

FILED
Court of Appeals
Division II
State of Washington
7/30/2019 11:21 AM
No. 52561-5-II

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

KIMBERLYN DOTSON,

Appellant,

vs.

PIERCE COUNTY,

Respondents.

REPLY BRIEF OF APPELLANT KIMBERLYN DOTSON

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I. INTRODUCTION

The Public Record Act Chapter 42.56 RCW (“PRA”) is a strongly worded mandate for broad disclosure of public records,¹ which must be liberally construed to carry out its purpose.² When the de novo standard of review for an appeal of this PRA grant of summary judgment is properly applied, with the facts viewed in light most favorable to non-moving party, Appellant Dotson prevails in this appeal. This appeal should also be granted for at least the following reasons. Dotson’s PRA action was timely brought based on the clear language of RCW 42.56.550(6), where “Actions under this section must be filed within one year of the agency’s claim of exemption or the last production of a record on a partial or installment basis”. Alternatively, equitable tolling applies here, where Pierce County was aware of responsive records but delayed production until after its enforcement hearing where the records were needed. Under the PRA, the County was required to disclose and produce records it possesses, and its duty to produce was not limited to just records it “uses” at hearing. The County’s search was not adequate, when it failed to produce responsive records it knew it possessed. The County also is

¹ *Burt v. Dep’t of Corr.*, 168 Wash.2d 828, 832, 231 P.3d 191 (2010) (quoting *Soter v. Cowles Publ’g Co.*, 162 Wash.2d 716, 731, 174 P.3d 60 (2007)), *Rental Hous. Ass’n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 535, 199 P.3d 393 (2009).

² *Soter v. Cowles Publ’g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007); RCW 42.56.030.

incorrect that error was not assigned to trial court's "sua sponte" equitable tolling comments. Last, Pierce County violated the PRA in additional, multiple ways in response to Ms. Dotson's request.

II. ANALYSIS

A. When De Novo Standard of Review for Appeal of PRA Summary Judgment is Properly Applied with Facts Viewed In Light Most Favorable to Non Moving Party – Ms Dotson Prevails.

1. Reviews of PRA Review and Summary Judgment Are De Novo

Agency actions under the PRA are subject to de novo review. RCW 42.56.550(3). On review, Courts take into account the policy of the PRA that free and open examination of public records is in the public interest, even if examination may cause inconvenience or embarrassment. RCW 42.56.550(3). Interpretations of law are similarly reviewed de novo.³ Grants of CR 56 summary judgments are also reviewed de novo, and Courts engage in the same inquiry as the trial court.⁴ In such appeals, all the facts submitted and the reasonable inferences there from are considered in the light most favorable to the nonmoving party.⁵

³ *State v. Kintz*, 169 Wash.2d 537, 545, 238 P.3d 470 (2010) (quoting *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009)).

⁴ *Lallas v. Skagit County*, 167 Wash.2d 861, 864, 225 P.3d 910 (2009) (citing *Campbell v. Ticor Title Ins. Co.*, 166 Wash.2d 466, 470, 209 P.3d 859 (2009)), as quoted in *Neighborhood Alliance of Spokane County v. County of Spokane*, 261 P.3d 119, 172 Wash.2d 702 (Wash., 2011).

⁵ *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 38, 785 P.2d 447 (1990). *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (quoting *Dickenson v.*

2. On De Novo Review, This Court Should Grant Dotson Appeal, Reverse County Summary Judgment and Grant Dotson's

The Trial Court erred as a matter of law when it granted the County's Motion and denied Appellant Dotson's. The record here establishes the below undisputed, material facts.

1. Appellant Dotson's PRA request to Pierce County ("County") was made May 19, 2016 (evening of May 18). CP 830.
2. The County admittedly provided records on an installment basis. CP 832.
3. Ms. Dotson sought the County records to prepare for an October 26, 2016 enforcement hearing pursued by the County against her. CP 3, 37.
4. At the enforcement hearing, the County numerous times referenced records from County File 553137 that had not been disclosed or produced to Ms Dotson in response to her records request. CP 40, 41, 46, 48, 60, 149, 302, 304, 341, 356, and 366.
5. The County Staffer who used the records at hearing had been aware of the County File 553137 since November 2015, a date well in advance of Ms Dotson's May 2016 records request. CP 663, copy attached as **Appendix 1**. But that same Staffer only disclosed and produced one, lone record from that County File 553137 in response to Ms. Dotson's request. CP 663.
6. The County Hearing Examiner denied Ms. Dotson's enforcement appeal, CP 37, expressly based records from County File 553137 that had not been disclosed or produced to Ms. Dotson in response to her records request. CP 40, 41, 46, 48, 60, 149, 302, 304, 341, 356, and 366.
7. Ms. Dotson only became aware of the additional, undisclosed, silently

Edwards, 105 Wn.2d 457, 461, 716 P.2d 814 (1986); and *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)).

withheld County records, on October 26, 2016, when the County used them against her at the land use enforcement hearing, and issued its last installment production of records, which predated this lawsuit.⁶ CP 877 and CP 838.

8. Public Records Official Ms. Predoehl's Oct. 26, 2016 cover letter concedes that, "the record of these visits falls within the dates of the Public Records Request you submitted on May 20, 2016 (your date range was January 2014 to present – May 20, 2016)". CP 635, copy attached as **Appendix 2**.
9. Ms. Dotson filed this suit October 25, 2017, which is within one year of the County's last installment of records released. CP 1-6.
10. The County even later provided two responsive records on November 7, 2017 (538 days), CP 839, and even more additional records on March 2, 2018, consisting of the Habitat Assessment Report from County File 553137, prepared for the adjacent site and which was repeatedly referenced in the Hearing Examiner Code Enforcement proceedings against Ms. Dotson. CP 839 and see Assessment Report at CP 637-658.
11. The County produced a generic search form for Dotson records, copy at CP 854-856 and attached as **Appendix 3**, but the County does NOT provide any Van Haren search form. Id.

Based on the above undisputed material facts, there can be no dispute of the following conclusions of law:

1. Ms. Dotson diligently submitted her public records request to the County in May 2016 in advance of her October 2016 land use enforcement hearing.
2. On October 26, 2016 Ms. Dotson learned of the County's silently

⁶ TR Appendix A to Dotson Opening Brief at 18: 3-7, "MS. LAKE: Your Honor, actually, these claims relate not so much to the June 23rd documents, even the October 26th documents, they pertain to the November 2nd documents and the March 2nd, 2018 documents because remember the context of what – of how this happened. We filed a records request because Ms. Dotson was charged by the County with a land use violation. We said, what do you have? What do you know that we don't?" And see CP 14, 31, 37-50.

withheld records which were used against her at hearing that date, and she received the County's last installment of records.

3. Ms. Dotson diligently and timely filed her PRA action on October 25, 2017, within one year of the County's production of its (at that time) last installment of records responsive to her request.
4. Alternatively, the record shows predicates for equitable tolling of statute of limitation are met in this case, (bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff).⁷
3. The County failed to perform an adequate search for records responsive to Ms. Dotson's request, as the County knew it possessed responsive records, but did not produce or disclose. CP 838-839, CP 663 (copy attached).
4. The County silently withheld responsive record and failed to disclose or produce them until after the County's enforcement hearing against her in violation of the PRA. CP 663 and CP 635 and CP 637-658.
5. The County failed to provide "fullest assistance" to Ms. Dotson and even if perceived to be needed, sought no clarification.
6. This appeal should be granted.

