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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOHN BOGEN,

Appellant,

v.

CITY OF BREMERTON,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Despite having his public records request fulfilled and closed by the City of Bremerton (City) on January 28, 2019, John Bogen chose to wait until what he believed was the last possible moment to file suit. In choosing to wait while potential daily fines accrued against the City, Mr. Bogen waited one day too long. The trial court correctly determined that RCW 42.56.550(6) requires a Public Records Act (PRA) claim to be filed within one year of the agency's final action and that the statute of limitations begins on the day of the agency's final action. Based on the plain language of RCW 42.56.550(6), case law holding the PRA one-year statute of limitations begins on the day of the agency's final action, and case law interpreting similar statutory language and dismissals under the Land Use Petition Act, the trial court properly dismissed Mr. Bogen's PRA suit as time barred.

II. COUNTER STATEMENT OF THE ISSUES

A. Does RCW 42.56.550(6) bar Mr. Bogen's lawsuit under the PRA when he filed one year and one day after the City's final action on his records request when the plain language of the statute, and relevant case law indicate that the one-year statute of limitations under 42.56.550(6) begins on the day of the agency's final response?

B. Does the public policy of the PRA for the prompt and full access to government documents support the statute of limitations requiring filing of an action within one year of final agency action when such a statute of limitations allows a citizen to immediately and effectively pursue access to undisclosed government documents?

C. Does RCW 42.56.550(4) entitle Mr. Bogen to statutory fees and costs if he prevails on this appeal when RCW 42.56.550(4) requires a party prevail on the merits of a PRA claim and there has been no determination of the merits of Mr. Bogen's PRA claim?

III. COUNTER STATEMENT OF THE FACTS

On January 28, 2019, the City sent Mr. Bogen a communication that all responsive records to his November 16, 2018 PRA request had been provided. The City indicated that the request was considered fulfilled and closed. CP 4.

On January 28, 2020 Mr. Bogen filed a PRA suit in Kitsap County Superior Court. The City moved to dismiss Mr. Bogen's claim because it was filed outside the statute of limitations. Following briefing and oral argument from the parties, the trial court concluded that the claim was barred by RCW 42.56.550(6). Based on this, the trial court dismissed the matter with prejudice. Mr. Bogen now timely appeals the trial court's dismissal.

IV. ARGUMENT

A. STANDARD OF REVIEW

A trial court's grant of dismissal pursuant to CR 12(b)(6) is reviewed de novo. *Keodalah v. Allstate Insurance Company*, 194 Wn.2d 339, 344, 449 P.3d 1040 (2019). The facts alleged in the complaint are presumed to be true. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Group Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014). Dismissal under CR 12(b)(6) "is appropriate only if it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery." *Tenore v. AT & T Wireless Services*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998).

B. THE ONE-YEAR STATUTE OF LIMITATIONS UNDER RCW 42.56.550(6) COMMENCES ON THE DAY OF THE AGENCY'S FINAL ACTION.

1. The plain language of the statute requires an action to be filed within one year of the final agency action.

When the meaning of statutory language is plain on its face, courts must give effect to that plain meaning as an expression of legislative intent. *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009). In 2005, the legislature amended RCW 42.56.550(6) of the PRA to shorten the limitations period for actions brought under the act from five years to one year. 42.56.550(6) (2005) (amended by Laws of 2005, ch. 483, § 5). The statute provides: "Actions

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

The Court in *Houston v. Teamsters Local 210, Affiliated Health & Ins. Fund-Vacation Fringe Ben. Fund*, 27 F. Supp. 3d 346, 353 (E.D.N.Y. 2014) examined almost identical phrasing in an action to collect severance pay and noted, “...when the term “within” is followed by a designation of some period of time, *and* then the word “of” followed by some event—such as “the notice of claim was filed within four days of the accident” or “he was married within two years of his 20th birthday” or “the player was traded within one week of winning the championship”—the period of time is commonly understood to begin on the date of the event and is then measured moving forward in time...” Here, the plain language of the statute indicates the one year begins with the agency’s action, not the day after the agency’s action.

2. *Kovacs* supports the trial court’s dismissal because the PRA does not say “within one year *after* the day” upon which an agency takes final action.

