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No. 42647-1-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

AMBER WRIGHT,

Respondent.

PETITION FOR REVIEW

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I. INTRODUCTION

The Public Records Act, RCW 42.56, ("PRA") is a strongly worded mandate for broad disclosure of public records. *Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane*, 172 Wn.2d 702, 714, 261 P.3d 119, 125 (2011). Agencies are required to disclose any public record on request unless it falls within a specific exemption. RCW 42.56.070(1). The burden is on the agency to show a withheld record falls within an exemption, to identify the document withheld and to explain how the specific exemption applies. *See Sanders v. State*, 169 Wn.2d 827, 845–46, 240 P.3d 120 (2010).

Petitioner Amber Wright, an abused juvenile seeking access to public records related to DSHS's handling of her case, seeks review of the Court of Appeals' decision denying the application of the PRA to her document request despite the acknowledgement that (1) the documents she requested were public records; (2) DSHS withheld the records from her for over two years; and (3) DSHS failed to provide an exemption log justifying its withholding. The Court of Appeals reached its conclusion by holding that the "other statutes" exemption of the PRA applies and further finding that the "other statute" at issue –RCW 13.50– preempted both compliance with the PRA and the award of PRA sanctions. That ruling is in direct conflict with this Court's prior application of the "other statutes"

exemption and creates a large hole in the PRA that permits the wrongful and silent withholding of public records without sanction.

II. IDENTITY OF PETITIONER

The Petitioner is Amber Wright, plaintiff in the trial court and respondent in the Court of Appeals.

III. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals issued its published opinion in *Wright v. DSHS*, No. 42647-1-II, on September 10, 2013 ("Decision"). A copy of the Decision is attached hereto as Appendix A.

IV. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred when it held that Amber was not entitled to penalties and attorney fees under the PRA despite DSHS wrongfully and silently withholding public records for two years?
2. Whether the Court of Appeals erred holding that the Juvenile Records Act "preempted" the procedures and sanctions of the PRA though (1) the procedures under the Juvenile Records Act do not apply; (2) sanctions for non-disclosure under the Juvenile Records Act are not available; and (3) the result is to deprive the records requestor of any remedy for DSHS's admitted wrongdoing?

3. Whether the Court of Appeals erred in concluding that DSHS was not required to inform Amber that it was withholding her records via an exemption log?
4. Whether the Court of Appeals erred in applying the wrong standard of review to the trial court's findings of fact?

V. STATEMENT OF THE CASE

A. Amber's History of Abuse.

In August 2004, DSHS received the first of several warnings that Amber's father was physically and sexually abusing her, her brother, and several underage children. CP 2. Despite numerous reports from multiple sources, including local law enforcement, DSHS failed to perform a meaningful investigation and returned Amber and her younger brother to their abusive father. After enduring eight more months of abuse, Amber escaped on foot. She again reported her abuse and Amber's father was arrested and charged with multiple crimes. He pled guilty to three counts of child molestation in the first degree and was sentenced to prison. *Id.*

B. Amber Requests Her Records Pursuant to the Public Records Act and Chapter 13.50 RCW.

After Amber escaped from her abuser's home, she wanted to know why DSHS failed to take steps to protect her and her brother. CP 2. On March 26, 2007, Amber made her first records request to DSHS. She sought "her entire DSHS file" pursuant to both the PRA and RCW 13.50

RCW. CP 11. On May 4, 2007, Amber submitted a signed "Consent to Exchange Confidential Information" as requested by DSHS. CP 152.

On June 1, 2007, DSHS disclosed portions of Amber's Children's Administration record, pursuant to RCW 13.50. CP 156-57. DSHS's letter transmitting Amber's records demonstrates that it withheld and/or redacted numerous records from its production but did not provide the legal authority on which it relied when withholding or redacting this information. *Id.* DSHS provided no exemption log identifying the documents withheld. RP 101 (8/31/2011).

On May 20, 2008, Amber submitted a second, more detailed, records request, again pursuant to both the PRA and RCW 13.50. CP 11-17. Amber's May 20, 2008 request also encompassed all of her DSHS records. CP 11. Amber also sought additional records including those used by DSHS to investigate and resolve reports that she was the victim of physical and sexual abuse:

> Any and all documents associated with CPS referral ID #1543537, dated 08/18/2004. This includes, but is not limited to any and all intake documents, any and all notes, e-mails, letters, faxes, photographs and/or other documentation generated or received by Department personnel during investigation of this complaint. This request also includes, but is not limited to, ***any documents relating to the resolution of this complaint*** including reports, compliance agreements, revocation letters, etc.

CP 13 (emphasis supplied). On May 28, 2008, DSHS acknowledged receipt of Amber's second public records request and indicated it would produce Amber's records in 120 business days. CP 27. DSHS informed Amber that pursuant to RCW 13.50.100(7), it would not provide records related to other children. *Id.* DSHS, however, did not make a determination under the statute to withhold any of Amber's records. *Id.* From July 2008 through November 2008, DSHS occasionally provided records in response to Amber's May 2008 Public Records Act request. On November 14, 2008, DSHS sent a letter to Amber stating that its response to her May 2008 records request was complete. CP 466. This letter also did not inform Amber that any of her records were being withheld by the agency pursuant to an agency determination under RCW 13.50.100(7). DSHS did not provide an exemption log identifying the records that it was withholding and/or redacting or explaining the applied exemptions.

C. The Negligence Lawsuit

In February 2009, after being assured that DSHS completed its response to her two records requests, Amber filed a negligence lawsuit against DSHS. This lawsuit related to the failed child abuse investigation undertaken by DSHS. During discovery, critical evidence was discovered that should have been produced in response to Amber's records requests. Specifically, DSHS had silently withheld: (1) a recorded interview with

Amber disclosing to DSHS the horrific abuse she endured; (2) the child abuse investigation protocols that governed DSHS's investigation and resolution of Amber's case; and (3) a "PRIDE" manual for placement of children with out-of-home relatives that dictated where Amber should have been placed during the resolution of her allegations.

