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WASHINGTON COURT OF APPEALS  
DIVISION II

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CHARLES WOLFE,

*Appellant / Cross-Respondent,*

v.

WASHINGTON DEPARTMENT OF TRANSPORTATION,

*Respondent / Cross-Appellant.*

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REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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## **I. INTRODUCTION**

WSDOT has failed to carry its burden to prove that it actually produced numerous boxes of records back in 2008. WSDOT continues to tout its PRA procedures and record-keeping, and WSDOT cites such practices as a basis for reversing the trial court's award of penalties. But WSDOT has not explained why it ignored its own contemporaneous documentation in attempting to prove which records were actually provided to Wolfe. On appeal, WSDOT falsely asserts that the PRA officer who created WSDOT's internal records had left WSDOT before this case was filed, allegedly prejudicing WSDOT's ability to defend this case. In fact, the record shows that WSDOT's PRA officer was still working for WSDOT long after this case was filed.

On the issue of equitable tolling WSDOT ignores the undisputed fact that WSDOT relied on its own failure to locate the 1998 HPA records to pursue a defense in a related lawsuit, and continued to do so even after those records were finally discovered. WSDOT also erroneously argues that the statute of limitations was not tolled because Wolfe had notice of his PRA claims in 2008 and/or because Wolfe failed to exercise reasonable diligence.

## II. REPLY STATEMENT OF THE CASE

**A. The trial court decided the merits after a show cause hearing, not on motions for summary judgment.**

WSDOT erroneously asserts that the trial court decided the merits on motions for summary judgment. WSDOT Br. at 15-16 n.1. In fact, both parties' motions for summary judgment were denied. CP 1686-87. Judge Tabor decided the merits at a show cause hearing on May 1, 2015. CP 1693-96, 3228. This Court reviews the trial court's decision *de novo*., placing the burden of proof on WSDOT. *See* section III (below).

**B. WSDOT's PRA officer, Cynthia Whaley, was still employed by WSDOT long after this case was filed.**

Wolfe has explained that (i) WSDOT's own contemporaneous documentation contradicts WSDOT's assertion that all records were provided in 2008, and (ii) WSDOT never offered a declaration from its PRA officer, Cynthia Whaley, to explain the discrepancy between Tak's memory-based declaration and WSDOT's own documentation. In response, WSDOT attempts to blame Wolfe for its own failure to carry its burden of proof, erroneously asserting that WSDOT's PRA officer, Cynthia Whaley, was no longer employed by WSDOT when Wolfe filed this case. *WSDOT Br.* at 13, 24.

**Cynthia Whaley was still WSDOT's PRA coordinator long after Wolfe filed this case.** Whaley emailed the WSDOT spreadsheet to

Gernhart and Tak in November 2012 (CP 1777), more than six months after Wolfe filed this case (CP 7-10), and two weeks after Wolfe filed his *Amended Complaint* (CP 185). Whaley's email dated November 29, 2012 clearly states that she is still WSDOT's PRA coordinator, and that she is still working on Wolfe's PRA requests. CP 1777.

The record does not indicate exactly when Whaley left WSDOT. But the declaration from her replacement, Ashley Holmberg, implies that Whaley was still employed by WSDOT **until October 2013**, long after the trial court heard and denied the parties' motions for summary judgment. CP 1686-87, 1854. Furthermore, nothing in the record supports WSDOT's assertion that Whaley was unavailable to WSDOT as a witness even after she left WSDOT.

In sum, there is no basis in the record for WSDOT's assertion that Whaley was unavailable to WSDOT or that Wolfe's filing of this action in May 2012 somehow prejudiced WSDOT's ability to carry its burden of proof. The record shows only that WSDOT ignored its own contemporaneous documentation and failed to produce a declaration from its PRA officer.

**C. WSDOT's own documentation shows that WSDOT failed to produce entire boxes of responsive records in July and August of 2008.**

Wolfe has explained that five of WSDOT's declarants—Bellinger, Holmberg, Frinell, Ewaniec and Gernhart—claimed no personal knowledge of what records were actually provided to Wolfe in 2008. *Wolfe Br.* at 21 n.5. WSDOT does not argue otherwise. But WSDOT continues to cite these declarations to create the illusion that WSDOT's case is supported by something other than the declaration of Denys Tak. *See WSDOT Br.* at 6-12.

WSDOT entirely relies on the declaration of Denys Tak to prove that all responsive records were provided in 2008. CP 1516-1521. In his opening brief Wolfe questioned how Tak could have remembered the specific files and boxes, including specific 15-digit box numbers from years earlier. *Wolfe Br.* at 11, 15, 22. Apart from erroneously asserting that Wolfe prejudiced WSDOT by filing this case in 2012, WSDOT has no response. *WSDOT Br.* at 24. WSDOT clearly used Whaley's documentation to generate the Tak declaration. But because that documentation did not support WSDOT's claims, WSDOT did not offer either the actual documentation or a declaration from Whaley to explain that documentation.

