

No. 80532-6

SUPREME COURT OF THE STATE OF WASHINGTON

RENTAL HOUSING ASSOCIATION OF PUGET SOUND, a
Washington non-profit corporation,

Appellant,

v.

CITY OF DES MOINES, a Washington municipal corporation,

Respondent.

RESPONDENT CITY OF DES MOINES ANSWER TO
AMICUS CURIAE BRIEF OF ALLIED DAILY NEWSPAPERS
OF WASHINGTON AND WASHINGTON NEWSPAPER
PUBLISHERS ASSOCIATION

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STATE OF WASHINGTON

2000 APR 28 P 3:31

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I. INTRODUCTION

Amici curiae Allied Daily Newspapers of Washington and Washington Newspaper Publishers Association (hereafter collectively referred to as “Allied”) advocate an unworkable interpretation of the plain language of RCW 42.56.550(6) that creates uncertainty and promotes argument over process rather than focusing on access to the requested records. As such, the rule advocated by Allied will cause confusion, delay and dispute over the date by which actions under the Public Records Act must be brought.

II. ARGUMENT

A. **THE LEGISLATURE INTENDED THE STATUTE OF LIMITATIONS TO BE DETERMINED BY THE PLAIN LANGUAGE OF THE STATUTE.**

1. **The Legislature used different statutory language to define the commencement of the statute of limitations from that relied upon by Amicus Allied.**

Amicus Allied contends that commencement of the statute of limitations should be held hostage to a determination of the adequacy of the agency’s “claim of exemption” which they suggest must be determined under a three-part test pursuant to RCW 42.56.210(3). As an initial matter, RCW 42.56.210(3) does not use the term “claim of exemption” at all. Hence, there is no indication

that the Legislature intended to import the requirements of RCW 42.56.210(3) into RCW 42.56.550(6). When the legislature employs different terms in a statute, the Court presumes a different meaning for each term. *Koenig v. City of Des Moines*, 158 Wn.2d 173, 182, 142 P.3d 162, 165 (2006).

In this case, the statute of limitations in RCW 42.56.550(6) uses the term “claim of exemption” to define the date when the one year limitation period commences. RCW 42.56.210(3), relied upon by Allied, does not use this term, but defines the agency “response”, requiring the agency to include a “statement” of the applicable exemption and an “explanation” of how the exemption applies. The Legislature could easily have triggered the statute of limitations by including a direct reference to RCW 42.56.210(3), or by using the same language in both statutory provisions. It did not do so. Hence, there is no basis for the argument advanced by Allied that a “claim of exemption” has a technical meaning which differs from the plain meaning of the term “claim”. See Respondent’s Brief at 9.

2. The City’s response was not misleading and satisfied the statutory purpose of informing the requestor as to whether exemptions were properly applied.

Contrary to Amicus Allied’s argument, the purpose of RCW 42.56.210(3) is not so much as to inform the requestor of the details

of a claim of privilege, but to provide a basis for a court to conduct judicial review and to prevent an agency from “silent withholding” of records which could create a false impression in the requestor’s mind that all records have been produced. In noting that an agency’s response must identify the records which are withheld, the *PAWS II* opinion makes clear that the purpose of the indexing requirement is (1) to prevent creating a misleading impression that all records responsive to the request have been produced; and (2) to allow the court to have the ability to conduct *de novo* review as required by the statute. *PAWS v. University of Washington*, 125 Wn. 2d 243, 270, 884 P.2d 592 (1994) (“*PAWS II*”).

In describing the contents of a response to the Public Records Act, an agency’s response need not be elaborate, but must be informative of the fact that the city has withheld documents and what is being withheld. See WAC 44-14-04004(b)(ii). Indeed, the Attorney General’s Model Rules recognize that a withholding index is “one way” to comply with the statutory requirement in RCW 42.56.210(3) to “include a statement of the specific exemption” that applies and provide a “brief explanation of how the exemption applies to the record withheld”. *Id.*

Indeed, Amicus Allied is incorrect in asserting that the City's response did not comply with the requirements of the statutory language used in RCW 42.56.210(3). Allied generally mischaracterizes the City's response as "partial", or "vague" and "non-specific". Brief at 9. Allied does not address any of the specifics in the August 17, 2005 response, which expressly claimed exemption under former RCW 42.17.310(1)(i)¹ as drafts, notes and interagency memoranda, under former RCW 42.17.310(1)(j)² ("the controversy exception") applicable to attorney-client privilege and work product. Thus, the City's response complied with the first requirement of RCW 42.56.210(3) by including a statement of the specific exemptions relied upon to withhold the documents.

