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COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON

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KIMBERLYN DOTSON,

Appellant,

vs.

PIERCE COUNTY,

Respondents.

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OPENING BRIEF OF APPELLANT KIMBERLYN DOTSON

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CAROLYN A. LAKE  
WSBA #13980  
Attorney for Appellant Dotson  
501 South G Street  
Tacoma, Washington 98405  
(253) 779-4000

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**I. APPELLANT'S STATEMENT OF ISSUES &  
ASSIGNMENTS OF ERROR**

- A. The Trial Court Erred – Ms. Dotson's Summary Judgement Was Proven on Undisputed Facts
  
- B. The Trial Court Erred In Ruling Ms. Dotson's Action Was Time-Barred.
  - 1. The Trial Court erred as Ms Dotson's Action was Timely Filed.
  - 2. Trial Court Erred in Commencing Limitation Period on an Event Not Designated in PRA Statute
  - 3. Trial Court erred as *Belenski* Doesn't Apply to Present Facts.
  - 4. Trial Court's Erred by Creating New Law, When Existing Law Applied.
  - 5. Equitable Estoppel Applies
  - 6. Disputed Facts Bars County Grant of Summary Judgment
  - 7. Trail Court's Ruling is Error & Contrary to Basic Rules of Statutory Construction.
  - 8. Trial Court's Ruling is Error and Defeats the Strong PRA Mandate to Liberally Construe to Support Full Disclosure
  
- C. It Is Undisputed That Pierce County Violated the PRA In Additional, Multiple Ways Which the Trial Court Failed To Address.

1. **Pierce County Violated the PRA by Silently Withholding and Not Disclosing all Responsive Records**
2. **Pierce County failed to undertake an adequate search to identify and gather records responsive to Ms. Dotson's PRA Request.**
3. **Pierce County failed to timely and properly responded to Ms. Dotson's PRA Request.**
4. **Pierce County Violated the PRA By Not Providing a Privilege Log/Withholding Index for Withheld County Records**
5. **Pierce County Violated the PRA by Not Providing Fullest Assistance.**

## II. INTRODUCTION

Ms. Dotson sought to defend against a land use enforcement action brought by Pierce County (“County”). As part of that defense, she submitted a Chapter 42.56 RCW Public Records Act (“PRA”) request to receive a copy of all County records related to their enforcement action. The County released some records via multiple incremental releases of records, and on June 29, 2016, the County described its records response as “closed”. Later, after Ms. Dotson subpoenaed the County’s public records officer to appear at the land use enforcement hearing, the County issued an additional, late, incremental release of a record on October 26, 2016, the very date of the County’s land use enforcement hearing against her.

Ms. Dotson filed this PRA suit on October 25, 2016, within one year of that last County incremental release of records. PRA’s controlling statute, 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.”

After Ms. Dotson’s PRA lawsuit was filed, the County nearly immediately made additional incremental releases of responsive records, consisting of records used by the County at the land use

enforcement action, but which the County had not previously released to her. The County's late released records were material to Ms. Dotson's ability to defend herself against the County's enforcement action but were only released by the County after their usefulness to Ms. Dotson had passed.

The Trial Court below erred, and this appeal should be granted because the Trial Court found that this action was "barred by the statute of limitation". Presumably, the Trial Court accepted Pierce County's argument that the one-year limitation commences on the date the County closes its records request, and not the date of the agency's "last production of a record on a partial or installment basis" as RCW 42.56.550 (6) plainly provides. The Court's ruling directly conflicts with RCW 42.56.550(6). It is error and should be reversed.

In addition to being legally flawed, the Trial Court's Ruling also is bad policy. If the Trial Court is upheld on appeal, then an agency could unilaterally declare that its public records response was "officially closed", wait out the one-year statute of limitation timeframe beginning on that date, and then release any "inconvenient" public records with impunity. In fact, if the Trial Court is upheld, then even in the most innocent circumstances, where responsive records are legitimately later found, public agencies would be motivated not to

immediately release upon discovery, but instead, to withhold the records for a year after its announced “closure” date, to avoid the risk of lawsuit and penalty. The Trial Court’s ruling opens the door for behavior which is the antithesis of the PRA’s strongly-worded mandate for open government and to provide the public with timely access to public records and should be reversed. The Trial Court also erred by failing to find Pierce County violated the PRA in additional, multiple ways as described herein.

### **III. FACTS**

#### **A. Ms. Dotson’s Need For the County Records**

On May 18, 2016, Ms. Dotson’s attorneys submitted a public records request to Pierce County on her behalf requesting a copy of the following records:

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

Please search dates: January 2014 to the present. (“Records Request”).<sup>1</sup>

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<sup>1</sup> CP 383 **Exhibit 3** Plaintiff’s May 18, 2016 PRA Request attached to subjoined Dec of Legal Counsel.

At the time of Ms. Dotson's Records Request, she was subject to a land use enforcement action by Pierce County. The public records Ms. Dotson requested were essential to her defense of that land use enforcement matter, with the evidentiary hearing set for October 26, 2016.<sup>2</sup>

### **B. County's Response to PRR**

On May 20, 2016, the Pierce County Planning and Land Services Records Officer initially responded to Plaintiff's Records Request by acknowledging the request ("County's Initial Response").<sup>3</sup> The County's Initial Response explained the process by which the County would respond to Plaintiff's Records Request but did not identify a date certain by which its response would be made. The County's Initial Response also limited County's scope of search for any responsive records to solely the Pierce County Planning and Land Services department.<sup>4</sup> Ms. Dotson's request contained no such limitation.

Over four weeks later, on June 23, 2016, the County made its first incremental release of responsive records, consisting of codes that accessed a "file locker" electronic system, whereby Ms. Dotson/her attorney could access certain responsive records. The County issued

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<sup>2</sup> CP 37-50, **AR 2-11**

<sup>3</sup> CP 384-5 --**Exhibit 4** to subjoined Dec of Legal Counsel, CP 2.

<sup>4</sup> *Id.*

three sets of responsive records<sup>5</sup>, County Emails records with GLG Law Firm's BS numbering 1-166<sup>6</sup> and Exhibit 7, County Email #2 records, (no BS) consisting of two emails with very large attachments related to mailing lists and notices not pertinent here.<sup>7</sup> On June 29, 2016 the County described its records response as "closed".<sup>8</sup>

### **C. County's October 2016 Incremental Release of Additional Record**

Because at her land use enforcement appeal Ms. Dotson intended to rely on the records which the County released in response to her PRR, she subpoenaed the County Public Records Officer to attend that land use hearing. On October 26, 2016, the day of that hearing, the County Records Officer supplied one additional incremental release of a record to Ms. Dotson's attorney, consisting of a report of Ms. Dotson's lobby visits to the County.<sup>9</sup> The County's Cover letter to its October 26 2016 release of records acknowledged that this incremental release was in response to Ms. Dotson's public records request: "the record of these visits falls within the dates of the Public Records Request you

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<sup>5</sup> CP 386-465, Exhibit 5- County records, with County bates stamped (BS) numbering 1-80

<sup>6</sup> CP 466-631

<sup>7</sup> CP 632-634

<sup>8</sup> CP \_\_\_, May 4, 2017, Dec of Prodoehl at 7 (CP number to be assigned per Appellant's First Supplement Designation of Clerks Papers).

<sup>9</sup> CP635, Exhibit 8, copy of County 10/26/17 Cover letter attached to Dec of Legal Counsel. CP 636. Exhibit 9, copy of County Oct 26, 2017 record of lobby visit, both attached to subjoined Dec of Counsel.

submitted on May 20, 2016 (your date range was January 2014 to present – May 20, 2016)” .<sup>10</sup>

At the Pierce County land use enforcement hearing held later that same day on October 26, 2016, the County used additional records against Ms. Dotson, which had not been previously disclosed to her at any time, and which were clearly responsive to her May 18, 2016 Records Request.<sup>11</sup> Ultimately, the Pierce County Examiner supported the County’s enforcement action and denied Ms. Dotson’s land use appeal, relying on the County’s use of the undisclosed records against her,<sup>12</sup> which consisted of records which had not been disclosed to Ms. Dotson at any time, and which were clearly responsive to her Records Request.<sup>13</sup>

On October 25, 2017, Plaintiff filed this Public Record Act Complaint.<sup>14</sup> The action was timely brought pursuant to RCW 42.56.550 (6)<sup>15</sup> within the applicable statute of limitations as it was brought within one year of the date of the County’s last October 26,

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<sup>10</sup> CP 635 Ex 8.

<sup>11</sup> CP 37-50, 384-5,

<sup>12</sup> Id

<sup>13</sup> ID

<sup>14</sup> CP 1-6, *Complaint* on file.

<sup>15</sup> 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.”

2016 incremental release of records responsive to Ms. Dotson's records request.

**D. County's Post Lawsuit Release of Records and Still Missing Records**

On November 13, 2017, two weeks after Ms. Dotson filed her lawsuit and over a year after her land use enforcement hearing, Pierce County released two additional responsive records (1) a July 10, 2007 Habitat Assessment Report, for Pierce County Application #553137 Sobzik Homesite - Parcel 0417066004 ("Enforcement Records"), and (2) phone log record.<sup>16</sup> The Enforcement Records were a portion of the records relied on by the Hearing Examiner when he denied Ms. Dotson's land use appeal, a year earlier. Additional responsive records upon which the County purportedly relied on in their land use enforcement action remain undisclosed, even today. These records unquestionably exist, as they were (1) prepared by County Staff and (2) are referred to in the late released, Enforcement Records at page 2<sup>17</sup>:

During May 2006, Mr. John Meriwether, Pierce County Environmental Biologist, completed a fish and wildlife habitat assessment for this project site. Mr. Meriwether identified that a Type F Stream was located in the northeastern corner of the parcel. This stream would be regulated by Pierce County and would require a standard 150-foot buffer and 15-foot building setback as measured from the ordinary high water mark of this stream.

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<sup>16</sup> CP 637-656, See **Exhibit 10** attached to Dec of Legal Counsel.

