Supreme Court No. 101143-1

THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 56160-3

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

LISA EARL,

Petitioner,

v.

CITY OF TACOMA,

Respondent.

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, GENERAL PUBLIC PRACTICE & INDIAN LAW CLINIC AT GONZAGA UNIVERSITY SCHOOL OF LAW, CENTER FOR INDIAN LAW AND POLICY, AND FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

In our time of social reckoning, this Court has directed the judiciary to eliminate the systemic inequities and racial biases in our law enforcement and legal systems. The Public Records Act, RCW 42.65, *et seq*., ("PRA") is a critical transparency and accountability framework necessary to ensure police and other government entities equitably protect the communities they serve and carry out their duties in a manner consistent with anti-racist and democratic principles.

The open examination of public records affords the public and policymakers the ability to fully understand the police practices so that they can be addressed in the public interest. This is exactly what Ms. Earl intended to carry out when she sought – through the PRA—records related to the fatal police shooting of her pregnant and unarmed daughter, who was a member of the Puyallup Tribe of Indians.

In *Earl v. City of Tacoma*, No. 56160-3-II (July 12, 2022) ("*Unpublished Opinion*"), Division II of the Court of Appeals

wielded the statute of limitations to affirm the dismissal of a case brought under the PRA—in direct contravention of the policy and purpose of the PRA. Division II erroneously held (1) the discovery rule does not apply to PRA claims, and (2) that Ms. Earl did not meet the elements for equitable tolling. Division II effectively shifted the legal paradigm under the PRA from a law intentionally designed to be liberally construed to protect the public interest to a law where procedural barriers impair its purposes. This holding invites the government to withhold records, after assuring citizen requestors they have produced all responsive records, and then later avoid accountability under the PRA.

When, in response to a PRA request, the government fails to adequately search for responsive records, unlawfully conceals responsive records, and misrepresents the existence of responsive records—as the City of Tacoma ("City") did in this case—courts must apply equitable principles to toll the statute of limitations. This Court must therefore grant review of this matter

of substantial public interest under RAP 13.4(b)(4) to intervene to uphold the policy and purpose of the PRA, and to ensure racial justice in our legal system.[1]

II. IDENTITY AND INTEREST OF AMICI

The identity and interest of amici are set forth in the Motion for Leave to File.

III. STATEMENT OF THE CASE

Amici adopts Petitioner Earl's Statement of the Case.

IV. ARGUMENT

A. The Public Possesses A Substantial Interest In The Government Transparency And Accountability Mandated By The PRA

The public possesses a substantial interest in maintaining the government accountability and transparency the PRA guarantees to all citizens and ensuring law enforcement agencies do not perpetrate systemic inequities in their policing of

[1] Amici agree this matter raises issues under RAP 13.4(b)(1), (2), and (4). In the interest of judicial economy, Amici focus this brief on RAP 13.4(b)(4). Amici likewise agree that the Court should grant and consolidate review of this case and *Cousins v. State*, Court of Appeals Case No. 56996-5-II.

Washington citizens. Accordingly, this Court's review is warranted under RAP 13.4(b)(4).

1. The Primary Purpose Of The PRA Is To Foster Government Transparency And Accountability

The citizens of Washington enacted the PRA over fifty years ago to preserve "the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions." *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) ("*PAWS*"); RCW 42.56.030. Without tools such as the PRA, "government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests." *PAWS*, 125 Wn.2d at 251.

The PRA "stands for the proposition that full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." *Neighborhood Alliance of Spokane Cnty. v. Spokane Cnty.*, 172

Wn.2d 702, 715, 261 P.3d 119 (2011). The PRA is a "strongly worded mandate for broad disclosure of public records." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978); RCW 42.56.070.

The primary purpose of the PRA is to foster governmental transparency and accountability by making public records available to Washington's citizens. *John Doe A v. Wash. State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63 (2016). Accordingly, the Legislature has directed the Court to liberally construe the PRA to promote the policy of government transparency and accountability, and assure the public interest is protected. RCW 42.56.030; *Livingston v. Cedeno*, 164 Wn.2d 46, 50, 186 P.3d 1055 (2008). When evaluating a PRA claim, the Court must "take into account the policy of this chapter that free and open examination of public records is in the public interest[.]" RCW 42.56.550(3).

