

NO. 70757-4-I

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

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KAMAL MAHMOUD,

Respondent,

v.

SNOHOMISH COUNTY,

Appellant.

BRIEF OF RESPONDENT/CROSS-APPELLANT

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ORIGINAL

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I. INTRODUCTION

This case involves six public records requests submitted to Snohomish County (the County) by appellant Kamal Mahmoud¹. These requests are numbered 09-05374, 09-05375, 10-01666, 10-5383, 10-08592, and 10-08593.² The County responded to each request by producing responsive records in installments, claiming an exemption, or both. More than one year, and in some cases two years, after the County's last response, Mr. Mahmoud brought this lawsuit alleging that the County had violated the Public Records Act (PRA) when it responded to each of these six requests. The County moved to dismiss all claims based on RCW 42.56.550(6) and RCW 4.16.130's respective one-year and two-year statutes of limitations. The King County Superior Court dismissed 09-05374 as time-barred. The superior court declined to dismiss 09-05375, 10-01666, 10-5383, 10-08592, and 10-08593. Ultimately, after hearing from the parties on an order to show cause, the superior court found that the County had violated the PRA in its response to 10-05383 when it failed to produce eight documents. The superior court found that the County had complied in all respects to the other requests. Based on its

¹ Mahmoud's original complaint in this case alleged that he was terminated by the County for a discriminatory reason. CP 1-10. Mr. Mahmoud subsequently amended his complaint to include his PRA claims. CP 18-23. All employment claims settled and are no longer involved in this action.

² Mr. Mahmoud's PRA claims originally included a seventh request. Mr. Mahmoud voluntarily dismissed his claims regarding that seventh request. CP 994.

finding that the County had violated the PRA in one of seven requests, the superior court awarded attorney's fees and penalties associated with that prevailing claim.

Mr. Mahmoud appeals the superior court's dismissal of 09-05374 as time-barred. He also appeals the dismissal of 09-05375, 10-01666, 10-08592, and 10-08593 and the amount of the attorney fees awarded. The County cross-appeals based on the superior court's failure to grant its motion to dismiss all claims as time-barred.

This Court should affirm the superior court's dismissal of claims related to 09-05374 as time-barred. This Court should reverse the denial of summary judgment as to requests 09-05375, 10-01666, 10-05383, 10-08592, and 10-08593. If this Court determines that 10-05383 is barred by the statute of limitations, the award of attorney fees should be reversed as Mr. Mahmoud did not prevail on any claims.³

Should this Court conclude the statute of limitations does not bar claims regarding requests 09-05375, 10-01666, 10-08592, and 10-08593, this Court should affirm the superior court's finding that the County's response to these requests complied with the PRA and should affirm the dismissal of these claims and the amount of attorney fees awarded.

³ The County did not appeal the amount of the attorney's fees, only the entitlement to an award of attorney's fees.

II. CROSS-APPEAL ASSIGNMENT OF ERROR

The trial court erred in denying the County's motion for summary judgment based on the statute of limitations with regard to Mr. Mahmoud's public records requests 09-05735, 10-01666, 10-05383, 10-08592, and 10-08593.

III. ISSUES PRESENTED

A. ISSUES RELATED TO THE COUNTY'S CROSS-APPEAL⁴

Did the superior court err when it denied the County's motion for summary judgment as to Mr. Mahmoud's requests 09-05375, 10-01666, 10-05383, 10-08592, and 10-08593 where the County produced records in installments, claimed an exemption, or both, more than one year prior to the amendment of his complaint to include PRA claims?

Did the superior court err when it denied the County's motion for summary judgment as to Mr. Mahmoud's requests 09-05375 and 10-05383 where the County last responded to his request more than two years prior to the amendment of his complaint to include PRA claims?

⁴ The County addresses its cross-appeal first as a granting of the cross-appeal would be dispositive of the entirety of this case and would render Mr. Mahmoud's appeal moot.

B. COUNTER-STATEMENT OF ISSUES RELATED TO MR. MAHMOUD'S APPEAL

Did Mr. Mahmoud fail to timely bring his action where the County last responded to his request 09-05374 and claimed an exemption more than two years prior to the filing of his lawsuit?

Did the County conduct a reasonable search for records where the County searched the locations Mr. Mahmoud specifically asked be searched?

Did the County comply with the Public Records Act when it provided Mr. Mahmoud with reasonable estimates of times to provide responsive records and then met those timelines?

Did the trial court err when it apportioned Mr. Mahmoud's attorney fees award based on the portion of his claims upon which he prevailed?

IV. COUNTER-STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS RELATED TO THE COUNTY'S CROSS-APPEAL

Between August of 2009 and December of 2010, Mr. Mahmoud submitted six PRA requests to Snohomish County. Each request was received and assigned a tracking number. Those tracking numbers are 09-05374, 09-05375, 10-01666, 10-05383, 10-08592, and 10-08593.

1. Request 09-05374

The County received request 09-05374 on August 3, 2009. CP 125. On August 7, 2009, four business days later, the County responded, notifying Mr. Mahmoud that responsive records were exempt from production pursuant to RCW 42.56.250(5). Id. Mr. Mahmoud, through counsel, wrote two letters regarding this request to the County dated October 20, 2009, and February 11, 2010. CP 2515-16; 2518-19. In those letters, he inquired as to the status of request 09-05374, which had been responded to and closed on August 7, 2009. Id. The County did not respond to either of those letters.

2. Request 09-05375

The County received request 09-05373 on August 3, 2009. CP 44. On August 5, 2009, two business days later, the County acknowledged Mr. Mahmoud's request and provided a first installment of records. CP 45. A second installment of records responsive to 09-05375, was provided on October 21, 2009. Id. On April 2, 2010, the County produced a third and final installment of records. Id. The County also provided exemption logs for both the second and third installments in response to this request. Id. On June 4, 2010, Mr. Mahmoud sent an email to the County and his

counsel regarding this request. CP 2529-30. The County responded to this email on June 7, 2010. CP 2532-33.

