NO. 91427-3

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION,

Respondent,

v.

JOHN F. KLINKERT,

Appellant.

ANSWER TO CORRECTED PETITION FOR REVIEW

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I. INTRODUCTION

The Washington State Criminal Justice Training Commission ("the Commission") withheld documents requested by John F. Klinkert because the Legislature enacted a statute making the requested records "confidential and exempt from public disclosure." The Commission provided a privilege log to Klinkert that sufficiently disclosed the identity of the withheld documents without breaching their confidentiality.

Years after the statutory deadline for filing a Public Records Act (PRA) lawsuit expired, Klinkert filed a PRA lawsuit challenging the Commission's decision to withhold production of the documents it had identified in the privilege log. The superior court dismissed the lawsuit as untimely. The court of appeals affirmed in a published opinion. Klinkert seeks further review.

II. ISSUES PRESENTED

Klinkert argues that the decision of the court of appeals conflicts with decisions of this court. If review were accepted, the issue presented would be whether the one-year statute of limitations for filing a Public Records Act lawsuit applies to a lawsuit filed three years after the request was notified that certain identified records were withheld?

III. STATEMENT OF THE CASE

The Washington State Criminal Justice Training Commission is a state agency tasked with the training and licensing of Washington police officers. RCW 43.101.85(6). Full-time, fully commissioned police officers must maintain peace officer certification issued by the Commission as a condition of continuing employment. RCW 43.101.095(1). The Commission can revoke peace officer certification if an officer is terminated from employment for "disqualifying misconduct." RCW 43.101.105(d).

Washington law enforcement agencies must notify the Commission when an officer is terminated for disqualifying misconduct. RCW 43.101.135. Law enforcement agencies are further required to send the investigative file documenting the misconduct to the Commission if requested by the Commission. RCW 43.101.135. The Commission reviews the investigative file and any other documents it compiles and determines whether or not to initiate an administrative proceeding to revoke the officer's certification. RCW 43.101.135.

The Commission is exempt from producing for public inspection the notice of termination and the investigative file submitted by the terminating law enforcement agency. RCW 43.101.400(1). The

Legislature further directed the Commission to keep such records "confidential." RCW 43.101.400(1).

If the Commission declines to initiate an administrative proceeding against the terminated officer, it must "purge" the investigative file. RCW 43.101.400(4). This is generally accomplished by returning the file to the law enforcement agency.

On November 29, 2008, King County Sheriff's Deputy Paul Schene was involved in a physical altercation with an arrestee. CP 113. The King County Sheriff's Office (KCSO) terminated Deputy Schene's employment after an internal investigation resulted in sustained findings of misconduct. CP 108. On October 6, 2009, KCSO submitted to the Commission a file containing "the entire investigative records relating to the Internal Investigation of Deputy Paul Schene." CP 106.

On October 27, 2009, petitioner John F. Klinkert submitted a public records request to the Commission. CP 70. Klinkert requested that the Commission produce:

> any and all documents, transcripts, emails, handwritten notes, recordings or images which the CJTC has that are related to the 11/29/08 incident in King County where two King County Sheriff's Deputies, Deputy Paul Schene and Deputy Travis Brunner assaulted a 15-year-old girl, Malika Calhoun, in a holding cell in SeaTac.

CP 70. Klinkert essentially requested the entire investigative file that was provided to the Commission by King County.

On November 18, 2009, the Commission produced some of the records requested by Klinkert, but withheld two records which totaled 714 pages. CP 71–77 (Exhibits 3–5). The Commission disclosed the identity of the withheld documents by providing Klinkert with a privilege log that identified the withheld records and explained why they were exempt from public inspection. CP 77 (*Appendix A*). The privilege log identified one withheld page as a "Notice of Hire/Termination of Deputy Paul Schene." CP 77. The exemption log identified the remaining 713 withheld pages as the "King County Sheriff's Office Investigative File on Deputy Schene." CP 77. The exemption log also included the date of the records, the author of the records, the person at the Commission who received the records, citation to the statutes that exempted each record from public disclosure, and a brief explanation as to why the identified records were exempt from public disclosure pursuant to the cited statutes. CP 77.

On November 30, 2009, Klinkert told the Commission that he was dissatisfied with the privilege log. CP 79–80. The Commission declined to amend the privilege log.

Eight months later, on August 3, 2010, Klinkert contacted the Commission and complained again that the privilege log provided in

November 2009 was inadequate. CP 87-91. Klinkert requested "a proper privilege log." CP 87–91.

