No. 91427-3

71461-9

SUPREME COURT
STATE OF WASHINGTON

JOHN F. KLINKERT,

Petitioner

v.

WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION,

Respondent

Court of Appeals, Division One, Case No. 71461-9
Appeal from Superior Court of Snohomish County

PETITION FOR REVIEW

John F. Klinkert
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A. IDENTITY OF PETITIONER

Petitioner pro se John F. Klinkert asks this Court to accept review of the published decision of the Court of Appeals, Division I, terminating review of this Public Records Act case. I am the records requester, the plaintiff pro se in the trial court, and the appellant pro se in the Court of Appeals.

B. COURT OF APPEALS DECISION

The Court of Appeals, Division I, filed its published decision for Case No. 71461-9 on February 9, 2015. I have included a copy of the Court of Appeals decision in the Appendix, at pages A-1 – A-6.

C. ISSUES PRESENTED FOR REVIEW

1. Public Records Act section RCW 42.56.030 says that "[i]n the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern." RCW 43.101.400(1), which is an "other act," says that "all investigative files of the [Washington State Criminal Justice Training] [C]ommission compiled in carrying out the responsibilities of the commission under [Chapter RCW 43.101]" are "exempt from public disclosure." Does RCW 43.101.400(1) "conflict" with the Public Records Act?

2. If RCW 43.101.400(1) conflicts with the Public Records Act, do the provisions of the Public Records Act govern my situation and require the Washington State Criminal Justice Training Commission (hereafter, "Training Commission") to produce some or all records in its investigative file for King County Sheriff's Deputy Paul Schene?

3. Do the Supreme Court's principles stated in its case law governing "categorical exemptions" under the Public Records Act apply to exemptions stated in an "other statute" mentioned in Public Records Act section 42.56.070(1)?

4. If the Supreme Court's principles stated in its case law governing "categorical exemptions" under the Public Records Act apply to exemptions stated in an "other statute," is in camera review available to a public records requester in order to verify that the records claimed by an agency to satisfy the "categorical exemption" stated in an "other statute" actually do satisfy the exemption?

5. The Supreme Court in Sanders v. State, 169 Wash.2d 827, 240 P.3d 120 (2010), distinguishes between "disclosure" of (the existence of) public records and their "production." If the "other statute" allowed the Training Commission to avoid producing records in its investigative file for Deputy Paul Schene, should the Training Commission have at least disclosed the existence of all records by providing me with a listing of the

records on a privilege log that satisfied the requirements of Rental Housing Association of Puget Sound v. City of Des Moines, 165 Wash.2d 525, 199 P.3d 363 (2009)?

6. When a government agency provides all responsive records to a requester of public records under the Public Records Act in a single one-time batch -- that is, by a response that is not in installments – and fails to provide an adequate privilege log for records claimed to be exempt, is either of the two prongs of the one-year statute of limitations in the Public Records Act at RCW 42.56.550(6) ever triggered?

7. The Division I case Tobin v. Worden, 156 Wash.App. 507, 233 P.3d 906 (2010) and the Division II case Bartz v. Department of Corrections, 173 Wash.App. 522, 297 P.3d 737 (2013) are split as to the correct interpretation of the meaning of "installment" in the one-year statute of limitations in RCW 42.56.550(6) and the resulting applicable default statute of limitations if the one-year statute fails. Is a one-time response by an agency an "installment" that can invoke the one-year statute of limitation?

8. If the Public Records Act's one-year statute of limitations in RCW 42.56.550(6) was never triggered and was not the applicable statute of limitations for my situation, what was the applicable statute of limitations: the two-year catch-all statute in RCW 4.16.130 or the more

specific three-year statute in RCW 4.16.080(6) for "an action upon a statute for penalty or forfeiture...." – such as lawsuits like mine for statutory penalties authorized in Public Records Act section RCW 42.56.550(4) for public records requesters?

9. Did I file my original Complaint against the Training Commission within the applicable three-year statute of limitations?

