71461-9

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No. 71461-9

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

JOHN F. KLINKERT,

Appellant

v.

WASHINGTON STATE CRIMINAL JUSTICE
TRAINING COMMISSION,

Respondent

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STATE OF WASHINGTON
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On Appeal from the Superior Court of Washington
for Snohomish County

The Honorable Marybeth Dingledy, Judge

APPELLANT'S BRIEF

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2. In determining when the applicable statute of limitations began to run, the hearing judge failed to consider the two purported privilege logs provided to me in the form of emails on August 5, 2010, by Greg Baxter, the WSCJTC's Public Records Officer.

3. The hearing judge erroneously ruled as a Conclusion of Law that the applicable statute of limitations for a Public Records Act lawsuit in this situation was the one-year period in RCW 42.56.550(6).

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A. INTRODUCTION: THE WASHINGTON CRIMINAL JUSTICE TRAINING CENTER (WSCJTC) DOES NOT OWN THE LAW

This Court should make it clear to the Washington State Criminal Justice Training Center (WSCJTC) that its mocking attitude of "We own the law" will subject it to the possibility of monetary sanctions, and thereby vindicate one of the policies behind the Public Records Act as stated in RCW42.56.010, namely, that "the people…do not give their public servants the right to decide what is good for the people to know and what is not good for them to know."

I made a request for public records to the Washington State Criminal Justice Training Commission (WSCJTC) -- the state agency which certifies and decertifies all Washington peace officers – but the agency's two Public Records Officers stonewalled me. They each used preposterous excuses to avoid providing a valid privilege log, most likely in order (1) to avoid the tedious work of itemizing 713 pages of documents on a privilege log and (2) to trigger a one-year statute of limitations within which to file my lawsuit.

Rather than providing a valid privilege log, each of two WSCJTC Public Records Officers made the preposterous claim that the 713-page internal investigation file (the IIU document file) sent to them by the King County Sheriff's Office regarding former Deputy Paul Schene, which

contained a variety of investigative documents, constituted only <u>one record</u> and therefore required (1) only one entry on the two-line privilege log that WSCJTC provided me, and in response to my later second, different, records request required (2) only the two short emails which WSCJTC sent me claiming that they themselves constituted a privilege log.

Later, after I had filed a lawsuit against WSCJTC under the Public Records Act , the WSCJTC claimed in a CR 12(b)(6) motion to dismiss, that because they had provided me with a privilege log that was a valid claim of exemption, I was barred by the one-year statute of limitations in RCW 42.56.550(6) which disallows PRA lawsuits filed more than one year after the date an agency provides either (1) a [valid] claim of exemption or (2) the last production of a record on a partial or installment basis.

Inexplicably the Superior Court hearing judge granted WSCJTC's motion. Although WSCJTC filed its motion to dismiss before filing an Answer to my First Amended Complaint, I do not object to WSCJTC's not having filed an Answer, because it is a common practice to file a motion to dismiss before filing an Answer.

In this appeal I ask the Court of Appeals to

(1) Reverse the Superior Court judge's dismissal of my lawsuit to show the WSCJTC that it doesn't own the law;

(2) Remand this case to Snohomish County Superior Court;

(3) Order WSCJTC to file an Answer to my First Amended Complaint within the 10 days required by CR 12(a)(4)(A);

(4) Order the WSCJTC to provide me with a valid privilege log;

(5) Suggest to the Snohomish County Superior Court that it consider imposing the maximum monetary penalties on WSCJTC for its preposterous claims, blatantly scornful of the Public Records Act, that a 713-page file constitutes only one record; and

(6) Declare that in this situation, where an agency never provides a valid privilege log and does not provide records in installments, the applicable statute of limitations is the three-year period stated in RCW 4.16.080(6) for lawsuits seeking statutory penalties.

B. ASSIGNMENTS OF ERROR

1. The hearing judge failed to state as a Conclusion of Law that when the one-year statute of limitations in RCW 42.56.550(6) is not applicable, the applicable statute of limitations is triggered by an agency's last denial of records without the adequate "brief explanation of how [an] exemption applies to the record[s] withheld" required by RCW 42.56.210(3). .

2. In determining when the applicable statute of limitations began to run, the hearing judge failed to consider the two purported privilege logs provided to me in the form of emails on August 5, 2010, by Greg Baxter, the WSCJTC's Public Records Officer.

3. The hearing judge erroneously ruled as a Conclusion of Law that the applicable statute of limitations for a Public Records Act lawsuit in this situation was the one-year period in RCW 42.56.550(6).

4. Because the hearing judge erroneously ruled as a Conclusion of Law that I did not commence my lawsuit until after the applicable statute of limitations had expired, the hearing judge also erroneously ruled as a Conclusion of Law that my lawsuit must be dismissed under CR 12(b)(6).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When the one-year statute of limitations in RCW 42.56.550(6) is not applicable, is the statute of limitations triggered by an agency's last denial of records without the adequate "brief explanation of how [an] exemption applies to the record[s] withheld" required by RCW 42.56.210(3)?

2. Were the two emails purporting to be privilege logs that the WSCJTC's Public Records Officer, Greg Baxter, provided to me on August 5, 2010, adequate responses under the Public Records Act sufficient to trigger the one-year statute of limitations in RCW 42.546.550(6)?

