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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

PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals affirmed the dismissal of a Public Records Act ["PRA"] case because it was not filed within the one-year statute of limitations period. Despite being repeatedly informed that in *In re Fowler*, 197 Wn.2d 46, 479 P.3d 1164 (2021) this Court recently decided that application of equitable tolling is *not* limited to situations where the opposing party engaged in bad faith, deception, or the making of deliberately false assurances, the Court of Appeals did not even acknowledge the existence of *Fowler.* Instead, directly contrary to *Fowler* it held that equitable tolling *is* so limited.

Similarly, despite being repeatedly this Court's decision in *U.S. Oil Refining Co. v. Department of Ecology* 96 Wash.2d 85, 633 P.2d 1329 (1981), the Court of Appeals also did not even acknowledge the existence of that directly relevant case. *U.S. Oil* holds that when a government agency has a legal obligation to "self-report" a fact, if it fails to report or disclose that fact, then the discovery rule applies and the statute of

limitations does not begin to run until the plaintiff learns the undisclosed fact. Plaintiff Earl argued that *U.S. Oil* controls this case, and that the discovery rule applies to all PRA suits. Although *U.S. Oil* was cited to the Court of Appeals and was discussed at length during oral argument, the Court of Appeals simply ignored it and rendered a decision which flatly contradicts its holding.

II. STATEMENT OF THE CASE

In the course of trying to arrest Kenneth Wright, who was seated in the passenger seat, a Tacoma police officer shot and killed the driver, Jackie Salyers. Salyers' mother, Lisa Earl, wanted to know why. Unbeknownst to Earl, within 90 minutes of the shooting, the Tacoma PD SWAT team was called out and dozens of police officers responded to the scene. These SWAT officers searched for Wright, detained five potential witnesses to the shooting, and turned them over to detectives for questioning. App. B-3. Detective Jack Nasworthy, the commander of the SWAT team's mobile "Command Post," went to retrieve video

from a police surveillance camera that had been erected and pointed at the exact spot where the shooting took place. Nasworthy maintained that the camera mysteriously failed to function that night and that there was no recorded video of the incident. App. A-4.

Lisa Earl wanted to know why a Tacoma officer fired eight shots at her daughter and killed her with a shot to the head. App. E, ¶3. She made a PRA request for "[a]ll documents related to the shooting death of" her daughter. App. A-4. Tacoma produced a number of records and told Earl that it had determined that "there are no other records responsive to your request." App. A-5. Having no reason to doubt that representation, and no way of checking to see if that was true, Lisa Earl believed that representation was true. App. A-6. She believed that she had received all the documents she requested. App. E, ¶9.

But Tacoma never produced the master record of the activities of the SWAT team, a record entitled the Command Post

Log. App. A-6. That document bore the same Tacoma Police Department case number as every document that was disclosed to her in response to her PRA request. App. A-6; App. F-10. Moreover, on every page of that document the "SITUATION" for the SWAT team callout was labeled "Officer-Involved-Shooting." App. B-2, B-3, and B-4.

Lisa Earl did not know any of the following facts: (1) that there was such a thing as a mobile Command Post for the Tacoma PD SWAT team; (2) that on the night that her daughter was shot and killed, the Tacoma Police Department sent the mobile "Command Post" to the neighborhood of the shooting; (3) that a person named Jack Nasworthy was employed by the Tacoma PD and was the officer in charge of the "Command Post" that night; (4) that Nasworthy was responsible for creating a log of the SWAT team's activities and of coordinating the actions of all the officers on the scene; (5) that Nasworthy did create such a Command Post Log; and (6) that the log recorded the fact that several potential witnesses who lived in the house located right

behind the spot where Salyers was shot, were ordered to come out of their house and were “taken into custody” by members of the SWAT team and transported to a police station for questioning. App. E, ¶¶ 10-14.

Believing that the shooting of her daughter was unjustified, Earl filed suit in federal court against the officer and the City. More than two years later, after the period of time for discovery had expired, and after Earl learned that Nasworthy claimed to have discovered that the police surveillance camera failed to record anything, Earl filed a motion asking the district court judge to reopen discovery so that she could depose Nasworthy. In response to Earl’s motion, (which the district court granted), Tacoma filed an affidavit from Nasworthy in which he declared that he did not destroy or erase any video recorded on that camera. Attached to the affidavit was a copy of the SWAT team’s Command Post Log. App. B. According to Nasworthy, this log showed that he could not possibly have destroyed any video. App. D-2, D-4.

Once Earl discovered that the SWAT Command Post Log existed, she filed suit against Tacoma for violation of the PRA. Tacoma responded that the suit was untimely because it was not filed within the one-year statute of limitations. Earl maintained that because Tacoma told her they had given her all responsive documents, the statute of limitations was equitably tolled. She also maintained that because she did not know the PRA had been violated and could not possibly have known until the Nasworthy affidavit was filed, that the discovery rule applied and that the one-year statute of limitations did not begin to run until she discovered that the PRA had been violated. The Superior Court rejected Earl's arguments. Ignoring this Court's decisions in *Fowler* and *U.S. Oil,* the Court of Appeals affirmed.

III. IDENTITY OF PETITIONER AND DECISION BELOW

Petitioner Lisa Earl seeks review of the decision issued below on July 12, 2022, attached as Appendix A.

IV. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err by holding that equitable tolling of a statute of limitations is limited to those situations where the plaintiff can show that the defendant deliberately mislead the plaintiff, contrary to this Court's recent decision in *Fowler* where this court held that there is no such limitation on equitable tolling?

2. Did the Court of Appeals err by holding that the discovery rule does not apply to statutory actions seeking to collect penalties for violations of the PRA, contrary to this Court's decision in *U.S. Oil* where this court reversed the Court of Appeals for refusing to apply the discovery rule to a statutory action to collect penalties for violation of a pollution statute?

3. Did the Court of Appeals err by dismissing a complaint for violation of the PRA where, in response to a request for all records relating to the shooting death of the plaintiff's daughter, the police agency failed to produce the SWAT team's Command Post Log which bore the words

"Officer Involved Shooting" on every page and documented the police action of taking potential witnesses to the shooting into custody so that they could be questioned as to what they had seen or heard?

4. Did the Court of Appeals err by dismissing a complaint for violation of the PRA for police department failure to conduct an adequate search for requested records where the police conceded that they don't even know where they searched and cannot represent that they ever searched the files kept at the SWAT team's separate office?

V. REASONS WHY REVIEW SHOULD BE GRANTED

A. The decision below is in direct conflict with this Court's recent decision in *In re Fowler*. (RAP 13.4(b)(1).

1. The Court of Appeals held that equitable tolling applies only when there is a showing that there was a deliberate attempt to mislead.

Relying on *Price v. Gonzalez*, 4 Wn.App.2d 67, 419 P.3d 858 (2018), the Court below held that Washington courts apply equitable tolling only when the defendant's conduct constitutes

"bad faith, deception, or false assurances," and only where the plaintiff can make "a showing that the defendant 'made a deliberate attempt to mislead" the plaintiff. App. A-15, citing *Price,* at 76. According to the Court of Appeals, although the City had given Earl an express assurance that it had given her a copy of every document that was responsive to her PRA request, and although this response may well have been false, since Earl had failed to show that this assurance was "deliberately" false, she could not satisfy the requirements for equitable tolling:

> [A]s explained above, Washington courts have applied the false assurances prong in narrow circumstances and have appeared to require a showing of the defendant's deliberate attempt to mislead the plaintiff. *Price*, 4 Wn. App.2d at 76. Therefore, the response *may* have turned out to be objectively false, but given that there is no evidence the City knew it was false and deliberately mislead Earl when it made the statement, the closing letter was not on its own a "false assurance" for the purposes of equitable tolling.

App. A-16 (italics in original).

2. **In *Fowler* and other cases, this Court has made clear that there is no such limitation on the applicability of equitable tolling.**

In her opening brief of appellant, Earl pointed out that "[i]n *Millay v. Cam,* 135 Wn.2d 193, 206, 955 P.2d 791 (1998)," the Supreme Court held that equitable tolling applies "upon a finding of fraud, oppression, *or other equitable circumstances.*" (Italics added). She also noted that although *Millay* mentioned "bad faith, deception or false assurances" as circumstances to which equitable tolling applies, this Court held equitable tolling applied even though none of those specified predicates were present.[1] Earl further noted that Division Two of the Court of Appeals had itself applied equitable tolling in a case where there had not been any bad faith, deception or false assurances. In *State v. Littlefair*, 112 Wn. App. 749, 762, 51 P.3d 116 (2002),

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[1] In *Millay* the defendant "created confusion regarding the amount due" on a mortgage. *Id*. at 205. Despite the fact that there was no showing that the defendant *deliberately* created such confusion or that the defendant *intended* to mislead the plaintiff, this Court held that equitable tolling applied.

the court which accepted the defendant's guilty plea simply *failed* to tell him that he was pleading guilty to an offense for which deportation was a possible consequence. No one suggested that the plea judge, or anyone else, had acted with any *deliberate* intent to mislead the defendant. Nevertheless, equitable tolling applied because "due to a series of mistakes by his attorney, the court, and arguably the INS," the defendant did not know he would likely be deported if he plead guilty.

The *Millay* opinion states, "this court allows equitable tolling when justice requires." 135 Wn.2d at 206. The Court of Appeals ignored this statement, as well as the statement that equitable tolling applies "upon a finding of fraud, oppression, or other equitable circumstances." The Court below ignored these statements in *Millay* and the holding of that case that equitable tolling did apply despite the absence of any showing of a deliberate intent to mislead the plaintiff.

In her opening brief, Earl explicitly advised the Court of Appeals that the case of *In re Fowler*, 9 Wn. App.2d 158, 442

P.3d 647 (2019), *rev. granted*, 195 Wn.2d 1007 (2020) was pending before this Court.[2] Earl told the Court of Appeals that the issue in *Fowler* was whether equitable tolling applied in situations where the plaintiff received a false assurance which was made *without* any intent to mislead anyone.

Later, in her Reply Brief, Earl told the Court of Appeals that *Fowler* had been decided and that this Court had *rejected* the contention that the predicates for application of equitable tolling were limited to the three previously mentioned (bad faith, deception or false assurances).

In *Fowler* the Petitioner's former attorney assured him that he was preparing and would file a timely personal restraint petition. But that was not true, and the attorney never filed a PRP. There was no suggestion, however, that Fowler's attorney was acting in bad faith, or that he was *intentionally* deceiving Fowler. The attorney simply made a promise that he did not keep.

[2] *Br. of Appellant*, at 23, n. 12.

Subsequently, Fowler got a new attorney who filed a PRP and argued that even though it was not filed within the one-year statute of limitations, the assurances that Fowler had been given by his former attorney triggered equitable tolling. This Court agreed with Fowler and rejected the very same argument that the Court of Appeals accepted in this case. This Court said:

> ***We see no reason for such a limitation***. Such a limitation would undermine the purpose of equitable tolling – to ensure the fundamental fairness when extraordinary circumstances have stood in a petitioner's way. ***Accordingly, the Court of Appeals erred when it stated that "Washington courts require bad faith, deception, or false assurances caused by the opposing party or the court" in order to justify equitable tolling.***

Fowler, 197 Wn.2d at 55. (emphasis added). This Court held that Fowler reasonably relied on his attorney's assurance that he was preparing a timely PRP for him and that was enough to allow equitable tolling. Here, Earl reasonably relied on Tacoma's assurance that it had given her all documents responsive to her PRA request regarding the death of her daughter. There is no material difference. The Court of Appeals' decision that

equitable tolling does not apply because Earl cannot show that Tacoma *knew* that it was lying and intended to mislead her simply flies in the face of *Fowler* (and *Millay* and *Littlefair).*

The Court below never even mentioned *Fowler*. Ordinarily, one might assume this was simply an oversight. But that is not possible in this case. *Fowler* was drawn to the Court of Appeals' attention in both of Earl's briefs, and was explicitly mentioned by counsel during oral argument. App. F-11. The Court of Appeals simply refused to apply *Fowler* and premised its decision on a proposition that cannot be squared with *Fowler*..

B. The decision below is in conflict with *Thompson v. Wilson*. RAP 13.4(b)(2). Even assuming that Tacoma's false assurance must have been *deliberately* false in order for equitable tolling to apply, there is circumstantial evidence of that in this case.