<sup>17</sup> CP 638

On February 21, 2018, Ms. Dotson filed for Summary Judgement.<sup>18</sup> Pierce County later filed for Summary Judgement, and the Motion hearings were combined.<sup>19</sup> After hearing, the Trial Court granted the County's Summary Judgement Motion, finding that Ms. Dotson's action was "barred by the statute of limitations."<sup>20</sup>

#### **IV. ANALYSIS**

##### **A. PUBLIC RECORDS ACT GENERALLY**

The Public Records Act (PRA) is a strongly-worded mandate for open government so as to provide the public with access to public records. *Burt v. Department of Corrections*, 168 Wn.2d 828, 832, 231 P.3d 191 (2010) (internal citations omitted).

The PRA enables citizens to retain their sovereignty over their government and to demand full access to information relating to their government's activities:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to

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<sup>18</sup> CP 11-658

<sup>19</sup> TR **Appendix A** at 4.

<sup>20</sup> CP 785-786.

assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030 (2011).

## **6. PRA to be Liberally Construed to Promote Transparency.**

The PRA's provisions are to be liberally construed to promote the public policy, and exemptions from it must be strictly construed. *Id.* “Washington’s PRA is “a strongly worded mandate for broad disclosure of public records.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). “The PRA's disclosure provisions must be liberally construed and its exemptions narrowly construed. RCW 42.56.030.” *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d at 535.

Administrative inconvenience or difficulty does not excuse strict compliance with the Public Disclosure Act. *Zink v. City of Mesa* 140, Wash. App. 328, 166 P.3d 738 (2007).

## **7. Response in Five Business day to Include Forecasted Date of Records Release**

Within five days of receiving a public record request, an agency must either (1) provide the record, (2) provide an Internet address and link to the requested records, (3) acknowledge receipt of the request

and provide a reasonable estimate of the time the agency will require to respond, or (4) deny the request. RCW 42.56.520.

In general cases which allow delay beyond 5 days turn on a specific showing by the government why an earlier response is impossible because of lack of clarity or multiple requests. Good faith and reasonableness does not negate the agency's duty of strict compliance. *Zink*, 140 at 340.

### **8. Agency Search Must be Reasonably Calculated to Find Responsive Records**

An agency's search for records must also be reasonably calculated to uncover all relevant documents. *Neighborhood Alliance*, 172 Wn.2d at 720. A search that does not meet this standard constitutes a violation of the PRA and subjects the agency to daily penalties. *Neighborhood Alliance* at 724.

### **9. Exemptions to be Narrowly Construed**

Under the PRA, all public agencies are to disclose any requested public record, unless the record falls within a specific exemption. *Neighborhood Alliance at American Civil Liberties Union of Washington v. City of Seattle*, 121 Wn.App. 544, 548, 89 P.3d 295 (2004); RCW 42.56.070(1), *Progressive Animal Welfare Soc'y v. Univ. of Wash. (PAWS)*, 125 Wn.2d 243, 250, 884 P.2d 592 (1994).

## **10. Agency Bears Burden to Justify When Records Not Released.**

When an agency declines to disclose information, it bears the burden of proving that its refusal is valid based on one of the exemptions included in the PRA. *Id*, citing *King County v. Sheehan*, 114 Wn.App. 325, 337, 57 P.3d 307 (2002). “Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.” RCW 42.56.210 (4). Denials of requests must be accompanied by a written statement of the specific reasons therefore. RCW 42.56.520.

## **11. Silent Withholding of Responsive Records Violates The PRA**

Silent withholding of records occurs when a PRA agency withholds documents “that should have been disclosed pursuant to [a] records request. *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 269, 884 P.2d 592, (1994). “Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld.” *Id.* at 270.

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.

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

Washington Courts have consistently denounced the "silent withholding" of information in response to a PRA request:

Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld. 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. Moreover, without a specific identification of each individual record withheld in its entirety, the reviewing court's ability to conduct the statutorily required de novo review is vitiated.

*Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1994) at 270 (citation omitted).

## **B. PROCESS FOR JUDICIAL REVIEW OF PRA**

Under RCW 42.56.550(1), a party may seek judicial review under the PRA when the party has "been denied an opportunity to inspect or copy a record by an agency." Records are "produced" when they are "made available for inspection and copying." *McKee v. Washington State Dept. of Corrections*, 160 Wn.App. 437, 446, 248 P.3d 115 (Div. 2

2011), *quoting Sanders v. State*, 169 Wn.2d 827, 836, 240 P.3d 120 (2010).

### **C. SUMMARY JUDGMENT STANDARD APPLIED TO PRA.**

The CR 56 summary judgment standard is applied to summary judgment motions in a PRA action. *Block v. City of Gold Bar*, 189 Wn. App. 262, 269, 355 P.3d 266 (2015). Summary Judgment pursuant to CR 56(c) is proper if the pleadings, affidavits and depositions before the trial court establish that there is no genuine issue of material fact. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (quoting *Dickenson v. 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)). All the facts submitted and the reasonable inferences therefrom are considered in the light most favorable to the nonmoving party. *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 38, 785 P.2d 447 (1990).

A material fact is one on which the outcome of the litigation depends. *Braegelmann v. Snohomish County*, 53 Wn. App. 381, 383, 766 P.2d 1137, *review denied*, 112 Wn.2d 1020 (1989). A material fact is one upon which the outcome of the litigation depends. *Id.* In an action brought under the PRA the burden is on the agency to prove it has strictly complied with the act. RCW 42.56.550 Therefore to avoid

summary judgment establishing liability in favor of the requestor the agency must establish material facts admissible in evidence that it has strictly complied with the act. Speculation and conclusory statements are not material facts admissible in evidence.

The burden is on the moving party to prove there is no genuine issue of fact which could influence the trial. *Hartley v. State*, 102 Wn.2d 768, 774, 698 P.2d 77 (1985). Issues of law are properly resolved on summary judgment. See *Harris v. Harris*, 60 Wn.App. 389, 392, 804 P.2d 1277, review denied, 116 Wn.2d 1025, 812 P.2d 103 (1991); *Maltman v. Sauer*, 84 Wn.2d 975, 530 P.2d 254 (1975).

#### **D. LEGAL STANDARD ON APPEAL**

This Appeals Court reviews a grant of summary judgment de novo. *Dean v. Fishing Co. of Alaska, Inc.*, 177 Wn.2d 399, 405, 300 P.3d 815 (2013). Summary judgment is appropriate if “there is no genuine issue as to any material fact” and “the moving party is entitled to a judgment as a matter of law.” CR 56 (c). When reviewing an order of summary judgment, this Appeals Court engages in the same inquiry as the superior court. *Post v. City of Tacoma*, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009).

“This [Supreme] court reviews an agency's compliance with the PRA de novo. RCW 42.56.550(3).” *John Doe v. Benton Cnty., Corp.*,

403 P.3d 861, 864 (Wash. Ct. App. 2017) and see *Williams v. Dep't of Corr.*, No. 50079-5-II, at \*4 (Wash. Ct. App. Feb. 21, 2018), quoting *Hikel v. City of Lynnwood*, 197 Wn. App. 366, 371-72, 389 P.3d 677 (2016).

when judicial review is based solely on a documentary record, our Supreme Court has held that appellate review of a trial court's findings and conclusions is de novo—unlike where there has been testimony in the PRA proceeding, in which case we review the findings for substantial evidence. *Zink v. City of Mesa*, 140 Wn. App. 328, 336, 166 P.3d 738 (2007) (citing *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 904, 25 P.3d 426 (2001)).

*Kittitas Cnty., Corp. v. Allphin*, No. 34760-5-III, at \*23-24 (Wash. Ct. App. Mar. 13, 2018).

### **E. THE TRIAL COURT ERRED – MS. DOTSON’S SUMMARY JUDGEMENT WAS PROVEN ON UNDISPUTED FACTS**

The Trial Court erred when it granted Summary Judgement to Pierce County and found Ms. Dotson’s action “barred by the statute of limitations”. The following undisputed, material facts and clear law unquestionably supports granting this appeal and reversing and remanding to the Trial Court below:

1. Ms. Dotson’s PRA request was made May 19, 2016 (evening of May 18).<sup>21</sup>

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<sup>21</sup> CP\_\_\_\_, See *May 4, 2017, Dec of Prodoehl* at 7-9, (CP number to be assigned per Appellant’s First Supplement Designation of Clerks Papers).

2. The plain language of RCW 42.56.550 (6) provides that the PRA one-year statute of limitation commences to run on the date of the agency's last production of a record, when records are released on a partial or installment basis.<sup>22</sup>
3. The County indisputably made multiple incremental releases of responsive records. The County's last incremental release which predated this lawsuit was on October 26, 2016. ("Ms. Predoehl emailed the Lobby visit record to Ms. Lake on October 26, 2016.")<sup>23</sup>
4. The County expressly acknowledged the records were released to Ms. Dotson in response to her public records request. (... "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)".<sup>24</sup>
5. It is undisputed that Ms. Dotson filed this suit October 25, 2017, which is unquestionably within one year of the County's last, pre-lawsuit incremental release.<sup>25</sup>

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<sup>22</sup> 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.**" Emphasis added.

<sup>23</sup> CP\_\_\_\_, See *May 4, 2017, Dec of Prodoehl* at 18, (CP number to be assigned per Appellant's First Supplement Designation of Clerks Papers).

<sup>24</sup> CP 634, **Ex 8.**

<sup>25</sup> CP 1-6.

6. It is undisputed that, post lawsuit filing, the County issued two, additional, incremental releases of responsive records to Ms. Dotson's counsel on November 7, 2017 (538 days), consisting of phone log records and the Adjacent Parcel Records, which had been repeatedly referenced in the County's land use enforcement proceedings against Ms. Dotson.<sup>26</sup>
7. It is undisputed that even later on March 2, 2018, Pierce County provided additional records consisting of additional data about the parcel adjacent to Ms. Dotson. ("March 2018 Adjacent Parcel Records"). (653 days after Ms Dotson's PRR).<sup>27</sup>

Against these established undisputed material facts and the plain, unambiguous law, the Trial Court erred in finding Ms. Dotson's action was barred by the statute of limitations. On appeal this Court should find there is no dispute of the material facts that that the County failed to provided records responsive to Ms. Dotson's May 19, 2016 Public Records Request until October 26, 2016, and for some records November 7, 2017, a delay of 538 days and for another set of records a delay of 653 days for other records, all in violation of the

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<sup>26</sup> CP\_\_\_\_, See *May 4, 2017, Dec of Prodoehl* at 19, (CP number to be assigned per Appellant's First Supplement Designation of Clerks Papers).

