

FILED
Court of Appeals
Division II
State of Washington
5/4/2018 4:18 PM

NO. 50894-0

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

CHARLES WOLFE,

Appellant/Cross-Respondent,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondent/Cross-Appellant.

BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

In May 2008, Appellant Charles Wolfe (Wolfe) requested, under the Public Records Act (PRA), records relating to the SR4/Naselle River Bridge. On September 19, 2008, after Wolfe inspected a room full of records gathered by the Washington State Department of Transportation (WSDOT) to satisfy his PRA request, he sent a letter to WSDOT complaining it had not provided him the records he requested. In his September 2008 letter, Wolfe warned WSDOT about “any civil action I take.” However, Wolfe did not file this lawsuit until May 2012.

During the course of responding to Wolfe’s PRA request, WSDOT provided him three installments of responsive public records. In addition, it gathered several boxes of potentially responsive records at its Kelso, Washington office for Wolfe to inspect. Wolfe conducted two inspections, the last being on August 12, 2008. At that time, he asked for copies of some pages. After providing those records to Wolfe, WSDOT closed his PRA request on August 13, 2008.

Wolfe made several more PRA requests after his September 2008 letter. In responding to one such request in 2011, WSDOT discovered for the first time three records that were responsive to his May 2008 PRA request. Those three records related to a 1998 “rip-rap” project of which WSDOT personnel were unaware of when responding to Wolfe’s May 2008

PRA request. WSDOT produced those records to Wolfe immediately after their discovery in December 2011.

Wolfe filed this lawsuit in May 2012, claiming WSDOT failed to produce these three records, along with fifty-five other records, before it closed his 2008 PRA request. To date, neither party has confirmed many of those fifty-five records even exist. In the course of this litigation, WSDOT inventoried the boxes and files present in the Kelso office during Wolfe's 2008 inspections. The confirmed contents of the boxes and files includes all of the records known to exist that Wolfe alleges to have been missing during his 2008 inspections. Despite this uncontroverted fact, Wolfe continues to allege these records were not in the boxes of records he inspected.

The trial court ruled that all PRA claims in this lawsuit are barred by the statute of limitations, except for those claims related to the production of the three records WSDOT discovered in 2011. For those records, the trial court ruled WSDOT's late production was a violation of the PRA and assessed attorney fees and penalties against WSDOT.

Because WSDOT's definitive, final response to Wolfe's PRA request occurred in 2008, this Court should affirm the trial court's holding that Wolfe's claims are barred by the statute of limitations, but reverse its holding that his claims regarding the three records produced in 2011 are not barred. Wolfe's PRA claims all relate to WSDOT's failure to produce

records in 2008, and because he was aware of the facts supporting his claims in September 2008, the statute of limitations bars this PRA lawsuit.

In the alternative, if this Court affirms the trial court's holding as to the three records produced in 2011, it should reverse the trial court's assessment of attorney fees because Wolfe did not submit sufficient proof of reasonable attorney fees associated with his successful claims. The legal bills submitted by Wolfe do not distinguish between the successful and unsuccessful claims of his lawsuit. Because his lawsuit was unsuccessful on most claims, this Court should reverse the lower court's award of attorney fees and remand the case for further proceedings to determine what attorney fees are related to his successful portion of the PRA claims and if those fees are reasonable.

This Court should reverse the trial court's award of statutory penalties of \$20 per day because the undisputed evidence shows WSDOT made an honest attempt to comply with Wolfe's May 2008 PRA request and its search for responsive records was adequate.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court correctly find that, as a matter of fact, all but three records were provided to Wolfe?
2. Did the trial court correctly rule that Wolfe's PRA claims, except the claim for three specific records, were barred by the statute of limitations,

RCW 42.56.550(6)?

3. Did the trial court correctly decide not to award attorney fees for Allen Miller when Wolfe presented insufficient evidence that such attorney fees were related to the successful portion of his PRA lawsuit?
4. Did the trial court correctly deny sanctions against counsel for WSDOT where the allegedly improper conduct by counsel occurred in a separate case?
5. Is Wolfe entitled to attorney fees for this appeal if he is not the prevailing party?

III. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to dismiss all of Wolfe's PRA claims he filed in 2012, when it is undisputed that WSDOT's final action with respect to his PRA request occurring in May 2008.
2. The trial court erred in tolling the statute of limitations as to the three records produced in 2011 when there has been no showing of bad faith, deception, or false assurances to justify equitable tolling.
3. The trial court erred in finding WSDOT's search for the three records in May 2008, that were produced in 2011, was inadequate.
4. The trial court erred in awarding attorney fees to Wolfe when he failed to show with sufficient specificity that such fees were reasonable, and

the trial court did not make detailed findings as to the awarded fees' reasonableness.

5. The trial court erred in imposing penalties against WSDOT in the amount of \$20.00 per record (3) per day (1,305) for its diligent and good-faith attempt to fully comply with the May 2008 PRA request.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in failing to dismiss all of Wolfe's claims based upon the one-year statute of limitations when it is undisputed that WSDOT's final response to Wolfe's PRA request for the three records occurred in August 2008, and his PRA lawsuit was filed in 2012?

2. Did the trial court err in invoking the doctrine of equitable tolling of the statute of limitations in this case when the law set forth in *Douchette v. Bethel School Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991), disfavors such tolling absent bad faith, deception, or false assurances, none of which are present here?

3. Did the trial court err in finding that WSDOT conducted an inadequate search for responsive records in May 2008 when WSDOT produced undisputed evidence as to the reasonableness of the search conducted?

4. Did the trial court err in awarding attorney fees to Wolfe when he did not establish, with specificity, why he was entitled to most of the fees

incurred when he “prevailed” on only three of his fifty-eight PRA claims?

5. Did the trial court err in assessing penalties of \$20 per day for 1,305 days when the undisputed evidence demonstrated that WSDOT made a diligent and good faith attempt to comply with the May 2008 PRA request?

V. STATEMENT OF THE CASE

A. Statement of Facts

1. Wolfe’s 2008 public records request

Since 2008, Wolfe has sought to hold WSDOT liable for the erosion to his property he alleges is caused by the nearby SR4/Naselle River Bridge. CP at 12-13. Wolfe contends the angle of the bridge piers changes the course of the river and thereby intensifies the river’s erosion of his property. CP at 1735-36.