Even assuming, *arguendo*, that it was incumbent upon Earl to show that Tacoma's assurance that it had given her everything responsive to her PRA request was deliberately false, there was evidence from which a trier of fact could easily find deliberate falseness and/or bad faith. Earl pointed to *Thompson*

v. Wilson, 142 Wn. App. 803, 175 P.3d 1149 (2008), another case where a mother was trying to get information about her adult daughter's death. In *Thompson* the mother believed that her daughter had been murdered by her husband, but the county coroner had ruled that her death was a suicide. The mother attempted to exercise her statutory right to meet with the coroner. The coroner repeatedly promised to meet with her, but he never did. By the time the mother filed suit to enforce her statutory right the ordinary statute of limitations period had expired. The appellate court, however, ruled that because the coroner "misled her" and he did "not dispute [the mother's] assertions of deception and misleading assurance," *id*. at 814, a rational fact finder could conclude that the coroner acted with deliberate deception. Therefore, the *Thompson* Court ruled that equitable tolling applied because there was either deception or false assurances. In this case the mother, Lisa Earl, tried to get all records relating to her daughter's death, which she believed was an unjustifiable murder committed by a police officer. She was

assured that she had been giving every document "responsive" to her request. The Court of Appeals purported to distinguish *Thompson* on the ground that Earl "present[ed] no evidence which ... would lead a reasonable trier of fact to conclude that the City deliberately made false, misleading assurances to her, thereby causing the limitations period to lapse." App. A-18.

For over a decade it has been established that an agency has the burden of proving beyond a material doubt that it conducted a reasonable search. *Neighborhood Alliance v. Spokane*, 172 Wn.2d 702, 720-21, 261 P.3d 119 (2011); *West v. City of Tacoma*, 12 Wn. App.2d 45, 80, 456 P.3d 894 (2020). Here, the agency represented to Earl that it had acted in good faith and that it had conducted a reasonable search. The record, however, shows that nothing could be further from the truth.

Earl presented undisputed evidence that shows that the Tacoma deliberately allows the SWAT commander to decide where to keep SWAT team police records. Thus, Tacoma *does* act in "bad faith." App. F-6. Tacoma allows the commander to

decide *not* to integrate SWAT records into the regular computerized electronic records database, and to put them instead into a file drawer in a separate building where the SWAT team has its office. Thus, Tacoma enables the commander to keep SWAT records where they are not likely to be found. CP 388-89; App. F-10 ("You can't leave it up to police departments to be able to sort of offshore" a SWAT record "where it can't be found.").

Moreover, in its interrogatory answers the City conceded that it does not know who actually searched for the requested records *or where they searched.* The City lamely asserts that whoever conducted the search "would have searched both electronic and paper records within their control where responsive records would have reasonably been thought to be located." CP 514. This assertion does not even come close to satisfying its burden of proof under *Neighborhood Alliance*. Here the City never claimed that it had searched the SWAT office files. Nasworthy acknowledged that no one ever asked him

to search for SWAT team records and he never did such a search. But when the Earl sued the City for civil rights violations the City had no trouble locating the SWAT Command Post Log and using it to support its defense.

These facts clearly do permit a rational fact-finder to conclude that the City *deliberately* gave a false assurance to Lisa Earl. Thus, even if the *Fowler* case had never been decided; and even if some evidence of deliberate deception was required, Lisa Earl *did* present such evidence. Thus, her case should never have been dismissed on summary judgment.

C. The decision below is in direct conflict with this Court's decision in *U.S. Oil.* RAP 13.4(b)(1). Application of the discovery rule is "dictated ... where the plaintiff lacks the means or ability to ascertain that a wrong has been committed." 96 Wn.2d at 93.

This Court has long recognized that "in some circumstances where the plaintiff is unaware of the harm [she has] sustained, a literal application of the statute of limitations could result in grave injustice. To avoid this injustice, courts have applied a discovery rule of accrual, under which the cause

of action accrues when the plaintiff discovers, or in the reasonable exercise of diligence should discover, the elements of the cause of action." *Virginia Limited Partnership v. Vertecs*, 158 Wn.2d 566, 575-76, 146 P.3d 423 (2006). For example in *Ruth v. Dight*, 75 Wn.2d 660, 665, 453 P.2d 631 (1969), 22 years after surgery a patient discovered her surgeon had left a sponge in her body. Although the statute of limitations was two years, this Court held that it would be inequitable to cut off the patient's legal remedies after two years because she had no way of knowing of the doctor's malpractice.

Because it is not possible for a patient to see inside her body, a patient cannot be faulted for failing to discover that she has suffered such an actionable wrong until after the limitations period has expired. Similarly, a records requester cannot go and search an agency's files and computers for records. She cannot be faulted for failing to know that the agency has failed to disclose a properly requested record, or failed to conduct a reasonably adequate search for requested records. In this case,

as in *Ruth*, the relevant information was located in a place that was impossible for the plaintiff to search. In both cases, the discovery rule should – and does – apply.

However, relying on the prior Division Two decision in *Dotson v. Pierce County*, 13 Wn. App.2d 455, 464 P.3d 563 (2020), the Court below held that the discovery rule does not apply to PRA cases. In oral argument, Earl asserted that the Court should not follow *Dotson* because it was wrongly decided. App. F-8. Judge Maxa acknowledged that the panel was not bound by *Dotson*, but commented, "you know, we like our colleagues. We try not to overrule them or disregard them without reason." App. F-8. Earl responded that *Dotson* should not be followed because it conflicted with *U.S. Oil.* There this Court held that "unfairness of precluding justified causes of action ... *dictated* the application of the [discovery] rule where the plaintiff lacks the means or ability to ascertain that a wrong has been committed." 96 Wn.2d at 93 (italics added).

In *U.S. Oil,* the plaintiff had no way of knowing that the

defendant had discharged pollutants into a river. The defendant was under a legal obligation to "self-report" such discharges, but it failed to do so. After the passage of two years, the plaintiff learned of the discharge and sued the company to recover statutory penalties. If the statute of limitations was deemed triggered by the discharge, then the suit was time-barred because the plaintiff did not learn of the discharge until well after the statute of limitations had expired. This Court recognized the inequity of requiring the plaintiff to bring suit before it knew of the unlawful discharges and noted that such a rule would allow the company to benefit from its unlawful failure to report the discharge. This Court also recognized the absurdity of assuming that the legislature wanted to bar plaintiffs from bringing suits in circumstances "where the plaintiff lacks the means or ability to ascertain that a wrong has been committed." 96 Wn.2d at 93. Accordingly, this Court held that application of the discovery rule was "dictated" and thus the plaintiff's suit was not time-barred. Earl cited this passage from *U.S. Oil* to the Court of

Appeals:

> In each [case where it was applied], had the discovery rule not been applied, the plaintiff would have been denied a meaningful opportunity to bring a warranted cause of action. In each, the premise underlying all limitations statutes was not applicable. Statutes of limitation operate upon the premise that "when an adult person has a justiciable grievance, he usually knows it and the law affords him ample opportunity to assert it in the courts."
>
> ***That premise is also inapplicable where the plaintiff must rely on the defendant's self-reporting.*** 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 limitations nor justice is served when the statute runs while the information concerning the injury is in the defendant's hands.***

U.S. Oil, at 93-94 (emphasis added).

Tacoma argued that *U.S. Oil* was not a "tort case" and that the discovery rule only applies to tort cases "where an individual

has been harmed." App. F-19. Since "[a] PRA claim is not a tort claim" and since "the purpose" of a PRA action was merely to impose "a penalty against an agency for not complying with a statute," Tacoma argued that Earl's case was distinguishable from *U.S. Oil.* App. F-20. But Earl pointed out that *U.S. Oil* also was "not a tort case," also was not a case for damages, and was instead "[a] statutory cause of action for penalties," and thus was "exactly the same" kind of case as Earl's PRA case. App. F-24. In fact, *U.S. Oil* explicitly holds, "[w]e ... adopt the discovery rule for actions brought by DOE to collect penalties for unlawful waste discharges." *Id.* at 94. Earl argued that the panel was obligated to disavow *Dotson* and to follow this Court's binding decision in *U.S. Oil. See* App. F-5, *ll.* 4-13; App. F-7.

Instead, without even mentioning *U.S. Oil*, the Court below held, "Following *Dotson*, we hold that the discovery rule does not apply to PRA actions because the legislature has clearly specified the event that starts the running of the limitations period" (the date of the agency's final response to a PRA

request). App. A-11. But this reasoning simply ignores the decision in *U.S. Oil*. There is no reason to think that the Legislature wanted to enable government agencies to avoid compliance with the PRA and to escape penalties for PRA violations by successfully concealing records for more than one year.

D. This Court should grant review to decide an issue of substantial public interest: Whether the discovery rule applies to PRA cases because records requesters must rely on government agencies to accurately "self-report" what records they have and what places they have searched for them. (RAP 13.4(b)(4).

In *U.S. Oil*, the trial court held the discovery rule applied. The Court of Appeals then held that it did not. Finally, this Court reversed the Court of Appeals and agreed with the trial court. The following passage from *U.S. Oil* discusses the necessity of applying the discovery rule to make sure the pollution laws are obeyed. The same principle applies to compliance with the PRA:

> The Court of Appeals noted that the legislature specifically enacted a discovery rule in RCW 4.16.080(6). Thus, the court reasoned that had the legislature desired such a rule for the governing

> statute in this case, it would have enacted one.
>
> ***The waste regulatory scheme, however, mandates the application of a discovery rule.*** See RCW 90.48. DOE must rely on industry reporting to discovery violations. Since U.S. Oil did not properly report its discharges, discovery of the violations was delayed until DOE suspected that monitoring reports were inaccurate and investigated. ***Without a discovery rule, industries can discharge pollutants, and by failing to report the violation, can escape penalties***.

U.S. Oil, at 92 (emphasis added). Similarly, records requesters "must rely" on government agencies both to honestly report what records they have, and to conduct an adequate search for records responsive to a PRA request. "Without a discovery rule," Washington agencies, like police departments, "can escape [PRA] penalties" either by withholding responsive records, or by conducting a woefully incomplete and unreasonably cursory search for them. Here, as in *U.S. Oil*, the Court of Appeals erred in refusing to apply the discovery rule.

E. The decision below eviscerates the Public Records Act.

The result of the Court of Appeals' decision is that even if police agencies fail to disclose documents pertaining to police

officer killings of Washington citizens, so long as the records requester does not find out that such undisclosed documents exist, the agencies they will escape all liability for violating the PRA. As Judge Maxa recognized, if the discovery rule does not apply to the PRA, then police agencies do literally "get away with murder" so long as they succeed in deceiving records requesters for a period of more than one year. App. F-17-19.

Police agencies can decide to store sensitive records, like SWAT team records, separate and apart from all other records. Or they can simply fail to search in the places where such records are kept. Records requesters have no way of checking to see where the police looked for records, and no way of determining whether the search conducted was a reasonable search or a cursory and patently inadequate search. If the Court of Appeals' decision stands, then so long as the existence of a responsive record does not come to light within one year, even the most abysmally inadequate and negligently conducted records search will escape PRA judicial review and PRA liability. The Court of

Appeals holds that none of this matters. It's just "too bad." *See* App. F-22:7-10.

Tacoma has frequently been sued for the actions of its SWAT team which has killed and injured several people. *See, e.g.*, *Seaman v. Karr,* 114 Wn. App. 665, 59 P.3d 701 (2002); *Mancini v. Tacoma*, 188 Wn. App. 1006 (2015); *Estate of Cunningham v. Tacoma,* 2018 WL 1182239. If the police can avoid records disclosure for one day longer than one year from the date of a final response letter that falsely states that all responsive records have been produced, then they can avoid liability for the most egregious police misconduct.

VI. CONCLUSION

Failure to grant review in this case will allow police departments to violate the PRA at will. If police can get away with noncompliance with the PRA, they can also greatly improve their chances of – literally – getting away with murder. And if panels of the Court of Appeals can get away with simply ignoring the decisions of this Court which are called to their attention, then

the citizens will lose confidence in the courts as well.

> This document contains 4,965 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 5th day of August, 2022.

CARNEY BADLEY SPELLMAN, P.S.

By *s/James E. Lobsenz*
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

July 12, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LISA EARL, Appellant, v. CITY OF TACOMA, a political subdivision of Washington State, Respondent.	No. 56160-3-II UNPUBLISHED OPINION

VELJACIC, J. — A Tacoma police officer shot and killed Lisa Earl's daughter, Jacqueline Salyers, in January 2016. Earl made a request under the Public Records Act (PRA), chapter 42.56 RCW, to the City of Tacoma for records related to her daughter's death. The City disclosed records to Earl on an installment basis and, after providing Earl with the requested documents, issued a letter closing the request.

In the course of separate litigation, the City produced a record that was not disclosed in response to Earl's PRA request. Almost three years after the City's closing letter, Earl filed this action contending that the City violated the PRA by failing to conduct an adequate search and by failing to disclose responsive records. She also asked the court to enjoin the Tacoma Police Department (TPD) from keeping certain records separate and apart from other police records. Earl and the City filed cross-motions for summary judgment. The trial court ruled that Earl's action was untimely and granted the City's motion for summary judgment. Because the trial court

dismissed Earl's PRA claims on statute of limitations grounds, it did not address her motion for partial summary judgment.

Earl appeals the trial court's order granting the City's motion for summary judgment dismissal of her claims. Earl argues that the trial court erred by dismissing her PRA claims because the discovery rule and equitable tolling applied to make her complaint timely. She also asks us to order the trial court to grant her motion for partial summary judgment and hold that the City violated the PRA. She also requests attorney fees and costs on appeal.