The recorded interview and a transcript were finally provided to Amber on December 9, 2009, over two years after she first requested them. DSHS did not dispute the records should have been provided in response to Amber's earlier requests. CP 468. The PRIDE Manual and Investigation Protocols, both of which were responsive to Amber's May 2008 PRA request, were not disclosed until March of 2010. DSHS did not disclose any of these documents until long after Amber's expert witnesses in her tort suit had disclosed their written opinions.

D. The Public Records Act Lawsuit

Because it was clear that DSHS had failed to disclose these records in response to Amber's records requests, Amber filed a Public Records Act lawsuit on April 6, 2010. CP 1. The PRA case went to trial on August 31, 2011. On September 1, 2011, the trial court entered Findings of Fact and Conclusions of Law ruling that DSHS violated the Public Records Act. CP 795-797. After hearing testimony from several DSHS witnesses, the court ruled that the agency's conduct in silently withholding

such clearly responsive records amounted to an "unbelievable obstruction of justice". RP 57 (9/1/2011). The trial court awarded statutory penalties, costs and attorney fees to Amber. DSHS appealed.

E. The Court of Appeals' Decision

The Court of Appeals reversed. First, applying a *de novo* standard of review, the Court of Appeals ruled that DSHS had not violated the PRA by withholding the PRIDE Manual and the 2004 Pierce County Investigation Protocols[1] because Amber's May 2008 request did not encompass those documents. Though Amber's request included "any documents relating to the resolution" of Amber's disclosure, the Court held that the request was not sufficiently specific to trigger DSHS's obligation to produce the manual and protocols. Decision 8-9. In so ruling, the Court of Appeals disregarded the uncontroverted testimony that the manual and the investigation protocols were utilized to resolve Amber's CPS investigation. RP 50, 64-65 (8/31/2011).

The Court went on to hold that although the interview met the statutory definition of public records under the PRA, DSHS did not violate the Act when it silently withheld these records for over two years. Instead, the Court held "because the legislature has prescribed RCW 13.50 as the sole method for obtaining juvenile records maintained under that

[1] The CPS investigation involving Amber occurred in Pierce County in 2004.

chapter, we hold that (1) the PRA did not apply to DSHS's production of her interview recording and transcription; (2) DSHS did not violate the PRA in failing to disclose these requested items until it later found them; and (3) Wright was not entitled to any PRA awards for DSHS's nonexistent noncompliance." Decision at 11-12. Finally, the Court concluded that "if Wright believed that DSHS had improperly denied her access to her recorded interview, she had to comply with the process set forth in RCW 13.50.100(8) which requires filing a motion in juvenile court requesting access to these records." Decision at 13. The Court of Appeals did not address DSHS's failure to provide an exemption log in response to either of Amber's PRA requests.

VI. ARGUMENT

This Court should grant review because the Court of Appeals' decision conflicts with prior decisions of this Court and the Court of Appeals and raises an issue of substantial public interest. RAP 13.4(b).

A. The Decision Is In Conflict with Decisions of the Supreme Court and the Court of Appeals.

1. The Decision Conflicts with Supreme Court and Court of Appeals Authority Requiring a PRA Penalty When Documents are Wrongly Withheld.

Under the PRA, records are never exempt from disclosure, only production, so an adequate search is required in order to properly disclose responsive documents. *Neighborhood Alliance*, 172 Wn.2d at 721. If the

search identifies documents constituting a public record, the responding agency considers whether the record is exempt from production under the PRA. If an exemption applies, the agency is to prepare an exemption log identifying the document that is not being produced and the exemption being claimed. The log informs a citizen that a document is being withheld from production and allows the citizen timely to challenge the claim of exemption. *Id.* at 746 ("An undisclosed record results in [] prohibited silent withholding...").

The PRA "treats a failure to properly respond as a denial." *Id.* Accordingly, this Court and the Courts of Appeals have repeatedly held that the PRA requires the trial court to assess a daily penalty where the agency erroneously withholds a requested public record. *Yousoufian v. Office of Ron Sims,* 152 Wn.2d 421, 440, 98 P.3d 463 (2004); *see also Neighborhood Alliance,* 172 Wn.2d at 727 (penalty provisions of PRA are triggered when agency fails to properly disclose and produce records); *Freedom Found. v. Washington State Dep't of Transp., Div. of Washington State Ferries*, 168 Wn. App. 278, 303, 276 P.3d 341, 353 (2012).

Here, the Court of Appeals and trial court found, and DSHS conceded, that DSHS improperly and silently withheld public records, specifically Amber's interview, for over two years. Under the plain terms

of the PRA and the case law interpreting it, Amber is entitled to penalties for this wrongful withholding.

Despite this authority, the Court of Appeals held that Amber is not entitled to PRA penalties. The Court of Appeals reasoned that RCW 13.50, the Juvenile Records Act, constitutes an "other statute" under the PRA and controls both whether a record is producible and the penalties for wrongfully withholding the record. In this regard, the Decision conflicts with Supreme Court and Court of Appeals authority setting forth how "other statutes" such as RCW 13.50 interact with the remedial and enforcement provisions of the PRA.[2]

Specifically, this Court and the Court of Appeals have repeatedly held that "other statutes" such as RCW 13.50 *supplement* the PRA and are incorporated into it as additional exemptions to disclosure. *See Ameriquest Mortg. Co v. State*, 170 Wn.2d 418, 439-40, 241 P.3d 1245 (2010). But no one disputes that the public record of Amber's interview was subject to disclosure and was not exempt from disclosure under RCW 13.50.[3] Since DSHS, the responding agency, acknowledged that the requested document

[2] "The PRA requires that each agency make all public records available for public inspection and copying." *Deer v. Dep't of Soc. & Health Servs.*, 122 Wn. App. 84, 90, 93 P.3d 195 (2004) (quoting former RCW 42.17.260(1)). RCW 42.56.070(1) makes an exception for records that fall within specific exemptions in the PRA or "other statute which exempts or prohibits disclosure of specific information or records." *In re Dependency of KB*, 150 Wn. App. 912, 919, 210 P.3d 330, 333 (2009).