<sup>27</sup> CP\_\_\_\_, See *May 4, 2017, Dec of Prodoehl* at 19, (CP number to be assigned per Appellant's First Supplement Designation of Clerks Papers).

Public Records Act (PRA), Chapter 42.56 RCW. Ms. Dotson's appeal should be granted, and the matter remanded back to the Trial Court to assess the appropriate penalty for the County's tardy release of records some 538 and 653 days late.

**F. THE TRIAL COURT ERRED IN RULING MS. DOTSON'S ACTION WAS TIME-BARRED.**

**1. The Trial Court erred as Ms. Dotson's Action was Timely Filed.**

The plain language of RCW 42.56.550 (6) speaks directly to the facts of this case: the one-year limitation statute commences to run on the last production of a record when an agency issues responsive records on a partial or installment basis. 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."

Here, the undisputed facts show that prior to this lawsuit being filed, the County issued its last installment of records on October 26, 2016. This case was timely filed on October 25, 2017. End of discussion.

## 2. Trial Court Erred in Commencing Limitation Period on an Event Not Designated in PRA Statute

The Trial Court erred by adding a new milestone event from which the limitation period commences (agency's pronouncement that their records release is closed), where that event is nowhere found in the statute:

We had installments that were produced and then a closing letter, and at that point the claim accrued...<sup>28</sup>

This Division Two<sup>29</sup> has stated that courts " 'must not add words where the legislature has chosen not to include them.'<sup>30</sup> "

The Trial Court erred occurred when it (apparently) accepting the County's novel argument that once an agency states its public records response is "closed," then even if the agency later issues further installments of responsive records, the one-year limitation statute commences to run on the date the agency **announces** its response is

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<sup>28</sup> *Transcript of Court Ruling* ("TR Ruling") at 4:18-19. Copy attached as **Appendix B**. The Court expressed that this commencement event was "accepted by plaintiff's counsel". Id. Counsel disagrees, as this is the salient point of this appeal. Further, the County had not briefed the issue of limitation commencement date occurring as of the date of any County redactions. This was a new argument raised only at oral argument.

<sup>29</sup> In interpreting RCW 42.56.520. The same is true for RCW 42.56.550(6).

<sup>30</sup> *Hikel v. City of Lynnwood*, 389 P.3d 677, 681 (Wash. Ct. App. 2016), quoting *Hobbs v. Wash. State Auditor's Office*, 183 Wash.App. 925, 943, 335 P.3d 1004 (2014) (internal quotation marks omitted) (*quoting Lake v. Woodcreek Homeowners Ass'n*, 169 Wash.2d 516, 526, 243 P.3d 1283 (2010) (*quoting Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wash.2d 674, 682, 80 P.3d 598 (2003) ).

“closed”, rather than the date of the agency’s actual last incremental release of records.

The Trial Court erred because these words do not appear in the statute and are not defined as an event which triggers the one-year statute of limitation. When interpreting a statute, “we ‘must not add words where the legislature has chosen not to include them.’”<sup>31</sup>

Further, the Court’s ruling 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.” Emphasis provided.<sup>32</sup> Because the Trial Court’s ruling added is directly contrary to plan applicable law, this appeal should be granted.<sup>33</sup>

### **3. Limitation Commencement Date of June 23, 2016 is Err as Ms. Dotson Was Aware County Had Silently Withheld Records Until October 26, 2016.**

In addition to the other flaws, the Trial Court erred when it ruled that Ms Dotson could have filed her lawsuit on June 23, 2016, the

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<sup>31</sup> *Hobbs v. Wash. State Auditor's Office* , 183 Wash.App. 925, 943, 335 P.3d 1004 (2014) (internal quotation marks omitted) (quoting *Lake v. Woodcreek Homeowners Ass'n* , 169 Wash.2d 516, 526, 243 P.3d 1283 (2010) ).

<sup>32</sup> Ms Dotson 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.

<sup>33</sup> The court may decline to consider issues unsupported by legal argument and citation to relevant authority. *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989).

date the County announced its response to the records request was closed:

The plaintiff could have sued as of June. However, the plaintiff did not sue as of June. The plaintiff sued a year and four months later, give or take. I am going to dismiss this case on the statute of limitations.<sup>34</sup>

But this ruling is error as it does not square with the facts.

In claiming the limitation period commenced on June 23, 2016, the County argued two things below: (1) that the one-year limitations period began to run as of June 23, 2016, because the County's record production as of that date contained redactions/exemptions<sup>35</sup>, and (2) that as of June 23, 2016 Ms Dotson somehow should have known about the missing records.<sup>36</sup> Both contentions are not accurate.

First, Ms Dotson's lawsuit is **not** contesting the County's redactions from the pre-June 23, 2016 records. Second, Ms Dotson sued because she (only) became aware that the County had records

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<sup>34</sup> TR Ruling at 4:20-25. **Appendix B.**

<sup>35</sup> TR **Appendix A** at 8:16-9:8. "If the Court looks at this, the Court will also see that, as indicated in Ms. Predoehl's declaration, she had applied redactions. She applied exemptions to records on pages -- they're Bates stamped as pages 152, 155, 157, 159, and pursuant to the *Greenhalgh* case, this is an adequate assertion of an exemption. It states the authority, and it describes that the complainant requested nondisclosure. So Pierce County in its response did both in this case. On June 23rd, 2016, we produced records with a claim of an exemption. Six days later, June 29th, 2016, we have a closing letter that goes out. The County's position, obviously, as the Court understands, is that the closing letter is a final agency response that constitutes a denial from the standpoint of if a requester believes they have been denied records, well, a denial action accrues at that point under .550(1)."

<sup>36</sup> It is simply incorrect when the County at hearing argued that "She had all of the information that she needed because the existence of those other documents was made known by the June 23 production.." TR **Appendix A** at 14:16-18.

which it had not disclosed/was silently withholding, after the County issued its October 26, 2016 installment of records and after the land use hearing of October 26, 2016. On June 23, 2016 when the County described its record response was closed, Ms Dotson was totally unaware that the County had additional records that it was silently withholding. The Court erred when it found:

The claims you have in this case arise out of the essence of the original production. There was nothing about that later produced document that really fed into the claims that are in this case. So these claims that you have brought in this lawsuit, based on your argument you had a year and a number of months to bring them; ...”<sup>37</sup>

Ms Dotson only became aware of the additional, undisclosed County records, when the County used them against her at the land use enforcement hearing on October 26, 2016.<sup>38</sup> October 26, 2016 was also the date of the County’s last production of records. Ms Dotson timely filed her lawsuit within one year of the date of the County’s last (pre-lawsuit) incremental production of its records release, which was also the date she learned of the County’s silently withheld records which were used against her at hearing that date.<sup>39</sup>

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<sup>37</sup> TR **Appendix A** at 18: 3-7.

<sup>38</sup> TR **Appendix A** 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.

<sup>39</sup> Further, in the unlikely event that 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

In the unlikely event that 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” is found not to apply, this Appeals Court should find that equitable tolling applies. In *Belenski v. Jefferson Cty.*, 186 Wn.2d 452, 457, 378 P.3d 176, 179 (2016), the Supreme Court remanded the case to the trial court for consideration of equitable tolling, finding that requestor Belenski and amici had raised “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.” Two dissenting justices would have held that Belenski’s suit was timely because the county’s alleged “false response” never triggered the statute of limitations. 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.

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exemption or the last production of a record on a partial or installment basis” is found not to apply, this factual dispute between the County and Ms Dotson alone should have defeated the Court’s grant of Summary Judgement to the County.

#### 4. Trial Court erred as *Belenski* Doesn't Apply to Present Facts.

In its arguments that this action was not timely filed, Pierce County cited the Trial Court to *Belenski v. Jefferson Cty.*, 186 Wn.2d 452, 457, 378 P.3d 176, 179 (2016). Copy attached. The County's read is misguided, as *Belinski* primary holding in *Belenski* flatly does not apply to the facts of this case.

*Belenski* dealt with the question of which statute of limitation should apply (one or two years), where neither of the two prongs described in RCW 42.56.550 (6), the PRA- embedded one-year statute of limitation, clearly apply; when the agency (1) has not made a claim of exemption and (2) has not issued a last installment).<sup>40</sup> That is **not** the case here, where the County clearly issued its responsive records on an installment basis, with the last installment released on October 26, 2016. In *Belenski*, the responding agency claimed it had no records, thus that agency 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.<sup>41</sup>

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<sup>40</sup> 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."

<sup>41</sup> The *Belenski* court also remanded for the trial court to determine whether equitable estoppel would apply to extend the limitation period further. That last remand point evidencing the lengths courts go to strictly enforce the PRA laws.

The question addressed in *Belenski* case has no bearing on present facts at all. Here. County's actions **are precisely addressed** by the prongs of RCW 42.56.550 (6), in that this action was filed within one year of the County's "last production of a record on a partial or installment basis." Here, the undisputed facts show that prior to this lawsuit being filed, the County issued its last installment of records on October 26, 2016. This case was timely filed on October 25, 2017.

### **5. Trial Court's Erred by Creating New Law, When Existing Law Applied.**

The Trial Court erred when it determined that existing law does not address the facts of this case:

there really isn't any existing authority that is on all four corners like this case where you have installation, production, you have that final closing letter that says we're done, and then you have something else trickling in later, and there is no real appellate authority that directly addresses that issue with respect to the statute of limitations.

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We're expanding prior authority and statements by the Supreme Court and the Court of Appeals to these circumstances...<sup>42</sup>

Instead, RCW 42.56.550(6) clearly applies to these facts, and unequivocally provides that the one-year statute of limitations runs from the date the agency makes its last installment of records. The Trial Court erred when it determined that existing law, including RCW 42.56.550(6) does not address the facts of this case.

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<sup>42</sup> Transcript ("TR") of Trial Court proceeding below, **Appendix A** at TR 5:15-25.