D. STATEMENT OF THE CASE

1. Factual Background

The Washington State Criminal Justice Training Commission (hereafter, the "Training Commission"), trains sheriff's deputies and police officers at its academy and certifies all full-time peace officers 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 the Training Commission when a deputy is fired for misconduct. RCW 43.101.135. The Training Commission may investigate alleged misconduct by reviewing a law enforcement agency's internal affairs investigation, which the agency is required to produce upon the Training Commission's request. RCW 45.101.135. The files which the Training Commission "compiles" during its investigations of alleged misconduct are stated as exempt from public disclosure in RCW 43.101.400(1).

My first records request on October 27, 2009

On October 27, 2009 I made my first public records request to the Training Commission's then Public Records Officer Leanna Bidinger by email, asking the Training Commission for, among other things,records related to two deputies in the King County Sheriff's Office (KCSO)

> 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

The Training Commission's first 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 claimed to identify one record that was 713 pages long.

This supposed 713-page record almost consists probably of many records produced during the King County Sheriff's Office's (KCSO) internal IIU investigation of Deputy Paul Schene and Deputy Travis Brunner which KCSO had sent to the Training Commission after KCSO

completed its IIU investigation and Sheriff Sue Rahr had fired Deputy Schene. (CP 106)

My first protest to the Training Commission 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.

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

On March 22, 2010 Greg Baxter replaced Ms. Bidinger as the Training Commission'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 the Training Commission's claim that all the King County Sheriff's records which the Sheriff's Office had sent to them relating to Deputy Paul Schene's termination constituted only one 713-page record. (CP 87-91) On August 5, 2010 Mr. Baxter denied the validity 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 failed to acknowledge the existence of individual records that were responsive to my first public records request on October 27, 2009 to Leanna Bidinger, and therefore it was equivalent to a "silent withholding" of requested public records under Progressive Animal Welfare Society v. University of Washington (PAWS II), 125 Wash.2d 243, 884 P.2d 292 (1994).

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 the Training Commission's Public Records Officer, 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 Training Commission's new Public Records Officer. (CP 97-99)

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." Yet he had emailed me about two hours earlier that he had no Deputy Schene-related handwritten or handprinted records that I had requested, (CP 101-2), and he never explained why he said he didn't have them.

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

On August 5, 2010, Greg Baxter, the Public Records Officer for the Training Commission, sent me the two short emails referred to above at the top of this page, 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)

I filed my original Complaint against the Training Commission 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 – like mine -- for statutory penalties. (CP 116)

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

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

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)

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), and 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 I of the Court of Appeals.

The Court of Appeals decision (See Appendix A1-A6) affirmed the trial court's dismissal in a short opinion, ruling that the Training Commission's statute RCW 43.101.400 is an "other statute" that exempted the Training Commission from disclosing its investigative file. The opinion does not mention the crucial issue of whether the "other statute"

conflicts with the Public Records Act, a point I argued in my Appellant's Brief at pages 28-30. According to the opinion, because the Training Commission's claimed exemption was justified, its privilege log satisfied the Public Records Act's one-year statute of limitations in RCW 42.56.550(6). Thereby the Court of Appeals opinion (See Appendix A1-A6) was able to avoid discussing the ultimate issue in my appeal (stated in my Appellant's Brief at Pages 37-43), namely, what is the applicable statute of limitations and its trigger date or event in situations where the Public Records Act's one-year statute of limitations does not apply.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. By failing to completely confront the question of whether the "other statute" – RCW 43.101.400 – "conflicts" under RCW 42.56.030 with the Public Records Act, the Court of Appeals decision itself conflicts with previous decisions of the Supreme Court dealing with "other statute" conflicts.

The Training Commission at the top of Page 6 of its 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 Training Commission claims that "[I]nvestigative records held by CJTC are specifically and statutorily exempt from public disclosure." The Training Commission might seem to have claimed in footnote 5 on Page 3 of its Memorandum in Support (CP 45) that the entire IIU file is exempt

from disclosure and that therefore the Training Commission 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, and actually, the Training Commission did make this claim explicitly on Pages 9-10 of its Memorandum in Support (CP 51-52).

