

No. 72256-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WASHINGTON DEPARTMENT OF CORRECTIONS,

Appellant,

v.

ROBERT NORTHUP,

Respondent/Appellee.

2015 FEB 25 AM 10:47

CLERK OF COURT
STATE OF WASHINGTON

REPLY BRIEF OF
APPELLEE/RESPONDENT NORTHUP

MICHAEL C. KAHRs, WSBA #27085
Attorney for Appellant Northup
5215 Ballard Ave. NW, Ste. 2
Seattle, WA 98107
(206) 264-0643

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 1

 A. THE DISCOVERY RULE MUST BE APPLIED TO THE
 PUBLIC RECORDS ACT 1

 B. NORTHUP IS STATUTORILY ENTITLED TO A
 PENALTY FOR EACH DAY THE RECORDS HAVE NOT
 BEEN PROVIDED 4

III. CONCLUSION 5

TABLE OF AUTHORITIES

<u>State Cases</u>	<u>Page #</u>
<i>Ruth v. Dight</i> , 75 Wn.2d 660, 453 P.2d 631 (1969)	1
<i>Sanders v. State</i> , 169 Wn.2d 827, 240 P.3d 120 (2010)	4
<i>Yousoufian v. King County</i> , 152 Wn.2d 421, 98 P.3d 463 (2004)	4
<i>Yousoufian v. King County</i> , 168 Wn.2d 444, 229 P.3d 735 (2010)	2
 <u>State Statutes</u>	
Public Records Act, RCW 42.45	passim
RCW 4.24.430	4
RCW 40.14.070	3
RCW 42.56.550(4)	4

I. INTRODUCTION

Northup raised three issues in his opening brief. They included a challenge to the statute of limitations and challenges to the calculation of the time period the records were withheld. He addresses the Department of Corrections (“Department”) responses below.

II. ARGUMENT

A. THE DISCOVERY RULE MUST BE APPLIED TO THE PUBLIC RECORDS ACT.

As Northup pointed out in his opening brief, Washington first adopted the discovery rule in 1969. *See Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969). Since then, this rule has been applied to many areas of the law when the party raising the statute of limitations claim has an unfair advantage. This is precisely the problem that our courts have not addressed when applying the statute of limitations to the Public Record Act (“PRA”). The discovery rule is especially needed when the defendant holds all the evidence necessary to put the plaintiff on notice and the plaintiff has absolutely no means of penetrating that barrier.

The Department of Corrections argues against the discovery rule, claiming that “the PRA does not depend on self-reporting.” Response, p. 42. It claims that “the PRA provides multiple tools to force agency responses.” These claims are spoken from the point of view of an agency, not some

individual trying to litigate a case pro se.¹ And yes, any individual can file a lawsuit: not all individuals know how to litigate such a lawsuit especially when being opposed by an agency with experience defending these actions all the time.

The second argument the Department challenges is whether or not agencies can benefit from the concealment of records. If there can be no benefit from concealment, why has the Supreme Court established one of the aggravating factors for penalties the untimely release of records when time is of the essence? The first aggravating factor lists “a delayed response by the agency, especially in circumstances making time of the essence.” *Yousoufian v. King County*, 168 Wn.2d 444, 467-68, 229 P.3d 735 (2010). Why else would the first aggravating factors listed be a time factor?

As for taking a sizeable political and financial risk, perhaps if the agency is a small agency this might be true. However, the mitigating factors permit the size of the agency to affect the size of any penalty therefore it is accounted for. Plus the large multi-million dollar state agencies have no political and financial risk. When was the last time a governmental employee was fired for incompetence for his or her respond to a PRA request costing

¹Unless an attorney has an idea that the document requested actually exists, it is highly unlikely bordering on the absurd that an attorney will take on such a case on a contingent basis. This is simple common sense.

the agency large sums of money? The penalty certainly does not come out of their wages.

Finally, the Department raises a straw man against Northup's argument about the special relationship between the governed and the governing. It claims that the discovery rule would then apply to all actions against state or local government, resulting in no actual statute of limitations. This straw man spontaneously combusts when one realizes the discovery rule does not apply when an individual should of had or did have notice of the injury or, as with the PRA, notice of the withholding of documents. Almost all individuals suffering from injuries have notice of when they were assaulted, hit by a vehicle. Its when there is no notice that it applies.

As for the issue of finality, there is a natural limitation – the records retention schedule. All agencies must set a retention schedule for their records. RCW 40.14.070. Once records are destroyed, the agency is no longer “on the hook” for any penalties.

Northup might have known that the one year statute of limitations would run by November 3, 2011, but he had absolutely no reason to believe a record existed. If one would accept the Department's argument, then the

various agencies will have to respond to essentially frivolous lawsuits caused by the last of the discovery rule.²

B. NORTHUP IS STATUTORILY ENTITLED TO A PENALTY FOR EACH DAY THE RECORDS HAVE NOT BEEN PROVIDED.

In its Response, the Department claimed that the 2011 changes to RCW 42.56.550(4) had something to do with the period of time a court must find an agency to have violated the PRA. A cursory examination of the change quickly deletes this argument. In 2011, the legislature amended RCW 42.56.550(4) to change the possible penalty range from 0 to 100 dollars. Appendix A (SHB 1899). There was absolutely no modification of the language the Supreme Court used as the basis for its interpretation when it ruled that a requester is entitled to penalty for each day, even if the reason for the delay was the court system. *See Sanders v. State*, 169 Wn.2d 827, 863-64, 240 P.3d 120 (2010) (citing *Yousoufian v. King County*, 152 Wn.2d 421, 437, 98 P.3d 463 (2004)). There is no ambiguity in RCW 42.56.550(4) giving penalties “for each day.” At the Supreme Court has said, “[t]his rule may seem harsh, but it is the unambiguous meaning of the statute.” *Sanders*, 169 Wn.2d at 864.