In May 2008, Wolfe submitted his first request for public records seeking “Highway 4 bridge permits and certifications on bridge/hydraulic project approval from WSDOT back in 1986.” CP at 1525. Wolfe has since made several other PRA requests to WSDOT, but only the May 2008 request is the subject of this appeal. CP at 13-16.

WSDOT assigned Denys Tak, Kelso Project Engineer (Tak), Bart Gernhart, Southwest Region Assistant Administrator for Engineering (Gernhart), and Michelle Ewaniac, Public Records Coordinator (Ewaniac), to locate records responsive to Wolfe’s request. CP at 1314, 1516, 1523.

They identified individuals who could have responsive records. CP at 1314-15, 1517. Eighteen different employees were identified, and records from archives were ordered. CP at 1314, 1517. Ewaniac provided responsive records to Wolfe in three partial installments in May and June 2008. CP at 1315, 1525. On June 30, 2008, WSDOT closed Wolfe's PRA request. CP at 1315.

Nine days later, when Wolfe sent a follow-up email expanding his request by identifying twenty different categories of records he was seeking, WSDOT re-opened his PRA request. CP at 221. Tak and Ewaniac gathered records relating to the SR4/Naselle River Bridge and put them in Tak's office in Kelso, Washington for Wolfe to conduct an in-person inspection. CP at 1517-18.

On July 13, 2008, Wolfe enlarged his request again, by stating "[I]ikewise, I am interested in any files the [sic] relate to any work that WSDOT has done on the bridge or within 500 feet, both upstream and downstream, of the bridge since 1986." CP at 224. When Tak received this enlarged request, he did not expand the previous search for responsive records because he believed all records relating to the bridge had already been gathered and placed in his Kelso office. CP at 1517-18. In 2011, that belief was revealed to be erroneous.

In 2011, while responding to a subsequent PRA request by Wolfe

seeking information about bank stabilization projects near the SR4/Naselle River Bridge, WSDOT personnel searched its environmental office and found three records relating to a 1998 “rip-rap” project. The “rip-rap” project involved placing large rocks on the upstream side of the SR4/Naselle River Bridge piers. A review of these records showed them to be responsive to both Wolfe’s 2011 PRA request, because they involve environmental issues, and his first 2008 PRA request because they show work done within 500 feet of the bridge since 1986. CP at 1950-65.

2. WSDOT produced all known responsive records

WSDOT provided the trial court a full recounting of the circumstances surrounding its response to Wolfe’s July 13, 2008 email expanding his first PRA request. CP at 1522-26, 1516-21.

The Southwest Region is responsible for construction work on the SR4/Naselle River Bridge. Gernhart submitted a detailed declaration setting out the steps that he took in responding to the 2008 request. CP at 1522-26. Gernhart noted that Wolfe’s requests followed a concerted effort by WSDOT staff to respond to Wolfe’s claim that the SR 4/Naselle River Bridge design was affecting his property. This effort included an inspection of Wolfe’s property by a WSDOT hydrologist, which was attended by other WSDOT employees and representatives of several other agencies. CP at 1524. The WSDOT hydrologist concluded that the erosion on

Wolfe's property was natural occurring, and not caused by the bridge piers. CP at 1524. Given Wolfe's focus on the design and construction of the bridge, Gernhart's direction to staff focused on those issues. CP at 1526.

As the Kelso Project Engineer, Denys Tak had previously exchanged emails with Wolfe and understood his interest to be in the placement of the bridge pilings in the Naselle River in 1986. CP at 1516-17. Tak believed every document about the SR4/Naselle River Bridge was already in his office when he reviewed Wolfe's July 13, 2008 email. CP at 1518. Both he and Gernhart were unaware that the 1998 "rip-rap" project had occurred, and so it did not occur to them to ask the Southwest Region Environmental Office for any more records. CP at 1518, 1525-26. Nevertheless, among the records produced in July 2008 were bridge inspection reports referencing the need for and eventual performance of the 1998 "rip-rap" project. CP at 1525.

Wolfe's first records inspection occurred on July 17, 2008, in a room where nine boxes, along with many individual files, were gathered. CP at 1518. Three boxes were from the State Archives containing only records relating to the SR4/Naselle River Bridge, and six boxes contained records from a similarly named bridge. In addition to those nine boxes, many files from two more boxes recovered from State Archives and a box labeled "Southwest Region Environmental Box" were in the inspection

room. CP at 1518.

The Southwest Region Environmental Box contained individual files collected by WSDOT personnel specifically for Wolfe's SR4/Naselle River Bridge PRA request obtained from different specialty areas within WSDOT, including environmental, bridge and structures. CP at 1518. Tak is very familiar with the records provided to Wolfe, and he confirms that no records were added or removed from the boxes from the time they were in his office for Wolfe's in-person inspections in 2008. CP at 1517.

WSDOT did not assert that any records were exempt or required redactions; therefore, it did not provide an exemption log to Wolfe. CP at 1316. By the time Wolfe's second inspection of the boxes in Kelso concluded, Ewaniac and Tak either sent to Wolfe directly, or provided to him for in-person inspection, all records Tak and Gernhart knew existed that related to the SR4/Naselle River Bridge. CP at 1316. Therefore, WSDOT closed Wolfe's May 2008 PRA request for a second time on August 13, 2008. CP at 1316.

On September 18, 2008, Wolfe sent WSDOT another letter alleging it had not provided all records responsive to his request. CP at 1858-61. Wolfe wrote, "WSDOT has NOT fully complied with my request to research the cause(s) of the erosion activity affecting our property." CP at 1858. He also referenced the potential for litigation stating, "[a]ny

civil action I take will be from the standpoint of a citizen whose property is the source of that sedimentation pollution.” CP at 1861. Because this letter also contained several specific requests for additional records, WSDOT’s Public Disclosure Coordinator opened a separate PRA request. CP at 1854-55. WSDOT offered Wolfe a third in-person opportunity to review the additional records, which he declined. CP at 1855.

3. Wolfe’s PRA litigation against WSDOT

Approximately two years later, in June 2010, Wolfe filed a lawsuit in Pacific County alleging WSDOT was liable to him for damaging his property and violating the PRA by failing to fully respond to his May 2008 request. His PRA claims were dismissed for lack of jurisdiction without prejudice on August 29, 2011. CP at 193.

In May 2012, nine months later, and almost four years after August 12, 2008, when he received the last installment of records responding to his first 2008 request, Wolfe filed this case. CP at 7-18. He alleged WSDOT violated the PRA by silently withholding entire boxes of records (later identifying fifty-eight particular records) when it produced the boxes of records at its Kelso office. CP at 7-18.

