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No. 42052-0

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHAWN GREENHALGH, Appellant;

v.

DEPARTMENT OF CORRECTIONS, Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Paula Casey
No. 08-2-01041-1

OPENING BRIEF OF APPELLANT GREENHALGH

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

1. ASSIGNMENTS OF ERROR.
 1. The trial court erred in entering judgment on CR 15 when it permitted the Department of Corrections to amend its answer.
 2. The trial court erred in entering judgment on CR 56 when it entered its order dismissing this lawsuit based upon a violation of RCW 42.56.550(6).
2. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR.
 1. When a party fails to raise an affirmative defense in its Answer, is the party precluded from amending its answer to add the affirmative defense after the opposing party has moved for summary judgment?
 2. Does the statutory language of the Public Record Act require the accrual date of the statute of limitations to run from two business days after the receipt of an appeal by the agency if an appeal was filed?
 3. When an agency promulgates an administrative rule with plain language detailing the accrual of the statute of limitations, is the agency estopped from arguing that the statute of limitations accrued earlier after a requester has relied on the plain language of the rule.
 4. When an agency promulgates a state-wide policy with plain language detailing the accrual of the statute of limitations, is the agency estopped from arguing that the statute of limitations accrued earlier after a requester has relied on the plain language of the policy.
 5. Did the Department of Corrections act in bad faith when it denied responsive records existed?
 6. What penalties is Mr. Greenhalgh entitled to based on the actions of the Department of Corrections in response to his Public Records Act request?

7. Is Mr. Greenhalgh entitled to reasonable attorney fees and costs?

B. STATEMENT OF THE CASE

1. STATEMENT OF FACTS.

Mr. Greenhalgh was a tier representative at the Monroe Correctional Complex (“MCC”) when he made his Public Records Act (“PRA”) request that is the subject of this lawsuit. CP 66-68. A tier representative’s job is to act as a liaison between those individuals in his housing tier and the prison administrators, and Mr. Greenhalgh took his duties seriously. When asked by his tier constituents why the Department of Corrections (“the Department” or “DOC”) was charging \$.20 per page for documents released in accordance with the PRA but only \$.10 per page for inmate legal copies, Mr. Greenhalgh wrote a PRA request on February 23, 2007, to MCC’s Public Disclosure Coordinator Jane McKenzie. CP 31. In his letter, Mr. Greenhalgh made two separate requests. He first asked for any and all records that “explain how the Department determined it must charge \$.20 per page” for providing photocopies of public records. He then asked for any and all records that explain how DOC determined its \$.10 per page cost for providing photocopies of offender legal pleadings. *Id.*

In response to these initial requests, the Department provided a few pages of non-responsive documents on March 29, 2007. CP 34, 38-42. In

addition, the Department provided a Denial of Disclosure form stating that certain other responsive records were exempt from disclosure. CP 35-37

Dissatisfied with the Department's response to his February 23, 2007 requests, Mr. Greenhalgh propounded a new PRA request to the Department on April 12, 2007, again asking for two separate and distinct categories of documents. CP 43. In the first request, he asked for "DOC's formula for determining its copying fee, \$.20 per page," for providing photocopies of public records, as published in WAC 137-08-110. In the second request, he asked for the Department's formula for determining its \$.10 per page copying fee for offenders' legal pleadings.

In a letter dated April 23, 2007, Public Disclosure Specialist Gaylene Schave responded to each of Mr. Greenhalgh's requests. She first stated that "[t]here are no documents responsive to your request for formularies on the \$.20 charge per copy for public disclosure copying fees." CP 44. Ms. Schave then informed Mr. Greenhalgh that there were three pages responsive to how the Department determined its \$.10 per page fee for providing photocopies of offender legal pleadings but that those three pages were exempt from public disclosure under RCW 42.56.290 (records relevant to a controversy) and RCW 5.60.060(2)(a) (attorney-client privilege).

Mr. Greenhalgh appealed the Department's March 14, 2007 response to his February 23, 2007 requests in a letter to Kay Wilson-Kirby, the

Department's Public Records Appeals Officer, dated July 14, 2007. CP 45. In this letter, Mr. Greenhalgh questioned Ms. Schave's statement that there were no responsive documents to his first category, insisting that "[t]here must be public records ... which record how DOC determined that it must charge \$.20 per page for providing photocopies of public records in order to fully reimburse itself for its actual costs incurred in providing photocopies of public records," and that the \$.20 per page cost stated in the DOC's Policy 280.510 and in WAC 137-08-110 "were determined somehow."

On the same day, Mr. Greenhalgh appealed the April 23, 2007, Denial of Disclosure of Public Records in a separate letter to Ms. Wilson-Kirby. CP 46. In this appeal, received by the Department on July 18, 2007, *see* CP 47, Mr. Greenhalgh again directly addressed the lack of documents showing how the Department calculated the cost it charged the public for copies of public records. Mr. Greenhalgh stated there must be documents showing why the Department needed to charge \$.20 per page to reimburse itself for photocopying PRA documents but only \$.10 per page to reimburse itself for costs of inmate legal copies. CP 46. He additionally requested that the Department provide the records he requested, as well as requesting production of the records related to the other category of his request that had been withheld based on claimed exemptions. *Id.*

These appeals were received July 18, 2007. CP 47-48. After stating it would take approximately 30 business days to render a decision, Ms. Wilson-Kirby responded to each request individually. In a letter dated August 29, 2007, she responded to the first category of records in the April 12, 2007 request, by denying the appeal, stating that all relevant records had been released and those that were exempt had been withheld based on stated statutory exemptions. CP 47.

