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

KIMBERLYN DOTSON, Appellant

v.

PIERCE COUNTY, acting through its PLANNING & LAND SERVICES
DEPARTMENT, a municipal corporation, RESPONDENT.

RESPONDENT PIERCE COUNTY'S CORRECTED BRIEF

MARY E. ROBNETT
Prosecuting Attorney

By
MICHAEL L. SOMMERFELD
Deputy Prosecuting Attorney
Attorneys for RESPONDENT

955 Tacoma Avenue South
Suite 301
Tacoma, WA 98402
PH: (253) 798-6385

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**I. ISSUES PERTAINING TO APPELLANT DOTSON'S
ASSIGNMENTS OF ERROR**

1. Did the trial court properly dismiss Appellant's PRA action as barred by the statute of limitations when the complaint was filed over a year after the County produced records with partial exemptions and issued its closing letter?

2. Should Appellant's request to remand for equitable tolling be denied when Appellant failed to raise the doctrine below, failed to adequately brief the doctrine on review, and when the trial court considered equitable tolling *sua sponte* and ruled it was not justified in this case based upon the record?

3. Did the County conduct a reasonable search for records?

4. Should this court reject Appellant's claim that the County's 5-day acknowledgement letter failed to provide an estimate of time for future agency response when the 5-day letter informed the requester that the public record officer would respond further in "3-4 weeks" rather than upon a specific date of the calendar?

5. Should this Court reject Appellant's claim that the County failed to adopt rules for providing "fullest assistance" to PRA requesters when the Pierce County Council enacted such rules under Chapter 2.04 of the Pierce County Code, and where Appellant did not challenge any provisions of that code below or assign error to any of its provisions on appeal?

II. STATEMENT OF THE CASE

A. Procedural History

On October 25, 2017 Appellant Dotson filed a complaint in Thurston County Superior Court for judicial review of public records requested from and produced by the Pierce County Planning and Land Services (PALS) Department. CP1-6. The public record request was emailed to PALS by attorney Carolyn Lake on May 18, 2016. CP 383.

Appellant filed a motion for summary judgment on February 21, 2018. CP 11-658. Pierce County filed a response in opposition. CP 870-892.

On May 4, 2018 Pierce County filed its own motion for summary judgment seeking dismissal on the basis that the action was not filed within the one-year statute of limitations. CP 902-915. On May 22, 2018 Dotson filed a brief in response to the County's summary judgment motion, but the brief did not raise the doctrine of equitable tolling or equitable estoppel in response to the County's statute of limitations defense. CP 737-784,

The cross-motions for summary judgment filed by the parties were set to be heard by the trial court on June 1, 2018. CP 661. At the hearing, Judge Lanese indicated that rather than proceed under a summary judgment standard, he preferred instead with consent of the parties to treat

the hearing as a decision on the merits as the following colloquy reflects:

THE COURT: Good Morning. So, this is on for what are effectively cross motions, but it is also the merits hearing date for the PRA case that is here. My preference here is to proceed as follows: Because of the statutory frame- work for Public Records Act cases, **I'm going to fold this all up into one and treat this all as merits issues** because I believe they all go towards the merits. Technically the summary judgment standard is a little different, but I don't believe there are actually any uncontroverted facts. It's what those facts mean in this case that's really the controversy. **I wanted to make sure that no one was going to object to me treating this all as on the merits here rather than teeing it up under the CR 56 standard for the purposes of our appellate record at least. Is everyone okay with that?**

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

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

VRP at 3-4 (June 1, 2018)¹ (emphasis supplied).

During the hearing on the merits, Judge Lanese twice questioned Dotson's counsel as to when the PRA action accrued:

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

MS. LAKE: The statute - - if nothing else had happened, **we could have brought a lawsuit between June**

¹ VRP refers to the verbatim report of proceedings. There are two verbatim reports of proceedings for the hearing held June 1, 2018. The first VRP transcribes the parties' arguments. The second VRP transcribes the court's ruling following argument.

23rd, but the County opened the door by providing additional installment of records.

VRP at 17. Thereafter another exchange occurred:

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

MS. LAKE: **It could have been brought under June 23rd - - a year from June 23rd**, but when the County issued its next installment, it's clearly an installment that was responsive to this request. That extended - - that brought the - - that made a new bright line under the statutory prong of .556(2) [sic].

VRP at 18-19.

The trial court concluded that Dotson's PRA action accrued as of June 2016 after the County produced installments of records and then a closing letter. VRP at 4. The court noted that at the hearing plaintiff's counsel had "accepted" that the action accrued in June of 2016. VRP at 4.

Judge Lanese acknowledged that the Supreme Court's "*Belenski* opinion"² permitted trial courts to apply "the doctrine of equitable tolling" in PRA cases to address "concerns raised by the possibility that gamesmanship or other actions could occur in future cases[.]" but added "[n]one of the facts that would support any of those concerns are present in this case[.]" VRP at 5. The trial court then ruled that "the equitable tolling doctrine" was not applicable in this case because "there aren't facts to support it here." VRP at 5. By written order the trial court dismissed

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

the action as barred under the statute of limitations. CP 785-786.

B. Statement of Facts

On May 18, 2016, at 4:32 p.m., Attorney Carolyn Lake sent an email with the words “Public Records Request” addressed specifically to Sharon Predoehl, the public records officer (PRO) for the Pierce County Planning and Land Services (PALS) department. CP 793, 830, 843-846. Attorney Lake’s email included a letter which read in part:

Pursuant to the Public Records Act, RCW Chapter 42.56, please treat this letter as a formal request to Pierce County Planning and Land Services to provide the following information:

A copy of any and all records, correspondence, and documentation including Emails related to Kim Dotson, Parcel Number 04-17-06-2-101, Site Address: 5523 296th t. 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.

CP 793, 830, 843-846. The request was deemed received May 19, 2016 as it was received after county business hours on May 18th. CP 830. PRO Predoehl was out of the office on May 19, 2016 as she attended an all-day Washington Public Records Officers (WAPRO) conference. CP 830-31.

5-Day Request Acknowledgment Letter:

On May 20, 2016, Ms. Predoehl sent a “5-day” letter by fax and regular mail to Attorney Lake that acknowledged receipt of the request and provided Attorney Lake with an internet address and instructions permitting immediate access to a first installment of responsive permit

records from a PALS website by means of entering Dotson's parcel number or property address. CP 831, 848. Predoehl had already located numerous responsive records on the PALS website and immediately identified their availability in the 5-day letter. CP 832-33, 850-53.

Predoehl's 5-day letter addressed to Attorney Lake read in part:

We have public records on line at:
<https://palsonline.co.pierce.wa.us/palsonline/permitsearch>. Enter the parcel number or site address, and then you can click on each permit and see the tabs with information and documents.

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. I have submitted to our IT department, a request to search emails using the search terms: Kim Dotson, 041762010, 0417066001, 5523 296th St. E. 51105, and 46078. (The last two numbers are violation problem numbers). It takes at least one week to get the results back from IT; I then need to review each email for possible redactions and exemptions, and then I send it back to IT to produce the results as a PDF document. It can take another week for IT to produce the PDF. I will have Planning and Land Services staff search their files for records.

CP 384, 831, 848.

Pierce County's Search for Records:

Predoehl commenced her search for records on May 20, 2016, creating a spreadsheet to track her search, and by reviewing information on the "PALSplus" database to assist in determining where responsive records would be located and whether she could provide Lake access to some available records immediately via the department's website. CP 797, 831, 833. Predoehl asked the county Information Technology (IT)

department to perform an email search using the terms: “Kim Dotson; 0417062010; 0417066001, 5523 296th ST. E. 51105, and 46078.” CP 833. Predoehl added a parcel number to the IT search after she determined by her own search that “0417066001” was the correct parcel number for Dotson’s address at 5523 296th ST. E.. CP 848, 858. The parcel number provided in the record request, “417062010,” was incorrect and returned no records in the PALS or Assessor-Treasurer databases. CP 858

On May 20, 2016 Predoehl searched the PALS permitting database, found an active code violation and active applications for the Dotson parcel, and determined PALS Resource Management would likely have any responsive records. CP 833. Predoehl sent a copy of Attorney Lake’s request to PALS Resource Management Supervisor Kathleen Larrabee along with a search form prepared by Predoehl. CP 833. Predoehl prepared a detailed department record search form, sent it to Larrabee, and requested staff complete and return it. CP 833, 854-55.