However, the Training Commission failed to note the 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]. Because the Public Records Act governs, the Training Commission should have provided an adequate privilege log.

In Progressive Animal Welfare Society v. University of Washington (PAWS II), 125 Wash.2d 525, 199 P.3d 363, 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" – an error I will discuss later.)

> "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 Public Record's Act's requirement to list individual records with what seems to be the permission given (in RCW 43.101.400, quoted by the Training Commission in footnote 5 on Page 3 of its 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 of Puget Sound v. City of Des Moines, 165 Wash.2d 525, 199 P.3d 363 (2009), the Public Record Act wins. Pursuant to Rental Housing Association, supra, and Sanders v. State, 169 Wash.2d 827, 240 P.3d 120 (2010), the Training Commission must describe each record in the file. The Training Commission'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 violation of the Training Commission is not its refusal to produce the records, because exemptions,

if valid, do permit withholding. Rather the Training Commission's violation is its silence in not disclosing the existence of individual records, 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 the Training Commission may withhold records, but not silently.

In Fisher Broadcasting v. City of Seattle, 180 Wash.2d 515, 326 P.3d 688 (2014), this Court reiterated the principle stated in RCW 42.56.030, that "[i]n the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern....the agency refusing to release records bears the burden of showing secrecy is lawful." Fisher Broadcasting, 326 P.3d at 692. Furthermore, "exceptions, including other statute exceptions, are construed narrowly." Id. This Court then held that the Seattle Police Department's claim that dash-cam videos were exempt from production was limited to cases where the videos relate to actual pending litigation, but did not create a blanket exemption for all dash-cam videos. Id. at 694.

In addition, this Court noted that neither the "other statute" in question – RCW 9.73.090, relating to video recordings made by police officers of arrested persons – nor the statute's legislative bill reports mentioned the Public Records Act. And that situation obtains in my case,

where the "other statute" – RCW 43.101.400 – does not mention the Public Records Act.

RCW 43.101.400(1) purports to make the Training Commission's investigative files "confidential": "...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 responsibility of the commission under this chapter." But this Court in Bainbridge Island Police Guild v. City of Puyallup, 172 Wash.2d 398, 259 P.3d 190, 201 (2011), found that an "other statute", the Criminal Records Privacy Act (CRPA) in chapter 10.97 RCW, did not prevent the public from viewing purportedly "confidential" nonconviction data in certain criminal records, although redaction of some information was required. Bainbridge Island Police Guild, 259 P.3d at 202.

2. Whether the concept of a "categorical exemption" from production of records applies to an "other statute" is an issue of substantial public importance to records requesters under the Public Records Act.

The Training Commission's "other statute" purports to create what this Court has termed a "categorical exemption" from production, but the Court of Appeals decision (See Appendix A1-A6) never mentions the concept even though the Training Commission's "other statute" in essence claims exactly that: a total exemption for a certain type of file: the

Training Commission's investigative files stated as exempt in RCW 43.101.400(1).

This Court has in some situations imposed limits on, or narrowed, claimed "categorical exemptions", as in City of Lakewood v. Koenig, Supreme Court Docket No. 89648-8, filed December 11, 2014 (no page reference available), where the Supreme Court held that an agency that claims an "other statute" categorical exemption for records must provide an explanation of how the exemption applies to each record.

I inserted some material from Sargent v. City of Seattle, 179 Wash.2d 376, 314 P.3d 1093 (2013) on categorical exemptions in my Statement of Additional Authority submitted to the Court of Appeals on April 18, 2014. This material from Sargent, 314 P.3d at 1105, held that the effective law enforcement exemption does not apply categorically to records of an internal disciplinary investigation – precisely my situation.

My demand to the Training Commission for an adequate privilege log was justified, because there is no valid "categorical exemption" available to the Training Commission for the investigative file it is withholding.