The ruling in *Kovacs v. Department of Labor & Industries*, 186 Wn.2d 95, 375 P.3d 669 (2016) supports the trial court’s dismissal. *Kovacs* injured his back while working on September 29, 2010 and filed an application for benefits on September 29, 2011. *Id.* at 96. Applications for

workers' compensation benefits must be filed "within one year after the day upon which the injury occurred." *Id.* citing RCW 51.28.050. The Department argued the application was untimely by one day. The Court of Appeals agreed and concluded that "RCW 51.28.050 unambiguously means Mr. Kovacs had one year to file his application for benefits from the day of his injury, September 29, 2010; his application filed on September 29, 2011, was untimely." *Id.* citing *Kovacs v. Dep't of Labor & Indus.*, 188 Wn. App. 933, 934, 355 P.3d 1192 (2015). The Supreme Court reversed the Court of Appeals and noted the statute states "...unless filed within one year *after* the day upon which the injury occurred." (emphasis in original). *Id.* at 98. However, the Court went on to state, "Certainly, if the statute of limitations for a workers' compensation claim plainly started to run the day of injury, the department would be correct." *Id.* at 99. Here, the word "after" is not used in combination with the phrase "within one year." The one year to seek judicial review of an agency's response to a public records request begins the day of the agency's response.

3. Counting the day of agency action is not an anomaly, the language in the PRA is like the language in LUPA and LUPA counts the day of issuance.

The PRA and the Land Use Petition Act both allow for judicial review of government decisions. While the time limitations are different, the language regarding the time limitations for seeking review are the same.

The LUPA time limitation at RCW 36.70C.040(C) requires filing and service on all parties “within twenty-one days of the issuance of the land use decision.” The Supreme Court held this language means LUPA's 21-day statute of limitations begins to run on the date a land use decision is issued. *Habitat Watch v. Skagit Cty.*, 155 Wn.2d 397, 408, 120 P.3d 56, 61 (2005). The LUPA 21-day statute of limitations applies even when the litigant complains of lack of notice under the procedural due process clause. *Id.* at 401. The Court in *Habitat Watch* stressed that LUPA's “statute of limitations begins to run on the date a land use decision is issued,” *Id.* at 408, and that “even illegal decisions must be challenged in a timely, appropriate manner.” *Id.* at 407.

The same analysis should apply to the PRA's statute of limitations. “[W]ithin one year of the agency's claim of exemption or the last production of a record on a partial or installment basis” means the one year begins to run on either the agency's claim of exemption or the last production of a record and filing 366 days later is too late.

4. Case law mandates the one-year period begins on the date of final agency action.

Even if the statute is ambiguous, courts “resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.” *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317

P.3d 1003, 1006 (2014) (citing *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007)). The PRA's one-year statute of limitations begins on an agency's final, definitive response to a public records request. *Dotson v. Pierce Cty.*, 13 Wn. App. 2d 455, 469, 464 P.3d 563, 571, amended in part (July 8, 2020) citing *Belenski v. Jefferson Cty.*, 186 Wn.2d 452, 460, 378 P.3d 176 (2016).

5. The general counting statute is not applicable.

The general counting statute, RCW 1.12.040, which excludes the day of an action, does not apply in this situation because it conflicts with the time frame set forth in the more specific statute, RCW 42.56.550(6). The two statutes are inconsistent because the language in RCW 1.12.040 begins counting the day after an event. RCW 42.56.550(6) provides for counting the day of the final agency action. When a conflict exists between a general and specific statute, the more specific statute prevails unless there is legislative intent that the general statute prevails. *Ohio Security Insurance Company v. Axis Insurance Company*, 109 Wn. 2d 348, 353, 413 P.3d 1028 (2018). The PRA controls in any conflict with another statute, stating “[i]n 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. The exclusion of the first day under RCW 1.12.040 directly conflicts with RCW 42.56.550(6) which requires that the claim be filed *within* one year of

the final agency response. Therefore, RCW 42.56.550(6) is the controlling statute and the one year begins on the day of the final agency response.

