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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAR -3 PM 3:55

NO. 70757-4-I

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

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KAMAL MAHMOUD,

Appellant/Cross Respondent,

v.

SNOHOMISH COUNTY,

Respondent/Cross Appellant.

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# REPLY BRIEF OF APPELLANT/CROSS RESPONDENT

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## I. INTRODUCTION

Despite the mandate for strict compliance with the Public Records Act (PRA), the County admits it failed to locate, disclose, or produce hundreds of records at issue in this appeal. The County admits the records (emails) are responsive to Mr. Mahmoud's various PRA requests and they were on its network drives at the time.

The County chose to ignore the requests' language (which would have located the responsive records) and instead unilaterally narrowed the scope of the searches to only the email accounts of the identified individuals. The County's only defense for this is that it reads the term "including" to mean "limited to." The County's interpretation is unreasonable and the resulting searches violate the PRA. Likewise, the County failed to follow-up when Mr. Mahmoud questioned why the requested records were not located (again these leads would have located the records) – the County just assumed inaccurately they had been destroyed.

Moreover, the County failed to meet its obligations under the PRA with regards to the records it ultimately did disclose: its exemption claims are facially inadequate and it delayed responding to certain requests beyond the original estimates without justification.

As for the trial court's error in awarding attorney's fees, the County only

asserts the award was not an abuse of discretion because the fees were not segregated. Yet even when certain fees were segregated (because only one claim remained), the award failed to account for those fees. The County also wholly failed to address Mr. Mahmoud's arguments that most of the fees are incapable of segregation and a pro-rata segregation of fees was not appropriate. Finally the County failed to address the trial court reducing the award based on a strict pro-rata share of an already reduced fee request by Mr. Mahmoud to account for the unsuccessful claims. This resulted in a manifestly unreasonable double reduction.

Finally, as for the County's purported statute of limitations defense(s), neither the County's deficient exemption claim(s) nor its incomplete partial production(s) triggered the PRA statute of limitations. Moreover, because the PRA's statute of limitations applies, the two-year general statute of limitations of RCW 4.16.130 does not: especially when Mr. Mahmoud did not even discover he had valid PRA claims until March 2012. Since he timely amended his complaint to include such claims, the purported statute of limitations defense(s) fail.

## II. MR. MAHMOUD'S ISSUES ON APPEAL

### A. The County Failed to Conduct Reasonable Searches

For four of the six PRA requests at issue (PDR Request Nos. 09-05375, 10-01666, 10-08592, & 10-08593) Mr. Mahmoud requested, "all emails to and

from [listed individuals], including archived emails on the individuals [sic] C drive, P drive, or any other county network drive." CP 48, 59, 67, 94. The County asserts it strictly complied with the PRA by conducting adequate searches when it limited the scope of the searches to just the specified individuals' email accounts.

The first issue is whether the County's interpretation of the word "including," as used in Mr. Mahmoud's requests, means the same thing as the phrase "limited to." The County asserts, based on the wording of Mr. Mahmoud's requests, that it was reasonable to narrow the searches to only the specified individuals' email accounts. Id. at 33-34. However, the clear language of the requests sought all emails sent to or from the individuals, regardless of their location. Id. The requests did not limit the scope of the records' locations, rather they sought all emails, "including" those archived in the specified locations – and "any other county network drive." Id.

The County admits it failed to locate over 450 responsive emails that existed on its network drives at the time, including Mr. Mahmoud's archived email account (to which he did not have access). See, Respondent Brief at 17; but see, CP 1802-1828 (evidencing that Mr. Mahmoud was not a sender or recipient of certain emails at issue and they may not have come from his archived account.)

The County has failed to attempt to distinguish the analogous FOIA cases

cited in Mr. Mahmoud's Opening Brief.[1] For example, in LaCedra v. Executive Office for United States Attorneys, the D.C. Circuit reversed a trial court's decision finding that the agency was required under FOIA to not only search for the subset of requested records, but the entirety of the requested records. 317 F.3d 345, 348, 354-356 (D.C. Cir. 2003). See also, Negley v. FBI, 658 F.Supp.2d 50, 59 (D.D.C. 2009) (searching a single database unreasonable given that any doubt about the adequacy of the search should be resolved in favor of the requestor); Antonelli v. Bureau of Alcohol, Tobacco, and Firearms & Explosives, No. Civ.A. 04-1180 CKK, 2006 WL 141732 at *1 (D.C. Cir. Jan. 18, 2006) (unreported) (searching only identified locations was unreasonable when request was not limited to them); Campbell v. U.S. Dept. of Justice, 164 F.3d 20, 28 (D.C. Cir.1998) (searching only the "main" file system was inadequate given other locations reasonably likely to contain responsive documents); Oglesby v. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (unreasonable to search only one records system if another records system is likely to have responsive documents).

