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SUPREME COURT
OF THE STATE OF WASHINGTON

MIKE BELENSKI,

Appellant,

v.

JEFFERSON COUNTY,

Respondent.

APPELLANT'S ANSWER TO AMICUS CURIAE BRIEFS OF WASHINGTON
ASSOCIATION OF PROSECUTING ATTORNEYS, WASHINGTON STATE
ASSOCIATION OF MUNICIPAL ATTORNEYS AND ALLIED DAILY
NEWSPAPERS, et al.

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ORIGINAL

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A. INTRODUCTION

This case involves Jefferson County's ("County") response to a public records request submitted by Mike Belenski ("Belenski") on September 27, 2010.

At issue is the correct statute of limitations to apply to the subject request. Division II of the Court of Appeals ruled that Belenski's claim was time barred because more than two years had passed between the time the County responded to the request (October 4, 2010) (CP 214) and advised Belenski that it had "no responsive records" for the request, and the time the litigation was filed (November 19, 2012) (CP 188, CP 191). Belenski v. Jefferson County, 187 Wn. App 724, 739, 350 P.3d 689 (Div. II 2015).

The Court of Appeals decision is in direct conflict with this Court's rulings in Progressive Animal Welfare Society v. University of Washington, 125 Wn.2d 243, 884 P.2d 592 (1994) ("PAWS II") and Rental Housing Association of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 199 P.3d 393 (2009) ("RHA"). As well as a Division I Court of Appeals decision, Tobin v. Wordin, 156 Wn. App. 507, 233 P.3d 906 (Div. I 2010).

Put at extreme risk by the Court of Appeals decision is the public's right to know (RCW 42.56.030) because, under that opinion, a requestor must file a lawsuit within two years regardless of whether the agency has disclosed the existence of records relevant to the request and provided a privilege log. Put another way, if the agency is successful in silently withholding records relevant to the request for two years, it escapes accountability and liability for its actions. The

Court of Appeals opinion in this case should be overturned because it (1) failed to apply the correct statute of limitation, RCW 42.56.550(6) to the facts of the case, (2) is an improper construction of the PRA that encourages agencies to silently withhold records from citizens until the two year statute of limitation (RCW 4.16.130) runs out, (3) encourages agencies to provide requestors with as little information as possible, (4) is inequitable and clearly contrary to the legislative intent of the PRA and (5) directly conflicts with this Court's rulings in PAWS II and RHA.

B. ARGUMENT

Pursuant to the content of RCW 42.56.550(6), PAWS II and RHA, in order for the statute of limitations clock to begin running on the September 27, 2010, public records request for IALs, the County was required to produce all the requested records, or provide a privilege log for the records being withheld, and state the exemption authorizing withholding them along with an explanation of how the exemption applied to the records withheld. The County did neither. As a result, the PRA statute of limitations, RCW 42.56.550(6) did not begin to run.

However, the Court of Appeals ruled that there are two separate limitation periods for a request for records under the PRA. Belenski v. Jefferson County, 187 Wn. App 724, 739, 350 P.3d 689 (Div. II 2015).

The Court of Appeals stated:

A request for records under the PRA is subject to two separate limitation periods. One provision in the act itself provides that a plaintiff must file an action within one year of either (1) an agency's

claim of exemption from the PRA's disclosure requirements or (2) an agency's "last production of a record on a partial or installment basis." RCW 42.56.550(6); *Johnson v. Dep't of Corr.*, 164 Wn. App. 769, 775, 265 P.3d 216 (2011), review denied, 173 Wn.2d 1032 (2012). Alternatively, the two-year "catch-all" statute controls when there are no other applicable statutes of limitation. *Johnson*, 164 Wn. App. at 777.

Given the facts of this case, there was no reason for the Court of Appeals to have applied the two-year "catch-all" statute (RCW 4.16.130) and this Court should overturn that portion of the instant case.

The Court of Appeals went on to state:

Here, the County contends that its answer to Belenski's request 1 of "no responsive records" triggered the running of the PRA's one-year statute of limitations. CP at 214. Although it is not immediately clear whether such a response would trigger the PRA's one-year statute, we need not answer this question because Belenski's suit was untimely under the latter two-year statute.

Belenski made request 1 on September 27, 2010. The County mailed a letter stating it had "no responsive records" on October 4, and e-mailed him the same answer on October 5. CP at 214. Belenski does not dispute having received the responses on those dates. Belenski did not file his complaint until November 19, 2012, over two years after the County responded to request 1. Accordingly, we hold that Belenski's claim regarding the County's IALs from February 1, 2010 to September 2010 (request 1 is barred by the statute of limitations contained in RCW 4.16.130. *Id.* at 739.