[3] Under RCW 13.50.100(7), DSHS "shall, upon request" provide abused juveniles like Amber with their own records, except in two limited situations, which do not apply. That undisputedly did not happen here.

was a public record and subject to disclosure, the "other statutes" exemption should not have come into play.

The Court of Appeals then compounded its error by finding that the procedures and sanctions under the Juvenile Records Act preempt the provisions of the PRA. But there is no precedent in this Court for holding that an "other statute" can act to preempt the procedures and sanctions under the PRA.[4] The Court of Appeals "preemption" holding is erroneous because (1) the procedures under the Juvenile Records Act do not apply; (2) the sanctions for non-disclosure under the Juvenile Records Act are not available; and (3) it results in DSHS avoiding any penalty for wrongfully and silently withholding a public record.

The procedures and sanctions under the Juvenile Records Act do not apply here. RCW 13.50.100(8) enables a requester to file a motion in juvenile court to obtain records when a requester disagrees with an agency's withholding under subsection (7).[5] Below, DSHS conceded that the motion procedure set forth in subsection (8) applies only after an agency determination under subsection (7). App. Br. at 30, n.30; *see In re*

[4] Undercutting the Decision, the PRA states "in the event of a conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern." RCW 42.56.030.

[5] A juvenile or his or her parent denied access to any records following an agency determination under subsection (7) of this section may file a motion in juvenile court requesting access to the records. The court shall grant the motion unless it finds access may not be permitted according to the standards found in subsection (7)(a) and (b) of this section. RCW 13.50.100(8).

Dependency of KB, 150 Wn. App. at 921 ("RCW 13.50.100(8) only applies following an agency determination under RCW 13.50.100(7)".) Likewise, the Juvenile Records Act provides sanctions for non-disclosure only to "parties" to dependency and termination proceedings, which Amber was not. *See* 13.50.100(10) ("If the party prevails, he or she shall be awarded attorneys' fees, costs, and an amount not less than five dollars and not more than one hundred dollars for each day the records were wrongfully denied.") The sanctions mirror the sanctions under the PRA, but have very limited applicability.

It is undisputed that Amber requested her interview pursuant to both RCW 13.50 and the PRA, and DSHS never made a determination under subsection (7), or the PRA, to withhold her interview. Despite this, the Court of Appeals ruled that Amber should have "filed a motion" under subsection (8) pertaining to her interview—a motion that RCW 13.50 does not allow under these circumstances. Decision at 13. The Court of Appeals extinguished Amber's rights under the PRA when no "other statute" applied to prevent disclosure of her record. And the Court of Appeals effectively denied Amber any relief despite DSHS's wrongful withholding of a public record for two years.

If a preemption analysis is appropriate in some circumstances, it is not appropriate here. The Court of Appeals did not even engage in the

proper analysis assuming there is some kind of conflict between the PRA and the Juvenile Records Act. It is a well-established rule in Washington that the Courts "do not favor repeal by implication, and where potentially conflicting acts can be harmonized, we construe each to maintain the integrity of the other." *City of Spokane v. Rothwell*, 166 Wn.2d 872, 876, 215 P.3d 162 (2009). Here the application of the PRA and Juvenile Records Act can be reconciled. Since the Juvenile Records Act provides no process for redress for DSHS's wrongful withholding of public records, the PRA process applied. And there is no conflict regarding the relief to which Amber would be entitled. Under both the PRA and Juvenile Records Act, Amber as prevailing party is entitled to attorney's fees and a penalty of not more than one hundred dollars for each day the records were wrongfully denied.

Freedom Foundation presents analogous circumstances. There, the Washington State Department of Transportation (WSDOT) made improper redactions of requested drug testing records because it claimed the information was confidential under a federal regulation. The trial court and Court of Appeals agreed that the regulation in question constituted an "other statute" under the PRA, such that some of the information was properly withheld. However, WSDOT had also withheld information that was not exempted by the federal regulation. The Court of

Appeals held that WSDOT was required to pay penalties for the wrongfully withheld information. *Freedom Found*, 168 Wn. App. at 297-98. The same is true here. Amber's interview was not properly withheld under RCW 13.50, and could not have been, given that Amber is statutorily entitled to her own records. Accordingly, the fact that RCW 13.50 exists as an "other statute"—albeit one inapplicable to Amber's interview—does not render the remainder of the PRA inoperable.

Moreover, the agency did not invoke RCW 13.50 to withhold Amber's interview. If a record is exempt pursuant to an "other statute", an agency must invoke the exemption, via a detailed exemption log, to inform a requester why a request is denied. *See Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 538, 199 P.3d 393, 399 (2009). Here, DSHS did not contend that RCW 13.50 prevented disclosure of any of Amber's records. As such, nothing in RCW 42.56.070(1) renders the penalty provisions of the PRA inapplicable, particularly where, as here, the "other statute" does not prohibit disclosure or establish alternate procedures for enforcement or remedies.

The Court of Appeals relied on *In re Dependency of KB* and *Deer v. DSHS*, but these cases are inapposite. In *KB* and *Deer*, there was an applicable provision of RCW 13.50 that could function as an "other

statute" either to exempt the records from disclosure or provide alternate remedial provisions.