These cases stand for the proposition that an agency may not unilaterally

[1] "[T]he adequacy of a search for records under the PRA is the same as exists under FOIA." Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 719 (2011). Federal cases examining FOIA provide guidance as to the County's compliance with the PRA on this issue. Id. at 720.

narrow the scope of request based on its own subjective interpretation of where the records are likely to be located. See also, Neighborhood Alliance, 172 Wn.2d at 702. Yet, this is exactly what the County asserts: to wit, it only needed to search the individuals' email accounts and not "any other network drive" for "all emails." See, Respondent Brief at 33-34. Ironically, the County claims it believed it only needed to search such locations, "given the wording of the requests." Id.

Here, the County failed to comply with the PRA when it unilaterally narrowed the scope of the requests to read the word "including" to mean the same thing as the phrase "limited to," thereby disregarding the language of the requests to look for all emails, including those on "any other county network drive."

Likewise, the County failed to follow at least two obvious leads when Mr. Mahmoud pointed out that more emails should have been located. On June 4, 2010, with regards to the County's response to PDR No. 09-05375, Mr. Mahmoud stated, "[t]here are only 24 emails" to account for three full-time employees for a fifteen month duration; he concludes by re-requesting the information. CP 2568-69. As to PDR No. 10-08592, Mr. Mahmoud asked the County why no emails were located for three full-time employees for a four-month period. CP 2538.

Our Supreme Court has held an agency was required to follow obvious leads. Neighborhood Alliance, 172 Wn.2d at 702. Here, the County has failed to

explain its failures to follow these leads. Indeed, according to the County's CR 30(b)(6) designee, the re-requests for the same information should have re-opened the requests, initiating new searches. CP 2463. In contrast, the County simply responded to Mr. Mahmoud by inaccurately asserting the responsive emails were likely destroyed. CP 2538, 2568-72.

The County violated the PRA since it has failed to justify its unilateral narrowing of the searches, or follow obvious leads, as to PDR Request Nos. 09-05375, 10-01666, 10-08592, & 10-08593.

**B. The County Deficiently Claimed Exemptions**

To properly claim an exemption under the PRA, an agency must include the record's "number of pages" and "an explanation of how [the exemption] applies to the individual agency record." Rental Hous. Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 538 (2009); Sanders v. State, 169 Wn.2d 827, 846 (2010) (finding the mere identification of a record and claimed exemption to be deemed as a "brief explanation" violates the PRA as it would render the relevant PRA clause superfluous.).

The County repeatedly failed to explain how the purported exemptions applied to the withheld records nor did it provide sufficient information to determine if the exemption was applicable. CP 128-30, 399-402, 411-13, 415-16,

1564, 1593-95, 1600, 1614-19. The County also failed to identify the number of pages withheld. Id. The County has provided no justification for how these failures do not contradict controlling authority. Thus, each such claim for an exemption clearly violated the PRA; the County is liable thereunder.

### C. The County Unjustifiably Delayed Production

The PRA states an agency may provide a reasonable estimate by which it will respond to a request. RCW 42.56.52. After the estimate expires, "[a]n agency should communicate with the requestor that additional time is required ... [u]njustified failure to provide the record by expiration of the estimate is a denial of access to the record." WAC 44-12-04003(10). An unjustified failure to produce records in accordance with the estimates is a violation of the PRA. Violante v. King County Fire Dist. No. 20, 114 Wn. App. 565, 570-71 (2002) (agency's failure to produce records 14 days after estimate lapsed violated PRA).

Although the County claims it "was in constant communication with Mr. Mahmoud," it has failed to produce evidence to support such statements. Respondent Brief at 38. As to Requests No. 09-05375 and 10-01666, the County repeatedly failed to justify not meeting its estimate as to when the records would be available. CP 1566-69, 1583-90. It took over eight months from the initial requests to provide its final, yet incomplete responses. Id. The County produced

no evidence to justify its failures to meet its estimates and timely produce the records. Id. Thus, with respect to these requests, the County violated the PRA by unjustifiably delaying production of responsive records.

