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NO. 97297-4

**SUPREME COURT OF THE STATE OF WASHINGTON**

CHARLES WOLFE,

Petitioner,

v.

WASHINGTON DEPARTMENT OF TRANSPORTATION,

Respondent.

# WASHINGTON DEPARTMENT OF TRANSPORTATION'S ANSWER TO AMICUS CURIAE BRIEF OF WASHINGTON COALITION FOR OPEN GOVERNMENT

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## I. IDENTITY OF ANSWERING PARTY

The Washington Department of Transportation (WSDOT) submits this answering brief in response to the Amicus Curiae brief of the Washington Coalition for Open Government (Amicus). As fully explained in WSDOT's Answer to Petition for Review, this Court should deny the Petition for Review (Pet.).

## II. INTRODUCTION

The Petition for Review in this case presents the narrow issue of whether—under the circumstances of the case—Petitioner Charles Wolfe (Wolfe) is entitled to equitable tolling to save this untimely action for penalties and fees under the Public Records Act (PRA). Wolfe, and now Amicus, argue that either equitable tolling or a common law "discovery rule" should save these untimely claims from an otherwise straightforward application of the statute of limitations. Both of these arguments must fail because the record establishes that Wolfe received a final and definitive response to his public records request in 2008, that Wolfe knew in 2008 that he was not receiving any further records from WSDOT, and that Wolfe nonetheless waited until 2012 to file this lawsuit.

The Court of Appeals' Unpublished Opinion (Op.) correctly determined that Wolfe had failed to demonstrate the kind of bad faith, deception, or false assurances necessary to invoke equitable tolling. It also

declined to address application of the discovery rule, noting that Wolfe had apparently abandoned that argument on appeal. The Court of Appeals' decision simply applies existing Supreme Court precedent in a fact-specific and non-precedential opinion that breaks no new ground. It does not raise the kind of widespread issues of public importance that warrant review by this Court.

Like Wolfe, Amicus mischaracterizes both the facts and the case law to try and force ill-fitting facts into a strained test for tolling. But to expand the test so far as to accommodate Wolfe's case would create an exception that would overwhelmingly swallow the rule. If tolling were to apply on these facts, the statute of limitations would virtually never apply. Because this would be contrary to *Belenski*, *Millay*, and the one-year statute of limitations created by the Legislature in RCW 42.56.550(6), the Court should decline to modify the law as Amicus suggests.

## III. COUNTERSTATEMENT OF THE CASE

In the interest of brevity and compliance with RAP 10.3(f), WSDOT incorporates its full counterstatement of the case as set forth in the Answer to Petition for Review and only focuses here on the issues raised by Amicus.

In response to Wolfe's 2008 request for records, WSDOT provided at least three installments of records and produced multiple boxes of records

for Wolfe to review in its Kelso office. Op. at 2-3.[1] Following two opportunities for Wolfe to inspect the records that had been gathered and produced, WSDOT closed Wolfe's request on August 13, 2008. CP at 1318. Wolfe knew at that time that WSDOT was not going to provide any more records. Op. at 9. The record did not show that WSDOT personnel knew about the three undisclosed rip-rap records at this time. Op. at 10; CP at 3348.

On September 19, 2008, Wolfe sent a letter to WSDOT stating his belief that "WSDOT has NOT fully complied with my request to research the cause(s) of the erosion activity affecting our property" and threatened litigation. Op. at 3; CP at 1858-61.[2] Wolfe did not commence a lawsuit against WSDOT in 2009.

In June of 2010, Wolfe filed a separate tort lawsuit against WSDOT in Pacific County. Op. at 3. That case was dismissed in 2010 and Wolfe appealed. Op. at 4. In 2011, during the pendency of that appeal, Wolfe sent WSDOT another public records request and as a result WSDOT found and

[1] Amicus mischaracterizes the record, asserting that "WSDOT did not provide any records to that specific request." Amicus Brief of Washington Coalition for Open Government in Support of Petition for Review (Amicus Br.) at 2. The record establishes that WSDOT provided "a number of boxes" of records in response to Wolfe's request. CP at 3343 (trial court findings); CP at 1812, 1818-23 (list of boxes and description of their contents).