Larrabee determined employees Dominique Senzig and Environmental Biologist Mary Van Haren might have responsive records as Van Haren was previously assigned to a fish and wildlife application for Dotson’s parcel. CP 833. Senzig and Van Haren provided records to Predoehl, who provided them to Attorney Lake on June 23, 2016. CP 834.

Van Haren received an email from Predoehl on May 20, 2016

requesting that she perform a record search and complete a search summary form for records in response to Ms. Lake's request for records in concerning the Dotson property. CP 664.

Approximately six months earlier, in late 2015, Van Haren was assigned to investigate a complaint that the State Department of Ecology submitted to PALS regarding Dotson's property, parcel number 041706600. CP 662. As a part of that investigation, on November 9, 2015, Van Haren retrieved a document entitled "CRITICAL AREA NOTICE FISH AND WILDLIFE HABITAT CONSERVTION AREA/AND OR STREAM BUFFER NOTICE" that was dated August 27, 2007 from archived PALS file application number "553137." CP 663. File "553137" concerned a 2006 application submitted by property owners "Hansen/Pecheos" seeking approval to build a single-family residence on county tax parcel "0417066004," a parcel adjacent to Dotson's parcel. CP 663. Van Haren retrieved only one document from file "553137" for purposes of her review of Dotson's parcel. CP 663. That single documents was the final approved and recorded (title notification) document for the build application, and it identified an "F1" type stream on the "Hansen/Pecheos" property, parcel 0417066004. CP 664, 674. The final approved and recorded document for the "Hansen/Pecheos" application was *the only record* or "data" Van Haren used from the

“553137” file for purposes of her work concerning Dotson’s parcel prior to Attorney Lake’s record request. CP 663. Van Haren did not otherwise use or review any other record from the “553137” file for her work on the Dotson review, nor did she do so subsequently for purposes of Dotson’s administrative appeal hearing held in October of 2016. Id.

By letter dated November 25, 2015, Van Haren advised Dotson that PALS had received a complaint or “public service request” concerning a potential “critical area violation” that concerned the presence of a stall, a horse, and a paddock³ located within 100 feet of a stream located on Dotson’s parcel. CP 663, 678-80. Van Haren’s letter further advised Dotson that the stream was previously typed as an “F1” category stream “during a review of an adjacent parcel,” that “F1” category streams require a 150-foot buffer, and that the paddock and stall were currently within the buffer. Id. Van Haren’s letter referenced the potential relocation of the paddock and stall to another area of the property and advised Dotson that she needed to make application for a “Fish and Wildlife Habitat Water Type Verification and Farm Management Plan.” CP 679. Van Haren’s November 25, 2015 letter to Dotson was based upon her prior review of the CRITICAL AREA NOTICE FISH AND WILDLIFE HABITAT

³ A “paddock” is a fenced area used for horse grazing.

CONSERVATION AREA/AND OR STREAM BUFFER NOTICE” dated August 27, 2007 she previously obtained from PALS file “553137.” CP 664.

On March 17, 2016, Dotson submitted an application for a Fish and Wildlife Habitat Water Type Verification and Farm Management Plan to PALS, which was designated as application “832074.” CP 664.

By letter dated May 4, 2016 and addressed to Dotson, Van Haren advised she had completed a fish and wildlife habitat water type verification, approved Dotson’s application, and requested that Dotson sign and return the enclosed application document. CP 664. In that same letter, Van Haren also identified and enclosed a copy of a document entitled “Regulated Fish and Wildlife Species and Habitat Conservation Area Approval” for application number “832074” which read in part: “Based on our research and site visit, a stream was identified within your parcel. This drainage course was typed as an F1 through application 553137 in the upstream parcel 0417044004.” CP 664, 682, 685.

Upon receiving Predoehl’s email regarding Lake’s record request, Van Haren searched her own records according to department protocol. CP 664-65. Van Haren searched electronic and physical locations where records related to enforcement and application activities concerning Dotson’s property might logically be found. CP 665. Van Haren searched

her personal devices, personal drive on her office computer, personal shared drive on her computer, project shared drive on her office computer, section files, and personal work space. CP 665.

Van Haren's search was in good faith and with due diligence to locate all responsive records as she understood Attorney Lake's request. Van Haren understood the request as seeking any documents that she had used or prepared for purposes of the application and enforcement actions concerning Dotson's property. CP 665. When Van Haren reviewed Attorney Lake's request for Dotson property records, it did not occur to her at any time that any records from the "553137" application *file other than the one document she had retrieved and used* were responsive to the request. CP 665. Van Haren observed that Attorney Lake's record request referred to application or enforcement records concerning Dotson's address, but that it nowhere identified or referenced the "553137" application file, the "Hansen/Pecheos" property, or the tax parcel number for that property. CP 665. Prior to Attorney Lake's record request, Van Haren had placed into the department's Dotson violation file a copy of the one and only document she had retrieved and used from the "553137" file for purposes of her review of Dotson's property. CP 666. For that reason, Van Haren did not search the 553137 file for other records in response to Lake's request because she never used them. CP 666.

Van Haren and Senzig located responsive records, including phone logs and duplicates of application 832074 records stored in the “PALSplus” permit database that Van Haren knew Predoehl would retrieve, and provided the records to Predoehl. CP 666. Senzig and Van Haren provided their completed search forms to Predoehl. CP 800.

Predoehl left for vacation on May 27, 2016 and returned from vacation on June 17, 2016. CP 800. The results of her IT search request were processed during her absence and ready for review upon her return. CP 801. Predoehl reviewed the IT records between June 17 and June 21. CP 801.

On June 23, 2016, Predoehl sent Attorney Lake a letter by email advising that records were available at the PALS website, writing “parcel number 0417066001 has application numbers 832074 and 832073 which are related to this violation.” The letter further advised Lake that “the parcel number in your request 04176062010, has no records and appears to be an invalid number.” CP 802. Predoehl included Assessor-Treasurer and PALS database screen shots showing no records existed for parcel number “417062010.” *Id.* Predoehl also advised that she would be uploading three files of responsive records by means of “Filelocker,” an electronic file transfer system that Lake could access using a password that Predoehl provided in the email. CP 804.

Partially Exempt Records Produced:

On June 23, 2016, Predoehl uploaded records to "Filelocker." CP 80.

That installment included partially exempt redacted to withhold the identity of a citizen who contacted Department of Ecology to report the land use violation against Dotson. CP 617, 620, 622, 624. The installment produced included the November 25, 2105 and May 4, 2106 letters from Van Haren to Dotson, as well as the 553137 the final approval notice record Van Haren used in her investigation of Dotson's property. CP 31, 395-398, 416-417, 427-431.

On June 28, 2016, Predoehl received read receipt emails indicating Attorney Lake had downloaded records from Filelocker. CP 804.

PRA Response Closed:

On June 29, 2016, Predoehl sent the county's final response to Attorney Lake by letter that advised the request was being closed. CP 805. The letter indicated Predoehl had received read receipts for the records she had delivered to Lake by Filelocker, and further stated: "As you have received responsive documents, I am closing your request." *Id.* Predoehl's letter concluded: "If you have any questions regarding this request please contact me at (253) 798-3724." CP 805.

Ms. Lake did not submit any other public record request to PALS on behalf of Ms. Dotson during the period between May 20, 2017 and the

administrative hearing held on October 26, 2016. CP 807. Ms. Lake did not contact Ms. Predoehl at a later date to amend her record request or to indicate that she wanted records related to parcel 0417066004 or application number "553137." CP 807.