3. What is the applicable statute of limitations in this situation?

4. Did I commence my lawsuit within the applicable statute of limitations?

C. STATEMENT OF THE CASE

1. Factual Background: WSCJTC's Stonewalling

a. Brief description of the WSCJTC

The defendant, Washington State Criminal Justice Training Commission (WSCJTC), certifies all full-time peace offices in the state of Washington – sheriff's deputies, police officers, and state troopers. RCW 43.101.085(6). Law enforcement agencies such as the King County Sheriff's Office are required to notify WSCJC when a deputy is fired for misconduct. RCW 43.101.135. The WSCJTC may investigate alleged misconduct by reviewing a law enforcement agency's internal affairs investigation, which the agency is required to produce upon WSCJTC's request. RCW 45.101.135. The files which WSCJTC "compiles" during its investigations of alleged misconduct are exempt from public disclosure, RCW 43.101.400(1), and therefore, I presume, any file the WSCJTC receives from a law enforcement agency would be added (or "compiled") into the WSCJTC's own investigative files.

b. My first records request to WSCJTC on October 27, 2009

On October 27, 2009 I made my first public records request to Defendant WSCJTC's then Public Records Officer Leanna Bidinger under RCW 42.56 *et seq.* by email, asking WSCJTC for, among other things,

"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

c. WSCJTC's first (outlandish) response on November 18, 2009: Its first purported privilege log

On November 18, 2009 Ms. Bidinger responded by email. (CP 72) Her email contained two attachments. One attachment (CP 74) was a letter stating that Ms. Bidinger had sent me two discs, each containing one record.

The second attachment (CP 77) was a one-page purported privilege log in chart form, containing only two lines. And one of these two lines purported to identify one record that was 713 pages long.

This supposed 713-page record almost certainly consists actually of many records produced during the KCSO's IIU investigation of Deputy Paul Schene and Deputy Travis Brunner which KCSO had sent to WSCJTC after KCSO completed its IIU investigation and Sheriff Sue Rahr had fired Deputy Schene. (CP 106)

d. My first protest to WSCJTC on November 30, 2009

On November 30, 2009 I emailed Ms. Bidinger (CP 79) protesting that the privilege log did not meet the requirements for privilege logs stated in

Rental Housing Association of Puget Sound v. City of Des Moines, 165 Wash.2d 525, 199 P.3d 393 (2009).

Ms. Bidinger never replied to my protest.

e. My second protests and Greg Baxter's August 5, 2010 denial

On March 22, 2010 Greg Baxter replaced Ms. Bidinger as WSCJTC's Public Records Officer, a fact which I learned on August 4, 2010. (CP 82)

On August 3, 2010 I sent to Ms. Bidinger, and on August 4, 2010 I sent to Mr. Baxter, emails complaining about WSCJTC's claim that all the King County Sheriff's records which the Sheriff's Office had sent to them relating to Deputy Paul Shene's termination constituted only one 713-page record. (CP 87-91) On August 5, 2010 Mr. Baxter refused to acknowledge the truth of my protest and continued to claim that the 713-pages constituted only one record. (CP 87-91)

Greg Baxter's email reply on August 5, 2010 claiming that the one-line entry for one record of 713 pages on the purported privilege log was adequate (CP 87) was his most recent defense of the purported privilege log. It fails to acknowledge the existence of individual records that are responsive to my first public records request on October 27, 2009 to Leanna Bidinger. and it is equivalent to a silent withholding of requested public records.

f. My second, and different, records requests of August 3, 2010, relating to Deputy Schene and Deputy Brunner

On August 3, 2010, not knowing that Ms. Bidinger had been replaced by Greg Baxter as WSCJTC's Public Records Officer (See **Argument 2.e** above), I made a public records request via email to Ms. Bidinger requesting all documents related to Deputy Paul Schene that contained

> "the handwriting, handwritten initials, hand printing, or signatures of King County Sheriff's Deputy Paul Schene which the CJTC has that are related to the 11/29/08 incident..."

and I made an identical request to Ms. Bidinger for all documents handwritten by Deputy Travis Brunner. (CP 93, CP 95)

On August 5, 2010, I made the same two requests via email to Greg Baxter, the WSCJTC's new Public Records Officer. (CP 97-99)

g. Greg Baxter's August 5, 2010 denials of my second records request, and his two purported email privilege logs

Later the same day, August 5, 2010, Greg Baxter replied to me via email (CP 101-2) that as to Schene-related records the email was serving as a privilege log for a 713-page investigative file prepared by the King County Sheriff's Office and that "RCW 43.100.400 specifically exempts from public disclosure the entirety of such WSCJTC files." he had no Deputy Schene-related handwritten or handprinted records that I had requested. (CP 101-2)

Also on the same day, August 4, 2010, Greg Baxter replied to me via email (CP 104) that as to Brunner-related records the email was serving as a privilege log for a 713-page investigative file prepared by the King County Sheriff's Office and that "RCW 43.100.400 specifically exempts from public disclosure the entirety of such WSCJTC files."