In *KB*, the requester was a party to a dependency guardianship proceeding. She requested records from DSHS, but they were not provided until she filed a PRA show cause motion to obtain them. The requester then sought penalties under the PRA for the delay in producing her records. The Court of Appeals held that the sanctions provision in RCW 13.50.100(10), which "mirrors" PRA sanctions, was applicable to parties to a dependency guardianship proceeding. However, because the requester had not followed the requirement in RCW 13.50.100(10) of requesting records via civil discovery, she was not entitled to sanctions based on the agency's delay in producing them. Here, there is no dispute that Amber is *not* a party to a pending guardianship, dependency or termination proceeding with DSHS. Unlike the requester in *KB*, she could not have sought sanctions under subsection (10). Accordingly, *KB* does not support the Decision.

Likewise, in *Deer*, the requester sought juvenile records via the PRA only. The *Deer* court held that as an "other statute", RCW 13.50 contains the exclusive process for obtaining juvenile records. *Deer*, 122 Wn. App. at 92–93. As such, the requester could not circumvent the process in RCW 13.50 by using a PRA show cause action. Again, *Deer* is

inapplicable here because Amber did employ the process under RCW 13.50 as well as the PRA to request her records. Moreover, as DSHS conceded, and *KB* holds, Amber could not use the enforcement process set forth in RCW 13.50.100(8) to obtain her interview because DSHS never informed her pursuant to subsection (7) that they were withholding it.

In sum, in holding that no PRA remedies were available to Amber, despite the legal inapplicability of any of the exemption, remedial or enforcement provisions in RCW 13.50, the Decision conflicts with decisions from this Court and the Court of Appeals requiring the payment of penalties when records are wrongfully withheld.

2. The Decision Conflicts with Supreme Court and Court of Appeals Authority Requiring Preparation of an Exemption Log.

After taking testimony from multiple witnesses, the trial court ruled that DSHS violated the PRA by failing to provide an exemption log in response to either of Amber's PRA requests. CR 566. DSHS admitted it did not provide such a log, and likewise conceded that it never informed Amber that it was withholding her interview, despite Amber's proper request for her "entire DSHS file." Whether it is characterized as a failure to respond or an inadequate search, the fact remains that Amber was wrongfully denied access to her interview by DSHS. This is a violation of the PRA and the trial court properly ruled that Amber was entitled to

mandatory penalties. *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 270, 884 P.2d 592, 607 (1994) ("*PAWS II*") ("The Public Records Act clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request.").

The Court of Appeals did not address this independent violation of the PRA, despite this Court's well-established authority holding that a failure to disclose responsive records is akin to an improper denial. *See Neighborhood Alliance*, 172 Wn. 2d at 721; *Rental Housing*, 165 Wn.2d at 538 ("RCW 42.56.210(3) requires identification of a specific exemption and an explanation of how it applies to the individual agency record."). DSHS's "silent withholding" of Amber's interview precluded her from seeking any further relief under either RCW 13.50 or the PRA and constitutes a clear violation of both statutes. Review is warranted.

3. The Decision Conflicts with Supreme Court and Court of Appeals Authority in Applying the Wrong Standard of Review.

The Court of Appeals improperly applied a *de novo* standard of review to the trial court's determination that Amber's PRA request did not encompass the PRIDE Manual and the Investigation Protocols. Decision at 6. This contradicts Supreme Court and Court of Appeals authority applying a substantial evidence standard to a trial court's findings when based on live testimony. As this Court held: "Where the record on both

trial and appeal consists of affidavits and documents . . . the appellate court stands in the same position as did the trial court in reviewing the record." *Spokane Police Guild v. Wash. State Liquor Control Bd.*, 112 Wn.2d 30, 35–36, 769 P.2d 283 (1989). However, "when a trial court hears live testimony and judges the credibility of the witnesses, appellate courts consistently afford deference to its determinations of fact." *Zink v. City of Mesa*, 140 Wn. App. 328, 336, 166 P.3d 738, (2007) (citing *Org. to Preserve Agric. Lands v. Adams County,* 128 Wn.2d 869, 882, 913 P.2d 793 (1996) (applying substantial evidence review following trial on issues under Open Public Meetings Act, RCW 42.30)). Accordingly, the standard of review for "findings of fact based on the testimonial record [is] to determine if there is substantial evidence to support them." *Zink*, 140 Wn. App. at 337 (citing *PAWS II,* 125 Wn.2d at 252–53). The Decision is in conflict with this authority because it applied a *de novo* standard to the trial court's factual findings.

B. The Decision Raises an Issue of Substantial Public Importance.

The Decision raises an issue of substantial public importance because it creates a gaping hole in the PRA's disclosure mandate as applied to juvenile justice records. Though it is undisputed that Amber was entitled to her interview, the Court of Appeals held that Amber is not entitled to statutory penalties for DSHS's failure to provide it, even though

no other remedial or enforcement provision of RCW 13.50 applies to Amber's request. The Decision creates from whole cloth new exceptions to the PRA enforcement and remedial provisions which permit DSHS to silently and wrongfully withhold juvenile records that it is otherwise statutorily mandated to release, all without any penalty. A class of requesters who are uniquely statutorily entitled to their records (namely abused juveniles seeking their own records under RCW 13.50) now lack a remedy or enforcement mechanism to access these public records whenever DSHS fails to make a determination under subsection (7) that the juvenile is not entitled to their records. And the injustice is compounded because DSHS does not even have to inform the juvenile that it is withholding records. The juvenile is prevented from utilizing the remedial portions of both the Juvenile Records Act and the PRA.

