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**SUPREME COURT OF THE STATE OF WASHINGTON**

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MIKE HOBBS,

Petitioner,

v.

STATE OF WASHINGTON,  
WASHINGTON STATE AUDITOR'S OFFICE,

Respondent.

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**ANSWER TO PETITION FOR REVIEW**

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## Table of Contents

I.	INTRODUCTION.....	1
II.	ISSUES PRESENTED FOR REVIEW.....	2
	A. Where the Auditor responded to Hobbs’ records request and produced records in installments, does the PRA provide a cause of action based solely on the Auditor’s first installment of records, or is PRA compliance measured by the Auditor’s “final action” on the basis of all of the installments produced by the Auditor?.....	2
	B. Five days after receipt of Hobbs’ request, the Auditor provided Hobbs an estimated date it would produce the first installment of records, and thereafter gave estimated dates for each subsequent installment of records and for completing its production. Does this method comply with RCW 42.56.520?.....	2
III.	STATEMENT OF THE CASE.....	2
IV.	REASONS REVIEW SHOULD BE DENIED.....	7
	A. Hobbs Fails To Demonstrate Inconsistency Between The Court Of Appeals Decision And Decisions By The Supreme Court Or Court of Appeals.....	8
	B. This Case Does Not Present An Issue of Substantial Public Interest That Should Be Determined By The Supreme Court.....	12
V.	CONCLUSION.....	15

## TABLE OF AUTHORITIES

### Cases

<i>Gronquist v. Washington State Dept. of Licensing</i> , 175 Wn. App. 729, 309 P.3d 729 (2013) .....	8, 9
<i>Hobbs v. State</i> , 183 Wn. App. 925, 335 P.3d 1004 (2014) .....	7, 8, 9, 13, 14
<i>Koenig v. Lakewood</i> , 176 Wn. App. 397, 309 P.3d 610 (2013), <i>affirmed</i> 182 Wn.2d 87, ___ P.3d ___ (2014) .....	8, 9
<i>Progressive Animal Welfare Society v. Univ. of Wash.</i> , 125 Wn.2d 243, 253, 884 P.2d 592 (1994) .....	10, 11
<i>Rental Housing Association of Puget Sound v. Des Moines</i> , .....	10
165 Wn.2d 525, 199 P.3d 393 (2009)	
<i>Sanders v. State</i> , 169 Wn.2d 827, 849, 240 P.3d 120 (2010) .....	8, 9
<i>Soter v. Cowles Publishing</i> , 162 Wn.2d 716, 754-56, 174 P.3d 60 (2007) .....	10

### Statutes

RCW 42.56 .....	1
RCW 42.56.080 .....	12
RCW 42.56.210(3) .....	6
RCW 42.56.520.....	2, 6, 12, 13
RCW 42.56.550 .....	13
RCW 42.56.550(1) .....	13
RCW 42.56.550(2) .....	14

**Rules**

RAP 13.4(b)(1), (2) ..... 11  
RAP 13.4(b)(3) ..... 2  
RAP 13.4(b)(4) ..... 12

**Regulations**

WAC 44-14-04004(4)(b)(ii) ..... 10  
WAC 44-14-080 ..... 11  
WAC 44-14-08004 ..... 11  
WAC 48-13 ..... 11

## I. INTRODUCTION

The Public Records Act (RCW 42.56) authorizes agencies to produce records in installments. Within five days of receiving Petitioner Mike Hobbs' records request, Respondent Washington State Auditor's Office (Auditor) informed Hobbs it would produce responsive records to him in installments. Two days after receiving the Auditor's first installment of records, Hobbs filed this lawsuit to challenge redactions and related exemption explanations in the first installment. Both the superior court and the Court of Appeals correctly found the Auditor voluntarily cured Hobbs' alleged violations of the PRA during the time the Auditor was producing records in a series of installments.

Both courts also determined that the Auditor's final and complete production of records complied with the PRA, and Hobbs does not contend otherwise in his Petition for Review. Under these circumstances, the Court of Appeals correctly determined that Hobbs' lawsuit was premature, and that considering the Auditor's diligence in responding to Hobbs' challenges to the first installment, Hobbs' lawsuit appears to be a "gotcha" game that serves no purpose of the PRA.

