Washington Supreme Court No. 92161-0
Court of Appeals, Division Two, No. 45756-3-II

IN THE WASHINGTON SUPREME COURT

MIKE BELENSKI,

Petitioner

v.

JEFFERSON COUNTY,

Respondent.

AMICUS CURIAE MEMORANDA OF ALLIED DAILY NEWSPAPERS OF WASHINGTON, THE WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION, THE BELLINGHAM HERALD, THE OLYMPIAN, THE NEWS TRIBUNE, THE TRI-CITY HERALD, AND THE WASHINGTON COALITION FOR OPEN GOVERNMENT IN SUPPORT OF BELENSKI'S PETITION FOR REVIEW

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I. IDENTITY AND INTEREST OF AMICUS

Amicus curiae are newspaper associations, daily newspapers, and the Washington Coalition for Open Government ("WCOG"), collectively "Amicus Curiae" or "Amici".[1] Amici and their members are frequent users of the Public Records Act ("PRA").

II. LEGAL AUTHORITY AND ARGUMENT

A. The Issues Here Were Preserved.

This case addresses whether the two year statute of limitations ("SOL") found in RCW 4.16.130 applies in a Public Record Act ("PRA") claim when an agency intentionally and silently withholds public records, and if so, when the cause of action accrues. These issues were preserved by Petitioner in the trial court and Court of Appeals. See CP 165-173, 184-185 (trial court briefing); App.'s Reply Br. at 20-21.[2] This Court has the rare opportunity here to address the two year SOL argument in a published case where the parties admit the agency knowingly and intentionally withheld records in the response held to trigger the SOL.

B. Conflicts with Decisions of this Court.

The Petition should be granted pursuant to RAP 13.4(b)(1). The PRA

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[1] The identity and interest of Amici are further described in the accompanying Motion to File Amicus Curiae Memorandum.

[2] The trial court did not reach the issue of the SOL, and so the Petitioner's opening appellate brief did not, and could not, have addressed that issue; it was raised by the County in its appellate Response and addressed by the requestor in his appellate Reply.

requires agencies to produce **all** non-exempt public records.[3] It requires agencies to conduct a reasonable search for records as part of its response obligations. **Neighborhood Alliance v. County of Spokane**, 172 Wn.2d 702, 261 P.3d 119 (2011). It requires agencies to identify with specificity **all** responsive records not being produced along with the exemption authorizing their withholding and an explanation of how the exemption applies to each document.[4] A PRA action may be brought when the requestor was "denied an opportunity to inspect or copy a public record by an agency"[5] or denied an adequate response.[6]

A requestor who does not receive a sufficient response to a request—either because the response does not identify the records that exist or state and explain the exemptions alleged to apply to them—is entitled to an award under the PRA of his fees and costs regardless of whether or not records are eventually held to have been improperly withheld.[7] If a requestor also was deprived of a record that was not exempt, he is further entitled to an award of statutory penalties.[8]

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[3] RCW 42.56.070; see also RCW 42.56.030.
[4] **Rental Housing Ass'n v. City of Des Moines**, 165 Wn.2d 525, 199 P.3d 393 (2009) ("**RHA**"); **Sanders v. State**, 169 Wn.2d 827, 240 P.3d 120 (2010).
[5] RCW 42.56.550(1).
[6] RCW 42.56.550; **Neighborhood Alliance**, 172 Wn.2d 702; **Sanders**, 169 Wn.2d 827; **City of Lakewood v. Koenig**, 182 Wn.2d 87, 343 P.3d 335 (2014); **Yakima County v. Yakima Herald–Republic**, 170 Wn.2d 775, 809–10, 246 P.3d 768 (2011).
[7] **City of Lakewood**, 182 Wn.2d 87; **Yakima County**, 170 Wn.2d at 809–10.
[8] **Lakewood**, 182 Wn.2d 87; **Yakima County**, 170 Wn.2d at 809–10; **Sanders**, 169 Wn.2d 827.

PRA claims have a stated statute of limitations. RCW 42.56.550(6). A requestor is required to sue within one year of the agency producing the last responsive record or within one year of the agency's statement of exemption for all the records withheld.[9] An exemption claim that does not provide sufficient detail prevents the one year clock from starting.[10] Further, the "last production" trigger requires that the agency has actually produced **all** responsive records. RCW 42.56.550(6). A requestor is "denied the opportunity to inspect or copy a public record"—thus entitling him to sue under the PRA—by virtue of an agency's omission of such a record from a production and failure to identify it—as surely as the requestor was "denied the opportunity to inspect or copy a public record" by a deliberate statement of exemption.