2. Procedural History

a. WSCJTC's two preposterous emails of August 5, 2010

On August 5, 2010, Greg Baxter, the Public Records Officer for WSCJTC, sent me the two short emails referred to above, each of which claimed to be a privilege log for a 713-page IIU file [which by implication comprised only one record]. (CP 102-4)

b. My original Complaint filed July 30, 2013

I filed my original Complaint against WSCJTC in Snohomish County Superior Court on July 30, 2013, five days before the expiration of the three-year statute of limitations in RCW 4.16.080(6) relating to lawsuits for statutory penalties. (CP 116)

c. My First Amended Complaint filed October 24, 2013

c. I filed my First Amended Complaint on October 24, 2013 (CP 56) and served it on WSCJTC on the same day.

d. WSCJTC's Motion to Dismiss filed November 7 , 2013

WSCJTC filed its CR 12(b)(6) motion to dismiss on November 7, 2013. (CP 42)

e. Superior Court hearing on December 12, 2013

The CR 12(b)(6) motion to dismiss was heard in Snohomish County Superior Court on December 12, 2013 by the Honorable Marybeth Dingledy. (CP 9)

f. Original Order, Corrected Order, and Notice of Appeal

Superior Court Judge Dingeldy filed her initial order of dismissal with prejudice later on the same day as the hearing, December 12, 2013. (CP 5)

Because of some minor errors in the order, WSCJTC's attorney, John Hillman made a few corrections at my request and resubmitted the order for Judge Dingledy's signature. (CP 1)

On January 2, 2014, Judge Dingledy filed the corrected order. (CP 1)

On January 30, 2014, I filed a Notice of Appeal in Snohomish County Superior Court and in Division One of the Court of Appeals.

D. ARGUMENTS

1. **When the one-year statute of limitations in RCW 42.56.550(6) is not applicable, the statute of limitations is triggered by an agency's last denial of records without the adequate "brief explanation of how [an] exemption applies to the record[s] withheld" required by RCW 42.56.210(3).**

   Standard of Review: This is a question of law, and an appellate court reviews questions of law and conclusions of law de novo. Veach v. Culp, 92 Wash.2d 570, 573, 599 P.2d 526 (1979).

Where an agency never provides an adequate privilege log (as a satisfactory "brief explanation of how an exemption applies to records it withhheld"), the date that starts the statute of limitations running is the date of the agency's last denial. In Johnson v. Department of Corrections, 164 Wash.App. 769, 265 P.3d 216 (2011), a Public Records Act case cited by the Attorney General on Page 8 of his Memorandum in Support (CP 50) (but for a different proposition), the plaintiff inmate argued for a two-year statute of limitations under the "catch-all" statute RCW 4.16.130, while the defendant Department of Corrections urged the court to use the one-year statute in the Act, RCW 42.56.550(6). The Court of Appeals, Division Two, refrained from deciding which of the two statutes applied, because the court found that "even under the more lenient two-year statute, the plaintiff's action was time-barred." Johnson, supra, 265 P.3d at 220. The court did not discuss the possibility of the three-year statute in

RCW 4.16.080(6). However, the Johnson court used as the trigger to start the statute running the date of the defendant agency's last reply which was a written denial to the requester that the records existed. In addition, this denial by the agency was in response to an initial records request that the requester had repeated – similar to what I did. (That is, I made an initial request, and I later made a second, but different, records request.) (CP 93, CP 96-9)

2. WSCJTC's two short emails of August 5, 2010 denying my second request were WSCJTC's last denial of a requested record, and the emails were not valid privilege logs sufficient to trigger the one-year statute of limitations in RCW 42.56.550(6).

Standard of Review: This is a question of law, and an appellate court reviews questions of law and conclusions of law de novo. Veach v. Culp, 92 Wash.2d 570, 573, 599 P.2d 526 (1979).

a. The two short emails were not sufficient to trigger the first prong of the one-year statute of limitations in RCW 42.56.550(6)

The one-year statute of limitations in RCW 42.56.550(6) has two prongs, either of which can trigger the one-year period:

> "(6) Actions under this section 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 42.546.550(6)

The first prong is "the agency's claim of exemption", and the second prong is the agency's "last production of a record on a partial or installment basis."

The "claim of exemption" required by the first prong echoes the additional requirement on agencies stated in RCW 42.56.210(3):

> "(3) Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." RCW 42.56.210(3)

WSCJTC did not trigger the first prong, because WSCJTC's two emails did not provide a "claim of exemption" for each record as required by RCW 42.56.210(3).

Neither of WSCJTC's two emails to me on August 5, 2010 described the individual records for which WSCJTC claimed an exemption. When an agency denies a request for production it must provide the requester with two things: (1) a written statement, pursuant to RCW 42.56.520, and (2) a statement of the claimed exemption and a brief explanation of how the claimed exemption applies to each record. That is, the agency must identify each record. WSCJTC did not do that. Instead, WSCJTC's two emails claimed that 713 pages in a file constituted one record, in order to avoid describing each record – most likely either out of a desire for secrecy or to avoid the tedious work of describing the records. (CP 101-4)

(1) The inadequacy of WSCJTC's purported privilege logs under Rental Housing Association

Greg Baxter's claim that WSCJTC's two emails constituted privilege logs is preposterous. RCW 42.56.210(3) refers to "brief explanations of how the exemption applies to the record withheld". Rental Housing Association of Puget Sound v. City of Des Moines, 165 Wash. 2d 525, 199 P.3d 393 (2009), clarified that an adequate privilege log is one way of making a sufficient "brief explanation of how the exemption applies to the record withheld". Rental Housing Association's requirement of a privilege log that itemized each record was in support of the statutory requirement in RCW 42.56.210(3) for a "brief explanation" of claimed exemptions for each record. That WSCJTC put its "brief explanation" for withholding records into the form of short emails and called them privilege logs (CP 101-4) to satisfy the requirement of Rental Housing Association, was obviously Greg Baxter's attempt to evade complying with the statutory requirement to provide a "brief explanation" for each record in the IIU file while at the same time triggering the one-year statute of limitations. Such open scorn for citizen access to government records violates the policy behind the Public Records Act, and this Court should not allow it, because allowing it would defeat the rationale behind Rental Housing Association itself, which is to

insure that all relevant records or portions of records be identified with particularity. Rental Housing Association, supra, 165 Wash.2d at 538, 199 P.3d at 399.