Nor did WSDOT attempt to have Tak explain either WSDOT's documentation or his own remarkable memory. Wolfe submitted the WSDOT spreadsheet with his motion for partial summary judgment. CP 300. The Tak declaration, filed two weeks later, simply ignored the WSDOT spreadsheet. CP 1516-1521. After Wolfe submitted the WSDOT spreadsheet as evidence for the show cause hearing WSDOT submitted the same 2013 Tak declaration again. CP 1940-45.

### **1. The WSDOT Spreadsheet**

For the first time on appeal WSDOT attempts to explain the WSDOT spreadsheet, and to argue that Wolfe's interpretation of the spreadsheet is wrong. *WSDOT Br.* at 12-14. WSDOT argues that, because all eight files in box ER520 relate to the SR 4 bridge, all of those files must have been sent to Kelso in 2008, even though the WSDOT spreadsheet indicates that only one file was sent. *WSDOT Br.* at 13-14. WSDOT also argues that, because boxes A3123 and A3124 contained both SR 4 records and other records, WSDOT must have sent eleven files and eight files respectively to Kelso in 2008, even though the WSDOT spreadsheet indicates that only one file from each box was sent. *WSDOT Br.* at 14. WSDOT concedes that, with respect to boxes MM116 and 80919, the spreadsheet correctly indicates that only one file from each box was sent to Kelso in 2008. *Id.*

WSDOT's belated explanation for its own spreadsheet is not consistent with the spreadsheet itself. If all of box ER 520 was sent to Kelso, why didn't the spreadsheet state "whole box" like all the other whole boxes of records listed in the spreadsheet. If WSDOT actually sent a large number of files from boxes A3123 and A3124, why did the spreadsheet indicate only one file just like the single files from boxes MM116 and 80919?

More importantly, WSDOT's newly-proffered explanation for its own spreadsheet is not evidence that can carry WSDOT's burden of proof under RCW 42.56.550 because it is not supported by a declaration. WSDOT could have and should have submitted a declaration from Whaley or Tak (or both) in the trial court to explain the spreadsheet and how that document allegedly supports WSDOT's argument. But WSDOT failed to offer such declarations, and the record does *not* support WSDOT's assertion that these witnesses were unavailable to WSDOT.

## **2. The October 30-31, 2008 email**

WSDOT has also failed to explain the email thread dated October 30-31, 2008, which WSDOT added to the record but never explained. CP 1865-66; *Wolfe Br.*, App. B. WSDOT cited this email in support of its argument that Wolfe had declined a second opportunity to review all responsive records in Kelso in October 2008. CP 1922. But the email

actually shows that WSDOT made only a “few items” available, which Wolfe had already seen, and that WSDOT did not provide whole boxes of SR 4 documents in 2008. CP 1865-66; *Wolfe Br.*, App. B.

WSDOT’s brief contains no discussion of the October 30-31, 2008 email (CP 1865-66). Instead, WSDOT cites “CP at 1855” for the proposition that Wolfe declined an additional opportunity to review the records. *WSDOT Br.* at 11. CP 1855 is the second page of the Holmberg declaration, in which Holmberg authenticated various WSDOT records, including the email dated October 30-31, 2008. In other words, WSDOT has simply repeated its erroneous argument from the trial court that this email shows that Wolfe declined to review responsive records. The email itself confirms that WSDOT’s argument is incorrect.

### **III. STANDARD OF REVIEW**

The trial court (Judge Tabor) decided the merits after a show cause hearing, and *not* on motions for summary judgment as WSDOT asserts. CP 1686-87, 1693-96, 3228. The trial court’s denial of summary judgment in March 2013 (CP 1686-87) was *not* an appealable order, and that ruling is *not* before this Court for review. The standard of review for motions for summary judgment is *not* applicable to this appeal.

As stated in Wolfe’s brief, WSDOT has the burden of proof under RCW 42.56.550(1). *Wolfe Br.* at 2, 23-25. WSDOT can only carry its

burden of proof with admissible evidence. *See Francis v. Dep't of Corrections*, 178 Wn. App. 42, 62, 313 P.3d 457 (2013). Because the trial court's ruling was based on declarations and documents this Court's review is *de novo*. *Progressive Animal Welfare Soc'y v. University of Washington (PAWS II)*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994).

#### IV. REPLY ARGUMENT

**A. WSDOT failed to prove that it provided entire boxes of responsive records in 2008.**

WSDOT argues that it produced “all known responsive records,” and that it did not “silently withhold” the 1998 HPA (“rip-rap”) project records. *WSDOT Br.* at 17-19. It is undisputed that WSDOT failed to produce the 1998 HPA (“rip-rap”) records until December 2011, *WSDOT Br.* at 2, less than a year before Wolfe sued. WSDOT's assertion that it did not “silently withhold” these records is irrelevant in light of *Belenski v. Jefferson County*, 186 Wn.2d 452, 378 P.3d 176 (2016). After *Belenski*, the dispositive issue is whether equitable tolling applies. *See* section V(B) (below).