3. Request 10-01666

The County received request 10-01666 on March 15, 2010. CP 63. On March 22, 2010, five business days later, the County responded acknowledging Mr. Mahmoud's request and providing an estimate of time needed to respond to his request. Id. On May 20, 2010, the County produced a first installment of responsive records. CP 64. On June 11, 2010, the County produced a second installment of responsive records. Id. On June 29, 2010, the County produced a third installment of responsive records. Id. On July 12, 2010, the County produced a fourth installment of responsive records and an exemption log. Id.

Mr. Mahmoud apparently did not review these records until four months later. In an email dated November 21, 2010, to Planning and Development Services Mr. Mahmoud noted that he believed records may be missing from the County's production. CP 89-90. The next day, November 22, 2010, the County provided him with a courtesy copy of the records that had been provided on June 29, 2010. CP 89. Although these records had been provided almost five months previously, the County considered this installment the fifth and final installment of responsive records. CP 64.

4. Request 10-05383

The County received request 10-05383 on July 23, 2010. CP 45. On July 28, 2010, three business days later, the County responded to Mr. Mahmoud's request and provided an estimate of time needed to respond to his request. Id. On August 16, 2010, the County produced the responsive records and claimed an exemption for one document. Id. Mr. Mahmoud was informed there were no further responsive records and the request was closed. CP 56.

5. Request 10-08592

The County received request 10-08592 on December 6, 2010. CP 45. On December 8, 2010, two business days later, the County responded to Mr. Mahmoud's request and provided an estimate of time needed to respond to his request. Id. On December 9, 2010, the County produced an installment of responsive records. CP 120. After an appropriate search, it was determined no more responsive records existed. CP 2551. On January 19, 2011, Mr. Mahmoud was informed there were no further responsive records and the request was closed. Id. Mr. Mahmoud sent correspondence to the County and his attorney regarding these records. Id. It is presumed the emails had been deleted from these accounts by the time Mr. Mahmoud's request was received by Snohomish County. Id.

6. Request 10-08593

The County received request 10-08593 on December 6, 2010. CP 64. On December 6, 2010, the same business day, the County responded to Mr. Mahmoud's request and provided an estimate of time needed to respond to his request. Id. On January 14, 2011, the County produced a first installment of responsive records. CP 65. On February 25, 2011, the County produced a second installment of responsive records. Id. On February 28, 2011, the County produced the third and final installment of responsive records and an exemption log. Id.

B. SUBSTANTIVE FACTS RELATED TO APPEAL

Mr. Mahmoud's requests 09-05375, 10-01666, 10-08592, and 10-08593 sought emails of multiple County employees. In order to understand the County's responses to these requests, it is necessary to understand how requests for emails are processed in the County.

1. Processing Requests for Emails in Snohomish County

Each County employee can send and receive e-mail by "logging on" to the central County computer network at an individual County computer and opening the Microsoft "Outlook" computer application installed on an individual County computer. CP 1076-77. E-mails sent or received from the individual County computer are not stored on the individual County computer using the Outlook application; rather, all e-

mail is electronically routed through the County computer network to or from an individual County computer and saved in a central County database (aka “server”) with other County employee emails, where they are saved unless and until they are deleted. CP 1077.

Additionally a County employee may “archive” emails. Id. This means the employee moves the emails from their storage place in one area of the County network to another area on the County network. Id. When a County employee chooses to “archive” their emails, those email archives are most often stored on the employee’s P drive or C drive, both of which are County network drives. Id.

In order to gather emails in response to a public records request, a County employee sends an email “extraction request” to the County’s Department of Information Services (DIS). Id. Upon receiving an extraction request, a standard email “extraction” procedure is used to search for and gather (or “extract”) email from the County’s central computer server. CP 1077-78. The standard extraction process goes as follows: 1) DIS connects directly to the employee’s Outlook email account in the County’s computer server; 2) an exact copy is made of the entire contents of the account and the copy is then moved to a separate computer file; and 3) the file is saved in a secure location accessible only by DIS. Id. The newly-created computer file contains all of the emails in that

employee's Outlook account at the time the account was accessed – email in the employee's inbox folder, sent folder, drafts folder, etc. Id.

To extract emails from “archive” folders, DIS connects directly to the employee's P drive and C drive (their “network drives”) in the County's computer database and proceeds with the same steps as identified above. CP 1078. The parameters of the specific request are then reviewed and responsive records are gathered. Id. After completing the extraction of employees' email accounts and gathering all e-mails within the specified range, the emails are then copied to computer discs which are sent to the department that requested the extract. Id.

This extraction process was followed in searching for records responsive to Mr. Mahmoud's requests 09-05375, 10-01666, 10-08592, and 10-08593. CP 1075-76.

a. Request 09-05375

Request 09-05375 sought the following:

I am requesting all emails sent to and from Max Phan, Bruce Duvall, Art Louie, Julie Peterson, Steve Thomsen, Debbie Terwilliger, including any archived emails on the individuals [sic] C drive, P drive, or any other County network drive. I want these emails in their native format (.pst) and copied to a CD.

The request is from present back to January 1, 2008.

I also request electronic copies of any policies or procedures related to preservation, back-up, and/or archiving of emails by the Department of Information Services.

CP 48.. Request 09-05375 was assigned and responded to by the County's Department of Public Works. CP 1779.

In 2009, the County's Department of Public Works processed and responded to 104 public records requests. Id. PDR 09-05375 sought all emails contained in network drives belonging to six Public Works employees for a twenty month time period. Id. This request was considered "large" by Public Works public records staff standards. Id. At the time, there were two employees in the Department Public Works assigned to respond to public records requests. Id. Based on the volume of active requests, the large scope of Mr. Mahmoud's request, and the available personnel to process the request, the County took eight months to fully comply with the request. Id.

The process for completing this request was to submit an extract request to the Department of Information Services, receive the records back, review all of the records, make the appropriate redactions, create an exemption log, seek advice from the Prosecuting Attorney's office, as necessary, and ultimately produce the records to the requestor. Id. This process for PDR 09-05375 was completed in conjunction with completing this same process for the other 103 requests received in Public Works that year. Id.