[2] Wolfe's original request correspondence to WSDOT in May of 2008 (which was later designated PDR-08-0445) similarly asked for information, records, and meetings about the cause of what he described as the "Naselle riverbank erosion problem." CP at 1839-41.

provided the three rip-rap records that would have been responsive to his 2008 request. Op. at 4. Wolfe filed this suit in May 2012. *Id.*

In October 2012 – five months after Wolfe had already commenced this suit and more than four years after the closure of his 2008 PRA request at issue here – counsel for WSDOT mistakenly said in oral argument in the other case that no work had been done on the Naselle River Bridge since 1986. Op. at 4. Neither Wolfe nor Amicus has identified any other specific statement or action by WSDOT that they allege would qualify as bad faith, deception, or false assurances.[3]

## IV. ARGUMENT IN RESPONSE

Amicus recycles Wolfe's generalized policy arguments underlying the Public Records Act, the doctrine of equitable tolling, and the discovery rule and then simply jumps to the conclusion that this case presents issues of substantial public interest. But without the necessary facts to support application of the tolling or discovery rule, this case presents nothing more than a routine application of the statute of limitations and existing Supreme Court precedent.

[3] Amicus obliquely suggests, but does not clearly argue, that the implicit statement of closing Wolfe's request might itself be enough to trigger tolling. Amicus Br. at 3, 7. Wolfe does likewise, and also argues that any hypothetical "incentive" to withhold records should suffice. Pet. at 14-15.

## A. Equitable Tolling is Already a Well-Defined Doctrine

Both Amicus and Wolfe argue that review is warranted because this Court did not provide guidance on the equitable tolling test when deciding *Belenski v. Jefferson Cty.*, 186 Wn.2d 452, 378 P.3d 176 (2016). They both present hypothetical questions and argue that this Court should "further refine" how equitable tolling applies in the context of the PRA. Amicus Br. at 4-5; *see also* Pet. at 16. But equitable tolling is a well-articulated doctrine, and was so at the time this Court decided *Belenski*. Amicus fails to show that this Court meant anything other than the long-accepted definition of equitable tolling when it called for the use of that test.

Equitable tolling cases have applied the doctrine consistently across a range of case types. *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998), the case relied upon by the Court of Appeals, describes two elements of the doctrine as "bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff." 135 Wn.2d at 206; Op. at 6. This is a common articulation of the test which has been applied across contexts and jurisdictions.[4] *Millay* itself was a mortgage foreclosure

[4] *See, e.g.*, *Price v. Gonzalez*, 4 Wn. App. 2d 67, 75, 419 P.3d 858 (2018) (tolling not allowed in car accident case where plaintiff named wrong defendant because of lack of diligence); *Thompson v. Wilson*, 142 Wn. App. 803, 814, 175 P.3d 1149 (2008) (in judicial review of a coroner's determination of death, tolling allowed based on uncontested evidence that the defendant actively misled plaintiff);

redemption case. *Millay*, 135 Wn.2d at 196. It repeated the equitable tolling test stated in *Finkelstein v. Sec. Properties, Inc.*, 76 Wn. App. 733, 739, 888 P.2d 161, 167 (1995), a case alleging breach of fiduciary duty. *Finkelstein* drew the test out of an employment discrimination case, *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 812, 818 P.2d 1362 (1991). Nothing in the case law suggests a special or unique test for equitable tolling in PRA cases is called for.

Further, Amicus incorrectly asserts that the Court of Appeals "failed to consider important precedents on equitable tolling" such as *Douchette*. *Compare* Amicus Br. at 5, *with* Brief of Respondent/Cross-Appellant at 20-21, 24-25, 28-29 (discussing various aspects of *Douchette*), *and* Reply Brief of Appellant/Cross-Respondent at 14 n.2 (denying that the factors from federal case law should apply outside the employment discrimination context). Quite to the contrary, the record indicates the Court of Appeals was well aware of the prior case law on equitable tolling, including *Douchette*.