WSDOT erroneously asserts that the 2015 inventory of records conducted by David Bellinger “proves” that all responsive records were provided to Wolfe in 2008. *WSDOT Br.* at 19. In fact, the Bellinger was

only tasked with reviewing the boxes in 2015. CP 1813. Bellinger had no personal knowledge of which boxes, if any, were provided in 2008.

WSDOT entirely relies on the declaration of Denys Tak to prove that all responsive records were provided in 2008. CP 1516-1521. But WSDOT has not explained how Tak could have remembered the specific files and boxes, including specific 15-digit box numbers from years earlier. *See Wolfe Br.* at 11, 15, 22. WSDOT clearly used Whaley's documentation to generate the Tak declaration. But because that documentation did not support WSDOT's claims, WSDOT did not offer either the actual documentation or a declaration from Cynthia Whaley to explain that documentation.

WSDOT continues to argue that Wolfe "declined" the opportunity to review responsive records. *WSDOT Br.* at 11. But WSDOT has ignored the October 30-31 email which disproves WSDOT's factual theory. CP 1865-66; *Wolfe Br.*, App. B; *see* section II(C) (above).

WSDOT's brief attempts to explain the discrepancy between the WSDOT's own spreadsheet and the Tak declaration. *WSDOT Br.* at 13-14; *see* section II(C) (above). But WSDOT's newly-proffered explanation of its own records could have and should have been provided in a declaration from WSDOT's PRA officer, Cynthia Whaley. There is no factual basis for WSDOT's claim that Whaley was not available to help

WSDOT explain its own documentation. Whaley was still WSDOT's PRA officer at least six months after this case was filed, CP 1777, and likely much longer than that.

Because no WSDOT witness has testified that WSDOT's interpretation of the spreadsheet is correct, WSDOT cannot carry its burden of proof with the explanation offered on pages 13-14 of WSDOT's brief. That explanation is simply inadmissible speculation.

WSDOT has also failed to respond to Wolfe's point that WSDOT should not have been relying on memory to determine what records had been provided. *Wolfe Br.* at 23-24. A large agency like WSDOT must rely on systematic record-keeping, *not memory*, to keep track of what records have been provided to a requestor. *See* WAC 44-14-04004(6). The fact that WSDOT's PRA officer (Whaley) attempted to keep a record of what was provided to Wolfe shows that WSDOT understands the importance of record-keeping. Indeed, WSDOT touts its record-keeping system in its cross-appeal of the trial court's award of penalties. *WSDOT Br.* at 41. But WSDOT chose to ignore its own internal records when it realized that those records did not support its position.

This Court reviews the trial court record *de novo*, placing the burden of proof on WSDOT. RCW 42.56.550(1); *PAWS II*, 125 Wn.2d at 252. In the absence of any explanation of how Tak could have

remembered all the detailed information in his declaration (CP 1516-1521), that declaration is simply not credible. WSDOT's reliance on such a declaration is inconsistent with WSDOT's alleged formal record keeping system. Furthermore, the Tak declaration is inconsistent with the WSDOT spreadsheet, the October 30-31, 2008, and Wolfe's dogged pursuit of the SR 4 Bridge records until they were finally produced in February 2013. CP 1751, 2649. In contrast, Wolfe has consistently testified that whole boxes of records were not provided to him until after this case was filed in May 2012. CP 1755. This Court should reject the self-serving Tak declaration and hold that WSDOT has failed to carry its burden to prove that it provided all responsive SR 4 bridge records in 2008.

**B. The statute of limitations was equitably tolled under *Belenski v. Jefferson County*, 186 Wn.2d 452, 378 P.3d 176 (2016).**

It is undisputed that RCW 42.56.550(6) requires a PRA requestor to bring a lawsuit within one year of an agency's final response, unless equitable tolling applies. *Wolfe Br.* at 26; *WSDOT Br.* at 19-20, 22-23; *Belenski v. Jefferson County*, 186 Wn.2d 452, 378 P.3d 176 (2016).

The trial court held that the statute of limitations barred Wolfe's claims for some records but not others, and the trial court's reasoning is unclear. CP 3267-3271. Wolfe has appealed the trial court's ruling that the statute of limitations barred Wolfe's claims for the boxes of records

that Wolfe asserts were not provided until 2012. CP 3230. Wolfe argues that equitable estoppel applies because WSDOT had an incentive to withhold the 1998 HPA records, WSDOT relied on its own failure to produce those records to argue that Wolfe's damages claims were barred by a 10-year statute of limitations, and WSDOT continued to wrongfully deny that it had worked on the SR 4 bridge in 1998 even after the truth was discovered. *Wolfe Br.* at 28-29. WSDOT has cross-appealed the trial court's refusal to apply the statute of limitations to the 1998 HPA ("rip-rap") records. *WSDOT Br.* at 4.

