

NO. 47062-4-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STEVEN L. CANHA,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal involves two public records requests Canha submitted to the Department of Corrections (DOC or Department). In 2012, Canha requested certain records related to inmate banking. The Department timely mailed the responsive records to the prison address designated by Canha. The documents were restricted by the Department's mailroom and the mailroom provided Canha with notice of the restriction. In 2013, Canha sent the Department a letter requesting copies of the documents that the Department had previously mailed to him in response to his 2012 request and another request not at issue in this lawsuit. Treating this letter as a separate request, the Department again timely mailed the responsive records to Canha. In 2014, Canha filed this lawsuit alleging that the Department's responses to his two public records requests violated the Public Records Act (PRA).

The superior court correctly granted the Department's motion for summary judgment and dismissed Canha's claims. First, Canha's claims related to his 2012 public records request were barred by the PRA's one-year statute of limitations. Canha filed his complaint more than one year after the Department claimed an exemption and produced the documents, and Canha did not show that he was entitled to a discovery rule under the

PRA. Second, the Department complied with the PRA by providing all of the documents responsive to the 2013 request.

II. STATEMENT OF THE CASE

A. Statement of Facts

1. Canha's First Public Records Request PDU-22455

On October 19, 2012, the Department received a public records request from Canha. CP 38, 43. In this request, Canha stated:

I need information on inmate banking, specifically on the mandatory inmate savings where are these funds deposited i.e. what bank what account. I need a copy of the banking agreement between the Department of Corrections and the bank for inmate specific funds. Is there any interest earned on it for 2009 thru 2011.

CP 38, 43.

The Department sent Canha a letter on October 26, 2012, acknowledging his request and informing him that his request had been assigned tracking number PDU-22455. CP 38-39, 45-46. The Department told Canha that it interpreted his request as seeking records showing: 1) which bank and which accounts inmate savings funds are deposited; 2) the banking agreement between the Department and the bank identified in part 1 of Canha's request; and 3) the amount of interest inmate savings accounts earned from January 1, 2009 through December 31, 2011. CP 45-

46. The Department indicated that records were being gathered and further response would be provided on or before January 4, 2013. CP 45-46.

On January 4, 2013, the Department notified Canha that two pages of responsive records had been gathered and that these records would be sent to him once payment of \$0.85 was received. CP 38-36, 48-49. On February 12, 2013, after the Department received payment for the records, it sent Canha the two pages of responsive records along with an Agency Denial Form/Exemption Log explaining the redactions made in the records. CP 39, 51-57. Department mailroom staff restricted these documents and issued Canha a mailroom restriction because the mail contained banking information for the Washington State Department of Corrections. CP 110.

On April 12, 2013, the Department received a public records appeal from Canha challenging the handling of this request. CP 39, 59-60. Canha indicated that the documents that were provided did not adequately respond to his request. CP 39, 59-60. On June 3, 2013, the Department responded to Canha's appeal. CP 39, 59-60. In its response to Canha's appeal, the Department found that the documents had been properly redacted and the Department had provided all responsive documents. CP 59-60.

2. Canha's Second Public Records Request PDU-24889

On April 24, 2013, the Department received a letter from Canha. CP 39, 62. In this letter, Canha asked for copies of the documents that had been sent to him in response to two previous public records requests, PDU-22455 and PDU-22386. CP 39, 62. The Department processed this letter as a new public records request. CP 39. The Department assigned this request tracking number PDU-24889 and informed Canha on May 1, 2013, that 11 pages had been gathered and that they would be sent upon payment. CP 40, 64-65. These records were the responsive records that had been previously gathered and produced in PDU-22455 and PDU-22386. CP 40. The Department received payment from a third party and provided Canha the responsive documents on July 1, 2013. CP 40-41, 68-87.

3. Procedural History

Canha filed this action on April 15, 2014, challenging the Department's handling of his 2012 request (PDU-22455) and his 2013 request (PDU-24889). CP 4-8. The Department moved for summary judgment arguing that Canha's claims related to his 2012 request were barred by the PRA's one-year statute of limitations. CP 17-18. In response, Canha argued that the court should apply a discovery rule and equitable tolling applied. CP 98-102. Additionally, the Department argued

that it did not violate the PRA in its handling of Canha's 2013 request because it produced all of the responsive documents based on a reasonable interpretation of Canha's request. CP 18. Specifically, the Department argued that it reasonably interpreted Canha's request as seeking all documents previously produced in response to his two previous public records requests and that it produced all of the documents previously produced in response to those requests. CP 18. In response, Canha argues that there were disputed factual issues regarding the meaning of Canha's second request. CP 102-104.