Note also that just as I alleged that I repeated my request to WSCJTC for an adequate privilege log (CP 93, CP 97-9), so did the (eventually) victorious plaintiff in Rental Housing Association, supra, 165 Wash.2d at 529, 199 P.3d at 395. And note further that the reason the Washington Supreme Court in Rental Housing Association appeared to accept, finally, a document which the defendant agency had labeled "privilege log" as a "brief explanation..." was not because it was labeled a "privilege log" but because it described (disclosed the existence of) individual records with the required particularity.

One might try to argue that WSCJTC's claim was so obviously preposterous that I was on notice to sue with the statute of limitations. However, this was precisely the same situation in Rental Housing Association, namely, an agency's obvious lack of adequate "brief explanation ...." for each record, and the Washington Supreme Court still held that the one-year statute of limitations was not triggered until the agency provided a privilege log with sufficient brief explanations for the individual records. In order for WSCJTC to do this, it must group the 713 pages into records. (Presumably the King County Sheriff's Office had sent

the 713 pages to WSCJTC already grouped into records, and possibly also each record was stapled and therefore easy to identify.)

(2) The correct definition of "disclosure" under Sanders v. State

Sanders v. State, 169 Wash.2d 827, 240 P.3d 120 (2010), explicitly makes a distinction between disclosure and production. Most of the PRA cases I have read actually use "disclosure" to mean "production", but Sanders clarifies the correct usage of the two words. Individual records can be exempt from production but never from disclosure of their existence. Disclosing their existence requires describing them individually, and in order to do this, WSCJTC must group the 713 pages into records. Almost certainly the King County Sheriff's Office, when it sent the 713 pages of records to WSCJTC, had already done this for WSCJTC.

> "1. Records 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.
>
> 2. Disclosed records are either "produced" (made available for inspection and copying) or "withheld" (not produced). A document [note the use as a synonym for "record"] may be lawfully withheld if it is "exempt" under one of the PRA's enumerated exemptions> A document not covered by one of the exemptions is, by contrast, "nonexempt." Withholding a nonexempt document is "wrongful withholding" and violates the PRA. [Citation omitted]

3. 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). [Footnote omitted] The claimed exemption is "invalid" if it does not in fact cover the document." Sanders v. State, 169 Wash.2d. 827, 240 P.3d 120, 125 (2010)

Sanders quotes the trial court's correct ruling that the PRA

> "require[s] an agency claiming an exemption to 'include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld ' CP at 1717 (quoting RCW 42.56.210(3) [footnote omitted] [emphasis added" Sanders v. State, supra, 169 Wash.2d. 827, 240 P.3d at 130

WSCJTC's purported email privileges logs never showed, nor could they show, how (or whether) their claimed exemption applied to each of the (presumably) variable-length records in the file that contained 713 pages of records. This is important, because some of the records actually might not be exempt even though they were in a file sent to WSCJTC by the King County Sheriff's Office.

(3) No silent withholding: Rental Housing Association and PAWS II

Rental Housing Association, supra, cited Progressive Animal Welfare Society v. University of Washington, 125 Wash.2d 243, 884 P.2d 592 (1994) (PAWS II) for an evil they called "silent withholding", and that is precisely what WSCJTC is doing here. "Silent" means not disclosing the existence of the individual records for which an exemption

is claimed, or simply withholding records without acknowledging the withholding at. And here, WSCJTC is withholding 713 pages of records because it is not producing them, and this non-production is silent since WSCJTC has not disclosed which particular records are contained in the 713 pages. Rental Housing Association forbade this tactic of the defendant City of Des Moines when it quoted long stretches of text from PAWS II on silent withholding. Rental Housing Association, supra, 165 Wash.2d at 539, 199 P.3d at 399.

(4) WSCJTC's claim of the "other statute" exception in RCW 42.56.070(1) is disallowed by PAWS II because it conflicts with the public Records ACT.

The Attorney General at the top of Page 6 of his Memorandum In Support (CP 48) claimed that RCW 43.101 400 qualifies as an "other statute which exempts or prohibits disclosure of specific information or records", citing RCW 42.56.070(1) as support, and the Attorney General claims that "[I]nvestigative records held by CJTC are specifically and statutorily exempt from public disclosure." The Attorney General might seem to have claimed in footnote 5 on Page 3 of his Memorandum in Support (CP 45) that the entire IIU file is exempt from disclosure and that therefore WSCJTC need not group the 713 pages into records and described them with the required privilege log information for individual records, each record having a variable number of pages. Actually, the

Attorney General did make this claim explicitly on Pages 9-10 of his Memorandum in Support (CP 51-2).