WSDOT responds to Wolfe's appeal on the statute of limitations on pages 19-25 of its brief, and argues its cross-appeal on the 1998 HPA records on pages 27-31. But the arguments of both parties are essentially the same for both sets of records and both appeals. WSDOT argues (i) that Tak and Gernhart did not know that the 1998 HPA records existed, *WSDOT Br.* at 25, 30, (ii) that Wolfe should have filed his PRA action in 2008, *WSDOT Br.* at 23, 29-30, and (iii) that Wolfe prejudiced WSDOT's ability to respond by filing his PRA action in 2012, *WSDOT Br.* at 24.

**1. The "discovery rule" cases cited by WSDOT are irrelevant.**

WSDOT asserts that the trial court "apparently applied the discovery rule" in ruling that the statute of limitations did not apply to the

1998 HPA (“rip-rap”) records, and argues that the trial court erred in applying the discovery rule. *WSDOT Br.* at 28. This argument, and the discovery rule cases cited by WSDOT, are irrelevant because Wolfe has *not* asked the Court to affirm the trial court’s decision under the discovery rule.<sup>1</sup> Wolfe has conceded that, after *Belenski*, the issue before the Court is whether equitable tolling applies to prevent WSDOT from asserting the statute of limitations as a defense. *Wolfe Br.* at 27-28.

**2. WSDOT has failed to explain why equitable tolling should not apply where WSDOT relied on its own failure to locate the 1998 HPA records in order to present a statute of limitations defense in a related lawsuit between Wolfe and WSDOT.**

WSDOT has inexplicably failed to respond to Wolfe’s main argument: that WSDOT’s reliance on its own failure to locate the 1998 HPA records equitably tolled the statute of limitations under *Belenski*. *Wolfe Br.* at 1, 8-9, 20, 28-29. WSDOT blandly asserts that Wolfe “failed to show WSDOT acted in bad faith, in a deceptive manner, or gave false assurances,” and that Wolfe has no evidence that WSDOT knew that it had responsive records in 2008. *WSDOT Br.* at 24-25, 30. But WSDOT has not even attempted to explain why WSDOT’s conduct—relying on its

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<sup>1</sup> See *O’Neil v. Estate of Murtha*, 89 Wn. App. 67, 947 P.2d 1252 (1997); *Beard v. King County*, 76 Wn. App. 863, 889 P.2d 501 (1995); *Virgil v. Spokane County*, 42 Wn. App. 796, 714 P.2d 692 (1986); see also, *Sherbeck v. Estate of Lyman*, 15 Wn. App. 886, 552 P.2d 1076 (1976) (interpreting the requirement of discovery in the statute of limitations for fraud claims under RCW 4.16.080(4)).

own failure to locate records to erroneously (and later, falsely) assert that no work had been performed on the SR 4 bridge after 1986—is not sufficient grounds for equitable tolling. WSDOT had the same type of improper incentive to withhold the 1998 HPA records as the incentive identified in *Belenski*:

Belenski and amici raise legitimate concerns that allowing the statute of limitations to run based on an agency's dishonest response could incentivize agencies to intentionally withhold information and then avoid liability due to the expiration of the statute of limitations.

*Belenski*, 186 Wn.2d at 461-62.

WSDOT assumes, without any analysis or authority, that WSDOT's documented conduct is not sufficient evidence of the “bad faith, deception or false assurances” required for equitable tolling. *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). But equitable tolling applies to all sorts of circumstances when justice requires. 135 Wn.2d at 205-206. WSDOT has completely failed to explain how it would be *equitable* to permit WSDOT to assert the PRA statute of limitations during a period in which WSDOT was relying on its own failure to locate records in order to assert a defense in a related case.<sup>2</sup>

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<sup>2</sup> WSDOT purports to extract a seven-factor test for equitable tolling from *Douchette v. Bethel Sch. Dist.*, 117 Wn.2d 805, 811, 818 P.2d 1362 (1991). WSDOT Br. at 20-21. In *Douchette*, the Supreme Court held that equitable tolling did not apply where the plaintiff argued that the defendant had failed to post required notices of employees' rights, but the plaintiff had failed to diligently pursue her claim. 117 Wn.2d at 811-812. The seven factor test, which was derived from federal case law on when equitable tolling applies to

WSDOT has forgone its only opportunity to address whether equitable tolling should apply to WSDOT's actual conduct in this case. WSDOT's brief was its only opportunity to respond to Wolfe's appeal on equitable tolling. With respect to WSDOT's cross-appeal, WSDOT is entitled to a reply brief, but WSDOT cannot make any arguments for the first time in that reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Having ignored Wolfe's primary argument, WSDOT assumes, without any supporting authority, that Wolfe must prove that WSDOT actually knew that it had the 1998 HPA records and/or that Tak or Gernhart were lying about the missing records. *WSDOT Br.* at 24-25, 30. But the alleged ignorance of two WSDOT employees (Tak and Gernhart) does not explain why WSDOT continued to falsely assert that it had not worked on the SR4 bridge since 1986 even after WSDOT realized that this allegation was not true.

