

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 WASHINGTON COALITION FOR
OPEN GOVERNMENT

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STATE OF WASHINGTON
2008 APR 28 P 3:31
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I. INTRODUCTION

Respondent City of Des Moines responds to the brief of Amicus Curiae Coalition for Open Government (hereafter "COG"), filed on April 8, 2008. Because the requestor did not file a renewed public records request for the same records sought in its initial July 2005 request, Amicus COG's fears that the statute of limitations would preclude disclosure on the merits are unwarranted. Amicus COG fails to present any persuasive argument for reversal of the trial court's dismissal of the plaintiff's claims based on the July 2005 request, which were brought 17 months after the City claimed exemptions applied and were beyond the one-year statute of limitations of RCW 42.56.550(6).

II. STATEMENT OF THE CASE

Amicus COG proceeds with a critical misunderstanding of a key fact. COG contends that RHA made a new public records request for the City Attorney files in correspondence between legal counsel after the City initially claimed these documents were exempt. Brief of Amicus COG at 12. As explained below, RHA's counsel did not resubmit a new request, but demanded reversal of the City's response to his prior July 20, 2005 request.

The facts clearly establish that the City claimed that the contents of the City Attorney's files, requested on July 20, 2005 were exempt under the "controversy exemption"¹ as attorney-client privileged and work product, and also under the "deliberative process" exemption.² CP 58.

RHA's attorney responded immediately that the City was violating the Act and that it was withholding non-exempt records that were not privileged. CP 60. RHA threatened to sue for daily penalties and attorney's fees, and also demanded a privilege log of all documents withheld by the City. *Id.* After exchange of several letters and the passage of five months, RHA sent a letter in January 2006 again demanding production of a privilege log and again threatening suit. CP 65.

The second letter contained an additional public records request, not for the same documents, but for records created subsequent to the City's initial response. CP 66-67. The request for records generated after the July 2005 request was clearly identified and understood by the parties as a new request. The January 25, 2006 letter was not treated by any party as a new request for the

¹ Former RCW 42.17.310(1)(j), recodified as RCW 42.56.290.

² Former RCW 42.17.310(1)(i), recodified as RCW 42.56.280.

same records sought in the July 2005 request. RHA never demanded that the City send a five day letter in response to a new request for the same records as would have been required by RCW 42.56.520(1). Indeed, the parties recognized RHA's demands as pertaining to the original request, not a renewed request.

In proceedings below, RHA did not argue that it understood and intended to renew its July 2005 request in this correspondence. In describing the intent of the January 25, 2006 letter, plaintiff's counsel submitted a declaration in which he described it as:

After two months had passed without any response from Des Moines, I sent the City a follow-up letter dated January 25, 2006. I also included a new PRA request in that letter for documents concerning the City's Crime-Free Rental Housing Ordinance/Program and the City's 2006 budget.

CP 2116 (Declaration of Michael Witek).

Tellingly, Witek does not claim this was a renewal of his July 20, 2005 request. Indeed, this contention was not advanced at oral argument and was mentioned in the trial court only obliquely in a footnote of their Response Brief, where RHA claimed, without any citation to legal authority, that its demands for the documents requested "effectively restarted the time from which any statute of limitations would run." CP 2095 (Plaintiff's Response, n.8).

III. ARGUMENT

A. THE STATUTE OF LIMITATIONS CUTS OFF CAUSES OF ACTION UNDER RCW 42.56.550(6).

Amicus curiae Washington Coalition for Open Government (COG) argues that the statute of limitations only cuts off actions for daily penalties and cannot be read as a substantive determination on the merits of an agency response. This reading is somewhat narrower than the express language of RCW 42.56.550(6), which applies to “[a]ctions under this section. . .”.

RCW 42.56.550 contains two types of causes of action. The first is an action challenging an agency’s denial of records and seeking to compel disclosure of records. RCW 42.56.550(1). If the requestor prevails in this type of an action, the prevailing requestor is entitled to an award of a daily penalty and reasonable attorney’s fees. RCW 42.56.550(4).

The second cause of action under RCW 42.56.550 is where a requestor disagrees with an agency’s estimate of time necessary to respond. The Act thus provides a direct remedy for requestors who believe that an agency is taking too long to respond to a request. See *Limstrom v. Ladenburg*, 98 Wn. App. 612, 989 P.2d 1257 (1999).

By its terms, the statute of limitations in RCW 42.56.550(6) applies to all causes of action created by that section. COG is correct

that this applies to an action for penalties, but it also applies to any action more than a year after denial of a request, that is based on the untimely request.

COG contends that a dismissal based on the statute of limitations is not a determination on the merits of a request and cannot preclude a requestor from filing a new request for the same records. Presumably, COG is concerned that a dismissal on statute of limitations grounds could be used by an agency under the doctrine of collateral estoppel to deny future records requests. Aside from the fact that the City has not argued such a position, the concerns of COG are illusory. An adjudication on the merits of a claim is a clearly established prerequisite for application of collateral estoppel. *Nielson By and Through Nielson v. Spanaway General Medical Clinic, Inc.*, 135 Wash.2d 255, 263, 956 P.2d 312, 316 (1998) (prior adjudication must have ended in a final judgment on the merits). Dismissals based on statute of limitations do not adjudicate the merits of a claim and it is well established that it will not preclude future claims under the doctrine of collateral estoppel. *Cloud ex rel. Cloud v. Summers*, 98 Wn. App. 724, 991 P.2d 1169 (1999).

