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SUPREME COURT OF THE STATE OF WASHINGTON

RENTAL HOUSING ASSOCIATION OF PUGET SOUND,

Appellant,

v.

CITY OF DES MOINES,

Respondent.

**AMICUS CURIAE BRIEF OF ALLIED DAILY NEWSPAPERS
OF WASHINGTON AND WASHINGTON NEWSPAPER
PUBLISHERS ASSOCIATION**

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ORIGINAL

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I. IDENTITY AND INTEREST OF AMICI

A. Allied Daily Newspapers of Washington

Allied Daily Newspapers of Washington ("Allied") is a Washington nonprofit, nonpartisan organization that represents 25 daily newspapers throughout the State of Washington. Its members are involved in filing numerous public records requests on a frequent basis and are dedicated to promoting the public's right to know in matters of public interest.

B. Washington Newspaper Publishers Association

Washington Newspaper Publishers Association ("WNPA") represents 140 community newspapers in Washington state. Its members are frequent users of the Public Records Act in conveying information about government operations to their readers.

C. Amici's Interest in this Case

Amici have a vested interest in the long-term viability of the Public Records Act ("PRA") to enable the people to evaluate the actions of the agencies and officials who serve them.

The King County Superior Court's Opinion prematurely starts the statutory clock running against a citizen requestor, ignores this Court's prior determination of what is required by an agency when making a claim

of exemption, and unnecessarily invites untimely and hasty public records litigation by requestors attempting to comply with an uncertain deadline.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The City of Des Moines' construction of the PRA ignores the necessary interaction of RCW 42.56.210(3), which defines the required content of an agency's claim of exemption, and RCW 42.56.550(6), which establishes a one-year time frame within which a records requestor must initiate an action after the agency's claimed exemption. These two sections must be read together to afford a record requestor an opportunity to evaluate an agency's response before commencing litigation.

Moreover, the natural consequence of the City's policy argument, is to force a citizen-requestor to file suit long before he or she possesses all of the necessary information on the merits of the same, a result that is contrary to the stated policy of the PRA that it "shall be liberally construed ... to promote this public policy and to assure that the public interest will be fully protected." RCW 42.56.030.

The trial court's decision must be overturned because it does not comport with the proper application of controlling provisions of the PRA: 1) correct statutory interpretation of the PRA requires that the Act's provisions as to content of an agency response and the resulting date when the statute of limitations begins to run be read in harmony with each other,

which is squarely in line with the Act's stated intent of promoting access to public records; 2) the PRA's own language, and this Court's previous rulings, dictate the content of proper agency responses to record requests and establish objective standards by which compliance can be measured; and 3) a proper statutory interpretation will eliminate hasty and uninformed lawsuits that citizens would otherwise be forced to file to preserve their statutory rights.

The trial court's decision encourages agencies to obfuscate responses to public records requests, then assert the defense of the statute of limitations, and thus deprive requestors of their statutory rights under RCW 42.56.550(4) to daily penalties for delay in providing access to public records.¹

By reinforcing the Act's mandate that the statute of limitations does not commence until an agency furnishes a proper claim of exemption or produces a final installment of records, this Court can establish a bright-line and consistent rule that enables requestors to determine precisely when their statutory clock begins, and discourage frivolous and hasty lawsuits meant only to preserve a litigant's action.

¹ Application of the statute of limitations to bar pursuit of a lawsuit does not serve as a determination as to a requester's right of access, since in such a situation, no substantive decision has been made as to whether an agency properly invoked an exemption to the PRA. Thus, a requester could make a new request for the same records and, if this second request was denied, initiate a new lawsuit.

The trial court's narrow reading of the statute, coupled with the City's urged interpretation of the statutory limitations, demonstrates the potential to frustrate the legislative intent of the PRA. If the lower court's erroneous interpretation is allowed to stand, agencies will be encouraged to provide evasive and deficient responses to record requests in hopes of exhausting the statute of limitations or prompting a premature lawsuit that could easily be defeated.