Nor does Wolfe's alleged knowledge of WSDOT's PRA violations preclude equitable tolling. Wolfe correctly surmised that there were additional records that WSDOT had not produced, but he could not prove that unless and until the records were actually found and produced by

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administrative claims filed with the Equal Employment Opportunity Commission (EEOC), only applies to claims of equitable tolling based on a failure to give required notice. *Id.*

WSDOT. Equitable tolling precludes the application of a statute of limitations until such time as the plaintiff, in the exercise of due diligence, actually uncovers the truth. In *Millay*, the plaintiff (Millay) was “sure” that the redemption amount stated by the defendant was grossly exaggerated, but could not determine the actual amount due and thus failed to tender payment within the time permitted. 135 Wn.2d at 197-98. The fact that Millay was “sure” that the redemption amount was incorrect did *not* preclude equitable tolling. The Court held that equitable tolling would apply if (i) the redemption amount was grossly exaggerated (or fraudulent), and (ii) Millay was unable to determine the correct sum within the time limit. 135 Wn.2d at 207-08. Similarly, even if Wolfe correctly suspected that WSDOT had violated the PRA in 2008, he could not prove that—or prevail in a PRA case against WSDOT—unless and until WSDOT actually found the missing records in 2012.

**3. Wolfe did *not* prejudice WSDOT’s ability to prove which records were actually produced.**

Assuming, *arguendo*, that prejudice to the defendant is a relevant consideration in the application of equitable tolling, there is no factual basis for WSDOT’s assertion that Wolfe prejudiced WSDOT’s ability to defend itself. WSDOT’s prejudice argument is based on WSDOT’s false assertion that WSDOT’s PRA officer, Cynthia Whaley, had left WSDOT

before Wolfe's case was filed. *WSDOT Br.* at 21, 24. As explained in section II(B), Whaley was still employed by WSDOT long after this case was filed, and nothing in the record suggests that she was actually unavailable to WSDOT even after she left. There was no prejudice to WSDOT.

**4. Wolfe exercised reasonable diligence.**

WSDOT argues that Wolfe failed to exercise reasonable diligence because, according to WSDOT, Wolfe should have sued in September 2008, after WSDOT closed his PRA request. *WSDOT Br.* at 21-22, 23-24, 30. WSDOT argues that, under *Belenski*, Wolfe's letter shows that he had notice that WSDOT had violated the PRA in September 2008, and Wolfe should have sued shortly after that. *WSDOT Br.* at 21-22. Contrary to WSDOT's characterization, that letter does *not* allege that WSDOT has withheld records in violation of the PRA or that Wolfe threatened to sue WSDOT under the PRA. CP 1767-1770.<sup>3</sup> The letter merely asserts that WSDOT has not responded to Wolfe's request for "research" into the causes of erosion, and suggests that Wolfe might sue WSDOT for property damage, not PRA violations. *Id.*

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<sup>3</sup> The September 19, 2008 letter relied on by WSDOT appears in three places in the record. CP 227-230, 1767-1770, 1858-1861. At various places in its brief WSDOT cites all three copies of the same letter. *See* *WSDOT Br.* at 10-11, 23, 30.

More importantly, WSDOT's argument is based on an incorrect understanding of *Belenski*. In the portion of *Belenski* cited by on page 21 of WSDOT's brief (186 Wn.2d at 461) the Court held that the agency's assertion that there were "no responsive records" was sufficient to trigger the one-year statute of limitations. In other words, the fact that the requester had notice that the agency was not going to produce any more records satisfied the requirement in RCW 42.56.550(6) that the agency had made its last production of records. *Id.* Nonetheless, the Court remanded to case to the trial court to determine whether equitable tolling should still apply. 186 Wn.2d at 462. Under *Belenski*, the fact that a requestor might have notice of a PRA claim does *not* preclude the application of equitable tolling. Wolfe's knowledge in 2008 that WSDOT was not going to produce any more records establishes only that the statute of limitations in RCW 42.56.550(6) had been *triggered* and would ordinarily run a year later. But such notice does *not* preclude the application of equitable tolling. *Belenski*, 186 Wn.2d at 462.

WSDOT's diligence argument simply assumes, based on nothing, that Wolfe would have received the missing records if he had sued in 2008. *WSDOT Br.* at 22, 30. WSDOT's argument ignores the fact that when Wolfe first sued WSDOT for PRA violations in Pacific County in 2010, that lawsuit did *not* result in WSDOT actually producing the

missing records. CP 244-254.<sup>4</sup> WSDOT assertion that Wolfe could have and should have sued in 2008 to obtain the records is pure speculation.