The other letter denying the appeal from the March 23, 2007 letter first completely misstated the nature of the request as asking for documents comparing the two charges, as opposed to two separate requests for documents. CP 48. Ms. Wilson-Kirby then claiming that “[t]here are no records that exist explaining these particular cost formulations and comparing them with each other.”

This lawsuit was filed on May 1, 2008. It was during the course of discovery that further responsive documents were finally provided. On November 12, 2008, in response to formal discovery requests, the Department provided Mr. Greenhalgh with seven pages of responsive documentation showing how the Department had determined its actual per page costs for providing photocopies of public records. CP 49-56. These documents included a letter dated January 10, 1996, from Ms. Wilson-Kirby to an inmate in the King County Jail in which she clearly explains the factors

the Department relied upon, citing to RCW 72.09.057. CP 49-50. It also included two costs calculations, but without any date or authorship. CP 51-53. The disclosure further contained a 1996 memorandum from then Public Disclosure Office (and future PRA appeals officer) Kay Wilson-Kirby that provided a revised cost calculation due to legislative objections to the prior cost calculation. It finally included Appendix B to an old DOC Policy 280.510. CP 53-54

In a subsequent request, Mr. Greenhalgh asked for further documentation on how the copy cost was justified. Apparently, after this lawsuit was filed, the Department reevaluated its cost per page charge. As part of this request, he was provided 57 pages addressing recent cost calculations by the Department. In some of these pages, the Department recalculated the costs of actually responding to PRA requests. CP 55-59. After performing the necessary calculations, it was determined by the Department it could not continue to justify the 20 cents it charged. However, the Department still charges 20 cents per page.¹

¹An investigation shows that most state agencies charge fifteen cents a page and that the Department of Corrections is the exception, not the rule. CP 69.

2. DEPARTMENT OF CORRECTIONS PUBLIC RECORDS ACT RULES AND POLICIES.

When Mr. Greenhalgh made his requests, there existed two separate sources of Departmental interpretations of the Public Records Act. These sources were and are the Washington Administrative Code, WAC 137-08, and Departmental Policy 280.510. The WAC titled “Review of denial of Disclosure” stated the following:

(1) If the person requesting disclosure disagrees with the decision of a public disclosure coordinator denying disclosure of a public record, such person may petition the department's public disclosure officer for review of the decision denying disclosure. The form used by the public disclosure coordinator to deny disclosure of a public record shall clearly indicate this right of review.

(2) Within ten working days after receipt of a petition for review of a decision denying disclosure, the public disclosure officer shall review the decision denying disclosure, and advise the petitioner, in writing, of the public disclosure officer's decision on the petition. Such review shall be deemed completed at the end of the second business day following denial of disclosure, and shall constitute final agency action for the purposes of judicial review.

WAC 137-08-140.

DOC also enacted a policy, titled “Public Disclosure of Records,” to govern its handling of PRA requests and appeals. CP 94-100. The policy had a revision date of March 13, 2007. It was in effect when Mr. Greenhalgh made all his requests and appeals. In this policy, the Department set out an appeal process for the requester to follow. This policy stated the following:

A. If the requester disagrees with a decision to deny the request: in whole or in part, she may appeal to the Department Appeals Officer for review. The Department Appeals Officer will review the appeal and affirm or reverse the denial within 2 business days following receipt of the appeal.

B. Final Department action for the purposes of judicial review will not be considered to have occurred until the Department Appeals Officer has rendered his/her decision on the appeal: or until the close of the second business day following receipt of the appeal: whichever occurs first.

C. Any further appeal will be made to the Superior Court per RCW 42.56.

CP 100 (DOC Policy 280.510, p. 7 (revised March 13, 2007)).

3. CASE PROCEDURAL HISTORY.

After the initial complaint was filed, Mr. Greenhalgh filed an amended complaint. The Department timely filed an Answer to the amended complaint, raising various affirmative defenses. CP 12-16. The Department failed to raise the defense of a violation of the statute of limitations. Mr. Greenhalgh propounded discovery upon the Department. Documents were produced which showed that the Department was aware of its obligations under RCW 42.56.120 to calculate actual costs if the cost charged was greater than fifteen cents. CP 49-56.

Mr. Greenhalgh filed a motion for summary judgment. CP 17-30. In this motion, Mr. Greenhalgh asserted that the Department, in bad faith, failed to turn over documents in its possession in a timely manner. In particular, the

Department's response to Mr. Greenhalgh's appeal of the denial of records for the PRA cost ignored a responsive document, a memorandum written by the very employee who answered the appeal by stating that no such documents existed.

In its response, the Department raised a statute of limitations defense for the first time. CP 70-78. It failed to address any of the issues raised in the summary judgment including the bad faith argument against the Department. In his reply, Mr. Greenhalgh argued that the Department had waived the statute of limitations defense. CP 79-91. The Department subsequently moved to amend its answer, to which Mr. Greenhalgh objected. CP 109-130. The trial court granted the motion to amend the answer and dismissed this case based upon a violation of the statute of limitations as set forth in RCW 42.56.550(6). CP 131-134.

