NO. 97297-4

SUPREME COURT OF THE STATE OF WASHINGTON

CHARLES WOLFE,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondent.

AMICUS BRIEF OF WASHINGTON COALITION FOR OPEN GOVERNMENT IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

The Washington Coalition for Open Government ("WCOG") respectfully submits this amicus curiae brief supporting the grant of Petitioner's Petition for Review of the unpublished opinion of the Court of Appeals in *Wolfe v. Washington State Department of Transp.,* No. 50894-0-II (May 7, 2019) (*"Unpublished Opinion").*

II. IDENTITY OF MOVING PARTY

WCOG is a Washington nonprofit, nonpartisan organization dedicated to promoting and defending the public's right to know about the conduct of government and matters of public interest. WCOG's mission is to help foster the cornerstone of democracy: open government, supervised by an informed and engaged citizenry.

How the short one-year limitation period of RCW 42.56.550(6) is applied is critical to requesters' ability to enforce the Washington Public Records Act ("PRA") and, in turn agencies' ability to evade such enforcement. WCOG's interest here is in advocating that the PRA's statute of limitations be applied so as to promote the PRA's bedrock policies of government transparency and accountability. Like the other procedural provisions of the PRA, its statute of limitations should be construed and applied liberally in favor of the requester, and courts should

broadly apply equitable tolling principles, where warranted, as in this case.

III. STATEMENT OF THE CASE

The following facts are undisputed. In July of 2008 Petitioner Charles Wolfe submitted a PRA request to Respondent Washington Department of Transportation ("WSDOT") for records relating to any work on the Naselle River Bridge that it performed after 1986. *Unpublished Opinion,* p. 3. WSDOT did not provide any responsive documents to that specific request, which it closed on August 13, 2008. *Id.* However, in 2011 WSDOT produced three responsive documents showing that it had done work on the Naselle River Bridge in 1998. These documents, which were responsive to the July 2008 PRA request, were discovered in answering a 2011 PRA request from Wolfe. *Id*. p.4. A year earlier, in 2010, a trial court judge dismissed Wolfe's lawsuit about property damage caused by WSDOT's work on the Naselle River Bridge because Wolfe's claims were "time barred". *Id.* p.3. When Wolfe appealed this dismissal, WSDOT's attorney denied that work had been done on the bridge since 1986 at oral argument in 2012, *even though WSDOT had produced the three records in 2011 that showed that WSDOT worked on the bridge in 1998. Id.* p. 4.

In May 2012 Wolfe sued WSDOT for violations of the PRA in failing to produce the three records about the 1998 WSDOT work, as well as several boxes of records that Wolfe claimed were not disclosed. *Id.* p. 5.

The trial court ruled that WSDOT's failure to produce the three 1998 records violated the PRA and a claim based upon them was not barred by RCW 42.56.550(6), even though this statute barred Wolfe's other claims about failure to produce records in 2008. *Id.* p. 6. The Court of Appeals upheld the latter ruling but reversed the former with respect to the three 1998 records, finding that Wolfe's claims based upon them were barred by the one-year statute of limitations, which was not equitably tolled. The Court of Appeals did not address the issue of whether the discovery rule should apply in PRA cases.

III. ARGUMENT

A. How and Why Equitable Tolling Should Apply in PRA Cases Are Issues of Substantial Public Interest.

WCOG agrees with Wolfe that his Petition for Review raises issues of "substantial public interest that should be determined by the Supreme Court" under RAP 13.4(b)(4). The facts of this case present a common scenario: an agency fails to produce responsive records, tells the requester that no further responsive records exist, closes the PRA request and then "discovers" critical records more than a year after it closes the PRA request. A strict application of RCW 42.56.550(6) prevents the requester from suing the agency, and the agency escapes accountability for its failure to comply with the PRA.

In *Belenski v. Jefferson County*, 186 Wn. 2d 452, 378 P. 3d 176 (2016) this Court recognized that the PRA's policies require courts to not strictly apply the one-year statute of limitations in RCW 42.56.550(6) under similar circumstances. The Court was concerned that "allowing the statute of limitations to run based on an agency's dishonest response could incentivize agencies to intentionally withhold information and then avoid liability due to the expiration of the statute of limitations." 186 Wn. 2d at 181. This would undermine the PRA's mandate of broad disclosure. Therefore, this Court remanded the case to the trial court to determine whether "equitable tolling" applied to prevent the harsh, strict application of the one-year statute of limitation. However, the Court provided no guidance as to what factors should be considered when applying this doctrine in the context of a PRA case. Are they simply the two elements applied here by the trial court and Court of Appeals, drawn from *Millay v. Cam,* 135 Wn.2d 193, 206, 955 P.2d 791 (1998)?[1] Should the party who asserts equitable tolling bear the burden of proof in a PRA case, as claimed by the Court of Appeals? *Unpublished Opinion,* p. 8. Should this doctrine be used only "sparingly" in a PRA case? *Id.* The answers to these important questions can only be resolved by this Court, which is why this Petition