Hobbs now seeks review of the Court of Appeals decision. However, Hobbs' Petition identifies no conflicting state appellate decisions. Nor does Hobbs demonstrate that this is a significant issue of

constitutional law,<sup>1</sup> or a matter of substantial public interest. The Court should deny Hobbs' Petition.

## **II. ISSUES PRESENTED FOR REVIEW**

Although Hobbs' Petition sets forth six "Issues Presented and Reasons Why Review Should Be Granted", these issues may be combined into the following two issues for review:

- A. Where the Auditor responded to Hobbs' records request and produced records in installments, does the PRA provide a cause of action based solely on the Auditor's first installment of records, or is PRA compliance measured by the Auditor's "final action" on the basis of all of the installments produced by the Auditor?
- B. Five days after receipt of Hobbs' request, the Auditor provided Hobbs an estimated date it would produce the first installment of records, and thereafter gave estimated dates for each subsequent installment of records and for completing its production. Does this method comply with RCW 42.56.520?

## **III. STATEMENT OF THE CASE**

Hobbs, through his attorney, requested records related to a whistleblower investigation conducted by the Auditor regarding the Department of Social & Health Services' management of foster children's social security income. CP 261-62. The Auditor possessed thousands of records that fell within the scope of this request. CP 255. These records

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<sup>1</sup> Hobbs argues that he presents a significant issue of law, but he misreads RAP 13.4(b)(3), which refers to "significant questions of law under the Constitution of the State of Washington or of the United States." Hobbs' Petition makes no such constitutional arguments. Therefore, he is not entitled to review under RAP 13.4(b)(3).

contained voluminous information that is confidential under state and federal law. CP 250, 256-57.

Knowing that production of these records would require a great deal of time to redact, the Auditor sent an acknowledgement letter to Hobbs within five days of receipt of Hobbs' request and invited Hobbs to contact the Auditor about delivery of records. CP 266-67. The Auditor's letter provided an estimated date of December 16, 2011 – three weeks after receipt of Hobbs' request – on which the Auditor would have a first installment of records ready for Hobbs' review. *Id.* The letter also stated that due to the confidential nature of the information requested, the Auditor would consult with DSHS to prepare redactions of confidential foster child information. *Id.*

The Auditor produced the first installment on December 21, 2011, by sending Hobbs an email with a link to a Secure File Transfer. CP 255-56. The Auditor redacted this installment by concealing confidential information with black boxes, and superimposing RCW citations on the black redaction boxes. CP 46. The Auditor also provided Hobbs a list of "exemption codes" relating to the RCW citations. CP 255, 269. The Auditor's email also stated that the Auditor's public records officer would contact Hobbs the following week about delivery of the next installment of records. CP 269. Two days after the Auditor sent this

email, on December 23, 2011, Hobbs filed this lawsuit challenging the first installment's redactions and exemption claims, the Auditor's initial response letter, and making other claims. CP 11-27.

On December 30, 2011, the Auditor produced the records contained in the first installment a second time, and this time applied code numbers to the black redaction boxes. CP 255, 277, 685-89. It also provided Hobbs a second copy of the exemption codes. *Id.* These exemption codes consisted of nine different types of information that the Auditor could redact from whistleblower investigation and confidential DSHS foster child records. CP 190. Each code cited one or more statutes and described the type of information the Auditor redacted pursuant to those statutes. *Id.*

In total, it took the Auditor until March 2012 to identify, copy and redact paper and electronic records as necessary to protect confidential information, and complete its full response to Hobbs' request. CP 255. During that time, the Auditor continued to produce records in installments.<sup>2</sup> During this time, the Auditor continued to send emails and letters to Hobbs with estimated dates for production of upcoming installments. CP 259. For example, on January 6, 2012, the Auditor

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<sup>2</sup> The Auditor delivered installments on December 21 and 30, 2011, and the following dates in 2012: January 12; February 1, 13, 14, 16, 17, and 27; and March 1. CP 280, 285-88, 290-94, 299-302.



estimated it would complete its response on February 13, 2012, but later revised that estimated date of completion to March 1, 2012. CP 259, 289.

