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SUPREME COURT OF THE STATE OF WASHINGTON

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RENTAL HOUSING ASSOCIATION OF PUGET SOUND,

Appellant,

v.

CITY OF DES MOINES,

Respondent.

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AMICUS CURIAE BRIEF  
OF THE  
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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## I. IDENTITY OF AMICUS CURIAE

This *amicus curiae* brief is filed by the Washington Association of Prosecuting Attorneys (“WAPA”).

## II. STATEMENT OF CASE

WAPA does not supplement either Rental Housing Association of Puget Sound or City of Des Moines’ Statement of the Case.

## III. DISCUSSION

### A. Overview: Basic principles relating to RCW 42.56.550(6).

In this appeal, the Court is called upon to interpret a recently adopted statute of limitations for actions brought under the Public Records Act (“PRA”). The new statute of limitations reduces the time to bring a claim under the PRA from five years to one year. The provision states:

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). WAPA believes that this statutory language is clear and can be meaningfully and consistently applied as written. In this *amicus curiae* brief, WAPA explores the application of RCW 42.56.550(6) to a variety of factual scenarios. In doing so, WAPA has applied three basic principles:

First, the provision should be interpreted in a manner that creates an incentive for agencies to respond to record requests quickly and discourages delay in responding to such requests. At the same time, the legislature’s

adoption of the one-year statute of limitations must be respected and not rendered meaningless.

Second, determining the start date of the statute of limitations should not depend on the outcome of the litigation regarding the completeness of the agency response or the validity of a claim of exemption: an approach that would render the statute of limitations moot.

Third, the provision should be interpreted to preclude a requester from unilaterally extending the one-year limitation period by manipulating the timing, nature, or number of record requests or by disputing the form or adequacy of the agency's response.

**B. Proposed application of RCW 42.56.550(6).**

**1. "Requests" do not trigger the statute of limitations.**

The language of RCW 42.56.550(6) creates two triggers for the commencement of the one-year statute of limitations period: (1) a "claim of exemption" or (2) "the last production of a record on a partial or installment basis." Thus it is clear that merely filing a *request* for a record does not start the one-year limitation period. Assume that a record request is made on January 1, 2010, and that the agency denies the request on February 1, 2010. The statute of limitations will expire on February 1, 2011; not January 1, 2011.

## **2. The trigger when there is no agency response.**

The question arises as to what starts the statute of limitations running when there has been no agency response to the record request. The answer is found in the PRA requirement that agencies must respond to record requests within five business days. RCW 42.56.520. Five business days is thus the *de facto* PRA response time.

If the agency has not responded within five business days, the statute of limitations starts running on that date (i.e., the request date plus five days.) For example, assume that a record request is made on Friday, January 1, 2010, and that there is no agency response. The statute of limitations will expire on Friday, January 8, 2011.

Under this scenario, the requester is likely to be in the best position to know that there has been no response to the record request. The PRA allows the requester to maximize his penalty award by waiting until the last moment to seek judicial review, but limits the maximum penalty by requiring that the requester bring his claim within one year. This provides incentive for an agency to track and respond to records requests, while minimizing the impact if the request was inadvertently lost or overlooked.

## **3. The trigger when the agency requires time to respond.**

The PRA provides an agency the option to request additional time to respond to a record request. RCW 42.56.520. In this circumstance the statute of limitations should start running when the agency makes a claim of

exemption or when the last record is produced.

For example, assume that a record request is made on January 1, 2010, and the agency states it will respond by March 1, 2010. If the agency produces the records or claims they are exempt on February 15, 2010, then the statute of limitations will start running on that date and expire on February 15, 2011. By establishing the date of production as the starting point for the limitation period, the legislature created an incentive for the agency to promptly respond to record requests.