In addition, claimed "categorical exemptions" can be scrutinized or tested by an in camera review in the trial court, as this Court held in Sanders v. State, 169 Wash.2d 827, 240 P.3d 120, 133 (2010). In camera

review is needed in my situation because of the Training Commission's claim that the "other statute" – RCW 43.101.400(1) – makes the entire investigative file in question exempt, which is a claim for a categorical exemption.

3. By its failure to consider the distinction in the Supreme Court's decision in Sanders v. State between "disclosure" of the existence of public records and their "production," the Court of Appeals decision conflicts with this Court's decision in Sanders v. State.

As I argued in my Appellant's Brief at Pages 26-27, in order for the Training Commission to disclose (the existence of) the individual records in Deputy Schene's investigative file, it must list them individually on a privilege log, even though the Training Commission might eventually not need to produce them.

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 v. State 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, the Training Commission must group the 713 pages into records. Almost certainly the King County Sheriff's Office, when it sent the 713 pages of records to the Training Commission,

had already done this for the Training Commission, i.e., it was not an additional task the Training Commission needed to perform.

> 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

The Training Commission's purported email privilege log never showed, nor could it show, how (or whether) the Training Commission's 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 the Training Commission by the King County Sheriff's Office.

4. The Court of Appeals opinion conflicts with the Supreme Court's holding in Rental Housing Association of Puget Sound v. City of Des Moines regarding the Necessity of providing an itemized privilege log

Actually, the Court of Appeals justification for not requiring the Training Commission to produce a privilege log is quite similar to the justification that the losing defendant in Rental Housing Association, 165 Wsh.2d 525, 199 P.3d 363 (2009), attempted unsuccessfully to offer the Supreme Court. The Court of Appeals in my case said that "the exemption log provided by the Commission was sufficient to trigger the [one-year] statute of limitations" because "[i]t let Klinkert know that the entire 813-page investigative file was being withheld as exempt under RCW 43.101.400(1)." See the Court of Appeals Decision in Appendix at A-6. However, and to the contrary: the Training Commission's privilege log, showing that it was claiming a 713-page file to be one "record", is nowhere near the same as listing each record individually, and that was what this Court required the defendants in Rental Housing Association, supra, to do.

5. **Resolving the split of authority between the Court of Appeals opinion by Division I regarding interpretation of the one-year statute of limitations in RCW 42.56.550(6) in Tobin v. Worden, 156 Wash.App. 507, 233 P.3d 906 (2010), and the conflicting Division II opinion in Bartz v. Department of Corrections, 173 Wash.App. 522, 297 P.3d 737 (2013), is an issue of substantial public importance to records requesters under the Public Records Act.**

The Court of Appeals decision in my case (Appendix A1-A6) fails to acknowledge this split of opinion between Division I and Division II, a topic for which I argued for Division I's interpretation in my Appellant's Brief at Pages 31-35, and I devoted Pages 31-35 in my Appellant's Brief to the split of opinion.

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".

What the ruling by Division II amounts to is 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 is 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]

No triggering of the second prong

By no stretch of the imagination can the Training Commission'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.

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

The Training Commission's privilege log 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 the Training Commission'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).

6. The question of what statute of limitations applies when the one-year statute in section RCW 42.56.550(6) fails to apply is an issue of substantial public importance for records requesters under the Public Records Act.

. 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" period in RCW 4.16.130 or (2) the three-year period in RCW 4.16.080(6) pertaining to lawsuits seeking statutory penalties. I devoted Pages 37-43 in my Appellant's Brief to an analysis of this topic, using several traditional principles of statutory analysis, statutes of limitation, and canons of statutory construction, and I concluded that the applicable statute is the three-year statute of limitations in RCW 4.16.080(6), for

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

The Training Commission's objection to the three-year statute does not apply in this situation

The Training Commission on Page 7 of its Memorandum In Support (CP 49) asserted that the clause in the three-year statute RCW 4.16.080(6) which adds "...except when the statute imposing it prescribed a different limitation" disqualifies it from applying to my situation. I assume the Training Commission had in mind, by quoting the phrase "the

statute imposing it", section 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, 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).