As explained in *In re Dependency of KB*, "RCW 13.50.100 contains two remedial provisions which apply when DSHS fails to provide requested records, RCW 13.50.100(8) and (10)." 150 Wn. App. at 921. But RCW 13.50.100(8) "only applies following an agency determination under RCW 13.50.100(7)", and subsection (10) only applies "when there is already pending litigation" between the requester and DSHS, in the form of a dependency, guardianship, or termination proceeding. *Id.* at 921, 923. If the PRA does not otherwise fill in the holes to provide

penalties, this creates the "absurd result" described in *KB,* where a requester who is undisputedly entitled to her records under RCW 13.50 and the PRA is not entitled to any sanctions when DSHS silently withholds them.

Though both the PRA and RCW 13.50 require disclosure to juveniles seeking their own records, under the Decision, juveniles who are statutorily entitled to their own records will now lack any actionable remedy when DSHS wrongfully withholds them. Review should be granted to address this issue of substantial importance.

VII. CONCLUSION

For Amber, the Decision leaves her without recourse for the wrongful withholding of the most damning evidence of DSHS's negligence. Amber was entitled to her interview under RCW 13.50, and DSHS admittedly failed to provide it or even disclose it for nearly two years. This failure violates the PRA. Likewise, the Court of Appeals applied the wrong standard when it held that Amber's request did not encompass the PRIDE Manual or Investigation Protocols. The Decision conflicts with numerous decisions of this Court and the Court of Appeals, as well as presents an issue of substantial public importance. The petition for review should be granted.

RESPECTFULLY SUBMITTED this 10th day of October, 2013.

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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

AMBER WRIGHT, Respondent, v. STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Appellants.	No. 42647-1-II PUBLISHED OPINION

HUNT, P.J. — The Department of Social and Health Services (DSHS) appeals the trial court's final order and finding that DSHS violated the Public Records Act (PRA)[1] [2] by failing to provide certain records in response to Amber Wright's PRA requests. DSHS also appeals the trial court's award of penalties, litigation costs, and attorney fees to Wright. DSHS argues that (1) of the four records that Wright alleges it failed to disclose, two of them are not governed by the PRA and the other two were time-barred; and (2) the trial court erred in awarding PRA damages, attorney fees, costs, and penalties to Wright for these perceived violations. We hold that the PRA does not apply to chapter 13.50 RCW juvenile records and that Wright never

[1] Chapter 42.56 RCW.

[2] While this case was pending, the legislature amended several pertinent statutes, which amendments do not affect our analysis. Thus, in this opinion, we cite the current statutes unless we indicate otherwise.

submitted a PRA request for the other records that she now claims DSHS impermissibly withheld. We reverse the trial court's final order finding that DSHS violated the PRA and the trial court's award of attorney fees, costs, and penalties to Wright.

FACTS

I. PUBLIC RECORDS REQUESTS

A. First Request, March 26, 2007

On March 26, 2007, Amber Wright wrote to the State of Washington Department of Social and Health Services (DSHS), requesting "a copy of her entire DSHS file." Clerk's Papers (CP) at 145. Within several days, DSHS replied, informing Wright that she would have to sign a release to obtain the records and that she would receive them under chapter 13.50 RCW.[3] Wright responded with a signed consent form; Diane Fuller, a supervisor at DSHS, then requested clarification:

> [I]f you are seeking all DSHS records I will need to forward your request to the other agencies . . . . My understanding is that you are only seeking Children's Administration records and [I] will begin processing your request. If I am in error and you wish these other agencies to [be] contacted please let me know.

CP at 154.

Approximately one month later, on June 1, DSHS provided Wright with her Children's Administration record, which consisted of five volumes; DSHS also provided page numbers and explanations for any redactions.

[3] Chapter 13.50 RCW governs the maintenance and release of dependency records by juvenile justice or care agencies. *In re Dependency of J.B.S.*, 122 Wn.2d 131, 134, 856 P.2d 694 (1993).

B. Second Request, May 20, 2008

Over one year later, on May 20, 2008, Wright sent a second request to DSHS, stating, "Pursuant to [chapter] RCW 42.56 *et seq.* and [chapter] RCW 13.50 *et seq.*, please consider this an official request pursuant to the Washington State Public Disclosure Statutes for any and all documents relating to Amber Wright." CP at 11. More specifically the letter requested:

> [C]opies of any and all documents already produced to *any* person or agency regarding Amber Wright. . . . This includes, but is not limited to, the following documents:
> 1. Any and all documents produced to the Pacific County Prosecutor's Office;
> 2. Any and all documents produced to the Sumner Police Department and
> 3. Any and all documents produced as a result of any prior public disclosure and/or records request not listed above.

CP at 11.

Approximately one week later, DSHS notified Wright that (1) her Children's Administration records were confidential and exempt from public disclosure under chapter 42.56 RCW but her authorization permitted disclosure under chapter 13.50 RCW; and (2) she could expect to receive the other requested records within 120 business days.[4] From July through November 2008, DSHS provided Wright with copies of her requested records. On November 14, 2008, DSHS notified Wright that her records request was complete. Wright did not follow

[4] Wright responded that DSHS's timeframe was "unacceptable" and that if she did not receive the records within 40 days of her original request date, she would sue DSHS. CP at 30. DSHS informed Wright that it would process her request as quickly as possible, emphasizing, however, that it (1) did not have the "staff or the resources available to process all pending requests at the same time," (2) was "not permitted by law to distinguish between requesters," and (3) "[could not] give [Wright's] request priority over other pending requests." CP at 32. DSHS further noted that Wright's request was considered a "large volume request," comprising seven volumes. CP at 33. Wright did not file a PRA action against DSHS at that time.

up with any additional requests or questions after receiving this last disclosure. Nor did she file a PRA lawsuit.

In December 2009, under RCW 13.50.100, DSHS provided a transcribed copy of a 2005 CD-recorded interview with Wright. DSHS informed Wright that the recording had not been included in its response to Wright's May 20, 2008 request because the interview had "only recently been located," and DSHS was trying to determine how this recording had been missed in its original search. CP at 221.