On December 19, 2014, the Court granted the Department's motion for summary judgment and dismissed Canha's claims with prejudice. CP 137-38. Canha appealed.

III. STATEMENT OF THE ISSUES

1. Whether Canha's claims related to his 2012 public records request are barred by the PRA's one-year statute of limitations.
2. Whether the Department complied with the PRA when it produced all of the responsive records based on a reasonable interpretation of Canha's 2013 public records request.

IV. STANDARD OF REVIEW

A trial court's decision to grant summary judgment is reviewed de novo. *Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane*, 172

Wn.2d 702, 715, 261 P.3d 119 (2011). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The non-moving party bears the burden of producing sufficient probative evidence for the factfinder to rule in the party's favor. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Similarly, agency actions under the PRA are reviewed de novo. *Neighborhood Alliance*, 172 Wn.2d at 715. An appellate court can affirm a superior court's decision on any ground supported by the record. *Gronquist v. State*, 177 Wn. App. 389, 396 n.8, 313 P.3d 416 (2013).

V. ARGUMENT

A. The Trial Court Properly Dismissed Canha's Claims Related To His 2012 Request As Barred By The Statute of Limitations

RCW 42.56.550(6) states that a claim under the PRA "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." Under the PRA, records are "produced" when they are "made available for inspection and copying." *Sanders v. State*, 169 Wn.2d 827, 836, 240 P.3d 120 (2010).

1. Canha's Claims Are Barred By the PRA's One-Year Statute Of Limitations

The Department produced the records and claimed a number of exemptions on February 12, 2013, when the Department sent Canha a cost

letter. CP 51-52. In this letter, the Department sent Canha the records along with an agency denial form/exemption log. Although Canha has indicated that the records were screened at the mailroom, the fact that the Department screened the records at the mailroom is a separate issue from the Department's public records response. *See Livingston v. Cedeno*, 164 Wn.2d 46, 57, 186 P.3d 1055 (2008). Canha did not file this lawsuit until over one year later, on April 15, 2014. CP 4-8. Canha does not contest the application of the one-year statute of limitations nor does he appear to dispute that his claims would be barred by the PRA's statute of limitations, absent creation of a discovery rule. Therefore, the Court properly dismissed Canha's claims as barred by the one-year statute of limitations in RCW 42.56.550(6).

2. This Court Should Decline Canha's Invitation To Create A Discovery Rule For Actions Under The PRA

Canha argues that the creation of a discovery rule for the PRA's one-year statute of limitations. The Court need not address the creation of a discovery rule, however, to resolve this case because the evidence demonstrates that Canha knew of a possible cause of action by April 12, 2013, at the latest. Even if the Court considers Canha's argument for the creation of a discovery rule, it should decline to do so because a discovery rule in the PRA context is unnecessary to prevent any grave injustice.

Although Canha argues that the Court should create a discovery rule, the Court should not do so in this case because Canha's claims are untimely even under a discovery rule. It is undisputed that Canha filed an agency appeal challenging the handling of the 2012 request, and that Canha argued that the Department's handling of his request was inadequate. CP 59-60. The Department received this appeal on April 12, 2013. CP 59. As such, Canha possessed sufficient factual information to know that he potentially had a claim by April 12, 2013. Even though Canha argues that the mailroom restricted the records thereby preventing him from knowing the nature of the response, Canha received notice of the restriction on February 20, 2013, CP 110, and had sufficient information to file an agency appeal by April 12, 2013. This indicates the he did have sufficient information to know of a possible cause of action by that date. Therefore, even if the Court created a discovery rule, Canha's claims would be barred by the PRA's one-year statute of limitations because he did not initiate this action until April 15, 2014.