Because the discovery rule does not apply to PRA cases, and because Earl fails to meet her burden of proof for equitable tolling, we affirm the trial court's order dismissing Earl's PRA claims as time barred under RCW 42.56.550(6). We also deny Earl's request for attorney fees and costs on appeal because she is not the prevailing party.

FACTS

I. BACKGROUND

On January 28, 2016, Tacoma police officers Scott Campbell and Aaron Joseph drove to the 3300 block of Sawyer Street in Tacoma because they received a tip concerning the location of Kenneth Wright. The informant also provided information on a vehicle that Wright was recently seen driving. The TPD was on a mission to locate Wright because he had a warrant out for his arrest for armed robbery, among other crimes.

The officers arrived at the Sawyer Street location at approximately 11:45 p.m. Once there, Campbell spotted a vehicle backed into a parking spot that matched the informant's tip. Campbell recognized Wright sitting inside the passenger side of the vehicle. Salyers was in the driver's seat.

Joseph stopped the patrol vehicle in front of the suspect vehicle. Both officers exited the patrol vehicle, drew their firearms, and moved towards the suspect vehicle. At some point, Salyers began to drive forward. Campbell stated that he was about 5-10 feet at a 45 degree angle from the front passenger side of the vehicle when it began to accelerate. Campbell then fired eight shots, killing Salyers.

After Campbell stopped shooting, the vehicle rolled to a stop. Wright exited the vehicle with a rifle and ran down an alley. The officers did not chase Wright because they were unsure if he took up a defensive position in the dark alley or if he continued fleeing the scene.

Shortly after midnight, the TPD called out its Special Weapons and Tactics (SWAT) team to search for Wright. Jack Nasworthy was one of the responding SWAT officers. Nasworthy's role that night was to serve on the Command Post Element, which provides intelligence to the other SWAT elements through radio and coordinates tactical operations.

Nasworthy learned that there was a pole camera installed at the 3300 block of Sawyer Street. He believed that the camera captured footage which could narrow down Wright's possible location. The Sawyer Street camera was installed on January 22 and appeared to be focused on the area where the shooting occurred. The camera is a motion activated device meaning that it will only record footage if some movement activates the recording function.

Nasworthy attempted to log into the View Commander system[1] to access the Sawyer Street pole camera. He was unable to log in with his Criminal Investigations Division (CID) password because the camera was a Special Investigations Division (SID) asset. He called Scott Shafner, who was also a responding SWAT officer that night, and obtained his login information. Because

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[1] "View Commander" is the name of the software program that houses all camera footage, live or recorded, and controls access to any camera that was set up under its program.

Shafner was an administrator on the View Commander system, Nasworthy was able to gain access to the Sawyer Street camera. Only administrators have editing privileges for the View Commander system.

Once he had accessed View Commander, Nasworthy stated that he checked the live feed for the Sawyer Street camera. He stated that he was unable to see anything because of the darkness. Nasworthy then checked for a recording of the shooting, but stated that he could not find any recorded information.

Wright ended up escaping that night. He was arrested approximately two weeks later without incident.

II. EARL'S 2016 PRA REQUEST

The following morning, on January 29, Earl learned that a Tacoma police officer had shot and killed her daughter, Salyers. Earl wanted to know why the officer killed her daughter.

On June 30, Earl, through counsel, submitted a comprehensive, 16 item public records request to the City. Relevant here, Earl requested a copy of the following records:

> 1. All documents related to the shooting death of Jacqueline Salyers on January 27-28, 2016, including but not limited to the complete investigative report, and any and all follow-up reports, investigation materials, witness statements and officer's notes, photographs, DXF/CAD files, measurements, physical evidence, video/audio, dash cams, and the involved vehicle including any data downloads from that vehicle;
>
> 2. All documents (including photographs and video) related to the surveillance camera and the location of that surveillance camera identified as the Axis 214 camera installed in the covert box that was deployed at 3314 S. Sawyer.

Clerk's Papers (CP) at 255.

The City produced responsive records in two installments. The first installment was disclosed on October 7 and the second installment was disclosed on November 8. The records produced included reports written by Tacoma police officers and other reports that referred to the SWAT team's activities on the night Salyers was killed.

On November 23, the City closed Earl's request. The closing letter stated, "After searching further, it was determined there are no other records responsive to your request. As such, your request . . . is now considered closed. If you believe there are other records responsive, or this does not meet the scope of your request, please contact me at your earliest convenience." CP at 556. Earl did not respond to this letter.

III. THE COMMAND POST LOG

On April 28, 2017, Earl, Salyers' minor children, and the Estate of Jacqueline Salyers (hereinafter collectively referenced as "Earl") filed a complaint in the Western District of Washington against Campbell and the City based on the shooting death of Salyers. Specifically, Earl asserted claims of excessive force, a violation of substantive due process rights, and wrongful death.

In that case, Earl filed a motion to reopen discovery because she claimed that Nasworthy deleted a video recording of the shooting. On September 25, 2018, the City filed an affidavit from Nasworthy in response to Earl's motion. Nasworthy declared that he did not delete any video footage from the pole camera on Sawyer Street. As a member of the Command Post Element, Nasworthy stated that his responsibility on the night of the shooting was to prepare the "Command Post Log," which was attached to his affidavit. CP at 224.

The Command Post Log is a three-page document that compiles information pertaining to the SWAT team's movements. Relevant here, the first few lines of this document read,

CASE # – 1602801965
DATE – 1/29/2016
LOCATION – 3300 Sawyer/3326 Sawyer susp address
SUBJECT – Kenneth Wright
SITUATION – Officer Involved Shooting

CP at 227. Sergeant Peter Habib, a responding SWAT officer on the night of the shooting, stated that the phrase "officer-involved shooting" means that "some officer discharged their firearm." CP at 659. The TPD case number that appears on the Command Post Log (No. 1602801965) is the same case number that appears on the police reports furnished to Earl in response to her 2016 PRA request. This was the only information in that three-page document that related to the shooting of Salyers.

However, the Command Post Log was not disclosed to Earl in her 2016 PRA request. Earl declared that "[she] believed the City when it said there were no other records responsive to my request." CP at 626. Earl also stated that "[t]he first time [she] ever knew that such a document existed was sometime after September 25, 2018." CP at 626. Earl further stated that "[i]f I had known that there was a SWAT Team Command Post Log that documented the activities of the SWAT Team on January 29, 2016, I would have objected to Tacoma's failure to give me a copy of it pursuant to my [PRA] request." CP at 626. Thus, the City's failure to disclose the Command Post Log in response to Earl's 2016 PRA request is at issue in this case.

IV. Procedural History

On August 29, 2019, Earl filed a complaint in Pierce County Superior Court alleging that the City violated the PRA. Earl filed a motion for partial summary judgment arguing that the City violated the PRA (1) by failing to disclose the Command Post Log and (2) by failing to perform an adequate search for responsive records. She also asked the court to enjoin the City from keeping SWAT team records separate and apart from other TPD records.

The City also filed a motion for summary judgment, arguing that Earl's complaint was barred by the PRA's one year statute of limitations. In response, Earl argued that the statute of limitations should be equitably tolled because the City falsely assured her that it possessed no other responsive records in its closing letter. Earl also contended that the discovery rule postponed the date that her PRA cause of action began to accrue to September 25, 2018, thus making her complaint timely.

The trial court agreed with the City and ruled that Earl's action was barred by the PRA's one year statute of limitations. It did not address the merits of Earl's motion for partial summary judgment. The court then issued an order granting the City's motion for summary judgment, denying Earl's motion for partial summary judgment, and dismissed Earl's PRA claims and request for injunctive relief.

Earl appeals the order granting the City's motion for summary judgment dismissal of her claims. She also argues that we should hold that the City violated the PRA, effectively asking us to make an initial ruling on her motion for partial summary judgment.

ANALYSIS[2]

Earl and the amici argue that the trial court erred by granting the City's motion for summary judgment because her action was timely filed. We disagree and hold that Earl's action was time barred.

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[2] Amicus ACLU appears to advance policy arguments, based on studies demonstrating the historical and enduring systemic violence perpetrated against Native people by government officials, to support its contention that the discovery rule and equitable tolling should apply to PRA cases. While we recognize and are sensitive to this important social justice issue, such "[p]ublic policy arguments 'are more properly addressed to the Legislature, not to the courts.'" *McCaulley v. Dep't of Labor & Indus*., 5 Wn. App. 2d 304, 316, 424 P.3d 221 (2018) (quoting *Blomster v. Nordstrom, Inc*., 103 Wn. App. 252, 258, 11 P.3d 883 (2000)).

I. STANDARD OF REVIEW

"The PRA is a 'strongly worded mandate for broad disclosure of public records.'" *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 431, 327 P.3d 600 (2013) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). It requires governmental agencies to "'make available for public inspection and copying all public records, unless the record falls within the specific exemptions of [the PRA].'" *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 535, 199 P.3d 393 (2009) (quoting RCW 42.56.070(1)).

"The PRA's primary purpose 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). The PRA mandates that its provisions "shall be liberally construed" to promote full access to public records. RCW 42.56.030; *John Doe A*, 185 Wn.2d at 371. We review challenges to agency actions under the PRA de novo. RCW 42.56.550(3).

"Grants of summary judgment are reviewed de novo, and we engage in the same inquiry as the trial court." *Neigh. All. of Spokane County v. Spokane County*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011). Summary judgment is appropriate "if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). "We review all evidence and reasonable inferences in the light most favorable to the nonmoving party and consider only the evidence that was brought to the trial court's attention." *O'Dea v. City of Tacoma*, 19 Wn. App. 2d 67, 79, 493 P.3d 1245 (2021).

II. STATUTE OF LIMITATIONS

Whether a claim is time barred is a legal question we review de novo. *Kelly v. Allainz Life Ins. Co. of N. Am.*, 178 Wn. App. 395, 399, 314 P.3d 755 (2013).

The PRA establishes a one year statute of limitations for judicial review of agency actions. RCW 42.56.550(6) provides that "[a]ctions under [the PRA] must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis." "Our Supreme Court has held that this section reveals the legislature's intent to impose a one year statute of limitations 'beginning on an agency's final, definitive response to a public records request.'" *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 470, 464 P.3d 563 (quoting *Belenski v. Jefferson County*, 186 Wn.2d 452, 460, 378 P.3d 176 (2016)), *review denied*, 196 Wn.2d 1018 (2020). This final response includes a letter sent to the requester notifying him or her that the request has been closed. *Dotson*, 13 Wn. App. 2d at 471.

Amicus ACLU argues that the trial court erred by concluding that the statute of limitations began to run on the date of the City's closing letter, rather than the date the City disclosed the Command Post Log in Earl's federal lawsuit. Specifically, the ALCU contends that the City's disclosure of that document "equates to the agency's last production of a record on a partial or installment basis," thus making Earl's complaint timely. Br. of Amicus Curiae (ACLU et al) at 16. However, we rejected a similar argument in *Dotson*, 13 Wn. App. 2d at 470-72. So too here, this argument fails.

Here, the City sent a letter closing Earl's request on November 23, 2016. This action comprised a final, definitive response to Earl's request, and started the PRA's one year statute of limitations. Earl did not file her PRA complaint until August 29, 2019. Therefore, unless Earl can

show that the discovery rule applies to PRA actions or that equitable tolling applies to her case, her complaint was untimely.

III. DISCOVERY RULE

Earl and the amici argue that the statute of limitations began to run on September 25, 2018, when Earl discovered that the City had not disclosed the Command Post Log, which they contend was a responsive record to her PRA request. We reject Earl's attempt to apply the discovery rule to her PRA action.

A. Legal principles

"Under the discovery rule, a cause of action accrues when the plaintiff knew or should have known the essential elements of the cause of action." *Allen v. State*, 118 Wn.2d 753, 757-58, 826 P.2d 200 (1992) (footnote omitted). "[T]he discovery rule will postpone the running of a statute of limitations only until the time when a plaintiff, through the exercise of due diligence, should have discovered the basis for the cause of action. A cause of action will accrue on that date even if *actual* discovery did not occur until later." *Id.* at 758.

"The discovery rule does not alter the statute of limitations. It is . . . a rule for determining when a cause of action accrues and [when] the statute of limitations commences to run." *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 587, 146 P.3d 423 (2006). "[T]he discovery rule is not available where the legislature has clearly delineated the event that starts the running of the limitations period, for there is then no 'accrual' to interpret." *In re Parentage of C.S.*, 134 Wn. App. 141, 147, 139 P.3d 366 (2006); *see Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991) ("Where the statute does not specify a time at which the cause of action accrues, the general rule of law is that an action accrues when the plaintiff discovers or reasonably should discover all the essential elements of a cause of action.").

Recently, we have rejected the application of the discovery rule in PRA actions reasoning in part that, "the PRA statute of limitations contains triggering events that enable a requester to know that a cause of action has accrued, and the legislature enacted no discovery rule exception." *Dotson*, 13 Wn. App. 2d at 472.