B. AMICUS COG IS FACTUALLY INCORRECT IN ASSERTING THAT APPELLANT SUBMITTED A SECOND PUBLIC RECORDS REQUEST IN ITS JANUARY 25, 2006 CORRESPONDENCE.

Amicus COG's contention that the claims relating to the July 20, 2005 public records request were timely because of a re-newed records request are factually incorrect. COG relies on the January 25, 2006 letter from RHA's counsel, CP 60, which demanded reversal of the denial articulated in the City's August 17, 2005 response.

COG strains to fit the facts of this case within the imaginary scenario described in its brief, at 10-11. However, the argumentative portions of the January 25, 2006 letter demanding a reversal of the City's claim of exemption are not a new records request. Although not required to cite the Public Records Act, a person requesting documents from an agency must state the request with sufficient clarity to give the agency fair notice that it had received a request for a public record. *Wood v. Lowe*, 102 Wn. App. 872, 10 P.3d 494 (2000); *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409-12, 960 P.2d 447 (1998), *review denied*, 137 Wn.2d 1012, 978 P.2d 1099 (1999).

Clearly, RHA knew how to make a public records request and clearly did so in its July 20, 2005 letter to the City. CP 48. Likewise,

in a later portion of the January 25, 2006 letter, RHA made a second request for additional documents prepared subsequent to those demanded in its July 20, 2005 request. CP 66. In the January 25, 2006 letter, RHA repeats their demand for “overdue” records, directing the City to their July 20, 2005 request. Any fair reading of this letter reveals that it is not a new request, but is 1) a demand for the City to reverse its prior denial of the July 20, 2005 request, and 2) a request for subsequently created documents.³ The documents in dispute here are those denied by the City’s August 17, 2005 claim of exemption.

C. CLEAR APPLICATION OF THE STATUTE OF LIMITATIONS PROMOTES PROMPT RESOLUTION OF PUBLIC RECORDS ACT DISPUTES.

Contrary to COG’s argument, the clear application of a statute of limitations will encourage prompt resolution of public records disputes, not incomplete or dilatory responses. On its face, a statute of limitations, such as that included in RCW 42.56.550(6), limits disputes to a one year period. Thus, all parties have incentive not to allow disputes to fester, but to promptly bring the show cause

³ The City responded to the second records request in several installments, the last being sent in March 2006. RHA has not shown that the response to the second request violated the Act, but continued to press for the records withheld by the City in its August 2005 response.

motion contemplated by RCW 42.56.550(1) to the court's attention for resolution.

In considering the provisions of the statute, amicus COG ignores the impact of RCW 42.56.520, which makes an agency's response to a public records request final after two days. If, as COG posits, an agency is dragging its feet or providing incomplete responses, a requestor has the right to sue immediately for the denial of its request. Moreover, RCW 42.56.520 also deems the "re-review" to be final agency action two business days after the City's initial response allowing suit without further delay or exhaustion of administrative remedies. See *PAWS v. University of Washington*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994) ("*PAWS II*").

Neither amicus COG nor RHA has ever explained why, in light of RCW 42.56.520, the City was required to respond further after its initial denial of the claim. At that point in time, two days after the August 17, 2005 response, RHA's claim was ripe and it could have immediately sued. Indeed, the letters from plaintiff's counsel indicated that it knew it had a viable lawsuit to challenge the claim of attorney-client privilege. RHA has never explained why it did not

more than four months prior to expiration of the statutory of limitations.⁴

The expeditious procedures provided by the Legislature in RCW 42.56.550(1), (3), show a clear intent to provide expeditious resolution of Public Records Act disputes. Should this Court allow the statute of limitations to be deferred at the discretion of plaintiff's counsel by sending repeated demand letters, it will only allow disputes to fester and be prolonged. Clearly this is contrary to the intent of having a one year statute of limitations. Thus, the result advocated by amicus COG would defeat the statute of limitations based on recurring letters between legal counsel which continue an argument that the City's claim of exemption was incorrect. Nothing in the Public Records Act supports such a result. It leads to the absurd consequence that the statute of limitations is triggered, not by the agency's "claim", but by the date the requestor last expressed dissatisfaction with the claim. This is contrary to the express language of RCW 42.56.550(6).

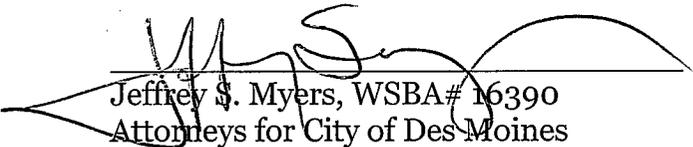
⁴ It is also clear from the pleadings below that RHA sought penalties from date of the City's August 17, 2005 response, not based on the date that it "renewed" its request.

IV. CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's dismissal based on the statute of limitations because the trial court correctly applied the statute of limitations based on the July 20, 2005 records request which is the subject of this dispute. The trial court correctly found that the City claimed that the City attorney's files responsive to this request were exempt in its August 17, 2005 letter. Because RHA did not commence its action until 17 months after this letter was sent, claims related to the July 2005 request were not timely brought and were correctly dismissed.

Respectfully submitted this 28th day of April, 2008.

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