NO. 101143-1

SUPREME COURT
OF THE STATE OF WASHINGTON

LISA EARL,

Appellant,

v.

CITY OF TACOMA,

Respondent.

CITY OF TACOMA'S COMBINED RESPONSE TO WASHINGTON COALITION FOR OPEN GOVERNMENT'S 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 AMICUS CURIAE

WILLIAM B. FOSBRE, City Attorney
MICHELLE N. YOTTER, WSB#49075
Attorney for Respondent
Tacoma City Attorney's Office
747 Market Street, Suite 1120
Tacoma, Washington 98402
(253) 591-5885

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUES

COURT RULES

I. INTRODUCTION

Amici curiae American Civil Liberties Union of Washington and Washington Coalition for Open Government (both these entities will be collectively referenced throughout as "amici curiae") argue that this Court should accept review of the instant matter because the Washington State Court of Appeals Division II ("Division II") erred when it failed to extend the statute of limitations for this Public Records Act ("PRA") matter beyond the one-year time period set forth by the legislature, and because expansion of well-settled PRA jurisprudence is necessary to balance systemic inequities in our law enforcement and justice systems. As outlined below, these arguments fail.

II. ISSUE PRESENTED

Should this Court accept discretionary review of this PRA case under RAP 13.4(b)?

Answer: No, there are no grounds under which discretionary review of this matter is warranted.

III. COUNTER STATEMENT OF THE CASE

The City relies on the Counter Statement of the Case as laid out in its *Answer* to *Plaintiff's Petition for Review*.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A petition for discretionary review shall only be accepted if the petition meets specific criteria as identified in RAP 13.4(b). Both the Petitioner and the above identified amici curiae fail to establish any of the criteria identified by RAP 13.4(b) necessary for discretionary review and, as such, review of this matter must be denied.

A. Division II's holding in Earl does not conflict with this Court's previous decisions applying the common law "Discovery Rule."

Amici curiae argue that under this Court's holding in U.S. Oil & Ref. Co. v. Department of Ecology, 96 Wn.2d 85, 633 P.2d 1329 (1981), Division II erred when it did not extend the statue of limitations beyond the one year period allowed by the statute. *See* RCW 42.56.550(6).

The facts and legal issues at play in U.S. Oil, however, are obviously and undeniably distinguishable from the facts in the matter presently before this Court. First, U.S. Oil involved the regulation of the discharge of pollutants by the Washington State Department of Ecology ("DOE"). U.S. Oil, at 87. Under DOE regulations, businesses – like U.S. Oil – are required to self-report discharge of pollutants. Id. In that matter, U.S. Oil filed the required reports, but the reports were inaccurate in that they did not disclose that U.S. Oil had exceeded it effluent limits. Id. The DOE had no way to know that the required reports filed by U.S. Oil were inaccurate. Id. U.S. Oil did not dispute that it had submitted inaccurate reports and had illegally discharged pollutants. Id. U.S. Oil argued, however, that it should avoid penalty for the illegal discharge and false reports because the statute of limitations had run. Id. The facts in U.S. Oil are in no way analogous to a PRA claim such as that presently being considered by this Court.

More importantly, however, this Court expressly limited its adoption of the discovery rule in U.S. Oil to "**actions brought by DOE** to collect penalties for unlawful waste discharges." U.S. Oil, at 94 (emphasis added). Accordingly, based on this Court's clear and definitive holding in U.S. Oil, Division II did not err or create any conflict or inconsistency when it refused to apply the discovery rule in Earl's PRA action.

B. Division II's holding in Earl does not conflict with this Court's previous decisions applying Equitable Tolling.

Amici curiae argues that Division II erred when it failed to extend the statute of limitations beyond the statutorily imposed one-year period by operation of the doctrine of Equitable Tolling. This argument inexplicably turns a blind eye to both critical facts of the instant case and the relevant precedent created by this Court's recent holding in Fowler v. Guerin, 200 Wn.2d 110, 119, 515 P.3d 502 (2022).

Importantly, Division II found "Earl presents no evidence to suggest that the City made deliberately false, misleading

assurances which caused the statute of limitations to lapse" and, accordingly, Division II properly refused to equitably toll the statute of limitations applicable to Earl's PRA Claim. Earl at *21. Amici curiae argue that, in light of this Court's decision in In re Pers. Restraint of Fowler, 197 Wn.2d 46, 479 P.3d 1164 (2021), Division II erred when it held that Earl was required to provide sufficient evidence establishing each of the conditions necessary for Equitable Tolling mandated by Millay v. Cam, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). Like Petitioner, amici curiae assert that this Court's decision in In re Pers. Restraint of Fowler dispensed with the Millay criteria and, as such, Earl's PRA Claim should be eligible for Equitable Tolling and ultimately considered timely.

The position put forward by amici curiae ignores that this Court made it abundantly clear in its very recent decision from Fowler v. Guerin, that:

> [t]he four-part standard set forth in Millay remains the standard for equitable tolling of statutes of limitations in civil actions under Washington law. Washington courts

> must evaluate each part of this standard in light of the particular facts of each case and should equitably toll the applicable statute of limitations only when all four parts of the Millay standard are satisfied.

Fowler v. Guerin, at 124-25 (Aug. 18, 2022)(emphasis added).

