NO. 101769-3

SUPREME COURT OF THE STATE OF WASHINGTON

TERRY COUSINS,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

DEPARTMENT'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

This Court should reject Petitioner Terry Cousins' third request for its review of the dismissal of her Public Records Act (PRA) claims based on the statute of limitations. Nearly two years after the Department of Corrections (Department) informed Cousins that her request was closed, Cousins filed this lawsuit asking the superior court to award her 12.4 million dollars in penalties.

The superior court correctly concluded that Cousins' claims were barred by the PRA's one year statute of limitations in RCW 42.56.550(6), and the Court of Appeals affirmed that decision. These decisions were consistent with *Belenski v. Jefferson*, 186 Wn.2d 452, 378 P.3d 176 (2016), in which this Court adopted a clear accrual rule for all types of responses to public records requests, as well as the subsequent Court of Appeals decisions that have consistently concluded the PRA's statute of limitations is triggered when the agency informs the requester that the request is closed.

As this Court concluded in *Belenski*, any potential policy concerns created by the application of such a rule can be addressed by applying equitable tolling in appropriate cases. Here, in a portion of the superior court decision that Cousins has not challenged on appeal, the superior court rejected Cousins' arguments for equitable tolling. Instead of any evidence of bad faith, the superior court concluded the Department's "search was adequate, reasonable, and conducted in a manner to timely produce the requested records." And the Court of Appeals correctly noted that "there is no indication in the record that DOC's response was an attempt at manipulation." *Cousins v. Department of Corrections*, --- Wn. App. 2d ---, 523 P.3d 884, 890 (2023). Such a fact-based determination does not present an issue of substantial public importance.

Because the Court of Appeals decision was consistent with this Court's cases and does not present an issue of substantial public importance, this Court should deny Cousins' petition for review.

II. STATEMENT OF THE CASE

A. The Department Receives Cousins' Broad Request and Conducts an Extensive Search for Records

On July 21, 2016, a paralegal at a law firm submitted a public records request to the Department on behalf of Petitioner Terry Cousins. CP 1252-53. This broad request sought "[a]ny and all records regarding Renee A. Field" for a two-and-a-half year period. CP 1253. Field, who was Cousins' sister, had died in Department custody.

The Department acknowledged the request within five business days and provided an initial time estimate. CP 1256. It immediately began searching for responsive records by directing the request to various staff to identify and locate records. CP 1234-35. The request was routed to the two prisons where Field had been housed, as well as staff across the Department, including Health Services staff at the Department's Headquarters, staff in the Department's Business Services unit, staff in the Department's PREA (Prison Rape Elimination Act) unit, staff in the Department's Correspondence unit, and IT staff.

CP 1234-35; *see also* CP 1454-57 (list of staff who searched for records). The Department also sent the request to staff who handle medical and chemical dependency record requests, which are addressed outside of the PRA process. CP 1220-21.[1]

After the Department gathered records and received payment from Cousins, the Department provided its first installment of records in November 2016. CP 1237. After that, the Department continued to gather records and send them to Cousins in installments. CP 1237-42. The Department communicated with Cousins about her request throughout the process. CP 1459-1464 (timeline of the Department's communications with Cousins); CP 1749. For example, when Cousins expressed a concern about her ability to pay for an installment that was over 5,000 pages, the assigned Public Records Specialist communicated with Cousins and was able to

[1] Department staff sent Cousins the medical records on August 16, 2016, and the chemical dependency records on February 8, 2017. CP 1220-21.

reduce the number of pages by excluding certain records with Cousins' permission. CP 1240, 1324-25.

Over the course of the Department's response, at least eighty-two Department staff members were involved in the search for records, and those staff spent over ninety-three hours searching for and reviewing responsive records. CP 1454-57 (list of staff who searched). In its oral ruling, the superior court specifically concluded that the Department's "search was adequate, reasonable, and conducted in a manner to timely produce the requested records." CP 1794. After conducting this reasonable search, the Department closed the request on January 17, 2019, because it believed that it had fulfilled Cousins' request.[2] CP 1348. On that day, the Department sent Cousins a letter informing her that her request "is now closed." CP 1348.