Later Produced Records:

On October 25, 2016, while preparing for a hearing in response to a subpoena from Attorney Lake, PALS employee Cory Ragan contacted Predoehl and provided her with a "Lobby Visit Report." CP 806. Ragan indicated that when he received a subpoena from Lake pertaining to the administrative hearing, he ran the lobby visit report to assist his memory as to any prior conversation with Dotson. CP 806. Prior to October 26, 2016, Predoehl was unaware that "PALSplus" maintained lobby visits records. CP 806. The lobby visit record identified three visits by Dotson between 2012 and 2016, including two in the date range of the request. *Id.* CP 806. Predoehl emailed the lobby visit record to Attorney Lake on October 26, 2016. *Id.* 18.

On October 26, 2016, Van Haren testified at Dotson's administrative appeal hearing concerning the enforcement action on Dotson's property. CP 668. Van Haren was the only County witness at the hearing and she testified regarding the "F1" stream type on the Hansen/Pecheos parcel adjacent to Ms. Dotson's parcel. CP 268-381. Van Haren only considered

the single final “approval” document that she had retrieved from the “553137” file. CP 304-305, 356, 668-669.⁴

Dotson filed her PRA suit on October 25, 2017, sixteen months after the county closed its response by letter dated June 29, 2016. CP 1-6.

After Dotson filed suit, Predoehl reviewed her file and found two pages of phone log records that were not produced on June 23, 2016. CP 807. PALS staff had provided those records in the original search results, but Predoehl believed she must have misfiled or overlooked them in her rush to get the records to Lake. *Id.* Predoehl located those records post-suit on November 6, 2017 and sent them to Attorney Lake the next day. CP 807 Based upon her review of Dotson’s PRA complaint that was filed two weeks earlier, Predoehl also sent Lake a copy of a 2007 Habitat Assessment Report. CP 807.

On March 2, 2018, Predoehl reviewed a copy of Dotson’s motion for summary judgment filed ten days earlier. CP 807. Predoehl noted that Dotson’s summary judgment brief referenced numerous documents from the adjoining Hansen/Pecheos parcel and application “553137.” CP 807.

⁴ The following exchange between Attorney Lake and Van Haren at the October 26, 2016 hearing:

Question by Attorney Lake: And so to type the other property as an F1 you had to look at materials that they submitted, including arterials and maps of fish and wildlife aerial and other planimetrics; is that correct?

Answer by Van Haren: Actually, what I looked at is the fish and wildlife approval that was issued under the referenced application in that paragraph.

Based on her prior reading of Lake's record request at the time it was submitted, Predoehl did not realized Attorney Lake was seeking those records as they were not identified in the request. CP 807.

Also on March 2nd, after reading Dotson's summary judgment brief and claims about the records, Predoehl scanned the entire file for application "553137," and also took screen shots from "PALplus" for every permit record related to 0417066004. Van Haren was on vacation on that date, so Predoehl could not consult her at that time to determine whether any other records from "553137" or the upstream parcel (Hansen/Pecheos) might be responsive. On the afternoon of March 2, 2018, Predoehl hand delivered a CD containing the scanned records pertaining to all of "553137" and 0417066004 to Attorney Lake's office along with a cover letter identifying the records. CP 808-809. Predoehl provided those records "to show good faith and out of an abundance of caution" without conceding the records were responsive to the original request. CP 807-808.

When Van Haren returned from her vacation, Predoehl reviewed the records identified in Dotson's summary judgment motion. CP 809. Van Haren stated that she had not used any of those records from 0417066004 or any of the other records from 553137 that Predoehl later produced to Lake. CP 809.

III. LAW AND ARGUMENT

A. Standard of Review

Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 of the Public Records Act shall be *de novo*. RCW 42.56.550(3); *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 428, 327 P.3d 600 (2013). PRA cases can be resolved on the merits by affidavits. *Brouillet v. Cowles Pub. Co.*, 114 Wn. 2d 788, 793, 791 P.2d 526, 529 (1990). Where the record consists only of affidavits, memoranda of law, and other documentary evidence, and where the trial court has not seen or heard testimony requiring it to assess the witnesses' credibility or competency, the appellate court stands in the same position as the trial court. *Doe ex rel. Roe v. Washington State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63, 66 (2016) (citing *Dragonslayer, Inc. v. Wash. State Gambling Comm'n*, 139 Wn.App. 433, 441–42, 161 P.3d 428 (2007)). Where the trial court resolves a PRA action by a decision on the merits, as opposed to summary judgment, the case will be reviewed *de novo*, but the facts will not be construed in the light most favorable to the non-prevailing party. *Brouillet*, 114 Wn.2d at 794.

Respondent agrees that appellate review is *de novo*, but disagrees that a summary judgment standard is applicable when the trial court declined to proceed under that standard, and instead reached its decisions on the

merits with consent of the parties for that procedure. VRP at 3-4.

Accordingly, this Court should apply the *Brouillet* standard of review.

B. The Trial Court Correctly Ruled That Appellant’s Pra Action Was Barred by the Statute of Limitations When It Was Filed Sixteen Months After Production of Records With a Claim of Exemptions and Final Agency Action Closing the County’s Response

The purpose of a statute of limitations is to “compel the exercise of a right of action within a reasonable time so opposing parties have fair opportunity to defend.” *Stenberg v. Pac. Power & Light Co.*, 104 Wn.2d 710, 714, 709 P.2d 793 (1985). Statutes of limitation are intended to provide certainty and bring finality to transactions for both parties.

Atchison v. Great W. Malting Co., 161 Wn.2d 372, 382, 166 P.3d 662 (2007). Given that the purpose of a statute of limitations is to provide finality . . . it [is] unlikely that the legislature intended loophole[s]. *Id.*

The Legislature has emphasized a need for PRA requesters to commence litigation on any claims within a brief period of time. When first enacted, the PRA provided for a six-year limitations period for all actions. Laws of 1973, ch. 1, § 41. In 1982, the period was reduced to five years. Laws of 1982, ch. 147, § 18. In 2005 the legislature reduced that limitations period to just one year. *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 555, 199 P.3d 393, 408 (2009).

In *Belenski v. Jefferson County*, our Supreme Court held in 2016 that

RCW 42.56.550(6) defines the statute of limitations period for PRA actions and that "this statute normally begins to run on an agency's definitive, final response to a PRA request." *Belenski v. Jefferson County*, 186 Wn.2d at 457. The Court reasoned that the legislature intended to impose a one year statute of limitations for an agency's final response and "[t]his theme of finality should apply to begin the statute of limitations for all possible responses under the PRA[.] Id. at 460. The Court also held that an agency's closing response triggered the statute of limitations:

In this case, the County gave a final, definitive response to Belenski's public records request on October 4, 2010, stating that "the County has no responsive records" relevant to his PRA request for IALs on September 27, 2010. Belenski received this response via e-mail on October 5, 2010. **Regardless of whether this answer was truthful or correct, the county's definitive, final response to Belenski's PRA request was sufficient to put him on notice that the County did not intend to disclose records or further address this request.** If Belenski was unsatisfied with this answer, he could sue to hold the County in compliance with the PRA as soon as it gave this response—there was no need for him to wait an additional 25 months before bringing his cause of action.

Belenski v. Jefferson Cty., 186 Wn. 2d at 460–61, 378 P.3d 176, 180–81 (2016) (citations omitted) (emphasis added).

The Supreme Court's inclusion of the statement "regardless of whether its claim to have no responsive records was truthful or correct" implicitly contemplates the possibility that an agency could come across later discovered records after the issuance of a closing letter and provide the later discovered records prior to or after the filing of a lawsuit.

Impliedly accounting for such possibilities, *Belenski* held that an agency's

final definitive response nonetheless triggers the running of the one-year limitations period. *Id.*

Appellate Court decisions have not previously treated “later disclosed documents” produced after an agency has closed out its PRA response as an “installment” as that term is used RCW 42.56.080. Appellant’s contrary theory is without precedent, inconsistent with *Belenski* and other appellate decisions, contrary to the Attorney General’s Model Rules interpreting the PRA, and, as the trial court ruled below, contrary to the legislature’s intent as evidenced by use of the terms “partial or installment basis” within the overall context of the PRA. Further, Appellant’s interpretation would produce absurd results.