There is no need for this Court to clarify the equitable tolling doctrine that is already well defined. Instead, Wolfe and Amicus invite the Court to create an entirely new test for tolling in the context of the PRA that

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*Duncan Place Owners Ass'n v. Danze, Inc.*, No. 15 C 01662, 2015 WL 5445024, at *8 (N.D. Ill. Sept. 15, 2015) (breach of implied warranty claims); *Young v. Lehman*, 249 F. App'x 521 (9th Cir. 2007) (unlawful detention claim under 42 U.S.C. § 1983).

would allow it to apply broadly in nearly every case. For the reasons described below, the Court should decline the invitation.

## B. The Court of Appeals Properly Declined To Invoke Equitable Tolling on the Facts of This Case

Expanding the test for equitable tolling as Wolfe and Amicus suggest would conflict with the policy underlying the statute of limitations, abrogate the clear rule from *Belenski*, and essentially allow the exception to swallow the rule. This does not warrant review.

### 1. The view of tolling taken by Amicus is sharply at odds with the statute of limitations

The Public Records Act provides a one year statute of limitations on causes of action. RCW 42.56.550(6); *Belenski*, 186 Wn.2d at 458. This was a deliberate choice made by the Legislature in 2005, when the limitations period was reduced from five years to one year. Laws of 2005, ch. 483, § 5.[5] "The policy behind statutes of limitation is protection of the defendant, and the courts, from litigation of stale claims where plaintiffs have slept on their rights and evidence may have been lost or witnesses' memories faded." *Douchette*, 117 Wn.2d at 813 (internal quotation omitted). This protection against stale claims is especially important in the context of the PRA, where penalties can be severe and agencies have the burden to prove compliance.

[5] *See* Second Substitute H. B. 1758, 59th Leg., Reg. Sess., 2005 (available at http://lawfilesext.leg.wa.gov/biennium/2005-06/Pdf/Bills/Session%20Laws/House/1758-S2.sl.pdf)

As time elapses, it can only become more difficult for the agency to prove its compliance with the PRA. Agency records are subject to various retention periods according to their classification, at the end of which they may be destroyed. *See* RCW 40.14.060. This means that when forced to litigate stale claims, in addition to faded memories, key documents that may have been needed to prove the adequacy of a search may no longer exist. This case provides an example: in 2012, WSDOT was forced to try and justify actions it took in 2008, with respect to records of events that occurred in 1998. Had Wolfe brought his claim in 2009, memories of critical witnesses would have been clearer and WSDOT staff could have perhaps better explained why the three rip-rap records were initially missed. But with the distorting effects of hindsight, all that is left is the conclusion that the records were not initially uncovered and produced. Tolling the statute of limitations as broadly as Amicus suggests would unfairly force agencies to frequently litigate these kinds of stale claims.

Contrary to Amicus' arguments, extending the limitation periods on suits for penalties and fees may not necessarily serve the interests of transparent government as Amicus presents. If this Court were to announce a broad new tolling rule, agencies may be forced to balance that risk by extending retention periods and saving exponentially more records than before. As agencies accumulate more and more records, this will make it

more difficult to separate the wheat from the chaff, and increase the likelihood that records are misfiled or misplaced, or otherwise not found even after a diligent search. Conversely, under the existing law, a requestor may simply submit a new request for the records he or she desires, as Wolfe did in 2011. This appropriately leaves the focus on efficiently locating and providing access to records, rather than retaining records indefinitely on the chance that the agency may be forced to defend against litigation that would have been barred under a faithful application of the statute of limitations.