The one year clock on a PRA claim never starts when a record was silently withheld or an inadequate withholding index was provided.[11] As this Court held in **RHA**:

> Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld. **The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing**

[9] RCW 42.56.550(6).
[10] **RHA**, 165 Wn.2d 525.
[11] **RHA**, 165 Wn.2d 525; **Progressive Animal Welfare Society v. University of Washington**, 125 Wn.2d 243, 884 P.2d 592 (1992) **("PAWS II")**; **see also Tobin v. Wordin**, 156 Wn. App. 507, 515, 233 P.3d 906 (Div. I 2010).

> **of documents or records**. **Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed.** Moreover, without a specific identification of each individual record withheld in its entirety, the reviewing court's ability to conduct the statutorily required de novo review is vitiated.

RHA, 165 Wn.2d at 537, quoting **PAWS II**, 125 Wn.2d at 270 (emphasis added). This Court continued:

> We emphasized the need for particularity in the identification of records withheld and exemptions claimed:
>
> > The plain terms of the Public Records Act, as well as proper review and enforcement of the statute, make it imperative that all relevant records or portions be identified with particularity. Therefore, in order to ensure compliance with the statute and to create an adequate record for a reviewing court, an agency's response to a requester must include specific means of identifying any individual records which are being withheld in their entirety. Not only does this requirement ensure compliance with the statute and provide an adequate record on review, it also dovetails with the recently enacted ethics act.

RHA, 165 Wn.2d at 537-38, quoting **PAWS II**, 125 Wn.2d at 271.

> Our analysis in *PAWS* II, however, underscores we were concerned with the need for sufficient identifying information about withheld documents in order to effectuate the goals of the PRA. To sever this important concern from the statute of limitations would undermine the PRA by creating an incentive for agencies to provide as little information as possible in claiming an exemption and encouraging requesters to seek litigation first and cooperation later.

RHA, 165 Wn.2d at 538 n.2. The above language makes clear the overall concern of the Court was that requestors have sufficient information about

the records being withheld before a SOL clock even begins. Under this Court's precedents and the clear language of the PRA an agency must do one of two things, therefore, to start the SOL clock for any PRA claim: (1) it must produce all responsive records actually in existence at the time of the request, or (2) identify all such responsive records and state an exemption to withhold them explaining how the exemption applies.

In this case, the requestor Mike Belenski made a PRA request on 9/27/10 to Jefferson County for the Internet Access Logs ("IALs") of the County from 2/1/10 to 9/27/10. CP 211. On 9/28/10—one day after the request—the County's Internet Technician Chris Grant sent an email to the Public Records Officer ("PRO") Lorna Delaney and Deputy Prosecuting Attorney David Alvarez stating "**We have Internet Access Logs**, but they are not natively viewable. They must be pulled out of a database and generated in a human readable format by the firewall reporting system (Viewpoint)." CP 138 (emphasis added). Nonetheless, on 10/4/10, six days later, the County through the same PRO Delaney responded that it had no responsive records. CP 214. The agency has since admitted that statement was not true, and Mr. Grant's email to PRO Delaney and Deputy Prosecutor Alvarez on 9/28/10 establishes the County knew the statement was not true when it was made on 10/4/10. The County has since claimed it did not believe the records would constitute

"public records" under the PRA. CP 471-480. The County has not explained why it did not admit the records existed and state that contention when it responded in October 2010 rather than stating instead the records did not exist.

On 1/3/12, one year and three months after the County claimed IALs for 2010 did not exist, Belenski learned that the County had in fact possessed IALs for the 2010 period when he requested them. CP 124, 166, 195-96, 307. In a meeting with Belenski, a County employee admitted for the first time that the IALs had existed when requested in 2010 but that Mr. Grant had "decided" without confirming that Belenski "didn't have the software to look at them." CP 124, 166, 195-96, 307. Belenski subsequently received a copy of the 9/28/10 email from Grant (CP 138) in response to a different PRA request and Belenski filed suit on 11/19/12—less than a year after the 1/3/12 meeting where Belenski first learned the County did possess IALs in 2010 and had lied to him on 10/4/10 when it claimed the records did not exist.

On appeal, the County argued that the one year SOL stated in the PRA should apply and was allegedly triggered even though the County did not produce or identify the 2010 records and did not cite any exemptions. The County alternatively argued that the two-year SOL for claims without any SOL should apply to a PRA claim despite there being a clear one year

stated limitation period in the PRA. The County argued the two year SOL required a requestor to sue within two years of any response, no matter how inaccurate, incomplete or untruthful, and within two years of the last production an agency intends to make or a statement that no records existed to be produced regardless of whether other responsive records existed that were being silently withheld.