The Commission promptly responded on August 5, 2010 and reiterated that the exemption log provided on November 18, 2009, was "fully adequate." CP 87-88. The Commission explained to Klinkert that the exemption log was adequate because it:

> identified that we were withholding the entirety of a 713-page investigative file received from the former employer of a terminated officer. We explained that the cited statute exempts all files we compile in the course of certification investigations. Since the information our privilege log provided about the author, recipient, nature, and intended use of the record allows you to make the "threshold determination of whether the claimed exemption is proper," that is a proper privilege log entry. Publishing an inventory of the investigative file's contents is not required for your "threshold determination," not required by the public disclosure law, and could easily defeat our proper claim of privilege.

CP 87–88 (emphasis in the original).

For almost four years, Klinkert took no legal action to challenge the Commission's November 2009 decision to withhold the requested records. On July 24, 2013, Klinkert filed a lawsuit in Snohomish County Superior Court which alleged that the Commission violated the Public Records Act by improperly withholding the requested records. CP 56–113.

The Commission moved the superior court for an order dismissing Klinkert's lawsuit pursuant to CR 12(b)(6). CP 42–53. Specifically, the

Commission argued that Klinkert's lawsuit was barred by the one-year statute of limitations for a PRA lawsuit. CP 43–53. The trial court agreed and dismissed the lawsuit as untimely. CP 1–4.

Klinkert appealed the order of dismissal, but the Court of Appeals affirmed the trial court's order of dismissal. The Court of Appeals held:

> The exemption log provided by the Commission on November 18, 2009, was sufficient to trigger the statute of limitations. It let Klinkert know that the entire 713-page investigative file was being withheld as exempt under RCW 43.101.400(1). That was enough information to enable Klinkert to evaluate, and a court to review, the Commission's decision to withhold the entire file. As soon as Klinkert received the one-page exemption log in November 2009, he could have brought suit asking the superior court to rule that each discrete document in the investigative file required its own separate entry in the exemption log. His suit—filed on July 24, 2013—was time barred, and the trial court correctly dismissed it.

Published Opinion at 6.[1] Klinkert petitions this court for further review.

IV. ARGUMENT

The Supreme Court will review a decision terminating appellate review only in the following limited circumstances:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

[1] The published opinion of the Court of Appeals is appended to *Klinkert's Corrected Petition for Review*.

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). In his corrected petition, Klinkert only argues criterion (1), that the Court of Appeals decision conflicts with previous decisions of the Washington State Supreme Court. The Court should deny review because Klinkert's petition fails to satisfy this criterion for review.

A. The Petition For Review Should Be Denied Because The Court Of Appeals Decision Does Not Conflict With Any Decision of The Washington Supreme Court

Klinkert argues that the opinion of the Court of Appeals conflicts with three opinions of this court: *Progressive Animal Welfare Soc'y v. Univ. of Wash. (PAWS II)*, 125 Wn.2d 243, 884 P.2d 592 (1994); *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010); and *Rental Housing Association of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009). Klinkert's petition for review fails to establish that the Court of Appeals' opinion conflicts with these cases or any other authority from this Court.

1. The Court of Appeals' decision does not conflict with *PAWS II* because the provisions of RCW 43.101.400(1) do not conflict with the PRA

Klinkert first argues that the Court of Appeals' opinion conflicts with *PAWS II* on the issue of whether an "other statute" conflicts with the

PRA. At the outset, the Court should deny review because the Court of Appeals' opinion did not address this issue. An opinion cannot conflict with case law on an issue if that issue is not addressed in the opinion.

Klinkert's argument also fails on its merits. In *PAWS II*, this court said with respect to the PRA's "other statute" exemption, "if such other statutes mesh with the Act, they operate to supplement it. However, in the event of a conflict between the Act and other statutes, the provisions of the Act govern." *PAWS II*, 125 Wn.2d at 262. Klinkert alleges that the Court of Appeals' opinion conflicts with this statement from *PAWS II* because, according to Klinkert, RCW 43.101.400(1) allows for an inadequate privilege log contrary to the requirements of the PRA.

Klinkert's argument ignores the authority of the Legislature to exempt from public disclosure records that an agency would otherwise be required to produce under the PRA. The Legislature clearly contemplated and intended to reserve for itself the right to enact statutes that would exempt specific records from public inspection under the Public Records Act:

> Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of *subsection (6) of this section, this chapter, *or other statute which exempts or prohibits disclosure of specific information or records*. . . .

RCW 42.56.070(1) (emphasis added). The only rational interpretation of the emphasized language is that the Legislature knew that on occasion it would determine that the confidentiality of records outweigh the public's interest in reviewing them.