Next, the City's response contained a "brief explanation" of the exemptions applied to the records which were being withheld, as RCW 42.56.210(3) requires. The City identified these records as the City attorney's files, including approximately 600 pages. The City's description did not stop there, but expressly stated what types of records were being withheld, in enough detail that it was

¹ Recodified in 2005 as RCW 42.56.290.

² Recodified in 2005 as RCW 42.56.280.

to inform the plaintiff's attorney as to whether the claim of exemption was appropriate.

In reviewing the City's response, there can be no doubt that the response was satisfied the statutory purposes identified by *PAWS II*, in that it was not misleading nor did it create a false impression that all records had been produced. The City's response included a specific means to identify individual records withheld in their entirety as required by *PAWS II*, 125 Wn.2d at 271. Moreover, it cannot be fairly disputed that the City's response was definite enough to allow the plaintiff's attorney to make a considered judgment as to whether the exemption was properly claimed. Plaintiff's counsel immediately did so, contending that the privilege was improperly "claimed" in his October 7, 2005 letter to the City attorney. CP 60. In this response, plaintiff's counsel disagrees with the City that five categories of records are exempt under either of the claimed exemptions in former RCW 42.17.310(1)(i) and (j). Plaintiff clearly knew that a claim under RCW 42.56.550(1) was ripe and could be brought at any time following receipt of the City's claim of exemption in its August 17, 2005 letter.

Amicus Allied takes issue with the degree of specificity or "particularity" provided by the City's initial response. The City's

initial response categorically described all the records withheld. Moreover, even when a full privilege log was provided, RHA continued to dispute the adequacy of the descriptions and demand additional detail. This fact illustrates how the rule advocated by RHA and Allied would create uncertainty as to the date of the commencement of the limitations period and would prolong disputes that the Legislature intended be promptly resolved.

Here, the City's initial response was not elaborate, but it identified all the records withheld by category. Ultimately, the City agreed to provide more detail to RHA and did so more than four months before the one year statute of limitations expired. Under such facts, the claims that RHA was misinformed or needed additional detail to bring their claim are simply erroneous. More salient is the utter lack of any explanation by RHA for its failure to bring its claims within a year of the City's claim of exemption.

A critical fact in this case is RHA's unexplained delay in bringing their dispute over the City's August 17, 2005 response to the attention of the courts. RHA acknowledged that it knew that it had a claim under RCW 42.56.550(1) as early its October 7, 2005 letter to the City. CP 60. RHA knew that the City was claiming exemption for all the City Attorney's records and knew what these

records were, yet RHA did not file a lawsuit for 17 months. Further, RHA inexplicably delayed bringing its claim even though it had a full privilege log four months before the statute of limitations expired. RHA chose to argue over the adequacy of the privilege log rather than bring their challenge to the City's claims to court. Such a delay is diametrically contrary to the expeditious judicial review process embodied by RCW 42.56.550.

B. THE PUBLIC RECORDS ACT PROVIDES A REMEDY WHERE A REQUESTOR BELIEVES AN AGENCY IS DILATORY OR A RESPONSE IS INADEQUATE.

- 1. A requestor may file an action based on an inadequate response to a public records request.**

The attorney for Amicus Allied has previously recognized a much different remedy than now advocated where an agency response is deemed inadequate. Mr. Overstreet was the editor in chief and a principal author of the Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws (Greg Overstreet, ed. Wash. State Bar Assoc. 2006) (hereafter "the Deskbook").

The Deskbook addresses the failure to adequately explain withholding, the very situation that Amicus now suggests extends the statute of limitations. The Deskbook, however, does not suggest

that the statute of limitations is extended, but contends that the failure to provide a *PAWS II* index violates the Act and is actionable under RCW 42.56.550(1). Deskbook, §16.1(2).

Using the rationale of the Deskbook, the requestor has a “response cause of action” where there is a failure to adequately respond because:

An agency’s failure to do any of these things is a failure to adequately respond to the request and, moreover, is an effective denial of access to public records. An effective denial is a denial of an “opportunity to inspect or copy” records under . . . RCW 42.56.550(1).

Deskbook, §16.1(2), at p. 16-3.

The Public Records Act therefore provides a direct remedy to the alleged “vague, non-specific denial” posited by Amicus Allied. The Act does not provide for a suspension of the statute of limitations while attorneys debate whether the agency response is sufficient. RHA chose not to exercise that remedy for 17 months, well in excess of the one year limitations period prescribed by RCW 42.56.550(6).

2. A “Response” Cause of Action contemplated as a remedy to dilatory or inadequate response is subject to the one year statute of limitations.

Of course, if Mr. Overstreet is correct in the Deskbook that an inadequate response creates a cause of action under RCW

42.56.550(1), that is an “action under this section” which is itself governed by the one year limitations period in RCW 42.56.550(6). Under the explicit terms of RCW 42.56.550(6), RHA had one year from the City’s response to sue over the adequacy of the City’s August 17, 2005 response. It failed to do so and its claims challenging this response were correctly dismissed as untimely.