In 2015, WSDOT employee Dave Bellinger (Bellinger) manually inspected, inventoried, and indexed all materials contained in the same boxes that were in the Kelso office for Wolfe’s inspections. CP at 1813.

Several records Wolfe claims were not provided to him in 2008 are still not known to exist. CP at 1815-17. However, for the records which have been confirmed to exist, Bellinger found each one in the same boxes that were delivered and made available to Wolfe in the Kelso office in 2008. CP at 1813-23.

Tak's office in Kelso became the repository for these records in 2008, and his declaration confirmed that he was familiar with the contents of those boxes. CP at 1517. Tak has reviewed Wolfe's list of "silently withheld" records, and he confirms those records were in his office during Wolfe's in-person inspections. CP at 1519-21.

Wolfe claims a spreadsheet showing, "that five full boxes of SR 4 records were not requested by Tak or sent to the Kelso office until April 2012" as proof that WSDOT personnel are wrong. Br. Appellant at 22. This spreadsheet is a list of materials requested from the State Archives and is attached to a 2012 email from former WSDOT Public Disclosure Coordinator, Cynthia Whaley (Whaley). CP at 1777. For entries dated in 2012, a column on the spreadsheet indicates "whole box" for boxes numbered ending 0919, A3123, A3214, ER520, and MM116. However, for those same boxes in 2008, the spreadsheet shows "File – SIO CONTRACT #3040 ONLY." CP at 1778-80. Wolfe asserts this spreadsheet shows that the fifty-five records he alleges were not at the Kelso office were in those

specific boxes because only records relating to SIO CONTRACT #3040 were pulled from those boxes when requested the State Archives. WSDOT's ability to respond to this allegation is limited because by the time Wolfe filed this lawsuit, Whaley was no longer employed by WSDOT and the current Public Disclosure Coordinator has no relevant personal knowledge. CP at 1854.

However, the inventory of those five boxes shows their entire contents are specifically identified by Project/Contract Title. CP at 1818-23. SIO CONTRACT #3040 is the identifier for records relating to the SR4/Naselle River Bridge. CP at 1818-23. Therefore, when the files for SIO CONTRACT #3040 were taken from these boxes in 2008, all files responsive to Wolfe's May 2008 request relating to the SR4/Naselle River Bridge were taken from the State Archives and delivered to the Kelso office for Wolfe's in-person inspection. In other words, because the remaining contents of these boxes were particularly known in 2008, just as they continued to be known in 2015 and now, the non-SIO CONTRACT #3040 materials can be reviewed to determine if any responsive records from those boxes were not provided to Wolfe at the Kelso office. CP at 1818-23.

More particularly, all eight files contained in box ER520 have been identified with particularity, and this box has only final records for SIO CONTRACT #3040. CP at 1821. Therefore, Wolfe's interpretation of

the Whaley spreadsheet is shown to be false because all of box ER520 files were pulled from State Archives even though the spreadsheet lists, "1 File-Contract 3040 Final Records Only." In short, ER520 contained eight files, not one, and they all were final construction records for the contract. Therefore, the entire contents of this box was at the Kelso office, not just one file taken from it as alleged by Wolfe. CP at 1821.

Similarly, box A3123 contains two categories of records, including nine files for Contract #3039 (Grays Harbor County Line to Trails 4-12) and eleven files for Contract #3040 (Salmon Creek and Naselle River Bridges). CP at 1820. Box A3124 contains eleven files for Contract #3041 (S. 56th St. Park & Pool Lot) and eight files for Contract #3040. CP at 1819.

Wolfe is right that only one file each from box MM116 and box 80919 was at the Kelso office for his inspection. That is because although each box contains seventeen files, only one relates to the Naselle River Bridge contract. CP at 1818. More importantly, the inventory disproves Wolfe's speculation about missing SR4/Naselle River Bridge records in both box MM116 and box 80919, because each of the remaining sixteen files is described in the "Project/Contract Title" column of the inventory. CP at 1818-19. Each of those remaining files is therefore known and verified as not responsive to Wolfe's May 2008 request. CP at 1818.

B. Procedural History

On May 1, 2015, Thurston County Superior Court Judge Gary Tabor heard Wolfe's motion for partial summary judgment and WSDOT's motion to dismiss. CP at 3234-80. The trial court granted WSDOT's motion for dismissal based upon the statute of limitations for all claims, except the three records regarding the 1998 "rip-rap" project. CP at 3269-70. The trial court granted Wolfe's motion for partial summary judgment by finding late production of those three records to be violations of the PRA. CP at 3268.

However, the trial court then went further and ruled that the other fifty-five record violations claimed by Wolfe "were present at the time that the review took place by Wolfe in a number of boxes." CP at 3270. The trial court described WSDOT's efforts as "an honest attempt to try to comply with the Public Records Act." CP at 3273. The trial court specifically disagreed with Wolfe's contention that there was proof of WSDOT's intent to hide the three 1998 "rip-rap" project records noting, "I think the plaintiff here suggested that there might be indications in that material about choices of, well, perhaps withholding something or not looking for something or saying that there was material that was sensitive that they hoped wouldn't be disclosed. There's nothing like that." CP at 3272.

Addressing Wolfe's assertion of bad acts by WSDOT, the trial court noted:

It's been stated to me a number of times in various pleadings by the petitioner that the State lied when they said that they didn't have - - that there was no other project. And then they find out that there was a project. Well, I don't think that they knew that there was another project. And when they learned that there was this rip-rap project, they did turn that over. I don't believe that that's evidence that there was a purposeful lie, but I don't guess that's before me today, either.

CP at 3275. Finally, the trial court ordered a subsequent hearing on the amount of attorney fees and penalties for the three found PRA violations.

CP at 2078.

Thurston County Superior Court Judge John Skinder incorporated the transcript of Judge Tabor's May 1, 2015 oral ruling when he issued the trial court's Findings of Fact, and Conclusions of Law, Order, Judgment on August 25, 2017. CP at 3228-96.¹ On July 14, 2017, the trial court assessed attorney's fees and costs to Wolfe in the amount of \$102,892.08 and statutory penalties of \$20.00 per record for 1,305 days totaling \$78,300.00. CP at 3230.