### D. The Trial Court's Fee Award is Manifestly Unreasonable

The County wholly fails to address the facts and authorities that show the trial court's fee award (mandatory under the PRA) is manifestly unreasonable. The County merely asserts that because Mr. Mahmoud prevailed on one-seventh of his PRA claims, the trial court did not err in awarding only one-seventh of his already reduced fee request. See, Respondent Brief at 40-41.

First, the Washington Supreme Court has rejected a strict pro rata allocation between successful versus unsuccessful PRA claims and affirmed awarding greater fees recognizing that, "there were economies of scale involved, such that it was fairer to award Justice Sanders 75 [percent] of the fees allocated..." Sanders, 169 Wn.2d at 866.

Here, virtually all the issues among the various PRA claims overlapped. For example, Mr. Mahmoud was forced to research and brief the same statute of limitations issues for all claims – both successful and unsuccessful. CP 31-987, 997-1054. He was forced to research and brief the reasonable search and deficient exemption claims issues applicable to both successful and unsuccessful claims.

CP 1991. He was also required to search through all the records produced in response to the PRA requests versus those produced in response to discovery requests to identify and verify his PRA claims. CP 1862-63. Clearly, the fees accruing from all this effort that applied to both the successful and unsuccessful claims cannot be allocated on a strict pro rata basis under Sanders nor based on common sense. The County ignores these facts as well as the holding in Sanders.

Second, even if a pro-rata reduction of fees was appropriate, in this case it resulted in a double reduction. The trial court reduced Mr. Mahmoud's fee request by six-sevenths. CP 1991-92. However, Mr. Mahmoud's fee request had already been discounted by almost 35% to account for unsuccessful claims. CP 2084-85. The trial court ignored this and applied a second reduction to the reduced fee request. In contrast to the court's award, the County had conceded that $36,547 (or nearly 20% of the **total** (not reduced) PRA fees) was reasonable. CP 1940.

Finally, even when the fees were entirely segregated as to the prevailing claim, the trial court failed to award them or provide a rationale for this failure. CP 2115-18. On April 17, 2013, the trial court dismissed all but one claim which Mr. Mahmoud prevailed upon. All the fees requested for work after that date, $33,171, was performed solely on the prevailing claim. CP 1998, 2085. Yet, the trial court awarded less than 55% of even these fees! See, CP 2117.

For all these reasons, the trial court's award was manifestly unreasonable and the County has wholly failed to address or rebut these reasons.

### E. The SOL Issues on Appeal & Cross-Appeal are Intertwined

Because the statute of limitations (SOL) arguments that pertain to Mr. Mahmoud's SOL issues on appeal are the virtually the same as those presented by the County on cross-appeal (which further supports Mr. Mahmoud's inability to rationally segregate most of his fees between his successful versus unsuccessful claims), Mr. Mahmoud will address them below.

## III. THE COUNTY'S ISSUES ON APPEAL

The PRA explicitly states its one-year SOL is triggered by an agency in one of two ways. RCW 42.56.550(6);[2] Rental Hous. Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d at 536 ("RHA"); Tobin v. Worden, 156 Wn. App. 507 (2010). The first is when an agency claims an exemption for a specific record. Id. The PRA and our Supreme Court have explicitly set forth how to properly claim an exemption under the PRA. RCW 42.56.210(3); RHA at 538-40. The second way an agency triggers the PRA SOL is by actually producing the responsive record(s) on a partial or installment basis. RCW 42.56.550(6); Tobin, 156 Wn.

[2] The County's brief at page 20 cites cases regarding the need for a SOL generally; yet, they do not analyze the PRA SOL. See, RHA, 165 Wn.2d at 540-41 (the PRA must be liberally construed, including interpreting its SOL provision).

App. at 513. An agency produces a record when it is "made available for inspection and copying." Sanders, 169 Wn.2d at 836. Once the agency triggers the PRA SOL, whether by claiming a proper exemption or producing the responsive record, a claimant has one year to file a claim. RCW 42.56.550(6).

Here, two broad categories of records at issue. First, there are over 450 responsive records that were never identified, disclosed or produced by the County in response to the PRA requests. See, CP 418-19, 423-971. The second set of records, referred to as inadequately identified records, are those that were identified, but were not properly claimed as exempt pursuant to RHA. This latter set of records, is identified *supra* in section I.E.

As set forth *infra*, the SOL was not triggered with respect to either the undisclosed records or the inadequately identified records. Indeed, the County does not address the fact that in order to trigger the PRA SOL, the PRA requires all responsive records to be produced or properly claimed as exempt. RCW 42.56.210(3); RHA at 538-39; Tobin, 156 Wn. App. at 514-15. The PRA does not authorize a third triggering event, which reflects the County's position: administrative closure of the request would trigger the SOL despite the agency's failure to produce or identify in any manner all the responsive records.