In *Greenhalgh v. Department of Corrections*, 170 Wn.App. 137, 282 P.3d 1175 (2012), the Court affirmed dismissal of a PRA action where the action was filed over a year after DOC claimed exemptions in response to a PRA request. *Id.* at 142. In response to Greenhalgh’s first request, DOC produced six pages on March 29, 2007 as well as a denial form that exempted a few documents under the attorney client-privilege. *Id.* at 147. Greenhalgh made a second request on April 12, 2007, and DOC responded that three pages were exempt under attorney-client privilege. *Id.* at 141. Greenhalgh filed a PRA action on May 1, 2008, over a year after DOC had claimed exemptions. *Id.* at 142. DOC released additional records to

Greenhalgh on November 8, 2012. *Id.* Greenhalgh claimed that “records the DOC released to him on November 12, 2008, in response to his requests for production were the records that DOC previously claimed did not exist in response to his PRA request.” *Id.* He specifically asserted that the later disclosed records produced by DOC after filing of his suit were responsive to his original request. *Id.* at 140, n. 2. He moved for summary judgment based on DOC’s November 12, 2008 production of responsive documents that DOC had denied existed in response to his PRA request. *Id.* The trial court dismissed based on the statute of limitations. *Id.* The Court of Appeals affirmed, ruling DOC’s claims of exemptions triggered the statute of limitations, but that the action was filed more than one year after those exemption claims, thereby barring the action. *Id.* at 148. Further, the Court of Appeals did not treat DOC’s production of previously undisclosed records during litigation as a subsequent “installment” extending the statute of limitations. *See also Strickland v. Pierce Co.*, 2 Wn. App. 2d 1018 (Jan 29, 2018)⁵ (exemption log and closing letter responses triggered PRA statute of limitations.)

In *White v. City of Lakewood*, 194 Wn. App. 778. 374 P.3d 286 (2016), attorney White made three near identical requests, each asking for

⁵ GR 14.1 permits citation to unpublished decisions, which are nonbinding upon this Court.

records of specified police case numbers and search warrant or search records pertaining to a search of an identified address. *Id.* at 782-84.

After his first request was categorically denied, White's made a second request on July 27, 2012. *Id.* On September 5, 2012, the city released some records with partial exemptions, and claimed a *categorical* active investigation exemption for other records that the Court of Appeals later held invalid where the investigation was no longer active. *Id.* at 783, 790. The city's September 5, 2012 response to White added: "Your request for public records will be considered closed unless you respond to the contrary by October 5, 2012." *Id.* White's third request was made September 24, 2012, and on October 2, 2012 the city once again asserted an "active" investigation exemption. *Id.* at 784.

White filed his PRA action on September 6, 2013. *Id.* at 784. After suit was filed, "[t]he city later produced several more records." *Id.* For the first time, on September 23, 2013, the city "provided the *requested* search warrants and affidavits." *Id.* at 784 (emphasis added). The trial court dismissed White's first two requests as barred by the one-year statute of limitations, and White appealed those dismissals. *Id.* The Court of Appeals held the city's response to White's second request triggered the statute of limitations:

However, the City subsequently produced some responsive documents with its response to White's second request and stated

that White's request for public records would be considered closed unless White responded "to the contrary by October 5, 2012." The one-year time-bar under RCW 42.56.550(6) was then triggered by the City's production of the responsive documents.

Id. at 791 (emphasis added). The Court affirmed the trial court's conclusion that the limitations period for the city's response to White's second request ran as of September 5, 2013. *Id.* 792-93. The city's first production of the responsive search warrant records occurring more than a year after the city closed its response to the second request was not treated as an "installment" that extended the statute of limitations.

In *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004 (2014), the Court of Appeals addressed what agency response constituted "final agency action or final action" for purposes of RCW 42.56.520 and .550(1), thereby causing a PRA action to accrue. *Id.* at 935-36. The court held "there must be some agency action, or inaction, indicating that the agency will not be providing responsive records." *Id.* at 935. A letter from the Auditor to Hobbs advising the agency believed it had provided all responsive records and requesting contact regarding any concerns was deemed by the Court to be "final action" "indicating that the agency will not be providing responsive records." *Id.* at 936-37.

Belenski later held that the one-year statute of limitations and its "theme of finality" applies "for all possible responses under the PRA[.]" *Belenski*, 186 Wn.2d at 460. Accordingly, *Hobbs* and *Belenski* establish

that an agency closing letter is “final agency action” constituting a “denial,” which causes a PRA action to accrue, thereby triggering the one-year statute of limitations.

In the unpublished decision of *Mahmoud v. Snohomish County*, 184 Wn. App. 1017 (2014), *review denied*, 182 Wn.2d 1027, 347 P.3d 458 (2015)⁶ the Court reviewed a PRA request (PRR 10-05383) seeking “journal entries” made by county employee Max Phan. *Id.* at 2. In an August 16, 2010 email the county provided records with a partial exemption claim and stated: “This request is now considered closed.” *Id.* Mahmoud filed a discrimination suit on June 30, 2011. *Id.* In March 2012, the county produced previously undisclosed journal entries. *Id.* Five months later in August of 2012 Mahmoud amended his complaint to add PRA claims. *Id.*

The Court of Appeals held Mahmoud’s claims for 10-05383 were barred by the statute of limitations that began on August 16, 2010. This was the holding despite the county’s concession it had not produced all records and had disclosed additional journal entries 16 months after its closing response and 5 months prior to the August 2012 filing of PRA claims. *Id.* at 6. The Court rejected Mahmoud’s argument that the March

⁶ GR 14.1 provides that unpublished opinions of the Court of Appeals filed on or after March 1, 2013 may be cited as nonbinding authorities.

2012 record disclosure should extend the limitations period.

In the instant case, on June 23, 2016 the County produced records, including some that were partially redacted based on identified exemptions of complaining witness identifiers. CP 617, 620, 622, 624. Pursuant to RCW 42.56.550(6) and *Greenhalgh*, these exemption claims by the County on June 23, 2016 triggered the running of the one-year statute of limitations. Dotson's assertion on appeal that she is not contesting the County's claimed exemptions applied to the records produced on June 23, 2016 (see App. brief at 21) is of no consequence and cannot act to waive accrual of the action at that time. Such an argument disregards the importance of "finality" recognized by *Belenski*.

Additionally, on June 29, 2016 the County emailed a closing letter to Attorney Lake after PRO Predoehl confirmed that Lake downloaded the records produced on June 23rd. Predoehl's closing letter referenced prior produced documents consisting of at least two installments, and read in part, "As you have received responsive documents, I am closing your request. If you have any questions regarding this response, contact me at 253-798-3724." CP 858. Pursuant to *Belenski* and *Hobbs*, the County's closing letter constituted final agency action and a "denial" as to any other records for purposes of RCW 42.56.550(1), thereby commencing the one-year statute of limitations by not later than June 29, 2016.

The trial court's dismissal is also supported by principles of statutory construction. General rules of statutory construction apply to the PRA. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 606, 963 P.2d 869 (1998). In interpreting a statute, courts must consider the statutory context, basic grammar, and any special usages by the legislature. *J.S. v. Vill. Voice Media Holdings, L.L.C.*, 184 Wn.2d 95, 106–07, 359 P.3d 714, 720 (2015) (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 48A:16, at 809–10 (6th ed.2000)). The goal of statutory interpretation is to give effect to the legislature's intent. *Francis v. WA State Dep't of Corr.*, 178 Wn.App. 42, 59, 313 P.3d 457, 466 (2013). Courts consider a statute's plain meaning by looking at the text of the provision at issue, as well as 'the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.' *Id.* Courts give effect to all the language in a statute and harmonize all its provisions. *Ockerman v. King Co.*, 102 Wn.App. 212, 216, 6 P.3d 1214 (2012).