Amici request this Court reverse the Superior Court decision and allow RHA's case to proceed on the merits.

III. ARGUMENT

A. The Public Records Act's Statute of Limitations Commences Once an Agency Produces a Complete Claim of Exemption or the Last Record on an Installment Basis

1. The PRA Contains Clear Standards for a Proper Claim of Exemption

The PRA mandates that an action to initiate judicial review of an agency's wrongful withholding or denial of a public records request "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 PRA does not define a "claim of exemption" within the judicial review section. However, the PRA codifies the elements necessary for a proper claim of exemption in a related section. RCW

42.56.210(3). Where a statute lacks a definition of any term, a basic tenet of statutory construction holds that the statute must be read as whole, giving effect to each part. *City of Bellevue v. East Bellevue Community Council*, 138 Wn.2d 937, 946, 983 P.2d 602 (1999).

Pursuant to RCW 42.56.210(3), an agency that refuses inspection of a public record:

Shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.

Id. (emphasis added). In short, an agency claim of exemption must include 1) a specific citation to the statutory authority upon which the agency relies and 2) an explanation of exactly how the cited exemption applies to the particular record withheld.

When interpreting a statute, a court's "fundamental objective ...is to ascertain and carry out the intent of the Legislature..." *Servais v. Port of Bellingham*, 127 Wn.2d 820, 830, 904 P.2d 1124 (1995). The clear intent of the Legislature, as manifested in the PRA, is to "promote broad disclosure of public records." *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 301, 825 P.2d 324 (1992).

Here, the PRA's plain language as to what constitutes a proper claim of exemption must be construed in conjunction with the Act's statute of limitations to provide clear, measurable standards of compliance.

2. Even Where a Section of the PRA is Unambiguous, a Court May Evaluate Other Sections of the Act to Buttress Its Conclusions

As a recognized principle of statutory construction, Washington courts have read specific PRA provisions together to effectuate the Legislature's purpose. *Ockerman v. King County Dept. of Development*, 102 Wn. App. 212, 216, 6 P.3d 1214 (2000) ("Statutes are construed as a whole, to give effect to all language and to harmonize all provisions.") In *Ockerman*, the court evaluated the interaction of an agency's duty to provide notice of receipt of a public records request and a reasonable estimate of the time required to respond with an agency's duty to provide an explanation of the reasons for denying a public records request. *Id.* at 217. Although the court found the statutory requirements "unambiguous," it nonetheless looked at a second passage within the statutory text to buttress its interpretation. *Id.* *Ockerman* supports the proposition that a court must evaluate the PRA in its entirety to effect the law's overall purpose.

Similar to the reasoning in *Ockerman*, the standards for what constitutes an exemption under RCW 42.56.550(6) are found within the

text of RCW 42.56.210(3). This statutory exercise does not require the addition of any language to the statute; it simply involves marrying two complimentary sections of the document to effectuate the legislative purpose.

3. RCW 42.56.210(3) Creates a Three-Part Test for what Constitutes a Legally Sufficient Claim of Exemption

This Court has fashioned a three-part test for an agency's statutory compliance with the requirements of RCW 42.56.210(3). *Progressive Animal Welfare Soc'y v. Univ. of Wash. (PAWS II)*, 125 Wn.2d 243 (1994). In *PAWS II*, the Court construed former RCW 42.17.310(4) (recodified as RCW 42.56.210(3)) in the context of an improper withholding of requested records. The Court held that a proper claim of exemption must contain three parts: 1) identification, "with particularity," of each individual record withheld; 2) identification of the "specific exemption" upon which the agency relies in withholding each record; and 3) an "explanation of how the exemption applies to the specific record withheld." *Id.* at 270-271. These standards create objective criteria by which agency compliance can be measured.