2. Division II Disregarded The Legislature's Mandate And This Court's Precedent In Failing To Apply The Discovery Rule Or Equitable Tolling

Division II held that the discovery rule generally does not apply to PRA cases, and that equitable tolling did not apply to Ms. Earl's claim. Division II completely disregarded the Legislature's mandate and decades of uniform precedent from this Court requiring the judiciary to liberally construe the PRA in favor of the requester. Worse, Division II grossly undermined the well-established purpose of the PRA in a manner that encourages government agencies to disregard the PRA and stifles the public policy of the PRA. This Court must therefore accept review.

In holding that the discovery rule does not apply to PRA cases, Division II failed to consider the unique relationship between citizens and their government under the PRA and the way the PRA facilitates this relationship. Under the PRA, the government controls the disclosure of information leaving citizens to rely on adequate self-reporting by their government. In *U.S. Oil & Refining Co. v. State Department of Ecology*, 96 Wn.2d 85, 93-94, 633 P.2d 1329 (1981), this Court observed:

> Where self-reporting is involved, the probability increases that the plaintiff will be unaware of any cause of action, for the defendant has an incentive not to report it. Like the other cases which have employed the rule, this is a case where if the rule were not applied the plaintiff would be denied a meaningful opportunity to bring a suit. Like those plaintiffs, this plaintiff lacks the means and resources to detect wrongs within the applicable limitation period. Not applying the rule in this case would penalize the plaintiff and reward the clever defendant. Neither the purpose for statutes of limitation nor justice is served when the statute runs while the information concerning the injury is in the defendant's hands.

The discovery rule is an exception to the general rule of accrual, and Washington courts have applied it to claims where "injured parties do not, *or cannot*, know they have been injured." *In re Estates of Hibbard*, 118 Wn.2d 737, 744-45, 826 P.2d 690 (1992) (emphasis added). Such is the case under improper record withholding under the PRA. The discovery rule promotes the purpose and policy of the PRA by ensuring that the public is not penalized when a government agency withholds information within its custody and control. Division II erroneously relied on a purported "trend towards making violations and penalties less

onerous on agencies" in contravention of established principles of fairness and equity.

Division II likewise ignored the Legislature's mandate and this Court's precedent in holding that equitable tolling does not apply to Ms. Earl's claim. Division II reasoned that courts should apply the doctrine of equitable tolling "sparingly," and only upon a showing that the government made deliberately false and misleading assurances. *See* App. A-15. In *Millay v. Cam*, 135 Wn.2d 193, 955 P.2d 791 (1998), however, this Court expressly held that equitable tolling continues to serve as the backdrop to the general rule of accrual under "equitable circumstances" or as "justice requires." *Millay*, 135 Wn.2d at 206. Applying "equitable tolling is appropriate when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations." *Id*.

The primary purpose of the PRA is clear: government transparency and accountability to the public. The PRA must be liberally construed to fully protect the public interest. RCW

42.56.030. A statute of limitations exists to "compel the exercise of a right of action within a reasonable time so opposing parties have a fair opportunity to defend." *Stenberg v. Pac. Power & Light Co.*, 104 Wn.2d 710, 714, 709 P.2d 793 (1985). When a government agency conceals responsive documents from the public, and then later attempts to use them against the requester in a judicial proceeding, as is the case here, equitable tolling should apply.

Division II's holding renders principles of equity and justice obsolete by improperly limiting equitable tolling to cases where the requester can establish that the government sought to deliberately mislead in withholding documents under the PRA. This Court should thus grant review to restore these equitable principles of fairness and justice.

B. The Public Possesses A Substantial Interest In Ensuring Equitable and Fair Policing Practices

The government transparency and accountability principles of the PRA are critical to monitoring law enforcement conduct in deadly use-of-force incidents involving Native

Americans. The systemic inequities in our justice system and violence perpetrated by governmental officials against Native American people predates the founding of the United States and continues to disproportionally impact Indigenous people. Applying either the discovery rule or equitable tolling to the PRA's statute of limitations in a manner consistent with its accountability and transparency principles combats the structural inequities in policing that disparately impact citizens like Ms. Earl's Tribal daughter.