To allow an agency to have the SOL clock start based on the denial of the request would encourage agencies to silently withhold records and hope to "run out the clock" before the silent withholding is discovered. Given the playing field defined by the Court of Appeals, an agency can now respond to a requestor using the "no responsive records" response and then wait 2 years for RCW 4.16.130 to

run out. This is contrary to the PRA and the rulings of this Court. Before the SOL clock begins to run, a requestor has a right under RCW 42.56.550(6) to know exactly what records are being withheld and why. This levels the playing field, allows the requestor to make an informed decision regarding the records being withheld and the claims of exemption, and provides a court a record to review.

In sum, for an agency to gain the benefit of the protection that SOL's provide, it must first comply with the requirements of the PRA. These requirements include the production of a privilege log and claims of exemption. When the SOL begins to run is entirely dependent on the actions of the agency. If it decides to be open and honest with a requestor by performing an adequate search for records and providing the required privilege log and claims of exemption, any claims made by the requestor will be time barred after one year. If an agency follows the path that the County followed in this case, by lying and silently withholding records, it does so at its own peril. An agency should not gain the benefit of the protection that SOLs provide because the agency failed to comply with the requirements of the PRA and acted inequitably.

1. Belenski had no knowledge that IALs responsive to his September 27, 2010 public records request existed when the County responded to the request on October 4, 2010

On October 4, 2010, the County advised Belenski that it had "no responsive records" involving his September 27, 2010 request for IALs (CP 214). Belenski had previously requested and received IALs (CP 120-121); the date on a letter (March 7, 2005) (CP 356-357) to the County Commissioner representing his

district shows that this request for IALs had occurred at least 5-1/2 years prior to the September 27, 2010 request.

WAPA advocates a false premise or analogy by apparently claiming that because Belenski received IALs more than 5-1/2 years prior that he had enough information as of October 5, 2010 to challenge the County's assertion that no records existed (WAPA Br. at 8). However, WAPA fails to explain how receiving IALs 5-1/2 years prior would result in enough information to challenge the County's assertion that no current records existed on October 5, 2010, and fails to explain exactly what this "enough information" is, and how Belenski learned of this "enough information", and how he could use this "enough information".

The IALs could have been lost in a catastrophic hard drive failure, or maybe the County was using different software from what it was using 5-1/2 years prior and that software did not collect IALs, or maybe due to the embarrassment the County had suffered 5-1/2 years prior, it reconfigured its software to no longer collect IALs. The list of reasons is endless. Belenski was not required to be a mind reader as to what the County supposedly really meant as to "no responsive records" and the conclusion any average citizen would draw from being told "no responsive records" is that the County was claiming it had no records.

RCW 42.56.520 is plain on its face, "Denials of requests must be accompanied by a written statement of the specific reasons therefor." If the County had records relevant to Belenski's request (which it did, CP-68, CP-80), and the County did not consider the IALs to be "public records", it was

nonetheless required to disclose the existence of the records so Belenski could pursue judicial review under RCW 42.56.550(3) and have a court determine if the IALs he requested were public records. [NB: The COA's opinion ruled that IALs are public records. Belenski v. Jefferson County, 187 Wn. App. 724, 747, 350 P.3d 689 (2015)].

It also should be noted that in the past when the County made a determination that requested records were not public records it advised Belenski of that determination (CP 125 ¶24, CP 141-142). The deviation by the County in this case, to state “no responsive records” rather than advise Belenski that it did not consider the IALs to be public records, is further evidence that the County was intentionally and deliberately concealing the existence of the IALs from Belenski.

All told, WAPA’s conclusory statement that Belenski had knowledge the IALs existed is not supported by the record and is not supported by authority or meaningful analysis, and therefore fails. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). (arguments not supported by authority or analysis need not be considered). See also, Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918 (1986) (“The record must contain a sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the declared premise.”).

WSAMA makes a similar assertion that Belenski should have known that the County’s “no responsive records” response really meant that records existed but they were not responsive (WSAMA Br. at 11, note 7). WSAMA has no

personal knowledge as to what Public Records Officer Lorna Delaney meant when she advised Belenski that the County had “no responsive records” (CP 214) or any personal knowledge of her state of mind when she responded to the request. This is nothing more than a conclusory statement by WSAMA that is unsupported by the record of this case and is without merit.

The County routinely denies public records requests by responding “no responsive records” or “no responsive documents” and Belenski has often received such responses. Additionally, WSAMA provided no authority that it is inherent in the use of the word “responsive” that records exist, but are not responsive. That reasoning makes no sense. Consider if Belenski made a public records request to the County for all emails received by the County from any Earthling currently living on Pluto, and the County responded with its typical “no responsive records” or “no responsive documents”, is it WSAMA’s position that emails from Pluto do exist, but are not responsive?