7. The question of what the trigger date or event is for the applicable statute of limitations, when the one-year statute does not apply, constitutes an issue of substantial public importance for records requesters under the Public Records Act.

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 Training Commission on Page 8 of its 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 II, 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)

The Training Commission's two short emails of August 5, 2010 denying my second requests, which I mentioned at the top of Page 13, 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).

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 (ACLU 1), 86 Wash.App. 688, 937 P.2d 1176 (1997), 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.

The trigger date to start the limitations period running 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 superior court hearing judge should not have granted the Training Commission's CR12(b)(6) motion to dismiss my First Amended Complaint.

G. 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 the Training Commission on remand to file an Answer to my First Amended Complaint within the 10 days required by CR 12(a)(4)(A);

(4) Order the Training Commission on remand to provide me with a valid privilege log;

(5) Authorize on remand an in camera review of all records in the Training Commission's investigative file;

(6) Declare that in this situation, where an agency did not provide records in installments and never provided a valid privilege log, the applicable statute of limitations not the one-year statute in section RCW 42.56.550(6) of the Public Records Act, but is the three-year period stated in RCW 4.16.080(6) for lawsuits (like mine) seeking statutory penalties; and

(7) Award me costs for this appeal, costs in both the Court of

Appeals and in this Supreme Court.

Dated this 10th day of March, 2015

Respectfully submitted,

John F. Klinkert

John F. Klinkert
Petitioner Pro Se

Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOHN F. KLINKERT, Appellant, v. WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION, Respondent.	)	No. 71461-9-I DIVISION ONE PUBLISHED OPINION FILED: February 9, 2015

BECKER, J. — By statute, an investigative file sent by a law enforcement agency to the Washington State Criminal Justice Training Commission is exempt from public disclosure. Because the appellant in this case brought his action more than one year from the Commission's properly-stated claim of exemption, the trial court did not err by dismissing the action as time barred.

The Commission licenses all Washington police officers. RCW 43.101.085(6). Officers must be certified by the Commission as a condition of continuing employment. RCW 43.101.095(1). If an employer terminates an officer's employment for "disqualifying misconduct," the Commission may revoke the officer's certification. RCW 43.101.105(d). Washington law enforcement agencies are required to notify the Commission when an officer is so terminated. RCW 43.101.135. The Commission may request the agency's investigative file

documenting the misconduct leading to the termination, and the terminating agency is required to comply with such a request. RCW 43.101.135. Commission records that are exempt from public disclosure include "investigative files of the commission compiled in carrying out the responsibilities of the commission." RCW 43.101.400(1)(c).

On October 27, 2009, appellant John F. Klinkert submitted a public records request to the Commission, asking for documents involving a King County sheriff's deputy. The deputy had been terminated from his job after an internal investigation found he used excessive force against a juvenile arrestee in a holding cell. Klinkert asked the Commission to produce "*any and all* documents, transcripts, emails, handwritten notes, recordings or images" relating to that incident.[1]

On November 18, 2009, the Commission responded to Klinkert with a one-page exemption log for two documents that were being withheld. Both had been received from the King County Sheriff's Office. The first document was identified as a one-page "Notice of Hire/Termination" for the deputy dated September 24, 2009. The log explained, "This is a personnel action report and such reports are confidential and exempt from public disclosure under 43.101.400(1)."

The second document was identified as a 713-page investigative file on the deputy with a cover letter dated September 30, 2009. The log explained that

[1] The record reflects that Klinkert, a retired attorney, successfully obtained some records concerning this incident from the King County Sheriff's Office. At oral argument before this court, Klinkert said he wanted to make sure that the sheriff's office sent all the records it had to the Commission.

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it was "additional documentation or information related to the personnel action report" regarding the deputy and "these are records that may be used by WSCJTC in an investigation of his certification. These documents cannot be disclosed under RCW 43.101.400(1)."

