to have "silently withheld" the record.

The Department did not silently withhold the back of the grievance form, containing only boilerplate instructions for filling out the form, because it was not responsive to Kozol's requests.

The Supreme Court has noted "silent withholding" occurs when an agency "retains a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applied to the specific record withheld." *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 270, 884 P.2d 592 (1994). Thus, when an agency chooses to withhold a record from a requestor, the requestor must be given notice of the exemption for which the agency believes the records are exempt from production. In *Progressive*, the requestor sought a grant proposal. The *Progressive* Court noted a clear withholding had occurred with a failure to identify the

records in the exemption log as the agency only included 23 pages of the grant proposal when it was clear the record had included at least 55 pages. *Id.* at 269. A similar purposeful withholding was deemed to be "silent withholding" when an agency provided responsive records to a requestor and noted in its cover letter that it was refusing to provide hundreds of pages of records without identifying them in an exemption log. *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 538, 199 P.3d 393 (2009) *reversed and remanded on other grounds* 165 Wn.2d 525, 199 P.3d 393 (2009). "Silent withholding" can also occur when an agency redacts information and fails to provide a statutory basis for the redactions. *Gronquist v. Washington Sate Dept. of Licensing*, 175 Wn. App. 729, 736, 309 P.3d 538 (2013). In each of the cases where the Court found an agency to be silently withholding records, it was clear the agency deemed the records responsive to the requests and yet failed to provide the requestor with proper identification or any explanation for the withholding.

The facts here do not amount to "silent withholding" because the Department did not purposefully deny or refuse Kozol from reviewing the back page of the grievance form. The back page of the form was not responsive to the request. While the form contains a back information page, that page is merely instructional for the offender. CP 742,745-746.

None of the information on the back page of the grievance form is used to process the offender's grievance because it is not considered to be part of the grievance record. CP 743. For the same reasons, it is not scanned and maintained as part of the official grievance record. CP 743. Therefore, when Kozol's request for documents related to grievances was processed, the Department did not consider the back page of the grievance form to be responsive to his request. CP 743. The Department's reasonable interpretation of Kozol's request yielded exactly what Kozol expected and what was provided to him, the official grievance record. The grievance record does not contain the instructional page nor would it ever be considered to be part of the retained grievance packet. CP 743. As such, the Department did not "silently withhold" a record that was never responsive to Kozol's request in the first place. Nor was Kozol entitled to an exemption log identifying a record that was not responsive to his request. Accordingly, the decision dismissing Kozol's claim should be affirmed.

2. Search of available paper grievances or any change in "search terms" would not have yielded the back page of the grievance form responsive to Kozol's request.

Kozol then asserts the Department failed to perform an adequate search for the records because its search did not include the paper grievance forms and the Department's search terms were inadequate.

However, neither review of the paper copies of the grievances nor a change in the search terms would have yielded the back page of grievance form as responsive to his request because the Department reasonably interpreted the request not to include the boilerplate instruction page.

Kozol was aware the back page would not have been deemed responsive to his request and used his request for grievance records as a pretext to set up the Department to "fail" in providing its response to his request for individual grievance records. CP 888-935. Kozol was well aware of this and began his campaign to create as many frivolous PRA claims as possible against the Department. CP 888-935.[5] This included ensuring he only requested grievances that were written on the "new" forms which would contain a front and back page as the old grievance forms would not contain the back page boilerplate instructions. CP 889-890. Further, Kozol's emails indicate he had no rhyme or reason to seek the grievance records he requested. CP 898-901. Therefore, in order to obtain as many valid grievance log ID numbers as possible, Kozol began "recruiting passers-by" to obtain their grievance number information and funneled that information so that he and his partner could begin filing

[5] On January 29, 2015, Defendant-Respondent identified "Omnibus Response to Plaintiff's Motion to Amend; Plaintiff's Response to Defendant's Motion for Summary Judgment; Plaintiff's Supplemental Memorandum in Support of Plaintiff's Response and Opposition to Plaintiff's Amended Motion for Partial Summary Judgment, with Exhibits and Attachments" in its Supplemental Designation of Clerk's Papers.

duplicative PRA requests. CP 900-901. Once Kozol received the Department's responses where they could "park" on his email address, he and his partner could then move forward with their "avalanche of suits." CP 904-918. Kozol had no intention of even reviewing the records which is evidenced by his request to see if the documents arrived with "no need to print any the content." CP 919-920. Kozol then moved forward with filing his lawsuits by being purposely evasive and filing in multiple counties to ensure his cases would not be considered duplicative and consolidated. CP 924-930.