**A. The County Failed to Provide Proper Exemption Claims and Thereby**

**Failed to Trigger the PRA SOL**

**1. The PRA SOL Was Not Triggered As to Responsive Undisclosed Records**

The County argues in its cross-appeal that the PRA SOL was triggered for PDR Request Nos. 09-05374 and 10-05383 based on its exemption claims for these requests.[3] The PRA and controlling authority supports neither the County's position, nor the trial's court dismissal of PDR Request No. 09-05374.

RHA is controlling here. In RHA, the Washington Supreme Court addressed the issue of when a claim for an exemption from production under the PRA is sufficient to trigger the PRA SOL. RHA stated the PRA SOL is not triggered unless and until the responsive record is individually identified and properly claimed as exempt. Id. at 539-40. The Court stated:

> The key issue then is when a "claim of exemption" under RCW 42.56.550(6) is effectively made. We find the reasoning of *PAWS II* guides our resolution of this issue. ... Of particular significance here, the Court in *PAWS II* denounced the "silent withholding" of information in response to a PRA request:
>
> > Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld. The

[3] Mr. Mahmoud appealed the trial court's improper dismissal of the PRA claim(s) related to PDR Request # 09-05374. The County did not cross-appeal these claim(s) but it addresses them in the section entitled, "Argument related to the County's cross-appeal." For purposes of efficiency, Mr. Mahmoud discusses them in this section to refute the County's assertions.

> Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed. Moreover, without a specific identification of each individual record withheld in its entirety, the reviewing court's ability to conduct the statutorily required de novo review is vitiated.
>
> *Id.* at 270, 884 P.2d 592 (citation omitted). We emphasized the need for particularity in the identification of records withheld and exemptions claimed...

Id. 536-538 (emphasis added), quoting PAWS II, 125 Wn.2d 243, 270 (1994).

Here, the County concedes, "the claimed exemption must provide what records are being claimed as exempt, what exemption is claimed, and how that exemption applies to the records." Respondent Brief at 22. It further concedes it "did not specifically identify individual records in the investigative file" when claiming an exemption as to PDR No. 09-05374. Id. at 23; see also, CP 128. Nor did the County identify the records it withheld and also failed to claim as exempt as to PDR No. 10-05383.[4] CP 56, 419, 738-43.

These admissions and failures contradict RHA's holding requiring "an agency's response to a requester [to] include specific means of identifying any

[4] The County failed to produce or identify over 450 responsive records on any exemption log. See, CP 418-19, 423-971. This constitutes over 450 separate records responsive to at least six separate PRA requests (and not including the "follow-up" requests which the County's CR 30(b)(6) designee admitted "re-opens" the corresponding requests). CP 2462-63.

individual records which are being withheld in their entirety." RHA, 165 Wn.2d at 538. Such conduct violates the PRA and constitutes "silent withholding" as denounced by our Supreme Court set forth above. RHA does not allow the County to trigger the PRA SOL while "silently withholding" such records as this would completely undermine the very purpose and letter of the PRA. Thus, the PRA SOL was not triggered for PDR Nos. 09-05374 and 10-05383 given the County's failures to identify the individual records being withheld.

### 2. The PRA SOL was Not Triggered as to the Inadequately Identified Responsive Records

There were some records, other than the undisclosed records referenced above, that the County inadequately identified on its exemption logs. These records are identified *supra* in section I.E. As described in that section, the County's claims did not contain sufficient information required by our Supreme Court. See, id. (such information must includes the type of record, its date and number of pages, and, unless otherwise protected, the author and recipient, as well as the specific exemption and an explanation of how it applies to each record).

Because the County repeatedly failed to provide this required information when it claimed exemptions, as set forth in section I.E. above, the PRA SOL was not triggered as to these records. An agency's failure to provide such information:

> was insufficient to constitute a proper claim of exemption and thus

> did not trigger the one-year statute of limitations under RCW 42.56.550(6). The City's August 17, 2005 reply letter did not (1) adequately describe individually the withheld records by stating the type of record withheld, date, number of pages, and author/recipient or (2) explain which individual exemption applied to which individual record rather than generally asserting the controversy and deliberative process exemptions as to all withheld documents.
>
> ***
>
> Without the information a privilege log provides, a public citizen and a reviewing court cannot know (1) what individual records are being withheld, (2) which exemptions are being claimed for individual records, and (3) whether there is a valid basis for a claimed exemption for an individual record. Failure to provide the sort of identifying information a detailed privilege log contains defeats the very purpose of the PRA to achieve broad public access to agency records. See RCW 42.56.030. In this regard, requiring a privilege log does not add to the statutory requirements, but rather effectuates them. See RCW 42.56.210(3), .550(6).