## **6. Trial Court's Ruling is Error & Contrary to Basic Rules of Statutory Construction.**

The Trial Court erred in interpreting RCW 42.56.550(6) rather than applying the plain words of that law. Courts should assume the Legislature means exactly what it says.<sup>43</sup> Plain words do not require construction.<sup>44</sup> Courts do not engage in statutory interpretation of a statute that is unambiguous.<sup>45</sup> If a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself.<sup>46</sup> A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable.<sup>47</sup> The courts are not "obliged to discern an ambiguity by imagining a variety of alternative interpretations."<sup>48</sup>

Applied to this case, the County's last installment was October 26, 2016, and the matter was timely filed on October 25, 2017. The controlling statute is plain, unambiguous, and no interpretation was required, or was proper. The Trial Court erred.

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<sup>43</sup> *W. Telepage, Inc. v. City of Tacoma, Dep't of Fin.*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000) (quoting *State v. McCraw*, 127 Wn.2d 281, 288, 898 P.2d 838 (1995) (quoting *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 329, 815 P.2d 781 (1991))); *State v. Smith*, 117 Wn.2d 263, 271, 814 P.2d 652 (1991).

<sup>44</sup> *Id.*

<sup>45</sup> *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (citing *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)

<sup>46</sup> *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999).

<sup>47</sup> *Id.*

<sup>48</sup> *W. Telepage*, 140 Wn.2d at 608.

## **7. Trial Court's Ruling is Error and Defeats the Strong PRA Mandate to Liberally Construe to Support Full Disclosure**

In addition to being legally flawed, the Trial Court's Ruling also is bad policy. If the Ruling is upheld on appeal, then an agency could unilaterally declare that its public records response was "officially closed", wait out the one-year statute of limitation timeframe beginning on that date, and then release any "inconvenient" public records with impunity. In fact, if the Trial Court is upheld, then even in the most innocent circumstances, where responsive records are legitimately later found, public agencies would be motivated not to immediately release upon discovery, but instead, to withhold the records for a year after its announced "closure" date, to avoid the risk of lawsuit and penalty. This would defeat the foundational purpose of the Public Records Act.

The Public Records Act (PRA) is a strongly-worded mandate for open government so as to provide the public with access to public records. *Burt v. Department of Corrections*, 168 Wn.2d 828, 832, 231 P.3d 191 (2010) (internal citations omitted). "Agencies are required to disclose any public record upon request unless it falls within a specific, enumerated exemption." *Neighborhood Alliance*

*v. Spokane County*, 172 Wn.2d 702, 714, 261 P.3d 119 (2011); RCW 42.56.070(1).

The goals of the (former) Public Disclosure Act are set out in its declaration of policy, which states, in pertinent part, that:

[F]ull access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.<sup>49</sup>

The Act further declares that the PRA should be liberally construed to promote full access:

The provisions of this chapter shall be liberally construed to promote ... full access to public records so as to assure continuing public confidence [in] ... governmental processes, and so as to assure that the public interest will be fully protected.<sup>50</sup>

In light of these strong mandates, the Trial Court's Ruling should be reversed. *Courts are to avoid a reading of a statute if it would result in "unlikely, absurd or strained consequences". Johnson v Department of Corrections, 164Wn App 769, 777, 265 P.3d 216 (2011).*

Pierce County was and is required to strictly comply with its Public Records duties, including to not silently withhold records, which in this case were necessary for Ms. Dotson's defense of County's land use enforcement. *Zink v. City of Mesa, 140 Wash. App. 328, at 340.*

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<sup>49</sup> Former RCW 42.17.010(11).

<sup>50</sup> *Id.*

Pierce County failed to do so. Ms. Dotson properly followed the plain words of the controlling statute. This Appeals Court should find she timely filed suit and grant this appeal.

**G. IT IS UNDISPUTED THAT PIERCE COUNTY VIOLATED THE PRA IN ADDITIONAL, MULTIPLE WAYS WHICH THE TRIAL COURT FAILED TO ADDRESS.**

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

Pierce County also violated the PRA by its silent withholding of records, not disclosing the requested and responsive public records.

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.

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

Once a valid request is made, the PRA requires an agency to provide a response within five business days whereby the agency (1) provides the records; (2) acknowledges the request and provides a reasonable estimate of time the agency will require in order to respond to the request; or (3) denies the request. RCW 42.56.520. An agency must strictly and actually comply with the PRA; “substantial compliance” is

not enough. *Zink v. City of Mesa*, 140 Wn. App. 328, 340, 166 P.3d 738 (2007).

Here, it is undisputed that Pierce County silently withheld the responsive land use Adjacent Parcel Records until their usefulness to Ms. Dotson's ability to prepare a defense to the enforcement action has passed. Pierce County allowed a gap of four months between its claimed "last" records release (June 29, 2016), and its next incremental release on October 26, 2016. That October 26, 2016 date of the County's last, pre-lawsuit release of records issued after Ms. Dotson subpoenaed the County's Public Records Officer to testify and happened to coincide with the very date of the County's enforcement hearing against Ms. Dotson.<sup>51</sup> This is the classic silent withholding that the PRA and the Courts interpreting that Act seek to prevent.

Silent withholding of records occurs when a PRA agency withholds documents "that should have been disclosed pursuant to [a] records request. *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 269, 884 P.2d 592, (1994). "Silent withholding would allow an agency to retain a record or portion without providing the

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<sup>51</sup> CP635-6. Similarly, the County issued its next two incremental record releases shortly after this lawsuit was filed. CP 637-656, CP\_\_\_\_, See *May 4, 2017, Dec of Prodoehl* at 10 and 11, (CP number to be assigned per Appellant's First Supplement Designation of Clerks Papers).

required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld.” *Id.* at 270. 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. *Id.*

Here, it is undisputed that Pierce County did not timely release all responsive records and impermissibly gave Ms. Dotson no indication that additional responsive records existed, until after their usefulness to her had passed. This is the misleading behavior that PRA seeks to prevent.

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.

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

It is not relevant to a finding of violation that the silently withheld records were not disclosed by inadvertence or due to “rushing” or because they were not thought to be responsive, as the County argued below.<sup>52</sup> It is also not relevant as Pierce County suggests, that a good faith effort was put forth or that the County “substantially complied. Administrative inconvenience or difficulty does not excuse strict compliance with the Public Disclosure Act. *Zink v. City of Mesa* 140,

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<sup>52</sup>CP\_\_\_\_, See *May 4, 2017, Dec of Prodoehl* at 10 and 11 , (CP number to be assigned per Appellant’s First Supplement Designation of Clerks Papers).

*Wash. App. 328, 166 P.3d 738 (2007)*. Good faith and reasonableness does not negate the agency's duty of strict compliance. *Zink*, 140 at 340.

**2. Pierce County failed to undertake an adequate search to identify and gather records responsive to Ms. Dotson's PRA Request.**

The adequacy of the agency's search is judged by a standard of reasonableness, construing the facts in the light most favorable to the requestor. An agency fulfills its obligations under the PRA if it can demonstrate ***beyond a material doubt*** that its search was reasonably calculated to uncover all relevant documents. Moreover, the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.

*Neighborhood Alliance of Spokane v. County of Spokane*, 153 Wn.App. 241, 257, 224 P.3d 775, rev. granted, 168 Wn.2d 1039, 233 P.3d 889 (2010).

An agency's search for records must also be reasonably calculated to uncover all relevant documents. *Neighborhood Alliance*, 172 Wn.2d at 720. A search that does not meet this

standard constitutes a violation of the PRA and subjects the agency to daily penalties. *Id.*, at 724.

Here, Pierce County cannot meet its burden to show it performed an adequate search for responsive documents, because indisputably, it first took Ms. Dotson subpoenaing the County's Records Official to obtain the October 26, 2016 incremental release of records, and then later, it took Ms. Dotson filing a law suit for the County to nearly immediately disgorge more responsive records. And still more easily identifiable, responsive records have not been provided to her. Based on this evidence, on appeal, this Appeals Court should determine the search was not adequate.

**[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.**

*Neighborhood All. of Spokane Cty. v. Spokane Cty.*, 172 Wn. 2d 702, 736, 261 P.3d 119 (2011).<sup>53</sup>

Pierce County's late-released responsive records of the Enforcement Records and the still missing Habitat Assessment must have been close at hand, since at the October 26, 2016 hearing, County Staff testified

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<sup>53</sup> Cases cited and internal quotations omitted.

expressly that they relied on exactly these records in their enforcement action against Ms. Dotson. The County cannot have plausibly undertaken an “adequate search” if the search did not uncover these records.<sup>54</sup>

### **3. Pierce County failed to timely and properly responded to Ms. Dotson’s PRA Request.**

In response to Ms. Dotson’s May 18, 2016 records request, the County responded as follows:

Due to the circumstances at the time of your request - I have seven requests ahead of yours, it will take me approximately\_3-4 weeks to complete your request. I will let you know if records are found before that date. <sup>55</sup>

The PRA requires an agency to respond to a record request within five days. “The plain language of RCW 42.56.520 requires that the agency provide a reasonable estimate of the time required to respond to the request.” *Hobbs v. State*, 335 P.3d 1004, 1012 (Wash. Ct. App. 2014).

The PRA requires an agency to respond to a records request within five days. A response that does not either include access to the records or deny the request must contain the agency's estimate of the time it will take to respond. No statute or case provides for an extension of the five-day

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<sup>54</sup> An inadequate records search may not be the fault of the County Public Records Officers. It is possible that County Staff who possessed the records did not adequately turn over the records when requested.

<sup>55</sup> CP 384-5.

period. The City acknowledged Hikel's request within the five-day period, but that acknowledgement was deficient because it did not contain any time estimate.

*Hikel v. City of Lynnwood*, 389 P.3d 677, 681 (Wash. Ct. App. 2016).

The County acknowledged Plaintiff's request within the five-day period, but that acknowledgement was deficient because it did not contain a date certain time when records would be available. "The PRA provides a cause of action "when an agency has not made a reasonable estimate of the time required to respond to the request." *Andrews v. Wash. State Patrol*, 183 Wn. App. 644, 651, 334 P.3d 94 (2014), *review denied*, 182 Wn.2d 1011 (2015)." *Williams v. Dep't of Corr.*, No. 50079-5-II, at \*4 (Wash. Ct. App. Feb. 21, 2018).