A County employee submitted an extraction for this PRA request on August 7, 2009. CP 1095-96. The extraction request sought “any emails or documents stored on C; P; or any other network drive” for Max Phan, Bruce Duvall, Art Louie, Julie Petersen, Steve Thomsen, and Debbie Terwilleger for the period of October 1, 2008, through July 31, 2009. CP 1089. Max Phan’s, Bruce Duvall’s, Art Louie’s, Julie Peterson’s, Steve Thomsen’s, and Debbie Terwilleger’s email accounts and archives were searched for responsive records. CP 1075-78. Kamal Mahmoud’s emails were not searched for records responsive to this request because Mr. Mahmoud, in his very specific request, did not request that his emails be searched. CP 1078.

The superior court found the County complied with the PRA in responding to this request. CP 1830.

b. Request 10-01666

Request 10-01666 sought the following:

I am requesting all emails to and from Craig Ladiser, former Deputy Director of PDS Greg Moran, Tom Rowe, Heather Coleman, including any archived emails on the individuals [sic] C drive, P drive, or any other county network drive. I want these emails in their native format (.pst) and copied to a CD. This request is from January 1, 2009 to March 1, 2009. I also request electronic copies of any policies or procedures related to preservation, back-up, and/or archiving of emails by the Department of Information Services.

CP 67. Request 10-01666 was assigned and responded to by the County's Department of Planning and Development Services. CP 63.

In 2010, the County Department of Planning and Development Services processed and responded to 2,404 public records requests. CP 1781-82. Between January and April, 2010, there were two employees in Planning and Development Services assigned to respond to public records requests. Id. Between April and December, 2010, there were three employees in Planning and Development Services assigned to respond to public records requests. Id. PDR 10-01666 was completed in conjunction with completing this process for the other 2,404 requests received in Planning and Development Services that year. CP 1782.

The process for completing PDR 10-01666 was to submit an extract request to the Department of Information Services, receive the records back, review all of the records, make the appropriate redactions, create an exemption log, seek advice from the Prosecuting Attorney's office, as necessary, and ultimately produce the records to the requestor. Id. During this process, the County maintained regular communication with Mr. Mahmoud regarding his request and provided him with date estimates and/or installments of records on: March 22, 2010, April 29, 2010, May 20, 2010, June 11, 2010, and July 12, 2010. Id.

A County employee submitted an extraction request on March 16, 2010. CP 1101. The extraction request sought emails from Craig Ladiser, Greg Morgan, Tom Rowe, and Heather Coleman, including emails from archive folders, for the period of January 1, 2009, through March 1, 2009. CP 1091. Kamal Mahmoud's emails were not searched for records responsive to this request because Mr. Mahmoud, in his very specific request, did not ask for his emails to be searched. CP 1078.

The superior court found the County complied with the PRA in responding to this request. CP 1830.

c. Request 10-08592

Request 10-08592 sought the following:

I am requesting all emails sent to and from Max Phan, Bruce Duvall, and Art Louie from October 1, 2008 to January 31, 2009, including any archived emails on the individuals [sic] C drive, P drive, or any other county network drive. I want these emails in their native format (.pst) and copied to a CD. I also request electronic copies of any policies or procedures related to preservation, back-up, and/or archiving of emails by the Department of Information Services.

CP 59-60. Request 10-08592 was assigned and responded to by the County's Department of Public Works. Id.

A County employee submitted an extraction request on August 7, 2009. CP 1096. The extraction request sought "all emails sent to and from each of these individuals [Art Louie, Bruce Duvall, and Max Phan]

including any archived emails on the individuals [sic] C drive P drive or any other network drive” for the period of October 1, 2008, through January 31, 2009. Id. No records were located that were responsive to this request. Id. Kamal Mahmoud’s emails were not searched for records responsive to this request because Mr. Mahmoud, in his very specific request, did not ask for his emails to be searched. CP 1078.

The superior court found the County complied with the PRA in responding to this request. CP 1830.

d. Request 10-08593

Request 10-08593 sought the following:

I am requesting all emails set to and from Tom Rowe, and Larry Adamson, including any archived emails on the individuals [sic] C drive, P drive, or any other county network drive. I want these emails in their native format (.pst) and copied to CD. This request is from September 1, 2009 to December 31, 2009. I also request electronic copies of any policies or procedures related to preservation, back-up, and/or archiving of emails by the Department of Information Services.

CP 95. Request 10-08593 was assigned and responded to by the County’s Department of Planning and Development Services. CP 64.

A County employee submitted an extraction request the same day seeking emails from Tom Rowe and Larry Adamson, including emails from archive folders, for the period of September 1, 2009, through December 31, 2009. CP 1093; 1102. Kamal Mahmoud’s emails were not

searched for records responsive to this request because Mr. Mahmoud, in his very specific request, did not ask for his emails to be searched. CP 1078.

The superior court found the County complied with the PRA in responding to this request. CP 1830.

2. Records Provided to Mr. Mahmoud in Discovery

When a County employee leaves their employment, a copy is made of the contents of their computer files, including their email Outlook account contents, and the contents of their P drive. CP 1097. A copy of the contents of Mr. Mahmoud's computer was made when he left County employment. Id.

When Mr. Mahmoud filed his lawsuit against the County alleging employment discrimination, a copy of the two CDs containing the contents of his computer files, including his email Outlook account contents and the contents of his P drive, was requested by and provided to the Snohomish County Prosecuting Attorney's Office. Id. The two compact discs were received from Public Works, Engineering Services. CP 1108. The contents of those CDs were then loaded onto the Prosecuting Attorney's Office shared network drive where they were stored in the electronic case file for Mr. Mahmoud's case. Id.

All of the emails Mr. Mahmoud alleges were responsive to his public records requests for emails, which were not provided to him until discovery, were contained on these two CDs. See CP 1639. These emails came from the contents of Kamal Mahmoud's email account and P drive. Id. There is no evidence that these emails came from the email accounts or archives of Max Phan, Bruce Duvall, Art Louie, Julie Petersen, Steve Thomsen, Debbie Terwilleger, Craig Ladiser, Greg Morgan, Tom Rowe, Heather Coleman, or Larry Adamson.

C. PROCEDURAL FACTS

On August 30, 2012, Mr. Mahmoud filed an Amended Complaint in his employment law case. CP 18-23. Mr. Mahmoud's Amended Complaint added a third claim to his lawsuit: a violation of the Public Records Act (PRA), Chapter 42.56 RCW, based on newly alleged facts. CP 21-22.