As noted in Wolfe's opening brief, the record shows that Wolfe went to extraordinary efforts to locate the missing records relating to the SR 4 bridge, a process that took three and a half years, more than three dozen PRA requests, and three sets of discovery requests. CP 1979, 1981, 1988. WSDOT simply ignores all of Wolfe's efforts to locate the records. When WSDOT finally produced the records Wolfe, exercised reasonable diligence by filing the current lawsuit less than six months later. WSDOT does not argue otherwise.

The Court should reverse the trial court and hold that the statute of limitations was equitably tolled. The Court should then remand this matter to the trial court for a new determination of the amount of penalties to award under RCW 42.56.550(4).

**C. The trial court erred in denying any attorney fees for Allen Miller.**

*See WSDOT Br.* at 25-26. Wolfe relies on his appeal brief at 30-32.

**D. The trial court erred in denying sanctions against WSDOT.**

*See WSDOT Br.* at 26-27. Wolfe relies on his appeal brief at 32-34.

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<sup>4</sup> Wolfe's first PRA action in Pacific County was dismissed without prejudice based on WSDOT's assertion that the records were not maintained in Pacific County. CP 1752.

**E. Wolfe should be awarded additional attorney fees on appeal.**

The parties agree that Wolfe is entitled to attorney fees on appeal under RCW 42.56.550(4) to the extent he prevails in this appeal. *See* WSDOT Br. at 27.

**V. RESPONSE TO CROSS APPEAL**

**A. The statute of limitations was equitably tolled under *Belenski v. Jefferson County*, 186 Wn.2d 452, 378 P.3d 176 (2016).**

WSDOT argues that Wolfe's PRA claims relating to the 1998 HPA records are barred by the statute of limitations in RCW 42.56.550(6). *WSDOT Br.* at 27-31. Wolfe argues that the statute of limitations was equitably tolled under *Belenski, supra*. *See* section IV(B).

**B. WSDOT failed to conduct a reasonable search for the 1998 HPA records.**

It is undisputed that the 1998 Hydraulic Project Approval (HPA) was responsive to Wolfe's 2008 PRA requests, and that WSDOT failed to produce this record until December 2, 2011. CP 3230. It is also undisputed that Wolfe filed this case in May 2012, more than a year after WSDOT closed his 2008 PRA requests, but less than six months after the 1998 HPA was finally produced. CP 7-10.

The 1998 HPA records were far from trivial. These were records of an environmental permit issued by the Department of Fish and Wildlife to allow WSDOT to perform construction work in the Naselle River. CP

1527-1531. Wolfe needed these records to respond to WSDOT's erroneous assertion that it had not performed any work on the SR 4 Bridge since 1986. As the trial court noted, these records were "what Mr. Wolfe was looking for all along." CP 3269. Yet WSDOT repeatedly failed to produce these records.

The PRA requires an agency to conduct a reasonable search for responsive records. *Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 720, 261 P.2d 119 (2011). The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents. *Id.* (citing *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)).

WSDOT argues that it conducted a reasonable search but was unable to locate the 1998 HPA records because two WSDOT employees, Tak and Gernhart, did not know about the 1998 "rip-rap" project. *WSDOT Br.* at 33. This argument posits that an agency as large as WSDOT may rely on employee memory alone to locate responsive records. According to WSDOT's reasoning, if current agency employees do not remember where records are stored then the agency cannot reasonably be expected to find such records.

By relying on memory WSDOT failed to perform a reasonable search for records. Along with general record retention laws, *see* Chap.

40.14 RCW, the PRA requires agencies to adopt procedures to keep records organized. RCW 42.56.100. Also, WSDOT should have kept contemporaneous records of what was provided to Wolfe. *See* WAC 44-14-04004(6).

To perform a reasonable search WSDOT was required to make a systematic search of its record-keeping system, and to document the steps taken to perform the search:

[T]he agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith. These should include the search terms and the type of search performed, and they should establish that all places likely to contain responsive materials were searched.

*Neighborhood Alliance*, 172 Wn.2d at 721. The declarations submitted by WSDOT are conclusory, and do not document how WSDOT allegedly searched for records.

WSDOT's new PRA coordinator, Ashley Holmberg, authenticated seventeen (17) emails and letters relating to Wolfe's PRA request. CP 1854-1916. But Holmberg did not produce any records of any systematic search of WSDOT's record-keeping system. *Id.* Presumably, if WSDOT had any documentation of how it searched for records Holmberg would have produced such documentation (unless, of course, such documentation did not support WSDOT's claims).

David Bellinger's declaration confirms that WSDOT had a computerized record-keeping system in which boxes of WSDOT records are indexed and given unique box numbers. CP 1818-1823. But Bellinger's declaration does not indicate whether or how WSDOT actually used this system to look for responsive records. *Id.*

Bart Gernhart's declaration confirms that WSDOT relied on memory to find responsive records, and that Gernhart never even looked for the 1998 HPA records because he was not personally aware of that project. CP 1525. Gernhart admitted that WSDOT kept its environmental permits in a different office, and that it never occurred to Gernhart to check with that office. *Id.* In other words, WSDOT admits that it failed to search a location where records were likely to be found.