C. ARGUMENT

Mr. Greenhalgh will first show that the trial court abused its discretion when permitting the Department to amend its answer to raise an affirmative defense after the filing of the summary judgment motion. He will then show that the accrual date of the statute of limitations was not triggered in sufficient time for this case to be dismissed. Mr. Greenhalgh will also show that he is entitled to rely on the Department's previously written administrative rules and policies which states the accrual date starts two

business days after receipt of an appeal and the Department is estopped from raising the statute of limitations based on an accrual date before the filing of the appeal. Mr. Greenhalgh then finally argues for penalties and reasonable attorneys fees and costs.

1. THE STANDARD OF REVIEW OF A PRA SUMMARY JUDGMENT MOTION SUPPORTED SOLELY BY AFFIDAVITS IS *DE NOVO*.

Courts review agency actions under the PRA *de novo*. RCW 42.56.550(3). The onus is on the agency refusing to allow inspection of copying of a particular record. RCW 42.56.550(1). This Court “stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence.” *Progressive Animal Welfare Soc’y v. Univ. of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1995) (“*PAWS*”). Therefore, it is not bound by the trial court’s factual findings.

2. THE DEPARTMENT OF CORRECTIONS WAIVED ITS STATUTE OF LIMITATIONS AFFIRMATIVE DEFENSE BY FAILING TO PLEAD IT IN ITS ANSWER TO THE FIRST AMENDED COMPLAINT IN VIOLATION OF CR 8(c).

The trial court abused its discretion in granting the Department’s motion to amend its answer because the Department had waived its assertion of the defense prior to moving to amend its answer. The Department waived the defense of statute of limitations because it failed to raise the defense in its

initial pleading, and its conduct in raising the defense was dilatory and inconsistent with assertions of the defense. Washington courts have consistently held that the common law principle of waiver applies to the raising of affirmative defenses. *See Lybbert v. Grant County*, 141 Wn.2d 29, 38-39, 1 P.3d 1124 (2000) (listing cases and approving of the doctrine). Waiver of an affirmative defense can occur in two ways: (1) “assertion of the defense is inconsistent with the defendant’s previous behavior”; or (2) “defendant’s counsel has been dilatory in asserting the defense.” *King v. Snohomish County*, 146 Wn.2d 420, 47 P.3d 563 (2002). A defendant can waive a statute of limitations defense. *See Matthies v. Knodel*, 19 Wn. App. 1, 573 P.2d 1332 (1977) (finding lack of waiver because defendant’s conduct was not inconsistent with the assertion of a statute of limitations defense).

The Department’s conduct was inconsistent with the assertion of a statute of limitations defense because the Department engaged in discovery on substantive issues prior to raising the defense. A party engaging in discovery on issues unrelated to the defense waives the right to raise the defense. *Romjue v. Fairchild*, 60 Wn. App. 278, 281, 803 P.2d 57 (1991). In *Romjue*, the defendant propounded discovery related to substantive issues, and then later raised the issue of insufficient service of process. The appeals court held that, while engaging in discovery related to the validity of a defense would not necessarily constitute waiver, engaging in discovery on

other substantive issues prior to raising the defense was inconsistent with the assertion of that defense. Here, the Department did not engage in any discovery related to raising a statute of limitations defense, even though it was provided ample opportunity. Such action would have alerted Mr. Greenhalgh to an intention to raise the defense. Conversely, the Department responded to discovery unrelated to the statute of limitations, and it otherwise engaged in the substantive issues in this case.

Additionally, the Department's counsel was dilatory in asserting the statute of limitations defense because it waited until after summary judgment had been filed to raise the issue for the first time. When a party's counsel is dilatory in asserting a required affirmative defense, the defense is waived. *Lybbert*, 141 Wn.2d at 39 (citing *Raymond v. Fleming*, 24 Wn. App. 112, 115, 600 P.2d 614 (1979)). In *Raymond*, the appeals court held that a party's counsel who had passed on numerous opportunities to raise the defense, but instead had repeatedly requested more time and failed to answer discovery had acted in a dilatory manner. *Raymond*, 24 Wn. App. at 115. Consequently, the court held that the party had waived the affirmative defense. *Id.*

Here, the Department, at all times prior to the filing of its response to Mr. Greenhalgh's summary judgment motion, engaged substantively in this case and gave no indication of an intent to assert a statute of limitations

defense. Most importantly, the Department did not raise the statute of limitations defense in its Answer. *Cf. King*, 146 Wn.2d at 424 (counsel not dilatory because defense first raised in answer). The Department responded to discovery propounded on it by Mr. Greenhalgh, notably by providing the documents that were requested, despite the Department's repeated assertion that the records did not exist. It was only after Mr. Greenhalgh moved for summary judgment that the Department ambushed him with a claim that the statute of limitations had run prior to his filing of the suit.

The principle of waiver of affirmative defenses is consistent with the plain language of CR 8(c), which requires that "a party shall set forth affirmatively . . . Statute of limitation . . . and any other matter constituting an avoidance or affirmative defense." "Fundamental to statutory construction is the doctrine that 'shall' is construed as mandatory language and 'may' is construed as permissive language." *State v. Goins*, 151 Wn.2d 728, 749, 92 P.3d 181 (2004). With this guidance, there is one interpretation, that a party must timely plead their affirmative defenses.