The County moved for summary judgment alleging Mr. Mahmoud's claims are time-barred. CP 31-133. The superior court denied those claims on December 19, 2012. CP 991-93. The County then moved for reconsideration and the superior court concluded Mr. Mahmoud's claims regarding request 09-05374 were time-barred. CP 1055-57. In response to a show cause order, the superior court ruled the County's responses to requests 09-05375, 10-01666, 10-08592, and 10-

08593 complied with the PRA. CP 1829-31. The superior court ruled the County violated the PRA in responding to request 10-05383 and awarded \$18,000.00 in penalties. CP 2445-53. After motions practice, the superior court awarded \$18,055.00 in attorney fees and costs, having reduced attorney fees by 1/7th because Mr. Mahmoud prevailed on one of his seven claims and his attorneys failed to segregate their fees. CP 2115-19. This appeal and cross-appeal followed.

V. STANDARD OF REVIEW

Judicial review of an agency's compliance with the PRA is *de novo*. Soter v. Cowles Pub'g Co., 162 Wn.2d 716, 731, 174 P.3d 60 (2007). “The [PRA] is a strongly worded mandate for broad disclosure of public records.” Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The PRA is liberally construed in favor of disclosure. RCW 42.56.030. Review of the amount of an award of attorney fees in a PRA case is for abuse of discretion. Sanders v. State, 169 Wn.2d 827, 867, 240 P.3d 120 (2010). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A trial “court's decision is ‘manifestly unreasonable’ if ‘the court, despite applying the correct legal standard to the supported facts, adopts a view

“that no reasonable person would take.” ’ ’ *Id.* (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting State v. Lewis, 115 Wn.2d 294, 298–99, 797 P.2d 1141 (1990)).

Where, as in this case, the action is barred by the statute of limitations, there are no facts upon which Mr. Mahmoud is entitled to relief and dismissal of the action in its entirety is required. In the alternative, the County’s responses to Mr. Mahmoud’s requests 09-05375, 10-01666, 10-08592, and 10-08593 complied with the PRA and their dismissal was appropriate. Furthermore, the superior court did not abuse its discretion in awarding \$18,055.00 in attorney fees where Mr. Mahmoud prevailed on only one of his seven claims and his attorneys failed to segregate their fees to include only those related to his prevailing claim.

VI. ARGUMENT

A. **ARGUMENT RELATED TO THE COUNTY’S CROSS-APPEAL**

1. **Mr. Mahmoud’s Claims Are Time-Barred Under RCW 42.56.550(6)**

The PRA requires plaintiffs to file any action within one year of the date of an agency’s “claim of exemption or last production of a record on a partial or installment basis.” RCW 42.56.550(6). As a statute of

limitations, RCW 42.56.550(6) acts to eliminate a plaintiff's right to maintain a cause of action, as it relates to a specific records request, beyond the time period specified within the statute.

Both the United States Supreme Court and the Washington Supreme Court recognize that statutes of limitations are intended to promote finality. Reading Co. v. Koons, 271 U.S. 58, 63, 46 S. Ct. 405, 70 L. Ed. 835 (1926); Atchison v. Great Western Malting Co., 161 Wn.2d 372, 382, 166 P.3d 662 (2007); see also Janicki Logging & Construction Co. v. Schwabe, Williamson & Wyatt, 109 Wn. App. 655, 662, 37 P.3d 309 (2001). The "obvious" purpose of such statutes is to set a definite limitation upon the time available to bring an action, without consideration of the merit of the underlying action. Dodson v. Continental Can Co., 159 Wn. 589, 596, 294 P. 265 (1930) (quoting Reading Co., 271 U.S. 58); see also Atchison, 161 Wn.2d at 382.

Statutes of limitations are strictly applied, and courts are reluctant to find an exception unless one is clearly articulated by the legislature. See, e.g., Huff v. Roach, 125 Wn. App. 724, 732, 106 P.3d 268 (2005); Bennett v. Dalton, 120 Wn. App. 74, 85-86, 84 P.2d 265 (2004); Janicki, 109 Wn. App. at 662. This is particularly true in cases governed by explicit statutory directives such as the PRA and not by the common law. See Elliott v. Dep't of Labor and Indus., 151 Wn. App. 442, 447, 213 P.3d

44 (2009) (declining to apply the discovery rule to modify the accrual date of an industrial insurance claim where the plain language of the statute specified that a claim had to be brought within one year of the injury/accident).

In PRA cases, the County has the burden of proof to establish its compliance with the PRA. RCW 42.56.550(1), (2). However, the County need not retain all of its records indefinitely; it is authorized to destroy records that have reached the end of their designated retention period. See generally RCW 40.14. Specifically, for files related to PRA requests, the County is currently permitted to destroy records related to a request two years after the request is fulfilled. See Washington State Archives Local Government Common Records Retention Schedule (CORE) Version 3.0⁵, at 141. Prior to 2012, the County was permitted to destroy PRA request files *one* year after the request was closed. See Washington State Archives Local Government Common Records Retention Schedule (CORE) Version 2.2 Revision Guide⁶, at 18 (emphasis added). The untenable consequence of an interpretation that the statute of limitations does not apply here or in Public Records Act cases in general is that the County's good faith

⁵ This document can be found on the Secretary of State's website at: http://www.sos.wa.gov/_assets/archives/RecordsManagement/CORE-3.0.pdf

⁶ This document can be found on the Secretary of State's website at: http://www.sos.wa.gov/_assets/archives/RecordsManagement/CORE%202.2%20Revision%20Guide.pdf

compliance with the retention schedule in RCW 40.14 could result in the loss of PRA lawsuits where it correctly destroyed records that had no continuing retention value, making the County unable to even attempt a defense.

In this case, it is undisputed that all of Mr. Mahmoud's PRA requests were closed more than one year prior to the filing of the Amended Complaint. In each of these requests, an event occurred that triggered the statute of limitations in RCW 42.56.550(6).

a. The County's Claims of Exemption in Response to Requests 09-05374 and 10-05383 Triggered the Statute of Limitations under RCW 42.56.550(6).