Division Two, in a published opinion that impacts every member of the public, agreed in a scant three lines saying:

> [T]he two-year 'catch-all' statute controls when there are no other applicable statutes of limitation. *Johnson*, 164 Wn. App. [769], 777[, 265 P.3d 216 (2011)].... Although it is not immediately clear whether [the County's 'no responsive records'] response would trigger the PRA's one-year statute [of limitations], we need not answer this question because Belenski's suit was untimely under the latter two-year statute.

Opinion at 12. In short, Division Two held (a) the two year SOL applied to a PRA case even though the PRA has its own stated limitation period, and (b) that this unstated and imported two year SOL starts with any response, no matter how untruthful and no matter how inadequate, even when the requestor has no reason to believe the Act has been violated by the time the two years pass.

No requestor could file suit against the agency under the time limit Division Two imposes here without violating CR 11. The Opinion further conflicts with this Court's cases, discussed above, holding that a silent

withholding itself is a violation and that a requestor is entitled to an explanation of withheld records and claimed exemptions prior to being forced to sue.

C. Conflicts with Previous Decisions of the Courts of Appeals.

The Opinion is in conflict with other decisions of the courts of appeal, justifying review pursuant to RAP 13.4(b) (2). Division One in **Tobin v. Worden**, held that the SOL clock on a PRA claim does not begin to run if the agency fails to produce a requested record. 156 Wn. App. 507, 515, 233 P.3d 906 (Div. I 2010). The agency claimed it mistakenly did not include the record and had produced the wrong record. 156 Wn. App. at 511-512. When the requestor brought a PRA case more than a year after the last production of the erroneous record, the agency moved to dismiss on SOL grounds and the trial court granted the motion. The trial court was overturned on appeal by Division One stating in relevant part:

> [T]he record is clear that the county did not produce the requested record at all, much less on a partial or installment basis; instead it twice produced documents that were not even requested....
>
> The county asserts that RCW 42.56.550(6) simply contemplates the agency's last response and contends that its last response, admittedly incorrect, was when it sent the second wrong document. **But as discussed above, the statutory language is clear that the one-year statute of limitations is only triggered by two specific agency responses—a claim of exemption and the last partial production—not simply the agency's "last" response. Had the legislature determined that the agency's last response would suffice, it would have expressly so stated.**

Id. at 514-515 (emphasis added). Division Two's two year SOL holding triggered by the "no records" response conflicts with Division One's holding in **Tobin**.

Previous published Division Two cases dealing with the SOL issue are cases where all responsive records were produced with the triggering response date and there was no evidence any record existed that had not been provided with the response.[12]

D. Issue of Substantial Public Interest

The Petition raises an issue of substantial public interest that should be decided by this Court meriting review pursuant to RAP 13.4(b)(4). Requestors are litigating, and often losing, in courtrooms throughout this State their right to bring a PRA lawsuit such as this one. Agencies are arguing that any response, even an inaccurate one like here, starts the clock by which a requestor must sue, forcing requestors into courts on vague speculative assumptions records might have been withheld or risk having such claims time barred. The holding of Division Two and cases like it in courts below are unnecessarily burdening our courts with suits

[12] **See, e.g., Johnson v. Department of Corrections**, 164 Wn. App. 769, 776 n. 11, 265 P.3d 216 (Div. II 2011) ("The record does not show that when Johnson made his request three years earlier the DOC had possessed any responsive documents other than the single one-page record it provided to him at the time."); **Greenhalgh v. DOC** 170 Wn. App. 137, 282 P.2d 1175 (Div. II 2012)(no record withheld); **Bartz v. Department of Corrections**, 173 Wn. App. 522, 297 P.3d 373 (Div. II 2013) (same).

that might have been avoided, and such holdings are further unfairly depriving requestors of their right of access to public records or remedies for improper denials when they sue one or two years and a day after an inaccurate claim of production of all records or inaccurate statement that no records exist. This Court should accept the Petition for Review in this case not solely to aid Belenski but for the benefit of all requestors and all agencies and to state the law for courts below so all will know that the only limitation period for a PRA claim is the one year period in RCW 42.56.550(6) and to know what is required to trigger that one year clock and what does not do so.[13] Unless the Petition is granted, this Court's evaluation of the very important statute of limitations question teed-up by this case may not occur for many years. These Amici urge the Court to accept **this** case **now** to address this troubling problematic issue that is impacting them and their members each day.

Respectfully submitted this 27th day October, 2015.

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[13] This case allows for evaluation of the "discovery rule" for when a PRA claim accrues, as the federal courts have addressed. **Reed v. City of Asotin**, 917 F.Supp.2d 1156, 1166-67 (E.D. Wash. 2013).

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on October 27, 2015, I delivered a copy of the foregoing document by email pursuant to agreement to:

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Dated this 27th day of October, 2015, at Seattle, Washington.

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