3. County Wrong: Facts are Viewed in the Light Most Favorable to Dotson

The County concedes that this Appeals Court hears this PRA case de novo, but cites *Brouillet*⁸ to wrongly argue that because the Court ruled on the merits of the case, not Summary Judgement, "the facts will not be construed in the light most favorable to the non-prevailing party."⁹ In fact,

⁷ *Millay*, 135 Wn.2d at 206. *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 812, 818 P.2d 1362 (1991).

⁸ *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788 (1990) 791 P.2d 526.

⁹ *County Appellate Response Brief* at 18.

the Trial Court granted the County's Summary Motion, did not rule on the merits and the *Bruillett* case doesn't apply. First, the Verbatim Report of proceedings ("VRP") makes clear that the Trial Court advised it would bifurcate the statute of limitation summary judgment motion, hear that motion first and only after that Summary Judgment Motion was ruled on, would the Court turn to the merits.¹⁰ The County concedes the Court dismissed this case based precisely on the statute of limitation Summary Judgment motion.¹¹ This is further bore out as when Appellant's SJ response concluded, and counsel then attempted to respond to the merits and the equitable tolling argument, she was cut off by the Court.¹²

Last, *Bruillet* doesn't support what the County argues. That court didn't apply the "light most favorable" standard expressly because in *Bruillet* – no party had moved for Summary Judgement, ("This case will

¹⁰ "There is the statute of limitations issue and then there is the underlying, well, the rest of the merits let's say. And so given that we would need to pass through that first hurdle of the statute of limitations, I would like to bifurcate this argument, and **then we will hear argument solely on the statute of limitations issue.... And then I will rule on that, and then contingent upon that ruling, we will then get to the merits that remain other than the statute of limitations. So with that being said, I will hear from Pierce County first because they are the moving party let's say with respect to statute of limitations issues**". VRP 4:12 – 5:3.

¹¹ See *County Appeal Brief* at 34 reference to VRP 3-4, dismissed on statute of limitation motion grounds.

¹² VRP 25: 21 – 26:11: "THE COURT: Thank you.

MS. LAKE: Oh, I will add one thing because **the County kind of mixed in a little bit of the substantive argument**. They claim that we were put on notice of the fact that records were missing by the one record of the adjacent parcel, but that's not true, Your Honor. As you know --

THE COURT: "I will indicate you don't need to get into that because that is not going to have any material impact on my ruling whatsoever".

be reviewed de novo, but the facts will not be construed in the light most favorable to the school system *inasmuch as no party moved for summary judgment below.*)¹³ Here, unquestionably, both parties had moved for Summary Judgment. The Trial Court in error granted the County's Motion, distinguishing this present case from *Bruillet*. Accordingly, in this de novo review, the facts are viewed in light most favorable to the non-moving party –Dotson.

B. This Action was Timely Brought Based on the Clear Language of RCW 42.56.550(6).

1. Clear Wording of RCW 42.56.550(6) Applies.

RCW 42.56.550(6) expressly provides: “Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.” Emphasis provided.¹⁴ It is undisputed that the County issued its records on an installment basis to Ms. Dotson's records request. CP 832. The County produced its last (prelitigation) installment on October 26, 2016.¹⁵ In her October 26, 2016 release of records, Public Records Official Ms Predoehl concedes that the records released that day fall squarely within Ms. Dotson's records request: “the record of these visits falls within the dates

¹³ Id.

¹⁴ Appellant has found no case that supports that an entity designating a closing date/final response stops the statute of limitation where, after that date, more responsive records are released.

¹⁵ CP 877, relying on *Predoehl Dec @ CP 838*.

of the Public Records Request you submitted on May 20, 2016 (your date range was January 2014 to present – May 20, 2016)”. CP 635. This lawsuit was timely filed within one year on October 25, 2016.

2. *Belenski* Doesn’t Apply Here

The County wrongly relies *Belenski v. Jefferson Cty.*, 186 Wn.2d 452, 457, 378 P.3d 176, 179 (2016) to claim this action was not timely filed. The County is misguided. *Belenski* has no bearing on present facts at all. *Belenski* dealt with the issue of which statute of limitation should rule (one or two years), where neither of the two prongs described in RCW 42.56.550(6) clearly apply. RCW 42.56.550(6) speaks expressly to when the agency has made a (1) claim of exemption or (2) last installment.¹⁶ In *Belenski*, the responding agency claimed it had no records, thus had not either claimed any exemption or issued any installments. The *Belenski* Court had no trouble in ruling that in fact the one-year limitation applies in all cases.¹⁷ In this case, no such confusion exists, as the plain language of RCW 42.56.550(6) applies: the statute commences to run on the last production of a record when issued on a partial or installment basis. Here, the undisputed facts show that the County’s last installment of records

¹⁶ RCW 42.56.550(6), “Actions under this section must be filed within one year of the agency’s claim of exemption or the last production of a record on a partial or installment basis.”

¹⁷ Of note: The *Belenski* court also remanded for the trial court to determine whether equitable estoppel would apply to extend the limitation period further. That Court’s remand action evidences the lengths courts go to strictly enforce the PRA laws

issued October 26, 2016. The correct statute of limitation is one year from that last production, pursuant to RCW 42.56.550(6). This case was timely filed on October 25, 2017. End of discussion. The County appears to argue that an agency can artificially trigger the limitation period by declaring a production closed, even where records thereafter continue to issue (here at least twice) on installment basis. *Belenski* clearly doesn't address those facts at all. This argument is *directly contrary* to the express language of RCW 42.56.550(6), where "Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis," and undermines PRA's purpose that "Full access to.. the conduct of government... must be assured."¹⁸

3. *White v. Lakewood* Supports Ms Dotson's Position that Limitation Runs from Date the Last Record is Produced.

White v. City of Lakewood, 194 Wn. App. 778 (5/25/2016)¹⁹ flatly does **not** support the County but **does support** Ms. Dotson's position that the PRA limitation period runs from the date the agency produces its last installment records.²⁰ In *White*, the Appeals Court analyzed the

¹⁸ *Soter v. Cowles Pub Co.*, 162 Wn2nd 716, 731,174 P.3rd 60 (2007) RCW 42.56.030.

¹⁹ cited at County *Response* 25-26.

²⁰ White filed three requests. Following a hearing on the motions, the superior court concluded White's claims arising out of his first and second PRA request were time-barred under RCW 42.56.550(6). The Superior Court found Lakewood violated the PRA as to the third request.

commencement of the limitation period of the second request, correctly keying in on the production of records date: “Therefore, the relevant inquiry is, when did the City produce the records, thereby triggering the one-year time-bar under RCW 42.56.550(6).”²¹ That section of that Appeal Court’s ruling is even labeled, “*The City’s Last Production of Records*” and delves into the definition of “production”.²² Thus, the ruling in *White* precisely supports Ms Dotson’s position that an agency’s last production – not a claimed closure – is the triggering event for the limitation period.²³ The County’s description of the Court’s holding in *White* is so inaccurate it is unrecognizable.²⁴ The County’s reference to the

²¹ *White* at 374 P.3d 292.