The Supreme Court has determined that, if they are not pled, they are waived, unless they are "asserted with a motion under CR 12(b) or tried by the express or implied consent of the parties." *Farmers Ins. Co. of Washington v. Miller*, 87 Wn.2d 70, 76, 549 P.2d 9 (1976). Here, the Department asserted its statute of limitation defense only after Mr.

Greenhalgh served his Summary Judgment Motion. Mr. Greenhalgh did not consent to its being asserted at such a late date, having argued in his reply against it being applied to this case. As such, the Department can not raise this defense to Mr. Greenhalgh's motion.

Under special circumstances, implied consent can be found because evidence and argument was submitted to the trial court. *See Dep't of Revenue. v. Puget Sound Power & Light Co.*, 103 Wn.2d 501, 504, 694 P.2d 7 (1985). In this case, the Department of Revenue ("DOR") appealed a decision denying its claim to abandoned utility deposits due to the statute of limitations being applied against the original owners and imputed to DOR. *Id.* at 502. Puget Sound Power & Light had failed to raise a statute of limitations claim in its abandoned property report. *Id.* at 502-503.

In analyzing this case, the Supreme Court stated that "[a]lthough Puget did not expressly plead the statute of limitations as an affirmative defense, the Department was well aware that it was the central issue in the litigation." *Id.* at 504.² This issue was presented front and center in DOR's trial memorandum. *Id.* Contrast that with this case. Here, the statute of limitations was not considered an issue by Mr. Greenhalgh because the

²This reasoning accords with the *Lybbert* court's finding that when a party's actions in discovery are consistent with the assertion of a defense, that defense is not necessarily waived. *Lybbert*, 141 Wn.2d at 41.

lawsuit was filed within one year after the date the Department received his appeal. The Department failed to raise this issue in any communications with Mr. Greenhalgh, nor did it raise the issue in any pleadings served in this case. Mr. Greenhalgh was not on notice that this defense would be raised therefore no implied consent can be found.

In the context of a summary judgment motion, *Rainier Nat'l Bank v. Lewis*, 30 Wn.App. 419, 635 P.2d 153 (1981), illustrates how this Court should treat the issue. Rainier issued a loan to the shareholders of a corporation provided that the shareholders guaranteed the loan. After no payment was ever made, the action was initiated against the guarantors. One set of guarantors answered the complaint using a general denial. Summary judgment was then granted to Rainier. *Id.* at 420-21.

Finally, prior to summary judgment being granted, Lewis had filed a counter motion for summary judgment and raised for the first time the defense of failure of consideration, a CR 8(c) defense. After stating that affirmative defense requirements are not construed absolutely, the *Rainier* Court made it clear that “it will not be abrogated where it affects the substantial rights of the parties.” *Id.* at 422 (citing *Mahoney v. Tingley*, 85 Wn.2d 95, 529 P.2d 1068 (1975); *Allis-Chalmers Corp. v. Sygitowicz*, 18 Wn. App. 658, 660, 571 P.2d 224 (1977)). A statute of limitations defense affects the substantial rights of parties. Because Rainier objected to this

defense and Lewis had made no motion to amend his pleadings, this defense was deemed waived. *Id.* at 423; citing CR 15(b). Here, because Mr. Greenhalgh has objected to the defense and the Department made no motion to amend its pleadings before filing its response, the statute of limitations defense has been waived.

3. THE ACCRUAL DATE FOR THE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN UNTIL AFTER MR. GREENHALGH FILED HIS APPEAL OF THE REJECTION.

- a) The Department Neither Claimed an Exemption nor Produced a Last Installment, so the Statute of Limitations Did Not Begin to Run.

Assuming, *arguendo*, the statute of limitations defense was properly raised, the defense is still not applicable in the present case because neither triggering event occurred to start the statute of limitations running. The plain language of RCW 42.56.550(6) indicates that the statute of limitations is triggered only by the occurrence of either of two events: (1) a claim of exemption; or (2) a last production on a partial or installment basis. As neither of these two events occurred with respect to the first category of requested documents, the statute of limitations for challenging the inadequacy of the Department's response to that request was never triggered.

The Department's argument that the statute of limitations began to run when it inadequately cited an exemption in response to Mr. Greenhalgh's concurrent but unrelated request is contrary to the holding in *Tobin v.*

Worden, 156 Wn. App. 507, 233 P.3d 906 (2010). Examination of the facts in both *Tobin* and this case leads to only one reasonable conclusion, because the Department denied the existence of records later found to be responsive, this case is on all fours factually and legally with *Tobin*.

Tobin involved a case with multiple requests and responses. *Tobin*'s first request, made April 22, 2005, resulted in a one-page document being provided without an exemption log. *Id.* at 510. *Tobin*'s subsequent inquiry, dated June 2, 2005, resulted in production of a document that was not responsive to the request. *Id.* at 510-11. When *Tobin* wrote back stating that she had not received the document she had requested, she received a copy of the redacted complaint she had already received. *Id.* at 511.

Mr. Greenhalgh asked for two separate set of records, one relating to the twenty cent charge for PRA documents, the other relating to the ten cent charge for legal documents. In response, he received a response that consisted of non-responsive records, just like the response to *Tobin*'s first request. The documents provided did not show how the twenty cent charge was calculated, only that Department's published administrative code, which was provided by the Department, permitted a twenty cent charge per document.