B. The Discovery Rule Does Not Apply to PRA Actions

Following *Dotson*, we hold that the discovery rule does not apply to PRA actions because the legislature has clearly specified the event that starts the running of the limitations period in RCW 42.56.550(6), which is the agency's final, definitive response to a public records request. *Belenski*, 186 Wn.2d at 460; *C.S.*, 134 Wn. App. at 147. Therefore, the trial court did not err by declining to apply the discovery rule to Earl's cause of action.

Earl advances several arguments contending that *Dotson* incorrectly held that the discovery rule does not apply to PRA actions and that it should be overruled. We disagree with each contention.

First, Earl contends that *Dotson* incorrectly interpreted the Supreme Court's decision in *Douchette* to stand for the proposition that the discovery rule only applied to negligence actions. But *Dotson* stated no such thing. Rather, *Dotson* held in part that the discovery rule did not apply to PRA actions because RCW 42.56.550(6) specifies the time at which a requestor's cause of action accrues, which is a correct statement of the law. 13 Wn. App. 2d at 472. Accordingly, this argument fails.

Second, Earl argues that *Dotson* confuses knowledge of the law (the accrual date for a PRA cause of action) and knowledge of the facts (the fact that the government failed to disclose responsive records). Because knowledge of the law is irrelevant to the application of the discovery

rule, Earl contends that *Dotson* impermissibly conflicts with *Douchette*, and therefore, should be overruled. We disagree.

Earl points to the following language in the *Dotson* opinion:

> The discovery rule generally applies in cases where "the statute does not specify a time at which the cause of action accrues." [*Douchette*, 117 Wn.2d at 813]. However, the PRA statute of limitations contains triggering events that enable a requester to know that a cause of action has accrued, and the legislature enacted no discovery rule exception. And Dotson cites no authority for applying the discovery rule to PRA actions that, as interpreted in *Belenski*, arise under a statute that specifies the statute of limitations begins to run at the time of the agency's "final, definitive response." 186 Wn.2d at 461 []. We hold that the statute of limitations began to run in June 2016.

13 Wn. App. 2d at 472 (footnote omitted).

The language in *Douchette* that Earl alleges is conflicting states, "[t]he discovery rule does not require knowledge of the existence of a legal cause of action itself, but merely knowledge of the facts necessary to establish the elements of the claim." 117 Wn.2d at 814. There, the Supreme Court explained this to convey the well-established principle that the limitations period will begin to run under the discovery rule when a plaintiff should have discovered the salient facts of their cause of action; not when the plaintiff has actual knowledge of a legal claim. *Id*. at 814-15. Earl's reliance on this proposition fails because, while true, it has no bearing on the applicability of the discovery rule to a *statute* that specifies an accrual date for a plaintiff's cause of action.

Contrary to Earl's assertion, both *Dotson* and *Douchette* harmoniously recognize that the discovery rule generally applies in cases where the applicable statute does not specify a time at which the cause of action accrues. 117 Wn.2d at 813; 13 Wn. App. 2d at 472. Again, this is a correct statement of the law. Because these decisions are consistent with each other, we decline to overrule *Dotson* on this ground.

Third, Earl contends that *Dotson* declined to apply the discovery rule only because the appellant in that case failed to cite legal authority to support her contention that the rule applied to PRA cases. We disagree.

Contrary to Earl's contention, *Dotson* did not rest its holding on RAP 10.3. The *Dotson* court declined to apply the discovery rule to PRA cases (1) because RCW 42.56.550(6) contained triggering events that enable a requester to know that a cause of action has accrued and (2) because the appellant cited no authority for applying the discovery rule to PRA cases. 13 Wn. App. 2d at 472. Because *Dotson* did not decline to apply the discovery rule to PRA cases solely based on the appellant's failure to cite legal authority, we reject Earl's argument.

Next, Earl relies on four cases to support her contention that the discovery rule applies to PRA cases. Specifically, Earl cites to *Reed v. City of Asotin*, 917 F. Supp. 2d 1156 (E.D. Wash. 2013); *Anthony v. Mason County*, 2014 WL 1413421 (W.D. Wash. 2014); *Mahmoud v. Snohomish County*, No. 70757-4-I (Wash. Ct. App. Oct. 27. 2014) (unpublished), https://www.courts.wa.gov/opinions/pdf/707574.pdf; and *Canha v. Dep't of Corr.*, No. 73965-4-I (Wash. Ct. App. Apr. 25, 2016) (unpublished), https://www.courts.wa.gov/opinions/pdf/739654.pdf. However, these cases are inapposite because none of them recognize that the discovery rule is inapplicable to a limitations statute where the legislature specifies an accrual event for a cause of action. *C.S.*, 134 Wn. App. at 147. Accordingly, Earl's reliance on these cases fails.

We recognize that our refusal to apply the discovery rule in the context of the PRA actions will preclude claims where, as here, the requestor did not know certain records existed until years after the agency's final closing letter. However, there has been a trend toward making violations and penalties less onerous on agencies. *See* Wash. State Bar Ass'n, PUBLIC RECORDS ACT

DESKBOOK: WASHINGTON'S PUBLIC DISCLOSURE AND OPEN PUBLIC MEETINGS LAWS § 18-4. For example, the legislature has amended the PRA to eliminate the $5.00 minimum per day penalty, allowing courts to conclude no penalty, or a small penalty of less than $5.00 per day is warranted, depending on the facts. LAWS OF 2011, ch. 273 § 1(4). And the legislature has made the specific policy decision to decrease the applicable limitations period for PRA claims. LAWS OF 1973, ch. 1 § 41 (original initiative establishing six year statute of limitations); LAWS OF 2005, ch. 483 § 5 (establishing current one year statute of limitations). We are not in a position to override the legislature's stated intent.[3]

Therefore, we follow *Dotson*'s holding that the discovery rule does not apply to PRA actions because the legislature has clearly specified the event that triggers the running of the limitations period: the agency's final, definitive response to a public records request. *Belenski*, 186 Wn.2d at 460; *C.S.*, 134 Wn. App. at 147. The statute of limitations for Earl's PRA claims began to run on November 23, 2016, which was date the City closed Earl's request. Earl filed her complaint on August 29, 2019. Accordingly, Earl's complaint is barred by the PRA's one year statute of limitations unless she can show that equitable tolling applies.

[3] If the legislature disagrees and instead believes that the discovery rule should apply, it is free to legislate accordingly.

IV. Equitable Tolling

Earl and the amici argue that the statute of limitations for her PRA claims should be equitably tolled.[4] We disagree.

A. Legal Principles

"Although we give deference to the trial court's factual determinations, we review a decision of whether to grant equitable relief de novo." *Trotzer v. Vig*, 149 Wn. App. 594, 607, 203 P.3d 1056 (2009).

"Equitable tolling permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed." *Price v. Gonzalez*, 4 Wn. App. 2d 67, 75, 419 P.3d 858 (2018). "The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff." *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). Washington courts have applied the false assurances prong in narrow circumstances and have appeared to require a showing that the defendant "made a deliberate attempt to mislead." *Price*, 4 Wn. App. 2d at 76. Furthermore, "[i]n Washington 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." *Millay*, 135 Wn.2d at 206.

"Courts typically permit equitable tolling to occur only sparingly, and should not extend it to a garden variety claim of excusable neglect." *Price*, 4 Wn. App. 2d at 76. "The party asserting

[4] The ACLU also argues that the doctrine of equitable estoppel applies to toll Earl's PRA claims. But equitable estoppel is not the appropriate test for tolling the statute of limitations. Rather, equitable estoppel works to prohibit a defendant from raising a statute of limitations defense when they made representations or promises to perform which lulled the plaintiff into delaying timely action. *Peterson v. Groves*, 111 Wn. App. 306, 310-11, 44 P.3d 894 (2002). Here, Earl does not dispute that the City can raise the defense; rather, she contends the limitations period was tolled. Thus, this argument fails.

that equitable tolling should apply bears the burden of proof." *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 379, 223 P.3d 1172 (2009).

B. Equitable Tolling Does Not Apply Here

Earl does not allege bad faith or deception. Instead, Earl and the amici argue that the first element of equitable tolling is met because the City made a false assurance that it possessed no other responsive records to her request in its closing letter. We disagree with the application of equitable tolling here because Earl fails to meet her burden of proof.

Here, the City closed Earl's PRA request on November 23, 2016, stating "[a]fter searching further, it was determined there are no other records responsive to your request. As such, your request . . . is now considered closed. If you believe there are other records responsive, or this does not meet the scope of your request, please contact me at your earliest convenience." CP at 556. But on September 25, 2018, the City disclosed the Command Post Log in the course of separate litigation.

Even assuming, without deciding, that the Command Post Log was responsive to her request, Earl presents no evidence to suggest that the City made deliberately false, misleading assurances which caused the one year limitations period to lapse. In her reply brief, Earl appears to argue that it is irrelevant as to whether the City's closing letter was "*deliberately* false." Reply Br. of Appellant at 13. But, as explained above, Washington courts have applied the false assurances prong in narrow circumstances and have appeared to require a showing of the defendant's deliberate attempt to mislead the plaintiff. *Price*, 4 Wn. App. 2d at 76. Therefore, the response *may* have turned out to be objectively false, but given that there is no evidence the City knew it was false and deliberately mislead Earl when it made the statement, the closing letter was not on its own a "false assurance" for the purposes of equitable tolling.

Such a showing was made by the requestor in *Belenski*. In that case, Belenski sent the County a PRA request asking to inspect the Internet Access Logs (IALs) from February 1, 2010 to September 27, 2010. *Belenski*, 186 Wn.2d at 455. On October 5, 2010, Belenski received a response stating that "the County has no responsive records." *Id*. Belenski explained that he was confused by the County's response because he had requested and received IAL data from the County in the past. *Id*. Eventually, Belenski discovered (through a separate public records response) e-mails between county employees sent shortly after his request admitting that the IALs existed during the relevant time period of Belenski's PRA request, but suggesting the County need not provide them because they are not "natively viewable" and would need to be "pulled out of a database and generated in a human readable format." *Id*. at 455-56. Belenski then filed a PRA complaint on November 19, 2012, which was well past the one year statute of limitations. *Id*. at 456. Because there were remaining factual issues concerning Belenski's diligence in pursuing his PRA claims, the Supreme Court remanded to the trial court to determine whether the doctrine of equitable tolling applied to toll the statute of limitations in that case. *Id*. at 461-62.

Requiring a PRA requestor to present evidence of an agency's deliberately false, misleading assurances will guarantee that the equitable tolling doctrine would be used "sparingly." *Price*, 4 Wn. App. 2d at 76. To hold otherwise would mean the statute of limitations would be tolled in every case where a requestor later obtains copies of records the agency claimed it did not

possess. That would not be sparing use of the doctrine. Therefore, the fact that Earl later received an alleged responsive record is not, by itself, sufficient to toll the one year statute of limitations.[5]

Earl contends that her case is akin to *Thompson v. Wilson*, 142 Wn. App. 803, 175 P.3d 1149 (2008), to support her argument that equitable tolling should apply here. We disagree.

In *Thompson*, the plaintiff repeatedly tried to meet with the defendant (the county coroner) to discuss the cause of her daughter's death, but when he finally agreed to meet with her, he misled her and only then did she seek judicial review. *Id*. at 814. The plaintiff asserted that defendant's actions caused the limitation period to lapse and the defendant "[did] not dispute these assertions of deception and misleading assurances." *Id*. Accordingly, we held that the limitations period was equitably tolled and commenced upon the defendant's good faith compliance with the statute at issue, which required the coroner to meet with the deceased's family upon request. *Id*. at 814-15.

Here, unlike *Thompson*, Earl presents no evidence which, when viewed in the light most favorable to her, would lead a reasonable trier of fact to conclude that the City deliberately made false, misleading assurances to her, thereby causing the limitations period to lapse. Therefore, Earl's reliance on *Thompson* fails.

Courts should apply the equitable tolling doctrine sparingly. Earl has the burden to show that equitable tolling applies. Earl fails to meet her burden of proof because, even considering the evidence in the light most favorable to her, she fails to show any evidence that the City made deliberately false, misleading assurances when it closed her PRA request without providing the

---

[5] This reasoning is consistent with Division One's unpublished decision in *Strickland v. Pierce County*, No. 75203-1-I (Wash. Ct. App. Jan. 29, 2018) (unpublished), http://www.courts.wa.gov/opinions/pdf/752031.pdf. There, Division One also held that "[w]hen a requester obtains copies of records that the agency previously claimed it did not possess, that circumstance, without more, is not sufficient to toll the running of the statute of limitations." *Strickland*, slip op. at 12.

one omitted record. Accordingly, we conclude that the trial court did not err by granting summary judgment in this case.

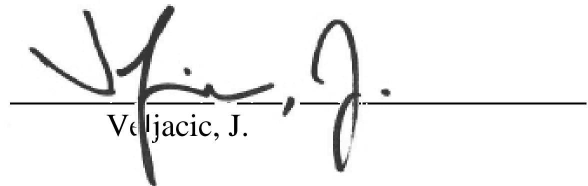
V. ATTORNEY FEES

Earl requests attorney fees and costs on appeal under RCW 42.56.550(4). We deny her request because Earl is not the prevailing party on appeal. RCW 42.56.550(4).