[2] Cousins continues to repeat her claim that the request was closed for failure to pay. Cousins' Petition, at 7. That is incorrect. The request was closed due to the Department believing it had fulfilled her request. Cousins herself stated prior to the litigation that the Department closed her request due to the Department's belief that her request was completely filled. CP 1370; *see also*

B. After Cousins Files Her Lawsuit Almost Two Years Later, the Superior Court Dismisses Her Lawsuit Based on the Statute of Limitations

Cousins did not file a lawsuit by January 17, 2020. Instead, she waited until January 12, 2021, almost two years after her request was closed. CP 1. In addition to the January 17, 2019 closing letter, the Department attempted to respond to her questions in January 2019 and February 2019. CP 1352-58.[3] In

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CP 1523 (acknowledging in her deposition that she did not believe in January 2019 that her request had been closed for nonpayment).

[3] Based on Cousins' characterization of deposition testimony, she claims that the Department "admitted that it should have reopened Ms. Cousins' request at this point, but that it failed to do so." Cousins' Petition, at 9. This is not a fair characterization of the deposition testimony and the Department did not make such a concession. *See, e.g.*, RP, at 21 (counsel asking superior court to examine deposition transcripts rather than rely upon Cousin's characterization of such transcripts). Cousins also claims to have called the Department multiple times between June and September 2019. Cousins' Petition, at 9. Her own phone records undermined such testimony because they showed she had called a completely separate state agency, the Department of Enterprise Services. CP 115-16 (showing DES's telephone number, 360-407-9199), CP 1720-21. In light of the unchallenged superior court findings on equitable tolling, these inaccuracies are not material. However, this Court should be wary of relying upon Cousins' characterization of the testimony or the factual record in this case.

November 2019, the Department reiterated to Cousins in response to an email that her request "is and remains closed." CP 1243, 1360. Even when Cousins hired her current attorneys around July 2020, CP 1702, she still waited an additional five months to file this lawsuit.

Around the same time that she hired her current counsel, and eighteen months after the closure of her request, Cousins sent an email to the Department on July 7, 2020, identifying items that she believed should have been provided. CP 1244; CP 1389. The Department acknowledged this email and, in an effort to address Cousins' concerns, indicated that it would search for the specific records she identified. CP 1388. After consulting with her attorney, Cousins emailed the Department on July 22, 2020, indicating that, in addition to the documents identified in her original July 7, 2020 email, she was seeking a list of 29 additional items. CP 1244; 1385-87; CP 1577-78 (conceding that she consulted with her current attorneys regarding this email).

Cousins was adamant that she objected to the Department considering this as a new request. CP 1380; CP 1541.

To attempt to address Cousins' concerns, the Department then conducted another search for records responsive to Cousins' request using the thirty-five additional items that Cousins ultimately identified as records that she believed were missing. CP 1244-48; CP 1380-84. The Department's search again involved multiple staff across the Department's facilities and its headquarters. CP 1245-47. The Department provided Cousins whatever records it located in an attempt to assist her. CP 1249. The vast majority of these records had already been provided to Cousins.[4] CP 1493-1517 (chart identifying records and showing

[4] Cousins refers to documents that she claims have a print date of August 30, 2016. Cousins' Petition, at 12. Cousins does not describe these records, but would apparently have the Court draw the inference that they were key to learning information about her sister's death. However, an examination of these records shows that they are kiosk messages (a form of electronic message) between Department staff and Field. CP 120-425. The majority of the messages are facility-wide announcements for things like movie events, laundry, and programming. *See, e.g.*, CP 138-40. The messages were not on Cousins' list of items that

most had already been provided to Cousins); CP 1753. In the superior court, the Department provided a detailed analysis of the records and information about the search. CP 1466-1517; CP 1753. The Department also explained why some records that Cousins indicated she was seeking did not exist. CP 1221-22.