Id. at 539, 540.

Here, because the County similarly did not comply with the PRA, the improper claims did not trigger the PRA SOL pursuant to RHA.

### 3. Claiming an Exemption as to One Record does not Trigger the PRA SOL as to Undisclosed and Unproduced Records

The County argues that by claiming an exemption as to a subset of disclosed records in response to PDR Nos. 09-05374 and 10-08593 that it triggered the PRA's SOL as to all records that were not produced or even identified in its claims for exemption. Such an analysis cannot be harmonized

with RHA. In RHA, our Supreme Court explicitly held that the PRA SOL is not triggered when an exemption claim is inadequate. Id. at 538-41. RHA requires that the individual record(s) withheld must be adequately identified with specific exemptions properly claimed for each such record. Id. at 539-40. The County admits it failed to disclose the responsive records at issue that it also failed to produce. Failing to individually identify the withheld responsive records, pursuant to RHA, constitutes an inadequate exemption claim and did not trigger the SOL.

The County's reliance on a "categorical" exemption in its only response to the first of multiple repeat PRA requests under PDR No. 09-05374 is misplaced. The County failed to address the recent Supreme Court decision on this issue. See, Appellant Brief at 31, f/n. 4, citing Sargent v. Seattle Police Dept., -- Wn.2d – (Wash. Dec. 19, 2013). The County's exemption is thus inapplicable and could not trigger the PRA's SOL as to the undisclosed withheld responsive records.

Further, the County's reliance on Greenhalgh v. Dep't of Corrections is misplaced. 170 Wn. App. 137 (2012). Greenhalgh merely determined that a PRA request that seeks multiple types of records constitutes a single PRA request. Id. at 1181-82. Greenhalgh fails to analyze the crucial issue here: whether an agency's failure to disclose all responsive records is sufficient to trigger the PRA SOL as to those undisclosed but responsive records that are not produced.

Regardless of Greenhalgh, under RHA (and Tobin, which accords with Sanders, as set forth below), the County failed to trigger the PRA SOL for the responsive records at issue when it failed to either produce or disclose them.

### 4. Defendant Failed to Respond to Re-Requests of # 09-05374

Further, with respect to PDR Request No. 09-05374, Mr. Mahmoud, through counsel, twice renewed his request after it had been closed. CP 2524-29, 2465. The County's first (and only) response to PDR No. 09-05374 stated the records were exempt "at this time" and closed the request. CP 128, 2465. However, the County's CR 30(b)(6) designee admitted the County's procedure is to re-open PRA requests when a requestor subsequently seeks the same information after the initial request has been closed. CP 2463.

Here, Mr. Mahmoud prior counsel re-issued the request to the County on October 20, 2009. CP 2425-25. This request, sent by mail and email, stated:

> it is imperative that Mr. Mahmoud first receive Mark Knudson's investigation file.... Please provide the requested public records to Mr. Mahmoud no later than the close of business on Friday, October 23, 2009.

Id. The County failed to respond to this request. Respondent Brief at 5. On February 11, 2010, Mr. Mahmoud's previous counsel again re-requested the same records from the County; yet the County failed to respond. Id.; CP 2426-29. The County's CR 30(b)(6) designee admitted the request shows the authors believed

the request was still open and sought an update on getting the responsive records. CP 2467. By failing to re-open or respond in any manner to these requests, the County again failed to trigger the PRA SOL

## B. The County's Last Incomplete Response Did not Trigger The SOL

The County's incomplete production of records did not trigger the PRA SOL as to records that were never produced or claimed as exempt, namely the 450 plus undisclosed records in response to PDR Request Nos. 09-05375, 10-01666, 10-05383, 10-08592, & 10-08593.

In 2010, this Court analyzed when the PRA SOL is triggered with respect to an incomplete production under the PRA. Tobin, 156 Wn. App. 507. In Tobin, a requestor made a public records request to the King County's Department of Development and Environment Services (DDES) for complaints against her property. Id. at 510. In response, DDES sent the requestor a one-page handwritten complaint. The requestor then made a second request seeking a copy of an anonymous letter. Id. DDES responded, stating that the "pertinent document is enclosed with this letter." Id. DDES's response was false: the requested record was not enclosed; rather, DDES produced a different record. Id. at 511. The requestor again renewed her request because the letter she requested was not "enclosed with this letter." Id. DDES did not provide any further response. Id.