Mr. Greenhalgh then proceeded to write a second letter dated April 12, 2007. In this letter he asked specifically for the formularies for each

separate request. For the twenty cent PRA charge, Mr. Greenhalgh asked how the fee was determined to permit the twenty cent charge set forth in WAC 137-08-110(1). Like *Tobin*, the Department's response to the second letter was again non-responsive to the actual request. The Department specifically stated that "[t]here are no documents response to your request for formularies on the \$.20 charge per copy for public disclosure copying fees . . ." CP 44. The previously claimed exemptions pertained only to the request for documents pertaining to the ten cent legal copy cost.

The Department never claimed an exemption related to the request for records pertaining to the twenty cent charge for public record documents that were required by RCW 42.56.120; the Department's subsequent response simply and dishonestly asserted that such documents did not exist. The *Tobin* ruling informs us that besides the response to the first request, the response to the subsequent request is relevant to determining the accrual date of the statute of limitations.

The Tobins further contend that the county's response to their second records request for the Ferguson complaint was neither a claim of exemption nor the last production of a record on a partial or installment basis. The record fully supports this contention. The county did not claim an exemption because it mistakenly believed it provided the requested documents in its entirety.

Id. at 515. Similarly, here the Department either mistakenly believed it produced all documents or it deliberately chose not to disclose them. Either

way, *Tobin* is directly on-fours with this case because the Department failed to produce documents that were subsequently found to be responsive.

Here, the Department makes the same assertion that was rejected in *Tobin*, namely that its incomplete response followed by a statement that no further records exist satisfies the requirements needed to trigger the statute of limitations.³ In the absence of either statutory triggering event related to Mr. Greenhalgh's specific RCW 42.56.120 request, the statute of limitations did not begin to run, neither did it expire, prior to the filing of the present lawsuit.

- b) The Plain Language of the Department's Administrative Rule and Policy Mirrors the Statutory Language And Requires the Accrual Date Start Two Business Days After Receipt of the Appeal.

The Department has promulgated rules governing an appeal process as part of its procedures under the PRA. WAC 137-08-140(1). This rule states that a person who disagrees with any decision of a public disclosure coordinator may ask for review of that decision. This rule then provides a procedure for evaluating the appeal:

³Tobin involved two productions of documents before the final denial. After each document production, Tobin asked for more documents. It was the final request which resulted in the denial of inspection. *Id.* at 510-12. It is this denial that the *Tobin* Court focused on when determining that the statute of limitations had not been triggered.

Within ten working days after receipt of a petition for review of a decision denying disclosure, the public disclosure officer shall review the decision denying disclosure, and advise the petitioner, in writing, of the public disclosure officer's decision on the petition. *Such review shall be deemed completed at the end of the second business day following denial of disclosure*, and shall constitute final agency action for the purposes of judicial review.

WAC 137-08-140(2) (emphasis added). This confirms that the proper interpretation of an appeal in accordance with RCW 42.56.520 and the statute of limitations in RCW 42.56.550(6) requires that the accrual date occur on the second business day following the denial of disclosure.

Agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action or final action by the office of the secretary of the senate or the office of the chief clerk of the house of representatives for the purposes of judicial review.

RCW 42.56.520. Because the WAC sets forth a rule based on the proper interpretation of the two statutes, Mr. Greenhalgh is not only permitted but required to rely on it when proceeding with his request. *See Parmelee v. Clarke*, 148 Wn. App. 748, 201 P.3d 1022 (2008) (when WACs properly follow the PRA statutory scheme, the requester must follow the dictates of the relevant WACs). Because Mr. Greenhalgh appealed and his appeal was received on July 18, 2007, the statute of limitations began to run on July 20,

2007. This language was mirrored in the policies promulgated by the Department. The policy in effect at that time, 280.510, specifically stated that

Final Department action for the purposes of judicial review will not be considered to have occurred until the Department Appeals Officer has rendered his/her decision on the appeal, or until the close of the second business day following receipt of the appeal, whichever occurs first.

CP 100. Under the language of the WAC and Policy, the accrual date must be, because the Department took more than two business days to decide the appeal, July 18, 2007, the date the appeal was received by the Department of Corrections. CP 47-48. Because this date is less than one year before Mr. Greenhalgh filed his complaint, the statute of limitations has not expired in this case.

4. THE DEPARTMENT OF CORRECTIONS IS ESTOPPED FROM RAISING A STATUTE OF LIMITATIONS DEFENSE BECAUSE MR. GREENHALGH IS ENTITLED TO RELY ON THE DEPARTMENT'S PUBLISHED RULES AND POLICIES.

The Department must be estopped from arguing that the statute of limitations expired before the lawsuit was filed because its published rules and policies indicate that the statute of limitations does not begin to run until after the administrative appeal process has completed. Equitable estoppel is invoked to prevent a party from advancing an argument that is contradictory to its prior position. "Estoppel consists of three elements: (1) an admission, statement, or act inconsistent with a claim later asserted; (2) action by the

other party on the faith of such admission, statement, or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.” *Dep’t of Revenue v. Martin Air Conditioning*, 35 Wn. App. 678, 682, 668 P.2d 1286 (1983) (citing *Harbor Air Svc, Inc. v. Bd. of Tax Appeals*, 88 Wn.2d 359, 366-67, 560 P.2d 1145 (1977)).

a) It Is Undeniable that the Department’s Statute of Limitations Defense Is Inconsistent With Its Rules and Policies.