Denys Tak's declaration states that only ten (10) out of eighteen (18) employees actually responded to WSDOT's request that they look for responsive documents. CP 1517. Tak's declaration does not indicate who those employees were, or how, when or where they searched for responsive records. *Id.*

Tak also states that WSDOT has a document retention system, and that WSDOT kept records of which boxes were sent to Kelso on particular dates. CP 1517. But Tak's declaration did not refer to or provide copies of any contemporaneous documentation from WSDOT's

record-keeping system. *Id.* Nor has Tak or WSDOT explained how Tak could have remembered the specific box 15-digit numbers set forth in his declaration without referring to some sort of documentation that WSDOT has never offered in evidence. Tak's conclusory declaration does *not* establish that a reasonable search was actually made.

WSDOT touts its record-keeping system in its cross-appeal of the trial court's award of penalties:

WSDOT's ability to bring forth so many records to satisfy Wolfe's requests comes from its system of tracking and storing records for production to the public when requested... WSDOT personnel assisting Wolfe in his search had sufficient resources to utilize: (1) a searchable archive system...

*WSDOT Br.* at 41. But when Wolfe alleged that WSDOT had failed to produce responsive records WSDOT "turned a blind eye" and ignored its own internal record-keeping system. CP 1732. The record indicates that WSDOT chose to ignore its own internal record-keeping when it realized that those records did not support its position. WSDOT inexplicably failed to provide a declaration from its own PRA coordinator, Cynthia Whaley, leaving Wolfe to put Whaley's spreadsheet into the record himself. *See Wolfe Br.* at 13 n. 3. WSDOT's assertion that Whaley left WSDOT before this case was filed is false, and nothing in the record

supports WSDOT's assertion that Whaley was unavailable to WSDOT as a witness even after she left WSDOT. *See* section II(B) (above).

WSDOT has failed to provide the detailed, nonconclusory affidavits required by *Neighborhood Alliance*. This Court should affirm the trial court's ruling that WSDOT failed to perform a reasonable search for the 1998 HPA records.

**C. The trial court did not abuse its discretion in refusing to award only 5% of Wolfe's attorney fees.**

WSDOT argues that the award of attorney fees to Wolfe was unreasonable because Wolfe prevailed on his PRA claims for three (3) records but did not prevail with respect to fifty-five (55) other records.<sup>5</sup> *WSDOT Br.* at 35-37. WSDOT's argument assumes that the trial court correctly ruled that WSDOT had provided all the other boxes of documents in 2008. If the Court agrees with Wolfe that WSDOT failed to produce those records as well, as WSDOT's contemporaneous documentation indicates, then the Court does not need to consider WSDOT's apportionment argument.

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<sup>5</sup> WSDOT's brief does not indicate the source of WSDOT's calculation that Wolfe did not prevail on fifty-five (55) records. Pursuant to a court order to show cause dated February 20, 2015, Wolfe submitted a list of withheld records on March 6, 2015, and an amended list on March 12, 2015. CP 1696, 1697, 1708-1717. The first three of fifty-eight (58) items on this list are the 1998 HPA records that WSDOT concedes were not provided to Wolfe. CP 1710.

WSDOT made several arguments in opposition to Wolfe's request for fees, some of which the trial court accepted. CP 3285-86. But the trial court correctly rejected WSDOT's argument that Wolfe should recover only 5% of his attorney fees, based on WSDOT's mathematical calculation that Wolfe recovered only 5% of the records that he claimed were withheld. CP 3135. This argument, which would have awarded Wolfe only \$2,851.12 in attorney fees, was not a serious attempt by WSDOT to estimate the amount of attorney fees reasonably incurred by Wolfe in obtaining the 1998 HPA records.

In *Sanders v. State*, 169 Wn.2d 827, 865-66, 240 P.3d 120 (2010), the trial court determined that the requestor (Justice Sanders) had raised four separate issues, and that he had prevailed on only one of those four issues. The trial court also weighted the four issues based on the difficulty and amount of work, and determined that the first issue of whether the records were exempt accounted for 50 percent of the case. *Id.* The trial court further determined that Sanders had prevailed on only five percent (5%) of the documents. *Id.* However, the trial court looked at the actual work involved, and *not* the raw number of documents, to determine the appropriate fee award:

[T]he trial court did not believe a pro rata allocation was appropriate because the amount of effort to contend that the final disputed document was nonexempt was far less than

the effort to contend that the first few documents were nonexempt. In other words, there were economies of scale involved, such that it was fairer to award Justice Sanders 75 percent of the fees allocated to issue (1).