Accordingly, Division II's application of the Millay factors in its Equitable Tolling analysis below does not conflict with this Court's jurisprudence and, as such, the reaching arguments presented here by amici curiae must fail.

C. This matter raises no issue of substantial public interest that required review by this Court.

Amici curiae argue that this Court should implement *both* Equitable Tolling *and* a common law discovery rule in all PRA cases to promote the PRA's purpose - i.e., to hold governmental agencies accountable and to prevent injustice. Under the theories advanced by amici curiae, there would be no finality in PRA requests. Instead, the discovery rule would apply in *every single* PRA case – effectively nullifying the statute of limitations created by the Legislature through its enactment of RCW 42.56.550(6). This Court has already concluded "leaving no

statute of limitations or imposing a different statute of limitations based on an agency's response" would lead to an "absurd result." Belenski v. Jefferson Cty., 186 Wn.2d 452, 460-61, 378 P.3d 176 (2016). Amici curiae have failed to identify any provision under RAP 13.4(b)(4) that would support review based on this argument.

V. CONCLUSION

The arguments presented by amici curiae wholly disregard both the evidence developed in the case below as well as our State's longstanding PRA jurisprudence including this Court's recent published decisions that are directly on point. For the reasons outlined above, this Court should decline review of this matter. The inapposite arguments of amici curiae regarding policy considerations should have no impact on this Court's analysis of this appeal.

//

/

This document contains 778 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 15th day of November, 2022.

WILLIAM C. FOSBRE, City Attorney

By: */s/ Michelle N. Yotter*
MICHELLE N. YOTTER,
WSBA #49075
Deputy City Attorney
Attorney for Respondent City of Tacoma

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on November 15, 2022, I filed with the Supreme Court and delivered through the Court's portal a copy of the foregoing CITY OF TACOMA'S COMBINED RESPONSE TO WASHINGTON COALITION FOR OPEN GOVERNMENT'S 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 AMICUS CURIAE and this Certificate of Service by email pursuant to agreement to the following:

Attorney for Appellant

James E. Lobsenz, WSBA # 8787
Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020
lobsenz@carneylaw.com

Attorneys for Washington Coalition for Open Government

Michele Earl-Hubbard, WSBA # 26454
Allied Law Group LLC
P.O. Box 33644
Seattle, WA 98133
(206) 443-0200
michele@alliedlawgroup.com

Judith Endejan, WSBA #11016
5109 23rd Ave W
Everett, WA 98203-1526
jendejan@gmail.com

Attorneys for Amici Curiae ACLU-WA

Bree R. Black Horse,
KILPATRICK TOWNSEND & STOCKTON
ACLU-WA Cooperating Counsel
1420 Fifth Avenue, Suite 3700 Seattle, Washington 98101
brblackhorse@kilpatricktownsend.com

Jaime Cuevas, Jr. Jaime Cuevas, Jr.,
ACLU-WA Cooperating Counsel
61 W Wapato, Rd. Wapato, WA 98951
Jr@ramseycompanies.com

Nancy Talner

La Rond Baker
ACLU OF WASHINGTON FOUNDATION

PO Box 2728
Seattle, WA 98111
(206) 624-2184
talner@aclu-wa.org baker@aclu-wa.org

Attorney for Amici Curiae General Public Practice & Indian Law Clinic at Gonzaga University School of Law

Bryan V. Pham,
GENERAL PUBLIC PRACTICE & INDIAN LAW CLINIC AT GONZAGA UNIVERSITY SCHOOL OF LAW

721 N. Cincinnati Street
PO Box 3528
Spokane, WA 9922
pham@gonaga.edu

Attorney for Center for Indian Law and Policy

Brooke Pinkham
CENTER FOR INDIAN LAW AND POLICY
901 12th Avenue
Seattle, WA 98122-1090
pinkham@seattleu.edu

Attorney for Amici Curiae Fred T .Korematsu Center for Law and Equality

Robert S. Chang
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY
Ronald A. Peterson Law Clinic
1112 East Columbia Street Seattle, WA 98112
changro@seattleu.edu

Dated this 15th day of November, 2022, at Tacoma, Washington

/s/Gisel Castro
Gisel Castro

November 15, 2022 - 3:57 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

The following documents have been uploaded:

- 1011431_Briefs_20221115155532SC287494_0304.pdf
  This File Contains:
  Briefs - Answer to Amicus Curiae
  The Original File Name was 2022.11.15 - Response to Amicus-GC Final.pdf

A copy of the uploaded files will be sent to:

- BRBLackhorse@kilpatricktownsend.com
- baker@aclu-wa.org
- changro@seattleu.edu
- info@alliedlawgroup.com
- jendejan@gmail.com
- jr@ramseycompanies.com
- laurwilson@kingcounty.gov
- lesliehunterboston@outlook.com
- lobsenz@carneylaw.com
- michele@alliedlawgroup.com
- pham@gonzaga.edu
- pinkhamb@seattleu.edu
- rhorst@kilpatricktownsend.com
- rrsmith@kilpatricktownsend.com
- talner@aclu-wa.org
- yount@gonzaga.edu

Comments:

Sender Name: Michelle Yotter - Email: myotter@cityoftacoma.org
Address:
747 MARKET STREET, SUITE 1120
TACOMA, WA, 98402
Phone: 253-591-5467

Note: The Filing Id is 20221115155532SC287494