Wolfe alleged he was entitled to all fees and costs he incurred in connection with this lawsuit totaling \$151,679.11, which included one-half of the attorney fees for his previous PRA lawsuit in Pacific County for these same claims. CP at 2627. The trial court granted Wolfe all attorney fees for

¹ Judge Tabor retired while this case was pending, and newly elected Judge Skinder was assigned to the case. CP at 3285. The trial court's order is mistitled, "Findings of Fact, Conclusions of Law, Order, Judgment" because it is granting of summary judgment; and therefore, the proper standard of review is de novo.

his attorneys of record in this matter, but declined to award him attorney fees arising from the Pacific County case because “there is absolutely no way to differentiate what that billing consists of based upon the attachment that was included.” CP at 3286.

The trial court denied Wolfe’s request for sanctions against counsel for WSDOT for alleged conduct occurring in the Pacific County case, and denied Wolfe’s request for a just compensation or property damage repair/restoration costs award. CP at 3230.

Both parties appealed.

VI. ARGUMENT IN RESPONSE

A. Standard of Review

The PRA permits summary judgment motions. *Spokane Research and Defense Fund v. City of Spokane*, 155 Wn.2d 89, 106, 117 P.3d 1117 (2005). Summary judgment orders are reviewed de novo with the court engaging the same inquiry as the trial court and viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006); *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

B. WSDOT Produced All Known Responsive Records

Wolfe claimed WSDOT silently withheld fifty-eight different records that he has either since received in a number of other requests and

through his independent discovery, or that he thinks WSDOT is still withholding. The record shows that WSDOT did not silently withhold any of the records identified by Wolfe.

An agency silently withholds records when, after a reasonable search, it knowingly fails to provide all relevant records, identification of records, or parts thereto properly withheld. *Progressive Animal Welfare Soc'y v. Univ. of WA*, 125 Wn.2d 243, 884 P.2d 592 (1994) (*PAWS II*); *Neighborhood Alliance of Spokane Cnty v. Spokane Cnty.*, 172 Wn.2d 702, 261 P.3d 119 (2011) (*Neighborhood Alliance*). Unlike WSDOT in this case, the responding agencies in both *PAWS II* and *Neighborhood Alliance* knew records potentially existed but did not search for them.

In *PAWS II*, the trial court was presented with evidence that responding agency personnel, “clearly stated that he will not respond to requests for information.” *PAWS II*, 125 Wn.2d at 268. From this evidence, the trial court noted, “[t]here is, then, at least a question of fact whether [they] silently withheld documents that should have been disclosed.” *Id.* at 269. The trial court noted that, “[f]ailure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed.” *Id.* at 270.

Similarly, in *Neighborhood Alliance*, the responding agency knew

the requested records were to be found on a specific computer, but the agency employee who knew the computer had been replaced did not search for it. *Neighborhood Alliance*, 172 Wn.2d at 721-22.

Unlike the responding agencies in *PAWS II* and *Neighborhood Alliance*, WSDOT in this case provided to Wolfe all relevant records that were located in 2008. The 2015 inventory of the same boxes provided to Wolfe in 2008 proves that all responsive records that have been shown to exist were provided to Wolfe at that time. CP at 1818-23. Only the three 1998 “rip-rap” project records were not produced in 2008, and the undisputed evidence is that Tak and Gernhart were unaware those records existed in 2008. CP at 1518, 1525-26.

Wolfe’s assertion that WSDOT silently withheld records is entirely unsupported in this record. Ewaniac, Tak and Gernhart did not realize they were not providing all responsive records in 2008, and when the 1998 “rip-rap” project records were discovered in 2011, they were immediately provided to Wolfe. CP at 1525-26. These records were not silently withheld because WSDOT personnel assigned to this records search were not aware of their existence even after having conducted an adequate search as discussed below.

C. Wolfe’s Claims Are Barred by the Statute of Limitations

The statute of limitations for PRA violations require actions for

judicial review “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.” RCW 42.56.550(6). The Washington State Supreme Court held that this “begins to run on an agency's definitive, final response to a PRA request.” *Belenski v. Jefferson Cnty.*, 186 Wn.2d 452, 457, 378 P.3d 176 (2016). WSDOT’s final response to Wolfe’s May 2008 PRA request occurred on August 12, 2008, when it provided him copies of records he requested after his Kelso inspection and closed his request. Wolfe filed this lawsuit in May 2012, over three years after receiving the last installment of records. CP at 8-17. Consequently, Wolfe’s claims under the PRA are time-barred because he did not file them before August 12, 2009.

The one-year statute of limitations in RCW 42.56.550(6) applies to cases involving responsive records not produced, but may be subject to equitable tolling. *Belenski*, 186 Wn.2d at 461-62. Where justice requires, equitable tolling is a remedy that permits a court to allow an action to proceed even though the statutory period of limitations has elapsed. *State v. McLean*, 150 Wn.2d 583, 591, 80 P.3d 587 (2003). The Washington State Supreme Court has set forth seven factors for courts to consider when invoking the doctrine:

- (1) lack of notice of the filing requirement;
- (2) lack of constructive notice of the filing requirement;
- (3) diligence in pursuing one's rights;

- (4) absence of prejudice to defendants;
- (5) claimant's reasonableness in remaining ignorant of the notice requirement;
- (6) claimant's reliance on deception or false assurances on the part of the party against whom the claim is made; and
- (7) claimant's reliance on authoritative statements made by the administrative agency that misled the claimant about the nature of her rights.

Douchette, 117 Wn.2d at 811.

Because there is no evidence of bad faith, deception, or false assurances by WSDOT, and it is irrefutable that Wolfe knew his PRA claims existed in 2008 but inexplicably failed to timely file them, causing prejudice to WSDOT, justice does not require equitable tolling in this case.

The “theme of finality should apply to begin the statute of limitations for all possible responses under the PRA.” *Belenski*, 186 Wn.2d at 461. When an agency puts a requester of public records on notice that it does not intend to disclose the public records or further address the public records request, the statute of limitations for PRA actions begins to run. *Id.* at 461.

In *Belenski*, the court held that the statement, “the County has no responsive records” was sufficient to put the claimant on notice that the public agency did not intend to disclose records or further address the public records request. *Id.* at 461. The court recognized “concerns that allowing 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.” *Id.* at 461. But, the court followed a long line of cases premised upon the statute of limitations being a “declaration of legislative policy to be respected by the courts.” *O’Neil v. Estate of Murtha*, 89 Wn. App. 67, 73, 947 P.2d 1252 (1997). While statutes of limitations clearly promote efficiency and economy in court, they also stand as a more general protective structure supported by Washington case law for the last century, “[i]t is better for the public that some rights be lost than that stale litigation be permitted.” *Id.* at 73; (quoting *Golden Eagle Mining Co. v. Imperator-Quilp Co.*, 93 Wash. 692, 696, 161 P. 848 (1916)).