*Sanders*, 169 Wn.2d at 865-66. In the end the trial court awarded Sanders 37.5 % of his fees, even though a strict mathematical analysis indicated that he only prevailed on 5% of one of four issues. *Id.* While the Supreme Court “quibble[d] with some of the trial court’s reasoning the Court upheld the fee award as within the trial court’s discretion. 169 Wn.2d 869.

WSDOT relies on *Sanders* to argue that the award of fees to Wolfe should have been discounted to only 5% of Wolfe’s total fees. *WSDOT Br.* at 36; CP 3135. But WSDOT argues for exactly the sort of pro rata analysis that was rejected in *Sanders*. WSDOT has not even argued that only 5% of the fees incurred by Wolfe were all that Wolfe needed to force WSDOT to finally produce the 1998 HPA records. WSDOT’s argument also ignores the fact that the factual issue of which records were produced was not the only issue decided in the trial court, and that a lot of attorney time was spent on other issues, such as the statute of limitations. WSDOT’s suggestion that 95% of the fees incurred by Wolfe were unrelated to his successful pursuit of the 1998 HPA records is absurd and unsupported by the record.

As the trial court noted, the 1998 HPA records were “what Mr. Wolfe was looking for all along.” CP 3269. If WSDOT had given the trial court a reasonable basis for reducing the fee award, based on the complexity (or weight) of the issues and the amount of work actually required, the trial court might have exercised its discretion to award a lower amount of fees. But the trial court not abuse its discretion in refusing to award only 5% of Wolfe’s attorney fees based on WSDOT’s tortured interpretation of *Sanders*.

**D. The trial court did not abuse its discretion in awarding only \$20 per day in penalties.**

WSDOT argues that the trial court abused its discretion in awarding a penalty of only \$20 per day for WSDOT’s failure to produce each of three (3) 1998 HPA records. *WSDOT Br.* at 37-41. The Court will not need to decide this issue unless the Court agrees with Wolfe that (i) WSDOT failed to conduct a reasonable search, and (ii) equitable tolling precludes WSDOT’s statute of limitations claim. *See* sections V(A) and (B) (above).

Although the trial court had the discretion to award no penalty at all, RCW 42.56.550(4), WSDOT has no authority to support the argument that the trial court abused its discretion in awarding only \$20 per day against a large agency like WSDOT. As expected, WSDOT touts the very

same record-keeping system that it chose to ignore on the key issue on whether WSDOT provided the records in the first place. *WSDOT Br.* at 41. The fact remains that WSDOT failed to locate the 1998 HPA records at the same time that WSDOT was erroneously arguing that it had not worked on the SR 4 Bridge since 1986. As the trial court noted, these records were “what Mr. Wolfe was looking for all along.” CP 3269. If the Court agrees with Wolfe that WSDOT failed to conduct a reasonable search for records then the trial court was well within its discretion to impose a small penalty of only \$20 per day for each of three documents.

Wolfe asked the trial court to award \$100 per day for each of six (6) pages, based on WSDOT’s continuing dishonesty about the 1998 SR 4 Bridge work it had done, and Wolfe was disappointed by the trial court’s decision to award only \$20 per day for each of three (3) records. CP 2727, 3230. But Wolfe did not cross-appeal that ruling because the trial court has discretion to determine the appropriate penalty for PRA violations. That discretion is only abused where the trial court’s decision “is manifestly unreasonable or based on untenable grounds or reasons.” *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 459, 229 P.3d 735 (2010) (citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)). The trial court’s ruling was not an abuse of discretion.

However, as Wolfe noted in his opening brief, the trial court's award of only \$20 per day for three records was based on the trial court's erroneous finding that all but three responsive records had been provided to Wolfe. CP 3290-3292; *Wolfe Br.* at 29. If the Court agrees with Wolfe that WSDOT failed to provide whole boxes of records in 2008 then a higher penalty amount is required. *Id.* WSDOT does not argue otherwise.

**E. Wolfe should be awarded additional attorney fees on appeal.**

The parties agree that Wolfe is entitled to attorney fees on appeal under RCW 42.56.550(4) to the extent he prevails in this appeal. *See WSDOT Br.* at 27. Whether or not Wolfe prevails on his appeal, Wolfe is also entitled to attorney fees under RCW 42.56.550(4) to the extent he prevails on WSDOT's cross-appeal. RAP 18.1.

## **VI. CONCLUSION**

For all these reasons the Court should reverse the trial court's erroneous finding that WSDOT provided the boxes of responsive records in 2008, its ruling that Wolfe's claims are barred by the statute of limitations, the denial of fees for attorney Miller and the ruling on sanctions. The Court deny WSDOT's cross-appeal, award Wolfe additional attorney fees for this appeal and remand this case to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 6th day of June, 2018.

By:   
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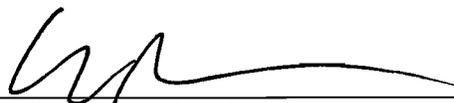
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