The PRA recognizes that an agency may not be able to respond fully to a request if that request is unclear. Therefore, RCW 42.56.520 allows an agency additional time either to provide the records or deny the request. The PRA does not, however, allow additional time to properly acknowledge a request. See *Hikel v. City of Lynnwood*, 197 Wn. App. 366, 389 P.3d 677 (Div. 1, 2016)<sup>56</sup>

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<sup>56</sup> In *Hikel*, the Appeals Court found a PRA violation when deputy city clerk responded five days after request, by e-mailing the requestor, acknowledging receipt of the request, asking for clarification due to the large volume of responsive records, and informing him that the City might need to produce the records in installments. The e-mail stated, "Once we receive your reply we will notify you of an anticipated date of completion."

This acknowledgement must include a reasonable estimate of when it will respond. By failing to provide a reasonable date certain estimate in its May 20,2016 letter, the County violated the PRA.

#### **4. Pierce County Violated the PRA By Not Providing a Privilege Log/Withholding Index for Withheld County Records**

Pierce County also violated the PRA is failing to provide a withholding index (also known as a privilege log) for county records withheld. RCW 42.56.210(3) provides:

Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.

*See also Sanders v. State*, 169 Wash. 2d at 846, 240 P.3d 120 130 (2010); *Rental Housing Ass'n of Puget Sound v. City of Des Moines (RHA)*, 165 Wn.2d 525, 538, 199 P.3d 393 (2009) (describing index requirements). If an agency is withholding records responsive to a request but does not account for those withheld records in its response, the agency's failure to provide a withholding index constitutes a violation of the Public Records Act. *Citizens For Fair Share v. State Dept. of Corrections*, 117 Wn. App. 411, 431, 72 P.3d 206 (2003). Here, there are records responsive to Ms. Dotson's request where Pierce County has still not disclosed. No withholding index or other

explanation for withheld records was ever provided to Ms. Dotson. Pierce County violated the PRA because of its failure to provide an privilege log/index for the withheld records.

### **5. Pierce County Violated the PRA by Not Providing Fullest Assistance.**

RCW 42.56.100 requires an agency to have rules in place to provide the “most timely possible action on requests.” See also WAC 44-14-04003(2) (Attorney General’s non-binding Model Rules on Public Records).<sup>57</sup> RCW 42.56.080 requires an agency to make records “promptly available.”

In addition to the “most timely possible action” and the “promptly available” requirements, an agency must have procedures in place to provide the “fullest assistance” to a public records requestor. RCW 42.56.100. This means readily available records must be provided almost instantly. To speed up access to public records, RCW 42.56.080 requires an agency to provide requested records “on a partial or

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<sup>57</sup> 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).

installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure.”

The purpose of the installment requirement of RCW 42.56.080 “is to allow requestors to obtain records in installments as they are assembled and to allow agencies to provide records in logical batches.” WAC 44-14-04004(3) (Providing records in installments gets batches to requestors much more quickly than waiting to assemble all the records and then providing all of them at the end).

## **V. CONCLUSION**

This Appeals Court should find the Trial Court erred and grant Ms. Dotson’s appeal for at least the following reasons:

1. Ms Dotson’s lawsuit was timely filed pursuant to RCW 42.56.550(6).
2. Pierce County failed to timely and properly responded to Ms Dotson’s PRA request.
3. Pierce County violated the PRA by silently withholding and not disclosing all responsive records.
4. Pierce County failed to undertake an adequate search to identify and gather records responsive to Ms Dotson’s PRA request.
5. Pierce County Violated the PRA by not providing a privilege log/withholding index for withheld County records.
6. Pierce County violated the PRA by not providing fullest assistance to requestor Ms. Dotson.

This Court is further asked to remand to this matter to the Trial Court for a determination of the appropriate per day penalty for each record Ms. Dotson was denied the right to inspect or copy pursuant to RCW 42.56.550 (4), and for an award of reasonable attorney fees incurred in connection with this legal action, as well as and any other relief this Appeals Court deems just and reasonable under the circumstances.

RESPECTFULLY SUBMITTED this 4<sup>TH</sup> day of January 2019.

GOODSTEIN LAW GROUP PLLC  
By: s/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 Lee Sommerfeld Pierce County Prosecutors Office 955 Tacoma Ave S Ste 301 Tacoma, WA 98402-2160 Email: <a href="mailto:msommer@co.pierce.wa.us">msommer@co.pierce.wa.us</a>	<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 4th day of January 2019, at Tacoma, Washington.

s/Carolyn A. Lake  
Carolyn A. Lake



A P P E A R A N C E S

For the Plaintiff: CAROLYN A. LAKE  
Attorney at Law  
Goodstein Law Group PLLP  
501 South G Street  
Tacoma, WA 98405

For the Defendant: MICHAEL SOMMERFELD  
Deputy Prosecuting Attorney  
Pierce County Prosecutor's Office  
Civil Division  
955 Tacoma Avenue South, Suite 301  
Tacoma, WA 98402-2160

1 JUNE 1, 2018

2 THE HONORABLE CHRIS LANESE, PRESIDING

3 \* \* \* \* \*

4 THE COURT: Is anyone here on anything other  
5 than Lost Lake or Dotson? Or is everyone here for  
6 Lost Lake and Dotson? I just wanted to make sure I'm  
7 not missing anything.

8 So we will hear Dotson first. Good morning.

9 MS. LAKE: Good morning, Your Honor.

10 THE COURT: We can begin with appearances,  
11 please.

12 MS. LAKE: Thank you. Carolyn Lake, Goodstein  
13 Law Group, for plaintiff, Kim Dotson.

14 MR. SOMMERFELD: Mike Sommerfeld on behalf of  
15 respondent, Pierce County.

16 THE COURT: Good morning.

17 So this is on for what are effectively cross  
18 motions, but it is also the merits hearing date for  
19 the PRA case that is here. My preference here is to  
20 proceed as follows: Because of the statutory  
21 framework for Public Records Act cases, I'm going to  
22 fold this all up into one and treat this all as  
23 merits issues because I believe they all go towards  
24 the merits. Technically the summary judgment  
25 standard is a little different, but I don't believe

1           there are actually any uncontroverted facts.  It's  
2           what those facts mean in this case that's really the  
3           controversy.  I wanted to make sure that no one was  
4           going to object to me treating this all as on the  
5           merits here rather than teeing it up under the CR 56  
6           standard for the purpose of our appellate record at  
7           least.  Is everyone okay with that?

8           MS. LAKE:  I believe so, Your Honor.

9           MR. SOMMERFELD:  I don't object, Your Honor.

10          THE COURT:  Okay.  Thank you.

11           And so what I would like to do next is -- there  
12           are two layers of issues here.  There is the statute  
13           of limitations issue and then there is the  
14           underlying, well, the rest of the merits let's say.  
15           And so given that we would need to pass through that  
16           first hurdle of the statute of limitations, I would  
17           like to bifurcate this argument, and then we will  
18           hear argument solely on the statute of limitations  
19           issue, which is interesting and unique in these  
20           circumstances, at least from this Court's  
21           perspective, and warrants individualized attention in  
22           terms of back-and-forth in that sense.  And then I  
23           will rule on that, and then contingent upon that  
24           ruling, we will then get to the merits that remain  
25           other than the statute of limitations.

1           So with that being said, I will hear from Pierce  
2 County first because they are the moving party let's  
3 say with respect to statute of limitations issues.

4           MS. LAKE: Thank you, Your Honor.

5           THE COURT: Thank you. So I have some  
6 questions, as you get situated there.

7           MR. SOMMERFELD: Okay.

8           THE COURT: I'm sure it's shocking.

9           First, it is Pierce County's position - I just  
10 want to make sure this is entirely clear - that this  
11 statute of limitations bars all of the claims brought  
12 by Ms. Dotson; is that correct?

13          MR. SOMMERFELD: That's correct, Your Honor.

14          THE COURT: Secondly, both sides cite  
15 different authorities, but there really isn't any  
16 existing authority that is on all four corners like  
17 this case where you have installation, production,  
18 you have that final closing letter that says we're  
19 done, and then you have something else trickling in  
20 later, and there is no real appellate authority that  
21 directly addresses that issue with respect to the  
22 statute of limitations. Would you agree with that?  
23 We're expanding prior authority and statements by the  
24 Supreme Court and the Court of Appeals to these  
25 circumstances, but we don't have a case that is like

1 this where we have a closing letter and then we have  
2 something else coming in later and what do we do with  
3 the statute of limitations. Is that fair?

4 MR. SOMMERFELD: Well, I would disagree  
5 because I believe that both *Greenhalgh* and the *White*  
6 case that I cited in the reply brief both contain  
7 fact patterns where records are produced.

8 THE COURT: But they were produced in  
9 different circumstances such as discovery or  
10 something else. They weren't produced just out of  
11 the blue by a public records officer with a reference  
12 to this is responsive, arguably, to your public  
13 records request.

14 MR. SOMMERFELD: *White* actually doesn't say  
15 whether it was produced in response to discovery. I  
16 would note in the *White* case that the opinion states  
17 that the suit was filed September 6th of 2013, is my  
18 recollection. I don't have it in front of me, but  
19 that's my recollection, judge. And that on the 23rd  
20 of September it said that the City produced the  
21 affidavits and the search warrants that were the  
22 subject of all three public records requests. The  
23 case does not indicate that it was produced in  
24 response to discovery. It simply says that they were  
25 provided.

1           In the *Mahmoud* case, which is unpublished, that  
2           was addressed in the briefing, the Court may recall  
3           that Mr. Mahmoud was involved in an employment  
4           action. The public records request pertained to his  
5           employment claims, and there were responsive records  
6           in the form of journal entries. As the Court may  
7           recall, he wanted journal entries pertaining to a  
8           supervisor. Some had been produced but some had not.  
9           Some had been produced for the very first time in the  
10          course of a non-PRA litigation, and so that was prior  
11          to a PRA suit being filed because he actually didn't  
12          amend his employment action and file PRA claims until  
13          -- it was a number of months later; I think it was  
14          August. And the production of the subsequent journal  
15          entries, which was more than a year later, was  
16          produced, I believe, in March of that year, so he  
17          didn't amend his claim and even have a PRA action  
18          pending before the Court for an additional five  
19          months. So I think those cases do address that.