### 2. Amicus' view of tolling would essentially abrogate *Belenski*

*Belenski* set forth a clear workable test for application of the statute of limitations in RCW 42.56.550(6). The *Belenski* Court determined that the statute of limitations began running at the time of the county's "final, definitive response . . . [r]egardless of whether its claim to have no responsive records was truthful or correct." 186 Wn.2d at 460-61. The focus was whether the county's response was "sufficient to put [the requestor] on notice that the County did not intend to disclose records or further address this request." *Id.* If the requestor was unsatisfied with this answer, he could sue immediately. *Id.*

Amicus would flip this rule on its head. It asserts that when an agency incorrectly "states that no other responsive records exists, the citizen

should be entitled to rely upon that representation" and suggests that, in its view, this alone should be sufficient to invoke equitable tolling. Amicus Br. at 7 (If agency statement is incorrect, it "should bear the consequence."). Amicus also wrongly claims that Wolfe "could not have acted on the three 1998 records within the one-year statute of limitations period when he did not know they existed until 2011." *Id.* But this ignores the fact that Wolfe himself believed in 2008 that his request had not been fulfilled, as evidenced by his September 2008 letter. It also directly conflicts with *Belenski*'s clear instruction that a dissatisfied requestor can sue immediately upon receiving a final response. 186 Wn.2d at 461. Under Amicus' proposed rule, regardless of whether the search was adequate or in good faith, the limitations period would toll nearly every time an agency missed a document and closed a request.

In addition to allowing stale claims, Amicus' proposed rule risks elevating the standard for an adequate search from one of reasonableness to essentially requiring perfection by the agency. This Court has been clear that "a search need not be perfect, only adequate." *Neighborhood All. of Spokane Cty. v. Spokane Cty.*, 172 Wn.2d 702, 720, 261 P.3d 119 (2011) (quoting *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986). Nearly all of Amicus' arguments presume that any missed record automatically means a violation of the PRA. This is not the case.

### 3. If equitable tolling applies here, the exception will overwhelmingly swallow the rule

Given the factual findings in this case, there is virtually no way to allow tolling for Wolfe that would not extend it to almost every case where a record is not disclosed. Amicus seemingly acknowledges this, arguing this fact pattern is "not unusual and has a high likelihood of repetition." Amicus Br. at 5. But this is only so if the facts are generalized to the point that they will apply to all cases where an agency closes a request and later finds an additional responsive record. Amicus Br. at 3. This entirely eliminates the well-established requirement of showing bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff.

The Court of Appeals' decision properly held the facts of this case to be inconsistent with the required elements of equitable tolling. As fully explained in WSDOT's Answer to Petition for Review, Wolfe did not show the kind of bad faith, deception, or false assurances necessary to invoke tolling. The record did not show that WSDOT personnel knew about the rip-rap records in 2008, much less that anyone tried to cover them up in deception or bad faith. Op. at 10.[6] Quite the opposite, the superior court

[6] This is critically different from *Belenski*, where evidence indicated that both *Belenski* and county employees knew that the requested IAL data existed. 186 Wn.2d at 455.

explicitly rejected Wolfe's insinuations that WSDOT had acted in bad faith, CP at 3348, and found that WSDOT had made an "honest attempt to try to comply with the Public Records Act." Op. at 10; CP at 3346.

Amicus and Wolfe suggest two statements from WSDOT could possibly qualify as "false assurances." One is the implicit statement made by the closure of Wolfe's request on August 13, 2008. Amicus Br. at 7; Pet. at 15. But this Court in *Belenski* directly rejected the notion that the closure of a request, when further responsive records exist, suffices on its own to toll the statute of limitations.[7] The only other statement Amicus and Wolfe identify is the 2012 statement by a WSDOT attorney in another case that no work had been done on the bridge. Amicus Br. at 2; Pet. at 6, 17. But this simply cannot meet the test. There is no way a statement in 2012, after Wolfe had already received the rip-rap records and filed this case, could have possibly confused or misled Wolfe about the status of his request in 2008-09 when he would have needed to file his suit. The Court of Appeals correctly determined neither of these statements rose to the level of bad faith, deception, or false assurances necessary to invoke tolling. Op. at 12.

Nor is it inequitable to apply the statute of limitations on these facts. It was uncontested that Wolfe knew in 2008 that his request was closed, that

[7] In *Belenski*, the county affirmatively told the requestor that "the County has no responsive records." 186 Wn.2d at 461. This statement triggered the statute of limitations, "[r]egardless of whether this answer was truthful or correct." *Id.*

he would not be receiving any further records in response to it, and that he was unsatisfied with what he believed was an incomplete response. Op. at 9; CP at 1858. There was no need for Wolfe to wait an additional 44 months before filing this suit.