²² *White* at 374 P.3d 293, “The terms “production” and “produce” are not defined in chapter 42.56 RCW et seq., Chapter 44-14 WAC et seq., or in accompanying case law. Generally, “production” is defined as “the act or process of producing, bringing forth, or making ... the creation of utility: the making of goods available for human wants.” WEBSTER’S THIRD INTERNATIONAL DICTIONARY 1810 (2001). Webster’s defines “produce” as “to bring forward: lead forth: offer to view or notice: EXHIBIT, SHOW ... to bring forth: give birth to: BEAR, GENERATE, YIELD ... to compose, create, or bring out by intellectual or physical effort.” WEBSTER’S, supra at 1810. Black’s Law Dictionary similarly defines “produce” as “1. [t]o bring into existence; to create. 2. [t]o provide (a document, witness, etc.) in response to subpoena or discovery request.” BLACK’S LAW DICTIONARY 1401 (10th ed. 2004)...

Thus, we hold that an agency satisfies the “production” requirement of RCW 42.56.550(6) when it brings all of the documents together and makes that collection of documents available to a delivery service for delivery to the requestor. This interpretation of the “production” requirement is in accord with its plain meaning, and its use in chapter 42.56 RCW and chapter 44-14 WAC.”

²³ The Appeals Court also found White’s claim with respect to his first request is not time-barred, because Lakewood’s claim of exemption was not valid, and that the superior court *erred* in dismissing White’s claims relating to his first request as time-barred. *White* at 374 P.3d 289.

²⁴ (“The city’s first production of the responsive search warrant records occurring more than a year after the City closed its response to the second request was not treated as an “installment” that extended the statute of limitations.”) *County Response Brief* at 26.

City's production of search warrant records in *White* relates to the third request, where the Superior Court found Lakewood had violated the PRA, and imposed penalties of \$10 a day."²⁵ White appealed the Superior Court ruling, Lakewood did not, so the appellant decision affects only White's first and second PRR, not the third request to which the County refers. *White* simply is no support for the County.

C. Alternatively, Equitable Tolling Applies Where County was Aware of Responsive Records But Delayed Production Until After the Hearing Where Records Were Needed

Alternatively, this record also supports a finding that equitable tolling applies and/or supports a remand for the trial court to determine. The PRA statute of limitations may be subject to equitable tolling.²⁶ Equitable tolling allows a court to toll the statute of limitations when justice requires.²⁷ "The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff."²⁸ The party who asserts equitable tolling bears the burden of

²⁵ "The City responded to White's third request on October 2, 2012. The City's letter to White claimed the requested records were exempt under RCW 10.97.070(2) and RCW 42.56.240 because releasing the records could interfere with the active investigation. Then, on September 23, 2013, 356 days later, the City provided the requested search warrants and affidavits. "... "With regard to White's claims arising from his third request, the superior court concluded that the City had violated the PRA "by failing to timely provide responsive records and that the City cured its violation by its subsequent production of the records." *White* at 374 P.3d 289.

²⁶ *Belenski v. Jefferson County*, 186 Wn.2d 452, 462, 378 P.3d 176 (2016).

²⁷ *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998).

²⁸ *Millay*, 135 Wn.2d at 206. *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 812, 818 P.2d 1362 (1991).

proof.²⁹ That burden is met here.

1. Current Record Supports Equitable Tolling

At argument before the Trial Court, the County conceded certain acts create an issue of equitable tolling, which is exactly what happened here:

Now, if we had sat on it knowing that it was there and that had come out in discovery, I think that would create an issue of equitable tolling. You'd have to kind of see what facts came out. But that would be the type of action that would say, well, wait a minute, why didn't you give it up as soon as you found out about it?³⁰

This record shows that County Staffer Ms. Van Haren (“Van Haren”) knew the County possessed responsive records in County File 553137 early on in her enforcement work against Ms. Dotson, as she accessed those records from County archives on Nov. 9, 2015.³¹ Later after she knew of and accessed those File 553137 records, Van Haren was asked to respond to the Dotson Public Records Request (“PRR”) on May, 2016,³² but did not produce that file. To use the County’s words, Van Haren “sat on it knowing it was there”. This is exactly the action that prompts both the County’s question, “why didn’t you give it up” and supports a finding of equitable tolling. To argue away the significance of Van Haren’s knowledge of and failure to timely produce the 553137 File records, the

²⁹ *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 379, 223 P.3d 1172 (2009).
Wolfe v. Wash. State Dep't of Transp. (Wash. App., 2019)

³⁰ VPR 12:18-25.

³¹ *County Appeals Brief* at 8 and CP 663.

³² *County Appeals Brief* at 8, CP 664.

County attempts many inaccurate sleights of hand.

2. County Required to Disclose and Produce Records it Possesses, not Limited to Just Records It “Uses.”

First, the County improperly defines PRA ‘responsive records’ as those “used” by the County at the enforcement hearing, where the proper focus of an adequate PRR response is the production of all responsive records possessed by the County, and repeatedly relies on this false distinction.

Recall that the County was enforcing Ms Dotson for an alleged stream violation.³³ In simple terms, the existence of a stream requires an Assessment Report and a “stream typing”.³⁴ The County could not legally access Ms Dotson’s property, so the County reached back to a 2007 stream typing application and Assessment Report prepared for an adjacent property (County File 553137) and from there, argued the conditions on the Dotson property were the same.³⁵ To prepare, Ms. Dotson requested records that related to the enforcement action for her property.³⁶ The

³³ CP 39

³⁴ Cp 109 and CP 233 -PCC 18E40.030B, CP 234-5 PCC 18E.40.020E, CP 235 PCC 18E.10.140- Appendix A(E) and CP 238-339. CP 40, 41 and 42.

³⁵CP 41: Pierce County Staff “...looked at adjacent parcels to see of a water typing review was done. If so, then Appellant’s parcel would have exactly the same stream tying. Shel found a stream typing done on the same stream on an abutting parcel. It was determined that a F 1 stream requires a 150-foot-wide buffer pursuant to 18E.40.060(b)(3).”

³⁶ CP 631: “A copy of any and all records, correspondence, and documentation including Emails related to Kim Dotson, Parcel Number 04-17-06-2-010, Site Address: 5523 296th St E. Graham, WA concerning: applications, permits, enforcement, cease and desist,

County did not disclose or produce the Assessment Report or other records from the File 553137 in response to her PRR.³⁷ But- at the hearing, the County referenced the File 553137 Assessment Report prepared for the adjacent property. The County Examiner denied Ms. Dotson's enforcement appeal, CP 37, expressly based on the references to the County records from File 553137 that had not been disclosed or produced to Ms. Dotson in response to her records request.³⁸ In defense of its anemic PRR response, the County argues only one "recorded" record ("Recorded Record") from File 553137 was actually "used" by the County at hearing, and thus that was the only record it need disclose in response to Ms. Dotson's PRR.³⁹ The County wholly misstates/misunderstands its

orders, complaints, communications with other agencies, communications with other departments, and or site visitations"

³⁷ CP 34 and CP 38-631 and 636-658.

³⁸ CP 40, 41, 46, 48, 60, 149, 302, 304, 341, 356, and 366.