It is undeniable that the Department’s latest interpretation of its rules and policies contradicts the plain language of the rule that was in effect when Mr. Greenhalgh appealed the denial of his request. Both WAC 137-08-140(2) and Policy 280.510 state the accrual date of the PRA statute of limitations happens two business days after the receipt of the appeal, which would have been July 20, 2007. Mr Greenhalgh filed his lawsuit on May 1, 2008. This is 288 calendar days after the second business day following receipt of the appeal by the Department, well within the one-year statute of limitations set forth in RCW 42.56.550(6). However, the Department has argued the Statute of Limitations accrued no later than April 23, 2007, more than one year before the filing of the lawsuit on May 1, 2007. The Department’s position in this case is indisputably inconsistent to the position it took by publishing its WACs and policies.

b) Mr. Greenhalgh Relied On Rules and Policies Which All Inmates Must Obey.

The Policies promulgated by the Department are for all inmates and employees to obey. Failure to do so may result in a general infraction, #102. An inmate would be punished for “[f]ailure to follow any written rules or policies adopted by the institution and not specified within this chapter or in local disciplinary rules.” WAC 137-28-220. Mr. Greenhalgh proceeded with the approved administrative appeal process and filed his lawsuit in accordance with the plain language of the rules and policies promulgated by the Department. His reliance was detrimental because the Department now claims that rules do not mean what they say and that the statute of limitations accrued well before the administrative appeal process had been exhausted.

c) The Department Repudiated the Plain Language of Its WACs and Policies Causing Mr. Greenhalgh Injury.

The Department has taken a position in this case antithetical to its written position in its rules and policies. When the trial court dismissed this case based upon the Department’s position, Mr. Greenhalgh has suffered the ultimate injury as a result of his reliance.

In summation, Mr. Greenhalgh is entitled to equitable estoppel of the Department’s current statute of limitations assertion because (1) the Department promulgated and published rules and policies that providing for an administrative appeal process that set the accrual of the statute of

limitations, (2) Mr. Greenhalgh relied on that process to appeal the denial of his request, and (3) the Department has now repudiated the plain language from its rules and policies and argued that the statute of limitations accrued before the completion of the administrative appeal process. Because the contradictory argument was raised after Mr. Greenhalgh relied on the plain language of the published rule, the Department must be estopped from arguing that the statute of limitations accrued prior to the completion of the appeal process.

5. MR. GREENHALGH IS ENTITLED TO THE MAXIMUM PER-DAY PENALTY DUE TO THE BAD FAITH OF THE DEPARTMENT OF CORRECTIONS.

a) Mr. Greenhalgh Is the Prevailing Party and Is Entitled to Statutory Penalties.

The PRA provides judicial review for “any person having been denied an opportunity to inspect or copy a public record by an agency.” RCW 42.56.550(1). The PRA further provides that monetary sanctions and attorney fees be awarded to a person who is denied documents.

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.

RCW 42.56.550(4).

A “person who prevails” has been defined by the Supreme Court as a person who must seek judicial review to determine that the requested public records were wrongly withheld. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005). The court held that the filing need not be the direct cause of the disclosure, so long as a court determines that disclosure had been wrongfully denied at the time the suit was brought. *Id.* The disclosure of documents prior to judgment does not moot the issue. Penalties are still mandatory for the period of time that disclosure was improperly denied from the time of request to disclosure. *Id.* at 102. Good faith is not a defense. *Amren v. City of Kalama*, 131 Wn.2d 25, 35, 929 P.2d 389 (1997).

Here, in accordance with RCW 42.56.550, Mr. Greenhalgh is the prevailing party, because the Department wrongly withheld public records requested by Mr. Greenhalgh on February 23, 2007 and April 12, 2007. Mr. Greenhalgh had to file suit to compel the Department to provide the requested documents. He is the prevailing party because documents were provided during discovery that should have been previously disclosed.

Under the PRA, an agency cannot charge in excess of \$.15 per page for photocopies of public records *unless* the agency has “determined the actual per page cost,” and then this cost must not exceed “the amount

necessary to reimburse the agency ... for its actual costs directly incident to such copying.” RCW 42.56.120. In addition, “[i]n no event may an agency charge a per page cost greater than the actual per page cost as established and published by the agency.” *Id.* If an agency does charge in excess of \$.15 per page, it must “establish, maintain, and make available for public inspection and copying a statement of the actual per page cost or other costs, if any, that it charges for providing photocopies of public records and a statement of the factors and manner used to determine the actual per page cost or other costs, if any.” RCW 42.56.070(7)(8).

In light of these statutory requirements, and the discrepancy between the \$.20 per page cost for copies of public records and the \$.10 per page cost of legal pleadings, Mr. Greenhalgh made a reasonable PRA request for any and all records explaining “how the DOC determined it must charge \$.20 per page in order for it to be fully reimbursed for such copying” of public records. CP 31. He made a perfectly reasonable and clear request for the formula calculated by the Department to justify the what it charged citizens for records.