However, the Attorney General failed to cite a qualification to the "other statute" exception, the qualification in RCW 42.56.030, which says "In the event of conflict between the provisions of this chapter [i.e., RCW Chapter 42.56, *et seq*., the Public Record Act] and any other act, the provisions of this act shall govern." [Emphasis added]

In PAWS II, supra, the Washington Supreme Court verified the significance of such a conflict. (Notice in the quotation from PAWS II the widespread but erroneous assumption that "disclosure" means "production".)

> "The "other statutes" exemption incorporates into the Act other laws that exempt or prohibit disclosure of specific information or records. RCW 42.17.260(1). In other words, 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. RCW42.17.920. ….." [Emphasis added] [Citation omitted] PAWS II, 125 Wash.2d at 261-262.

Thus, there is a conflict between the Act's requirement to list individual records with what seems to be the permission given (in RCW 43.101.400, quoted by the Attorney General in footnote 5 on Page 3 of his Memorandum in Support (CP 45), to withhold "all investigative files…". And because a conflict exists between (1) that provision, i.e., RCW

43.101.400, and (2) the Public Records Act's requirement in RCW 42.56.210(3) and the support given to RCW 42.56.210(3) by Rental Housing Association, the Public Record Act wins. Pursuant to Rental Housing Association, supra, and Sanders v. State, supra, WSCJTC must describe each record in the file. WSCJTC's refusal to list the IIU records individually on a real privilege log (or some other valid form of "brief explanation") violates the Act, because the Act requires disclosing the existence of records (no silent withholding), even though it allows non-production. The conflict in WSCJTC's situation is not its refusal to produce the records, because valid exemptions permit withholding. Rather the conflict is with the silence of not disclosing, i.e., not describing each record on a privilege log to satisfy the requirement of a "brief explanation of the exemption for the record withheld" in RCW 42.56.210(3). An agency such as WSCJTC can withhold records, but not silently.

(5) Conclusion: No triggering of the first prong

Thus, WSCJTC's claim that its purported privilege log was sufficient to trigger the first prong of the one-year statute of limitations in RCW 42.56.550(6) is false.

b. An agency's one-time provision of records to a requester does not qualify as an "installment" that triggers the <u>second prong</u> of the one-year statute of limitations in RCW 42.56.550(6)

(1) Split of authority

Currently there is a split of authority in the Court of Appeals between Division One and Division Two as to whether can agency's one-time response to a records requester constitutes a (last) installment sufficient to trigger the second prong of the one-year statute of limitations in RCW 42.56.550(6).

In <u>Tobin v. Worden</u>, 156 Wash.App. 507, 233 P.3d 906 (2010), Division One held that the only item the defendant King County Department of Development and Environment had provided to the plaintiffs Tobins was a one-page partially redacted handwritten document. <u>Tobin v. Worden</u>, <u>supra</u> 233 P.3d at 907. The court explicitly stated that

> "the language 'production of a record on a partial or installment basis' in RCW 42.56.550(6) can only be construed to mean the production of a record that is 'part of a larger set of requested records,' as described in RCW 42.56.080." <u>Tobin v. Worden</u>, <u>supra</u>, 233 P.2d at 909.

Therefore the one-year statute of limitations did not apply.

The court conceded that the phrase "partial or installment basis" contained in RCW 42.56.550(6) is somewhat ambiguous, but the court construed its meaning by looking to another provision of the Public

Records Act, RCW 42.56.080, which addresses "Facilities for copying – Availability of public records", a section that refers to the provision of records on "a partial or installment basis." The court quoted the relevant portion of RCW 42.56.080, as follows:

> "Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person including, if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure. Agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad." Tobin v. Worden, supra, 233 P.3d at 908

Thus, the rule of Tobin v. Worden is that an agency's one-time response providing records to a requester does not trigger the one-year statute of limitations in RCW 42.56.550(6), contrary to the Attorney General's claim.

I find the court's reasoning in Tobin v. Worden to be well-researched and persuasive. The Tobin opinion was written by Justice Kenneth C. Grosse, who authored Chapter 2 in the Public Records Act Deskbook published by the Washington State Bar Association, 2006 ed. and 2010 supplement. Chapter 2 is titled "The Public Records Act: Legislative History and Public Policy".

Division Two of the Court of Appeals disagrees with me and with Justice Grosse. In Bartz v. Department of Corrections, 173 Wash.App. 522, 297 P.3d 737 (2013), Division Two said it would adhere to the reasoning in one of its own recent cases, Johnson v. Department of Corrections, 164 Wash.App. 769, 265 P.3d 216 (2011), which was that the legislature intended that the Public Records Act's one-year statute of limitations applies to requests completed by an agency's one-time production of records. Id. at 297P.3d 744.