The Legislature made such a decision in 2001 when it enacted RCW 43.101.400(1). The plain language of the statute makes clear that it was intended to be an "other statute" that exempts specific records from public inspection where production would otherwise be required by the PRA:

> the following records of the commission are confidential and exempt from public disclosure: . . . (c) *all investigative files of the commission compiled in carrying out the responsibilities of the commission under this chapter*. Such records are not subject to public disclosure, subpoena, or discovery proceedings in any civil action . . .

RCW 43.101.400(1)(c) (emphasis added).[2]

The record in question here, the "investigative file," was clearly contemplated by the Legislature to be one record for PRA purposes. Use of the phrase "*all* investigative files" in RCW 43.101.400(1) is evidence of the Legislature's intent to prohibit the public disclosure of *all* of the "investigate files" compiled by the Commission, i.e., the entirety of each

[2] The "responsibilities of the commission under this chapter" (Chapter 43.101) include reviewing the investigative file to determine whether there is probable cause to believe that an officer was terminated for disqualifying misconduct; and using a finding of probable cause to initiate an administrative action to revoke peace officer certification. RCW 43.101.135; RCW 43.101.155(1).

file regardless of how many discrete documents are included within. The contents of each investigative file is a single record for purposes of responding to a public records request submitted to the Commission.

Use of the word "confidential" in RCW 43.101.400(1) is further evidence of the Legislature's intent that the entire investigative file is a single record for PRA purposes. "Confidential" means "private" or "secret." *Webster's Ninth New Collegiate Dictionary*, 275 (1984). The Legislature directed the Commission to keep "all investigative files" confidential, which means the entire contents of the file is confidential and accordingly may be considered by the Commission as one record for PRA purposes. It was the Legislature's prerogative to keep these records confidential and exempt from public disclosure when in the Commission's possession.[3]

PAWS II held that "if another statute (1) does not conflict with the Act, and (2) either exempts or prohibits disclosure of specific public records in their entirety, then (3) the information may be withheld in its entirety..." *Id.* at 262. Here, RCW 43.101.400(1) serves to mesh with the PRA by explicitly exempting certain records—to include "the investigative files"—from public disclosure. Contrary to Klinkert's

[3] There is no similar prohibition on disclosure for these same records when in the custody of the terminating law enforcement agency. Klinkert conceded at oral argument in the court of appeals that he had obtained the same records at issue here from the King County Sheriff's Office. *Published Opinion* at 2, n.1.

argument, nothing in RCW 43.101.400(1) exempts the Commission from sufficiently identifying records it withholds from a public records requestor and accordingly does not conflict with the PRA.

Here, the Commission properly withheld the entirety of the investigative file because an "other statute" that does not conflict with the PRA exempted the entirety of the file from public disclosure. Under these circumstances, *PAWS II* allowed withholding of the entirety of the record.

The Court of Appeals correctly held that the privilege log provided by the Commission "let Klinkert know that the entire 713-page investigative file was being withheld as exempt under RCW 43.101.400(1)." *Published Opinion* at 6. The Court of Appeals' decision does not conflict with *PAWS II*.

2. The Court of Appeals' decision does not conflict with *Sanders v. State* because the Commission "disclosed" the withheld record to Klinkert

Sanders v. State noted that while some records may be exempt from *production*, they are never exempt from *disclosure*, i.e., a record must always be identified and thereby "disclosed" in an exemption or privilege log. *Sanders v. State*, 169 Wn.2d 827, 836, 240 P.3d 120 (2010). Klinkert argues that the Court of Appeals' opinion conflicts with *Sanders*.

Klinkert's argument again rests on the erroneous assumption that the investigative file is comprised of multiple records and does not itself

constitute just one record. The plain language of RCW 43.101.400(1) contradicts this assumption. The statute identifies "all investigative files of the commission" as records that are confidential and exempt from public disclosure. RCW 43.101.400(1). As argued above, the Legislature's use of the phrase "all investigative files" and the word "confidential" evidences its intent to exclude the *entirety* of all investigative files obtained or compiled by the Commission, regardless of the number of pages or discrete documents within the file.

There is no conflict between the Court of Appeals' decision and *Sanders*. The Commission "disclosed" to Mr. Klinkert the existence of the file as required by *Sanders* by sufficiently describing it in a privilege log. The log disclosed to Klinkert that the withheld record was the "King county Sheriff's Office Investigative File on Deputy Schene," it was "713 pages including a cover letter of 1 page," it was dated "9/30/09," it was received at the Commission by Sonja Hirsch, it was authored by Robin Fenton at the King County Sheriff's Office, the statutory exemptions that applied to the record, and a brief "explanation of how exemption applies." *Appendix A* (CP 77). The Commission sufficiently "disclosed" the record as required by *Sanders*. The Court of Appeals' decision does not conflict with *Sanders* and review should be denied.