Based on these facts, Tobin stated:

> "partial" production as used in RCW 42.56.550(6) cannot be construed as simply withholding part of a record without explanation, as the county did here when it provided the redacted document, because such a "partial," i.e., incomplete, production is not authorized by the PRA. RCW 42.56.210(3) prohibits an agency's withholding of a part of a record unless it claims an exemption....
>
> The county asserts that RCW 42.56.550(6) simply contemplates the agency's last response and contends that its last response, admittedly incorrect, was when it sent the second wrong document. But as discussed above, the statutory language is clear that the one-year statute of limitations is only triggered by two specific agency responses—a claim of exemption and the last partial production—not simply the agency's "last" response. Had the legislature determined that the agency's last response would suffice, it would have expressly so stated.

Id. at 514. Division 2 has also held that the PRA SOL is not triggered until there is a complete and full production. McKee v. Washington State Department of Corrections, 160 Wn. App. 437, 446 (2011)("the trial court must first determine whether the agency folly [sic] and timely produced the requested records and then determine the applicable statute of limitations.")

Here, just as in Tobin and McKee, because the County's last and incorrect responses to the requests at issue failed to include all the required responsive records pursuant to the PRA, the SOL was never triggered as to these records.

Mr. Mahmoud's position is further supported by the interpretation of the

terms "disclosed" and "produced" as set forth in Sanders v. State, 169 Wn.2d at 836. Sanders states: "[r]ecords are either 'disclosed' or 'not disclosed.' A record is disclosed if its existence is revealed to the requester in response to a PRA request, regardless of whether it is produced." Id. at 836. The Court continues:

> A document is never exempt from disclosure; it can be exempt only from production. An agency withholding a document must claim a 'specific exemption,' i.e., which exemption covers the document. RCW 42.56.210(3). The claimed exemption is "invalid" if it does not in fact cover the document.

Id. The County concedes the 450 plus records in dispute were not "disclosed."

Sanders also holds records are "produced" pursuant to the PRA when they are "made available for inspection or copying". Id. In this case, the 450 plus responsive records that are in dispute were not "produced" until March 2012.

Tobin accords with Sanders: it is not the agency's last response that triggers the SOL, rather the SOL is triggered when there is either a proper exemption or a complete and final "production" of the responsive records.

Here, because the County failed to "disclose" or "produce" the responsive records in violation of the PRA, no "production" occurred as to these records. Thus, the SOL was not triggered as to each of the requests and records at issue.

### C. The County's Retention Policy Has No Bearing on the PRA's SOL

In its brief, the County appears to be asking this Court to fashion a new,

narrower interpretation of the PRA SOL so that it will accord with its retention policy. See, Respondent Brief at 22. Without any authority, the County suggests the PRA SOL should begin to run when it administratively closes a request. Id.

The County's retention policies cannot change the PRA SOL or controlling authority interpreting it. If the legislature had intended to limit the PRA SOL to accord with an agency's "administrative closure," it would have explicitly stated so. It has not.

In 2011, Substitute Senate Bill 5022 (SSB 5022) was introduced. SSB 5022, 62nd Leg., 2011 Reg. Sess. (Wash. 2011). The primary purpose of the bill was to address the precedent created by both RHA and Tobin. CP 407-09. Specifically, the bill sought to amend the PRA SOL by stating it would be triggered upon the last occurrence of one of the following actions:

(a) The agency's claim of exemption;
(b) The last production of a record prior to the action being filed;
(c) A response indicating no records have been located; or
(d) A response indicating there are no additional records that will be produced on a partial or installment basis.

Id. SSB 5022 also stated that if none of the above actions occurs, the PRA SOL expires one year after the request for records was made. Id.

SSB 5022 reflects the County's position that the PRA SOL should begin to run once it provided a response "indicating there are no additional records that

will be produced." However, the legislature chose not to pass this bill. As such, it is clear our legislature could have amended the PRA SOL to reflect the County's position, but it has not. Thus, RHA and Tobin remain authoritative.

### D. The Two-Year General SOL is Inapplicable

The County argues, that if the one-year PRA SOL was not triggered, then a two-year SOL under RCW 4.16.130 should serve as a basis to dismiss Mr. Mahmoud's claims. The County's reliance on the general SOL is misplaced.