**4. The trigger when the agency requires time to respond but does not do so.**

Assume that a record request is made on January 1, 2010, and the agency informs the requester that it will need until March 1 to gather the records, but then fails to produce any records at all. Under these facts, March 1, 2010 (the date the agency said it would respond by) should be the trigger date that commences the statute of limitations period.

In essence, the statute of limitations period is tolled while the agency is gathering records. As a practical matter, until the agency has completed its review, the requester does not yet have a claim under the PRA for failure to produce records because the request has not yet been denied. This interpretation benefits the requester because it maximizes the time available to seek judicial review. It does not penalize the requester for waiting until the agency's own estimate of the time needed to review and gather records

has elapsed. Once the estimated deadline has passed, however, then the cause of action has accrued and the requester may seek judicial review for failure to produce the requested records.<sup>1</sup>

**5. Trigger when requester asserts that agency has not made a reasonable estimate of time to respond.**

The PRA also creates a cause of action for requesters who believe “an agency has not made a reasonable estimate of time the agency requires to respond to a public records request.” RCW 42.56.550(2). The statute does not state what triggers the statute of limitations for these claims. Accordingly, the requester should be free to seek judicial redress as to the reasonableness of the estimate from the date the agency communicates its estimate to the requester. This creates a strong incentive for agencies to make reasonable estimates of the time it will take to gather records.

**6. The trigger when records are produced on an installment basis.**

The PRA is clear that when records are produced on an installment basis, the statute starts running on the date the last installment was produced. RCW 42.56.550(6). The benefit of this rule is that it creates a clear point in time, known to all the parties, that starts the clock running on the statute of

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<sup>1</sup>The bill reports accompanying 2SHB 1758, which enacted the one-year statute of limitations, confirm the legislature’s intent to subject claims for denial of a record and claims of those who believe an agency’s estimate of time is unreasonable to a one year limitation period. See Final Bill Report, 2SHB 1758 (2005), which stated:

Any action involving a person who is denied a public record or believes an agency’s time estimate is unreasonable 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.

limitations. The requester, upon receipt of the final installment of records, knows that there is one year to seek review of the adequacy of the production. Some additional points worth noting:

First, it makes no difference whether the agency has called the final installment the “last installment.” Indeed, it does not matter if the agency has said that there may be further installments forthcoming. What matters is that at a certain point in time records ceased to be produced. The requester simply needs to keep track of how many months have passed since the last production. The statute of limitations will lapse if more than twelve months passes without additional production of a record.

Second, it is irrelevant how the either party characterizes the status of the production (i.e., whether the agency believed the production is complete or whether the requester believed it is incomplete and that more records should be forthcoming). As discussed in more detail below, that dispute is the essence of a cause of action under the PRA; it should not determine the trigger date for the statute of limitations period.

Third, if the agency has made responses on an installment basis and promises that another installment is coming, but fails to produce any more records, then – consistent with the discussion above – the statute of limitations should start running on the date the agency said it would complete its review.

Fourth, by producing records over time, the agency may extend the period for the requester to seek judicial review past the one-year anniversary of the original request or the initial response by the agency. This serves to preserve the requester's right to litigate all issues relating to the agency response to a given request. If this were not the rule, then the requester would be forced to file multiple claims after every production on an installment basis.

Finally, it is possible for an agency to revive a potential claim *after* the one-year statute of limitations has apparently ended by the production of additional records. For example, assume a record request is made on January 1, 2010 and the agency responds with two installments, the last on June 1, 2010. A year passes without a claim being filed and then the agency unearths new responsive records and produces them on August 1, 2011. The statute of limitations should start running on that date and expire (absent further production) on August 1, 2012. This is consistent with the language of RCW 42.56.550(6), provides an important benefit to the requester (who cannot be expected to file a claim about records which were not produced), and creates a very strong incentive for an agency to respond to requests in a timely manner.