In order to trigger the statute of limitations, a claim of exemption must provide a requestor with "enough information ... to make a threshold determination of whether the claimed exemption is proper." Rental Hous. Ass'n of Puget Sound v. City of Des Moines (Rental Housing), 165 Wn. 2d 525, 539, 199 P.3d 393, 399 (2009), citing, WAC 44-14-04004(4)(b)(ii). The claimed exemption must provide what records are being claimed as exempt, what exemption is claimed, and how that exemption applies to the records. Id. at 538. The County is not required to provide an exemption log in order to trigger the statute of limitations. Greenhalgh v. Dep't of Corrections, 170 Wn. App. 137, 282 P.3d 1175,

1180 (2012) (citation to RCW 5.60.060(2)(a) in a letter triggers the statute of limitations). Additionally, where an exemption is claimed for a portion of a request, the claim of exemption triggers the statute of limitations for the entire request. Id. at 1181-82. Regardless of the existence of additional responsive records, the statute of limitations is triggered by the County's last claim of an exemption. The County claimed an exemption with regard to requests 09-05374 and 10-05383 more than one year prior to the filing of Mr. Mahmoud's lawsuit.

In response to the first request, 09-05374, an exemption was last claimed by the County on August 7, 2009. The statute of limitations was triggered by the claim of exemption notifying Plaintiff of the type of records (investigative records), what exemption applied (RCW 42.56.250(5) which exempts investigative records in an on-going EEO investigation), and why that exemption applied (the investigation was on-going). Although the email from the County did not specifically identify the individual records in the investigative file, RCW 42.56.250(6) should be treated as a "categorical exemption"⁷ which meets the County's burden

⁷ RCW 42.56.250(6) is akin to RCW 42.56.240(1) which the Washington State Supreme Court has concluded is a "categorical exemption" protecting open law enforcement investigations from disclosure and the citation of this exemption does not require an exemption log; rather, citation of the exemption in a letter is sufficient. See Newman v. King County, 133 Wn.2d 565, 574-75, 947 P.3d 712 (1997). For both of these exemptions, the identity of the individual records is not determinative for the exemption; rather, the fact of the on-going status of the investigation determines whether the exemption applies.

under Rental Housing and WAC 44-14-04004(4)(b)(ii). The statute of limitations was triggered on August 7, 2009. Plaintiff's claim is time-barred.

Although Mr. Mahmoud argues his letters, through counsel, dated October 20, 2009, and February 11, 2010, "re-opened" his request, the record belies any such suggestion. The plain language of the letters indicates their purpose was not to re-submit the request. Rather, they appeared to suggest merely that no response had been provided by the County, which was inaccurate. CP 2515-16; 2518-19. The County responded to Mr. Mahmoud's request on August 7, 2009, notifying Plaintiff that the records requested were exempt from production. Thereafter, the County appropriately closed the request. The statute of limitations ran on August 7, 2010.

The County timely provided responsive records and claimed an exemption to request 10-05383 on August 16, 2010. The exemption cited notified Plaintiff of the type of record (a memo from Max Phan to his attorney, Steve Bladek, concerning Plaintiff), what exemption applied (RCW 5.60.060(2)(a) which exempts attorney-client privileged communications), and why that exemption applied (the memo contained attorney-client privileged communications). Rental Housing, 165 Wn. 2d at 538. The County identified that a memo between a client and his

attorney was being withheld, under RCW 5.60.060(2)(a), because it contained attorney-client privileged communications. The County's claim of exemption satisfied Rental Housing and triggered the one-year statute of limitations.

Additionally, the County's claim of exemption for one record in response to request 10-05383 triggered the statute of limitations for the entire request. Greenhalgh, 170 Wn. App. 137. In Greenhalgh, as in this case, the agency claimed an exemption under RCW 5.60.060 in a letter to Mr. Greenhalgh, for one part of his request. Id. at 141. The Court concluded the claim of exemption for one part of the request triggered the statute of limitations for the entirety of the request and dismissed Mr. Greenhalgh's claim on a motion for summary judgment. Id. at 151 and 143. Here, the claim of exemption for one portion of request 10-05383 triggered the statute of limitations for the entire request. The statute of limitations ran on request 10-05383 on August 16, 2011.

b. The County's Production of Records on an Installment Basis in Response to Requests 09-05375, 10-01666, 10-08592, and 10-08593 Triggered the Statute of Limitations under RCW 42.56.550(6).

The clear language of RCW 42.56.550(6) states the statute of limitations is triggered with "the last production of a record on a partial or installment basis." The question for the Court in determining the

application of this law is whether the records were produced as part of a larger set of requested records. Tobin v. Worden, 156 Wn. App. 507, 514, 233 P.3d 906 (2010). Tobin involved a request where one single responsive record was produced. Id. The agency argued the production of one record was production on an installment basis, thus triggering the statute of limitations. Id. This Court held the statute of limitations was not triggered because that one record was “not part of a larger set of requested records.” Id., citing, RCW 42.56.080. Thus, the question to be answered in determining if RCW 42.56.550(6) was triggered is whether or not the records were produced as part of a larger set of requested records. In this case, four of Plaintiff’s requests were answered in installments, as part of a larger set of requested records. The statute of limitations was triggered by the last production of records in response to those four requests on April 2, 2010, November 22, 2010, December 9, 2010, and February 28, 2011. Each is barred by the one-year statute of limitations.

Mr. Mahmoud’s suggestion that the County engaged in “silent withholding” of records, tolling the statute of limitations, is without merit. “Silent withholding” is a term of art in the area of PRA law referring to an agency not providing information in an exemption log about the existence of additional records responsive to a request. See Rental Housing, 165 Wn.2d at 537. In Rental Housing, the agency provided a letter that

vaguely cited exemptions for “hundreds of pages” of records. The Court considered the issue of “silent withholding” when considering the “key issue” of the case: “when a ‘claim of exemption’ under RCW 42.56.550(6) is effectively made.” Id. The Court concluded, “[c]onsistent with this reasoning, a valid claim of exemption under the PRA should include the sort of ‘identifying information’ a privilege log provides.” Id. at 538. Rental Housing did not consider the language of RCW 42.56.550(6) dealing with production of a record on a partial or installment basis.