Even if the Court addresses Canha's arguments about a discovery rule, it should decline to create such a rule in the PRA context. Statutes of limitations are intended to promote finality. *Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 382, 166 P.3d 662 (2007); *see also Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt P.C.*, 109 Wn. App. 655,

662, 37 P.3d 309 (2001). The obvious purpose of such statutes is to set a definite limitation on the time available to bring an action, without consideration of the merit of the underlying action. *Dodson v. Cont'l Can Co.*, 159 Wash. 589, 596, 294 P. 265 (1930); *see also Atchison*, 161 Wn.2d at 382. Statutes of limitations exist “to shield defendants and the judicial system from stale claims;” plaintiffs are not permitted to “sleep on their rights” because of the risk that “evidence may be lost and witnesses’ memories may fade.” *Crisman v. Crisman*, 85 Wn. App. 15, 19, 931 P.2d 163 (1997). “[C]ourts will not, as a general rule, read into statutes of limitation an exception which has not been embodied therein, however reasonable such an exception may seem, even though the exception would be an equitable one.” *O’Neil v. Estate of Murtha*, 89 Wn. App. 67, 74, 947 P.2d 1252 (1997). The Court should not read a discovery rule into the PRA’s one-year statute of limitation because there is no statutory language to support such a rule.

The discovery rule does not apply in every case. *O’Neil*, 89 Wn. App. at 74. For a few causes of action the legislature has directed that the applicable statutes of limitations are subject to a discovery rule, under which a cause of action accrues when the plaintiff knew or should have known enough facts existed to support a right to sue. *See e.g., McLeod v. NW. Alloys, Inc.*, 90 Wn. App. 30, 35, 969 P.2d 1066 (1998) (discussing

the Uniform Trade Secrets Act); RCW 4.16.350(3) (medical negligence); and RCW 4.16.080(6) (misappropriation of funds). In those cases in which courts have applied a discovery rule to particular causes of actions, courts have often found support for the discovery rule in the statutory language of those provisions. *See e.g., McLeod*, 90 Wn. App. at 35-36; *Ruth v. Dight*, 75 Wn.2d 660, 666-68, 453 P.2d 631, *superseded by statute*, RCW 4.16.350 (1969).

The legislature knows how to write a discovery rule into a statute of limitations. If it intended for a discovery rule to apply under the PRA, the legislature could have done so in 2005 when it amended the statute of limitations to one year, or in 2011, when it made various legislative changes to the PRA. But the legislature chose not to. Rather, the legislature provided a precise trigger in RCW 42.56.550(6). As such, applying the discovery rule to the PRA would conflict with the explicit statutory language.

Canha argues that a discovery rule is appropriate when a party must rely on an industry's self-reporting. Canha's Brief, at 8-9 (*citing U.S. Oil v. Dep't of Ecology*, 96 Wn.2d 85, 633 P.2d 1329 (1981)). Unlike the pollution regulations at issue in *U.S. Oil*, the PRA does not depend on self-reporting. PRA requests are initiated by persons seeking records, not by agencies holding records, and the PRA provides multiple tools for a

person requesting records to force agency responses. For example, unlike the Department of Ecology in *U.S. Oil*, a requester is not precluded from bringing a suit until such time as he or she receives a response from the agency—a requester can bring suit to compel a response, which places all burdens of proof on the agency. RCW 42.56.550. *U.S. Oil* is distinguishable as a result.

Furthermore, the application of a discovery rule is unnecessary to prevent any grave injustice. In evaluating the need for a discovery rule, courts have balanced the possibility of stale claims against the unfairness of precluding justified causes of actions. *See e.g., 1000 Va. Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 575, 146 P.3d 423 (2006). When the court balances these factors, the court should conclude that a discovery rule is unnecessary in the PRA context. Unlike cases in which courts have adopted a discovery rule, the requester in a PRA action knows the necessary facts required to determine whether the PRA may have been violated. The requester knows of the nature of the request as well as the full response by the agency. The requester also knows exactly when the statute of limitations on any PRA claim will run. For instance in this case, Canha knew that any action challenging the Department's response would need to be filed by February 12, 2014, because that was the date that the Department sent him the responsive documents with an exemption log.

Such information is sufficient to allow a requester to challenge an agency's response to his PRA request.