By enforcing these objective elements, the information imbalance facing a requestor is partially rectified. Persons making public records requests are *seeking* information from an agency precisely *because* they do

not have all of the facts at their disposal; they cannot know what records exist and, furthermore, if the records exist, why they are exempt from disclosure. The PRA exists for just this reason, to promote "the sovereignty of the people and the accountability to the people of public officials and institutions." *PAWS II*, 125 Wn.2d at 251.

4. The Basic Concepts of Statutory Construction are Faithful to the PRA's Legislative Intent and Do Not Require Adding Language to the Act

These standards are not, as the City suggests, meant to "circumnavigate" the PRA's clear language, nor are they a "prescription for chaos." Brief of Respondent, pp. 18, 21. Rather, the statutory interpretation urged by RHA and amici creates a simple test for courts to apply: has the agency met the burden of providing a legally sufficient claim of exemption from which the statute of limitations clearly begins to run? The standards set forth are concrete and not prone to the insecurities and inefficiencies that would flow from the Court's adoption of the City's urged interpretation.

5. The City's Deficient and Evasive Responses to RHA's Records Request Highlight the Danger in the City's Interpretation of the PRA

If the City's position is accepted, the power of the people is yielded to ambiguities of their agencies without check. An agency could frustrate a citizen's request by responding initially with an inadequate and vague

denial, string out the request month by month with progressive disclosures and exemptions, and ultimately escape liability by relying on its initial opaque denial and a narrow construction of the statute of limitations.

The danger of this particular strategy is highlighted by the facts of this case:

- the City responded to RHA's initial request with a partial disclosure and a vague, non-specific denial of the remainder of the request;
- following RHA's written objection to the City's response, the City replied that it would "re-review the applicable statutes and case law concerning [the] exemptions," thus indicating an on-going obligation to respond to the request;
- following months of missed, self-imposed deadlines, the City reiterated its opinion that all non-exempt records had been disclosed, but did not provide a proper privilege log that identified the specific, individualized records being withheld and the reasons for their withholding;
- nine months after RHA's initial request, the City produced a privilege log that purported to identify the individual records withheld and the reason for their non-disclosure;
- after continued discussion between the parties regarding the sufficiency of the City's response, RHA filed suit against the City for failure to comply with the PRA;
- despite its obstinate refusal to disclose the requested records, and in disregard of its own dilatory and stalling tactics, the City moved to dismiss RHA's complaint for failure to comply with the PRA's one-year statute of limitations.

Finding the City's initial, statutorily insufficient response as the triggering date for the limitations period, the trial court dismissed RHA's complaint as barred by the statute of limitations under RCW 42.56.550(6). As a result, the City was rewarded for its evasive responses and piecemeal disclosure tactics.

The trial court opinion is an improper construction of the PRA that encourages agencies to play hide and seek with its citizens and withhold public records until the statute of limitations, as interpreted by the trial court, runs out. Should this opinion stand, other agencies would be encouraged to borrow from the City's playbook and evade a records request through vagueness and delaying tactics and then argue the statute of limitations has expired, thus foreclosing a requestor's right to judicial review. This result is inequitable and certainly contrary to the legislative intent of the Public Records Act. This Court should overturn the trial court's erroneous interpretation.

B. Public Policy and Traditional Notions of Fundamental Fairness Favor a Statute of Limitations Where Both Parties Have Equal Access to Information

Unlike other cases that may justify the idea of repose and certainty in a statute of limitations, PRA cases involve an inherent information gap between the citizen and agency. A citizen seeks disclosure from an

agency, most often not knowing exactly what records exist that are responsive to the request. The agency, on the other hand, because it has sole custody of the records, knows exactly what it has and what is responsive to the citizen's request. As is abundantly clear, all power to respond to the request is vested in the agency.

In recognition of this fact, the PRA requires the agency to identify "with particularity" records responsive to the request. *PAWS II*, 125 Wn.2d at 271. After all, "the purpose of the Public Records Act is to keep public officials and institutions accountable to the people." *Daines v. Spokane County*, 111 Wn. App. 342, 347 (2002). The PRA narrows the information gap by holding agencies to a process of disclosure that enables the requestor to see behind the curtain and fully evaluate that agency's statutory compliance. However, the process is flawed if an agency is allowed to partially disclose records and withhold others without fully disclosing the nature of the records claimed exempt and why, and then assert a statute of limitations defense when the requestor is still in the dark as to what records are even at issue and why.