As noted above, Cousins filed this lawsuit on January 12, 2021, and on November 19, 2021, the superior court held a hearing on Cousins' motion to show cause. CP 1799. Following the hearing, the superior court dismissed Cousins' claims as barred by the statute of limitations. CP 1799-1802. The court found no basis to apply equitable tolling because Cousins did not show bad faith on the part of the Department. CP 1801. To the contrary, the Court found that the Department's "search was adequate, reasonable, and conducted in a manner to timely

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she sought in July 2020, and any suggestion that they contain information necessary to file a tort claim is rebutted by the messages themselves. Indeed, despite implying records were somehow material to the filing of a tort claim, Cousins has never identified any specific document to support that claim or otherwise explained why she chose to not file a tort claim.

produce the requested records." CP 1794. The court also found that Cousins did not provide an adequate explanation for failing to file the lawsuit sooner. CP 1801. The court did not address the application of a discovery rule because it was never raised by Cousins.

C. This Court Denies Direct Review and the Court of Appeals Affirms

Cousins appealed the superior court's ruling and sought direct review from this Court. She argued that direct review was appropriate based on her contention that this Court should overrule the Court of Appeals' decision in *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 464 P.3d 563 (2020). On June 8, 2022, a panel of this Court unanimously denied direct review and transferred the case to Division II of the Court of Appeals. While the case was pending before Division II, Cousins filed another motion to transfer the case to this Court and consolidate the case with *Earl v. City of Tacoma*, No. 56160-3-II, 22 Wn. App. 2d 1050, 2022 WL 2679522 (2022), *review denied*, 200 Wn.2d 1017

(2022). The Commissioner denied Cousins' motion on December 20, 2022, and she did not move to modify that ruling.

Division II of the Court of Appeals ultimately affirmed the dismissal based on the statute of limitations. *Cousins v. Department of Corrections*, --- Wn. App. 2d ---, 523 P.3d 884 (2023).[5] The majority recognized that this Court had adopted a rule that the PRA's statute of limitations begins to run upon an agency's definitive, final response to a request and that Court of Appeals case law had previously determined that a letter informing the requester that the request was closed was such a final, definitive response. *Cousins*, 523 P.3d at 888.

The Court of Appeals recognized that the statute of limitations may lead to a harsh result when a requester is completely unaware that an agency failed to produce certain records. *Cousins*, 523 P.3d at 890. However, the Court of

[5] One judge dissented. *Cousins*, 523 P.3d at 891 (Glasgow, J., dissenting). The dissenting judge would have adopted a multi-factored approach to determining when the statute of limitations begins to run. *Id.* at 892.

Appeals concluded such concerns were not present in this case because "Cousins could have and should have filed suit regarding what she believed to be DOC's deficient production before the statute of limitations expired in January 2020." *Cousins*, 523 P.3d at 890. The majority also rejected adoption of a discovery rule. Cousins now seeks review of this decision.

III. ARGUMENT

A. The Superior Court and the Court of Appeals Faithfully Applied This Court's Case Law on the PRA's Statute of Limitations

Public Records Act claims are subject to a one year statute of limitations. RCW 42.56.550(6). This limitations period was shortened from five years by the Legislature in 2005 in conjunction with the recodification of the PRA that same legislative session. Laws of 2005, ch. 483, § 5. In *Belenski v. Jefferson County*, 186 Wn.2d 452, 378 P.3d 176 (2016), the Court adopted a rule that the one year statute of limitations applies to "all possible responses under the PRA." *Belenski*, 186 Wn.2d at 460. In doing so, the Court chose to adopt a clear,

administrable rule that did not depend on how the agency responded. In that particular case, the agency informed the requester that there were no responsive records. This Court concluded that the agency's response triggered the statute of limitations regardless of whether the response was "truthful or correct." 186 Wn.2d at 461.