Finally, the statute of limitation in the PRA context ensures that actions are filed in a timely manner to serve the goal of prompt public disclosure without resulting in disproportionate individual financial gain at the expense of other citizen taxpayers. The goal of the PRA, after all, is to provide access to records, not penalties. The PRA's statute of limitations does not preclude requestors from obtaining what they ultimately seek—disclosure of records. It simply prevents a requestor from obtaining daily penalties and attorney fees for noncompliance. A requestor can always make a new request for records he believes or learns were not included in the response to his original request, and thereby initiate a new statute of limitations period as well.

It is reasonable for the legislature to have established definite time limits on the ability to seek penalties and costs, both of which are borne ultimately by tax payers. Since penalties accumulate over time under the PRA, requiring requestors to file a claim for penalties and costs within one year of production simply prevents a requestor from holding back and seeking higher penalties as well as provides finality and certainty for agencies and the taxpayers regarding liability for potential penalties and costs. Because the language in the PRA does not include a discovery rule

and a discovery rule is not warranted, this Court should decline Canha's invitation to create one.

The trial court correctly concluded that Canha's claims related to 2012 public records request were barred by the one-year statute of limitations, and the Court should affirm the trial court's dismissal of those claims.

B. The Trial Court Correctly Concluded That The Department Complied With the PRA When It Sent Canha Copies Of Responsive Documents That Had Been Previously Produced To Canha In Response To His Second Public Records Request

The PRA requires agencies to respond to requests for identifiable public records. RCW 42.56.080; *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004). When making a request, "[a]t a minimum, a person seeking documents under the PRA must identify or describe documents with sufficient clarity to allow agencies to locate them." *Levy v. Snohomish Cnty.*, 167 Wn. App. 94, 98-99, 272 P.3d 874 (2012) (citing *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004)); *Beal v. City of Seattle*, 150 Wn. App. 865, 872, 209 P.3d 872 (2009). As a result, agencies are only obligated to search for responsive records that they reasonably understand are being requested. *See Levy*, 167 Wn. App., at 98-99. "The PRA does not 'require public agencies to be mind

readers.” *Id.* (citing *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998)).

The Department provided all records responsive based on a reasonable interpretation of Canha’s request. Here, Canha sent a letter to the Department requesting copies of the documents that had already been sent to him in response to two previous public records requests. CP 62. Specifically, Canha said “I am not seeking multiple copies of the requests. I am seeking to receive the ones that have already been sent due to me not receiving them. They were confiscated by the DOC. So I wish to pay for them again and have them sent to another address please.” CP 62. The Department interpreted this request as a distinct public records request seeking copies of the responsive documents that were previously sent to Canha in response to those previous requests. CP 39. As such, the Department immediately gathered the eleven pages of documents that had been previously sent as part of those requests and made them available to Canha in its initial five day letter. CP 40. The Department’s interpretation of this request was reasonable.

Canha argues that the superior court erred in granting summary judgment because his 2013 request was ambiguous. Canha Brief, at 12. But this ambiguity does not create a genuine issue of fact as Canha argues. Rather it demonstrates that the Department’s interpretation was plausible

and reasonable. Therefore, the Department made all of the responsive records available to Canha based on a reasonable interpretation of his request.

Canha also argues that there is a material issue of fact with respect to how the Department actually interpreted the request. Canha Brief, at 13-15. Conspicuously absent from the record is any declaration from Canha about the actual intent behind his request or what records he was actually seeking. Instead of providing evidence showing what his request meant, Canha argues that the Department did not actually interpret his request to be seeking the responsive documents that it sent him based on two arguments.

First, Canha points to the fact that the Department changed the Bates numbers of the documents to the tracking number of the second request, that it did not provide the cover letters or exemption logs from the previous requests as part of its response to the second request, and that the Department provided a new exemption log. This argument is based on a misunderstanding of the nature of the Department's interpretation of the request. The Department reasonably interpreted Canha's request as a request for the responsive records that had been previously produced in the two previous requests. CP 39. The previous exemption logs and cover letters were not responsive records produced in those requests but were

documents created as part of the Department's processing of Canha's previous public records requests. As such, they were not responsive to Canha's request for the previously produced responsive documents.