The remedy suggested by the Deskbook and RCW 42.56.550 is not to delay and debate the adequacy of the agency’s explanation and claim of exemption, but to promptly bring cases challenging the claim to court. Again, neither RHA nor Amicus Allied explains why plaintiff failed to file their claim within a year, despite clearly knowing enough to assert in October 2005 that the City was violating the statute. CP 60.

C. RCW 42.56.550(6) UNAMBIGUOUSLY PRECLUDES RHA’S ACTION BASED ON THE JULY 2005 RECORDS REQUEST.

Amicus Allied urges the court to construe the unambiguous language of RCW 42.56.550(6) by reference to other parts of the statute. In so doing, Allied concedes that the language of the statute of limitations is unambiguous. Brief of Amicus Allied, at 6. Despite this concession, Allied offers an interpretation that requires importation of additional statutory language into RCW

42.56.550(6), by triggering the one year limitation period only where there is a “proper” claim of exemption (in the requestor’s judgement). Brief of Amicus Allied, at 4.

Of course, this is not the language used by the Legislature in the actual terms of the statute. The statute is not triggered by a “proper” claim, Brief of Amicus Allied at 4, or an “legally sufficient” claim. Brief of Amicus Allied at 8. The one year limitation period is triggered merely by a “claim” of exemption. RCW 42.56.550(6). The plain meaning of the word “claim” is “an assertion of something as a fact”. Webster’s College Dictionary, Random House, 1991. The City’s August 17, 2005 response clearly asserted that the City Attorney’s files, which are fully described, are exempt as attorney-client privilege, work product and deliberative process privileged. CP 58, citing former RCW 42.17.310(1)(i), (j). This is plainly sufficient to trigger the one-year statute of limitations.

D. A CLEAR RULE TRIGGERING THE STATUTE UPON RECEIPT OF A CLAIM OF EXEMPTION PROMOTES CERTAINTY AND PROMPT RESOLUTION OF RECORDS DISPUTES.

Amicus Allied postulates that a rule triggering the one year statute of limitations will promote frivolous “limitations-preserving” lawsuits. This result is not only illogical, but it is more consistent with the statutory purpose of promptly resolving

disputes within a single year than to allow requestors to delay bringing their claims as Amicus advocates.

Amicus Allied contends that if privilege logs are provided with additional detail, then requestors will know that bringing claims will be pointless. This unsupported belief ignores the statutory incentives to sue deep pocket municipalities – mandatory penalties up to \$100 per day and mandatory attorney’s fee awards. Given the mandatory nature of daily penalties, the Court should not create a loophole for plaintiffs to inexplicably or intentionally delay their claims in hopes that they will become more profitable. See *Yousoufian v. Sims*, 152 Wn.2d 390, 98 P.3d 463 (2004).

Indeed, the rule advocated by Amicus Allied places tremendous burden upon public records officers to ensure that their responses meet a three part legal test, rather than the plain terms of the statute. This will only delay agency responses so that records officers can obtain legal review of each response, causing additional time and cost on municipalities already overwhelmed with the burdens of responding to voluminous records requests. See *Zink v. City of Mesa*, 140 Wn.App. 328, 166 P.3d 738 (2007) (172 requests made to rural city in 30 month period by a single requestor).

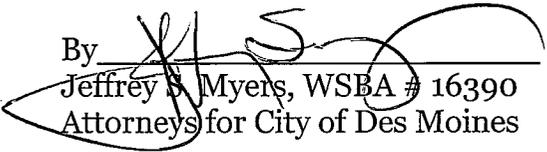
Amicus Allied makes a nonsensical argument that a clearly established one year limitation would undermine efforts to maintain a dialogue with the agency. Brief at 12. The opposite is true. A clear rule requires promptness in resolving the disputes, and, if an agency is as evasive as RHA and amici claim the City was here, requires them to promptly bring such disputes to the court's attention. Neither RHA nor Amici offer any rationale to support the result they advocate – allowing disputes to fester and drag on beyond the one year period envisioned by RCW 42.56.550(6).

IV. CONCLUSION

The Court should provide trial judges and requestors with a clear rule, consistent with the plain language of RCW 42.56.550(6), that claims challenging a decision to withhold records must be brought within one year of an agency's response that claims records are exempt. Marrying the date for commencement of the statute of limitations to the "adequacy" of the claim is inconsistent with the statute's language, promotes uncertainty and dispute over process, instead of prompt resolution of records disputes. Therefore, the Court should reject the invitation of Amicus Allied to create uncertainty and affirm the trial court's dismissal of claims brought 17 months after the City's claim of exemption.

Respectfully submitted this 28th day of April, 2008.

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