20          I would concede that *Greenhalgh*, yes, refers to  
21          discovery in terms of production. The *Belenski*  
22          opinion states rather emphatically -- *Belenski* had  
23          two holdings to it, one which we're not here arguing,  
24          is it a one-year or a two-year? It's a one-year.  
25          But the second portion of the *Belenski* opinion is

1           what's the trigger? And so the Supreme Court stated  
2           that it's the agency's final response, whether that  
3           response, in their words, was truthful or correct.

4           Now, you know, additionally -- and I don't know if  
5           the Court has all the exhibits with it, but in the  
6           motion on summary judgment on the County, I  
7           referenced all the other pleadings filed, and if the  
8           Court looks at Exhibit 6 to Ms. Lake's declaration  
9           that she filed in support of her motion for summary  
10          judgment, Exhibit 6 is a series of emails that were  
11          produced by Sharon Predoehl on June 23rd, as the  
12          Court may recall from the declarations. So if the  
13          Court looks at -- I'll hand it forward.

14           THE COURT: She can't --

15           MR. SOMMERFELD: Either way. I'm sorry.

16          If the Court looks at this, the Court will also  
17          see that, as indicated in Ms. Predoehl's declaration,  
18          she had applied redactions. She applied exemptions  
19          to records on pages -- they're Bates stamped as pages  
20          152, 155, 157, 159, and pursuant to the *Greenhalgh*  
21          case, this is an adequate assertion of an exemption.  
22          It states the authority, and it describes that the  
23          complainant requested nondisclosure. So Pierce  
24          County in its response did both in this case.

25          On June 23rd, 2016, we produced records with a

1 claim of an exemption. Six days later, June 29th,  
2 2016, we have a closing letter that goes out. The  
3 County's position, obviously, as the Court  
4 understands, is that the closing letter is a final  
5 agency response that constitutes a denial from the  
6 standpoint of if a requester believes they have been  
7 denied records, well, a denial action accrues at that  
8 point under .550(1). Under subsection (6), it makes  
9 it clear that all actions under this section, which  
10 is .550, are subject to a one-year statute of  
11 limitations. And so of course in *Belenski* you had an  
12 outright denial of having any responsive records.  
13 It's quite ironic that the Supreme Court would say  
14 that for an outright denial where there  
15 unquestionably were responsive records that that  
16 would trigger a one-year statute of limitations, but  
17 a closing letter, which we provided and made clear by  
18 its terms that it was a closing letter, indicating  
19 that no records were going to be provided at a later  
20 time -- and that implicates the *Hobbs* case as well  
21 which says that a denial is when the agency says that  
22 no more records are going to be provided in an  
23 affirmative statement or, alternatively, by inaction  
24 doesn't provide any further records.

25 THE COURT: So I have a hypothetical for you

1           now.

2                   MR. SOMMERFELD:  Sure.

3                   THE COURT:  So what if -- which isn't the case  
4           in this case, but I'm trying to understand what the  
5           proper rule would be.  What if the record that was  
6           the straggler record let's say that was produced  
7           after the closing record had contained a bunch of  
8           redactions in that document and then the lawsuit was  
9           filed one day less than one year after that straggler  
10          record was produced?  Would that have been timely?  
11          There would be -- in these circumstances, the  
12          plaintiff couldn't have known about the claim because  
13          there was an improper redaction, and let's say that  
14          the lawsuit is about the improper redaction and that  
15          document was produced way later.  So we have the  
16          closing letter, nothing wrong; we're happy with that  
17          production.  Then later we have a document that's  
18          straggling and produced with a bunch of exemptions  
19          that are arguably improper and the plaintiff wants to  
20          sue about that.  Do they then have a year from when  
21          they got that straggling record?

22                   MR. SOMMERFELD:  I think it depends.  
23          According to the Supreme Court, can they show  
24          equitable tolling?  That's the one exemption or the  
25          one exception that they otherwise provided for.  I

1 would say that if the requester can say, you know,  
2 you withheld this document and, Your Honor, I'm  
3 filing this lawsuit and before we proceed to motions  
4 on this, I want the Court to permit discovery,  
5 consistent with *Belenski*, because we think we can  
6 develop equitable tolling, that's consistent with  
7 *Belenski*. We don't have that here.

8 THE COURT: And the flip side is that what if  
9 agencies started responding by the first letter being  
10 we've got nothing and then it's closed and then you  
11 start trickling documents in?

12 MR. SOMMERFELD: And that's the very fact  
13 pattern in *Belenski*.

14 THE COURT: So do you think equitable tolling  
15 is the answer to the concerns raised by Ms. Dotson  
16 about a contrary rule that you are being -- I mean,  
17 the rule that you're advocating for.

18 MR. SOMMERFELD: Well, I'd put back to the  
19 Court, isn't that exactly what the Supreme Court said  
20 in *Belenski*? At the close of the opinion they  
21 acknowledge that the plaintiff's community had  
22 concerns about that, and I understand that the Court  
23 had to wrestle with those policy considerations. I  
24 agree that it's not an easy answer, but they did  
25 wrestle with it, and they had to come down one way or

1 another, and they made a very definitive statement  
2 when they said whether the agency's response is  
3 truthful or accurate. And if you think it over -- I  
4 think it was correct or truthful was the phrase that  
5 they stated.

6 When the Court looks at that statement, that  
7 statement by the Court obviously -- what's imbued in  
8 that is the fact that they know that records might  
9 get missed. It would be quite ironic to accept  
10 Dotson's position here that when the agency complies  
11 with what the Attorney General says under the model  
12 rules, which is that, you know, if you have missed  
13 something and you come across it, you should provide  
14 it, which is exactly what we did here. We didn't  
15 say, oh, gosh, let's hide this and just try to wait  
16 it out and see if that will give us an additional  
17 argument. We came forward with it.

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

25 So I think when you look at -- going back to this,

1 if you look at *White* and *Greenhalgh*, which are still  
2 valid opinions, they are a one-year rule. When you  
3 look at the fact that we have both an exemption, we  
4 have a closing letter, which I think it's very clear  
5 under both *Belenski* and *Hobbs* -- *Hobbs* was about what  
6 causes the action to accrue? And in that particular  
7 case it said, no, you can't start an action while the  
8 County is still producing installments, and then  
9 Division II went on to say, so when would the action  
10 have accrued? It would have accrued, according to  
11 that case -- I think it was on March 1 when the  
12 auditor said, okay, we're done. So hence, if you  
13 think that you have been denied something that you  
14 were entitled to, now you have a denial claim under  
15 .550(1) that's subject to a one-year rule, and that's  
16 exactly what we have here. The County has been  
17 accused of silent withholding, a denial claim.

18 And I would go back to the facts here that are  
19 pointed out in the declarations and in the briefing  
20 that the productions were complete by June 23. It's  
21 just that Ms. Predoehl waited a few days to get the  
22 confirmation receipts from Filelocker that -- Ms.  
23 Lake had downloaded all the documents, and then she  
24 said, we're closing this out, if you have any  
25 questions, let us know, and there was no further

1 response. But in the June 23 productions, there were  
2 documents as well that referenced the application  
3 file to the adjacent Pecheos parcel, hey, like  
4 there's a couple of names that are attached to it.  
5 But the adjacent parcel which they're asserting we  
6 should have given them the records on even though the  
7 County obviously contests it, that we didn't see that  
8 as being responsive as the request was framed, but  
9 regardless, assuming their position that they're  
10 responsive and that they were denied those records  
11 for purposes of a claim, they had all those facts by  
12 June 23rd.

13 In *Belenski*, the Supreme Court said there was no  
14 reason for them to wait 25 months to sue. Here,  
15 again, there was no reason for Ms. Dotson to wait 16  
16 months to sue. She had all of the information that  
17 she needed because the existence of those other  
18 documents was made known by the June 23 production,  
19 which is why, I would assume, they have not made an  
20 equitable tolling argument here consistent with  
21 *Belenski*.

22 THE COURT: No other questions for you.  
23 Anything else you want to add?

24 MR. SOMMERFELD: No, Your Honor.

25 THE COURT: Thank you.

1 Ms. Lake.

2 MS. LAKE: Thank you, Your Honor. I'll hand  
3 this up. It's just pages out of the cases that we  
4 cited.

5 First of all, Your Honor, you're exactly correct.  
6 There is no case that stands for the proposition that  
7 the County is providing enough because it's answered  
8 very simply. It's because RCW 42.56.550(6) is very  
9 clear, and so there doesn't need to be any case law  
10 interpreting what it means. Public records actions  
11 must be filed within one year of either the agency's  
12 claim of exemption or the last production of records  
13 on a partial or installment basis, and that's exactly  
14 what we have here. Prong (2) clearly applies. Ms.  
15 Dotson filed the public records suit within one year  
16 of the County's last production of records.

17 This Court should deny the County's statute of  
18 limitations summary judgment for at least the  
19 following reason: None of the cases stand for what  
20 the County says. I know that's a little harsh, but  
21 that's actually -- it's actually the case, and I want  
22 to walk through some of these cases to show why  
23 that's true. None of the cases overcome, obviously,  
24 the clear statutory directive of prong (2) of  
25 42.56.550(6).

1           We also want to ask the Court to reject on policy  
2 reasons because, as Your Honor pointed out, the  
3 County could simply say we don't have any records and  
4 then wait 365 days and issue a bunch more records.

5           THE COURT: Wouldn't that go to the tolling  
6 applied in this circumstance?

7           MS. LAKE: Perhaps, Your Honor, but we don't  
8 even need to get to that in this case because the  
9 statute -- the terms of the statute so clearly  
10 applies. The only reason one gets to *Belenski* and  
11 all of the other cases that they're talking about is  
12 because those cases came about at a time right after  
13 the 2005 legislative change to the public records  
14 statute of limitations. Previously it was five  
15 years. In 2005, they changed it to say it's going to  
16 be a one-year statute of limitations running from  
17 these two triggering actions, so there came a bunch  
18 of cases that said, well, wait a minute. What about  
19 a situation where one of those two prongs didn't  
20 happen? And that's exactly what the *Belenski* case --  
21 it was trying to address that.