The PRA identifies "installment" production as a mode for an agency to fulfill its response to a record request pursuant to RCW 42.56.080 and RCW 42.56.120. The legislature's use of the term "installment" within the overall context of RCW 42.56 conveys an intent that the term refers to an agency's record processing response consistent with its use in RCW 42.56.120, as well as *prior* to "final agency action" that occurs prior to the

closing of a request consistent with RCW 42.56.520(4). Use of the term “installment” to refer to production *after* "final agency action" and *after* the closing of a request is inconsistent with the context of these provisions of the PRA. Installment production under terms of the PRA applies generally to an agency’s need for additional time to assemble a larger set of responsive records and need to promptly make available a specific subset as the smaller subset is assembled for copying or inspection. RCW 42.56.080. Installment production under the terms of the PRA requires an agency provide an estimate of time in advance of production of the installment that is both reasonable and notifies the requester as to when the promised installment will be produced. *See* RCW 42.56.080(2) and .520(c). No such advanced reasonable time estimate could ever be given for later discovered records that are identified and produced after an agency has closed its response. Additionally, the PRA provides that requests can be deemed abandoned when a requester fails to inspect or make payment for an installment, thereby permitting an agency to close its response. RCW 42.56.120(4)⁷; WAC 44-14-040(8), (10). Production of

⁷ RCW 42.56.120(4) reads in part:

If an agency makes a request available on a partial or installment basis, the agency may charge for each part of the request as it is provided. If an installment of a records request is not claimed or reviewed, the agency is not obligated to fulfill the balance of the request.

later discovered records after an agency has closed a request would not result in the request being abandoned for lack of a requester response because the request would have already been closed. Use of the term “installment” to refer to records located and produced after an agency has closed out its response is contrary to the legislative intent based the overall context of the PRA.

The Attorney General’s Model Rules for the PRA⁸ provide additional guidance on this issue.⁹ The model rules discuss “providing records in installments” as production method for processing an open record request prior to an agency’s closing of that request, distinguishing an agency’s requirement to provide a reasonable estimate of time of when a future “installment” will be available *prior to the closure of a request* from the circumstance where the agency becomes aware of additional responsive records *after the agency has closed its response*. See WAC 44-14-040(4)(b), (10) (installment production). In contrast to “installment” production, the AG model rules refers to the discovery of additional documents after an agency has closed its response as “**Later discovered documents**” pursuant to WAC 44-14-040(13), which provides:

If, after the (name of agency) has informed the requestor that it has provided all available records, the (name of agency) becomes

⁸ The attorney General’s model rules for state and local agencies pertaining to the Public Records are authorized by RCW 42.56.570.

⁹ The AG model rules are advisory and nonbinding upon the court. WAC 44-14-0003.

aware of additional responsive documents existing at the time of the request, it will promptly inform the requestor of the additional documents and provide them on an expedited basis.”

The AG model rules reference to “later discovered documents” is not the equivalent of processing an open request by “installment” as the latter term is used in RCW 42.56.080, .120, and .550(6). The model rules nowhere refer to “installment” production as that which occurs after an agency has closed its response to the request.

Applying statutory construction, the trial court reached this same conclusion. VRP at 3-4. The trial court considered the phrase “last production of a record on a partial or installment basis” in RCW 42.56.550(6) based on its use elsewhere in the act. *Id.* After reviewing RCW 42.56.080,¹⁰ which refers to an “a partial or installment basis” as part of a larger set of records assembled or made ready for inspection,” the trial court agreed that “installment” production under the PRA occurs *prior to* the issuance of a closing letter:

This court believes that the provision and the use of that phrase in that context makes it clear that a partial or installment basis is what was commonly understood by that term which is when you have a larger group of records that you need to prepare and gather and you know at the outset it’s going to take time to gather and collect them, and then you turn them over in installments with a closing letter when your done producing those installments. That is what

¹⁰ RCW 42.56.080(2) reads in relevant part:

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

happened in this case. We had installments that were produced and then a closing letter, and at that point the claim accrued, as was accepted by plaintiff's counsel. The plaintiff could have sued as of June. The plaintiff sued a year and four months later, give or take. I and going to dismiss this case on the statute of limitations.

VRP at 3-4. The trial court was correct, and this Court should affirm its dismissal of Appellant's action as barred by the statute of limitations.

Appellant contends that "if the trial court is upheld, then even 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 in penalty." App. Brief at 27.

Appellant disregards that this same argument was addressed and resolved by the Supreme Court in *Belenski*, where the Court stated that the agency's final definitive response to *Belenski's* request triggered the statute of limitations "[r]egardless of whether this answer was truthful or correct[.]" *Belenski* at 460-61. The Supreme Court then acknowledged that "*Belenski* and amici raise legitimate concerns that allowing the statute of limitations to run based on an agency's dishonest response could incentivize agencies to intentionally withhold information and then avoid liability due to the expiration of the statute of limitations." *Id.* at 461.

The response from the Supreme Court in *Belenski* was to put agencies

and requesters on notice that the mechanism to address those concerns was to raise equitable tolling before the trial court when the facts warranted such concerns. *Id.* at 461-62. Accordingly, as of that September 2016 decision, agencies were on notice that if they locate responsive records and then intentionally withhold them without disclosure, plaintiffs may raise tolling where a requester does not otherwise have knowledge of the undisclosed information and otherwise fails to act upon it with diligence. *Id.* at 461. This clearly incentivizes agencies to not intentionally withhold records, but instead produce any later discovered documents immediately, which is also consistent with the dictates of the Attorney General's Model Rules for later discovered records. Failure to produce later discovered records immediately could create grounds for application of equitable tolling. Accordingly, *Belenski* has created a mechanism to address Appellant's policy argument through the doctrine of equitable tolling.

C. Appellant's Equitable Tolling Claim Should Be Denied When It Was Not Raised Below, Is Not Adequately Briefed on Appeal, and Was Rejected Sua Sponte by the Trial Court for Lack of Supporting Facts

A party who asserts equitable tolling of a statute of limitations carries a heavy burden of establishing the required elements. *In re Bonds*, 165 Wn.2d 135, 144; 196 P.2d 672 (2008); *Nickum v. City of Bainbridge Island*, 153 Wn.App. 366, 379, 223 P.3d 1172 (2009) (party asserting equitable tolling carries burden of proof). Further, the proponent bears a

“high burden” of demonstrating that delay was the result of bad faith, deception, or false assurances. *In re Bonds*, 165 Wn.2d at 144.

The trial court sua sponte considered equitable tolling pursuant to *Belenski*, and later ruled that it did not apply in this case because there were no facts to support it. VRP at 4-5. Appellant has not assigned error to that ruling. RAP 10.3(a)(4).

Arguments raised for the first time on appeal are generally not considered. *Kramarevcky v. DSHS*, 122 Wn.2d 738, 750, 863 P.2d 535 (1993); *Hernandez v. Department of Labor and Industries*, 107 Wn. App. 190, 199, 26 P.d 977 (2001) (declining to address equitable claims not presented to the trial court); *Cascade Valley Hosp. v. Stach*, 152 Wn.App. 502, 506, n.11, 215 P.3d 1043 (2009) (declining to address claims of equitable tolling and equitable estoppel where the arguments were not raised below); *Bankston v. Pierce County*, 174 Wn. App. 932, 941-42, 301 P.3d 495 (2013) (same); *Hyytinen v. City of Bremerton*, 185 Wn.App. 1015, at 5 (2014) (unpublished) (same).

Dotson raises equitable tolling for the first time in her opening brief. (App. brief at 23). She did not raise the doctrine in her briefing in response to the county’s motion for summary judgment, nor argue its application at the hearing on the merits. CP 737-48. While *Belenski* allows for equitable tolling when warranted, the Supreme Court clearly

indicated that it must be raised in the trial court. Appellant chose not to raise it in that forum despite the opportunity to do so at a hearing held almost two years after *Belenski* was issued.

Further, Appellant's brief does not develop any argument in support of equitable tolling for this Court to consider or for Respondent to brief in reply. Appellant's brief contains only a passing reference to *Belenski* without discussion of this case. Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Appellant's brief does not identify or address the elements of equitable tolling, nor apply those elements to the facts of this case with citation to the record. A court need not consider undeveloped arguments or arguments without authority. *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); RAP 10.3(a)(6). This Court and Respondent can do no more than speculate in the absence of adequate briefing by Appellant. This court should not consider a future request to remand for consideration of equitable tolling where the trial court has previously rejected its application to this case. *See Strickland v. Pierce County*, No. 75203-1-I, 2018 WL 582446, at 5 (Wash. Ct. App. Jan. 29, 2018) (unpublished) ("remand is not appropriate because the trial court has already considered equitable tolling and has rejected its application in this case.")