Belenski suggests that the PRA's statute of limitations should be interpreted in a manner that provides clear and workable rules. Since *Belenski*, the Court of Appeals has consistently determined that a letter informing the requester that the request has been closed is such a final, definitive response. *See Dotson v. Pierce Cnty.*, 13 Wn. App. 2d 455, 470-72, 464 P.3d 563 (2020), *review denied*, 196 Wn.2d 1018 (2020); *Ehrhart v. King Cnty*, No. 55498-4-II, 23 Wn. App. 2d 1016, 2022 WL 3754904, at *4 (2022), *review denied*, 200 Wn.2d 1029 (2023); *Earl v. City of Tacoma*, No. 56160-3-II, 22 Wn. App. 2d 1050, 2022 WL 2679522, at *5 (2022), *review denied*, 200 Wn.2d 1017 (2022).

Just like *Belenski* and *Dotson*, the Department's January 17, 2019 letter put Cousins on notice that the Department did not intend to produce additional records. The letter informed her that her request was closed. Given this, if Cousins was dissatisfied with the response—as she now indicates that she immediately was, *see* Cousins' Petition, at 7-8 (indicating she believed there were additional records in January 2019)—she was able to go to court to challenge it.[6] Indeed, when it came time for Cousins to file her motion to show cause and seek penalties in the superior court, Cousins asked the Court to calculate penalties from the January 17, 2019 letter because that letter was the "closure of her request." CP 656. Implicit in such an argument is recognition that

[6] Even the dissenting opinion in the Court of Appeals recognized that Cousins "could have brought her a public records lawsuit within one year of the initial closing letter." *Cousins*, 523 P.3d at 893. To conclude that Cousins could have brought a lawsuit at that point, however, inevitably recognizes that her claims accrued at that point. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 575, 146 P.3d 423 (2006) ("[A] cause of action accrues when the party has the right to apply to a court for relief."). And if her cause of action accrued at that point, the limitations period began to run, absent some kind of tolling.

she could have filed her PRA lawsuit once she received that January 2019 letter. She did not. Because she failed to file her lawsuit within one year of this closure, her claims were untimely.

Cousins argues that the Court of Appeals decision is inconsistent with *Belenski* and the plain language of RCW 42.56.550(6). Cousins' Petition, at 14-15. However, as discussed above, the Court of Appeals case law is based on *Belenski* and the consistent application of *Belenski*. *Belenski* itself was based on this Court's interpretation of the plain language of the PRA's statute of limitations and a need to adopt a consistent rule of finality "for all possible responses under the PRA." *Belenski*, 186 Wn.2d at 460. The Court of Appeals' decision to adopt such a clear rule in 2020 in *Dotson* and to continue to adhere to such a rule in subsequent cases does not conflict with *Belenski*.

Cousins also raises this Court's discussion in *Belenski* of the argument that a clear rule could incentivize an agency to intentionally withhold records, give a dishonest response, and let the statute of limitations run based on that response. Cousins'

Petition, at 15 (citing *Belenski*, 186 Wn.2d at 461). But, crucially, the Court in *Belenski* nonetheless decided to adopt a clear rule and recognized that equitable tolling was the solution to this concern. In this case, Cousins could have—and did in the superior court—attempt to make a showing under equitable tolling. CP 623-31, 1772-73. However, the superior court correctly rejected any application of equitable tolling to the facts of this case. CP 1802. Instead, it concluded that the Department's "search was adequate, reasonable, and conducted in a manner to timely produce the requested records, CP 1794, and again, Cousins does not challenge that determination on appeal.

Moreover, the record in this case does not support any conclusion that the Department attempted to intentionally withhold records. The superior court rejected that idea when it concluded that there was no bad faith on the part of the Department in handling the request and that the Department's search was adequate and reasonable. CP 1794, 1801. And, as the Court of Appeals noted, "there is no indication in the record that

DOC's response was an attempt at manipulation." *Cousins*, 523 P.3d at 890.

In a view that Cousins does not endorse in her petition for review, the dissenting judge would have adopted a different rule that would have amounted to a unique equitable tolling rule. Judge Glasgow would have adopted a multi-factored test to determine when a PRA claim accrues. *Cousins*, 523 P.3d at 892. This test would consider: (1) the extent of communications from the requester about the completeness of the agency's response; (2) any other notice the agency may have had that its response was incomplete; (3) the extent of additional searches and disclosures that were necessary after the response was initially closed; (4) the nature of any agency communications with the requester about allegations of an incomplete response; and (5) whether the requester diligently pursued any missing records they were aware of. *Id.* The dissent would have applied this multi-factored test in the first instance to conclude Cousins' claims were timely. *Id.* at 892-93.