The records Ms. Earl sought from the City related to the fatal shooting by Tacoma Police of her pregnant and unarmed daughter, a member of the Puyallup Tribe, perfectly exemplifies this country's centuries-old legacy of racial injustice towards Indigenous people. Unfortunately, the systemic violence and oppression perpetrated against Native people by government officials remains present in our law enforcement and legal systems. Nationally, law enforcement officers kill Native Americans at a rate disproportionally higher than any other racial

group.[2] Washington law enforcement officers are no exception—they too contribute to the disproportionate number of fatal and biased encounters law enforcement have with Native people, including in Pierce County.[3]

Despite the fact that Washington officers disproportionately police and kill Native people, the public has few tools by which to examine and hold law enforcement to account for their actions. The PRA is therefore vital. Full disclosure of public records under the PRA related to police encounters is the only accessible way many families, stakeholders, and policymakers can understand what happened, what role racial bias played in the incident, and how to reform the policing people of color. Preventing transparency and

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[2] *See* Melissa A. Jim, et al., *Racial Misclassification of American Indians and Alaska Natives by Indian Health Service Contract Health Services Delivery Area*, Am. J. Public Health (June 2014); *see also* Elise Hansen, The forgotten minority in police shootings, CNN (Nov. 13, 2017).

[3] *See* Research Working Group Task Force 2.0, Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court, at 2, 11-12, A-3, A-4 (2021).

accountability for police agencies that fail to fully and adequately disclose public records based on a non-jurisdictional technicality like the statute of limitations only serves to perpetuate the systemic inequities in our law enforcement and legal systems.

C. The Public Possesses A Substantial Interest In The Eradication Of Racism In Our Justice Systems

In response to the nationwide public outcry and racial reckoning following the murder of George Floyd by the Minneapolis Police, this Court issued an open letter calling on our judicial and legal community to eradicate racism in our justice system.[4] The Court has called upon all in the legal community, including the courts, to "administer justice and support court rules in a way that brings greater racial justice to our system as a whole." The Court recognized that administering justice in a manner that brings greater racial justice to our community requires "that even the most venerable precedent *must be struck down when it is incorrect and harmful*." The

[4] Letter from Washington Supreme Court to Members of the Judiciary and the Legal Community (June 4, 2020).

Court specifically noted that one of the persistent systemic injustices that plagues Black Americans remains "racialized policing."[5]

The decision of Division II is both incorrect and harmful. As explained in Ms. Earl's Petition for Discretionary Review, Division II's *Unpublished Opinion* is wrong because it conflicts with *Matter of Fowler*, 197 Wn.2d 46, 479 P.3d 1164 (2021), with *Thompson v. Wilson*, 142 Wn.App. 803, 175 P.3d 1149 (2008), and with *U.S. Oil Refining Co. v. Dep't of Ecology*, *supra*. *See Petition for Review* at 8-23.

The decision also is wrong because the discovery rule is applicable where, just as in Ms. Earl's case, "injured parties do not, *or cannot*, know they have been injured." *In re Estates of Hibbard*, 118 Wn.2d at 744-45 (emphasis added). Equitable tolling likewise applies broadly to promote the policy and purpose of liberal disclosure under the PRA. Amici agree with

[5] *Id*. (emphasis added).

Ms. Earl that equitable tolling applies "upon a finding of fraud, oppression, or other equitable circumstances" or as "justice requires."

More importantly, Division II's decision is extremely harmful because it not only undermines the purpose of the PRA, but it permits law enforcement to avoid responsibility for unlawful behavior by hiding behind the one-year statute of limitations after they secretly withhold documents responsive to a PRA request, and falsely assure citizens they have produced all responsive documents.

V. CONCLUSION

Police accountability is undeniably an issue of fundamental public import. To ensure that law enforcement agencies are held accountable, this Court should encourage courts to apply equitable principles to toll the statute of limitations when faced with agency action that undercuts the purpose of the PRA, and fosters the insidious legacy of racism that remains present in policing practices. In the interest of

justice and equity, Amici urge this Court to grant review under RAP 13.4(b)(4).

Dated this 4th day of October, 2022.

Undersigned counsel certifies that this document contains 2,487 words.

Respectfully submitted,

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October 04, 2022 - 5:15 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,143-1
Appellate Court Case Title:	Lisa Earl v. City of Tacoma
Superior Court Case Number:	19-2-10487-8

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