In addition to the e-mail correspondence, Kozol's own deposition admissions show he failed to provide the Department with a reasonable description of what he was seeking. Kozol admitted that prior to filing his lawsuits, he didn't even review the records that the Department provided in response to his requests, and the only record Kozol claimed was being withheld was the back page of the grievance form. CP 156-158. Kozol further admitted that even sixteen months after filing his initial lawsuit, he had never seen the actual responsive documents but only a page count of how many documents were provided to him. CP 158-161. Kozol didn't need to review the records themselves because he knew his request would be interpreted to only elicit the front page of the grievance form in response to his request. He was aware the Department would not deem the

back page of the form responsive to his request and merely counted the pages he received with no need to review the documents themselves before filing his lawsuit.

It is clear Kozol knew the Department would not identify the back page of the grievance form as responsive to his request. Such a request goes beyond the parameters of RCW 42.56.080 which requires the Department to produce records which are identifiable. An identifiable public record is "one for which the requestor has given a reasonable description enabling the government employee to locate the requested record." *Beal*, 150 Wn. App. at 872; *see also* WAC 44-14-04002(2) (an "identifiable record" is one agency staff can "reasonably locate"). In this regard, the PRA does not require agencies to be mind readers, or to produce records that have not been requested. *Bonamy*, 92 Wn. App. at 409. To hold otherwise would put agencies in an untenable position. *Id.*

The Department interpreted Kozol's request under the same context in which Kozol expected the request to be considered. The back page of a grievance form would be produced in response to a request that specifically seeks the back page of the form. CP 504-511. However, a request for a specific offender's grievance records would never yield the back page of the grievance form as a responsive record because the Department does not consider the back page to be part of the official

offender grievance record. CP 743. The same records would have been deemed responsive and provided to Kozol regardless of whether the Department reviewed the paper copy of the offender grievance record or changed its search terms. As such, Kozol never met his burden of establishing a prima facie case for a PRA violation as required by RCW 42.56.550 by failing to show there is even a controversy at issue. Therefore, the Court should affirm the dismissal of Kozol's claims.

3. The back page of the grievance form was not responsive regardless of whether it contained any hand writing.

Kozol further argues the back page of the grievance forms were responsive to his request because some of the forms appear to have writing on them. During the course of litigating these cases, Kozol filed another public disclosure request with the Department. Unlike his requests in these cases, Kozol specifically asked for copies of the back page of the grievance forms. Kozol asserts that because some of the back pages have writing on them, the Department cannot take the position that they are merely instructional. However, Kozol's assertion is misplaced.

Offenders housed in the Intensive Management Unit do not have access to a locked grievance box; therefore, the grievance documents are collected directly from the offender. Exhibit 1, Attachment C. At times, an offender may fold his grievance in half, causing the "back page" of the

grievance to become the outside/envelope of the grievance. Exhibit 1, Attachment C. The collecting staff member may write the grievance office mailbox number "W40" or the grievance officer's name on the outside of the grievance to ensure the grievance is delivered to the grievance office for processing. Exhibit 1, Attachment C. This information is not deemed to be relevant to the grievance complaint itself and would not be used to investigate the offender's complaint. Exhibit 1, Attachment C. Nor would the fact that the grievance mailbox number or the grievance officer's name be maintained for any purpose related to the offender's grievance complaint. Exhibit 1, Attachment C.

While Kozol may have received the back page of the grievance form, when he specifically requested the back page of the grievance forms, does not make them responsive to his requests for the official grievance record. Further, the mere fact that a back page has hand writing on it, does not change whether it is considered in the grievance investigation or scanned as part of the official grievance record. Despite his assertions, Kozol has failed to show the back page of the grievance form was responsive to his request and the Court should affirm the decision of the trial court dismissing his claims.

C. The Trial Court Correctly Denied Kozol's Motions to Amend His Complaint and Consolidate His Claims

Kozol argues the trial court should have allowed for amendment of his first case to include the claims in his second matter or alternatively consolidation of both of his cases. However, any consolidation or amendment would have been futile because, as noted above, Kozol's claims were not only time barred but Kozol had also failed to state a claim for relief.

1. Kozol failed to meet the requirements of Civil Rule 15(c).

Kozol first filed his vague PRA Complaint on April 11, 2012. CP 1-4. In response to the Department's motion for a more definite statement, Kozol filed a first amended Complaint. CP 8-9. As noted by his correspondence with Department's counsel and admitted in his brief, Kozol was well aware of the additional separate claims yet he chose to only identify one claim related to the Department's response to his records request under PDU-15229. CP 8-9. Sixteen months later, Kozol unsuccessfully sought to amend his Complaint for a second time to include the claims related to the remaining 21 requests. CP 14-29. While it appears Kozol wants the benefit of including the additional 21 claims as part of his original Complaint to avoid a dismissal for failing to timely file,

he also wanted the trial court to consider the claims separately to multiply his ability to collect penalties. Kozol cannot have it both ways.