³⁹ CP 663, Dec of Van Haren, "**On November 9, 2015 I retrieved from county archives a hard copy file for application '55 3137,' which was an application submitted to PALS in 2006 by property owners 'Hansen/Pecheos' ' who were seeking approval to build a single family residence on county tax parcel 0417066004, a property that is adjacent to the property owned by Ms. Dotson.** After I obtained the archived file for application "'553137" I retrieved and reviewed only one document for purposes of my review of Ms. Dotson's property, which was a document entitled "CRITICAL AREA NOTICE FISH AND WILDLIFE HABITAT CONSERVATION AREA AND/OR STREAM BUFFER NO TIC E" dated August 27, 2007 that identified the stream located at 29510 55th Ave East on county tax parcel 0417066004 as an " F1 ' water type. See Exhibit A; Bates 000010-000014 of county PRA response produced June 23, 2016. That document was the final approved and recorded document concerning the "F 1" stream designation for the " Hansen /Pecheos " property, parcel 0417066004, and was the only document and "'data" in the "' 553137 " application file that I used and considered relevant to my purposes concerning the Dotson property. I did not otherwise use or review any other records from the " 553137" application file in the course of my involvement with Ms. Dotson's parcel prior to Ms. Lake's public record request, nor subsequently

duty in response to a public records request. The proper focus of an adequate PRR response is the production of all responsive records possessed by the County. “Washington’s PRA is “a strongly worded mandate for broad disclosure of public records.”⁴⁰ The County as the public agency, bears the burden, beyond material doubt, of showing its search for and production of responsive records was adequate. *Valencia–Lucena v. U.S. Coast Guard*, 336 U.S. App. D.C. 386, 180 F.3d 321, 326 (1999), at 325.⁴¹ The County’s search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents.⁴² What will be considered reasonable will depend on the facts of each case.⁴³ Here, it cannot be said that the County’s search was ‘reasonably calculated to uncover all relevant

for purposes of the administrative appeal hearing held on October 26, 2016.

⁴⁰ *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978).

⁴¹ The Washington state Public Records Act “closely parallels” FOIA and therefore judicial interpretations of FOIA are “particularly helpful in construing” the PRA. *Hearst Corp. v. Hoppe*, 90 Wash.2d 123, 128, 580 P.2d 246 (1978); see *O’Connor v. Dep’t of Soc. & Health Servs.*, 143 Wash.2d 895, 907, 25 P.3d 426 (2001) (cases interpreting FOIA are often considered when interpreting the state act); *Limstrom v. Ladenburg*, 136 Wash.2d 595, 608, 963 P.2d 869 (1998) (same); *Dawson v. Daly*, 120 Wash.2d 782, 791–92, 845 P.2d 995 (1993) (same), *overruled on other grounds by Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wash.2d 243, 884 P.2d 592 (1994)(PAWS). Just as under the PRA, under FOIA there is a doctrine of full disclosure unless information falls under a clearly delineated exemption, the availability of identified records to a member of the public on demand, and a mandate to construe FOIA broadly and its exemptions narrowly. *Hearst*, 90 Wash.2d at 128–29, 580 P.2d 246., as quoted in *Neighborhood Alliance of Spokane County v. County of Spokane*, 261 P.3d 119, 172 Wash.2d 702 (Wash., 2011).

⁴² *Weisberg v. U.S. Dep’t of Justice*, 240 U.S.App. D.C. 339, 745 F.2d 1476, 1485 (1984) (quoting *Weisberg v. U.S. Dep’t of Justice*, 227 U.S.App. D.C. 253, 705 F.2d 1344, 1350–51 (1983)).

⁴³ *Weisberg*, 705 F.2d at 1351

documents’, when Staff was aware of the existence of the responsive records in File 1551357 yet failed to disclose or produce them, except for one record from the File 1551357 that the County “used”. Further, agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered, which it failed to do.⁴⁴ The search should not be limited to one or more places if there are additional sources for the information requested.⁴⁵ Even if Ms. Dotson’s straightforward request was somehow deemed unclear, the County had a duty to seek clarification. "To the extent the City was unclear about the scope of West's request, it had an obligation to request clarification. Because it did not disclose the existence of responsive documents to the request, the County silently withheld those documents and violated the PRA."⁴⁶ The same is true here.

3. County Silently Withheld and Failed to Produce Responsive Records.

Even in the unlikely event that the definition of responsive records is artificially narrowed to only those “used”, it is disingenuous to claim the County did not “use” other records in the 553137 File. The record of the enforcement hearing is replete with Van Haren’s reference to County File

⁴⁴ *Valencia–Lucena v. U.S. Coast Guard*, 336 U.S. App. D.C. 386, 180 F.3d 321, 326 (1999).

⁴⁵ *Valencia–Lucena*, 180 F.3d at 326.

⁴⁶ *West v. City of Tacoma* (Wash. App., 2018).

553137's "2007 Habitat Assessment Report" and "data and information".⁴⁷ The Transcript and Administrative Record

⁴⁷ Ex 1 here refers to the County's Enforcement action Administrative Record, filed with the Trial Court. The County referenced the undisclosed File 553137 records as follows:

Ms Haren prepared a water typing and *looked at adjacent parcels to see if a water typing review was done. If so, the appellant's parcel would have the exact same stream typing. She found a typing done on the same stream on an abutting parcel.* It was determined a F1 stream type that requires a 150-foot-wide buffer pursuant to 18E.40.060(8)(3).

Ex 1⁴⁷, CP 40-41, AR 5- 6.

Upon further questioning by MS. LAKE, MS. VAN HAREN marked the photograph with an x where she saw the stream. She marked the watercourse for the distance she could see it. She marked where she saw the stream from 55th Avenue and the same features (Exhibit L). She also marked the fencing and paddock. She could not see the stream within the paddock from 296th but she saw the paddock and stream from 55th near the north end of the appellant's parcel. DFW did not classify the stream as F1. DNR typed the stream as F1. The County can require a field assessment and generally does. The DNR typing is the beginning point. *A previous delineation occurred in 2007, and stream types are updated every five years per the WAC. Page 2 refers to indicators and page 6 refers to a protected Fish and Wildlife habitat area. In accordance with 18E.40.030(B), once they find an indicator, such requires a site investigation or habitat assessment. This was done in the present case and consisted of a field investigation and typing on an adjacent site.*

Ex 1, CP 41, AR 6.

Ms. Van Haren determined the stream a Type F1 based upon a Habitat Assessment prepared for the same stream for an upstream parcel to the northeast. The stream flows from said parcel through the culvert on 55th Avenue East and onto the appellant's parcel. *Ms. Van Haren testified that the Habitat Assessment was performed by Habitat Technologies, Inc., in 2007,* but did not introduce said assessment into the record.

Ex 1, Hearing Examiner Finding of Fact # 14 at CP, AR 11.

The only evidence of observed, in-field conditions in the area are the 2007 Habitat Assessment for the adjacent parcel and the appellant's assessment prepared by Ms. Van Haren that shows the stream flowing unobstructed across her parcel.

Ex 1, Hearing Examiner Conclusion 4 –CP 48, AR 13

Ms. Van Haren's reliance on the 2007 Habitat Assessment performed by Habitat Technologies for an adjacent upstream property is appropriate for consideration in typing the stream on the appellant's parcel, especially when considered with observations of the stream flowing freely within culverts where it enters and leaves appellant's parcel.

Ex 1, Hearing Examiner Conclusion 4 – CP 48, AR 13.

The appellant has appropriately highlighted some evidentiary weaknesses in the County's case regarding the water typing survey and habitat assessment. *During the hearing, Ms. Van Haren testified that she relied on* her observations from the

overwhelmingly establish how the County expressly used the undisclosed

roadways, from PALS critical area maps showing a hydrocenter line (Staff Exhibit SB) and data gathered from a fish and wildlife habitat assessment on a neighboring property.

Ex 1 County Brief to Examiner, page 5:6-11, CP 149, AR 114.

In addition, Ms. Van Haren admitted that she relied on data gathered during a fish and wildlife habitat assessment on a neighboring property

Ex 1 County Brief to Examiner, page 5:23-25, CP 149, AR 114.