No case has applied the concept of “silent withholding” in determining if the statute of limitations has been triggered where an agency sufficiently claimed an exemption or produced records on an installment basis. The one PRA case that has considered a scenario like the one presented by this case is Johnson v. Dep’t of Corr., 164 Wn.App. 769, 265 P.3d 216 (2011), review denied, 173 Wn.2d 1032, 277 P.3d 668 (2012). In Johnson, the relevant facts were analogous to the scenario present here: a PRA request was responded to by the agency, the request was closed, and, more than one year later, the Plaintiff learned of the existence of additional responsive records that were not provided to him in response to his PRA request. Johnson, 164 Wn.App. at 771-73 and 775. The existence of additional potentially responsive records was irrelevant

to the Court's analysis of whether the agency's response triggered the statute of limitations under RCW 42.56.550(6) or RCW 4.16.130. Id. at 774-75. After considering the agency's dispositive motion, the Court concluded Mr. Johnson's claim was time-barred.

In light of the plain language of the statute and the rulings in Tobin and Johnson, it is clear that Plaintiff's claims are time-barred. The County triggered the statute of limitations by producing records on an installment basis in response to requests 09-05375, 10-01666, 10-08592, and 10-08593.

The County's actions triggered the statute of limitations in each one of Plaintiff's PRA claims. There is no basis in law for concluding that the Plaintiff receiving records over a year later in the course of litigation nullifies the triggering of the statute of limitations in responding to his public records requests. Mr. Mahmoud appears to assert that the "discovery rule" applies to PRA cases with a citation to a non-precedential federal court decision. See Brief of Appellant at 33. No Washington State court has concluded the "discovery rule" applies in PRA cases. Furthermore, Mr. Mahmoud's case does not present a set of facts supporting the application of the discovery rule in PRA cases – the additional emails responsive to his requests were known to him from the time he submitted his first request as they were contained in his own email

account and email archives. The suggestion that he did not know of their existence is not supported by the record as Mr. Mahmoud or his counsel told the County he knew additional responsive records existed. CP 2515-16; 2518-19; 2529-30. Mr. Mahmoud could have filed suit in a timely manner and he failed to do so. This Court should conclude Plaintiff's claims are time-barred and dismiss his action in its entirety.

c. Alternatively, Mr. Mahmoud's Claims Regarding Requests 09-05374, 09-05375, and 10-05383 Are Time-Barred by RCW 4.16.130.

RCW 4.16.130 requires a plaintiff to file a lawsuit "within two years after the cause of action shall have accrued" when no other statute of limitations applies. RCW 4.16.130 applies to PRA cases when RCW 42.56.550(6) is not triggered by the agency's actions. Johnson, 265 P.3d 779-80. Again, it is solely the agency's action that triggers the statute of limitations. The statute does not require that a plaintiff have knowledge of his potential claim in order to trigger the running of this "catch-all" statute of limitations. As a statute of limitations, RCW 4.16.130 acts to eliminate a plaintiff's right to maintain a cause of action, as it relates to a specific records request, beyond the time period specified within the statute.

Mr. Mahmoud asserts it was improper under CR 59(a) for the superior court to consider RCW 4.16.130 as it was raised for the first time on a motion for reconsideration. This issue need not be considered by this

Court as “an appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it.” Adcox v. Children's Orthopedic Hosp. & Med. Ctr., 123 Wn. 2d 15, 32, 864 P.2d 921, 932 (1993), quoting, LaMon v. Butler, 112 Wn.2d 193, 200–01, 770 P.2d 1027, cert. denied, 493 U.S. 814, 110 S.Ct. 61, 107 L.Ed.2d 29 (1989). Thus, this Court can consider the application of RCW 4.16.130.

Assuming, *arguendo*, the County’s claim of exemption was insufficient in response to request 09-05374, and did not trigger the statute of limitations under RCW 42.56.560, it is still time-barred pursuant to RCW 4.16.130. The County last responded to request 09-05374 on August 7, 2009; thus, the two-year, “catch-all” statute of limitations acted to bar Mr. Mahmoud’s claim as of August 7, 2011 -- over one year before the filing of his amended complaint in this case.

Similarly, even if the Court concludes the letters submitted by Plaintiff on October 20, 2009, and February 11, 2010 (wherein he inquired about request 09-05374), were new PRA requests, the claims are still time-barred pursuant to RCW 4.16.130. The County failed to respond to these “requests.” An agency is required to respond to a PRA request within five business days of receipt. RCW 42.56.520. Plaintiff’s cause of action for these unacknowledged “requests” accrued five business days

after they were received by the County, or October 27, 2009, and February 18, 2010, respectively. Thus, the two-year “catch-all” statute of limitations acted to bar his claim as of October 27, 2011, and February 18, 2012 -- over six months before the filing of his amended complaint in this case.

Additionally, assuming, *arguendo*, the County’s action in producing records on an installment basis did not trigger the statute of limitations under RCW 42.56.550(6), Plaintiff’s second request 09-05375 is still time-barred pursuant to RCW 4.16.130. The County responded by last producing responsive records on April 2, 2010. Plaintiff claims regarding the sufficiency of this production accrued the date they were produced. Thus, the two-year, “catch-all” statute of limitations acted to bar his claim as of April 2, 2012 -- four months before the filing of his amended complaint in this case.

Finally, assuming, *arguendo*, the County’s actions in claiming an exemption did not trigger the statute of limitations under RCW 42.56.560, Plaintiff’s fourth request 10-05383 is still time-barred pursuant to RCW 4.16.130. The County responded by claiming an exemption on August 16, 2010. Assuming the claim of exemption was either invalid or not properly made, Plaintiff’s cause of action accrued when the County cited the exemption. Thus, the two-year “catch-all” statute of limitations acted to

bar his claim as of August 16, 2012 -- two weeks before the filing of his amended complaint in this case.

Each of Mr. Mahmoud's requests had a clear triggering event that started the running of the statute of limitations. See RCW 42.56.550(6); Tobin v. Worden, 156 Wn. App. 507, 233 P.3d 906 (2010); Johnson v. Dep't of Corrections, 164 Wn. App. 769, 265 P.3d 216 (2011).