Kozol asserts he should have been allowed to consolidate the claims under Civil Rule 15(c) which states: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." While Kozol argues the claims all arise out of the same conduct, transaction, or occurrence, each written request for records under the PRA is "treated as a single request." *Greenhalgh*, 170 Wn. App. at 150.

Kozol specifically intended for each claim to stand on its own as noted by his requests, each filed the same day but purposefully filed individually. CP 630-650. Each request was treated and processed individually. Each request had its own tracking number, a separate correspondence history, and the letters informing Kozol about responsive documents were provided to him on three different dates. CP 651-740. While the requests sought similar information, each response to the requests was treated and handled individually.

Kozol requested the same individual, separate treatment for the other 31 grievances (requested under PDU-18880 through PDU-18910)

Kozol sought to include through amendment to his complaint. CP 14-29. Kozol's letter to the Department requesting the grievances in other 22 requests be emailed to him made no mention of these additional 31 requests. CP 693. In addition, these 31 other requests were for individual grievance records from Stafford Creek Corrections Center and Airway Heights Corrections Center, neither of which were located in Walla Walla County. Kozol argues venue for these 31 additional claims could have been easily resolved through stipulation by the parties or a transfer of venue to Thurston County Superior Court, but the Department was not willing to stipulate to transfer of venue. Just as Kozol had intended, all 53 requests for grievances were submitted individually, provided separate PDU identification tracking numbers, and issued individual responses by the Department. Kozol even requested the responsive records be emailed to his account individually by PDU number. CP 693.

Further, Kozol purposefully filed his cases individually to avoid consolidation of his claims by the court. CP 924-930. As noted by his initial complaint in his first lawsuit, Kozol asserted he did not have to "provide any specifics" in a declaration so there was a "lower chance of these being seen as similar and this consolidated by the clerk." CP 924. Kozol wanted to "spread around the filing venues," in order to maximize his ability to collect penalties on each separate PRA request. CP 926-930.

Kozol cannot attempt to have the requests treated as separate conduct, transactions, and occurrences and later change his position to avoid a dismissal for failing to timely file his claims. As such, Kozol has failed to meet the standard for Civil Rule 15(c) and the trial court's decision to deny his amendment and consolidation should be affirmed.

2. Amendment of the Complaint would have caused undue delay and would ultimately be futile.

Kozol first sought to amend his Complaint sixteen months after he first filed his initial lawsuit. At that point, allowing Kozol to amend his Complaint would have resulted in an undue delay and prejudice to the Department. "The touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party. In determining whether prejudice would result, a court can consider potential delay, unfair surprise, or the introduction of remote issues. *Karlberg v. Otten*, 167 Wn. App. 522, 529, 280 P.3d 1123, 1127 (2012)(citing *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn. App. 192, 199, 49 P.3d 912 (2002); *Kirkham v. Smith*, 106 Wn. App. 177, 181, 23 P.3d 10 (2001)).

The additional claims were stale as the requests were filed more than two years before Kozol sought his amendment. The case was already sixteen months old and any additional amendment would have caused an

undue delay. Moreover, any amendment or consolidation would have been an act in futility as it did not cure the substantial defect of Kozol's failure to state a PRA claim.

Kozol also asserts the Department destroyed the back page of the grievance form after he submitted his requests and such destruction alone provides a basis for an amendment to his pleadings. However, the Department cannot be blamed for destroying the original paper copies containing the boilerplate back pages of the various grievances Kozol was requesting. Kozol purposefully failed to provide specific information in his Complaint in order to avoid any consolidation of his cases. CP 1-4, 924. While he identified the exact PDU numbers in his amended Complaint, he still purposefully failed to place the Department on notice of exactly which document he was alleging was silently withheld. CP 8-9. It was only after the Department took his deposition on November 22, 2013, that Kozol admitted at the time he filed his lawsuit and during the time of his deposition, his only claim of withholding was not being provided the back page of the grievance form. CP 156-157. This was well after the hard copy documents had been scheduled for destruction in December, 2012 and February, 2013. CP 783-784. As noted from Plaintiff's Complaint, he did not send letters of his disagreement with the responses to the Attorney General's Office until March 27, 2013. CP 603.

Destruction of the back page of the grievance forms occurred well before Kozol bothered to inform the Department that he was seeking those records.

Further, the actual grievance records were not destroyed. They were scanned and maintained by the Department. At the time it was processing the request, the Department reasonably read Kozol's request to exclude the boilerplate language on the back of the form. Regardless of whether Kozol amended his Complaint or consolidated his cases, the back page was not responsive to Kozol's request. Accordingly, the Court should affirm the decision of the trial court and find Kozol was neither entitled to amend nor consolidate his claims.