²The next thing that will happen is that agencies like the Department will then use the “frivolous claims” to ask the courts to preclude individuals with more than one request from filing lawsuits with fee waivers. RCW 4.24.430.

Northup would also point out that he had notified the Department that he needed items one through three on May 10, 2013, item one being the debriefing email. It took another five months for Northup to get the heavily redacted email. Northup has been denied the unredacted email from the beginning and especially after May 10, 2013 when he put the Department on notice.³

III. CONCLUSION

In conclusion, Northup is entitled to penalties because of the Department's bad faith. It knew it had released the email to Northup's enemies and that to Northup time was of the essence. It took its own sweet time and ended up doing nothing to help Northup figure out how he could protect himself. Northup is entitled his penalties for each day the records were withheld and to all reasonable attorney fees and costs.

Respectfully submitted this 23rd day of February, 2015.

KAHRS LAW FIRM, P.S.

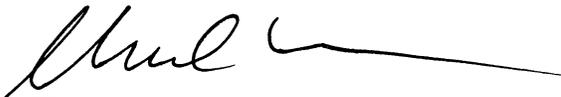

MICHAEL C. KAHRS, WSBA #27085
Attorney for Appellee/Respondent Northup

³To respond to the Department raising another straw man, Northup reminds this Court that he has never said the Department was prohibited from redacting information on the email received from another source, just not from information he provided.

CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on February 23, 2015 in Seattle, County of King, State of Washington, I deposited the foregoing document with the United States Mail, postage prepaid and 1st class on the following party:

Timothy Feulner
Criminal Division
Attorney General's Office
P.O. Box 40116
Olympia, WA 98504-0116

By: 

MICHAEL C. KAHRIS

APPENDIX A

teachers' retirement system combined plan 2 and plan 3 account, the tobacco prevention and control account, the tobacco settlement account, the transportation 2003 account (nickel account), the transportation equipment fund, the transportation fund, the transportation improvement account, the transportation improvement board bond retirement account, the transportation infrastructure account, the transportation partnership account, the traumatic brain injury account, the tuition recovery trust fund, the University of Washington bond retirement fund, the University of Washington building account, the urban arterial trust account, the volunteer firefighters' and reserve officers' relief and pension principal fund, the volunteer firefighters' and reserve officers' administrative fund, the Washington judicial retirement system account, the Washington law enforcement officers' and firefighters' system plan 1 retirement account, the Washington law enforcement officers' and firefighters' system plan 2 retirement account, the Washington public safety employees' plan 2 retirement account, the Washington school employees' retirement system combined plan 2 and 3 account, the Washington state health insurance pool account, the Washington state patrol retirement account, the Washington State University building account, the Washington State University bond retirement fund, the water pollution control revolving fund, and the Western Washington University capital projects account. Earnings derived from investing balances of the agricultural permanent fund, the normal school permanent fund, the permanent common school fund, the scientific permanent fund, and the state university permanent fund shall be allocated to their respective beneficiary accounts.

(b) Any state agency that has independent authority over accounts or funds not statutorily required to be held in the state treasury that deposits funds into a fund or account in the state treasury pursuant to an agreement with the office of the state treasurer shall receive its proportionate share of earnings based upon each account's or fund's average daily balance for the period.

(5) In conformance with Article II, section 37 of the state Constitution, no treasury accounts or funds shall be allocated earnings without the specific affirmative directive of this section.

Passed by the House March 5, 2011.

Passed by the Senate April 9, 2011.

Approved by the Governor May 5, 2011.

Filed in Office of Secretary of State May 6, 2011.

CHAPTER 273

[Substitute House Bill 1899]

PUBLIC RECORDS VIOLATIONS—PENALTIES

AN ACT Relating to penalties for public records violations; reenacting and amending RCW 42.56.550; and prescribing penalties.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 42.56.550 and 2005 c 483 s 5 and 2005 c 274 s 288 are each reenacted and amended to read as follows:

(1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in

which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

(2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

(3) Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. 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. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

(4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount (~~not less than five dollars and~~) not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

(5) For actions under this section against counties, the venue provisions of RCW 36.01.050 apply.

(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.

Passed by the House March 1, 2011.

Passed by the Senate April 21, 2011.

Approved by the Governor May 5, 2011.

Filed in Office of Secretary of State May 6, 2011.

CHAPTER 274

[Second Substitute House Bill 1909]

COMMUNITY AND TECHNICAL COLLEGES—INNOVATION—FUNDING

AN ACT Relating to creating a funding mechanism to promote innovation at community and technical colleges; amending RCW 28B.15.031 and 28B.15.100; reenacting and amending RCW 43.79A.040; adding a new section to chapter 28B.50 RCW; and creating a new section.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. (1) The legislature finds that the community and technical college system mission to ensure affordable access to higher education geographically distributed throughout the state is aligned with innovative approaches to learning and substantial efficiencies that have been implemented