(2) Tobin v. Worden is the better-reasoned case

However, rather than examine the Act itself to support its reasoning, as Justice Grosse did in Tobin v. Worden, supra, Division Two, although it acknowledged its difference of opinion with the Tobin court, simply declared, without more, that "It would...be absurd to conclude...that the legislature intended to create a more lenient statute of limitations for one category of PRA requests in light of the 2005 deliberate and significant shortening of the time for filing a claim from five years, under the old Public Disclosure Act, to one year, under the PRA." [Citations omitted]. Bartz v. Department of Corrections, supra, 297 P.3d at 743. Division Two's claim of possible absurdity here is disingenuous in light of its awareness of a two-year default "catch-all" limitations period, possibly applicable to Public Records Act cases, contained in RCW

4.16.130 which it had previously asserted in Johnson v. Department of Corrections, 164 Wash.App. 769, 265 P.3d 216 (2011), applied to situations where the first prong (the "brief explanation" privilege log requirement) of the one-year statute was (as in my case) inapplicable:

> "Even if the DOC did not trigger the PRA's one-year statute of limitations, RCW 4.16.130's two-year "catch-all" statute of limitations would time-bar Johnson's action." Johnson v. Department of Corrections, supra, 265 P.3d at 218.

Division Two's claim of absurdity is also unjustified, because, as I discuss in Argument **3.d** of this brief, a well-known canon of statutory interpretation says that the legislature is presumed to know the existing law, and in this case the "catch-all" in RCW 4.16.130 was in existence when the legislature revised the Public Records Act in 2005. Undoubtedly, Division Two is familiar with the canons.

What this ruling by Division Two amounted to was actually a rejection of the plain meaning of the wording in RCW 42.56.550(6) and the solid support for a plain meaning interpretation provided by Judge Grosse's analysis in Tobin v. Worden, supra. It was also a (silent) rejection of the obvious meaning of the word "installment" and of common usage. For the meaning of "installment", I use the following definition taken from Random House Webster's Unabridged Dictionary, Second Edition, 2001, page 988: "... n. ...2. A single portion of something

furnished or issued by parts at successive times: a magazine serial in six installments…" [Italics in original]

(3) No triggering of the second prong

By no stretch of the imagination can WSCJTC's providing me with two emails on the same day, August 5, 2010, denying my second, and different, records request, qualify as an "installment" or "something furnished or issued by parts at successive times." Therefore, the second prong of the one-year statute of limitations in RCW 42.56.550(6) was never triggered.

(4) Thus, neither prong of RCW 42.56.550(6) was triggered

WSCJTC did not invoke either of the two prongs of the one-year statute of limitations in RCW 42.546.550(6), and neither of the two August 5, 2010 emails purporting to be privilege logs which WSCJTC's Public Records Officer, Greg Baxter, provided to me on August 5, 2010 (CP 101-4), were adequate responses under the Public Records Act, and therefore were insufficient to trigger the one-year statute of limitations in RCW 42.56.550(6).

(5) WSCJTC in effect denied access to requested public records

WSCJTC's failure to meet the level of detail necessary for a valid claim of exemption for purposes of triggering the one-year statute of limitations was an "effective denial" of access to public records.

In American Civil Liberties Union v. Blaine School District No. 503, 86 Wash.App. 688, 937 P.2d 1176 (1997) (ACLU I), the Court of Appeals acknowledged that an agency's unjustified failure to provide records to a requester constitutes an effective, or implied, denial of access to public records:

> "The District's refusal to mail the documents ... and its insistence that the requester travel to Blaine to inspect the records are not based on a reasonable interpretation of the act. The District's position effectively denied access to the records." [Emphasis added] ACLU 1, supra, 937 P.2d at 1179.

By the term "effective denial" I mean the practical equivalent of a denial.

Also, the entire discussion in PAWS II, supra, 125 Wash.2d 243, 884 P.2d 592 (1994) (PAWS II) about "silent withholding" is really aimed at the evil of denying requesters access to public records, especially PAWS II 125 Wash.2d at 270. In Soter v. Cowles Publishing Co., 162 Wash.2d 716, 174 P.3d 60, 75 (2007) the Washington Supreme Court said explicitly that "[f]or practical purposes, the law treats a failure to properly respond as a denial," meaning a denial of access to public records. This emphasis on access occurred most recently in Rental Housing Association, supra, where the court said

> "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." [Emphasis added] Rental Housing Association of Puget Sound v. City of Des Moines, supra, 199 P.3d at 400.

The above case law shows that WSCJTC in effect denied me access to requested public records.

3.The applicable statute of limitations in this case is the three-year period in RCW 4.16.080(6) for lawsuits seeking statutory penalties, because my original Complaint under the Public Records Act and my First Amended Complaint and attached exhibits both sought statutory penalties under RCW 42.56.550(4).

> Standard of Review: In regard to questions in this appeal involving interpretations of statutes – namely, which statute of Limitations applies to this situation, and the use of canons of statutory interpretation to resolve the issue, statutory interpretation presents a question of law over which the Court of Appeals exercises de novo review. Jackson v. Fenix Underground, Inc., 142 Wash.App. 141, 145, 175 P.3d 977 (2007).

I showed above in Argument **2** that the only statute of limitations contained within the Public Records Act itself, RCW 42.56.550(6), does not apply to my situation.