The County relies solely on a single case to assert the general SOL bars Mr. Mahmoud's claims. See, Respondent Brief at 29, citing Johnson v. State Dept. of Corrections, 164 Wn. App. 769 (2011). The County fails to point out that recently however, Division 2 clarified its Johnson ruling. Bartz v. State Dept. of Corrections Public Disclosure Unit, 173 Wn. App. 522, 538 (2013). Bartz holds that courts shall only apply the PRA SOL to PRA claims. Id. Given Bartz, there is no basis to look at the general SOL. The PRA SOL is the only valid SOL for all PRA claims. As addressed above, the PRA SOL was never triggered here.

Second, in Johnson, the only record that was responsive to the PRA request was produced in its entirety. Johnson, 164 Wn. App. at 219. Despite the County's attempt to recast Johnson, there was no evidence that any other responsive records existed at that time that were not disclosed or produced. Id. at

778, f/n 11. Here, the County has conceded it had over 450 responsive records that were not disclosed or produced until March 2012. Johnson is inapplicable.

Finally, Johnson only dealt with a single-page production, which was the only purported rationale for potentially applying the general SOL. Id. at 219-220. Here, no single-page production is in dispute: each of the County's responses, when it did respond, consisted of multiple page productions, and often multiple installment productions. Johnson is inapplicable, as is the general SOL.

**E. Assuming an SOL was Triggered, the Discovery Rule Tolled it Until March 2012**

The intention behind the discovery rule is that a statute of limitations should not foreclose a cause of action before the injury is known, and that the term "accrue" should not be interpreted to create such a consequence. Ruth v. Dight, 75 Wn.2d 660, 667-68 (1969). An action thus accrues when the plaintiff knows or should know the relevant facts to establish a legal cause of action. Gevaart v. Metco Const., Inc., 111 Wn.2d 499, 501 (1988); Cawdrey v. Hanson Baker Ludlow Drumheller, P.S., 129 Wn. App. 810, 817 (2005).

Washington Courts have previously expanded the ruling in Ruth to encompass situations involving special relationships between the parties. See, e.g., Gazija v. Nicholas Jerns Co., 86 Wn.2d 215, 221-223 (1975) (professional

malpractice involves a fiduciary duty which permits the discovery rule); Kittinger v. Boeing, 21 Wn. App. 484, 488 (1978) (the employer-employee relationship creates responsibilities to the employer). Here, the County and Mr. Mahmoud had an employment relationship.

In addition, and with respect to the PRA, there is a special relationship between a citizen and his or her government. As far back as Potter v. New Whatcom, 20 Wash. 589, 590-91 (1899), our courts have acknowledged the special relationship between the government and the governed. The PRA expressly acknowledges and facilitates this special relationship.

The purpose of the PRA is to preserve "the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions." O'Connor v. Dep't of Soc. & Health Servs., 143 Wn.2d 895, 905 (2001) (quoting PAWS II, 125 Wn.2d at 251. It is the right to insist on being informed as to the actions of their government and to permit the citizen to maintain control that creates this special relationship. Our Supreme Court has made this clear when it stated that "[t]he Public Records Act 'is a strongly worded mandate for broad disclosure of public records.'" Id. at 913 (quoting Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127

(1978)). Courts are mandated to interpret the PRA liberally, including its statute of limitations provision. RHA, 165 Wn. 2d at 540.

In contrast, rewarding the County for failing to disclose the responsive records at issue would thwart the purpose of the PRA. In U.S. Oil & Refining Co. v. Dep't of Ecology, 96 Wn.2d 85, 91 (1981), the Court found that by failing to apply the discovery rule to situations involving self-disclosure, industries can discharge pollutants and, by failing to report violations, escape penalties. Id. at 92. Analogizing to other cases where the plaintiff lacks the means or ability to ascertain that a wrong has been committed, the Court reasoned:

> Where self-reporting is involved, the probability increases that the plaintiff will be unaware of any cause of action, for the defendant has an incentive not to report it. Like the other cases which have employed the rule, this is a case where if the rule were not applied the plaintiff would be denied a meaningful opportunity to bring a suit. Like those plaintiffs, this plaintiff lacks the means and resources to detect wrongs within the applicable limitation period. Not applying the rule in this case would penalize the plaintiff and reward the clever defendant. Neither the purpose for statutes of limitation nor justice is served when the statute runs while the information concerning the injury is in the defendant's hands.

Id. at 93-94.