Lastly, even when equitable tolling applies, a statute of limitations tolls only until a plaintiff learns, or through due diligence should have learned the facts the other party allegedly concealed. *See Finkelstein v. Sec. Prop. Inc.*, 76 Wn. App. 733, 740, 888 P.2d 161 (1995). A defendant is not equitably estopped from raising a statute of limitations defense when the plaintiff had actual notice of the facts giving rise to a claim in sufficient time for the plaintiff to commence an action before the expiration of the statutory period. *McLeod v. Northwest Allys, Inc.*, 90 Wn.App. 30, 40, 969 P.2d 1066 (1998). The record below is uncontested in showing that Dotson and Attorney Lake both received records from Van Haren (letters dated November 25, 2015 and May 4, 2016) and again from Predoehl as part of the June 23, 2016 record production that identified the existence of the “553137” file and or adjacent parcel records if indeed such records were believed responsive to the record request. CP 396, 398, 427-431, 461-462. Such knowledge as of June 23, 2016 does not support equitable tolling. To the extent Appellant focuses on the October 26, 2016 production of the singular lobby visit record, the undisputed declaration of Sharon Predoehl does not support any claim of deception, fraud or false assurance to establish equitable tolling. Indeed, it defies logic that anyone would purposefully conceal a lobby visit record

that reflects no more than entry into the department. This Court should decline to apply equitable tolling at this stage of the proceedings.

D. The County Performed a Reasonable Search for Responsive Records

Agencies must make a sincere and adequate search for records.

Fisher Broad.-Seattle TV LLC v. City of Seattle, 180 Wn.2d 515, 522, 326 P.3d 688 (2014). In determining if an agency performed an adequate search the "inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate." *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 719-720, 261 P.3d 119 (2011). "[T]he issue of whether the search was reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not found." *Id.* at 720. "[A] search need not be perfect, only adequate." *Id.* (quoting *Meeropol v. Meese*, 252 U.S. App. D.C. 381, 395, 790 F.2d 942 (1986)).

The search must be reasonably calculated to uncover all relevant documents. *Neighborhood Alliance*, 172 Wn.2d at 720. "What will be considered reasonable will depend on the facts of each case." *Id.* A reasonably calculated search is adequate to comply with the PRA. *Id.* Agencies may rely on "reasonably detailed, nonconclusory affidavits submitted in good faith" which should include the "search terms and the

type of search performed, and they should establish that all places likely to contain responsive material were searched." *Id.*

The fact that a requester later obtains responsive documents from an agency does not create a genuine issue of material fact for trial in a PRA action. *Block v. City of Goldbar*, 189 Wn.App. 262, 273-74, 355 P.3d 266 (2015), *review denied*, 184 Wn.2d 1037 (2016). Where an agency performs a reasonable search reasonably calculated to locate responsive documents, no per se violation of the PRA or genuine issue of material fact is established regarding the adequacy of a search merely upon a showing by a requester that other responsive records existed at the time of the request that were not identified or produced until a later time. *Block*, 189 Wn.App. at 276-78 (citing *Neighborhood Alliance*, 172 Wn.2d at 720).

Washington courts have adopted the federal courts' reasonableness standard as articulated by the Tenth Circuit Court of Appeals:

“[T]he focal point of the judicial inquiry is the agency's search process, not the outcome of its search. The issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate[,] . . . [which is determined under] a standard of reasonableness, and is dependent upon the circumstances of the case. The reasonableness of an agency's search turns on the likelihood that it will yield the sought-after information, the existence of readily available alternatives, and the burden of employing those alternatives.”

Forbes v. City of Goldbar, 171 Wn.App. 857, 866, 288 P.3d 384 (2012).

(alterations in original) (internal quotation marks omitted) (quoting

Trentadue v. Fed. Bureau of Investigation, 572 F.3d 794, 797–98 (10th Cir. 2009)).

At a minimum, a person seeking documents under the PRA must identify the documents with sufficient clarity to allow the agency to locate them. *Hangartner v. City of Seattle*, 151 Wash.2d 439, 447, 90 P.3d 26 (2004); *Hobbs v. State*, 183 Wn. App. 925, 944, 33 P.3d 1004 (2014). Agencies are not required to be mind readers. *Bonamy v. City of Seattle*, 92 Wn.App. 403, 409, 960 P.2d 447 (1998).

Appellant’s search argument asserts no more than that the search performed was not reasonable because records were later produced.¹¹ That argument is plainly deficient as it amounts to no more than a *per se* violation expressly rejected by *Neighborhood Alliance* and *Block*.

The declarations provided by Predoehl and Van Haren compellingly demonstrate a reasonable search was performed and designed to identify all responsive records based upon their genuine understanding of the request terms. CP 793-804. Ms. Predoehl has extensive training in PRA requirements, including search protocols. CP 790-91. She developed a search protocol for PALS prior to Ms. Lake’s request and had provided prior training to staff in conducting searches for records. *Id.* The

¹¹ The County continues to assert that records produced after the filing of the action were non-responsive consistent with the reasoning provided by Biologist Mary Van Haren.

department's search protocols are highly professional with detailed instructions directing staff to look for both hard copy and electronic records on both office and personal devices, including desktop computers, shared directories, department databases, and physical work spaces. CP 813-814. Ms. Predoehl had a thorough protocol for requesting a search of responsive email records from the county's IT department. CP 795. She provided a search form for emails that contained specific search terms derived from the record request. CP 790. She had the record request reviewed by her supervisor, who identified personnel who might have responsive records, to include Ms. Senzig and Ms. Van Haren, and those employees also conducted a search. CP 799-800.

Ms. Van Haren's declaration indicates she searched for responsive records to Ms. Lake's request according to the search summary form prepared by Ms. Predoehl. She searched for both electronic and physical records, including her personal devices, as well as her computer records and shared drives. She also searched her physical work space. She identified responsive records, as well as duplicate ones that she knew would be retrieved by Ms. Predoehl, and provided records to Ms. Predoehl. All places likely to contain responsive records were searched based upon the employees' understanding of the request.

Appellant asserts that “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 expressly that they relied on these exact records in their enforcement action against Ms. Dotson.” Brief at 34. This assertion is both contrary to the record and barred by issue preclusion. Van Haren was the only “staff” who testified at the October 16, 2016 hearing, and she unequivocally testified then, as well as stated in her declaration, that she only looked at and relied upon the final approval document from file “553137” and did not use any other records from the file. CP 304-305, 665-669. This claim was previously litigated between Dotson and the County before Division Two in 50860-5-II, which concerned Dotson’s appeal of the hearing examiner’s decision entered after the October 26, 2016 hearing.¹² Dotson argued in 50860-5-II that Van Haren’s “testimony at Ms. Dotson’s land use case is directly contradicted by the declaration of this same County witness in the PRA

¹² Issue preclusion applies when 1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom issue preclusion is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of issue preclusion does not work an injustice on the party against whom it is applied. *Id.* at 307, 96 P.3d 957; *State v. Williams*, 132 Wn.2d 248, 254, 937 P.2d 1052 (1997).

suit” with regard to whether Van Haren relied upon the full application file from 553137. A Commissioner of Division Two addressed Dotson’s claim in her motion to reopen the record in that appeal, ruling on August 7, 2018 that: “This Court agrees with the County that Van Haren’s testimony and her declaration are not in conflict.” Ruling at 2 (Appendix 1). A panel of judges later denied Dotson’s motion to modify the Commissioner’s Ruling. (Appendix 1). The record before this court belies Dotson’s claims that Van Haren relied upon other records from the 553137 file beyond the single final approval document she identified and that Predoehl released in the June 23, 2016 production of records to Attorney Lake. This issue has been litigated before this Court in 50860-5-II and resolved against Dotson.

E. Pierce County’s 5-Day Letter Advising That a Future Response Would Occur Within 3-4 Weeks Complied With RCW 42.56.520

Appellant asserts that the County violated the PRA “[b]y failing to provide a reasonable date certain estimate in its May 20, 2016 letter” as to “when records would be available.” App. Brief at 35-36. The record in this case indicates otherwise.