Early in the production process, on January 6, 2012, the Auditor informed Hobbs to contact the Auditor “if you believe the Auditor has made a mistake in processing your public records requests. The Auditor wants to hear from you if you think there are problems, so the Auditor may address your concerns promptly if it is possible to do so.” CP 121-22. Despite this request, on January 20, 2012, Hobbs moved for *in camera* review of the Auditor’s first December 21, 2011, installment. CP 40. As part of that *in camera* review, Hobbs filed pleadings raising various challenges to the first installment. CP 89-93, 100-18, 132-37. For example, Hobbs argued that the exemption explanations provided on December 21, 2011 were inadequate, even though the Auditor had previously supplemented those explanations on December 30, 2011. CP 90. Hobbs also identified 15 pages in the first installment and argued that the Auditor had redacted too much information. *Id.* Finally, Hobbs argued that 17 records produced in electronic format had incorrect metadata. CP 91. After reviewing Hobbs’ pleadings, and prior to any ruling from the superior court relating to its *in camera* review, the Auditor revised its prior redactions on four of the 15 pages, and made new copies

of the electronic records that contained the original metadata and produced them to Hobbs. CP 186-88.<sup>3</sup>

After conducting *in camera* review, the superior court ruled that the Auditor's productions on December 21 and 30, 2011, and subsequent February 2012 installments, fully complied with the PRA. CP 185-90. The superior court held that the Auditor's exemption codes satisfied RCW 42.56.210(3)'s requirement for a "brief explanation of how the exemption applies to the records withheld." CP 188. After comparing unredacted records to the Auditor's redacted version as produced on December 21, 2011, and in subsequent installments, the superior court ruled the final redactions and their related exemption explanations were compliant with the PRA. CP 187-88.

In a subsequent hearing, the superior court considered Hobbs' challenge to the Auditor's acknowledgement letter issued five days after receipt of Hobbs' request. CP 1368-69. The superior court rejected Hobbs' argument that RCW 42.56.520 requires agency initial acknowledgement letters to provide an estimated date the agency will complete its production of all records. *Id.*

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<sup>3</sup> Hobbs' Petition at 4 – which is not supported by citation to the Clerk's Papers – incorrectly suggests that the superior court ordered the Auditor to make these changes, which it did not. CP 186-88, 256.

The Court of Appeals affirmed the superior court in all respects. *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004 (2014). The Court of Appeals ruled that a PRA requester has a cause of action only to challenge the agency's "final action," and thus when an agency responds in installments, an immediate lawsuit to challenge the first installment is premature. 183 Wn. App. at 935-41. "When an agency diligently makes every reasonable effort to comply ... and has fully remedied any alleged violation of the PRA at the time the requester has a cause of action (i.e., when the agency has taken final action...), there is not a violation entitling the requester to penalties or fees." *Id.* at 941.

Hobbs now seeks review to pursue penalties and attorneys fees based on alleged violations in the Auditor's first installment of records, even though he knew he would receive records in installments, and even though the Auditor resolved alleged deficiencies in the first installment by the time its final production was complete.

#### **IV. REASONS REVIEW SHOULD BE DENIED**

In his Petition, Hobbs does not demonstrate any conflict between the Court of Appeals decision and decisions issued by this Court or the Court of Appeals.<sup>4</sup> In addition, the Court of Appeals decision is a correct

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<sup>4</sup> Much of Hobbs' Petition merely cites appellate court decisions and recites well-established principles that are not in contention in this case. *See, e.g.*, Pet. at 5, 8. For this reason, the Auditor does not address many of the citations to authority contained in Hobbs' Petition.

interpretation of the PRA as applied to the facts of this case; it is not an issue of substantial public importance and requires no further decision from this Court.

**A. Hobbs Fails To Demonstrate Inconsistency Between The Court Of Appeals Decision And Decisions By The Supreme Court Or Court of Appeals**

None of the decisions relied on by Hobbs in the trial court involved a fact pattern similar to that present in this case: an agency timely notifying the requester that it would provide records in installments, a PRA lawsuit filed immediately after the first installment to contest that installment, the agency refining its production of records and exemption claims as it continued to provide installments, and a final, complete production with proper redactions and sufficient explanations. Hobbs simply ignores this important distinction.