The question now becomes: which of the two remaining candidate statutes of limitations applies to a lawsuit's claim of (unjustified) effective or implied denial of access to public records: (1) the two-year "catch-all"

eriod in RCW 4.16.130 or (2) the three-year period in RCW 4.16.080(6) pertaining to lawsuits seeking statutory penalties.

a. Tools for this Court to use in its analysis

To guide this Court's choosing the applicable statute of limitations, a few tools exist:

1. Guidelines of the Washington Supreme Court towards conflicting statutes of limitations;

2. A common-sense, plain meaning interpretation of the language of the three-year statute in RCW 4.16.080(6); and

3. Traditional canons of statutory construction.

b. The Washington Supreme Court favors the statute of limitations with the longer time frame

For a long time now, a guiding principle in situations like this has been that if there is any doubt about which statute of limitations should apply, Washington case law favors the statute with the longer time frame. Stenberg v. Pacific Power & Light Co., 104 Wash.2d 710, 715, 709 P.2d 793 (1985), citing Shew v. Coon Bay Loafers, Inc., 76 Wash.2d 40, 51, 455 P.2d 359 (1969). This principle favors applying the three-year statute.

c. A plain meaning interpretation

Here below is an example of a plain meaning interpretation of the three-year statute as it applies to my own situation. The example is my

own simple, straightforward reasoning. I have put the example inside quotation marks.

"The applicable statute of limitations for a Public Record Act lawsuit such as this one is not the one-year period specified in RCW 42.56.550(6) – the one-year period that applies to (1) situations where an agency responds in installments to public records requests, and (2) situations where an agency claims exemptions by using a valid privilege log. Rather, the applicable statute of limitations is three years, as specified in RCW 4.16.080(6), for

> "...an action upon a statute for penalty or forfeiture where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribes a different limitation...",

because a lawsuit under the Public Records Act, RCW 42.56, *et seq.*, is an action "upon a statute for penalty". [Emphasis added] The statute involved here is the Public Records Act, in particular, RCW 42.56.550(6), which says

> "Actions under this section must be filed within one year of the agency's claim of exemption of the last production of a record on a partial or installment basis." RCW 42.56.550(6)

and the statutory penalty is

> "... an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record." RCW 42.56.550(4)"

d. Traditional canons of statutory construction

My approach here in this Argument **3.d.** is the same as that used by the Washington Supreme Court in State v. J.P., 149 Wash.2d 444, 69 P.3d 318, 320 (2003), which is to apply recognized principles (canons) of statutory construction:

> "Where we are called upon to interpret an ambiguous statute or conflicting provisions, we may arrive at the legislature's intent by applying recognized principles of statutory construction."

I find the most relevant canon to be the one which states that the legislature is presumed to know its own prior legislation. In particular, the Washington Supreme Court has said, quoting its prior case of Graffell v. Honeysuckle, 30 Wash.2d 390, 191 P.2d 858 (1948):

> "'In enacting legislation upon a particular subject, the Lawmaking body is presumed to be familiar not only with its own prior legislation relating to that subject, but also with the court decisions construing such former legislation.'" [Citation omitted] In Re Bale, 63 Wash.2d 83, 385 P.2d 545 (1963) [Emphasis added]

Thus, using this canon, the three-year statute of limitations prevails over the two year statute, because the legislature knew it had previously enacted the three-year statute for lawsuits for statutory penalties in RCW 4.16.080(6).

Next is the canon stating that a legislature's omissions are intentional:

"'Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted were intentionally omitted by the legislature.'" Snohomish County v. Archie Anderson, et al., 123 Wash.2d 151, 157, 848 P.2d 116 (1994), citing Washington Natural Gas Co. v. PUD 1, 77 Wash.2d 94, 98, 459 P.2d 6r33 (1969)

Thus, the legislature in amending the Public Records Act in 2005 intentionally eliminated the then existing five-year statute of limitations applicable to everything in the Act and intentionally added the one-year provision for certain narrow selected situations because it knew courts would use the legislature's previously enacted three-year statute in RCW 4.16.080(6) whenever the statute of limitations for the selected situations did not apply, as in my situation.

Next is the canon which states that statutes must be read together to determine legislative purpose so as to achieve a "'harmonious total statutory scheme...which maintains the integrity of the respective statutes.'" Employco Personnel Services, Inc. v. City of Seattle, 117 Wash.2d 606, 614, 817 P.2d 1373 (1`991), citing State v. O'Neill, 103 Wash.2d 853, 862, 700 P.2d 711 (1985).

I readily concede that this canon favors neither the two-year statute nor the three-year statute, because both statutes can be harmonized with the one-year statute within the Public Records Act itself, so as to "achieve

a 'harmonious total … statutory scheme … which maintains the integrity of the respective statutes." But this tie between the two-year statute and three-year statute is not decisive, and it shows that the three-year statute can be harmonized with the rest of the Public Records Act.

Finally there is the

> "well-established rule[ ] that the more specific statute controls over a conflicting, more general statute, and that the legislature is presumed to be familiar with its prior legislation." State v. Lessley, 59 Wash.App. 461, 465, 798 P.2d 302 (1990). [Citations omitted]

This canon favors the more specific three-year RCW 4.16.080(6), pertaining specifically to lawsuits, such as mine, seeking statutory penalties, as opposed to the general two-year catch-all RCW 4.16.130.

e. The Attorney General's objection to the three-year statute does not apply in this situation

The Attorney General on Page 7 of his Memorandum In Support (CP 49) asserted that the clause in the three-year statute RCW 4.16.080(6) which says," except when the statute imposing it prescribed a different limitation" disqualifies it from applying to my situation. I presume the Attorney General meant, by his quoting the phrase "the statute imposing it", RCW 42.56.550(6), which provides a limitation period of one year for situations where an agency provides a (valid) "claim of exemption", for example by providing a privilege log, or provides records in installments.