10 Q: It states in here, "Based upon our research and site 11 visits, a stream was identified on your parcel. This drainage course was typed as an F1 through **application 553137** on upstream parcel 0417066004"; is that correct?

14 A: That is correct.

TR 35: 10-14, CP 302. (Questioning of Ms Van Haren).

A: Part of the fish and wildlife review process is to type the stream. And in conjunction with that, you will look at data on adjacent parcels as part of that process. And in this case, the immediately adjacent parcel had gone through the typing system, so that information would be applicable to this site also, and it was used.

TR 37: 10-14, CP 304. (Questioning of Ms Van Haren).

So that is as -- what I did is I went to and I looked at the parcels around it to see if there had been any stream typing done on that -- on that drainage center line or hydro center line and found that that had been done on the immediately adjacent upstream parcel. So I used that data as part of my stream typing process.

Q: Okay. And what was the result of this study -- or this process that you just described?

A: The stream typing that was done on the adjacent parcels indicated that it was an F1 parcel. So that was used for - in conjunction with typing the stream on this parcel --on the Dotson parcel.

TR 74:10-21, CP 341. (Questioning of Ms Van Haren).

Q: Not being argumentative; I just want to be real clear.

These are your words. "This drainage course was typed as 14 an F1 through application 553137"; yes?

A: Yes.

TR 89: 13-15, CP 356. (Questioning of Ms Van Haren).

Q: And so it's your contention that this habitat assessment was done for the Dotson property?

A: Yes. Yes. Sorry. I didn't mean to --

Q: And what does that consist of?

A: It would have -- the field investigation that was done, and then the research to -- that incorporated the data on the adjacent site.

TR 99: 16: 4-11. CP 366. (Questioning of Ms Van Haren).

File 553137 Assessment Report, data and information in Ms Dotson’s land use enforcement case.

4. County Did Not Timely Disclose / Produce Responsive Records.

RCW 42.56.100 requires an agency to have rules in place to provide the “most timely possible action on requests.”⁴⁸ RCW 42.56.080 requires an agency to make records “promptly available.” In addition, an agency must have procedures in place to provide the “fullest assistance” to a public records requestor. RCW 42.56.100. To deflect from its untimely production of records, the County shifts the focus of the timing of when the record was released away from the date of Van Haren’s knowledge of the File 553137 records (in November of 2015, which pre-dates Dotson’s records request) to instead highlight that the records were ‘quickly released’ soon after when the County’s Records Officer – Ms. Proedoeh became aware of these records. Instead, the relevant timeframe from which to measure if the County timely disclosed its records is from (1) the

⁴⁸ See also WAC 44-14-04003(2) (Attorney General’s non-binding Model Rules on Public Records). While technically “non-binding,” several recent court decisions have adopted other provisions of the Model Rules. *See, e.g., Beal v. City of Seattle*, 150 Wn. App. 865, 876 (2009) (“While the model rules are not binding on the [agency] we agree that they contain persuasive reasoning.”) (footnote omitted); *O’Neill v. City of Shoreline*, ___ Wn.2d ___, 2010 WL 3911347 at 25 (Oct. 7, 2010); *Burt v. Dept. of Corrections*, 168 Wn.2d 828, 835, n.4 (2010); *Mechling v. City of Monroe*, 152 Wn. App. 830, 849 (2009); *Rental Housing Ass’n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 539 & 541 (2009); *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 753-4 (2007). Some courts have not adopted specific Model Rules. *See Koenig v. Pierce County*, 151 Wn. App. 221, 233-34, 211 P.3d 428 (2009); *Building Industry Ass’n of Wash. v. Pierce County*, 152 Wn. App. 720, 736-37, 218 P.3d 196 (2009).

date of Ms. Dotson's records request (May 19, 2016) at which time Van Haren already had knowledge of the responsive file 553137 (November 9, 2015) to (2) when those records eventually were released to Ms. Dotson (March 2, 2018), some 21 months later. CP 807-808. Significantly, the Supreme Court has repeatedly denounced silent withholding, noting that an "agency's compliance with the Public Records Act is only as reliable as the weakest link in the chain," here Van Haren.⁴⁹

5. County PRR Compliance Is Properly Judged Against the Actual Request and Not What County Staff Misinterpreted the Request to be.

Fourth, the County attempts to defend its actions by improperly recasting the scope of Ms Dotson's record request from what was *actually requested*, to what Van Haren *believed was requested*.⁵⁰ It is irrelevant that the silently withheld records were not disclosed by mistake, inadvertence or due to "rushing". A good faith effort or County's claim that County "substantially complied" is irrelevant. Administrative inconvenience or difficulty does not excuse strict compliance with the

⁴⁹ *Progressive Animal Welfare Soc'y v. Univ. of Wash.* 125 Wn.2d 243, 269- 71, 884 P.2d 592 (1994) (PAWS II), *Rental Ass'n v. City of Des Moines*, 165 Wn.2d 525, 540, 199 P.3d 393 (2009).

⁵⁰ It is of no consequence as the County argues at page 11 of its Response Brief, that Van Haren "understood the request as seeking any documents that she had used or prepared for purposes of the [Dotson] application and enforcement actions concerning Dotson's property"...and..... "it did not occur to her at any time that records from the "553137" application file other than the one document she had retrieved and used were responsive to the request."

Public Disclosure Act.⁵¹ Good faith and reasonableness does not negate the agency's duty of strict compliance.⁵² The PRA is a strongly worded mandate for disclosure of public records.⁵³ The PRA is to be liberally construed in favor of disclosure and production of public records.⁵⁴

County Staff's narrow reading of Ms Dotson's PRA request was unreasonable. The PRA treats a failure to properly respond as a denial.⁵⁵

6. County Incorrect that Error Was Not Assigned to Court's "Sua Sponte" Equitable Tolling comments.

Ms Dotson clearly assigned error to the Trial Court's sua sponte remarks and its failure to apply equitable estoppel. Expressly included in "APPELLANT'S STATEMENT OF ISSUES & ASSIGNMENTS OF ERROR", at B.5 is the assignment that "The Trial Court Erred in Ruling Ms. Dotson's Action Was Time-Barred; Equitable Estoppel Applies".⁵⁶ Further, Ms Dotson asserted in her Opening Brief that "this Appeals Court

⁵¹ *Zink v. City of Mesa* 140, Wash. App. 328, 166 P.3d 738 (2007).

⁵² *Zink*, 140 at 340.

⁵³ *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702 (2011).

⁵⁴ RCW 42.56.030.

⁵⁵ *Id.* Last, the County's "fact" section contains a curious statement to the effect that Ms Dotson's records request was not "amended" to request records related to File/Application 553137. *County Response Brief* at 14. This is another County sleight of hand, which seeks to impermissibly shift the burden for records compliance from the public agency to the requestor. This is not Washington law. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records. RCW 42.56.550.

⁵⁶ *Appellate Opening Brief* at viii.

should find that equitable tolling applies,”⁵⁷ and then analogized the factors which support equitable estoppel by describing how, like in *Belenski*, the county’s alleged “false response” never triggered the statute of limitations.⁵⁸ Ms. Dotson’s Opening Brief also fully develops her argument in support.⁵⁹ Further, the County admits that the Trial Court “sua sponte” raised equitable estoppel⁶⁰. The transcript also evidences that the Appellant’s legal Counsel attempted to address the equitable tolling argument but was cut off by the Court.⁶¹ An issue is adequately preserved if that issue is called out in briefing with reasonable clarity. (Issue considered because “This court will address the assignment of error because the issue is well framed by the record and briefing.”)⁶² Whether or not a party sets forth assignments of error for each issue on appeal, this court will reach the merits if the issues are reasonably clear from the brief, the opposing party has not been prejudiced and this court has not been

⁵⁷ *Appellate Opening Brief* at 23.