Instead of providing any of its existing statements of per-page cost calculations as to how it determined its actual cost for photocopies of public records, the Department provided Mr. Greenhalgh a copy of WAC 137-08-110, which states that the Department “shall collect a fee of twenty cents per

page... for providing copies of public records[,]” a letter sent to a previous inquirer, and a copy of an order in *Gronquist v. Evans and The Dept. of Corrections*, NO. 99-2-02113-9. CP 37-42. None of these documents were responsive.

The *Gronquist* order is not responsive to Mr. Greenhalgh’s PRA request because the basis of the *Gronquist* suit was that the Department’s charge, in 1999, of \$.35 per page for photocopies of public records was unreasonable in light of its inconsistency with the \$.20 per page cost as published in WAC 137-08-110. The order stated that the Department could not charge inmates more than the \$.20 per page as published in WAC 137-08-110 ““until WAC 137-08-110(2) is amended.”” *Id.* The Department could have amended WAC 137-08-110 at any time to charge an amount other than \$.20 per page, so long as the amount it charges is consistent with the published cost required in WAC 137-08-110. In no way does the *Gronquist* order absolve the Department of its requirement under RCW 42.56.120 to provide a statement of the factors and manner used to determine the actual per page cost if it charges more than the PRA maximum of \$.15 per page. Providing a copy of the administrative rule is also non-responsive. It does not state how the fee of twenty cents per page was determined, only that it was the set fee. Thus, the Department failed to comply with the PRA on two levels. It failed to provide Mr. Greenhalgh with the requested records as to

how it determined its \$.20 per page cost for copies of public records, despite Mr. Greenhalgh's repeated attempts to clarify his already straightforward request and it failed to make available the statutorily required statement of the factors and manner used to determine its actual per page cost, as the Department was charging more than the \$.15 per page PRA maximum. Only in response to formal discovery requests, after Mr. Greenhalgh was compelled to file suit, did the Department provide Mr. Greenhalgh with its existing per page cost calculations and formulas. CP 49-56. Therefore, Department is liable to Mr. Greenhalgh for wrongly withholding the public records he requested on February 23, 2007.

b) The Department Is Liable for Withholding Records for 618 Days.

The Department received Mr. Greenhalgh's February 23, 2007, PRA request on February 27, 2007. The responsive documents cited above were provided November 12, 2008, in response to formal discovery requests made after Mr. Greenhalgh was compelled to file suit. There are 618 calendar days between March 5, 2007, the date the response was due, and November 12, 2008. Therefore, there are 618 penalty days for which the Department is liable to Mr. Greenhalgh for improperly withholding public records.

- c) As The Prevailing Party, Mr. Greenhalgh Is Entitled to the Maximum Statutory Penalties Due to the Bad Faith of the Department.

Under the PRA, the statutory language provides that the wronged requester is entitled to penalties. RCW 42.56.550(4) states that “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.” Because Mr. Greenhalgh is the prevailing party, he is entitled to have this Court determine the amount of penalties the Department must pay.

Our Supreme Court has stated that the PRA penalty is designed to “discourage improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute.” *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 459-460, 229 P.3d 735 (2010) (alteration in original) (quoting *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 429-30, 98 P.3d 463 (2004)). To assist trial courts in assessing these penalties, the Supreme Court has laid out a framework of calculating the penalty based upon mitigating and aggravating factors. These factors are used in calculating agency culpability for its failure. In this new framework, the trial court must consider mitigating and aggravating factors. The suggested mitigating facts are:

(1) a lack of clarity in the PRA request, (2) the agency's prompt response or legitimate follow-up inquiry for clarification, (3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions, (4) proper training and supervision of the agency's personnel, (5) the reasonableness of any explanation for noncompliance by the agency, (6) the helpfulness of the agency to the requestor, and (7) the existence of agency systems to track and retrieve public records.

The suggested aggravating factors are:

(1) a delayed response by the agency, especially in circumstances making time of the essence, (2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions, (3) lack of proper training and supervision of the agency's personnel, (4) unreasonableness of any explanation for noncompliance by the agency, (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency, (6) agency dishonesty, (7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency, (8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency, and (9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.

Id. at 467-468. The Supreme Court in *PAWS* also emphasized that “[a]gencies have a duty to provide ‘the fullest assistance to inquirers and the most timely possible action on requests for information.’” *PAWS*, 125 Wn.2d at 252 (quoting RCW 42.17.290 (now RCW 42.56.100)).

Here, the Department did not act in good faith. The Department did not offer any reasonable explanation for its noncompliance, nor was it at all helpful to Mr. Greenhalgh in trying to fulfill his request, even though he let

the Department know several times that documents had to exist which would satisfy his request. Mr. Greenhalgh's request was clear from the outset, it was reiterated on more than one occasion, and the requested documents existed and were easily identifiable. There is no excuse for the Department's refusal to comply.