In this case, Wolfe did not diligently pursue his PRA claims. His September 2008 letter expresses his belief that his legal rights had been violated. To date, Wolfe has not explained why he did not timely file a civil action as he referenced in his September 2008 letter.

Further, a “smoking gun” is not necessary to commence the limitation period. *Beard v. King Cnty.*, 76 Wn. App. 863, 868, 889 P.2d 501 (1995). The limitation period begins to run even if the plaintiff is unable to prove at the time the wrongful conduct occurred. *Id.* Once a plaintiff “reasonably suspects that a specific wrongful act has occurred,” the limitation period begins to run. *Id.* For PRA lawsuits, the

statute of limitations is triggered by: “(1) the agency's claim of an exemption, or (2) the agency's last production of a record on a partial or installment basis.” *Greenhalgh v. Dep't of Corr.*, 170 Wn. App. 137, 147, 282 P.3d 1175 (2012); *see also Belenski*, 186 Wn.2d at 461.

In September 2008, Wolfe clearly stated his suspicion that he had not received records responsive to his PRA request. Where a plaintiff “has notice of facts sufficient to prompt a person of average prudence to inquire is deemed to have notice of all facts which reasonable inquiry would disclose.” *Virgil v. Spokane Cnty.*, 42 Wn. App. 796, 714 P.2d 692 (1986). Put another way, “[n]otice sufficient to excite attention and put a person on guard or to call for an inquiry is notice of everything to which inquiry might have led.” *Sherbeck v. Estate of Lyman*, 15 Wn. App. 866, 870, 552 P.2d 1076 (1976) (citations omitted).

Wolfe explicitly confirms he was on notice of facts that a PRA violation may have occurred when he wrote in his September 2008 letter, “WSDOT has NOT fully complied with my request to research the cause(s) of the erosion activity affecting our property.” CP at 1767. Wolfe then described the specific records he claimed were not produced. CP at 1767-70. He threatened litigation by stating, “[a]ny civil action I take will be from the standpoint of a citizen whose property is the source of that sedimentation pollution.” CP at 1861. Yet, despite his confirmation of notice, Wolfe took

no action until May 12, 2012.

Additionally, Wolfe's late filing prejudiced WSDOT's ability to defend itself. Wolfe asserts, "[t]he key issue of fact in this case is whether WSDOT failed to produce entire boxes of responsive records for Wolfe's inspection in July and August of 2008." Br. Appellant at 11. To support his claim that fifty-five records were not provided to him during his in-person inspections, Wolfe only points to a spreadsheet created years after the 2008 inspections, which he claims shows a supposed contradiction of the declaration from the only person with personal knowledge of what was provided to him. Br. Appellant at 21-25. Wolfe questions Tak's memory of events that took place years before and "how Tak could have remembered specific 15-digit box numbers from years before." Br. Appellant at 22. Wolfe interprets the spreadsheet's use of the word "file" instead of "whole box" to be a contradiction to Tak's declaration. Br. Appellant at 10-15. By delaying his filing of this lawsuit, Wolfe prejudiced WSDOT's ability to respond to this allegation because Whaley had left WSDOT and the current Public Disclosure Coordinator had no personal knowledge in this regard. CP at 1854.

Finally, Wolfe failed to show WSDOT acted in bad faith, in a deceptive manner, or gave false assurances to him, which is necessary to justify equitable tolling of the statute of limitations in this case. *Douchette*,

117 Wn.2d at 1366. “Mere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact that preclude a grant of summary judgment.” *Greenhalgh*, 160 Wn. App. at 714. Wolfe’s assertion, without supporting evidence, that WSDOT “silently withheld” records in order to defeat his tort claims are insufficient. Br. Appellant at 28. Wolfe has produced no evidence to suggest WSDOT knew it had records responsive to Wolfe’s request but failed to provide them.

Indeed, the trial court specifically noted WSDOT had made an honest attempt to locate records responsive to Wolfe’s public records requests. CP at 3272. In reviewing the internal communications that WSDOT asserted as privileged, the trial court specifically found no evidence that WSDOT discussed “material that was sensitive that they hoped wouldn’t be disclosed.” CP at 3272. There is no fact in the record to show bad acts by WSDOT when it closed Wolfe’s public records request on August 23, 2008. Therefore, because Wolfe failed to show the requisite acts of bad faith, deception, or false assurances demanded by the Washington State Supreme Court in *Douchette*, the doctrine of equitable tolling does not apply to this case.

D. Wolfe Failed To Prove His Attorney Fees Were “Reasonable”

Although the trial court awarded Wolfe \$102,892.08 in attorney

fees, it declined to include legal fees incurred by Wolfe in his Pacific County litigation. This Court should affirm the trial court in this regard because Wolfe did not demonstrate that awarding him these fees would be “reasonable,” as required by the PRA. The PRA claims within Wolfe’s Pacific County lawsuit were dismissed on jurisdictional grounds, and the legal bills he submitted which relate to that case do not provide sufficient details to determine whether those fees were incurred for efforts that furthered his causes of action in this case. Therefore, Wolfe’s claim for the Pacific County lawsuit fees fail as he was not the prevailing party in that litigation, and he has not shown sufficient proof that the fees were incurred in connection with his successful claims in this case. A claim for attorney fees arising from the Pacific County case must be raised in that case. By making the claim in this case, Wolfe is in effect collaterally attacking the final judgment rendered in the Pacific County litigation.

E. Sanctions Against Counsel for the State Are Unwarranted

Wolfe seeks sanctions against former counsel for WSDOT because of an oral argument made before another appellate court in a separate lawsuit. Once again, this is a collateral attack on a separate court judgment, as the court in that other lawsuit addressed this issue. *Wolfe v. Dep’t of Transp.*, 173 Wn. App. 302, 293 P.3d 1244 n.7 (2013). Wolfe’s request for sanctions should be denied because he alleges no improper action in

connection with this litigation; indeed, the subject attorney has never entered an appearance in this case. As such, any claim for sanctions is beyond the scope of the issues before the trial court and this Court on appeal. Accordingly, the Court should affirm the trial court's dismissal of Wolfe's claim for sanctions.