Hobbs again cites in his Petition three decisions that the Court of Appeals distinguished (at 183 Wn. App. at 937-39): *Koenig v. Lakewood*, 176 Wn. App. 397, 309 P.3d 610 (2013), *affirmed* 182 Wn.2d 87, \_\_\_ P.3d \_\_\_ (2014); *Sanders v. State*, 169 Wn.2d 827, 849, 240 P.3d 120 (2010); and *Gronquist v. Washington State Dept. of Licensing*, 175 Wn. App. 729, 309 P.3d 729 (2013).

The Court of Appeals was correct to distinguish these decisions. The single issue in *Koenig v. Lakewood*, was whether a requester is

entitled to penalties based solely on an agency's violation of the requirement to provide a "brief explanation" for redacting driver's license numbers. 176 Wn. App. at 400-401. In *Koenig*, unlike here, the City had completed its response to the records request, specifically refused to provide any additional explanation to the requester, and did not argue that the alleged violation was cured by continuing disclosure. 182 Wn.2d at 96. The timing of the lawsuit was not an issue in *Koenig*.

Similarly the Court of Appeals correctly distinguished *Sanders v. State* from the facts of this case. In *Sanders*, unlike here, the requester did not file his lawsuit prior to the agency's final action in response to the request. *Hobbs*, 183 Wn. App. at 938; *Sanders*, 169 Wn.2d 827, 836.

*Hobbs* likewise gains no support from *Gronquist*. Pet. at 6-7. There, the agency produced the only requested record, a business license application, and redacted many types of information without providing a citation to a statutory exemption or any other explanation. As the Court of Appeals correctly noted, the *Gronquist* decision did not address whether an agency may voluntarily cure alleged PRA violations while the request remains open and the agency is actively engaging in efforts to fully respond to a request. *Hobbs*, 183 Wn. App. at 939, citing *Gronquist*, 175 Wn. App. at 746-54.

Other decisions cited in Hobbs' Petition are also distinguishable from this case. *Soter v. Cowles Publishing*, 162 Wn.2d 716, 754-56, 174 P.3d 60 (2007), is an example. After the school district finished compiling responsive records, it did not produce some of them; instead, it notified a third party and then, together with the third party, filed a lawsuit seeking a declaration that the records were exempt. 162 Wn.2d at 727-28. *Soter* provides no support to requesters who quickly file lawsuits when the agency is actively engaged in producing records and has not yet completed its response.

Similarly, Hobbs' citation to *Rental Housing Association of Puget Sound v. Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009), is misplaced because it does not conflict with the *Hobbs* Court of Appeals decision. Pet. at 7. Hobbs refers to *Rental Housing's* discussion of privilege logs, but makes no argument to support his contention that the Auditor's exemption codes were deficient.<sup>5</sup>

Hobbs' final argument pertains to *Progressive Animal Welfare Society v. Univ. of Wash.*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994)

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<sup>5</sup> *Rental Housing* states that privilege logs are just one but not the exclusive method of explaining redactions. 165 Wn.2d. at 539 (referring to a privilege log as an "illustration of compliance," and citing with approval WAC 44-14-04004(4)(b)(ii) which states, in part, that "[o]ne way to properly provide a brief explanation of the ... redaction is for the agency to provide a withholding index....").

(*PAWS II*) and WAC 44-14-08004.<sup>6</sup> These authorities draw a distinction between an initial and a final agency PRA response as described in *PAWS II*, where the University's public records officer denied the request for the one and only document requested, at which time the University had completed its response. Thereafter, the requester sought internal review from the University's President. 125 Wn.2d at 250, 253. These authorities have no relevance to the facts of Hobbs' case, and do not represent a conflict with the Court of Appeals decision.

Turning to his arguments concerning Issue B – the legal sufficiency of the Auditor's acknowledgement letter – Hobbs cites no appellate court decision that addresses PRA requirements for estimating dates of disclosure when an agency uses the installment method. *See* Pet. at 5-6, 12. He therefore demonstrates no conflict.

In conclusion, Hobbs fails to identify a conflict between the Court of Appeals decision and any decision of this Court or a Court of Appeals. Therefore, he has failed to demonstrate grounds for accepting review under RAP 13.4(b)(1) or (2).