**7. The trigger when the agency response is “partial.”**

Another trigger that starts the statute of limitations under the PRA is the production of records on a “partial” basis. The difference from

production on an installment basis is that production on a partial basis may be a one-time event. Again, the rule under RCW 42.56.550(6) is clear: the clock starts running on the statute of limitations from the date of the last production of a partial record. Otherwise, partial claims can be treated in the same manner as productions on an installment basis.

However, because the question of whether an agency response to a record request is at the heart of much PRA litigation, it is crucial to emphasize that determining whether this trigger is satisfied should be a simple mechanical test: what was the date of the last partial production? The test should *not* depend on the subjective determination of either party as to whether the response was adequate (i.e., “complete” versus “partial”) nor should it depend on the outcome of the litigation concerning the adequacy of the agency response to the record request.

Focusing on how the parties view or interpret the production is obviously not helpful. The mere fact that the requester has sought judicial review suggests that that the requester believes that the agency response was partial or incomplete. Likewise, the responding agency presumably believes the production was adequate and complete.

It makes no sense if the commencement date for the statute of limitations hinges on the outcome of the litigation as to the adequacy of the production. Indeed, doing so has the absurd consequence of eviscerating the statute of limitations. Assume that a request is made on January 1, 2010, and

the agency responds on February 1, 2010, in a manner the requester does not believe is complete. The requester seeks review of the adequacy of the response *more* than one year later. If the requester loses (i.e., the response is deemed by the court to be complete) *then the entire litigation occurred after the statute of limitations had expired.*

Such an interpretation would render the statute of limitations meaningless. A requester could seek judicial review at any time and, if he prevails, would argue that the statute of limitations had not yet started to run. This absurd outcome should be rejected.

**8. The trigger when a claim of exemption is made.**

A “claim of exemption” under the PRA is also a trigger for the commencement of the statute of limitations. In interpreting this provision, the claim of exemption should be treated in the same manner as records produced on a partial or installment basis. Specifically, neither the ultimate validity of the claim of exemption (as subsequently determined by the courts) nor the parties’ subjective belief as to that claim’s validity should be controlling as to when the limitation period begins to run.

The critical factor in triggering the statute of limitations is the *communication* of the claim of the exemption. Once communicated, the one-year period begins to run. It is not affected by the merits of the claim or the form of the claim. Moreover, it should not matter if there are subsequent settlement negotiations, and the Court should not discourage such

negotiations by tolling the statute during such talks, unless the parties enter into a formal tolling agreement.

The nonsensical outcome of making the statute of limitations hinge on the validity of the claim of exemption is clear for the reason discussed above: it makes the statute of limitations moot. A requester could seek judicial review any time (months or years) after the one-year anniversary of the claim of exemption and, if successful, be free to pursue the claim that the agency failed to comply with the PRA. Allowing a requester to defer the statutory limitation period by disputing the format of the claim of exemption eviscerates the limitation period and allows the requester to unilaterally control when an action can be commenced. A requester could raise and litigate a claim at any time, without regard to the legislatively adopted time bar.

Note that this is different from the question of what form the claim of exemption must take (an issue that WAPA takes no position on in this brief). The sufficiency of the form of the exemption (i.e., whether it is detailed enough, sufficiently identifies records, etc.) goes directly to the question of whether the exemption is valid. This is precisely the issue that the requester must raise within one year, if he or she believes the claim of exemption is inadequate.

Running the statute of limitations period from the date of the actual claim of exemption imposes a very small burden on the requester. On receipt of a claim of exemption – in whatever form and of whatever probable or questionable validity – the requester has one year to seek judicial review. This approach imposes a bright-line running from the date of the claim of exemption and promotes certainty and clarity for requesters, agencies, and the courts.

**9. Multiple claims of exemption.**

Multiple claims of exemption are sometimes appropriate and speed the process of getting records to the requester. Assume that there is a records request that covers a large number of records. The PRA allows, indeed encourages, that these records be produced on an installment basis as they are reviewed. That review necessarily includes a determination as to whether any records are exempt from production. If only one claim of exemption were allowed, the agency would be forced to withhold production until all of the records were gathered and reviewed. This would clearly frustrate the goal of producing records quickly. The agency should be allowed to claim exemptions on a rolling basis as records are reviewed and produced.