⁵⁸ “This equitable tolling concept is the only portion of the *Belenski* case that arguably applies to this case, as more fully analyzed in the following section.” *Appellate Opening Brief* at 23.

⁵⁹ *Appellate Opening Brief* at 20- 23.

⁶⁰ County Brief at 36.

⁶¹ VRP at 25:21-26:11.

⁶² *Wolf v. Columbia Sch. Dist. No. 400*, 86 Wash. App. 772, 776, 938 P.2d 357, 359 (Div. 3, 1997) citing *Lewis v. Estate of Lewis*, 45 Wash. App. 387, 389, 725 P.2d 644, 646 (Div. 1, 1986) (Review of finding of fact allowed if briefing “clearly indicates that she is challenging the finding” despite not expressly challenging finding pursuant to procedural rule RAP 10.3.);

overly inconvenienced.⁶³ Also, it is patently untrue as the County claims⁶⁴ that in *Belenski* “the Supreme Court clearly indicated that it [equitable tolling] must be raised in the trial court.” *Belenski* says no such thing. Instead the Supreme Court recognized that in order to carry out the PRA’s strong mandate for disclosure of records and its requirement to liberally interpret the statute to effectuate that purpose, equitable principles must apply.⁶⁵ Those same equitable considerations are at play here as well. As demonstrated, the County failed to disclose or produce County File 553137 records. Ms Dotson was utterly unaware that the undisclosed County File 553137 records would be used against her until the date of the enforcement hearing October 26, 2016, which was also the date of the County’s last installment release. She brought her PRA suit within the following one-year limitation period. These undisputed facts support this Appeals Court finding on equitable tolling applies, or alternatively, remanding to the Trial Court to make that determination.

⁶³ *State v. Olson*, 126 Wash.2d 315, 323, 893 P.2d 629 (1995).

⁶⁴ County Response Brief at 38.

⁶⁵ “However, *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. 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 before filing his claim. In light of these issues, we remand this case to the trial court to resolve any factual disputes and to determine whether the doctrine of equitable tolling applies to toll the statute of limitations in this case.” *Belenski* at 175-176.

D. Pierce County Failed to Undertake an Adequate Search

An agency's search for records must be reasonably calculated to uncover all relevant documents.⁶⁶ A search that does not meet this standard constitutes a violation of the PRA and subjects the agency to daily penalties.⁶⁷ The County as the public agency, bears the burden, beyond material doubt, of showing its search was adequate.⁶⁸ Here, Pierce County cannot meet that burden. The County disingenuously describes Van Haren's search as adequate, or "in good faith and with due diligence;" but Van Haren was aware of the File/Application 553137 months before Ms Dotson submitted her records request, and yet Van Haren failed to disclose or produce those records. The focus of the inquiry is whether the County search was adequate.⁶⁹ 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.⁷⁰ What will be considered reasonable will depend on the facts of each case.⁷¹ Here, it cannot be said

⁶⁶ *Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 720, 261 P.3d 119 (2011); RCW 42.56.070(1).

⁶⁷ *Id.*, at 724.

⁶⁸ *Valencia–Lucena v. U.S. Coast Guard*, 336 U.S. App. D.C. 386, 180 F.3d 321, 326 (1999), at 325.

⁶⁹ *Citizens Comm'n on Human Rights v. Food & Drug Admin.*, 45 F.3d 1325, 1328 (9th Cir.1995); *Weisberg v. U.S. Dep't of Justice*, 240 U.S.App. D.C. 339, 745 F.2d 1476, 1485 (1984) (quoting *Weisberg v. U.S. Dep't of Justice*, 227 U.S.App. D.C. 253, 705 F.2d 1344, 1350–51 (1983)).

⁷⁰ *Weisberg v. U.S. Dep't of Justice*, 240 U.S.App. D.C. 339, 745 F.2d 1476, 1485 (1984) (quoting *Weisberg v. U.S. Dep't of Justice*, 227 U.S.App. D.C. 253, 705 F.2d 1344, 1350–51 (1983)).

⁷¹ *Weisberg*, 705 F.2d at 1351

that the County’s search was ‘reasonably calculated to uncover all relevant documents’, when Staff was aware of the existence of the responsive records in File 1551357 yet failed to disclose or produce them. Indeed, “the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested.”⁷² The County was duty bound to follow obvious leads,⁷³ which here it failed to do. Courts have held that one way to demonstrate an adequate search, an agency may rely on reasonably detailed, nonconclusory affidavits that include the search terms and the type of search performed, and they should establish that all places likely to contain responsive materials were searched.⁷⁴ This information is missing. Significantly, the County describes at great lengths the departmental search form which Records Officer Ms. Proedoeh created, but the County fails to disclose any search form which actually documents any Van Haren search.⁷⁵ There is a substantial difference between constructing protocols that can lead to an adequate search – and actually undertaking an adequate search.⁷⁶

⁷² *Oglesby v. U.S. Dep't of Army*, 287 U.S. App. D.C. 126, 920 F.2d 57, 68 (1990).

⁷³ *Neighborhood Alliance of Spokane County v. County of Spokane*, 261 P.3d 119, 172 Wash.2d 702 (Wash., 2011).

⁷⁴ *Neighborhood Alliance of Spokane County v. County of Spokane*, 261 P.3d 119, 172 Wash.2d 702 (Wash., 2011).

⁷⁵ The County Response brief cites to CP 800 as support that [County Staffers] “Senzig and Van Haren provided their completed search forms to Predoehhl.” But CP 800 is a reference to the generic search form for Dotson records, a copy of which appears at CP 854-856.

⁷⁶ The County’s PRR Search Form CP 855 states that: (1)Each staff member that receives

[I]f a review of the record raises substantial doubt, particularly in view of ‘well defined requests and positive indications of overlooked materials, summary judgment [dismissal of PRA complaint] is inappropriate; here, the search was inadequate because the record itself revealed positive indications of overlooked materials.⁷⁷

The same is true here. The County cannot have plausibly undertaken an “adequate search” if the search failed to produce File 553137 records, and no Search Form exists to support that the search was actually undertaken.⁷⁸ The failure to perform an adequate search precludes an adequate response and production. The PRA “treats a failure to properly respond as a denial.”⁷⁹ “[T]he County wrongfully withheld documents in violation of the PRA as a result of this inadequate search...”⁸⁰

E. Pierce County Violated the PRA by Silently Withholding and Not Disclosing all Responsive Records

The PRA “clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request.”⁸¹ “Silent

the email will complete Section 1 and 3, and the person responsible for Section 2 will complete that section as well, and (2) Staff members will provide the Search Form and any responsive documents to the Section Manager in hard copy format within the specified timeframe. But the County has not produced any Search Form filled out by Van Haren, as required by the County’s Form.

⁷⁷ *Neighborhood All. of Spokane Cty. v. Spokane Cty.*, 172 Wn. 2d 702, 736, 261 P.3d 119 (2011). Cases cited and internal quotations omitted.

⁷⁸ An inadequate records search does not appear to be the fault of the County Public Records Officers. The record supports that County Staff who possessed the records did not adequately turn over the records when requested.