3 The Court of Appeals' decision does not conflict with *Rental Housing Ass'n of Puget Sound v. City of Des Moines* because the statute of limitations started to run as soon as the Commission provided a privilege log to Klinkert that sufficiently identified the withheld record and the reasons for its non-production.

Judicial review of an agency's response to a public records request "must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis." RCW 42.56.550(6). Only when the claim of exemption does not provide sufficient identifying information will the one-year statute of limitations not begin to run. *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 539-40, 199 P.3d 393 (2009).

In *Rental Housing*, the rental housing association (RHA) requested twelve different categories of records from the City of Des Moines relating to a certain rental housing program. *Id.* at 528. The city refused to provide hundreds of pages of requested records and did not provide a privilege/exemption log. *Id.* at 528–29. Instead, the city generally characterized the withheld documents as "inter-office legal opinions and memoranda," copies of ordinances and cases, and other various items. *Id.* at 529. RHA filed suit under the PRA. The city moved to dismiss because the lawsuit was filed more than one year after the last production of records. *Id.* at 534–35.

This court held that a valid exemption claim under the PRA must include sufficient identifying information in a privilege log (as described in *PAWS II*), along with the identification of a specific exemption and an explanation of how the exemption applies to the record. *Rental Housing Ass'n*, 165 Wn.2d at 538. The court held that the city's reply with regards to the withheld records "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.. " *Id.* at 539. The city's response to the records request amounted to "silent withholding" by the city. *See id.* at 537. Because the city's response did not disclose the identity of the requested records even if an exemption applied, the one-year statute of limitations was not triggered by the response and RHA's suit was not time-barred. *Id.* at 541.

Klinkert argues that the Court of Appeals' opinion conflicts with *Rental Housing* because the Commission did not provide him with an "adequate privilege log for each record as required by *Rental Housing Association*." *Petitioner's Corrected Petition for Review* at 16. Klinkert's assertion is erroneous and the Court of Appeals' decision does not contradict *Rental Housing*.

The Court of Appeals directly addressed *Rental Housing* in its opinion and correctly applied it to the facts of this case. *Published Opinion* at 5-6. The Court of Appeals noted that the Commission "disclosed" the records on November 18, 2009 when it identified them as (1) a one-page "Notice of Termination" for Deputy Schene, and (2) King County's investigative file for Deputy Schene, which was comprised of 713 pages. *Appendix A* (CP 77).[4] The log identified the author of the records, the date of the records, the citations to the statutory exemptions, and a brief explanation as to why the cited statutes exempted the Commission from producing the identified investigative file. *Appendix A* (CP 77). The Commission's privilege log was significantly more detailed than the vague explanations that amounted to "silent withholding" in *Rental Housing*. Unlike *Rental Housing*, the Commission provided "enough information to enable Klinkert to evaluate, and a court to review, the Commission's decision to withhold the entire file." *Published Opinion* at 6.

The Court of Appeals' decision followed *Rental Housing* in holding that the statute of limitations began to run in November 2009 when the Commission used a privilege log to sufficiently disclose to Klinkert the identity of the withheld record and the reasons for its non-disclosure. Klinkert filed his lawsuit in July 2013, almost three years after

[4] This was later clarified to be the same investigative file that pertained to Deputy Brunner.

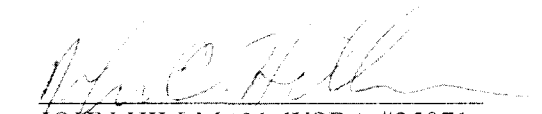
the statute of limitations had expired. The Court of Appeals properly affirmed the trial court's order dismissing the lawsuit as untimely.

V. CONCLUSION

The petition for review should be denied because the Court of Appeals' opinion does not conflict with *PAWS II*, *Sanders*, *Rental Housing*, or any other opinion of this court. Klinkert's lawsuit was very untimely and properly dismissed.

RESPECTFULLY SUBMITTED this _____ day of June, 2015.

ROBERT W. FERGUSON
Attorney General

By: 
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WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION,

Respondent.

DECLARATION OF SERVICE

I HEREBY CERTIFY that on Monday, June 1, 2015, I served true and correct copies of the State's Answer to Corrected Petition for Review and Declaration of Service by depositing same in the United States Mail, first-class delivery, postage prepaid and addressed as follows:

John F. Klinkert
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And by electronic e-mail to: John Klinkert, e-mail-johncar3@comcast.net

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

RESPECTFULLY SUBMITTED this 1st day of June, 2015.

DAISY LOGO
Legal Assistant

OFFICE RECEPTIONIST, CLERK

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Attached for filing for the case referenced above, please find the following documents:

1) Answer to Corrected Petition for Review
2) Declaration of Service

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