22           The one-year statute of limitations doesn't -- the  
23 prong of either exemption or last installment didn't  
24 happen here because there were no records produced,  
25 and so wait a minute, does that -- do we apply the

1 catchall statute of limitations or do we, you know --  
2 do we take the legislature's word to mean only these  
3 two things triggers it? And so the *Belenski* case had  
4 no trouble in saying we are going to apply the  
5 one-year statute of limitations no matter what the  
6 event was.

7 THE COURT: Isn't the Public Records Act and  
8 accompanying case law fairly clear? You get a pretty  
9 precise one-year window here. For example, you can't  
10 bring suit until the installments are complete. It's  
11 not ripe yet until you're done with the production,  
12 and then you get one year from then. So if the year  
13 didn't start until this later production, could Ms.  
14 Dotson have brought suit between the closing letter  
15 and this thing that you didn't know was going to  
16 happen yet? And if you could bring suit, doesn't  
17 that expand beyond the one year?

18 MS. LAKE: The statute -- if nothing else had  
19 happened, we could have brought a lawsuit between  
20 June 23rd, but the County opened the door by  
21 providing additional installment of records.

22 THE COURT: So the County actions can create a  
23 longer statute of limitations period than the  
24 legislature has enacted by statute?

25 MS. LAKE: Not at all, Your Honor.

1 THE COURT: Well, you had a year and three  
2 months let's say, or whatever it was, to bring suit  
3 then, right? The claims you have in this case arise  
4 out of the essence of the original production. There  
5 was nothing about that later produced document that  
6 really fed into the claims that are in this case. So  
7 these claims that you have brought in this lawsuit,  
8 based on your argument you had a year and a number of  
9 months to bring them; is that correct?

10 MS. LAKE: Your Honor, actually, these claims  
11 relate not so much to the June 23rd documents, even  
12 the October 26th documents, they pertain to the  
13 November 2nd documents and the March 2nd, 2018  
14 documents because remember the context of what -- of  
15 how this happened. We filed a records request  
16 because Ms. Dotson was charged by the County with a  
17 land use violation. We said, what do you have? What  
18 do you know that we don't?

19 THE COURT: When could you have brought this  
20 lawsuit in the first instance? When was it ripe for  
21 you to bring?

22 MS. LAKE: It could have been brought under  
23 June 23rd -- a year from June 23rd, but when the  
24 County issued its next installment, it's clearly an  
25 installment that was responsive to this request.

1 That extended -- that brought the -- that made a new  
2 bright line under the clear statutory prong of  
3 .556(2).

4 THE COURT: So you had a one-year-and-four-  
5 month period during which you could have brought this  
6 lawsuit?

7 MS. LAKE: No, Your Honor. We had one year  
8 from the date of the installment of records.

9 THE COURT: But you had three months between  
10 June and October that you could have brought this  
11 lawsuit.

12 MS. LAKE: And if the County would not have  
13 produced any additional records, then that would have  
14 been the end of the matter, but they did, and that's  
15 what triggered the clear language of 42.56.550(6) and  
16 the second prong.

17 The *Greenhalgh* case is exactly the same situation  
18 where the Department of Corrections actually did  
19 respond under prong (1) by exerting an exemption, but  
20 the requester there made what the Court called a  
21 novel argument. The requester said, well, instead of  
22 really having two public records requests, we  
23 actually made four, and he did respond to one, and so  
24 therefore you violated the Public Records Act. But  
25 the Court found, as we wish this Court would, that

1 42.56 was instead the definitive statute to follow  
2 and clearly applied because under prong (1) the  
3 Department of Corrections had issued an exemption,  
4 and so that started the one-year statute of  
5 limitations.

6 I want to point out the *Greenhalgh* case, and I  
7 handed that up because this is one of the first  
8 really glaring instances where the County, frankly,  
9 misstates what the holding in *Greenhalgh* was all  
10 about. The County argues that *Greenhalgh* ignored a  
11 last installment when they infer that responsive  
12 records were produced in discovery, and then they  
13 argue yet the Court didn't extend based upon that  
14 release of records. But in fact - and it's clear  
15 from just the one page that we provided up - there  
16 *Greenhalgh* did do discovery as part of the public  
17 records case, but then *Greenhalgh* argued, well,  
18 because you provided records in discovery, not  
19 responsive records to the public records case that  
20 the County argued, but that they did any kind of  
21 discovery at all, then they were foreclosed from  
22 asserting the affirmative defense of statute of  
23 limitations. That's what *Greenhalgh* stands for. It  
24 doesn't stand for the Court declined to extend the  
25 statute of limitations based upon an installment of

1 records, and that's why we handed up that case.

2 The *McKee* case is an unpublished case. It's not  
3 the best written, but we -- again, the County there  
4 says that that stands for a case where McKee got some  
5 records after his public -- but the Court did not  
6 extend the statute of limitations. If you look at  
7 just the one page of *McKee*, you'll see that's  
8 actually not the case at all. *McKee* was arguing  
9 whether a one, two, or three statute of limitations  
10 applied. The Court found that the claim was filed  
11 more than three years anyway, so there was no need to  
12 talk about whether one, two, or three applied. It  
13 doesn't address installment issues at all.

14 In the *Mahmoud* case -- well, in the County reply,  
15 they add a couple more cases, and they're  
16 interesting. First of all, they make a new argument  
17 not addressed in their opening brief that the model  
18 rules makes a distinction between production of  
19 records, later discovered records, and installments,  
20 and as we know, however, under WAC 44-14-0003, model  
21 rules are not binding and they're advisory only.

22 But then even more interesting, and I'm glad they  
23 raised the *Lakewood* case, *Lakewood v. White*, because  
24 if they hadn't we would have. And I handed that case  
25 up as well, Your Honor. That case addresses three

1 different requests, so I can understand how you can  
2 get a little mixed up when you're parsing out that  
3 case. The County argues on their reply that it was  
4 immaterial that Lakewood had produced records on  
5 September 23rd, 2013 after the City had closed out  
6 its request. That statement applies to the third  
7 request under *White*. The operative decision under  
8 *White* was that whether -- related to the second  
9 request, and I direct Your Honor's attention to page  
10 12, 13, and 14 where it made so clear that the Court  
11 made its decision because it found the one-year time  
12 bar under 42.56.550(6) was triggered by the City's  
13 production of records, and that's clear as day on  
14 page 12. White's claim relating to his second  
15 request are time barred, must be considered in light  
16 of the City's last production of records. It had  
17 nothing to do with the City's statement about this is  
18 our final production. It related to when did they  
19 produce the records.

20 And so the *White* case goes on to say, well, let's  
21 define what is a production of records because on the  
22 second request, the City had issued records on  
23 September 5th. The respondent -- or the petitioner  
24 said that they hadn't received those records, so they  
25 tried to make a claim that the statute didn't run

1 because they hadn't received it. And so the Court  
2 said because there was evidence that they had  
3 actually been mailed, then that is producing the  
4 record and that is the triggering date, the date they  
5 produced the installment of records. And it's clear  
6 as day on page 12, 13, and 14. The September 23rd,  
7 2013 date that the County talks about relates to the  
8 third request, and in that request both the trial  
9 court and the appeals court found that in fact a  
10 violation did occur and issued penalties. So it's a  
11 completely misleading citation to *Lakewood v. White*.

12 In the *Hobbs* case -- it's really extra curious  
13 that the County cited to *Hobbs* because *Hobbs* is just  
14 flat out not a statute of limitations case. *Hobbs*  
15 stands for the proposition that if a requester files  
16 a case too early, then there is no justiciable issue  
17 and the case has to be dismissed. So rather than  
18 talking about the dangers of filing too late, it's  
19 talking about filing too early. And the County cites  
20 to -- we feel like we know *Hobbs* pretty well. The  
21 County cites to the *West v. Port of Tacoma* and the  
22 *West v. Bacon* cases. We were the counsel on those  
23 cases for the Port of Tacoma, and we used *Hobbs* to  
24 show that in fact that the records request -- the  
25 records lawsuit had been filed too early, the reason

1 being is -- and if there's any obligation of *Hobbs* at  
2 all to these facts, *Hobbs* says that because the  
3 auditor was still issuing installment of records,  
4 then the statute of limitations didn't run yet  
5 because the statute of limitations would run from the  
6 time of the last installment. So *Lakewood* actually  
7 supports our position, Your Honor, and not the  
8 County's.

9 *Hobbs* also says that "Where the meaning of the  
10 statute is plain on its face, we give effect to that  
11 plain meaning as an expression of the legislature's  
12 intent," quoting *Rental*, the housing case. Here,  
13 there can be no clear expression of the legislature's  
14 intent when they say that the statute of limitations  
15 will run at the last production of records. It  
16 doesn't say at --

17 THE COURT: It says, "of a record on a partial  
18 or installment basis." It doesn't say "last  
19 production," period. It continues to go on.

20 MS. LAKE: Are we quoting from --

21 THE COURT: This is sub (6): "Actions under  
22 this section must be filed within one year of an  
23 agency's claim of exemption or the last production of  
24 a record on a partial or installment basis."

25 MS. LAKE: Exactly, Your Honor.

1 THE COURT: So it doesn't just say last  
2 production of a record though. It's specifically  
3 linking to a partial or installment basis. So isn't  
4 the question really what is a partial or installment  
5 basis?

6 MS. LAKE: Well, it's clear when you issue  
7 records over a series of installments, then that's an  
8 installment production, and that's the case here  
9 because the County issued two installments. Number  
10 one, in the very first response on May 20th, they  
11 issued a link to various records that were online.  
12 That's the first production, which they admit.

13 And then the second production was June 23rd when  
14 they issued additional records through the three sets  
15 of Filelocker system. So it's clear that they were  
16 issuing installments. They called -- they themselves  
17 called them installments. So when they are issuing  
18 records on a partial installment basis, check off  
19 that box. That's exactly what happened here. And  
20 there is a last production of records. No question  
21 there was a record produced by the County on October  
22 26th, 2016. That's the date at which the statute of  
23 limitations runs.