Additionally, the fact that the Department provided an exemption log is irrelevant. The Department provided the exemption log because information had been redacted from the records. The Department was attempting to comply with its PRA obligations by notifying Canha why certain documents were redacted and the basis for the redactions. Furthermore, this argument conflicts with Canha's complaint that the Department violated the PRA by not providing him a copy of the previous exemption log. Therefore, the Department's decision to provide a new exemption log and its failure to provide cover letters and previous exemption logs do not create a genuine issue of whether the Department produced records based on a reasonable interpretation of Canha's request.

Second, Canha alleges that the Department investigated whether there were additional responsive records. However, the fact that the Department double-checked whether previous information that it had received during Canha's request was accurate does not create a genuine issue of material fact. When the Department received the request, it immediately made records available to Canha on May 1, 2013, based on its interpretation of his request i.e. a request for the responsive documents

that were previously sent. Canha primarily relies upon an email dated July 1, 2013, to argue that the Department did an additional investigation into whether there were responsive records. Canha's Brief, at 15.¹ This email does not conflict with the clear testimony of the public disclosure specialist about her interpretation of Canha's request. Instead, it demonstrates that the specialist, out of an abundance of caution, was double-checking information that she had previously been provided. CP 72-73. This email was dated on the day that the specialist sent the records to Canha, and it simply sought to confirm some information about inmate bank accounts. *Id.* As such, this email is insufficient to create a genuine issue of material fact about whether the Department reasonably interpreted Canha's request to be seeking responsive documents previously sent to Canha.

Ultimately, the declaration of the specialist who handled the request explicitly states that she interpreted the request to be seeking all of the responsive documents that had been previously produced in response to the two previous requests. Plaintiff concedes that his request was ambiguous. The Department appropriately provided responsive records based on a reasonable interpretation of the request. Therefore, the trial

¹ Canha also cites an email dated June 11, 2013. Canha's Brief, at 15. However, this email clearly dealt with Canha's appeal of Canha's first request. As such, it does not provide any evidence on the Department's interpretation of Canha's second request.

court properly found that Canha had failed to raise a triable issue for a PRA violation with respect to Canha's 2013 request and properly dismissed his claims.

C. Costs And Attorney's Fees Should Not Be Awarded Because Canha Is Not The Prevailing Party

The PRA provides for costs and attorney's fees to the prevailing party. RCW 42.56.550(4); *Sanders v. State*, 169 Wn.2d 827, 865, 240 P.3d 120 (2010). Attorney's fees are only awarded when the party secures the disclosure of additional documents. *See Concerned Ratepayers Ass'n v. Public Utility Dist. No. 1 of Clark Cnty.*, 138 Wn.2d 950, 964, 983 P.2d 635 (1999). When a requester has not secured the disclosure of additional records on appeal, courts are required to remand the issue of attorney's fees to the trial court because the determination of which party is the prevailing party has not been made. *Id.*

First, Canha is not entitled to attorney's fees and costs because the trial court's decision should be affirmed. As such, Canha is not the prevailing party for purposes of appeal or this case. Even in Canha prevails on the reversal of one or all of his claims, Canha is not the prevailing party at this time. A reversal in this circumstance will result in further proceedings below to determine whether the Department violated the PRA. It is premature to determine who the prevailing party in this case

is until such a determination is made. If Canha succeeds on issues on appeal and submits a cost bill under RAP 18.1, the Department will respond to such appellate costs at that time. Therefore, in the event that the Court reverses any portion of the trial court's decision, it should remand the issue of attorney's fees to the trial court for it to determine the issue after the case is resolved and to determine the prevailing party.

VI. CONCLUSION

Canha's claims related to his 2012 public records request are barred by the PRA's one-year statute of limitations, and this Court should decline Canha's invitation to create a discovery rule. Additionally, the Department complied with the PRA when it produced all documents responsive to Canha's 2013 request. As such, the superior court correctly granted the Department's motion for summary judgment, and its decision should be affirmed.

RESPECTFULLY SUBMITTED this 8th day of May, 2015.

ROBERT W. FERGUSON
Attorney General

s/ Timothy J. Feulner
TIMOTHY J. FEULNER, WSBA #45396
Assistant Attorney General

CERTIFICATE OF SERVICE

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 8th day of May, 2015, at Olympia, WA.

s/ Cherrie Melby
CHERRIE MELBY
Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

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