CONCLUSION

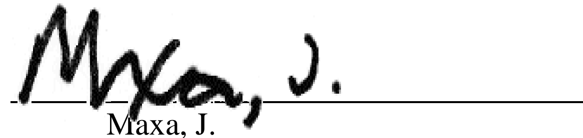
We affirm the trial court's order which granted the City's motion for summary judgment, denied Earl's motion for partial summary judgment, and dismissed Earl's PRA claims. We deny Earl's request for attorney fees on appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

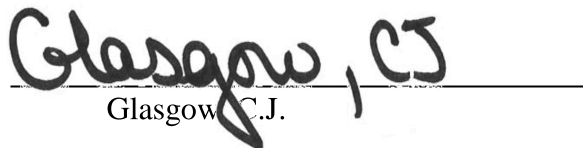


Veljacic, J.

We concur:



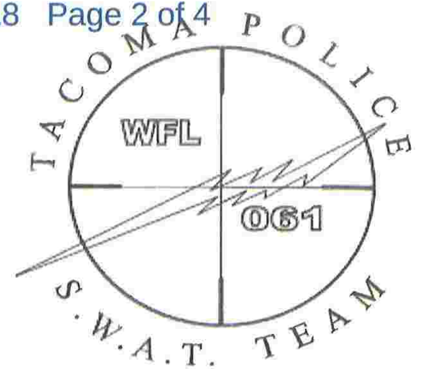
Maxa, J.



Glasgow, C.J.

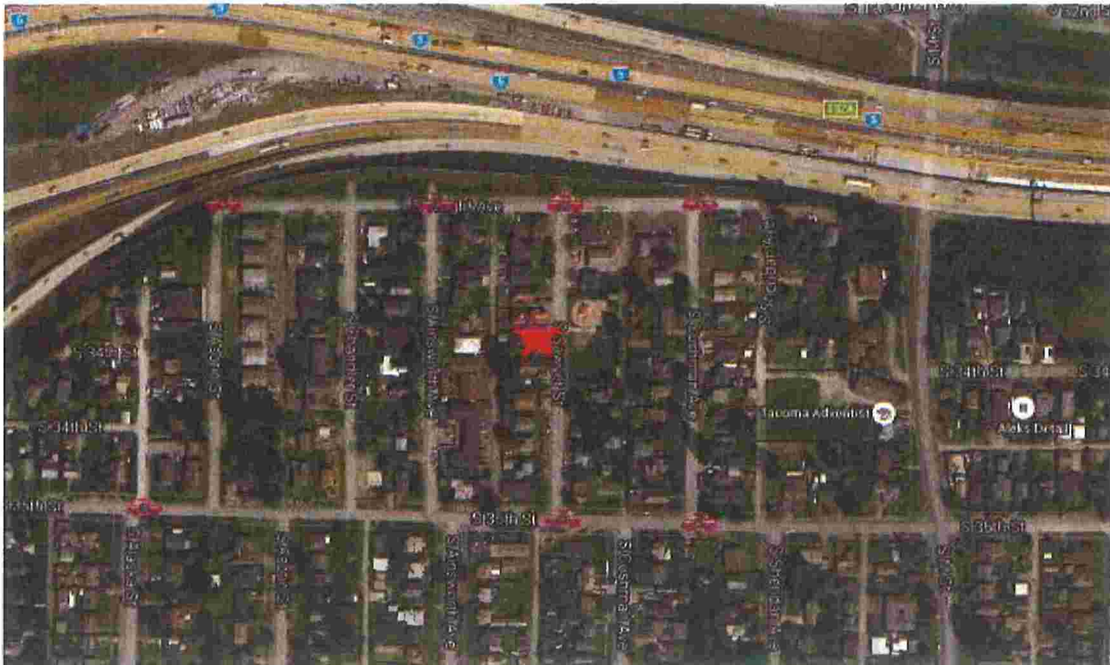
APPENDIX B

COMMAND POST LOG



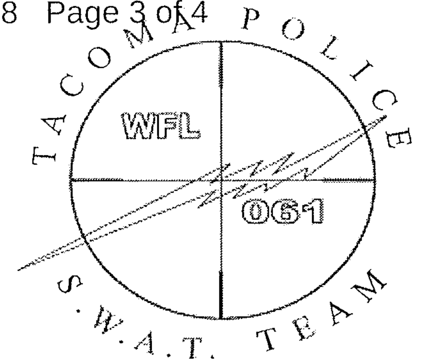
CASE # - 1602801965
DATE – 1/29/2016
LOCATION – 3300 Sawyer/3326 Sawyer susp address
SUBJECT – Kenneth Wright
SITUATION – Officer Involved Shooting

0110hrs – SWAT Team showing up. SWAT 1 on scene
0114hrs - Guardian 1 departed. Radio from LERN to PC11. WSP has containment on I-5
0119hrs – Containment map below:



0123hrs – Bearcat-Habib, May, Wolfe, Kelley, Graham, Ovens. Bear-Tiffany, Koskovich, Shafner, Roberts, Verkoelen, Storwick
0124hrs – Bear and Bearcat moving to 3326 Sawyer
0131hrs – Media Staging at 38th and M. CP moving to 37 and M Street. Dispatch notified
0139hrs – Tiffany to Habib-Subjects moving inside house we are at
0141hrs – Two females in bedroom by door, possibly moving towards door
0143hrs – May-woman, baby, and young male inside 3326 Sawyer
0146hrs – Habib-no indications in yard
0147hrs – May-K9 track not working
0147hrs – Habib copy. Hold for now
0148hrs – Habib-no indications around the house, on the fence or alley

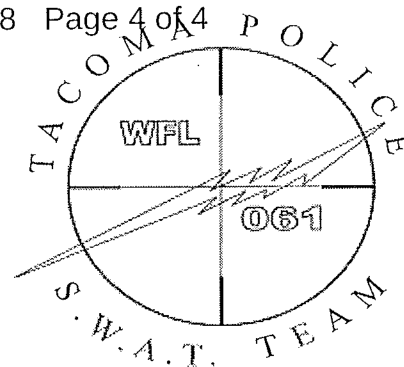
COMMAND POST LOG



CASE # - 1602801965
DATE – 1/29/2016
LOCATION – 3300 Sawyer/3326 Sawyer susp address
SUBJECT – Kenneth Wright
SITUATION – Officer Involved Shooting

0148hrs – Habib to Tiffany-they are coming around to your side of house. Tiffany-I might need another body
0148hrs – Hoschouer on scene
0151hrs – Shafner-turn off headlights in Bearcat
0152hrs – Graham to Habib-K9 wants to check house next door
0152hrs – Habib talking to witness. Suspect last seen in yard and dropped a personal item then fled. Have K9 try from here
0200hrs – K9 having no indication
0204hrs – May to Tiffany-move your crew back to Bearcat. Move Bearcat back to original scene
0204hrs – Team moving back to original locaiton to clear house to house
0205hrs – Quilio on scene
0208hrs – Habib-make announcements
0208hrs – May-3314 is a known house suspect is staying in
0210hrs – Habib-when you are ready make announcements
0210hrs – May to Habib-we need to push some people to alley to cover
0212hrs – Habib-what address is involved?
0213hrs – May to Bear-move vehicle broadside. Set up containment on front and back to cover all sides-Koskovich copy
0214hrs – Habib-Bearcat moving in alley
0215hrs – Tiffany-one looking out 1-1-1 window
0216hrs – Habib to Quilio-come east down alley
0217hrs – May to Habib-start making announcements yet? Habib-not yet need to shore up containment and clear some cars
0220hrs – Habib to Quilio-move forward. Moving
0224hrs – Habib to May-vehicles cleared moving back to alley
0225hrs – May-ready for announcement at 3314? Habib yes. Tiffany be ready with receiving team
0226hrs – Quilio-announcements loud and clear in alley
0227hrs – May- Five adults exiting 3314
0230hrs – Subjects from house cooperatie. Standing by for patrol to assist
0233hrs – Tiffany-five detained. 3 females and 2 males
0239hrs – May to Habib-debrief done. All subjects claim Wright has not been here at 3314 today.
0245hrs – May-prepare to contact 3318

COMMAND POST LOG



0246hrs – May moving in to clear 3318

CASE # - 1602801965
DATE – 1/29/2016
LOCATION – 3300 Sawyer/3326 Sawyer susp address
SUBJECT – Kenneth Wright
SITUATION – Officer Involved Shooting

0247hrs – May-opening exterior door
0249hrs – Patrol taking subjects from SWAT
0250hrs – 3318 is clear-May
0250hrs – Habib-will check 4017 Cushman on call of hearing noises
0251hrs – May, Wolfe and K9 moving up to check 3314 perimeter
0256hrs – Bearcat is on scene 4017 Cushman
0259hrs – K9 located crawl space. Clear
0300hrs – 4017 Cushman is clear
0304hrs – May to Tiffany-K9 didn't indicate anywhere around house at 3314. Security cameras observed. Perimiter of 3314 is secure.
0306hrs – May-K9 can clear
0306hrs – Tiffany-County K9 is clear
0308hrs – May-3318 is all clear. 3314 exterior and crawl space is clear. Need to clear inside
0310hrs – May-clear the house? Habib yes
0312hrs – May-will prep ThrowBot and prepare to breach and hold at back door.
0319hrs – Tiffany-ThrowBot is down. May-standby
0319hrs – May is in back with Wolfe, Tiffany is in front. Habib copy
0321hrs – Habib to May you can move
0321hrs – May to Tiffany- we will breach and delay. Then you can move and breach
0321hrs – Tiffany-moving
0322hrs – Tiffany-we are at front door. May-copy. We will breach back door. Back door breached
0323hrs – Tiffany-entry made into living room
0323hrs – May-removing security camera from exterior
0324hrs – Clearing
0330hrs – Moving upstairs
0332hrs – May-House is clear
0345hrs – Habib-Me, May, Tiffany, Hoschouer, Ovens, Wolfe will stay behind for security The rest of the team is securing. House ready to turn over to CID
0400hrs – Most of tactical back at CP
0436hrs – CID arriving

APPENDIX C

From: Anderson, Lisa [mailto:lisa.anderson@cityoftacoma.org]
Sent: Wednesday, November 23, 2016 2:47 PM
To: Groth, Debbie
Cc: Lobsenz, Jim
Subject: RE: Public Disclosure Request 16-10930 Carney Badley Spellman

Ms. Groth:

After searching further, it was determined there are no other records responsive to your request. As such, your request 16-10930 is now considered closed. If you believe there are other records responsive, or this does not meet the scope of your request, please contact me at your earliest convenience.

Regards,

Lisa Anderson

Public Disclosure Assistant

City of Tacoma

733 Market Street, Room 11

Tacoma, WA 98402

(253) 591-5188

APPENDIX D

THE HONORABLE BENJAMIN SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

LISA EARL; K.S., a minor child; K.W., a minor child; O.B., a minor child; I.B., a minor child; and THE ESTATE OF JACQUELINE SALYERS, by and through Lisa Earl, the Personal Representative of the Estate; Plaintiffs, v. SCOTT CAMPBELL; the marital community of Scott and Jane Doe Campbell; and the CITY OF TACOMA; Defendants.	NO. 3:17-cv-05315 AFFIDAVIT OF DETECTIVE JACK NASWORTHY IN RESPONSE TO PLAINTIFFS' MOTION TO REOPEN DISCOVERY Noted for consideration: September 28, 2018

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

JACK NASWORTHY, being first duly sworn upon oath deposes and says:

1. I am over the age of eighteen and am competent to testify herein.

2. I am currently a detective with the Tacoma Police Department, assigned to the Homicide Unit. I have been with the Homicide Unit since 2011, and have been a detective since 2006. I first joined the Tacoma Police Department in 1991. Prior to

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Civil Division
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Tacoma, WA 98402-3767
(253) 591-5885 / Fax 591-5755

becoming a detective, I worked both Patrol and Narcotics (Special Investigations Division, or SID).

3. I have been advised by the City Attorney's Office that the plaintiffs in this case are alleging that I deleted video footage from the pole camera on Sawyer Street, footage allegedly showing the officer involved shooting that occurred on January 29, 2016. That is not true. I did not delete anything and in fact, as explained below, when I attempted to pull the video up to view, there was nothing there to view.

4. On January 29, 2016, I was a member of the SWAT team. I first joined SWAT in 1994 and served on the Entry Element for 10 years. I left SWAT for about a year and then the Department created the Command Post Element of the team, so I came back to SWAT as a member of the Command Post Element. The Command Post Element works out of the command post vehicle, operates the radio and helps facilitate and coordinate tactical operations. This element provides intelligence to the other SWAT elements and coordinates resources (e.g., Patrol resources, emergency personnel, like the Tacoma Fire Department, and other tactical teams). I have been serving as a member of the Command Post Element since approximately 2005.