F. Wolfe Is Not Entitled To Attorney Fees for This Appeal

The PRA provides for attorney fees and costs to the prevailing party. RCW 42.56.550(4). Wolfe is not entitled to attorney fees and costs until he is determined to be the prevailing party. "There is no reason why the definition of "prevailing" under the PRA on appeal should differ from the definition at trial." *Sanders v. State*, 169 Wn.2d 827, 870, 240 P.3d 120 (2010). If Wolfe succeeds on issues on appeal and submits a cost bill under RAP 18.1, WSDOT will respond to such appellate fees and costs at that time.

VII. OPENING BRIEF OF CROSS-APPELLANT

A. All of Wolfe's Claims Are Barred by the Statute of Limitations

As discussed above, WSDOT provided Wolfe a final response to the May 2008 PRA request on August 13, 2008, when it closed his request after his last inspection and receipt of records on August 12, 2008 in Kelso. The trial court agreed and dismissed all of Wolfe's claims, except for his claimed PRA violation arising from three records of a 1998 "rip-rap" project.

CP at 3269. These three records were located during a search for responsive records relating to another Wolfe PRA request made in September 2011. Br. Appellant at 7.

The trial court held this new PRA request related back to Wolfe's 2008 request, and then apparently applied the discovery rule to toll the PRA statute of limitations, describing WSDOT's production of the 1998 "rip-rap" records as "the reopening in 2011 as to the records 1, 2, 3." CP at 3276. The trial court did not provide any other reasoning for excluding the 1998 "rip-rap" records in its dismissal of this case. CP at 3267-80.

The discovery rule does not apply in every case. *See e.g., O'Neil v. Estate of Murtha*, 89 Wn. App. 67, 72, 947 P.2d 1252 (1997). Although the Legislature has mandated application of the discovery rule in some cases, it has not done so in public records cases.² RCW 42.56.550(6).

Generally, the discovery rule applies when "a statute does not specify a time at which the cause of action accrues." *Douchette v. Bethel School Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991). However, the PRA does specify a time at which its causes of actions accrue. Such

² "There is no authority in the statute or in the case law for applying a discovery rule to actions brought under the Public Records Act, a statute that specifies a limitations period that begins to run, as interpreted in *Belenski*, at the time of the agency's final, definitive response." Unpublished opinion, *Strickland v. Pierce Cnty.*, 2018 WL 582446 (Not Reported in P.3d) (January 29, 2018). The *Strickland* decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate pursuant to GR 14.1.

actions, “must be filed within one year of the agency’s claim of exemption or last production of a record on a partial or installment basis.” RCW 42.56.550(6). Because the PRA statute specifies when its causes of action accrue, the trial court erred in applying the discovery rule to this case.

Furthermore, there is no legal basis for the discovery rule in this case. Courts apply the discovery rule to only two types of cases: “(1) cases of fraudulent concealment; and (2) cases where the nature of the plaintiff’s injury makes it difficult for the plaintiff to learn the factual elements giving rise to the cause of action within the limitations period.” *O’Neil*, 89 Wn. App. at 72. Further, “[t]he discovery rule does not require knowledge of the existence of a legal cause of action itself, but merely knowledge of the facts necessary to establish the elements of the claim.” *Douchette*, 117 Wn.2d at 814.

Here, the trial court found that WSDOT did not fraudulently conceal the three 1998 “rip-rap” project records. CP at 3272. Moreover, Wolfe has failed to present any evidence that WSDOT knowingly concealed any information from him. Likewise, Wolfe’s purported injury (i.e., denial of requested records) was easy to identify when WSDOT produced the last installment on August 12, 2008 and closed his PRA request the next day.

On August 13, 2008, Wolfe knew that WSDOT was not going to provide any more records in response to his May 2008 PRA request. He

also explicitly claimed in his September 2008 letter that records were missing and asserted that he had a cause of action. CP at 227-30. There was no legitimate reason for him to delay legal action, given his stated position. Wolfe, therefore, has failed to show any legal basis for applying the discovery rule to his PRA claims, and the trial court erred in applying it in this case.

Furthermore, the facts of *Belenski* differ from this case in a crucial respect. In *Belenski*, the agency knew the subject records existed when it chose not to produce them. In the present case, Tak and Gernhart did not know the three 1998 “rip-rap” project records existed in 2008 when they produced all records they knew to exist. The agency in *Belenski* explained it did not provide the subject records “because they are not ‘natively viewable’ and would need to be ‘pulled out of a database and generated in a human readable format.’” *Belenski*, 186 Wn.2d at 455-56. Therefore, remanding *Belenski* was appropriate in the face of the agency’s purposeful non-disclosure because, as the court noted:

On one hand, we recognize that such an incentive could be contrary to the broad disclosure mandates of the PRA and may be fundamentally unfair in certain circumstances; on the other hand, certain facts in this specific case indicate that *Belenski* knew the County possessed IAL data, yet he inexplicably waited over two years.

Id. at 461-62. It therefore remanded the case to determine whether equitable

tolling was appropriate. *Id.* As argued above, equitable tolling is not applicable to the facts of this case.

B. The State Performed a Diligent Search for Records, Which Meets the Adequacy Requirement in *Neighborhood Alliance*

Although the PRA is silent about what constitutes an adequate search, the Washington State Supreme Court has determined it requires an agency to perform an adequate search for responsive records. *See Neighborhood Alliance*, 172 Wn.2d at 702. “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.* at 719-720.

When determining if a search is adequate, the focus is not whether responsive records exist that were not produced; rather, it is whether the search was reasonable depending on the facts of each case. *Id.* at 720. Agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. *Id.* The search should not be limited to one or more places if there are additional sources for the information requested. *Id.* Indeed, “[t]he agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested.” *Id.* This is not to say, of course, that an agency must search *every* possible place a record may be conceivably stored, but only those places where it is *reasonably likely* to be found. *Id.* (emphasis in original).

WSDOT performed an adequate search for Wolfe's May 2008 PRA request because it determined the location of where any responsive records were reasonably likely to be found and then gathered all such records. In his request, Wolfe sought records about bridge work that occurred in 1986. Many of the individuals who worked on the bridge in 1986 had left WSDOT's employment prior to Wolfe's request. CP at 1517. Despite this passage of time, eighteen people were identified as possibly having information about the records Wolfe requested. These people were from various WSDOT offices throughout the state including engineering, environmental, and headquarter personnel. CP at 1314-15, 1517, 1525. Pursuant to WSDOT's document retention policies, a majority of the responsive records were located at State Archives, and all archived files regarding the bridge were provided to Wolfe. CP at 1517.