When there have been multiple claims of exemption, the requester should have one year from the date *each* claim of exemption is asserted to seek judicial review and to challenge that specific claim of exemption. This is consistent with the plain language of RCW 42.56.550(6) that “[a]ctions

under this section must be filed within one year of the agency's claim of exemption..." At the same time, the requester gets a full year to seek judicial review of each subsequent claim of exemption. Note that the rule is appropriately different for claims of exemption than from the production of records on an installment basis because a requester's right to seek judicial review in response to a claim of exemption accrues immediately (that is, there is something to legitimately and immediately contest). In contrast, when an agency is producing records in installments, there is nothing to contest until the production of records has ceased.

**10. Multiple requests for production of the same record.**

A requester should not be allowed to circumvent the one-year statute of limitations by making multiple requests for the same records. Another way of saying this is that a subsequent record request should not revive or resurrect a prior records request.

For example, let's assume that Request 1 is made on January 1, 2010, and the agency responds on February 1, 2010. On January 31, 2011, the requester makes Request 2 for the same records that were sought in Request 1. If Request 2 were interpreted to "revive" Request 1, then the requester would have another year (until potentially a date in 2012 – two years after the initial request) to seek judicial review. Further, if the litigation resulted in the production of more records, the requester might seek per-day penalties spanning a two-year period.

This outcome is fundamentally flawed for a variety of reasons. Most basically, it undermines the legislative adoption of the one year statute of limitations. A requester could extend the statute of limitations time bar indefinitely through the simple expedient of filing multiple requests periodically for the same records. A better rule – one that is consistent with the PRA – is to treat each record request as an independent action for which the requester may pursue separate judicial review.

This approach accomplishes a number of important goals: It respects the legislature's adoption of a one-year statute of limitations and precludes the circumvention of that time bar simply by the filing of multiple claims. At the same time, it recognizes that a requester may make multiple requests under the PRA and may seek judicial review for each of those requests. Finally, it encourages agencies to respond fully and completely to the initial request and to efficiently keep track of the records it has produced to various individuals. By doing so, the agency can respond even more promptly to subsequent requests, thus minimizing exposure to potential penalties.

#### IV. CONCLUSION

In this brief, WAPA has outlined guidelines for interpreting RCW 42.56.550(6) that both encourage agencies to promptly respond to record request and respects the legislature's decision to adopt a one-year statute of limitations for seeking judicial review under the PRA.

Reviewing the various scenarios outlined above, a more general rule can be perceived: *the statute of limitations should commence running when the cause of action under the PRA has accrued and the requester could justifiably seek judicial review.* Thus, there is no cause of action when a requester has made a request, but the agency has not yet responded. Nor has a cause of action accrued where the agency has asserted it will produce records by a date certain in the future and no records have yet been produced. But when the date for making a response passes, the requester has a cause of action and can immediately seek judicial review.

The moment an agency declines to produce records under a claim of exemption, the requester has a potential cause of action and may seek judicial review. Accordingly, the statute of limitations should run from that point in time. Likewise, it is from this point in time (the accrual of the cause of action) that per-day penalties under the PRA commence.

To interpret RCW 42.56.550(6) otherwise will only lead to incongruence between the statute of limitations, the accrual of the cause of action, and potential penalty awards; which will lead to confusion and uncertainty for future actions under the PRA.

In sum, WAPA respectfully requests that the Court, in resolving the dispute between the Rental Housing Association and the City of Des Moines, interpret RCW 42.56.550(6) in a manner that provides both agencies and requesters with clear and consistent guidelines as to the application of the statute of limitations under the PRA.

DATED this 4th day of April, 2008.

Respectfully submitted



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