5. On the night of the officer involved shooting, I responded to the SWAT callout and was working in the Command Post. SWAT was deployed because Kenneth Wright had fled the scene and was known to be armed. Based on the available information, SWAT had identified and contained three different houses as possible locations for Kenneth Wright. Because of the multiple locations, resources were spread thin.

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Civil Division
747 Market Street, Room 1120
Tacoma, WA 98402-3767
(253) 591-5885 / Fax 591-5755

6. I learned that there was a pole camera in place for the 3300 block of Sawyer Street and believed that the footage may be able to narrow Wright's possible location. I had experience with the View Commander system because of a prior assignment to the Regional Intelligence Group (a joint law enforcement intelligence unit), so using the login information for the Criminal Investigations Division (CID) (the Division to which I was assigned), I logged into the View Commander System. However, the CID login did not give me access to the Sawyer Street pole camera, since it was an SID asset. I then called Detective Scott Shafner, who was also a member of SWAT and deployed on this call, and obtained his login information for the View Commander System. Because Detective Shafner was assigned to SID and an Administrator on the View Commander System for SID, his login information gave me access to the Sawyer Street camera.

7. When I accessed View Commander, the first thing I did was check the live feed from the camera. It was totally dark and the camera did not show anything. In order to access stored footage, you have to go to a separate tab to pull up recorded information, so that is what I did. When you access the tab for recorded information, it comes up in a calendar format and any date for which recorded information has been stored is highlighted. If there is no recorded information stored for a particular date, the date on the calender is not highlighted. When I accessed the tab in View Commander for the recorded information, the date of the shooting (January 28, 2016), was not highlighted, indicating that there was no recorded information. That is far as I went, since the system was saying that there was nothing recorded for the 28th.

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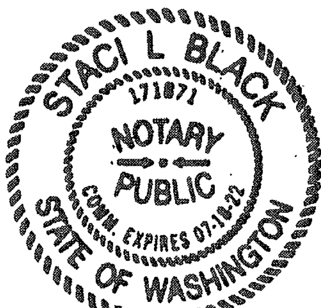
8. Plaintiffs, in their motion, question why I did not write a report for my involvement in this call. The answer is simple. As a member of the Command Post Element, my responsibility was to prepare the Command Post Log and I did not have any direct involvement that required me to write a supplemental report. Attached hereto as Exhibit 1 is a true and correct copy of the Command Post Log that I prepared as a result of my involvement in this call out.

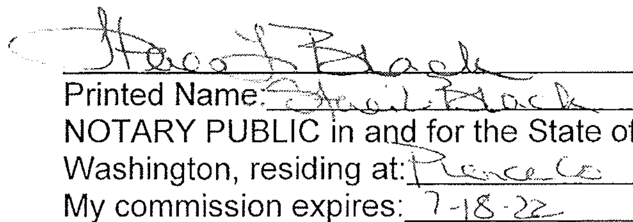
9. Plaintiffs also argue that my leaving the scene and then returning is somehow evidence that I deleted the video footage. Again, that is not true. I left the scene at around 5:30 am in order to get coffee and food for the Patrol officers and CID investigators on the scene and then brought it back to the scene. When I returned to the scene at about 7:30 am, I advised Dispatch to show me back on the scene with Detective Chris Shipp. Detective Shipp was a relatively new detective and he was doing the canvas of nearby houses. Because he was new, I went along on the canvas with him.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

JACK NASWORTHY

SUBSCRIBED and SWORN to before me this 4th day of September, 2018.





Printed Name: Staci L Black
NOTARY PUBLIC in and for the State of Washington, residing at: Pierce Co
My commission expires: 7-18-22

Tacoma City Attorney
Civil Division
747 Market Street, Room 1120
Tacoma, WA 98402-3767
(253) 591-5885 / Fax 591-5755

APPENDIX E

E-FILED
IN COUNTY CLERK'S OFFICE
PIERCE COUNTY, WASHINGTON

November 16 2020 1:56 PM

KEVIN STOCK
COUNTY CLERK
NO: 19-2-10487-8

Honorable Stanley J. Rumbaugh
Hearing Date: November 25, 2020

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF PIERCE

LISA EARL, Plaintiff, v. CITY OF TACOMA, a political subdivision of Washington State, Defendant.	NO. 19-2-10487-8 DECLARATION OF LISA EARL IN OPPOSITION TO THE CITY'S MOTION FOR SUMMARY JUDGMENT

I, LISA EARL, do hereby declare under penalty of perjury under the laws of the State of Washington that the following facts are true and correct:

1. I am the Plaintiff in this case. I have personal knowledge of the facts set forth here.
2. In the morning of January 29, 2016, I learned that a Tacoma police officer had shot and killed my daughter Jacqueline Salyers shortly before midnight on January 28, 2016.
3. I wanted to know why the officer killed my daughter.
4. At my request, attorney James Lobsenz made a Public Records Act request to the City of Tacoma for me. He sent a records request to the City on June 30, 2016.
5. The City eventually produced records in two installments.
6. On October 7, 2016, the City of Tacoma sent a first installment of records to my attorney at his law firm.

7. On November 8, 2016, the City sent a second installment of records to my attorney at his law firm and in an accompanying email told my attorney that any additional records should be ready by November 23, 2016.
8. On November 23, 2016, on behalf of the City a Ms. Anderson sent an email to my lawyer's law firm that stated: "After searching further, it was determined that there are no other records responsive to your request. As such, your request is now considered closed. If you believe there are other records responsive, or this does not meet the scope of your request, please contact me at your earliest convenience."
9. I believed the City when it said there were no other records responsive to my request.
10. I had no idea that a document called a Command Post Log existed.
11. I had no idea that the Tacoma Police SWAT team normally creates a Command Post Log when there is a SWAT team call out.
12. I did not know there was such a thing as a mobile Command Post for the Tacoma SWAT Team.
13. I had no knowledge that a Command Post Log had been created by the Tacoma police for the SWAT Team call out of January 29, 2016.
14. I had no idea that there was a person named Jack Nasworthy who worked for the Tacoma police department.
15. If I had known that there was a SWAT Team Command Post Log that documented the activities of the SWAT Team on January 29, 2016, I would have objected to Tacoma's failure to give me a copy of it pursuant to my Public Records Act request. I would have asked my attorney to demand that a copy be given to me.
16. The first time I ever knew that such a document existed was sometime after September 25, 2018. Sometime in the week or so after September 25 my attorney told me that a detective named Jack Nasworthy had filed an affidavit in federal court in my civil rights

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

1 lawsuit against the officer who killed my daughter and that detective Nasworthy had
2 attached a copy of the document to his affidavit.

3 17. I had no idea that on the night my daughter was shot and killed by Officer Scott
4 Campbell that the SWAT team had gone to the house at 3314 South Sawyer in Tacoma
5 and had ordered all the people who were inside that house to exit the house.

6 18. Until I saw the document in late September or October of 2018, I had no idea that on
7 the night my daughter was shot and killed by Officer Scott Campbell that the SWAT
8 team had gone to the house at 3314 South Sawyer in Tacoma and had ordered all the
9 people who were inside that house to exit the house.

10 19. Until I saw that document, I had no idea that SWAT team officers had entered that
11 house and searched it.

12 20. The Command Post Log states that at 3:22 a.m. SWAT Team officers entered the
13 house through the back door.

14 21. An entry on the Log for 3:23 a.m. states: "May-removing security camera from
15 exterior".

16 22. Until I saw that document, I had no idea that SWAT Team police officers had
17 disabled security video cameras that were mounted on the outside of the house at
18 3314 South Sawyer Street.

19 23. By the time I learned these things, more than two years had passed since my
20 daughter's death and it was no longer possible to find the cameras that the SWAT
21 Team had taken down from the house at 3314 South Sawyer Street.

22 DATED this 10th day of November, 2020.

23

24

25 Lisa Earl, Plaintiff

26

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701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Court ESERVICE to the following:

Attorneys for Defendant
Margaret A. Elofson
CITY OF TACOMA
747 Market Street #1120
Tacoma, WA 98402-3726
margaret.elofson@cityoftacoma.org

DATED this 16th day of November, 2020.

s/Deborah A. Groth
Deborah A. Groth, Legal Assistant

APPENDIX F

1 IN THE COURT OF APPEALS OF WASHINGTON

2 DIVISION II

3 ___

4 LISA EARL,	)	
5 Appellant,	)	
6 v.	)	COA Appeal No. 561603
7 CITY OF TACOMA,	)	
8 Respondent.	)	

9 ___

10 ORAL ARGUMENT

11 Before The Honorable Rebecca Glasgow,

12 The Honorable Bradley Maxa,

13 The Honorable Bernard Veljacic

14 May 10, 2022

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24 TRANSCRIBED BY: Reed Jackson Watkins
Court-Certified Transcription

25 206.624.3005

1 A P P E A R A N C E S

2

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4 On Behalf of Appellant:

5 JAMES E. LOBSENZ

6 Carney Badley Spellman

7 701 5th Avenue, Suite 3600

8 Seattle, Washington 98104-7010

9

10

11 On Behalf of Respondent:

12 MICHELLE N. YOTTER

13 City of Tacoma

14 747 Market Street, Suite 1120

15 Tacoma, Washington 98402

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1 -o0o-
2 May 10, 2022
3
4 THE BAILIFF: All rise.
5 JUDGE GLASGOW: Please be seated.
6 THE BAILIFF: Court is reconvened.
7 JUDGE GLASGOW: Please be seated. Thank you.
8 Good morning, Counsel.
9 MR. LOBSENZ: Good morning, Judge.
10 JUDGE GLASGOW: We are here today for our second case,
11 which is Earl v. City of Tacoma.
12 Mr. Lobsenz, I understand you've reserved five minutes for
13 rebuttal?
14 MR. LOBSENZ: Yes.
15 JUDGE GLASGOW: Okay. Thank you. You may begin.
16 MR. LOBSENZ: Thank you, Your Honors. May it please the
17 Court, I am Jim Lobsenz. I represent Lisa Earl. To give
18 you an outline of what I maybe will hope to cover today are
19 the following:
20 We submit that there are two independent reasons why the
21 superior court erred in dismissing the case on statute of
22 limitations grounds. We meet the requirements for equitable
23 tolling, and we also think the discovery rule applies to
24 Public Records Act cases and that this panel should not
25 follow Dotson, which is incorrect, and that we should also

1 not have been dismissed because of the discovery rule.
2 We meet the equitable tolling rule for various reasons,
3 including, among others, false assurances. We meet the
4 discovery rule, and in the U.S. Oil case the Washington
5 Supreme Court ruled that the discovery rule is dictated
6 where the plaintiff lacks the means to know that a wrong has
7 been committed against her. It's not a Public Records Act
8 case, but I think it's -- I don't really think that's dicta.
9 I mean, I think that's the rule, and it governs.
10 This is a case where it is impossible for a plaintiff to
11 know whether or not a public agency has records that they
12 haven't searched or given you; therefore, it is dictated, I
13 think, that the discovery rule applied.
14 JUDGE MAXA: So there's also cases that suggest that the
15 discovery rule only applies when accrual is uncertain. And
16 here the legislature has specifically said it accrues when
17 that last letter goes out.
18 MR. LOBSENZ: You -- the way you phrase it, I sort of have
19 to agree. You say suggested, but I note that the City
20 consistently leaves out the word "usually" from that
21 sentence of Douchette. It says "usually" when the
22 legislature has specified the accrual that that's it, and
23 the discovery rule doesn't apply.
24 But the Supreme Court of Washington has also said that
25 these rules apply when justice requires it. And they've

1 also said in U.S. Oil that it dictates it in these
2 situations. So this isn't usual.
3 In the situations where the plaintiff can't know, it's
4 nuts to say that, well, sorry, you had no way of knowing
5 that you had a lawsuit. You had no way of knowing there was
6 a Public Records Act violation. You couldn't go and search
7 the records themselves. Sorry. If that becomes the rule,
8 police agencies can just -- I want to distinguish here
9 between intentional misconduct and just sort of bad
10 searching. But they can do both. They can be lazy in their
11 searching and do adequate [sic] searches and get away with
12 it because nobody will find out for a long time, or they can
13 be intentionally deceptive, or they can do what they do
14 here, which is they park their SWAT records in a different
15 place, and they leave it up to the SWAT team commander
16 whether to even integrate them into their records system,
17 which I submit is a form of bad faith.
18 But I don't think that --
19 JUDGE GLASGOW: So, Counsel, why isn't the legislature
20 entitled to make that choice and say, well, we have a
21 trigger for accrual. They did reduce the statute of
22 limitations down to one year, so we know that they're making
23 some judgments, and then leaving the safety valve to be
24 equitable tolling, where you have pretty -- some pretty
25 extreme circumstances that can leave you to -- to tolling

1 the statute of limitations.
2 Like, why -- why is that not a balancing that the
3 legislature has established?
4 MR. LOBSENZ: Well, the legislature can do that.
5 JUDGE GLASGOW: Right.
6 MR. LOBSENZ: But I think the Washington Supreme Court and
7 this court have both said that that doesn't relieve the
8 judiciary of deciding whether justice requires that you not
9 run the rule; that you not dismiss for expiration of the
10 statute of limitations.
11 I think the sentences that I would return to -- equitable
12 tolling, of course, is not in any way inconsistent with that
13 really, is it? Because if there's equitable tolling --
14 JUDGE GLASGOW: Right.
15 MR. LOBSENZ: -- there's equitable tolling.
16 JUDGE GLASGOW: Right.
17 MR. LOBSENZ: It's only the discovery rule that runs into
18 that issue. And the U.S. Oil case says they're doing -- in
19 determining whether to apply the discovery rule, the
20 possibility of stale claims must be balanced against the
21 unfairness of precluding justified causes of action. That
22 balancing test has dictated -- that means required, doesn't
23 it? -- has dictated the application of "the" rule, the
24 discovery rule, where the plaintiff lacks the means or
25 ability to ascertain that a wrong has been committed.