Nothing in the plain language of RCW 42.56.550(6) supports this test for determining when the PRA's statute of limitations begins to run. This multi-factor test is inconsistent with this Court's approach in *Belenski*, adopting a clear and predictable rule for determining when the PRA's statute of limitations is triggered. Moreover, the various factors articulated could be fairly categorized as the diligence of the requester (factors 1 and 5) and the bad faith of the agency (factors 2, 3, and 4). These factors are already considered in the context of equitable tolling. *See Fowler v. Guerin*, 200 Wn.2d 110, 119, 515 P.3d 502 (2022). And, for purposes of this case, Cousins had an opportunity to litigate equitable tolling. After losing on that issue in the superior court, she has abandoned any argument regarding equitable tolling on appeal.

Finally, Cousins asserts that the *Belenski* court "did not intend to limit an agency's liability." Cousins' Petition, at 15. However, a statute of limitations inherently places limits on liability and the Legislature expressly shortened the PRA's

statute of limitations from five years to one year. This kind of limitation on liability makes particular sense in the PRA context because the PRA's statute of limitations does not foreclose a requester's ability to get records—the core purpose of the PRA. *Cousins*, 523 P.3d at 890. After all, a requester can always resubmit a request. Instead, it merely places a time limit on the requester's ability to file a lawsuit seeking monetary penalties related to a specific request.

Therefore, this Court should deny review of the Court of Appeals' faithful application of case law from this Court and the Court of Appeals.

B. The Court of Appeals' Interpretation of the Statute of Limitations Does Not Present an Issue of Substantial Public Importance

This Court has emphasized the importance of speedy review of PRA claims. *Kilduff v. San Juan Cnty.*, 194 Wn.2d 859, 871, 453 P.3d 719 (2019) (rejecting exhaustion requirement and recognizing a requester can file suit when an agency denies a public records request). The PRA's relatively short one year

statute of limitations likewise ensures that PRA claims are addressed in a timely manner. This result is consistent with the important purposes of statutes of limitations more generally to provide finality and protect against stale claims. *See Stenberg v. Pac. Power & Light Co.*, 104 Wn.2d 710, 714, 709 P.2d 793 (1985). This need for clarity and finality led this Court to adopt an interpretation of the PRA's statute of limitations that applied to all possible responses by an agency to a public records request. *Belenski*, 186 Wn.2d at 460.[7]

Cousins argues that the Court of Appeals' consistent interpretation of the PRA's statute of limitations is an issue of substantial public importance because the rule encourages agencies to silently withhold records. Cousins' Petition, at 21. This argument presumes that agencies will knowingly violate the PRA. The Court should not make the presumption. *See, e.g.*,

[7] To the extent Cousins believes the current one-year PRA statute of limitations should be altered, these arguments are best made to the Legislature.

State ex rel. Hodde v. Superior Court of Thurston Cnty., 40 Wn.2d 502, 515, 244 P.2d 668 (1952) ("It has long been the rule in this state that it is to be presumed that public officials act, or will act, within the limits of their authority and in good faith."). Courts should not base their interpretation of the PRA's statute of limitations on the proposition that agencies will knowingly violate the PRA.

In fact, Cousins does not explain how this policy argument makes sense under the facts of this case. As the Court of Appeals correctly noted, Cousins expressed almost immediate dissatisfaction with the Department's response, and she acknowledged that she knew that she had not received some records that she believed existed when the Department closed her request in January 2019. Cousins' Petition, at 7-8. There is no evidence that the Department intentionally delayed the production of responsive records to prevent Cousins from filing a timely lawsuit.