II. PROCEDURE

On April 6, 2010, Wright sued DSHS for alleged violations of the PRA. She asserted that DSHS had failed to produce certain required documents in response to her PRA requests, such as the 2005 interview and "other critical evidence, including investigative protocols and policies, requested by [Wright]." CP at 4. At trial, Wright claimed that DSHS should have provided its Child Sexual and Physical Abuse Investigation Protocols (investigation protocols) and its Preservice Training for Prospective Foster Parents and Adoptive Parents PRIDE manual (PRIDE manual) in response to her PRA requests, and that its failure to do so entitled Wright to PRA penalties.

In January 2011, DSHS moved for partial summary judgment, arguing that (1) all of the records DSHS provided in response to Wright's March 26, 2007 request were child welfare records, governed by RCW 13.50.100 and, thus, not subject to her PRA action; and (2) all of the records that DSHS had provided in response to her May 20, 2008 request, except for 69 pages,[5]

[5] These 69 pages are not at issue in this appeal.

were child welfare records, similarly governed by RCW 13.50.100. Shortly thereafter, the State brought a second motion for summary judgment, arguing that Wright's lawsuit seeking damages for DSHS's failure to provide the 69 pages not governed by RCW 13.50.100 was time barred or, alternatively, that DSHS did not wrongfully withhold the records in violation of the PRA. The trial court denied both of DSHS's summary judgment motions.

The case proceeded to a bench trial. The trial court ruled that DSHS violated the PRA by failing to provide the recorded interview and transcription, the PRIDE manual, and the investigation protocols in response to Wright's PRA requests. The trial court also concluded that DSHS had violated the PRA by failing to provide a privilege log identifying each record that it had withheld from Wright. The trial court awarded Wright penalties of $100.00 a day, totaling $287,800.00; $16,096.87 in litigation costs; and attorney fees, with a lodestar[6] multiplier of 2, totaling $346,000.00. DSHS appeals each of these rulings.

ANALYSIS

I. NO PRA REQUEST FOR DSHS PRIDE MANUAL AND INVESTIGATION PROTOCOLS

DSHS first argues that, because Wright never asked DSHS to produce its PRIDE manual and investigation protocols documents, the trial court erred in concluding that (1) Wright's PRA action was timely filed, and (2) DSHS violated the PRA by failing to provide Wright with those documents. We agree with the State: The record shows Wright's PRA request did not include

[6] Under the lodestar methodology, a trial court must determine the reasonable number of hours counsel expended and the reasonableness of counsel's hourly rate. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998). In rare instances, as here, a court may adjust the lodestar fee upward or downward. *Mahler*, 135 Wn.2d at 433-34.

the PRIDE manual or investigation protocols. We hold, therefore, that the trial court erred in concluding that DSHS had violated the PRA by failing to provide these unrequested documents.

A. Standard of Review

We review de novo challenged agency responses to PRA requests. RCW 42.56.550(3). Thus, we stand in the same position as the trial court. *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 904, 25 P.3d 426 (2001). The PRA requires agencies to respond to requests for only "identifiable public records." RCW 42.56.080; *see also Hangartner v. City of Seattle*, 151 Wn.2d 439, 447-48, 90 P.3d 26 (2004). A party seeking public records under the PRA must, "at a minimum, provide notice that the request is made pursuant to the [PRA] and identify the documents with reasonable clarity to allow the agency to locate them." *Hangartner*, 151 Wn.2d at 447.

B. Wright's PRA Request

On March 26, 2007, Wright submitted her first request to DSHS, seeking "her entire DSHS file." CP at 145. On June 1, DSHS sent her a five-volume file that contained her children's juvenile administrative records, which DSHS explained it was providing under the juvenile records act, chapter 13.50 RCW, rather than under the PRA, chapter 42.56 RCW. More than one year later, on May 20, 2008, Wright submitted a second request to DSHS, seeking "any and all documents relating to Amber Wright." CP at 11. DSHS responded to Wright's second request by again providing under chapter 13.50 RCW a series of disclosures related to her children's juvenile administrative records.

As our Supreme Court has explained,

> The [PRA] was enacted to allow the public access to government documents once agencies are allowed the opportunity to determine if the requested documents are exempt from disclosure; it was not enacted to facilitate [the] unbridled searches of an agency's property. [*A*] *proper request under the* [*PRA*] *must identify with reasonable clarity those documents that are desired.*

Hangartner, 151 Wn.2d at 448 (emphasis added). The PRIDE manual and investigation protocols provide general DSHS guidance and procedures for numerous DSHS clients and other members of the public; they are not specific to Wright's individual Child Protective Services (CPS) referral history and records.

Wright's request for document production neither expressly mentioned nor identified with "reasonable clarity" the manual or the protocols; on the contrary, its language limited her request to a broad range of materials specifically related to the 2005 investigation of a CPS referral when she was a child.[7] We hold, therefore, that because Wright's request for "any and all documents relating to Amber Wright"[8] did not include the DSHS protocols and manual with

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[7] Wright's May 20, 2008 PRA request to DSHS expressly sought:

> [A]ny and all documents relating to Amber Wright and/or David Wright.
> [. . .]
> This includes, but is not limited to any and all intake documents, any and all notes, e-mails, letters, faxes, photographs and/or other documentation generated or received by Department personnel during investigation of this complaint. **This request also includes, but is not limited to, any documents relating to the resolution of this complaint** including reports, compliance agreements, revocation letters, etc.

CP at 11-12 (emphasis added). Wright argues that the above bolded language required DSHS to disclose the investigative protocols and PRIDE manual. But the second half of this sentence clarifies that Wright was seeking *case-specific* documents and not general internal guidance manuals and protocols.

[8] CP at 11.

"reasonable clarity,"[9] DSHS's "failure" to disclose these documents was not a PRA violation and cannot support the trial court's PRA award to Wright for attorney fees, costs, and penalties.