1 Justice requires this court to decide whether the usual
2 rule that the legislature has specified an accrual period,
3 time, trigger, should apply or not. And I think the U.S.
4 Oil case says not.
5 JUDGE MAXA: So we obviously have the Dotson case. We are
6 not bound by the Dotson case. That's one of the quirks of
7 our appellate system. But, you know, we like our
8 colleagues. We try not to overrule them or disregard them
9 without reason.
10 So what's the reason that we should disregard Dotson?
11 MR. LOBSENZ: Well, really the Dotson case, Your Honor --
12 I know it's not like the Ninth Circuit where I get to say
13 the rule of interpanel accord binds one panel to another,
14 and I think that's sort of a good thing about our system.
15 It allows different panels to take different views, and then
16 we leave it to the Supreme Court of Washington to figure out
17 which panel is right.
18 Dotson is so clearly wrong. It relies in a sentence or
19 two on Douchette, and Douchette says, flat out in a sentence
20 on -- I forget which page -- "This is not a case where we
21 need to decide whether the discovery rule applies." That's
22 what Douchette says. If Douchette says that, how can Dotson
23 look to it and say, well, we -- we have to say that the
24 discovery rule doesn't apply because that's what Douchette
25 says? That is not what Douchette says.

1 Second, Douchette has a long quote in it from U.S. Oil v.
2 Department of Energy [sic]. It goes through all the -- it
3 goes through the same analysis I basically just argued to
4 you. Douchette lost because she knew the facts. She didn't
5 fit within this U.S. Oil rule of lacks the ability to
6 ascertain whether she had a case. She knew her own age, and
7 she knew she was fired because they said you're too old.
8 She knew the facts. That's why the court said in Douchette
9 we don't have any occasion here to decide whether the
10 discovery rule applies to this case.
11 But the Washington Supreme Court has said it's a judicial
12 task to decide whether justice requires these things. It
13 does. If you decide that Dotson is right and you're going
14 to follow it, and you also say no to the equitable tolling,
15 then police departments across this -- not just police
16 departments, but police departments can just hide stuff.
17 And maybe that gives me an opportunity to segue back to
18 equitable tolling for a moment.
19 The City has said, I think, this isn't a case of
20 intentional hiding of a document. How are we supposed to
21 know? I don't know whether it's intentional or not. I do
22 know that when you talk about the state of mind of a city,
23 you have lots of different actors. There's Mr. -- I forget
24 his name -- the civil attorney who delegated to other people
25 to go searching. There's -- they don't even know who did

1 the searching. There's a list of people who likely did the
2 searching. There's their states of mind. But I know one
3 thing. Somebody made up this policy that Detective
4 Nasworthy testified to, that they leave it to the commander
5 of the SWAT team unit to decide whether to integrate SWAT
6 team documents into the electronic files. Big surprise.
7 They don't get there.
8 This document had the same incident number as every other
9 police report that had anything to do with Jackie Salyers'
10 death. It's got the same incident number. And, yet, they
11 don't put these documents in the electronic file, so of
12 course they don't get found.
13 There's language in -- in their briefing about -- I've
14 lost my train of thought here for a minute -- oh, about
15 target words, they said. I don't know where they come up
16 with these target words. But they said if you use these
17 four target words, this SWAT document doesn't come up. What
18 about the word "shooting"? That was the first word in my
19 request that I framed. We want all documents related to the
20 shooting of Jackie Salyers on this date.
21 It says "officer involved shooting" on every single page
22 of this document. Every single page. You can't leave it up
23 to police departments to be able to sort of offshore. It's
24 like keeping your income in Bermuda so it can't be taxed.
25 If you keep it in the SWAT office where it can't be found

1 because you're not integrating, it's not going to be found.
2 That's not right. And I would urge you to get to the
3 injunctive issue, which I -- I'm not going to have really
4 time to talk about here.
5 But I think in addition to reversing and ordering them to
6 enter partial summary judgment and liability in Ms. Earl's
7 favor, just figuring out penalties later. Penalties, we
8 could -- it matters whether or not the violation was
9 intentional or unintentional. I don't think it matters to
10 the equitable tolling rule particularly whether it's
11 intentional or not. If it's intentional, it's deception.
12 And then, of course, it fits one of the three -- they're not
13 limited to three categories, but one of the three named
14 categories.
15 They also ignore the Fowler case decided six months before
16 they wrote their brief that said it is not limited to these
17 three categories. We see no reason to limit it. We will
18 apply it where justice requires.
19 JUDGE MAXA: Fowler's a criminal case. Does that make a
20 difference?
21 MR. LOBSENZ: No, absolutely not. I mean, I -- if it was
22 going to make a difference, it would have made a different
23 the other way and they would have said we'll be tighter
24 about equitable tolling in criminal cases because finality
25 is more important. But I think it weighs against them, not

1 for them.
2 Well, perhaps in jumping around, I've covered most
3 everything. And I see I've used my ten minutes, so I will
4 sit down.
5 JUDGE GLASGOW: Thank you, Counsel.
6 MS. YOTTER: Good morning. May it please the Court,
7 Michelle Yotter on behalf of the City of Tacoma this
8 morning.
9 The City is asking that this court dismiss the matter at
10 bar, and there are two distinct reasons for that request.
11 First, the City asks that this court find the document in
12 question -- and I want to be clear that there were thousands
13 of documents produced, or at least a thousand documents
14 produced in this matter, and we are here today talking about
15 a single three-page document. It's the City's position that
16 that document was never responsive to this PRA request, and
17 that there was no PRA violation to begin with.
18 And to make that point I want to give you just a very
19 brief background. The record in question is called a
20 Command Post Log. That is a three-page document created by
21 the SWAT team. And the only information contained in that
22 log are the SWAT team's efforts to track a known violent
23 felon by the name of Kenneth Wright.
24 The SWAT team ended up responding to the scene of this
25 shooting not because there was a shooting, not because there

1 was a death. These aren't things the SWAT team would
2 normally respond to. The SWAT team doesn't respond to
3 investigate deaths, and they don't respond, typically, to
4 officer-involved shootings. They respond to dangerous
5 situations where special weapons and tactics are necessary.
6 JUDGE MAXA: So was the movement of Mr. Wright related to
7 the shooting; right? "Related" is a very broad word.
8 MS. YOTTER: It is a very broad term. I agree with that.
9 And so I want to give -- and that's where the background
10 here becomes important. The Tacoma Police Department's
11 violence reduction team had been conducting a manhunt for
12 Kenneth Wright for several weeks prior to the shooting
13 taking place.
14 On the night of the shooting, with two patrol officers in
15 the area because they believed that there was a possibility
16 Mr. Wright could be in the area, and, in fact, they spotted
17 Mr. Wright. He was a passenger in the vehicle of
18 Ms. Salyers. The officers on foot attempted to apprehend
19 Mr. Wright. And in that attempt, Ms. Salyers, the driver,
20 drove the car directly at one of the officers. He fired and
21 killed her. After that occurred, Mr. Wright climbed across
22 her body, had a long gun in his hand, and took off on foot.
23 The only reason the SWAT team responded was because the
24 officers didn't know where Kenneth Wright had gone. And so
25 the SWAT team response was to look for Mr. Wright, to see if

1 he was laying in wait and planning to shoot the officers.
2 If he -- this is a residential neighborhood. If he'd gone
3 into a residence and had taken people hostage. There was --
4 the officers on the scene had no idea.
5 The SWAT team did not respond, though, simply because
6 there was an officer-involved shooting or because there was
7 a fatality, and they had no role in that investigation.
8 That's important because when we look to the specific
9 language of the public records request, and the appellant
10 points -- they did make a very extensive request. I believe
11 it had 16 paragraphs. But the appellant points to paragraph
12 number 1 as where the City should have responded with this
13 SWAT document.
14 And what that paragraph requests is all documents related
15 to the shooting death of Jacqueline Salyers on January 27
16 through 28, 2016, including, but not limited to, the
17 complete investigative report, any and all follow-up
18 reports, investigation materials, witness statements, and
19 officers' notes, photographs, DXF CAD files, measurements,
20 physical evidence, video, audio, dash cams, and the involved
21 vehicle, including any downloads from the vehicle.
22 So based on that paragraph, the City did not interpret
23 that to mean we want this log tracking Kenneth Wright. And
24 in her reply brief --
25 JUDGE GLASGOW: So why wouldn't that be officer notes?

1 MS. YOTTER: So in -- well, in her reply brief -- it
2 wasn't officer notes related to the shooting death or the
3 investigation. That's, I think, where we make the
4 distinction. All of the notes related to the investigation
5 of the shooting and the officers that were there in response
6 to the fatality, that information was all provided.
7 What we didn't provide was just this log that showed the
8 tracking of Kenneth Wright. The City did not interpret that
9 to be related to the shooting death.
10 And just to give a hypothetical example, had the shooting
11 occurred, had the facts been the same except Kenneth Wright
12 wasn't there, the SWAT team would never have been called.
13 They would never have been a part of the investigation into
14 that shooting.
15 And so in her reply brief, on page 4, Ms. Earl now
16 contends what that request meant was she wanted documents
17 about Wright was doing the day of the shooting, and the City
18 didn't interpret that request to mean they should look for
19 documents related to what eyewitnesses were doing throughout
20 the day.
21 So for those reasons, the City didn't deem this single
22 record to be responsive. They didn't search for it, and it
23 was not produced. It was subsequently produced in the
24 course of the civil case by the City voluntary.
25 So for those reasons we would ask that the Court find the

1 document not responsive, but --

2 JUDGE GLASGOW: But, Counsel, moving into the question of

3 equitable tolling.

4 MS. YOTTER: Yes.

5 JUDGE GLASGOW: So it looks like what the response -- the

6 final response email said was "After searching further, it

7 was determined that there are no other records responsive to

8 your request."

9 So assuming for a moment that we -- we don't agree, and we

10 think that the records in question were responsive, so help

11 me understand how that sentence -- how we apply equitable

12 tolling with that sentence in mind.

13 MS. YOTTER: Absolutely. Thank you, Your Honor.

14 So that would be the second argument the City would have.

15 So even if you were to find -- either not engage in the

16 analysis as to whether the document was responsive or if you

17 were to find that it was, the single document was

18 responsive, this court should dismiss on the basis of

19 statute of limitations. And there's no dispute as to the

20 timeline here. And I'm happy to go through that if the

21 court would like.