Denys Tak and Bart Gernhart were responsible for searching for and identifying individuals who might have responsive records. CP at 1516-21, 1523-25. In their respective roles as Kelso Project Engineer and Assistant Regional Administrator for Engineering, it was reasonable for them to have been assigned the responsibility of coordinating the response to Wolfe's PRA requests. Their understanding of what Wolfe was looking for was influenced by the conversations they were continuing to have with him, which focused on the design and placement of the bridge piers.

CP at 1523-26. WSDOT made more than a perfunctory search for responsive records, and its search was reasonably calculated to uncover all responsive records.

The fact that the three 1998 “rip-rap” project records were not produced as part of the May 2008 PRA search does not prove the search was inadequate. In 2011, the three “rip-rap” project records were found in the environmental office because Wolfe had submitted a PRA request regarding bank stabilization projects. CP at 1525-26. They were not found in 2008 because neither Denys Tak nor Bart Gernhart had any knowledge of the 1998 “rip-rap” project. Therefore, it did not occur to them to ask the environmental office to look for records relating to the bridge structure as requested by Wolfe in May 2008. CP at 1518. By the time Wolfe had expanded his initial May request in July 2008 to include this type of record, WSDOT personnel believed all records relating to the SR4/Naselle River Bridge were already located in Tak’s Kelso office. CP at 1518, 1525.

The fact that a responsive document was later found is not dispositive of whether an adequate search was made. *Neighborhood Alliance*, 172 Wn.2d at 719-20. In 2008, WSDOT searched all locations that were reasonably likely to have records about the bridge structure, and so its search was reasonably calculated to uncover all responsive records. An agency that conducts a reasonable search is not liable under the PRA. *See*

Forbes v. City of Gold Bar, 171 Wn. App. 857, 288 P.3d 384 (2012). A search “need not be perfect, only adequate.” *Neighborhood Alliance*, 172 Wn.2d at 720. Here, WSDOT’s search may not have been perfect because it did fail to uncover three responsive records. However, it was reasonably calculated to identify all responsive records; and therefore, WSDOT should not be held liable under the PRA.

This case presents the opposite of what the court in *Neighborhood Alliance* was presented. In that case, a public disclosure request was made for records related to the possible illegal hiring process by county officials. *Id.* at 710-11. The computer that had stored the records had been replaced after those records were created, but prior to the public disclosure request. In responding to the request, the county searched only the new computer, despite knowledge that the records would not be located there. The agency did not attempt to search the old computer, which was still in the agency's possession. *Id.* at 710-12. In finding that the agency's search was inadequate, the Washington State Supreme Court stated that the agency's “search” consisted of the only place a complete electronic record could not be found, “[the] new computer[.]” *Id.* at 721-22. The county “knew [the] computer had been replaced only a few weeks before the request was made, and had some idea that searching only the new computer would prove unfruitful.” *Id.* at 722. Despite knowing that the response would be

incomplete, no further search was done. *Id.*

Unlike the responding agency in *Neighborhood Alliance*, WSDOT diligently searched all places where the requested records were reasonably likely to be stored. Also, unlike the agency in *Neighborhood Alliance*, there is no evidence to suggest that WSDOT chose not to search a location where it knew the records to be located.

C. Wolfe Failed To Prove His Attorney Fees Were “Reasonable”

The trial court erred in awarding Wolfe \$102,892.08 in attorney fees because it provided no factual findings that this award was reasonable in light of Wolfe’s failure to prevail on the substantial portion of his PRA lawsuit.

During the course of this lawsuit, WSDOT has always conceded it did not locate, and therefore did not provide to Wolfe, three records responsive to his May 2008 PRA request when it closed that request on August 13, 2008. Thus, there are two main issues presented by Wolfe’s lawsuit. One is whether a PRA claim for the three records is barred by the statute of limitations. The other is whether fifty-five other records were also not located and produced by WSDOT in 2008. Wolfe prevailed on the first issue but the trial court dismissed his claims as to the other fifty-five records. Accordingly, he prevailed in this lawsuit only as to the three “rip-rap” project records and his attorney fees award should be limited to

only that portion of his claims.

A court has discretion to apportion an award of attorney fees and costs so that it does not relate to any exempt records. *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010) (citing *Limstrom v. Ladenburg*, 136 Wn.2d 595, 616, 963 P.2d 869 (1998)). In *Sanders*, the court awarded only a portion of the plaintiff's attorney fees because he had not prevailed on all of his PRA claims. *Id.* at 865-66. The court noted, "[a]round 95 percent of the claimed exemptions proved valid, suggesting that Justice Sanders's fees and costs should be deeply discounted." *Id.* at 868. Given the particular circumstances present by the facts in *Sanders*, the court affirmed the award of 37.5 percent of the claimant's requested fees and costs. *Id.* at 868. Applied to this case, since Wolfe only prevailed on three of his fifty-eight PRA claims, his request for attorney fees and costs should be deeply discounted. "The lodestar method is appropriate for calculating attorney fees under the PRA." *Id.* at 869, (citing *West v. Port of Olympia*, 146 Wn. App. 108, 123, 192 P.3d 926 (2008)). "A court using this method multiplies a reasonable attorney rate for the prevailing party by a reasonable number of hours worked, and then has discretion, in rare cases, to adjust the product upward or downward." *Id.* at 869, (citing *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632 (1998), *review denied*, 165 Wn.2d 1050, 206 P.3d 657 (2009)).

A court has a duty, when awarding fees, to specifically set forth the calculation it employs and make findings of fact as to the reasonableness of any such award. An attorney fee award must be supported by findings of fact and conclusions of law that sufficiently establish an adequate record for review. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). The trial court's failure to do so in this case is a direct result of Wolfe's failure to provide sufficient proof of attorney fees associated with his successful portion of the PRA claims.

The billing records submitted by Wolfe assume that all attorney fees incurred by him are recoverable regardless of whether they relate to his unsuccessful claims. Moreover, they do not provide sufficient detail in order to parse out which fees are attributable to his successful claims, (i.e. the three 1998 "rip-rap" project records.) CP at 2456-2556, 2636-41, 2693-96, 3117-21. Since it is Wolfe's burden to establish sufficient evidence of his attorney fees, this Court should remand this matter for further proceedings to determine the reasonable attorney fees associated with Wolfe's successful portion of his claims.