3. The Department did not agree to an amendment of the pleadings to include the 21 additional claims.

Kozol also asserts the 21 additional claims were amended into his first lawsuit when he included them in his amended partial motion for summary judgment. However, this was clearly Kozol's attempt to circumvent the Department's show cause motion seeking dismissal in his second matter, filed nearly a month prior to his amended partial summary judgment motion. CP 615-749. Further, before his amended partial motion for summary judgment was filed, the trial court had already issued its ruling granting the Department's motion and dismissing the 21 claims as

both time barred and because he had failed to state a claim under the PRA. CP 809-811. Regardless of whether the Department presented evidence to combat the additional 21 claims, there was never express or implied consent of the Department. The Department continually objected to Kozol's requests to amend his complaint and consolidate his claims. "Amendment under Civil Rule 15(b) cannot be allowed … if the issues have not in fact been litigated with the consent of the parties." *Harding v. Will*, 81 Wn.2d 132, 136, 500 P.2d 91 (1972). When the Department eventually filed its response, the 21 claims had already been dismissed in the second lawsuit and the 21 claims could not be somehow magically revived through Kozol's amended partial summary judgment motion. Accordingly, Kozol failed to show the 21 claims were amended into his first lawsuit and the decision of the trial court should be affirmed.

4. Kozol cannot complain the Court made an error when it did exactly what he requested.

Finally, Kozol argues the trial court erred when it failed to allow him to voluntarily dismiss the claims in his second lawsuit. However, Kozol admits his request for voluntary dismissal was only predicated on the trial court granting his motion to consolidate his cases. Because the trial court denied his motion to consolidate his cases, it did exactly as Kozol requested and did not grant his motion to voluntarily dismiss the

claims in his second case. Kozol cites to no authority which provides a trial court must grant a plaintiff's motion to voluntarily dismiss, even when the party indicates that an outright dismissal is not what it is seeking. RAP 10.3(a)(5). Therefore, any argument the trial court erred in failing to grant his voluntary dismissal is disingenuous and the Court should affirm the trial court's decision.

D. Kozol Had Adequate Time to Conduct Discovery and Any Additional Continuance Was Unnecessary

Kozol argues the trial court erred when it refused to grant his motion for a CR 56(f) continuance as he needed additional time to obtain evidence to rebut the Department's claims. However, he had more than two years from the date he filed his lawsuit, and three years from the date he received the records, to obtain discovery he needed to litigate his claims. CP 3-4. CP 410-452. Kozol should not be rewarded for failing to fully investigate his claims for three years and the Court should find there was no error in refusing to grant his continuance request.

E. Show Cause Motions Are the Correct Method in Determining Whether an Agency Has Violated the PRA

Lastly, Kozol argues a show cause hearing unfairly shifts the burden of litigating a PRA case onto the requestor and the Department should not have been allowed to file a its own show cause motion. However, nothing in RCW 42.56.550 prevents an agency from making a

show cause motion on its own accord. Waiting for a requestor to make such a motion, which may or may never come, would run afoul of the PRA as its purpose is to ensure the speedy disclosure of public records. *Spokane Research & Defense Fund v. City of Spokane*, 121 Wn. App. 584, 591, 89 P.3d 319 (2004), *rev'd on other grounds*, 155 Wn.2d 89 (2005). "[S]how cause hearings are the usual method of resolving litigation under [the PRA]." *Wood v. Thurston County*, 117 Wn. App. 22, 27, 68 P.3d 1084 (2003). Further, RCW 42.56.550 expressly permits a show cause hearing to determine issues and the Court "may completely resolve PRA claims in the show cause proceeding." *West v. Gregoire*, 184 Wn. App. 164, 336 P.3d 110, 114 (2014).

While Kozol asserts a show cause motion unfairly places a burden on the requestor to show a violation of the PRA, RCW 42.56.550(1) states the "burden of proof should be on the agency." Here, the Department held the initial burden of proof to show there was no PRA violation. Once the Department met its burden, the burden was then switched to Kozol to provide contrary evidence. Accordingly, the Court should find that resolving all issues related to Kozol's PRA claims through a show cause proceeding was proper.

V. CONCLUSION

For the reasons stated above, the Court should affirm the trial court's holding in this matter and dismiss Kozol's claims.

RESPECTFULLY SUBMITTED this 11th day of June, 2015.

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CERTIFICATE OF SERVICE

I certify that I served all parties, or their counsel of record, a true and correct copy of the Brief of Respondent by US Mail Postage Prepaid to the following addresses:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 11th day of June, 2015, at Spokane, Washington.

PATTY WILLOUGHBY
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