22 But the -- the lawsuit was filed almost three full years

23 after the final definitive response by the City. We know

24 from this Court's earlier decision in Dotson, in Zellmer,

25 and in Wolf that missing a single document, even if

1 responsive, is not, in and of itself, enough to trigger the
2 equitable tolling rule. In fact, Belenski is the only
3 public records case that the City is aware of where
4 equitable tolling is even considered. And you had a very
5 distinct fact pattern there that isn't present here.
6 JUDGE MAXA: So why -- why isn't it equitable? So
7 equitable tolling, obviously, is an equitable doctrine.
8 MS. YOTTER: Yes.
9 JUDGE MAXA: The City or any agency basically says, "Trust
10 us. We've given you all the records." There's nothing that
11 the requester can do to check that. And so if -- if they
12 say "trust us," and they're wrong, it seems like you're
13 saying, "Hey, you screwed up; you trusted us."
14 MS. YOTTER: So trust us we're wrong, if the requester
15 comes back and says, "I asked for these specific documents
16 and you didn't give them to me," I think that's a different
17 fact pattern than what we have here where Ms. Earl is saying
18 "anything related to." That's open to the interpretation of
19 the City as to what's related to. And if the governmental
20 entity makes a good faith, we truly believed that we had
21 encapsulated everything she wanted and gave it to her, if
22 there's a single document that later she says, "Oh, I also
23 meant this. I didn't know," and the City also didn't know,
24 there really shouldn't be equitable tolling because there
25 isn't bad faith, there isn't deception, and there aren't

1 false assurances.
2 To hold that equitable tolling applies any time a
3 governmental entity says "we've given you everything we
4 believe to be responsive," then you --
5 JUDGE GLASGOW: But that's not what you said. You said
6 "after searching further, it was determined that there are
7 no other records responsive to your request." That's
8 different than saying "We've searched. We've done a
9 good-faith search and we believe we found everything
10 responsive to your request." I know it's splitting hairs,
11 but it's not the same.
12 MS. YOTTER: And I do agree. And I think --
13 JUDGE GLASGOW: Yeah.
14 MS. YOTTER: -- maybe I would say that our language was
15 inartful.
16 JUDGE GLASGOW: Okay.
17 MS. YOTTER: I don't think that there was any bad faith,
18 any deception, or any false assurances. I think the City
19 truly believed that we had captured everything that this
20 requester was seeking and we were providing it to her.
21 JUDGE MAXA: So let's move to the discovery rule, then.
22 So, again, in every single opinion, including Dotson and
23 including, I'm sure, a bunch that I've written, it says "the
24 PRA is a broad mandate for the full disclosure of records."
25 And, yet, if the discovery rule doesn't apply, we could have

1 a situation where -- and let's say it's not intentional.
2 The City has a folder of a thousand pages. It's -- somehow
3 it got misplaced. It wasn't produced. A year passes. The
4 requester's out of luck, without a discovery rule.
5 How is that furthering the broad purposes of a PRA?
6 MS. YOTTER: So I don't have a specific answer to that
7 question, other than my response would be should -- should
8 we say a discovery rule applies to all PRA cases, and that,
9 at any time in the future, a single document which could
10 arguably have been responsive extends the statute of
11 limitations because there's now a discovery rule? What
12 you're essentially doing is nullifying RCW 42.56.550 and the
13 legislature's enactment of the one-year statute.
14 Certainly this has been an ongoing issue in these types of
15 cases, and the legislature could enact a discovery rule or
16 they could modify their rule in 42.56.550, sub (6), saying
17 there's a one-year statute of limitations.
18 And then the other thing I would point out, as the
19 appellant relied on U.S. Oil and also In re Fowler, I'd be
20 happy to comment on that, but in those cases -- well,
21 particularly U.S. Oil and Douchette, those are tort cases.
22 And you're talking about, in those situations, where an
23 individual has been harmed. They've suffered harm, and the
24 purpose of tort law is to make that individual whole for the
25 harm that they have suffered. And PRA is distinguishable in

1 that.

2 A PRA claim is not a tort claim. The purpose of the
3 penalty is not to assess harm to a requester and make them
4 whole for a document or documents that were missed. It's
5 actually quite contrary to that. It's a penalty against an
6 agency for not complying with a statute.

7 JUDGE GLASGOW: So, Counsel, why doesn't the PRA sort
8 of -- why wouldn't we say that it's designed to sort of take
9 care of this good faith missing of a record on the back end?
10 So instead of saying that the discovery rule is completely
11 unavailable, in -- where a -- where an agency has made a
12 good-faith search and they missed something, then, at the
13 back end, the PRA accounts for that by saying, well, you
14 don't necessarily get penalties if there was a good-faith
15 search.

16 So why shouldn't we let it through the door and sort of
17 have an expansive reading of the -- or a limited reading of
18 the statute of limitations and let the -- that good faith
19 situation be addressed on the back end, where there's actual
20 proof from the agency that they did do a good-faith search?

21 MS. YOTTER: So I guess I'm a little bit confused about
22 your question. I would want to distinguish, are you saying
23 that would fall under more of a common law discovery rule or
24 that that would be assessed more in terms of an equitable
25 tolling rule --

1 JUDGE GLASGOW: Well --
2 MS. YOTTER: -- where there was something missed?
3 JUDGE GLASGOW: Yeah. I mean, I'm just sort of echoing
4 what Judge Maxa said, which is we're supposed to take this
5 expansive view of the Public Records Act; right? But we
6 recognize that the legislature has pulled back on that some,
7 by shortening the statute of limitations, by allowing zero
8 penalties in some cases; right? So it's not as draconian as
9 it used to be with the agencies; right?
10 So given that that's the case, if we have to apply this
11 broad -- or this principle that we want to promote
12 transparency and access to public records, why would we bar
13 the door at the beginning as opposed to letting those
14 solutions at the back end work when the agency puts actual
15 facts on the table to show their good faith?
16 MS. YOTTER: Yeah. So I think I would point the Court to
17 Neighborhood Alliance, which isn't quite on point. But I
18 think there, when we're talking about adequate searches, I
19 think this would run along the same lines. The test isn't
20 perfection; the test is reasonableness.
21 When you're talking about governments who create, in the
22 course of their business every day, thousands, if not
23 hundreds of thousands of documents, and they're asked to
24 sometimes interpret requests and to figure out what citizens
25 mean, I don't think a level of perfection is possible.

1 So I think the analysis should be in line with adequate
2 search, and that's a reasonableness. Was the government
3 reasonable in their actions and in their production?
4 JUDGE MAXA: Although, that seems to suggest that we don't
5 apply the statute strictly, because as Judge Glasgow
6 suggested, the trial court can then assess reasonableness.
7 We're -- right now, if we -- if we slam the door, it could
8 be intentional, it could be deliberate, it could be
9 fraudulent. And it's like, too bad. You -- you didn't know
10 soon enough.
11 MS. YOTTER: And I agree with your comment, and I should
12 probably have started my answer by saying I do think a hard
13 line following of the RCW is the first appropriate step and
14 the step that clearly legislature has outlined for us. But
15 if the Court wanted to go in another direction and ignore
16 the statute, then I think it would turn to a reasonableness
17 standard.
18 I don't have a -- a better answer on how that could be
19 evaluated, although I would, again, say it would be --
20 you're holding governments to an impossible level, if what
21 you're saying is you must be perfect in every single search
22 and provide every single document that the requester had in
23 mind.
24 JUDGE MAXA: Do we need to consider the universe of cases
25 or can we focus on this case?

1 So I -- this seems like a very valid public records
2 request. I mean, this isn't, you know, a wacko going "give
3 me every document you ever produced in the last 20 years"
4 just because they want to try to get penalties.
5 I understand we -- you know, the wackos we want to keep
6 out. But this is a very legitimate request on a very
7 serious issue, so why should we slam the door on this one?
8 MS. YOTTER: I don't disagree. But I think when we look
9 to Belenski, that's the first one that would guide us, we
10 know that there is no discovery rule, but there's a
11 possibility for equitable tolling. But this Court has been
12 very consistent in its rulings in Dotson and Zellmer and in
13 Wolf; that missing a document or a couple of documents in a
14 good-faith search does not rise to the level to defeat the
15 statute of the one-year statute of limitations.
16 So I would say this Court should stay consistent with its
17 previous rulings. And then I would also just point out a
18 couple of unpublished cases that are very recent out of
19 Division I, which would be Gibson v. Snohomish and
20 Strickland v. Pierce County where Division I's opinions have
21 been right in line with this Court.
22 So my time is up, I believe. So, with that, I thank you
23 for your time today and happy to answer any other questions
24 or provide any supplemental briefing that would be of
25 assistance for the court.

1 JUDGE GLASGOW: Thank you, Counsel.
2 Bailiff, will you add one minute to the rebuttal time,
3 please.
4 Thank you.
5 MR. LOBSENZ: A couple points about precedent first.
6 Counsel mentioned the Belenski case and suggested that it
7 ruled that there was no such thing as a discovery rule in
8 this context. Belenski is silent about the discovery rule.
9 Says nothing about it whatsoever. It addresses solely
10 equitable tolling. And I can't believe that Belenski
11 silently overruled U.S. Oil.
12 As far as U.S. Oil is concerned, counsel said something
13 about, well, this is a PRA case. It's not a tort case. So
14 what? Among other things, they said that for a while and
15 that was the reason for saying, oh, the -- none of this
16 applies to a contracts case. The Western Supreme Court
17 said, yes, it does. We didn't limit it to tort cases. And
18 in the Vertecs case, they said it applies to contracts
19 cases.
20 U.S. Oil is not a tort case or a contracts case. It's not
21 a case where the Department of Energy [sic] is seeking
22 damages for either one. It's a statutory cause of action
23 for a penalty. Exactly the same as what this is. A
24 statutory cause of action for penalties and for injunctive
25 relief.

1 Counsel said that -- repeated this argument that the SWAT
2 team was called out has absolutely nothing to do with
3 investigating the shooting of Jackie Salyers, just looking
4 for Kenneth Wright. I just want to go back and point out
5 that the record is clear, you'll find at clerk's papers 324,
6 one member of the SWAT team that was called out was Mr. Gary
7 Roberts, who is an investigator for the Internal Affairs
8 Division of the Tacoma Police Department. The Internal
9 Affairs Division investigates misconduct by police. It
10 investigates situations whether -- where there's a -- going
11 to be anticipated, in this case there was, an allegation
12 that he shouldn't have shot Jackie. Why is he going along?
13 He's not going along to look for Kenneth Wright. He's with
14 Internal Affairs.
15 A small point about false assurances, again, and the
16 Thompson case. An intent. False assurances, I think,
17 doesn't require an intent to deceive. If it did, this
18 language would be awfully duplicative, to be talking about
19 false assurances or deception. But in Thompson v. Wilson,
20 which is, I think, a Division II decision, you have a
21 similar situation. You have a mother trying to get
22 information about why her daughter is dead. And in one case
23 the assurances she was given for Ms. Thompson was, we will
24 meet -- the coroner will meet with you, the coroner will
25 meet with you, the coroner will meet with you. And the

1 coroner never met with her, and the statute of limitations
2 expired. And in this case it's we were given --
3 JUDGE GLASGOW: So, Counsel, would that false assurances
4 analysis be different if the language in the response letter
5 were different? If they were -- if it were less absolute
6 about there are no other records responsive to your request?
7 MR. LOBSENZ: Well, I think the best way I can answer that
8 is to say I agree with you; that the language that was used
9 was pretty over-the-top emphatic. If it hadn't been, my
10 argument would be not as strong. But I would still be
11 arguing because these are still false assurances. You're
12 still saying it doesn't exist. Trust us.
13 I did want to say there is a consistent ignoring by the
14 City of the independence of PRA violations for not producing
15 responsive document and PRA violations for not doing an
16 adequate search. Certainly I think you should rule -- I
17 think you should rule this was responsive and there was a
18 violation. But even if you didn't, there's still the
19 separate and independent question of whether or not there
20 was an adequate several, which itself is a violation, even
21 if they don't -- if they -- if they've done an adequate
22 search, if they searched all the SWAT documents and there
23 didn't exist any and there was nothing missed, there would
24 still be a violation.
25 JUDGE VELJACIC: Did U.S. Oil have a -- I apologize, Judge

1 Maxa.
2 Is U.S. Oil, is that a situation where the legislature
3 specifically articulated an accrual date, statutory accrual
4 date?
5 MR. LOBSENZ: I can't really answer your question,
6 Your Honor. I wish I could, but I don't think the opinion
7 really clearly identifies that. The best I can say is it
8 sort of seems to read like -- like the law makes the accrual
9 date the discharge of the pollutants into the water, but I
10 don't know that. I can't -- I can't tell you that the
11 opinion really says that. It just sort of seems to me to
12 apply that.
13 JUDGE VELJACIC: Thanks.
14 MR. LOBSENZ: I did want to say --
15 JUDGE MAXA: So -- excuse me. So let me ask you kind of
16 the policy question that I asked counsel. So, I mean, we do
17 have this broad mandate. But, on the other hand, we all
18 know, and certainly it's not the case in this specific case,
19 the PRA can be abused; right? And the legislature has
20 struggled with that, particularly with prisoners and
21 whatnot.
22 It seems like an argument could be made that the
23 legislature intentionally wanted to tighten up this statute
24 of limitations, no discovery rule, one year, just because so
25 many cases are abused.

1 What are your thoughts about that?
2 MR. LOBSENZ: Well, if the legislature had wanted to say
3 no discovery rule, they could have said so. If the
4 legislature had wanted to say no equitable tolling, they
5 could have said so. They didn't say that.
6 It would produce all kinds of other issues about
7 separation of powers, I would think. If the legislature
8 actually wrote "the courts are forbidden to apply equitable
9 tolling or the discovery rule," I would argue that that's
10 another case; that that violates separation of powers.
11 And I guess I would close and point you back to some
12 language, again, in U.S. Oil. It's similar to language in
13 the very first case. The very first case about the
14 discovery rule was the sponge -- the surgery sponge case. A
15 woman can't look inside her own body and see that there's a
16 sponge in there. She brought suit 19 years after that
17 sponge was left in her, and the court said she could do
18 that. The legislature has not forbidden that. They've left
19 the courts free to decide what justice requires.
20 And in U.S. Oil, the court said "neither the purpose for
21 statute of limitations nor justice is served when the
22 statute -- by this statute when the information concerning
23 the injury is in the defendant's hands."
24 JUDGE GLASGOW: Thank you, Counsel. Your time has
25 expired.

1 MR. LOBSENZ: Thank you.
2 JUDGE GLASGOW: Thank you, Counsel, for your helpful
3 arguments this morning.
4 Bailiff, has Counsel checked in for the third case?
5 Yes. Okay. So we will take a moment to switch out
6 counsel and -- for the third case.
7 (May 10, 2022, proceedings concluded)
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