D. The State Should Not Incur Penalties for Non-Compliance with Public Records Act

This Court has considerable discretion to award penalty amounts ranging from \$0.00 to \$100.00 per day for PRA violations, and the analysis

used by courts to determine the amount of penalties is found in the Washington State Supreme Court case of *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 466-67, 229 P.3d 735 (2010) (*Yousoufian III*).

The penalty range for PRA actions is, “within the discretion of the court to award such person an amount 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) (amended in 2011 to remove \$5.00 per day minimum).

“The minimum statutory penalty should be reserved for instances of less egregious agency conduct, such as those instances in which the agency has acted in good faith but, through an understandable misinterpretation of the PDA [Public Disclosure Act] or failure to locate records, has failed to respond adequately.” *Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 60 P.3d 667 (2003) (*Yousoufian I*).

Recognizing sterile calculations could lead to huge penalty awards despite the absence of bad faith by an agency, the court in *Yousoufian II* held that the PRA, “did not require the assessment of per day penalties for each requested record.” *Bricker v. Dep’t of Labor and Indus.*, 164 Wn. App. 16, 262 P.3d 121 (2011) (citing *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004) (*Yousoufian II*)). The PDA’s purpose of promoting access to public records is served by basing penalties

on the agency's culpability. *Id.* at 21 (citing *Yousoufian II*, 152 Wn.2d at 435).

WSDOT lacked clarity in the evolving nature of Wolfe's requests. Initially his request focused on a specific project almost thirty years in the past. It was only after Wolfe later requested bank stabilization records for the Naselle River that another area of potential records was considered and searched. The three additional records were not located where the other responsive records produced to Wolfe were found in 2008, but once found in the regional environmental services office, they were immediately produced.

The trial court found that all records were produced timely once they were located. The trial court found there "was nothing like that" when referring to Wolfe's assertion of WSDOT "withholding something or not looking for something." CP at 2072. WSDOT promptly responded to Wolfe's PRA requests by initiating a comprehensive search and then promptly produced all responsive records when they were located.

The trial court characterized WSDOT's efforts as an "honest attempt to try to comply with the Public Records Act." CP at 3273. Failure to comply with the PRA can be innocent. As the trial court stated, "[w]ell, I don't think that they knew that there was another project." CP at 3274.

This case presents the Court with the desirable circumstance of what

happens when proper training and supervision promote fidelity to the PRA. WSDOT acted swiftly at all times when analyzing Wolfe's specific requests, assigning numerous personnel to pursue all avenues of the search and establishing open communications with Wolfe to better respond to his requests. Within weeks, it completed an extensive search for all sources of information and gathered responsive records for Wolfe to review. WSDOT took Wolfe's requests seriously, acted professionally, and reflected the public policy of the State of Washington to be accountable to its citizens. This is work that should not be penalized. To do so creates a standard that is so difficult for agency staff to achieve that it risks creating a disincentive to provide prompt and thorough responses to PRA requests – a “why bother” standard.

The trial court noted the reasonableness of WSDOT's explanation for why it did not produce the 1998 “rip-rap” project records in 2008 stating, “the request for public records disclosure of the specific bridge work that occurred long before. The passage of time, change of personnel, some of those issues were discussed but there was, nevertheless, throughout what I characterize as an honest attempt to try to comply with the Public Records Act.” CP at 3273.

WSDOT's open dialogue with Wolfe and efforts to satisfy his continually evolving records requests are the epitome of publically

accountable helpfulness. This helpfulness allowed WSDOT to gather such a large volume of records for Wolfe's review. As the trial court noted, "I am finding that WSDOT has presented sufficient evidence through the declarations of various parties that the records were present at the time that the review took place by Wolfe in a number of boxes." CP at 3270.

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. Here, that system provided Wolfe the opportunity to review boxes of potentially helpful records and quickly receive hundreds of pages of responsive records. WSDOT personnel assisting Wolfe in his search had sufficient resources to utilize: (1) a searchable archive system; (2) an internal communications policy that coordinated WSDOT personnel; (3) document retention policies that preserved the records; and, most importantly, (4) a culture of public accountability that led its personnel to maintain communications with Wolfe to better satisfy his evolving requests. CP at 1314-16, 1516-21, 1523-26. In the words of Judge Tabor, "an honest attempt." CP at 3272.

For these reasons, the trial court should have assessed WSDOT's penalty in this case as zero. This case involves an honest mistake and not any hint of indifference or other bad acts by WSDOT.

VIII. CONCLUSION

It is appropriate to view the rights bestowed upon records seekers by the PRA broadly and with an eye on transparency and accountability. However, the PRA clearly sets forth a statute of limitations provision of one year. The facts of this case are clear: Wolfe waited four years to file his PRA lawsuit, and his reasons why the limitations period should be tolled are unpersuasive. Thus, all his PRA claims are time-barred. Even if Wolfe's equitable tolling argument was valid, it fails as to the three 1998 "rip-rap" project records because WSDOT performed a diligent search in 2008. While the trial court was correct in most of its findings, it erroneously excluded the three 1998 "rip-rap" project records from the statute of limitations, and it improperly assessed penalties and awarded attorney fees. In light of this, and for all the reasons stated above, this Court should affirm in part, reverse in part, and remand for further proceedings.

RESPECTFULLY SUBMITTED this 4th day of May 2018.
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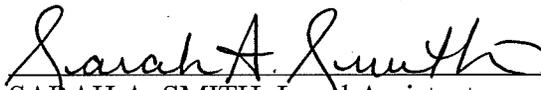
I, Sarah A. Smith, an employee of the Transportation and Public Construction Division of the Office of the Attorney General of Washington, certify that on this day a true copy of the foregoing Brief of Respondent/Cross-Appellant was served on the following parties as indicated below:

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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.

DATED this 4th day of May 2018, at Tumwater, Washington.


SARAH A. SMITH, Legal Assistant

ATTORNEY GENERAL'S OFFICE/TRANSPORTATION AND PUBLIC CONSTRUCTION

May 04, 2018 - 4:18 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50894-0
Appellate Court Case Title: Charles Wolfe, App./Cross-Respondent v. Dept. of Transportation, Res./Cross-Appellant
Superior Court Case Number: 12-2-01059-2

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