[1] The two elements of equitable tolling, according to *Millay* are "(1) bad faith, deception, or false assurance by the defendant and (2) the exercise of diligence by the plaintiff." 135 Wn. 2d at 206.

for Review should be granted. Where an agency's failure to timely disclose requested public records has such a serious consequence to a citizen, as in this case, review should be granted, particularly because its fact pattern is not unusual and has a high likelihood of repetition. If the public is entrusted with the important task of enforcing the PRA, then it should not be hamstrung by rigid application of an extremely short statute of limitations without considering whether such application would be unjust under the facts of the case. That is why this Court ruled in *Belinski* that "equitable tolling" should be applied in PRA cases. Now, this Court needs to further refine *what that means* when the PRA statute of limitations may bar a citizen's action.

B. Equitable Tolling is an Equitable Remedy that Should Have Applied in this Case.

The *Unpublished Opinion* failed to consider other important precedents on equitable tolling. In *Douchette v. Bethel School District,* 117 Wn. 2d 805, 818 P. 2d 1362 (1991) this Court noted that equitable tolling is an equitable remedy and that courts should "balance the equities" between the parties, taking into consideration the relief sought by the plaintiff and the hardship imposed on the defendant. *Id.* at 812. It relied upon Arizona caselaw[2] for direction on how to balance the equities in

[2] *Hosogai v. Kadota*, 145 Ariz. 227, 213, 700 P. 2d 1327 (1985).

allowing equitable tolling of a statute of limitations "Equitable tolling is appropriate when it would effectuate:1) the policies underlying the statute, and 2) the purposes underlying the statute of limitations." *Id.*

The policies underlying the PRA are clear. The core policy underpinning the PRA is the public's right to a transparent government. That policy, itself embodied in the statutory test, guides our interpretation of the PRA.[3] *Nissen v. Pierce County,* 183 Wn. 2d 863, 876, 357 P. 3d 45 (2015). "The PRA preserves the most central tenet of representative government, namely the sovereignty of the people and the accountability to the people of public officials and institutions." *King County v. Sheehan,* 114 Wn. App. 325, 335, 57 P. 3d 307 (2002). The PRA's policies promoting openness are demonstrated by its direction that PRA exemptions be narrowly construed, and the agency must bear the burden of justifying any claimed exemptions. RCW 42.56.030; .550(1).

"The policy behind statutes of limitation is 'protection of the defendant, and the courts, from litigation of stale claims where plaintiffs have slept on their rights and evidence may have been lost or witnesses' memories faded.'" *Douchette,* 117 Wn. 2d at 813.

Further review in this case, considering the countervailing policies at issue, would tip the equity scales in favor of Wolfe. He did not sleep on

[3] RCW 42.56.550(3) declares: "Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. "

his rights by 2009 because he could not have acted on the three 1998 records within the one-year statute of limitations period when he did not know they existed until 2011. A citizen does not know what records are within an agency, which has control over those records. Moreover, when that agency affirmatively, as in this case, states that no other responsive records exist, the citizen should be entitled to rely upon that representation. Under the PRA, the agency should have the burden of ensuring that its representation is correct—not the citizen who is not in any position to know. Where, as here, that representation was incorrect, the agency should bear the consequence—not the requester. Further, the agency bears the burden "beyond material doubt of showing its search was adequate." *Neighborhood Alliance v. County of Spokane*, 172 Wn. 2d 702,721, 261 P. 3d 119 (2011). Clearly, when important requested records are not produced within the statute of limitations time period, the adequacy of the search is a central issue. Why weren't these records discovered in the initial search? Under the Court of Appeals' reasoning in the *Unpublished Opinion*, a citizen would be foreclosed from challenging the adequacy of the search because his claim would be time-barred. This protects agencies for inadequate searches, contrary to the PRA's policies.

In a case like this, it is unjust and inequitable to foreclose, on narrow statute of limitations grounds, a challenge to an agency's failure to comply with the PRA *when the agency itself is the reason why the action*

could not have been brought within that limitation.

Correcting the Court of Appeal's error in rejecting equitable tolling here will encourage agencies to conduct better, more thorough searches and to make sure that their responses to requesters are accurate, so requesters can rely upon such representations. This would further the PRA's policies, without damaging the policy behind the statute of limitations, which is focused on protecting the rights of defendants who cannot control factors that would make it unfair to continue with litigation. Here, the defendant agency is the party in control and the plaintiff could not sleep on rights he did not know were violated.