Apparently, WSAMA has not read the record of this case. The County’s statement of “no responsive records” did prescribe Belenski’s knowledge that IALs existed. Most citizens that request public records are not lawyers and most citizens would apply a common sense interpretation or plain reading of the words “no responsive records”, leading them to conclude that the County was claiming it had no records. This interpretation by Belenski was further reinforced by DPA Alvarez when he was asked by Belenski why he had not received the IALs responsive to his September 2010 public records request and DPA Alvarez

responded that “we don’t use them for anything so we don’t have to keep them.”. (CP 194, ¶13). DPA Alvarez could have easily responded with what WSAMA is advocating, and responded that what was meant by the “no responsive records” is that the County has the IALs you requested, but does not consider them responsive to your request. But he didn’t. Or DPA Alvarez could have told Belenski the “no responsive records” response really meant that the County had the IAL he requested, but did not consider them to be public records, and given Belenski the chance to obtain judicial review of that decision. But he didn’t. DPA Alvarez knew the IALs requested by Belenski existed (CP 138), but he continued with the dishonesty and deceit. WSAMA fails to explain why Belenski would believe that IALs existed, when he was specifically told by DPA Alvarez that “we don’t use them for anything, so we don’t have to keep them.”. A common sense understanding of DPA Alvarez’s statement, in concert with the fact that the County provided no privilege log and claim of exemption for the requested IALs, along with the County’s “no responsive records” response of October 4, 2010, made it clear that the County was claiming that it had no records relevant to the September 27, 2010 request. The actions taken by the County were deliberate and intentional, and gave Belenski the misleading impression that there were no records relevant to his request.

There is nothing “misplaced” about Belenski’s reliance on PAWS II. The instant case parallels PAWS II. In PAWS II, only 23 pages of a 55 page grant proposal were provided to the requestor, while in the instant case none of the IALs

were provided to Belenski. In both cases, the denial by the agency precluded the requestor from learning that records relevant to the requests existed, but were being silently withheld.

By definition, “An undisclosed record results in the prohibited silent withholding discussed in PAWS, 125 Wn2d at 270”, Neighborhood Alliance of Spokane v. County of Spokane, 172 Wn.2d 702, Footnote 16, 261 P.3d 119 (2011).

Therefore, in order for there to be no silent withholding, undisclosed records need to be disclosed. Disclosed is defined as “To expose to view, To make known”, American Heritage Dictionary – New College Edition – (1979), page 375.

The County did not “expose to view” or “make known” the existence of the subject IALs until more than 15 months after Belenski made his request (CP 124, ¶20). As a result, the IALs were silently withheld for more than 15 months. After Belenski learned that records had been silently withheld from him, he addressed the Board of County Commissioners about the failure of the County to provide the requested IALs. Belenski was assured that County Administrator Philip Morley would follow up with him, but neither CA Morley nor anyone else from the County followed up or contacted Belenski. (CP 124, ¶21). It should be obvious that the County was engaged in a campaign to provide Belenski with as little information as possible regarding the subject IALs in order to make any litigation extremely difficult, if not impossible.

WSAMA fails to square its arguments with the rulings of this Court in PAWS II and RHA. The withholding of records relevant to a request requires the production of a privilege log and claim of exemption (PAWS II at 270-271; RHA at 537-538). A privilege log “makes known” to a requestor exactly what records are being withheld and why, and provides an adequate record for a court to review. The actions of DPA Alvarez and PRO Delaney and the failure of the County to produce a privilege log prescribed Belenski’s knowledge that the IALs existed. WSAMA fails to make any compelling argument to the contrary.

2. The Doomsday scenario presented by the WAPA ignores the mandates of the PRA and the prior rulings of this Court

The doomsday scenario presented by the WAPA involving litigation arising many years after a public records request has been made (WAPA Br. at 2-3) should only be a concern for those agencies that knowingly violate the PRA.

The PRA will not shield agencies that don’t make timely and sufficient efforts to advise records requestors what records are being withheld and why. Rental Housing Association of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 540, 199 P.3d 383 (2009).

An agency is required to conduct an adequate search for records, and explain the adequacy of the search in response to the request. Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 722-723, 261 P.3d 119 (2011). The agency then is required to produce all non-exempt records to the requestor and provide a privilege log describing the records being withheld

and the exemption claimed for each withheld record. Rental Housing Association of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 538-540, 199 P.3d 383 (2009).