RCW 42.56.520 sets forth response options an agency must take within five business days following receipt of a records request. The reasonable response time estimate provided for in RCW 42.56.520(1)(c) is

at issue here. The Court of Appeals in construing this provision has stated, "The only requirements under [this section] are that the agency acknowledge that it received the request and provide a reasonable estimate of the time it will require to comply with the request." *Ockerman v. King Cty. Dep't of Developmental & Env'tl. Servs.*, 102 Wn.App. 212, 217, 6 P.3d 1214, 1217 (2000). "No interpretation of this statute, no matter how liberal, allows a court to modify by judicial fiat the plain wording of the statute." *Ockerman*, 102 Wn.App. at 218.

By its plain terms, RCW 42.56.520(1)(c) nowhere requires an agency to express its reasonable time estimate in terms of a date certain on the calendar or by means of an exact number of weeks or days. Put simply, an estimate expressed as a range of weeks is not prohibited under the plain text. An estimate expressed in a range of weeks provides a readily ascertainable future response time by virtue of calculation. Courts have recognized that an estimated response time provided by an agency in a five-day letter expressed as a period of weeks - rather than a specified date - complies with the requirements of RCW 42.56.520. *See Ockerman*, 102 Wn.App. at 218 (construing former RCW 42.17.320, recodified as RCW 42.56.520 by Laws 2005, ch. 274, § 103) (five-day response letter specifying "three weeks" as "estimate of time to provide the requested records was reasonable"). Pierce County complied with the reasonable

time estimate requirements of RCW 42.56.520 in its five-day acknowledgement letter of May 20, 2016, by providing Attorney Lake with a specific estimate expressed in terms of 3-4 weeks.

Appellant reliance on *Hikel v. City of Lynnwood*, 197 Wn.App. 366, 389 P.3rd 677 (2016), is misplaced where the city's response provided no time estimate whatsoever in its 5-day letter for a future response, opting instead to await response to the city's request for clarification before providing any time estimate for future record production. *Id.* at 372. That is not comparable to this case, where PRO Predoehl timely acknowledgement Lake's request and stated that the request would be completed within 3-4 weeks.

F. Pierce County Provided Fullest Assistance

Appellant asserts that the county violated the PRA by not providing "fullest assistance." Appellant's argument fails to comply with RAP 10.3(6) as it does not cite to the record or otherwise discuss any specific instance of lack of assistance by discussion of the record or any specific example in her brief. Instead, Appellant merely recites several statutes and model rules without application to this case.

For example, Appellant cites RCW 42.56.100 for the proposition that an agency must have rules in place to provide the "most timely possible action on requests," and "procedures in place to provide the 'fullest

assistance to a public records requestor.” Brief at 37. Yet, Pierce County has such rules in place, adopted by the Pierce County Council under Chapter 2.04 of the Pierce County Code.¹³ Appellant next asserts that “[t]his means readily available records must be provided almost instantly.” Initially, it must be observed that Appellant cites no authority to support her claim that records “must be provided almost instantly,” presumably because none exists. Appellate cases are replete with examples of record production occurring over a period of weeks and months due to work loads and a need to locate and review records even when they are otherwise “readily available.” *See e.g., Ruffin v. City of Seattle*, 199 Wn.App. 348, 398 P.3d 1237 (2017) (production of records within 65 days of request was not unreasonable).

The record establishes that Attorney Lake was given almost instant access to records. One business day after her request was received, PRO Predoehl emailed a 5-day response letter that provided a county internet address to the PALS permit website permitting immediate access to responsive records by entering Dotson’s address or parcel number. Further, it must be remembered that Attorney Lake provided a parcel

¹³ The Pierce County Code can be accessed at <https://www.codepublishing.com/WA/PierceCounty/>. Chapter 2.04 of the code is entitled: “Public Records Inspection and Copying Procedures.” It is a detailed code that is consistent with the Model Rules promulgated by the Attorney General of the State of Washington. See PCC 2.04.010.

number for Dotson's property in the record request that returned no records. PRO Predoehl provided "fullest assistance" by independently researching Dotson's property, obtaining the correct parcel number, and then identifying records corresponding to the correct number.

Lastly, Dotson observes that "[t]o speed up access to public records, RCW 42.56.080 requires an agency to provide records 'on a partial or installment basis'." Again, in disregard of RAP 10.3(6), Appellant does not develop an argument or otherwise apply the cited statute to the facts of this case or cite to the record. Respondent and the Court should not be left to speculate upon an issue that is inadequately briefed. The record in this case shows that some records were immediately produced on an installment basis by providing internet access information on May 20, 2016, with another installment of records produced on June 23, 2016.

G. Pierce County Acknowledges the Production of the Phone Call Logs and Lobby Visit Records Were Inadvertently Delayed

The County concedes that two phone log records, which were located and provided by Ms. Van Haren and Ms. Senzig to Ms. Predoehl in response to the search request should have been provided to Ms. Lake by the June 23, 2016 final production date. Ms. Predoehl indicates that staff provided her those records, but that she had inadvertently misfiled them in a rush to get records out the door to Ms. Lake after her return from vacation. Ms. Predoehl caught the mistake on her own when she reviewed

the file in response to Plaintiff's lawsuit. It appears that the mistake should not be viewed as the product of any bad faith, as evidenced by Ms. Predoehl's declaration. The County maintains that this claim, along with Dotson's other claims, are barred by the statute of limitations.

Additionally, the Lobby Visit Report was produced on October 26, 2016, approximately four months after the county's response to the request was closed on June 23, 2016. Ms. Predoehl had no prior knowledge that the lobby visit records existed, or that such data was kept by the PALS development center. She disclosed the record to Ms. Lake immediately upon learning of the document and the mistake was not due to any bad faith. Accordingly, there is no basis to apply equitable tolling.

Plaintiff's claims of "silent withholding of responsive records" and omission of a "privilege log/withholding index for withheld county records" are subsumed under the inadvertent late production of the lobby visit report and phone logs.

The County maintains that the other records pertaining to file 553137 produced after commencement of the litigation in this case were not responsive to the request. Dotson repeatedly contends that the County should have provided additional documents from the "553137" file that constituted an application for construction of a single family residence on the adjacent "Hansen/Pecheos" parcel adjacent to Yet, records for the

“553137” or the adjacent parcel number were not identified in Attorney Lake’s request.

As Van Haren’s declaration makes clear, she used only one document from the 553137 application file for purposes of her enforcement and application actions concerning the Dotson property, which she identified in her declaration as the “CRITICAL AREA NOTICE FISH AND WILDLIFE HABITAT CONSERVATION AREA/AND OR STREAM BUFFER NOTICE” that identified a stream located on parcel 0417066004, also known as the “Hansen/Pacheos” property, as an “F1” type stream. She used no other documents from that file for either enforcement or application activities concerning Ms. Dotson’s property. Dotson was provided that record in the County’s response of June 23, 2016, and PRO Predoehl invited further response from Lake on the request, but none was made.

Plaintiff’s record request should not be viewed in the same manner as a discovery request. No definitional terms in the request were provided. Ms. Predoehl and Ms. Van Haren read the request and applied a non-legalistic interpretation. It is not reasonable to view the request solely from the perspective of an attorney who drafted it. The terms “enforcement” and “application” as found in the record request were

reasonably interpreted by Van Haren as encompassing only the record that she viewed and used for her involvement concerning the Dotson parcel.

Objectively viewed, the terms of Lake's record request were confined to Dotson's address and parcel number, though the number provided in the request was in error and the correct number was pursued and identified by Ms. Predoehl thereby evidencing a lack of gamesmanship by the county in searching for records responsive to the correct parcel number. Objectively and reasonably viewed from the perspective of a biologist and a non-attorney public record officer, the request was logically perceived as directed at records that had been used or prepared by PALS staff in the enforcement or application process concerning Ms. Dotson's property.