C. This Court Should Consider Whether the Discovery Rule Applies in PRA Cases.

The second issue of significant public interest is whether the "discovery rule", addressed in briefs in *Belenski* but not the decisions, should apply in PRA cases. In a case like this, where Wolfe could not have sued until he discovered the PRA violation, long after the technical PRA statute of limitations had run, equity and justice require application of the "discovery rule", which is a variation on "equitable tolling" because it is based upon equity. For the same reasons discussed above, the public has a substantial interest in resolution of this issue which protects a citizen's ability to enforce the PRA and hold an agency accountable for untimely, unexplained subsequent disclosures that should have been made in

response to a PRA request.[4]

The theory of the discovery rule is that limitations statutes are not intended to foreclose a cause of action before the injury is known, and that the term "accrue" should not be interpreted to create such a consequence. *Ruth v. Dight*, 75 Wn.2d 660, 667-68, 453 P.2d 631 (1969). The action accrues when the plaintiff knows or should have known the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action. *Gevaart v. Metco Const., Inc.*, 111 Wn.2d 499, 760 P.2d 348 (1988); *Cawdrey v. Hanson Baker Ludlow Drumheller*, P.S., 129 Wn. App. 810, 120 P.3d 605 (2005).

When overruling *Lindquist v. Mullen*, 45 Wn.2d 675, 277 P.2d 724 (1954) rejecting the discovery rule, the Supreme Court asked:

> But what happens to the concepts of fundamental fairness and the common law's purpose to provide a remedy for every genuine wrong when, from the circumstances of the wrong, the injured party would not in the usual course of events know he had been injured until long after the statute of limitations had cut off his legal remedies?

Ruth, 75 Wn.2d at 665.

The Court overturned *Lindquist* and applied the "discovery rule" to medical malpractice cases involving foreign objects left in the body

[4] A subsidiary legal issue is whether the Court of Appeals interpreted RCW 42.56.550(6) correctly because the late production of the three 1998 records could be deemed a "triggering event" under that statute as "the last production of a record on a partial or installment basis." Under that interpretation Wolfe's suit would with respect to those three records would have been timely.

cavity, as a matter of fundamental fairness. *Id.* at 667.

Washington courts have expanded *Ruth* to encompass situations involving special relationships between the parties. See, e.g., *Gazija v. Nicholas Jerns Co.,* 86 Wn.2d 215, 543 P.2d 338 (1975) (professional malpractice involves a fiduciary duty which permits the discovery rule); *Kittinger v. Boeing,* 21 Wn. App. 484, 585 P.2d 812 (1978) (the employer-employee relationship creates responsibilities to the employer).

In addition, where the defendant controls disclosure of information that can inform the complaining party of a cause of action, a special relationship is established which can invoke the discovery rule. As this Court said in *U.S. Oil & Refining Co. v. Dep't of Ecology*, 96 Wn.2d 85, 91, 633 P.2d 1329 (1981):

> Where self-reporting is involved, the probability increases that the plaintiff will be unaware of any cause of action, for the defendant has an incentive not to report it. Like the other cases which have employed the rule, this is a case where if the rule were not applied the plaintiff would be denied a meaningful opportunity to bring a suit. Like those plaintiffs, this plaintiff lacks the means and resources to detect wrongs within the applicable limitation period. Not applying the rule in this case would penalize the plaintiff and reward the clever defendant. Neither the purpose for statutes of limitation nor justice is served when the statute runs while the information concerning the injury is in the defendant's hands.

Id. at 93-94.

So too, the discovery rule should be applied to the PRA as a matter of fairness, particularly because there is a special relationship between

citizens and their government under the PRA. The PRA acknowledges and facilitates this special relationship.

The purpose of the Public Records Act is to preserve "the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions." *O'Connor v. Dept. of Soc. & Health Serve.,* 143 Wn.2d 895, 25 P.3d 426 (2001) (quoting *Progressive Animal Welfare Soc. v. University of Washington,* 125 Wn.2d 243, 251, 884 P.2d 592 (1994) It is the right to insist on being informed as to the actions of their government and to permit the citizen to maintain control that creates this special relationship.

Finally, as noted WSDOT controls the information or records here, hence the means of discovery. As a matter of equity and common sense, therefore, the discovery rule should be applied to PRA cases.

IV. CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Review.

Respectfully submitted this 2nd day of August 2019.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 2nd day of August, 2019, I caused a true and correct copy of this pleading to be served, by the method)s) indicated below, to the following persons:

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