- ♦ The statute of limitations on 09-05374 ran on August 7, 2010.
- ♦ The statute of limitations on 09-05375 ran on April 2, 2011.
- ♦ The statute of limitations on 10-01666 ran on November 22, 2011.
- ♦ The statute of limitations on 10-05383 ran on August 16, 2011.
- ♦ The statute of limitations on 10-08592 ran on December 9, 2011.
- ♦ The statute of limitations on 10-08593 ran on February 28, 2011.

The Amended Complaint was filed on August 30, 2012; therefore, the superior court's finding that request 09-05374 was time-barred should be affirmed. The superior court's finding that Mr. Mahmoud's remaining requests were not time-barred should be reversed and this case dismissed in its entirety as a matter of law.

B. ARGUMENT ON MR. MAHMOUD’S APPEAL

1. The County Conducted a Reasonable Search for Records Responsive to Plaintiff’s Public Records Requests 09-05375, 10-01666, 10-08592, and 10-08593

In PRA cases, the burden is on the County to prove it conducted an adequate search for public records in response to a request. Neighborhood Alliance of Spokane v. County of Spokane, 172 Wn.2d 702, 261 P.3d 119 (2011). “[T]he focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate.” Id. at 719-20. The focus is “the search process not the result of that process.” Forbes v. City of Gold Bar, 171 Wn.App. 857, 288 P.3d 384, 388 (2012). The County need not search “*every* possible place a record may conceivably be stored, but only those places where it is *reasonably likely* to be found.” Neighborhood Alliance, 172 Wn.2d at 720 (emphasis in original). Under this standard, the County conducted a reasonable search.

Mr. Mahmoud’s requests sought “all emails to and from” specific County employees. He specifically directed the County to locate those emails on specific employees’ “C drive, P drive or any other County network drive.” In accordance with Mr. Mahmoud’s requests those named individuals’ email accounts and network drives were searched, gathered, and produced to him. Given the wording of the requests, it was reasonable for the County to comply by promptly accessing these individuals’

accounts on the network drives, copying all emails, and providing the records for the time period(s) Mr. Mahmoud requested.

Mr. Mahmoud could have, but did not, submit a public records request for his own email account and archives. If he had done so, the same process would have been completed for his accounts and the records provided in discovery would have been produced to him under a public records request. In the absence of such a request, the County was under no obligation to search Mr. Mahmoud's email account. Rather, the County conducted a search into the locations where the emails of Max Phan, Bruce Duvall, Art Louie, Julie Petersen, Steve Thomsen, Debbie Terwilleger, Craig Ladiser, Greg Morgan, Tom Rowe, Heather Coleman, and Larry Adamson were "*reasonable likely*" to be located – their own email accounts and email archives on the County's network drives. The County's search was reasonable and the fact that records existed in Plaintiff's email account does not refute that fact.

a. The County's Exemption Logs Complied with the PRA

In order to trigger the statute of limitations, a claim of exemption must provide a requestor with "enough information ... to make a threshold determination of whether the claimed exemption is proper". Rental Housing, 165 Wn. 2d at 539. The claimed exemption must indicate what

records are being claimed as exempt, which exemption is claimed, and how the exemption applies to the records. Id. at 538. The County is not required to provide a formal exemption log in order to trigger the statute of limitations. Greenhalgh v. Dep't of Corrections, 170 Wn.2d. 137, 147, 282 P.3d 1175 (2012) (citation to RCW 5.60.060(2)(a) in a letter is sufficient to trigger the statute of limitations).

The County claimed exemptions in response to five of Mr. Mahmoud's requests. Consistent with the requirements of the law, each claim of exemption indicated to Mr. Mahmoud what records were being claimed as exempt, which exemption applied, and how the exemption applied. Rental Housing, 165 Wn.2d at 538. Accordingly, the trial court correctly ruled the County complied with the PRA.

Specifically, as argued above in section VI(A)(1)(a), the County's claim of exemption in response to request 09-05374 provided Mr. Mahmoud with the information required by RCW 42.56.210(3) and Rental Housing. The County's claim of exemption in response to request 10-05383 was also sufficient. The County indicated to Mr. Mahmoud that the claim of exemption applied to a memo from Max Phan to his attorney, Steve Bladek, concerning Mr. Mahmoud -- satisfying the requirement that the County indicate what records are being claimed as exempt. Additionally, the County indicated that RCW 5.60.060(2)(a)

applied to the record because it contained attorney-client privileged communications, thereby satisfying the requirements to identify which exemption applied and how the exemption applied.

Similarly, the County's claim of exemption in response to request 09-05375 provided Mr. Mahmoud with the information he needed to challenge the exemption. For example, one document containing redactions was identified as an "Email", the exemption that applied was RCW 42.56.230(2), and it applied because the email contained a "proposed letter of reprimand" in an employment investigation. CP 2525. This satisfies the three-pronged requirement of RCW 42.56.210(3) and Rental Housing.

The County's exemption log provided in response to request 10-01666 likewise identified, in every instance: the types of records redacted or withheld (email[s]); the exemption that applied to each record (RCW 5.60.060(2)); the individuals involved in the email (Prosecuting Attorney); and that the exemption applied because each communication contained attorney/client privileged information. CP 2540-42. The County was not required to provide this formal exemption log, but in providing the log and the information contained therein, the County again complied with the requirements of RCW 42.56.210(3) and Rental Housing.

Finally, the County's exemption log provided in response to request 10-08593 also provided the required information for each document redacted or withheld. For example, one document containing redactions was identified as an "email," the exemption that applied was "RCW 5.60.060(2)," and the exemption applied because the email was "providing legal advice." CP 2560-61. This example is typical of how the County identified and supported the claimed exemptions. The County complied with its obligations under the PRA.

In sum, the County complied with RCW 42.56.210(3), the holding of Rental Housing, and WAC 44-14-04004(4)(b)(ii) in providing exemption logs and the information in them to Mr. Mahmoud. The superior court's ruling on this issue should be affirmed.

b. The County's Estimates of Time Were Reasonable

The PRA explicitly allows the County to make an estimate of time of when it will produce records based on a number of factors including: 1) the need to clarify the request; 2) the need to locate and assemble the records requested; 3) the need to notify third persons affected by the request; and 4) the need to determine whether any records, or portions thereof, are exempt. RCW 42.56.520. The PRA also allows for consideration of additional factors including: 1) the number of records

responsive to the request; 2) the number and size of other public records requests pending with the agency; 3) the amount of processing required for a particular request and other pending requests; and 4) agency staffing and funding levels and the current volume of other agency work, as these determine the amount of staff time that can be devoted to any specific request. Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws (Greg Overstreet, et al. eds., 2006) at 5-12.