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<sup>6</sup> WAC 44-14-08004 is not itself a rule but rather a Comment to model rule WAC 44-14-080. The Auditor has not adopted this model rule or this Comment. *See generally* WAC 48-13.

**B. This Case Does Not Present An Issue of Substantial Public Interest That Should Be Determined By The Supreme Court**

Hobbs' Petition does not claim that the Auditor's final, complete response to his records request denied non-exempt information or inadequately explained exemptions from disclosure in violation of the PRA. Rather, he seeks a finding that the Auditor's first installment violated the PRA during the short period of the time it took the Auditor to consider Hobbs' concerns and address them. Hobbs also seeks a blanket ruling that agencies must in all circumstances give an estimated date of *final* production no later than five days after receipt of a records request. These are not issues of substantial public interest which merit review under RAP 13.4(b)(4).

Hobbs' inability to find supporting case law authority is unsurprising, given the plain language of the PRA as referenced by the Court of Appeals opinion. The Auditor acted in strict compliance with RCW 42.56.520<sup>7</sup> and RCW 42.56.080<sup>8</sup> when it responded to Hobbs within

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<sup>7</sup> RCW 42.56.520 permits an agency to respond to a request within five business days by "acknowledging that the agency . . . has received the request and providing a reasonable estimate of the time the agency . . . will require to respond to the request . . . Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request."

<sup>8</sup> RCW 42.56.080 provides in part "[A]gencies shall . . . make [public records] promptly available... including . . . on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure...."



five days and informed him that it would respond to his request with installments of records. RCW 42.56.550(1) provides a cause of action to a person “denied” an opportunity to inspect a record. RCW 42.56.550 requires a “final” action prior to seeking judicial review. *Hobbs*, 183 Wn. App. at 936-37. Here, Hobbs filed suit during the time the Auditor was locating, redacting, preparing exemption claims, and producing records in installments. Under these circumstances, Hobbs was not “denied” an opportunity for inspection of the records. *Id.* at 940-41. Similarly, the Court of Appeals correctly determined that the Auditor’s acknowledgement letter providing an estimated date of a first installment complied with the plain language of RCW 42.56.520. 183 Wn. App. at 942-43.

Hobbs speculates that the Court of Appeals opinion below will result in agencies lacking a sense of urgency when responding to records requests. Pet. at 9. Hobbs’ speculation is meritless. The Court of Appeals was careful to explain that this case did not present a situation in which an agency ignored a records request for an extended period, or where agency action or inaction indicates that the agency is no longer actively responding to a records request. 183 Wn. App. at 936, 937 n. 6.

In any event, the PRA provides requesters with a distinct cause of action to challenge an agency’s estimate of time it will take to respond; a

PRA claim that Hobbs did not pursue in this case. RCW 42.56.550(2). Any other requester who wishes to challenge an agency's estimate of time to respond would be able to argue that his case is distinguishable from the decision below. Moreover, although Hobbs speculates that agencies may attempt to charge requesters for the same record more than one time under the Court of Appeals decision, nothing supports his speculation, particularly because the Auditor did not charge Hobbs for any of the thousands of records produced to him. Pet. at 9.

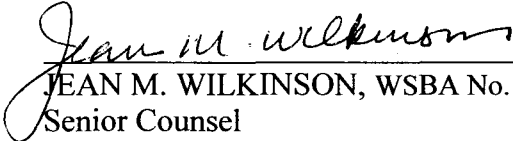
Hobbs' final argument – that he could have waited one year to file a PRA lawsuit – has nothing to do with this case. Pet. at 10-11. The purpose of the Public Records Act is to make public records available to the public. Public records disclosure is not a “gotcha” game in which requesters rush to collect penalties, fees and costs, during the time an agency is actively working on its response and expresses willingness – as the Auditor did here – to quickly address alleged deficiencies. As the Court of Appeals noted below, “[t]he purpose of the PRA is best served by communication between agencies and requestors, not by playing ‘gotcha’ with litigation.” *Hobbs*, 183 Wn. App. at 941, n. 12. The Court of Appeals decision correctly interpreted the PRA and is consistent with the public interest in timely access to public records.


**V. CONCLUSION**

The Court should deny the Petition for Review.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of March, 2015.

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