In the PRA context, an agency is in a similar role. It has both sole custody of responsive records and a desire to avoid penalties for non-disclosure. A requestor has little opportunity to verify whether all responsive records are

disclosed. Thus an agency, particularly when faced with disclosing a sensitive matter of likely malfeasance, has an incentive not to timely disclose. Our Supreme Court recognized this conflict: "It allows government agencies to resist disclosure of records until a suit is filed and then to disclose them voluntarily to avoid paying fees and penalties. This rule flouts the purpose of the [PRA]..." Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 103 (2005).

The County seeks permission for agencies to successfully resist disclosure and production of records. This approach also flouts the purpose of the PRA. The purpose of the penalties provision is to promote access to records and governmental transparency. Yousoufian v. King County, 152 Wn.2d 421, 435 (2004). If agencies can successfully fail to disclose responsive records and simultaneously trigger the SOL, and thereby avoid PRA penalties and fees, then the very situation our Supreme Court warned about can more easily come to pass.

Here, the County was the sole source of records responsive to Mr. Mahmoud's PRA requests. The County failed to timely disclose or produce the responsive records. If the County's narrow interpretation of the PRA SOL is imposed, it will not face any consequences for its failures to comply with the PRA.[5] At least one court has applied the "discovery rule" to a PRA claim. Reed

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[5] The County asserts, "No Washington State court has concluded the "discovery rule" applies in

v. City of Asotin, 917 F.Supp.2d 1156 (E.D. Wash. 2013) (holding the "discovery rule" tolled the SOL until plaintiff became aware of the withheld documents). The County failed to address this authority, cited in Mr. Mahmoud's opening brief.

This case is more egregious. When Mr. Mahmoud re-requested the same records, the County ignored his requests, twice, which violated its own policy. CP 2524-29, 2463-65. Likewise, when he communicated to the County he thought more records existed than were disclosed or produced, the County inaccurately assured him all responsive records were produced or destroyed. CP 2538, 2568-72. Mr. Mahmoud did not know, and little reason to suspect, the County had the additional responsive records on its network drives, but they were being withheld. He was forced to rely upon the County's multiple false assurances. It was not until March 2012, when the records were finally produced, that Mr. Mahmoud realized he had a cause of action under the PRA. In such a situation, and given the PRA's mandate, accrual can only start when a requester knows or should know all responsive records were not disclosed. Here, that did not occur until March 2012.

With respect to the County's false assurances that the responsive records had been destroyed, requestors, including Mr. Mahmoud, are placed in a position

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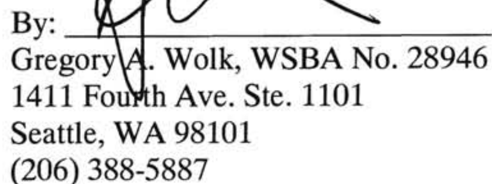
PRA cases. Respondent Brief at 28. However, in 2010 this Division reversed a trial court that refused to apply the "discovery rule" to a PRA claim. Unfortunately, we are prohibited from citing to the decision.

to either take the County's explanation as true, or, if the SOL is triggered, to file a lawsuit based on mere suspicion, potentially subjecting them to CR 11 sanctions. This result and the County's attendant position are absurd. Rather, the proper approach has been adequately addressed by Washington courts as set forth above: to wit, the PRA SOL is not triggered in cases of silent withholding, much less when false assurances are made that the responsive records have been destroyed.

## V. CONCLUSION

For the reasons set forth above, Mr. Mahmoud respectfully requests the Court to enter an order reversing the trial court as set forth in his opening brief and affirming the trial court's decisions on cross-appeal. In addition, Mr. Mahmoud requests an award for all attorney's fees and costs associated with bringing this appeal.

RESPECTFULLY SUBMITTED this 3rd day of March, 2014.



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## CERTIFICATE OF SERVICE

I, Jason Proctor, certify that a copy of the foregoing **BRIEF OF APPELLANT** was caused to be electronically served (through the consent of opposing counsel) on March 3, 2014, to the following counsel of record at the following email addresses:

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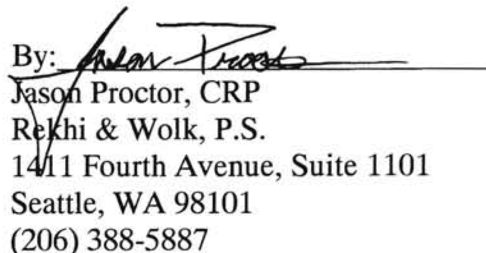
The foregoing statement is made under the penalty of perjury under the laws of the United States of America and the State of Washington and is true and correct.

DATED this 3rd day of March, 2014.



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