In light of these factors, the fact that it took the Department of Public Works eight months to respond to request 09-05375 by gathering and processing all emails for six employees over a 20 month period, is reasonable. Especially considering the other 103 pending requests and the fact that two staff members were tasked with the responsibility of responding to all PRA requests. It is also reasonable that it took Planning and Development Services four months to gather and process records responsive to 10-01666. Especially considering the other 2,404 pending requests and the fact that two to three staff members were tasked with the responsibility of responding to all PRA requests during this time period. Additionally, the County was in constant communication with Mr. Mahmoud during these timeframes regarding the length of time that was needed to produce records. Mr. Mahmoud also received installments of

responsive records throughout these two periods, in accordance with RCW 42.56.080. The County's time estimates and the length of time it took to provide records for these two voluminous requests was reasonable.

c. The County Triggered the Statute of Limitations in RCW 42.56.550(6) When it Claimed an Exemption in Response to Request 09-05374

As argued above in section VI(A)(1)(a), the County triggered the one-year statute of limitations in RCW 42.56.550(6) when it claimed an exemption for request 09-05374. This Court should affirm the superior court's ruling and dismiss this claim as a matter of law.

d. Alternatively, the Statute of Limitations in RCW 4.16.130 Bars Mr. Mahmoud's Claims Regarding Request 09-05374

As argued above in section VI(A)(1)(c), if the Court concludes the County did not trigger the one-year statute of limitations in RCW 42.56.550(6), then the statute of limitations in RCW 4.16.130 bars Mr. Mahmoud's claim regarding request 09-05734. This Court should affirm the superior court's ruling and dismiss this claim as a matter of law.

e. The Court's Award of \$18,055.00 in Attorney Fees and Costs Was Not An Abuse of Discretion.

Under the PRA, a prevailing party is entitled to costs and "*reasonable attorneys' fees.*" RCW 42.56.550(4) (emphasis added). Washington courts apply the "lodestar" method for determining reasonable fees; a reasonable hourly rate multiplied by number of hours

reasonably expended on the litigation. Sanders v. State, 169 Wn.2d 827, 869, 240 P.3d 120 (2010); West v. Port of Olympia, 146 Wn. App. 108, 122 192 P.2d 986 (2008), rev. denied, 165 Wn.2d 1050 (2009). Under “lodestar,” a court must first determine that counsel expended a reasonable number of hours in securing a successful recovery for the client, which requires the court to exclude any hours that are wasteful, duplicative, or that pertain to unsuccessful claims. Mahler v. Szucs, 135 Wn. 2d 398, 433-34, 957 P.2d 632, 651 (1998) order corrected on denial of reconsideration, 966 P.2d 305 (Wn. 1998) citing, Scott Fetzer Co. v. Weeks, 122 Wn.2d, 109, 151, 859 P.2d 1210 (1990). A party seeking fees has the burden to prove the reasonableness of the fees. Fetzer, 114 Wn.2d at 151.

When PRA litigation involves several disputed issues, the court should only award fees for work on successful issues. Sanders v. State, 169 Wn.2d 827, 868, 240 P.3d 120 (2010). In Sanders, the Supreme Court ruled that the prevailing party’s fee request should be reduced by 75% to account for the three issues he did not prevail on and the one issue upon which he did prevail. Sanders, 169 Wn.2d at 871. Here, Plaintiff prevailed on only 14% (1 of 7) of his claims. The superior court, therefore, reduced Mr. Mahmoud’s attorney fees by 86%. The superior court properly applied the law and made a reasonable decision in reducing the fee

amount. As such, the superior court did not abuse its discretion in making a fee award of \$18,055.00. This Court should affirm the attorney fee award if it affirms the ruling that Mr. Mahmoud's claims are not time-barred.

VII. CONCLUSION


For all of the foregoing reasons, the County respectfully requests that this Court affirm the superior court's dismissal of Mr. Mahmoud's claims regarding request 09-05374 as time-barred and should reverse its denial of summary judgment as to the remainder of Mr. Mahmoud's claims.

Should this Court conclude the statute of limitations does not bar Mr. Mahmoud's claims, the County respectfully requests that this Court affirm the superior court's finding that the County's response to Mr. Mahmoud's requests 09-05375, 10-01666, 10-08592, and 10-08593 complied with the PRA and should affirm the dismissal of these claims.

This Court should also affirm the superior court's determination of attorney fees in accordance with controlling authority in the area of public records litigation.

Respectfully submitted on January 30, 2014.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
SARA J. DI VITTORIO, WSBA #33003
Deputy Prosecuting Attorney
Attorney for Respondent

DECLARATION OF SERVICE

I, Regina McManus, hereby certify that on January 31, 2014, I served a true and correct copy of the foregoing Brief of Respondent/Cross-Appellant upon the person/persons listed herein by the following means:

Hardeep S. Rekhi 1411 Fourth Avenue, Suite 1101 Seattle, WA 98101 206-388-5887/phone 206-577-3924 /fax hsrekhi@rekhiwolk.com /email	<input checked="" type="checkbox"/> Electronic Filing/Eservice <input type="checkbox"/> Facsimile <input type="checkbox"/> Express Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Via ABC Messenger Service for Service by 4:30 p.m. on ____
Greg Wolk Greg Wolk, P.S. 1411 Fourth Avenue, Suite 1101 Seattle, WA 98101 206-965-9998 206-965-9911 /fax greg@rekhiwolk.com /email	<input checked="" type="checkbox"/> Electronic Filing/Eservice <input type="checkbox"/> Facsimile <input type="checkbox"/> Email <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Via ABC Messenger Service for Service by 4:30 p.m. on ____

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Everett, Washington, this 31st day of January, 2014.



Print: Regina McManus
 Legal Assistant