C. RHA's Interpretation will Discourage Frivolous PRA Litigation Filed Solely to Preserve a Requestor's Statutory Rights Before He Or She Has All of the Necessary Information

A thoughtful approach to the PRA's statute of limitations provision should yield a result that will discourage frivolous litigation and provide

certainty to both requestor and agency. The City's urged interpretation would require a requestor to file suit within one year of the agency's initial denial—regardless of the content of that response or subsequent correspondence between the parties. Shoot first and ask questions later. The City argues that this would increase predictability and certainty in the public records arena by establishing a "date certain" from which to begin the statutory clock. In reality, the exact opposite would be true, as records requestors would find themselves trying to cobble together a show cause motion as their one-year timeframe wound down, all-the-while trying to maintain a dialogue with the responsive agency about the status of the pending request. The City's position would force the average requestor to initiate litigation the requestor may not desire and incur court costs and attorneys fees—even when it is the agency that has not complied with the PRA's mandate as to a proper response. In addition, the converse may be true. Requestors might choose to give up the fight for access to public records if faced with a premature choice of filing a lawsuit and incurring the costs and attorneys fees, which the average requestor may not be prepared to undertake. This situation is unworkable and fraught with problems, as RHA has pointed out to this Court.

By way of contrast, beginning the limitation clock only after receipt of a complete agency claim of exemption could significantly

reduce the amount of public records litigation. Armed with information about the exact identity of the records being withheld, as well as the precise statutory reason for their withholding, a citizen requestor would have much greater knowledge of the scope and appropriateness of the response and whether an appeal of the same has merit or would be a waste of time, effort, court costs, and attorneys fees.

If the agency has properly demonstrated an exemption applies to identified records, the requestor will know that any litigation would be pointless. If the agency has failed to justify non-disclosure as to specific and defined records, the requestor will be able to fashion a narrowly-tailored action to obtain disclosure. Both parties benefit from an agency being held to the proper PRA standard: a requestor has better information from which to make its decision, and an agency will not face the deluge of public records litigation that can cause delay and burden to its everyday functions.

This Court's proper and harmonious construction of the Act's statute of limitations and exemption provisions will provide a clear roadmap for the parties and reduce "limitations-preserving" lawsuits that lack a solid factual or legal foundation. Simply put, the nature of non-disclosure and the rationale for exemption must necessarily be fully

determined before Public Records Act litigation is filed and should not be an issue that is still being fleshed out after litigation is commenced.

IV. CONCLUSION

The King County Superior Court's decision must be overturned for three reasons: 1) the PRA must be construed in favor of access and the lower court's ruling frustrates the Legislature's stated statutory intent; 2) the trial court did not give weight to language in the PRA and this Court's prior rulings that have established a bright-line test for an agency's appropriate response to a records request; and 3) proper construction of the PRA defining the scope of an acceptable response in order to determine when the statute of limitations begins to run will eliminate the information gap between requestor and agency, thereby reducing the potential for unnecessary, hasty, and costly public records litigation.

Accepted principles of statutory construction harmonize the Public Records Act's limitations and exemption language, which read together fashion a clear and unambiguous process for accessing public records to aid both citizens and agencies alike. For these reasons, the lower court's decision should be reversed and RHA's action allowed to proceed on the merits.

Respectfully submitted this ~~4~~^{4th} day of April, 2008.

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I hereby certify under penalty of perjury under the laws of the State of Washington that on the ____ day of April, 2008, I caused a true and correct copy of the foregoing document, "Amicus Curiae Brief of Allied Daily Newspapers of Washington and Washington Newspaper Publishers Association," to be delivered by U.S. Mail to the following counsel of record:

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