⁷⁹ *Soter v. Cowles Publ’g Co.*, 162 Wash.2d 716, 750, 174 P.3d 60 (2007) (citing RCW 42.56.550(2), (4) (formerly RCW 42.17.340)).

⁸⁰ *Neighborhood Alliance of Spokane County v. County of Spokane*, 261 P.3d 119, 172 Wash.2d 702 (Wash., 2011).

⁸¹ PAWS, 125 Wn.2d at 270.

withholding is prohibited.⁸² Silent withholding is not about the production of documents. It is about the disclosure of documents.⁸³

The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure 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.⁸⁴

Here, Pierce County silently withheld responsive records, giving Ms.

Dotson the misleading impression that she was provided with all records related to the County's enforcement.

F. County Reliance on Other, Inmate and Unpublished Statute of Limitation Cases are Not on Point or Persuasive.

Other than *Belinski*, the two additional cases cited by the County for its statute of limitation argument deal with inmate records requests; one of the two cases is unpublished, and reliance on all cases is absolutely misplaced, as discussed below. In *Greenhalgh*⁸⁵, that Court was dealing with a response to an inmate PRA request that did not cleanly fit under the two prongs expressly addressed in RCW 42.56.550 (6)⁸⁶, and where

⁸² *Rental Hous. Ass'n v. City of Des Moines*, 165 Wash.2d 525, 537, 199 P.3d 393 (2009); *PAWS II*, 125 Wash.2d at 270, 884 P.2d 592." *Resident Action Council v. Seattle Hous. Auth.*, 327 P.3d 600 (Wash., 2014).

⁸³ *Sanders v. State*, 169 Wn.2d 827, 836, 240 P.3d 120 (2010).

⁸⁴ *Progressive Animal Welfare Soc.*, 125 Wn.2d at 270.

⁸⁵ *Greenhalgh v. Dept of Corrections*, 170 Wn.App. 137, 282 p.3d 1175 (2012).

⁸⁶ RCW 42.56.550(6), "Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis." "Greenhalgh next argues that the PRA's one-year statute of limitations never began to run because neither of that statute's two clear triggering events occurred."

Plaintiff argued his two requests were actually four independent requests, such that one of the four had no exemptions, and thus nothing had triggered the limitations period.⁸⁷ The *Greenhalgh* Court declined this “novel” argument and dismissed the suit. The *Greenhalgh* facts are nothing like this case. The County incorrectly describes that DOC “released” additional records to Greenhalgh on November 12, 2008 [after the litigation was filed], and then argues that “the Court of Appeals did not treat DOC’s production of previously undisclosed records during litigation as subsequent installments of records.”⁸⁸ This is not at all supported by the case. The DOC did not produce “responsive records” during the lawsuit, it responded to (undescribed) discovery. Greenhalgh then claimed DOC’s discovery responses restarted the limitations clock. The Court disagreed. Nowhere in *Greenhalgh* is there support for the County’s claim that the DOC’s discovery was responsive to Plaintiff’s prior records request. The case is simply not on point.

Mahmoud v. Snohomish County,⁸⁹ is yet another unpublished decision, involving numerous PRA requests made by inmate Plaintiff and the only

⁸⁷ “In an attempt to avoid this result, Greenhalgh makes a novel argument: he made four distinct PRA requests and the DOC failed to claim an exemption for one of those four requests. Greenhalgh’s argument presents an issue of first impression and requires us to determine whether Greenhalgh made two or four PRA requests.”

⁸⁸ *County Response* at 23-24.

⁸⁹ *Mahmoud v. Snohomish County*, 184 Wn. App. 1017 (2014), *review denied*, 182 Wn.2d 1027, 347 P.3d 458 (2015)

one that even remotely deals with “later issued” records. In that instance, the DOC agency released some records and claimed exemption for others in 2010. Plaintiff filed suit alleging employment and retaliation claims in 2011. Then, in April 2012 during discovery on the retaliation claim, the County produced some records it had not thought were responsive to the previous request. Mahmoud then amended his complaint in August of 2012 to add PRA claims. The Court found the statute of limitations had passed, with no specific explanation, perhaps a symptom of its unpublished status, and is therefore not helpful. The Court found DOC’s exemptions sufficiently described, that the discovery rule does not apply; and the action was dismissed on limitation grounds. Appellant pleads none of these issues here.⁹⁰

G. County’s Position Directly Contrary to PRA Controlling Statute.

Pierce County’s arguments are all directly contrary to the plain language of PRA’s controlling statute, RCW 42.56.550 (6). That statute does NOT state that PRA actions must be filed within one year of the agency's unilateral declaration that its records response is “closed”.

⁹⁰ The *Mahmoud* Court also found it significant that Plaintiff Mahmoud “knew or should have known” of the records within the statutory time limits and “Given that many of the requested documents came from Mahmoud’s own files, he had to know of their existence.” Here, prior to October 26, 2016, the date of County enforcement hearing and last records release, Ms. Dotson would not know that Pierce County possessed additional records. the October 26, 2015 released Lobby Visit report record, which was the County’s intended to reference other records from the File 553137 against her at hearing.

Instead, RCW 42.56.550(6) unequivocally states that “Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.” It is undisputed that the County issued an installment of records responsive to Ms Dotson’s records request on October 26, 2016, making this lawsuit filed within one year on October 25, 2016 timely. No case cited by the County over comes this clear language.

III. CONCLUSION

This Appeals Court should grant Ms. Dotson’s appeal:

1. Ms. Dotson diligently submitted her public records request to the County in May 2016 in advance of her October 2016 land use enforcement hearing.
2. October 26, 2016 was also the date Ms. Dotson learned of the County’s silently withheld records which were used against her at hearing on that date.
3. Ms. Dotson diligently and timely filed her PRA action on October 25, 2017, within one year of the County’s production of its (at that time) last installment of records responsive to her request.
4. Alternatively, the record here shows the predicates for equitable tolling of any applicable statute of limitation, (bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff), are met in this case. ⁹¹
5. The County failed to perform an adequate search for records responsive to Ms. Dotson’s request.
4. The County possessed records responsive to her request, but which were not timely provided to Ms. Dotson. CP 838-839, CO 663 (copy attached).
7. The County was aware that records responsive to Ms. Dotson’s request existed, but the County failed to disclose or produce the records until the date of and well after the County’s enforcement hearing against

⁹¹ *Millay*, 135 Wn.2d at 206. *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 812, 818 P.2d 1362 (1991).

her. CP 663 and CP 635 and CP 637-658.

8. The County silently withheld responsive records.
9. The County failed to provide “fullest assistance” to Ms Dotson.
10. The County failed disclose or produce records that were admittedly responsive to Ms Dotson’s May 19, 2016 PRR until November 7, 2017, a delay of 538 days for some records and a delay of 653 days for other records produced on March 2, 2018, in violation of the PPA.