The documents had to exist, because RCW 42.56.520 requires that when an agency charges more than \$.15 a page, it must provide a justification for that charge. For supervisory agency personnel, this is Public Records Act 101. It is beyond belief that the agency person who was so clearly involved in these calculations back in 1996, Kay Wilson-Kirby, denied the very existence of these records in responding to Mr. Greenhalgh's appeals. Given this evidence, this Court can conclude only that the evidence supports a finding of wanton bad faith and intentional noncompliance. This Court must also conclude that cost issues are of tremendous importance to the public. Often, the requesters are prisoners or their families. The Department charges five cents a page more than any other agency contacted to those whose financial resources are less than many citizens. Furthermore, if the prisoner pays for it out of funds being maintained at the prison, and those funds have already had statutory deductions taken out of the original amount, so the actual cost to the prisoner per page is substantially more. RCW 72.09.110. Finally, if the Department fails to justify its deviation from the statutory

maximum of \$.15 a page, then the Department has wrongfully received excess fees from those who can least afford it.⁴

Moreover, the Department's lack of compliance was especially egregious because it failed to comply with multiple statutory requirements. The Department is *required* under the PRA to "establish, maintain, and make available for public inspection and copying a statement of the actual per page cost or other costs, if any, ... and a statement of the factors and manner used to determine the actual per page cost..." RCW 42.56.070(7). As shown by the documents finally provided via formal discovery, the Department was well aware of the PRA requirement to provide a statement of the factors and manner used to determine the actual cost per page, yet it steadfastly refused to do so until Mr. Greenhalgh retained counsel and filed a lawsuit.

The Department is not above the law, any more than any other state agency. As shown, there is one aggravating factor after another. Not only that, but Mr. Greenhalgh has also shown a pattern of continued disregard for reasonable requests by incarcerated persons. Our Supreme Court has stated that "[t]he penalty must be an adequate incentive to induce future compliance." *Yousoufian v. Office of Ron Sims*, 168 Wn.2d at 463. A higher

⁴It is confusing to Mr. Greenhalgh that the Department has calculated that it cannot charge twenty cents a page for PRA responses and yet continues to do so. CP 55-59.

penalty amount is necessary to deter an agency the size of the Department from continuously withholding statutorily required documents, and for continuously failing to comply with the PRA. In light of the above, Mr. Greenhalgh asks for the maximum penalty of \$100.00 a day, for a total penalty of \$61,800.00.

6. MR. GREENHALGH IS ENTITLED TO ATTORNEY FEES AND COSTS IF HE PREVAILS ON THIS APPEAL.

- a) The Prevailing Party Against A Governmental Entity Is Entitled To Reasonable Attorney Fees And Costs In Accordance With RAP 18.1 And The PRA.

RAP 18.1 permits attorney fees and costs on appeal if the applicable law grants this right for an appeal. Under the PRA, an individual who prevails against the agency is entitled to all costs, including reasonable attorney fees. RCW 42.56.550(4). This Court has determined the PRA authorizes attorney fees and costs on appeal. *Progressive Animal Welfare Soc'y v. Univ. of Washington*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990). If this Court overturns the trial ruling, Mr. Greenhalgh asks that attorney fees and cost be granted.

- b) Courts May Also Consider Equitable Considerations When Considering Granting Attorneys Fees And Costs On Appeal.

Our courts have also granted costs and attorney fees in PRA suits based on equitable considerations. *See Confederated Tribes v. Johnson*, 135 Wn.2d 734, 958 P.2d 260 (1998). As the Supreme Court has said, “[t]he

applicable equitable rule is that attorney fees may be awarded to a party who prevails in dissolving a wrongfully issued injunction or, as here, temporary restraining order.” *Id.* at 758 (citing *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 143, 937 P.2d 154, 943 P.2d 1358 (1997), *cert. denied*, 118 S. Ct. 856 (1998); *Seattle Fire Fighters Union, Local 27 v. Hollister*, 48 Wn. App. 129, 138, 737 P.2d 1302 (1987)).

The rationale for this equitable remedy lies with the issue of damages. Because the trial on the merits had for its sole purpose a determination of whether the injunction should stand or fall, and was the only procedure then available to the party enjoined to bring about dissolution of the temporary injunction, the case comes within the rule that a reasonable attorney’s fee reasonably incurred in procuring the dissolution of an injunction wrongfully issued represents damages.

Cecil v. Dominy, 69 Wn.2d 289, 418 P.2d 233 (1996). This award can include costs and fees at appeal. *Seattle Fire Fighters*, 48 Wn. App. at 138. Mr. Greenhalgh has had to argue that the granting of the Department’s Motion to Dismiss was wrong thus if he prevails, he is entitled to equitable attorney fees and costs.

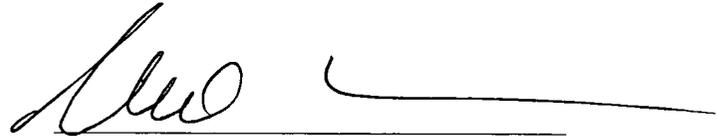
D. CONCLUSION

For the reasons stated above, Mr. Greenhalgh respectfully requests that this Court reverse the trial court’s order of dismissal and order denying summary judgment. Mr. Greenhalgh further requests that this Court to

hold that the Department acted in bad faith and reward Mr. Greenhalgh the maximum amount of penalties along with reasonable attorney fees and costs.

DATED this 15th day of July, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael C. Kahrs", written over a horizontal line.

MICHAEL C. KAHRIS, WSBA #27085
Attorney for Appellant Shawn Greenhalgh

CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on July 15, 2011, in Seattle, County of King, State of Washington, I deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

1. APPELLANT'S OPENING BRIEF

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FILED
COURT OF APPEALS
DIVISION II
11 JUL 18 AM 10:00
STATE OF WASHINGTON
BY _____
DEPT _____

By: 
MICHAEL C. KAHRIS

Date: 7/15/11