Additionally, Cousins' rule would punish the Department for producing records in 2020 by concluding that the Department's actions revived her time barred PRA claims. Cousins' proposed rule would incentivize agencies to not engage with a requester after the statute of limitations passed to avoid reviving a time barred claim. In other words, it would have the effect of discouraging communication and collaboration between the requester and agency.

Ultimately, an agency who intentionally withholds clearly responsive records in response to a PRA request runs the risk of a requester filing suit within the one year period and receiving substantial penalties. It also runs the risk of a court applying equitable tolling to an otherwise time barred claim based on the agency's bad faith. Existing case law does not incentivize agencies to intentionally withhold records as a result. And the superior court here correctly rejected the application of equitable tolling. Thus, this case does not present an issue of substantial public interest warranting this Court's review.

C. Review to Address the Discovery Rule Is Not Warranted When Application of a Discovery Rule Would Not Render Cousins' Claims Timely

Cousins' argument that the discovery rule should apply in PRA cases, Cousins' Petition, at 22-27, does not warrant this Court's review. It finds no support in the case law, would not affect the outcome of this case, and in any event is not preserved for appeal.

Courts do not adopt a discovery rule for a statute of limitations when the Legislature has clearly delineated the event that starts the running of a limitations period. *In re Parentage of C.S.*, 134 Wn. App. 141, 139 P.3d 366 (2006). Since the Public Records Act—at that time called the Public Disclosure Act—was adopted in 1972, no appellate court had applied a discovery rule to a PRA claim. This Court was faced with an argument for a discovery rule in *Belenski*, Br. of Pet., at 11-16, *Belenski v. Jefferson Cnty*., 186 Wn.2d 452 (2016), but it declined to adopt such a rule. And since at least 2018, the Court of Appeals has rejected the application of a discovery rule to the PRA. *See*

Strickland v. Pierce Cnty., No. 75203-1-I, 2 Wn. App. 2d 1018, 2018 WL 582446, at *5-6 (2018).[8] Although the PRA has been amended a number of times over the years, including amendments to the statute of limitations, the Legislature has not added a discovery rule to the PRA. This Court should not grant review to adopt such a rule.

Moreover, this case would be a particularly poor vehicle to adopt a discovery rule because applying a discovery rule would not result in Cousins' claims being timely. Under a discovery rule, a cause of action accrues when the plaintiff knew or should have known the essential elements of a cause of action. *Dotson*, 13 Wn. App. 2d at 472. In this case, Cousins was aware that the Department had closed the request on January 17, 2019, and she was aware of the records that the Department had

[8] This case is unpublished. Consistent with GR 14.1, the Department informs the Court that this decision has no precedential value, is not binding on any court, and is cited only as persuasive authority as the Court deems appropriate. *Crosswhite v. Wash. State Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 544, 389 P.3d 731 (2017).

produced. CP 1370. She also has indicated that she was almost immediately aware of records that she believed should have been produced. Cousins' Petition, at 7-8. Yet she waited twenty-three months after she knew the essential elements of her cause of action to file her lawsuit. As such, her claims would still be untimely, even with a discovery rule.

Finally, Cousins did not make this discovery rule argument to the superior court. Courts do not generally consider arguments raised for the first time on appeal. RAP 2.5(a). In the superior court, Cousins focused her arguments on equitable tolling. The only reference to a discovery rule was buried in a footnote in one of her briefs. CP 619. The Court of Appeals decision recognized that Cousins had not argued for a discovery rule in the superior court, although it nonetheless dismissed the argument based on pre-existing case law. *Cousins*, 523 P.3d at 890. Cousins' unpreserved discovery rule argument does not warrant this Court's review.

IV. CONCLUSION

Because the Court of Appeals faithfully applied existing case law and its decision does not present issues of substantial public importance, the Court should deny Cousins' petition for review.

This document contains 4,562 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 12th day of April, 2023.

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CERTIFICATE OF SERVICE

I certify that on the date below I filed the DEPARTMENT'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW with the Clerk of the Court using the electronic filing system, which will notify the following electronic filing participants:

JOSEPH ROBERT SHAEFFER joe@mhb.com

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

EXECUTED this 12th day of April, 2023 at Olympia, WA.

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