DATED this 30th day of July 2019. GOODSTEIN LAW GROUP PLLC

By: *Carolyn A. Lake*

Carolyn A. Lake, WSBA #13980
Attorneys for Appellant Dotson

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

Michael L. Sommerfeld Pierce County Prosecuting Attorney Civil Division 955 Tacoma Avenue South, Suite 301 Tacoma, WA 98402-2160 Email: mike.sommerfeld@piercecountywa.gov	<input checked="" type="checkbox"/> U.S. First Class Mail <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Overnight Courier <input checked="" type="checkbox"/> Electronically via email
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DATED this 30th day of July 2019, at Tacoma, Washington.

s/Carolyn A. Lake
Carolyn A. Lake

Appendices

- 1. CP 663 – County Van Haren Declaration excerpt evidencing knowledge that County possessed responsive records, which County failed to disclose or produce**
- 2. CP 635 – County Record Officer’s Cover letter to County’s last pre-litigation production of records on October 26, 2016.**
- 3. CP 854-856- County’s PRA Search Summary Form, which was not filled out and which fails to document Van Haren ‘search’ for responsive records.**

1 Kimberlyn Dotson.

2 3.) On October 15 2015 I went to the area of ms. Dotson's property with Marc LaCasse,
3 an employee of the Department of Ecology, where I viewed Ms. Dotson's property
4 from roadways.

5 4.) On November 9, 2015 I retrieved from county archives a hard copy file for
6 application "553137," which was an application submitted to PALS in 2006 by
7 property owners "Hansen/Pechecos" who were seeking approval to build a single
8 family residence on county tax parcel 0417066004, a property that is adjacent to the
9 property owned by Ms. Dotson. After I obtained the archived file for application
10 "553137" I retrieved and reviewed only one document for purposes of my review of
11 Ms. Dotson's property, which was a document entitled "CRITICAL AREA NOTICE
12 FISH AND WILDLIFE HABITAT CONSERVATION AREA AND/OR STREAM
13 BUFFER NOTICE" dated August 27, 2007 that identified the stream located at
14 29510 55th Ave East on county tax parcel 0417066004 as an "F1" water type. See
15 Exhibit A; Bates 000010-000014 of county PRA response produced June 23, 2016.
16 That document was the final approved and recorded document concerning the "F1"
17 stream designation for the "Hansen/Pechecos" property, parcel 0417066004, and was
18 the only document and "data" in the "553137" application file that I used and
19 considered relevant to my purposes concerning the Dotson property. I did not
20 otherwise use or review any other records from the "553137" application file in the
21 course of my involvement with Ms. Dotson's parcel prior to Ms. Lake's public record
22 request, nor subsequently for purposes of the administrative appeal hearing held on
23 October 26, 2016.

24 5.) On November 25, 2015 I mailed Ms. Dotson a letter stating that she needed to submit

Deena Pinckney

Subject: FW: Kim Dotson Public Records Request
Attachments: Lobby Visits for Dotson.pdf
Importance: High

From: Sharon Predoehl [<mailto:spredoe@co.pierce.wa.us>]
Sent: Wednesday, October 26, 2016 8:52 AM
To: Carolyn Lake
Cc: Sharon Predoehl
Subject: Kim Dotson Public Records Request
Importance: High

Dear Ms. Lake:

Yesterday, October 25, 2016, a staff member created and showed me a report that shows lobby visits by Kimberly Dotson on 9/17/15 and 3/17/16. The record of these visits falls within the dates of the Public Records Request you submitted on May 20, 2016 (your date range was January 2014 to present – May 20, 2016.)

I have provided a copy of this report as an attachment to this email.

Sincerely,



Sharon Predoehl | Public Records Officer, Office Assistant 3 | Pierce County Planning and Land Services | (253)798-3724 |
2401 South 35th Street, Tacoma, WA, 98409-7490 | Sharon.Predoehl@co.pierce.wa.us | www.co.pierce.wa.us/pals

NOTICE OF PUBLIC DISCLOSURE: This e-mail account is public domain. Any correspondence from or to this e-mail account may be a public record. Accordingly, this e-mail, in whole or in part, may be subject to disclosure pursuant to RCW 42.56, regardless of any claim of confidentiality or privilege asserted by an external party.

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Exhibit D
A true and accurate copy of
the Search Summary Form

Planning and Land Services PRR Search Summary

Section 1 - General Information

PRR # / Requestor's Name:	PRR Subject:
Carolyn Lake, Goodstein Law Group	Kim Dotson, 0417032010 (old parcel number that was made into a short plat), 5523 296 th ST E, 0417056001
Name of Person Searching:	PALS Section:
	Resource Management
Date Search Completed:	Approximate Time Spent Searching:
Hit Words to Use for Search:	
Kim Dotson, 0417032010 (old parcel number that was made into a short plat), 5523 296 th ST E, 0417056001; Problem # 51105 - Wetland; 832074, 832073 DCPT; SRS P#51105; DOE Marc LaCasse.	

Section 2 - Manager Delegated Search

Database and Electronic Records Search - Provide Permit/Project/Case ID/Problem #'s

Delegated to:	✓ Searched	System/Application	Permit/Application/Project/Case ID/Problem #	Search Results/Comment
		PALS+	LXSV 832074, DCPT 832073; S-296180	
		SERVICE RESPONSE SYSTEM (SRS)	Wetland P#51105	
		Network Drive (N)		
		OTHER (Specify):		

Paper/Hard Copies

Delegated to:	✓ Searched	Type	Permit/Application/Project/Case ID# and Location	Search Results/Comment
		File Room		
		Offsite Storage Files		

Section 3 - All Staff Search

Electronic Files

✓ Searched	Type	Location Address	Search Results/Comment
	Personal Device (Cell phone, computer, iPad)		
	Personal Drive (M)		
	Personal Share Drive (C)		
	Project Share Drive (T)		

Paper/Hard Copies

✓ Searched	Type	Project/Case ID and Location	Search Results/Comment
	Section Files (Located outside File Room)		
	Personal Work Space		

Additional Comments/Summary:

Back page of Search Form with instructions to staff:

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**Planning and Land Services PRR Search Summary
Procedures/Instructions**

- PRO will contact Section Managers for appropriate hit words to use in search and will enter those hit words on the Search Form.
- PRO will send "Notice of Public Records Request and Hold" email to Section Managers along with a copy of the original request and the Search Form.
- Section Managers will forward this email, along with the attachments, to the appropriate staff in their sections. This includes delegating responsibility to the appropriate person in their section who will provide data listed in Section 2.
- Staff will notify Section Manager within 2 business days of receipt of the email as to whether they have responsive documents or not, and provide an estimate of how many days they will need to produce the responsive documents.
- Section Manager will provide this information to the PRO.
- Each staff member that receives the email will complete Section 1 and 3, and the person responsible for Section 2 will complete that section as well.
- Staff members will provide the Search Form and any responsive documents to the Section Manager in hard copy format within the specified timeframe.
- Once all documents have been received and reviewed by the Section Manager, he/she will provide them to the PRO in hard copy format within the specified timeframe.
- If the Section Manager determines that there are no responsive documents within their section, they will complete the form and provide it to the PRO.

Staff Expectations

Section 2 of Search Form - Designated staff member(s)

- Provide Permit, Application, and/or Problem #'s for PALS+ and SRS
- Provide Case/Project ID, Permit and/or Application #'s and location of file for File Room and Offsite Storage
- Provide Location and name of documents on N:/Drive

Section 1 and 3 of Search Form - All Staff

- Search all personal devices
- Search M, C and T Drives
- Search Section Files for applicable files
- Search Personal Work Space for any notes, documents, phone messages, etc.
- Print all documents found on computer and provide them, along with any files found, to Section Manager

GOODSTEIN LAW GROUP PLLC

July 30, 2019 - 11:21 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52561-5
Appellate Court Case Title: Kimberlyn Dotson, Appellant v. Pierce County Planning & Land Services Dept, Respondent
Superior Court Case Number: 17-2-05669-1

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