II. JUVENILE RECORDS COVERED EXCLUSIVELY BY CHAPTER 13.50 RCW

DSHS next argues that of the four records in dispute, production of two of them—her recorded interview and its transcription—are governed exclusively by chapter 13.50 RCW; and, therefore, the trial court erred in ruling that DSHS should have provided them to Wright in response to her PRA request. Again, we agree.

A. Standard of Review; PRA Disclosure Policies

We review de novo questions of law, including statutory construction. *Pasco v. Pub. Employment Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992). We look to a statute's plain language to give effect to legislative intent. *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). When faced with an unambiguous statute, we derive the legislature's intent from the plain language alone. *Waste Mgmt. of Seattle, Inc. v. Util. & Transp. Comm'n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994). When faced with two controlling statutes, the more specific one controls. *Waste Mgmt.*, 123 Wn.2d at 630.

Generally, the PRA favors broad disclosure of public records and requires state agencies to disclose and to produce public records on request unless an exception applies. *West v. Wash. State Dep't of Natural Res.*, 163 Wn. App. 235, 242, 258 P.3d 78 (2011), *review denied*, 173 Wn.2d 1020 (2012); *see* RCW 42.56.070(1). But because the PRA applies only to public

[9] *Hangartner*, 151 Wn.2d at 448.

records, we first must determine whether two juvenile records[10] contained in Wright's social file—the recorded interview and its transcription—are "public records" within the meaning of the PRA, chapter 42.56 RCW.[11]

B. "Public Records," RCW 42.56.010(3)

The PRA broadly defines the term "public record" to include

> any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

RCW 42.56.010(3). Because DSHS prepared, used, or retained the juvenile records[12] contained in Wright's social file for purposes of performing its statutory mission to protect children, the requested records fit this statutory definition of "public records." *See Deer v. Dep't of Soc. & Health Servs.*, 122 Wn. App. 84, 90, 93 P.3d 195 (2004). Meeting this definition of "public

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[10] RCW 13.50.010(1)(c) defines juvenile "records" as "the official juvenile court file, the social file, and records of any other juvenile justice or care agency in the case." *See also State v. Sanchez*, No. 87740-8, 2013 WL 3761532, at *5 (Wash. July 18, 2013) (A juvenile's "court file," which may include court filings, findings, order, and other documents filed with the superior court, is open to the public unless sealed; but the "social file" is generally confidential).

[11] In analyzing this question, we interpret the disclosure provisions of the PRA liberally and exemptions narrowly. *Koenig v. Thurston County*, 175 Wn.2d 837, 842, 287 P.3d 523 (2012). The PRA directs, "Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3). The agency claiming the exemption, here, DSHS, bears the burden of proving that the requested documents fall within the scope of the exemption. *Koenig*, 175 Wn.2d at 842.

[12] This interview transcription was not part of Wright's juvenile file; and it was not in existence at the time of Wright's PRA requests. Thus, this transcription was not a "public record" for PRA purposes. RCW 42.56.010(3). DSHS later transcribed Wright's interview as a courtesy, *after* she submitted her records request.

records," however, does not automatically mean that the records at issue here were subject to disclosure under the PRA or penalties for failure to make such disclosure.

C. Independent Chapter 13.50 RCW Exemption from PRA

DSHS contends that the PRA does not apply to and, therefore, did not require production of Wright's recorded interview and transcription because chapter 13.50 RCW prescribes the exclusive method for procuring juvenile records and, thus, separately exempts these juvenile records from the PRA's disclosure requirements and penalties. We agree.

The PRA provides that a requested record may be exempt from disclosure if the record is controlled by *any "other statute which exempts or prohibits disclosure* of specific information or records." RCW 42.56.070(1) (emphasis added). RCW 13.50.100(2) expressly provides: "Records covered by this section shall be confidential and *shall be released only pursuant to this section and RCW 13.50.010.*"[13] (Emphasis added) (second emphasis added). Relying on this provision, we have previously held that chapter 13.50 RCW provides the exclusive means of obtaining juvenile justice and care records. *Deer*, 122 Wn. App. at 92.[14] In *Deer*, the "sole question" was "whether a person denied access to DSHS records in which they or their children are named can use the processes and obtain the relief set forth in the [Public Disclosure Act] PDA." *Deer*, 122 Wn. App. at 88. We concluded that the child dependency records Deer sought

[13] RCW 13.50.010.

[14] The trial court denied Deer's show cause action alleging that DSHS had violated the PRA's predecessor, the Public Disclosure Act, for failure to produce DSHS juvenile records. *Deer*, 122 Wn. App. at 87-88. The legislature's 2005 recodification of the Public Disclosure Act, chapter 42.17 RCW, as the Public Records Act, chapter 42.56 RCW, did not alter the pertinent language on which we relied in *Deer*. *See* former chapter 42.17 RCW; *recodified as* chapter 42.56 RCW (LAWS OF 2005, ch. 274, *effective* July 1, 2006).

were public records within the meaning of the PDA, but that chapter 13.50 RCW is an "'other statute'" that "'exempts or prohibits'" disclosure "of particular documents to particular people under [the PDA]." *Deer*, 122 Wn. App. at 89-90, 92 (quoting RCW 42.17.260). Consequently, Deer could not use the PDA's public record request procedures or seek remedies for DSHS's alleged PDA noncompliance because chapter 13.50 RCW is the exclusive means of obtaining the juvenile records at issue. *Deer*, 122 Wn. App. at 92-93. As in *Deer*, here, too, the PRA did not apply to Wright's request for the recorded interview and transcription and did not require DSHS to produce those records.