C. PUBLIC POLICY FURTHER SUPPORTS THE STATUTE OF LIMITATIONS IN RCW 42.56.550(6)

A statute of limitations requiring an action to be brought within one year of the final agency action is not only what RCW 42.56.550(6) requires, but it is also consistent with public policy and the purpose of the PRA. “The primary purpose of the PRA is to provide broad access to public records to ensure government accountability.” *City of Lakewood v. Koenig*, 182 Wn.2d 87, 93, 343 P. 3d 335 (2014). As noted by Justice Madsen in her dissent, the purpose of the PRA is to allow citizens to access information about their government. *Rental Housing Association of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 558, 199 P.3d 393, (2009) (Madsen, J. dissent). The judicial review provisions, along with the penalties provide a means to an end, which is accessing the information. *Id.*, 165 Wn.2d at 558 (Madsen, J. dissent). “The one-year statute of limitations in RCW 42.56.550(6) is designed to ensure that actions are resolved quickly to serve the PRA disclosure goals without disproportionate individual financial gain.” *Id.*, 165 Wn.2d at 558 (Madsen, J. dissent).

Mr. Bogen is asking this Court to reweigh the public policy issues that the Legislature has already balanced in passing RCW 42.56.550(6). The

Legislature unambiguously stated that an action must occur within one year of the final agency action. This statute of limitations “does not preclude requestors from getting what they ultimately seek, which is prompt access to government records. Requiring requestors to file a claim for penalties and costs within one year of a denial simply prevents a requestor from delaying and then seeking higher penalties.” *Id.*, 165 Wn.2d at 558 (Madsen, J. dissent). These goals are sound public policy, and the policy the Legislature chose to enact.

Contrary to Mr. Bogen’s contention, grave consequences will not result from a one-year statute of limitations beginning from the agency’s final action. Not only is this one-year statute of limitations consistent with the language of the statute, but it ensures that at the time of final agency action, citizens are able to immediately and effectively pursue disclosure of records they believe have been improperly withheld. Mr. Bogen’s assertion that pro se litigants and attorneys will fall into a statute of limitations trap if the Court applies RCW 42.56.550(6) as written, is also misplaced. The purpose of the PRA is the open and timely disclosure of public records. Its purpose is not to accrue the maximum penalties for a failure to disclose.

D. IF MR. BOGEN PREVAILS ON THIS APPEAL, MR. BOGEN’S CLAIMS FOR ATTORNEY FEES AND COSTS ARE PREMATURE.

Even if Mr. Bogen were to prevail in this appeal, he would not be a prevailing party under RCW 42.56.550(4) and therefore he is not entitled to costs and fees at this time. The Washington State Supreme Court has explicitly and repeatedly held that attorney fees and costs can only be awarded after a determination on the merits of the PRA violation. *Kilduff v. San Juan County*, 194 Wn.2d 859, 878, 453 P.3d 719 (2019); *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 152, 240 P.3d 1149, (2010); *Concerned Ratepayers Association v. Public Utility District No. 1 of Clark County*, 138 Wn.2d 950, 964, 983 P.2d 635, (1999).

If Mr. Bogen prevails in this appeal, the only issue that will have been decided is the statute of limitations. The underlying PRA claims were not decided by the trial court. Because there has been no determination on the merits of the PRA claim, the issue of attorney fees and costs is premature. If Mr. Bogen prevails on appeal and the case is remanded to the trial court, the issue of fees and costs should also be remanded pending a decision of the PRA claims.

V. CONCLUSION

The trial court's decision dismissing Mr. Bogen's action under the PRA should be affirmed. Under the plain language of the statute the one-year statute of limitations begins on the day of final agency action. The Supreme Court held that the one year starts on the day of final agency action

in *Belenski v. Jefferson Cty.*, as did this Court in *Dotson v. Pierce Cty.* Starting the statute of limitations on the final day of agency action is not an anomaly and is consistent with LUPA which has the same phrasing and purpose of establishing judicial review of government actions. The purpose of the PRA is accessing information, not maximizing per day penalties. Affirming the trial court's decision is consistent with the statute, the case law and public policy.

RESPECTFULLY SUBMITTED this 21st day of September 2020.

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