If equitable tolling were to apply here, it is nearly impossible to imagine a situation where the one-year statute of limitations the Legislature purposefully adopted in RCW 42.56.550(6) would apply instead of the new tolling rule Amicus advances. Review by this Court is not needed to address this argument.

### C. The Court Should Decline To Address the Discovery Rule

Amicus largely recycles the same policy arguments under a different heading, attempting to achieve the same result by another name. But the discovery rule arguments are premised on the faulty notion that "Wolfe could not have sued until he discovered the PRA violation" in 2011. Amicus Br. at 8. As explained, this ignores the critical fact that Wolfe knew in 2008 that he was not receiving any further records, believed that his request had not been completely fulfilled, and could have brought suit at that time. CP at 1858. Even if a common law discovery rule were available under the PRA in some circumstances, it would not apply here.

To support its arguments, Amicus vastly overstates policy implications involved in the Court of Appeals' decision. For instance,

Amicus mischaracterizes the imbalance in information between Wolfe and WSDOT, claiming "*the agency itself is the reason why the action could not have been brought*" within the limitation period. Amicus Br. at 7-8 (emphasis in original). This characterization is wholly unfounded, particularly given the superior court finding that the relevant WSDOT personnel *did not know* there had been a rip-rap project on the bridge when they were responding to Wolfe's request in 2008. CP at 3348. Moreover, with such large requests, where decades-old records must be drawn out of archives, the agency personnel responding to the request will often have little to no familiarity with the underlying events. As this case illustrates, with Wolfe clearly having made himself an expert concerning the Naselle River Bridge, quite often the requestor will have the best knowledge of what they desire. But most importantly to the discovery rule arguments, the Legislature would have been aware of this dynamic when it chose to enact the one-year statute of limitations in RCW 42.56.550(6).[8]

Amicus also argues that the relationship between a citizen and the government is a "special relationship" such that the discovery rule should apply. Amicus Br. at 10-11. But the relationship is not akin to a fiduciary, or employer-employee relationship, which is between individuals. *Id.* And

[8] Amicus also ignores the countervailing policy interest in encouraging agencies to be transparent and to produce newly uncovered records once they are uncovered, rather than penalizing them for the disclosure.

the non-disclosure of records is nothing like the harm done by the surgeon who leaves a sponge in a patient undiscovered for 20 years. Amicus Br. at 9-10 (citing *Ruth v. Dight*, 75 Wn.2d 660, 667-68, 453 P.2d 631 (1969)). Ultimately, the special relationship test is a common law exception to the public duty doctrine used to determine whether there is a tort duty of care to a particular person. *Taylor v. Stevens Cty.*, 111 Wn.2d 159, 166, 759 P.2d 447 (1988). It is not a means to sidestep a clear one-year statute of limitations set forth by the Legislature.

Given that the Court of Appeals did not directly address the discovery rule issue, and that Wolfe did not properly raise it on appeal, this Court should similarly decline to grant review and consider it.

## V. CONCLUSION

The Petition for Review fails to present a substantial issue of public interest that warrants review by this Court. The record shows that Wolfe knew in 2008 that his request was closed, that he would not receive any further records, and that he was dissatisfied with that response. Without facts to support application of equitable tolling or adoption of a discovery

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rule, this case presents a straightforward application of the statute of limitations. Accordingly, the Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 3rd day of September 2019.

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## CERTIFICATE OF SERVICE

I, Angela M. Boggs, an employee of the Transportation and Public Construction Division of the Office of the Attorney General of Washington, certify that on this day true copies of Washington Department of Transportation's Answer to Amicus Curiae Brief of Washington Coalition for Open Government and this Certificate of Service were served via electronic mail, per agreement, on:

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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 3rd day of September 2019 at Tumwater, Washington.

ANGELA M. BOGGS
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## ATTORNEY GENERAL'S OFFICE/TRANSPORTATION AND PUBLIC CONSTRUCTION

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