Similarly, in *In re Dependency of K.B.*, the petitioner "agree[d] that chapter 13.50 RCW controls the *process* but argue[d] that it does not control the *sanctions* that may be imposed for [DSHS's] improper failure to disclose" requested juvenile records. 150 Wn. App. 912, 920, 210 P.3d 330 (2009). Disagreeing, we held,

> If the legislature had intended to provide PRA sanctions in cases in which DSHS wrongfully denies access to chapter 13.50 RCW records, then it would have specified this in RCW 13.50.100(1).

K.B., 150 Wn. App. at 923. We further noted that the legislature passed chapter 13.50 RCW to specify the exclusive "process, including sanctions, for obtaining juvenile justice and care agency records, after the PRA." *K.B.*, 150 Wn. App. at 923. Here, we similarly hold that the PRA does not provide Wright with an applicable remedy for her unsupported claim that DSHS violated the PRA, based on its alleged "late" disclosure of the audio recorded interview and its transcription, available only under chapter 13.50 RCW.

Because the legislature has prescribed chapter 13.50 RCW as the sole method for obtaining juvenile records maintained under that chapter, we hold that (1) the PRA did not apply

to DSHS's production of her interview recording and transcription; (2) DSHS did not violate the PRA in failing to disclose these requested items until it later found them; and (3) Wright was not entitled to any PRA awards for DSHS's nonexistent noncompliance.

D. Juvenile "Records" under Chapter 13.50 RCW

Nevertheless, Wright argues that (1) "[a]t trial, DSHS offered ***no*** evidence that the audio recording was a 'record' as defined in RCW 13.50.010"[15] or that the recording was kept in the official juvenile court file or social file, and thereby failed to meet its burden of proof at trial;[16] (2) treating DSHS as a juvenile justice or care agency would exempt "***all*** of [its] records";[17] and (3) chapter 13.50 RCW applies only to dependency records. Br. of Resp't at 26 (citing *Deer*, 122 Wn. App. at 90). We disagree.

Contrary to Wright's first argument, a DSHS representative testified at trial that the CD containing the recorded interview had been found in Wright's Children's Administration file,[18] maintained by the Children's Administration division of DSHS. The interview transcription was admitted into evidence as an accurate copy of the audio recording; the attached cover letter stated that DSHS was providing this transcript "pursuant to RCW 13.50.100," with no mention of the

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[15] RCW 13.50.100(10) provides:

> Subject to the rules of discovery in civil cases, any party to a proceeding seeking a declaration of dependency or a termination of the parent-child relationship and any party's counsel and the guardian ad litem of any party, shall have access to the records of any natural or adoptive child of the parent.

[16] Br. of Resp't at 22.

[17] Br. of Resp't at 23.

[18] Children's Administration records form a subpart of a child's juvenile file.

PRA. Ex. 4 at 1. Moreover, the records Wright sought were not part of any official court file at the time she made her PRA request; therefore, they were confidential and part of her juvenile social file, subject only to the exceptions listed in RCW 13.50.050(3). *See State v. Sanchez*, No. 87740-8, 2013 WL 3761532, at *5 (Wash. July 18, 2013).

Contrary to Wright's second argument, DSHS does not claim that all of its records are exempt from disclosure under the PRA; instead, it argues that, of the records in dispute here, *only Wright's juvenile dependency recorded interview and transcription are exempt* from the PRA, by virtue of chapter 13.50 RCW. DSHS is correct: Under the legislature's express language, chapter 13.50 RCW controls "access to all records and information collected or retained by a juvenile justice or care agency which pertain to the juvenile." RCW 13.50.100(7).

We do not address Wright's third argument, including her narrow reading of our decision in *Deer*. *Deer* involved dependency records under chapter 13.50 RCW. *Deer*, 122 Wn. App. at 86. The CD and interview transcription here are also dependency records under chapter 13.50 RCW.[19] Thus, *Deer* controls this issue without expanding its scope.

Because Wright's recorded interview was available to her only under chapter 13.50 RCW, DSHS's failure to produce it in response to her PRA request cannot serve as the basis for a PRA violation. On the contrary, if Wright believed that DSHS had improperly denied her access to her recorded interview, she had to comply with the process set forth in RCW 13.50.100(8), which requires filing a motion in juvenile court requesting access to these records. *Deer*, 122 Wn. App. at 94 ("A party denied access to juvenile records must follow the

[19] Again, we use the term "records" lightly with respect to Wright's interview transcription, which was not yet in existence at the time of Wright's request. *See* footnote 12.

procedures set forth in chapter 13.50 RCW."). This she failed to do; instead, she pursued her interview recording and transcription only under the PRA, which did not apply. Accordingly, we hold that the trial court erred in ruling that the PRA required DSHS to provide Wright's recorded interview and transcription in response to her PRA request, that DSHS thereby violated the PRA, and that PRA penalties were warranted.

We reverse the trial court's final order finding that DSHS violated the PRA, and we reverse the trial court's PRA award of attorney fees, costs, and penalties to Wright.[20]

Hunt, P.J.

We concur:

Penoyar, J.

Bjorgen, J.

[20] Consistently, in *Deer*, we concluded that, because "the PDA [did] not provide an applicable remedy" for non disclosure of juvenile records, Deer was not entitled to PDA sanctions and attorney fees for DSHS's alleged noncompliance with the PDA. *Deer*, 122 Wn. App. at 88, 94-95.

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Appellant, v. AMBER WRIGHT, Respondent.	No. 42647-1-II CERTIFICATE OF SERVICE

I, Bill Hill, under penalty of perjury of the laws of the State of Washington, declare as follows:

1. I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, and competent to be a witness in the above action, and not a party thereto.

2. On the 10th day of October, 2013, I delivered a true and correct copy of the Petition for Review via e-mail and U.S. Mail to the following:

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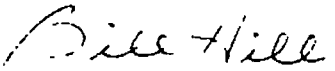
Signed at Seattle, Washington this 10th day of October 2013.



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