24 THE COURT: Anything else?

25 MS. LAKE: No, Your Honor.

1 THE COURT: Thank you.

2 Rebuttal argument.

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

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

12 MS. LAKE: Okay. I appreciate that. Thank  
13 you, Your Honor.

14 MR. SOMMERFELD: Your Honor, the first thing I  
15 would point out is that, again, it's unrebutted that  
16 Ms. Predoehl on June 23rd, 2016 produced records  
17 prior to closing the response out six days later, and  
18 in that June 23rd production she made exemptions of  
19 certain records that are in Exhibit 6 that I've  
20 previously handed forward. That triggered the  
21 one-year statute of limitations.

22 I would also point out, I don't know exactly where  
23 the plaintiff is trying to contend that this is --  
24 that .550(6) is supposed to be construed as a latter  
25 of the two events in terms of which would occur

1 later, either an exemption or an installment. I  
2 would -- if that is what's being implied, although it  
3 wasn't ever expressly stated in the argument, that  
4 that is not what (6) says. It doesn't say that it's  
5 the later of the two. And as the Court knows, there  
6 are a host of statute of limitations provisions out  
7 there for other claims where that pertains to child  
8 sexual abuse events, there's insurance claims. For  
9 instance, there's a host of statute of limitations  
10 where the legislature has used language which says  
11 you can sue, you know, X number of years based upon  
12 this event or another event, whichever is later.  
13 That language is not used in .550(6), and the Supreme  
14 Court in *Belenski* made it clear it's going to be one  
15 year for all responses.

16 What we did here is we claimed exemptions. On top  
17 of that, we don't believe that the language of  
18 "installment production," as the Court just keyed on  
19 a few minutes ago, refers to later discovered  
20 documents, which is the term that the AG uses.  
21 Installment production is simply used under the  
22 context of .080 under 42.56 and also under one of the  
23 other provisions that I said in the brief and in the  
24 model rules. It's referred to as a mechanism for the  
25 agency's response prior to final action. As you know

1 from the .520 statute that refers to final action --  
2 and I did see that I misstated in my brief in my  
3 reply that I cited to .550(4) for the installment  
4 final action. Final action is referred to under  
5 .520. As the Court knows, for State agencies for  
6 final action, if an agency says we're done, you can  
7 appeal and get -- within 48 days, I'm sorry, 48  
8 hours, two days, and if you get a response, that's  
9 when there's final action.

10 The statutes, when you read all this together,  
11 it's very clear that the legislature is referring to  
12 installment production prior to the agency taking  
13 final action. It's not referring to things that  
14 occur later. When you look at the *Belenski* statement  
15 of we're gonna apply one year whether the response is  
16 truthful or accurate or correct, that obviously  
17 implicates the Supreme Court's understanding that  
18 records could get missed, and yet they went out of  
19 their way to say it doesn't matter if the response  
20 was not correct. The only remedy that the plaintiff  
21 will have at that point is going to be equitable  
22 tolling.

23 I've got to say that I disagree strongly with  
24 plaintiff's interpretation of the *Lakewood* case. I  
25 noticed when she handed the document forward to the

1 Court for review on page 12, she highlighted on the  
2 second paragraph there, starting at a particular  
3 statement, but she neglected to point out that the  
4 preceding sentence reads, "However, the City  
5 subsequently produced some responsive records with  
6 its responses to White's second request and stated  
7 that White's request for public records would be  
8 considered closed unless White responds to the  
9 contrary by October 5th, 2012. The one-year time bar  
10 was then triggered by the City's productions of the  
11 response. Therefore, whether White's claims relating  
12 to a second request are time barred must be  
13 considered in light of the City's last production of  
14 records."

15 I think also, if the Court gives a fair reading of  
16 this case, the Court will see that the production of  
17 records by the City of Lakewood consisting of the  
18 warrant and the affidavits in support were not solely  
19 in response to request number three. They were in  
20 response -- they were responsive records to all three  
21 requests, including number two, because in each of  
22 the requests the attorney, White, was asking for the  
23 search warrant records. So it's really not an  
24 accurate representation of the case to say that that  
25 later production did not apply to the second

1 response.

2 When you raised your question about installments  
3 and counsel came back and said, well, you know, they  
4 chose to make installments, they made installments  
5 earlier, you were trying to point out, well, what is  
6 an installment and how do we apply this? Well, what  
7 if we deal with a situation like *Belenski* where the  
8 response is we're not going to provide you some  
9 installments, we're simply going to tell you we don't  
10 have any records, even if it's untruthful, as it was  
11 in that case. Or what about another fact pattern  
12 where the agency doesn't say we don't have any  
13 records, but they simply say wholesale, everything we  
14 have is exempt, okay? Neither one of those would be  
15 installment production. I think we could all agree  
16 on that. Those are denials. One is an exemption,  
17 one is like *Belenski*, saying we don't have it at all.

18 If the agency then comes out later on, four months  
19 later, six months later, or 15 months later, and  
20 produces some records, we're not going to call that  
21 an installment. It doesn't make any sense to call it  
22 an installment. It's contrary to the plain terms of  
23 the statute. So I don't think that they can find  
24 refuge in the fact of saying, well, it's an  
25 installment after you give a closing response, so

1           therefore we should get the benefit of that.

2           *Greenhalgh* is on all fours on this case because we  
3           provided exempt documents. As the Court pointed out,  
4           she could have sued as soon as June 23rd, and I think  
5           she conceded that to you. And so the -- if she --  
6           we're not arguing about equitable tolling at this  
7           point, but I think it's very clear as well what *Hobbs*  
8           also stands for. We disagree obviously about this.  
9           The whole point of *Hobbs* is when does the action  
10          accrue? Because you had to know under that decision  
11          when does the action accrue in order to decide  
12          whether or not the action is premature or timely.

13          I think, as this Court's questioning to counsel  
14          pointed out, on June 23, that's when the action  
15          became timely, and that's consistent with *Hobbs*, and  
16          that's why we believe that they had to file their  
17          action by not later than June 23rd of 2017. We could  
18          have debated a closing letter, but I think either the  
19          exemption on June 23rd or the closing letter on June  
20          29th, which was also a denial of any remaining  
21          records, both triggered the statute of limitations.  
22          And so for those reasons, we would ask that the Court  
23          dismiss.

24                         (The ruling of the Court was previously  
25                         transcribed under separate cover.)





A P P E A R A N C E S

For the Plaintiff: CAROLYN A. LAKE  
Attorney at Law  
Goodstein Law Group PLLP  
501 South G Street  
Tacoma, WA 98405

For the Defendant: MICHAEL SOMMERFELD  
Deputy Prosecuting Attorney  
Pierce County Prosecutor's Office  
Civil Division  
955 Tacoma Avenue South, Suite 301  
Tacoma, WA 98402-2160

1 JUNE 1, 2018

2 THE HONORABLE CHRIS LANESE, PRESIDING

3 \* \* \* \* \*

4 (After hearing argument, the Court ruled as  
5 follows.)

6 THE COURT: Thank you. The Court is prepared  
7 to rule at this time.

8 This question before the Court is one with regard  
9 to the statute of limitations. The statute of  
10 limitations that governs in this case is under RCW  
11 42.56.550(6), which indicates that "Actions under  
12 this section must be filed within one year of the  
13 agency's claim of exemption or the last production of  
14 a record on a partial or installment basis." The  
15 parties effectively dispute what that last phrase  
16 means, "the last production of a record on a partial  
17 or installment basis."

18 In determining what a statute means, a court may  
19 look at other provisions within the same statutory  
20 scheme. There is no definition under the Public  
21 Records Act of what "a partial or installment basis"  
22 means. However, we may look at how those terms are  
23 used in other provisions of the same statute. I am  
24 looking specifically at 42.56.080(2), which states,  
25 "Public records shall be available for inspection and

1 copying and agencies shall, upon request for  
2 identifiable public records, make them promptly  
3 available to any person, including, if applicable, on  
4 a partial or installment basis as records that are  
5 part of a larger set of requested records are  
6 assembled or made ready for inspection or  
7 disclosure."

8 This Court believes that that provision and the  
9 use of that phrase in that context makes it clear  
10 that a partial or installment basis is what was  
11 commonly understood by that term which is when you  
12 have a larger group of records that you need to  
13 prepare and gather and you know at the outset it's  
14 going to take time to gather and collect them, and  
15 then you turn them over in installments with a  
16 closing letter when you're done producing those  
17 installments. That is what happened in this case.  
18 We had installments that were produced and then a  
19 closing letter, and at that point the claim accrued,  
20 as was accepted by plaintiff's counsel. The  
21 plaintiff could have sued as of June. However, the  
22 plaintiff did not sue as of June. The plaintiff sued  
23 a year and four months later, give or take.

24 I am going to dismiss this case on the statute of  
25 limitations. There are concerns raised by the

1 possibility that gamesmanship or other actions could  
2 occur in future hypothetical cases, but those cases  
3 are not before this Court. None of the facts that  
4 would support any of those concerns are present in  
5 this case, and should those concerns arise in future  
6 cases, as the Supreme Court stated pretty  
7 emphatically at the conclusion of the *Belenski*  
8 opinion, we are more than equipped to handle those  
9 issues through the doctrine of equitable tolling.

10 However, if this Court were to find in favor of  
11 the plaintiff here, this would effectively mean that  
12 agencies could, through their own actions, expand a  
13 statutory statute of limitations beyond the very  
14 strict one year that we have in Public Records Act  
15 cases, and that is not permitted outside the confines  
16 of the hypothetical situations that one might  
17 encounter vis-a-vis the equitable tolling doctrine,  
18 which, again, was argued here, and there aren't facts  
19 to support it here.

20 Thus, I am dismissing this case on statute of  
21 limitations grounds. I will sign an order consistent  
22 with that. I will allow the parties to confer.

23 That is going to conclude this matter.

24 (Proceedings were concluded.)  
25



# GOODSTEIN LAW GROUP PLLC

January 04, 2019 - 4:57 PM

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**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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