However, as I showed above in Argument **2**, the circumstances described in RCW 42.56.550(6) are a narrow set of circumstances that do not apply to my type of situation, and therefore the one-year statute does not qualify as a statute that prescribes a different limitation period from the three-years specified in RCW 4.16.080(6).

f. The Washington Supreme Court favors the longer statute of limitations

Finally, as I showed above in Argument **3.b**, the Washington Supreme Court favors the longer of any conflicting statutes of limitations. Using an agency's last effective or implied denial of access (an effective or implied denial by virtue of its refusal to provide an adequate privilege log) will provide a longer statute of limitations for records requesters.

g. Conclusion: Traditional canons of statutory interpretation favor the three-year statute

Use of traditional canons of statutory construction shows that the applicable statute of limitations for WSCJTC's effective or implied denial of my first records request is the three-year period in RCW 4.16.080(6) pertaining to lawsuits for statutory penalties.

4. Because I filed my original Complaint on July 30, 2013, within the applicable three-year statute of limitations, the hearing judge should not have granted WSCJTC's CR 12(b)(6) motion to dismiss.

> Standard of Review: A trial court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted is a question of law and is reviewed de novo by an appellate court. Hoffer v. State, 119 Wash.2d 415, 420, 755 P.2d 781 (1988). *aff'd on rehearing*, 113 Wash.2d 148, 776 P.2d 963 (1989).

WSCJTC's refusal to provide an adequate privilege log is a refusal to identify the records it is withholding. Using the distinction between "disclosure" and "production" in Sanders v. State, supra, which I discussed above in Argument **3.a(2)**, this Court can see that that WSCJTC's refusal to group the 713 pages into records is not only a refusal to produce records it is also a refusal to disclose which records it refuses to produce. This constitutes an effective or implied denial of access.

The date of WSCJTC's last refusal was August 5, 2010. (CP 101-4) Three years from August 5, 2010 is August 5, 2013. Therefore, as to the allegations in my First Amended Complaint about my first records request, my filing of my original Complaint in this lawsuit on July 30, 2013, five days before the three-year statute of limitations expired on August 5, 2013 satisfied the statute of limitations.

An explicit denial of the existence of particular requested records which actually do exist is an effective or implied denial of access to those records, because as I showed above in Argument **1**, and state here again, "[f]or practical purposes, the law treats a failure to properly respond as a denial." Soter v. Cowles Publishing Co., supra, 162 Wash.2d 716, 174 P.3d 60, 78 (2007). In response to my second, separate, records requests of August 3 and August 5, 2009, Greg Baxter, WSCJTC's Public Records Officer, falsely denied the existence of particular records relating to Deputies Schene and Brunner.

I showed earlier in Arguments **2** and **3** that where (as here in this situation regarding my second records request of August 3 and August 5, 2010) (CP 93, CP 97-9)an agency provides no records in installments -- and here WSCJTC provided no records at all -- and no adequate privilege log (or "brief explanation…"), the applicable statute of limitations is the three-year period specified in RCW 4.165.080(6) for lawsuits seeking statutory penalties.

The trigger date to start the limitations period running, as I showed in Argument **1**, is the date of the agency's last denial.

Greg Baxter's effective denial to me of access to requested public records occurred on August 5, 2010 by virtue of his two emails claiming that they constituted privilege logs. (CP 101-4)

Three years from August 5, 2010 is August 5, 2010.

I filed my original Complaint claiming that WSCJTC violated the Public Records Act on July 30, 2013, five days before the three-year statute of limitations expired on August 5, 2013. (CP 116)

Therefore, the Snohomish County Superior Court hearing judge should not have granted WSCJTC's CR 12(b)(6) motion to dismiss

E. CONCLUSION

I ask this Court to

(1) Reverse the Superior Court judge's dismissal of my lawsuit;

(2) Remand this case to Snohomish County Superior Court;

(3) Order WSCJTC to file an Answer to my First Amended Complaint within the 10 days required by CR 12(a)(4)(A);

(4) Order the WSCJTC to provide me with a valid privilege log;

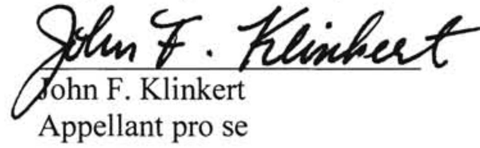
(5) Suggest to the Snohomish County Superior Court that on remand it consider imposing the maximum monetary penalties on WSCJTC for its preposterous claims, blatantly scornful of the Public Records Act, that a 713-page file constitutes only one record; and

(6) Declare that in this situation, where an agency never provides a valid privilege log and doesn't provide records in installments, the applicable statute of limitations is the three-

year period stated in RCW 4.16.080(6) for lawsuits seeking statutory penalties.

Dated this 13th day of April, 2014

Respectfully submitted,



John F. Klinkert
Appellant pro se

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

JOHN F. KLINKERT, Appellant vs. WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION, Respondent	NO. 71461-9 DECLARATION OF MAILING

I certify that I am over 18 years of age, that I am not a party to this action, and that I served a copy of APPELLANT'S BRIEF on the party named below on the date below by depositing it in the US mail, postage prepaid, in Lynnwood, Washington.

John Hillman, Asst. Attorney General
Attorney General's Office
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

DATED this 13th day of April, 2014 at Lynnwood, Washington.

Caron C. Curry-Klinkert

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