Ms. Van Haren disclosed in correspondence to Ms. Dotson in November of 2015 and May of 2016 - prior to her record request - that the stream had been typed as an "F1" from a review of data on an adjacent parcel through application 553137. Those references were based upon the document that Ms. Van Haren had reviewed from the 553137 application and placed into the Dotson enforcement file – not based upon any other records she had used but not disclosed. Ms. Van Haren had not used any other records from that file. Further, given that Van Haren had identified to Dotson months previously that the stream was typed FI based on the adjacent parcel in application 553137, it would be objectively reasonable

for Van Haren to consider Lake's failure to specifically ask for additional records from 553137 and omission of that file number from the request to be purposeful and evincing a non-request for those records.

As part of the county's public record response of June 23, 2016, Lake was provided copies of the May 4, 2016 and November 25, 2015 correspondence between Van Haren and Dotson, which referenced application file 553137 and the upstream parcel, 0417066004, owned by Hansen/Pecheos. Despite receipt of those records, as well as the invitation Predoehl extended by letter of June 29, 2016 asking Lake to contact her if she had any questions regarding the record request, Lake did not engage in any subsequent communication or seek additional records from PALS concerning the 553137 application or the Hansen/Pecheos parcel.

The production of additional records after Dotson's action was filed should not be deemed a concession by the county that the records were responsive. The County contested that below and continues to do so.

PRA complaints commonly allege that an agency has yet to produce previously "undisclosed" records that are further alleged to be responsive to the request. Such PRA complaints will also often describe the alleged previously "undisclosed" records with identifying details previously not provided to the agency in the original request. Not surprisingly, upon receiving such complaint, an agency may tactically decide to produce the

allegedly responsive and “undisclosed” records described in the Complaint as a rational strategy to reduce risk of exposure to penalties while nonetheless contesting that the “undisclosed” records were responsive or adequately identified in the original request.

Similarly, a plaintiff’s summary judgment motion may finally provide identification of records that a requester asserts should have been previously provided. An agency may similarly produce records first identified by a plaintiff in litigation in order to reduce the risk of penalties without conceding that they were responsive. In other words, the production of records after a request has been closed by the agency, whether before or after commencement of litigation, is not a *per se* concession that the later disclosed records were responsive or wrongfully withheld. *See e.g. Sanders v. State*, 169 Wn.2d 827, 849-50, 240 P.3d 120 (2010) (“If an agency were deemed to concede wrongdoing simply because it produced documents during litigation, it would reduce the incentive for agencies produce the documents.”) Accordingly, production of records by an agency after it has issued a closing letter to the requester also should not reasonably be deemed to constitute an “installment” as that term is used in either RCW 42.56.080 or RCW 42.56.560(2).

In this case the County produced additional records pertaining to the “553137” application file and the Hansen/Pecheos adjacent parcel because

Dotson identified those records and claimed them to be responsive in her complaint and summary judgment motion. That later disclosure by the County is not a concession regarding the responsiveness of those records. Based on Van Haren's declaration, the County disputes that they were reasonably responsive to Lake's request.

IV. CONCLUSION

Pierce County produced records and claimed partial exemptions for some of those records on June 23, 2016. Six days later the County issued a closing letter that constituted final agency action terminating its record response. The trial court properly ruled that the PRA action accrued as of June 2016, thereby triggering the statute of limitations. Accordingly, the filing of the PRA action approximately sixteen months after the exemption claims and closing letter was time-barred, and the trial court correctly dismissed the action on that basis. The trial court should be affirmed on appeal.

DATED this 1st day of May, 2019.

MARY E. ROBNETT
Prosecuting Attorney

s/ MICHAEL SOMMERFELD
MICHAEL SOMMERFELD, WSBA # 24009
Attorneys for Respondent
Pierce County Prosecutor / Civil
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402-2160
Ph: 253-798-6385 / Fax: 253-798-6713
E-mail: michael.sommerfeld@piercecountywa.gov

CERTIFICATE OF SERVICE

On May 1, 2019, I hereby certify that I electronically filed the foregoing **RESPONDENT PIERCE COUNTY'S CORRECTED BRIEF** with the Clerk of the Court and I delivered a true and accurate copy to the following:

Via electronic mail:
Carolyn Lake: clake@goodsteinlaw.com
Deena Pinckney: dpinckney@goodsteinlaw.com
Richard B. Sanders: rsanders@goodsteinlaw.com
Goodstein Law Group, PLLC
501 S. G Street
Tacoma, WA 98405

Dated this 1st day of May, 2019.

s/ JEANINE L. LANTZ
JEANINE L. LANTZ
Legal Assistant
Pierce County Prosecutor's Office
Civil Division, Suite 301
955 Tacoma Avenue South
Tacoma, WA 98402-2160
Ph: 253-798-6083 / Fax: 253-798-6713

Appendix 1

The County submitted the Van Haren Declaration in connection with a Public Records Act suit brought by Dotson after a hearing examiner issued a decision in her land use action. In the declaration, Van Haren stated that she reviewed only the title notification for an adjacent parcel (Application No. 553137)—but not the rest of the file—in connection with the land use review of Dotson's property. Dotson contends that this information was not provided to the land use hearing examiner, who Dotson contends "expressly relie[d] on the County's use of the adjacent Parcel's [full] application, analysis and data." Mot. to Allow Additional Evidence at 8.

The County objects to Dotson's motion. The County states that Van Haren testified in the land use action that she only looked at "the results of the habitat assessment on the adjoining parcel and did not delve deeper into the reports or supporting data." Resp. to Mot. to Allow Additional Evidence at 2. Thus, her testimony is consistent with her declaration. It adds that the County informed Dotson of the existence of the adjoining parcel's habitat assessment in a May 4, 2016 letter, and again in an October 11, 2016 staff report that referenced the assessment.

This court agrees with the County that Van Haren's testimony and her declaration are not in conflict. Thus, the additional evidence is not needed to fairly resolve the issue on review identified by Dotson—whether the contradiction resulted in a violation of RCW 36.70.130(1). RAP 9.11(a)(1). Similarly, for this reason, Dotson fails to show that RAP 9.11(a)(2) is satisfied. In addition, this court agrees with the county that Dotson had an opportunity at the hearing to question Van Haren on the sufficiency of her review of the adjacent parcel's reports, but did not do so. RAP 9.11(a)(3). Because Dotson fails to demonstrate all of the RAP 9.11(a) factors are satisfied, her motion is denied. *Public*

50860-5-II

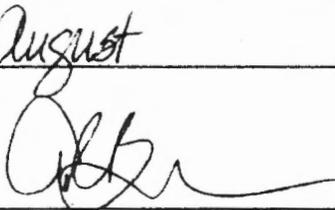
Hosp. Dist. No. 1 of King County v. University of Wash., 182 Wn. App. 34, 327 P.3d 1281, review denied, 181 Wn.2d 1019 (2014) (all six requirements of RAP 9.11(a) must be met).

Accordingly, it is hereby

ORDERED that the RAP 9.11(a) motion is denied. It is further

ORDERED that the request to stay briefing deadlines is denied.

DATED this 7th day of August, 2018.



Aurora R. Bearse
Court Commissioner

cc: Carolyn Lake
Cort O'Connor
Hon. Christopher Lanese

September 10, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KIMBERLYN DOTSON,

Appellant,

v.

PIERCE COUNTY,

Respondent.

No. 50860-5-II

ORDER DENYING MOTION TO MODIFY

APPELLANT moves to modify a Commissioner's ruling dated August 7, 2018, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Johanson, Bjorgen

FOR THE COURT:


PRESIDING JUDGE

PIERCE COUNTY PROSECUTING ATTORNEY CIVIL DIVISION

May 01, 2019 - 3:41 PM

Transmittal Information

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

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Comments:

Respondent's CORRECTED Brief. The previous one filed had the Table of Authorities codes (hidden text) in it which is why it was overlength. The only change in this version is the deletion of the codes (hidden text).

Sender Name: Jeanine Lantz - Email: jeanine.lantz@piercecountywa.gov

Filing on Behalf of: Michael Lee Sommerfeld - Email: msommer@co.pierce.wa.us (Alternate Email: pcpatvecf@co.pierce.wa.us)

Address:
955 Tacoma Ave S Ste 301
Tacoma, WA, 98402-2160
Phone: (253) 798-6732

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