On November 30, 2009, Klinkert sent an e-mail advising the Commission that in his opinion, the exemption log did not meet the requirements of the law as stated in Rental Housing Association of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 199 P.3d 393 (2009). Klinkert received no answer to this e-mail.

On August 3, 2010, Klinkert wrote to the Commission complaining that the exemption log was inadequate because it did not itemize each document within the 713-page investigative file. He added a new request for all documents related to the incident containing the deputy's handwriting.

On August 5, 2010, the Commission responded to Klinkert by e-mail, stating that the exemption log was "fully adequate." The e-mail stated that it was permissible to withhold the entirety of the 713-page investigative file, so long as the privilege log provided enough information to the requester to understand whether the file was within the exemption. According to the e-mail, "Publishing an inventory of the investigative file's contents is not required . . . and could easily defeat our proper claim of privilege." Klinkert was informed that the Commission did have documents containing the deputy's handwriting, but they were inside the exempt 713-page investigative file, "part of a record we compiled in conducting an investigation into his certification."

On July 24, 2013, Klinkert filed suit in superior court, alleging that the Commission had violated the Public Records Act, chapter 42.56 RCW, by improperly withholding the requested records. The Commission moved to dismiss the complaint as barred by the Act's one-year statute of limitations. The trial court granted the motion. Klinkert appeals.

The Act requires that public agencies make all public records available for public inspection and copying, unless the record falls within the specific exemptions of RCW 42.56.070(6), chapter 41.56 RCW, or "other statute" which exempts or prohibits disclosure of specific information or records. RCW 42.56.070(1). Here, the exemption claimed by the Commission is found in an "other statute," namely RCW 43.101.400. It should be noted that this appeal is not concerned with RCW 42.56.240(1), the exemption for "specific intelligence information and specific investigative records . . . the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy."

When an agency responds to a request by refusing inspection of any public record in whole or in part, the response must 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); Progressive Animal Welfare Soc. v. Univ. of Wash., 125 Wn.2d 243, 271 n.18, 884 P.2d 592 (1994). The brief explanation can be in the form of a privilege log or withholding index and "need not be elaborate but should allow a requestor to make a threshold determination of whether the agency has properly

invoked the exemption." WAC 44-14-04004(4)(b)(ii), quoted in Rental Housing Association, 165 Wn.2d at 539. The adequacy of a public agency's response to a request for production is subject to judicial review in the superior court in the county in which the records at issue are maintained.

An action seeking judicial review of an agency's refusal to allow inspection or copying of a public record 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). If the claim of exemption does not provide sufficient identifying information, the one-year statute of limitations does not begin to run. Rental Housing Ass'n, 165 Wn.2d at 539-40.

In Rental Housing Association, the city of Des Moines responded to a public records request in August 2005 by withholding hundreds of pages of documents that were not individually identified. They were grouped into categories that included, among other things, appellate court opinions, treatises, newspaper articles, and ordinances from other municipalities. Rental Housing Ass'n, 165 Wn.2d at 529. In response to complaints that such documents were not exempt, the City provided a privilege log on April 14, 2006. The requesters filed suit on January 16, 2007. The Supreme Court rejected the City's argument that the one-year statute of limitation had expired. The City's response in August 2005 was insufficient to trigger the statute of limitations, the court held, because it did not contain enough details. The limitations period did not begin to run until the day the City provided an adequate privilege log—April 14, 2006. "Without the information a privilege log provides, a public citizen and a reviewing court cannot

know (1) what individual records are being withheld, (2) which exemptions are being claimed for individual records, and (3) whether there is a valid basis for a claimed exemption for an individual record." Rental Housing Ass'n, 165 Wn.2d at 540.

Klinkert contends his appeal is controlled by Rental Housing Association and that it was preposterous for the Commission to treat the investigative file as a single record. We disagree. 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.

Affirmed.

Becker, J.

WE CONCUR:

Leach, J.

Schindler, J.

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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 the Petition for Review, and a Motion Pursuant to RAP 18.8 to Submit an Over-Length Petition for Review, 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
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DATED this 11th day of March, 2015 at Lynnwood, Washington.

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