What is especially troubling is that apparently there are other Counties / agencies, associated with WAPA, that are denying public records requests because the agency has determined that the requested records do not fit the definition of “public records”. (WAPA Br. at 2). Neither the County nor the WAPA cite any authority that permits an agency to determine whether a record is a public record or not. Whether a record is a public record is left to the determination of a court, not an agency or its attorney. Concerned Ratepayer Association v. Public Utility District No. 1 of Clark County, 138 Wn.2d 950, 983 P.2d 635 (1999); Dragonslayer, Inc. v. Washington State Gambling Commission, 139 Wn. App. 433, 161 P.3d 428 (2007); Nissen v. Pierce County, 183 Wn.2d 863, 357 P.3d 45 (2015); Belenski v. Jefferson County, 187 Wn. App. 724, 350 P.3d 689 (2015).

The arguments proffered by the WAPA fail to accept or acknowledge the fact that records relevant to the subject public records request were silently withheld. Records were not overlooked or not found due to an inadequate search, rather the records were deliberately and intentionally withheld by the County.

There are no doomsdays for agencies that follow the mandates of the PRA.

3. The Decision Conflicts with Previous Decisions of the Courts of Appeals

Belenski echoes the arguments made by Amicus Curiae Allied Daily

Newspapers, et al. (Br. 14-16) involving the Courts of Appeals decisions involving Tobin v. Wordin, 156 Wn. App. 507, 233 P.3d 906 (Div. I 2010); Johnson v. State Department of Corrections, 164 Wn. App. 769, 265 P.3d 216 (Div. II 2011); Bartz v. State Department of Corrections, 173 Wn. App. 522, 297 P.3d 737 (Div. II 2013) and Greenhalgh v. Department of Corrections, 170 Wn. App. 137, 282 P.2d 1175 (Div. II 2012).

The arguments presented by WAPA involving the application of the above cases (WAPA Br. 3-6) urges this Court to overrule Tobin and makes the argument that, with regard to RCW 42.56.550(6), “that the Legislature intended situations in which an agency denies a request to fall within the scope of “the agency’s claim of exemption.””. And goes on to claim that “To do otherwise would yield unreasonable, illogical, and absurd consequences.”. (WAPA Br. at 4).

RCW 42.56.550(6) is plain on its face, and when combined with this Court’s rulings in PAWS II and RHA, it is clear that for RCW 42.56.550(6) to begin to run, an agency must either (1) provide the requestor with all the records requested or (2) provide a privilege log and claim of exemption with explanation.

WAPA’s interpretation of RCW 42.56.550(6) violates the well-established canon that where the Legislature omits language from a statute, intentionally or inadvertently, courts will not interpret the statute as if the language was there. Manary v. Anderson, 176 Wn.2d 342, 357, 292 P.3d 96 (2013) (“Where the Legislature omits language from a statute, intentionally or inadvertently, this court

will not read into the statute the language that it believes was omitted.”) (citation omitted).

If the legislature wanted to include denial of a request within the scope of “the agency claim of exemption”, the Legislature could have easily done so, but it did not.

As for the WAPA argument that “To do otherwise would yield unreasonable, illogical, and absurd consequences.”, WAPA’s conclusory statement is not supported by authority or any analysis, and therefore fails. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments not supported by authority or analysis need not be considered).

The current wording of RCW 42.56.550(6), along with this Court’s rulings in PAWS II and RHA, protect the public from agencies that silently withhold records.

4. Litigation Prior to the Production of a Privilege Log is Contrary to the PRA

In this case, the County failed to provide a privilege log and claim an exemption for the IALs. The County (Supp. Br. of Resp. at 8), WSAMA (Br. at 11) and WAPA (Br. at 8) all advocate that Belenski should have initiated litigation once he was advised that the County had “no responsive records”. (CP 214). Initiating litigation prior to the production of a privilege log and claim of exemption is contrary to the PRA. The PRA requires that an agency create a privilege log so that a requestor can know exactly what records are being withheld

and why. Requiring a requestor to sue just to find out what records, if any, are being withheld and why, creates an artificial barrier and stonewalls access to public records, and violates the PRA [*“The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.”* (RCW 42.56.030)]. Going to court is costly, time consuming, and long and drawn out. And going to Court with no knowledge and little chance of success is a waste of judicial resources. The production of a privilege log allows the requestor to make an informed decision whether to pursue litigation, and would save both the requestor and the agency, the time and money consumed by a needless lawsuit.

The argument put forth by the County, WAPA and WSAMA forces requestors to either file a lawsuit with little or no information to support their claim and be subject to sanctions for filing a frivolous lawsuit, or just walk away from the request because the time, effort and money involved is too much.

Fortunately, the PRA with its requirement that an agency produce a privilege log and claim of exemption, levels the playing field. Requestors are informed as to what records are being withheld and why, and can then determine the best course of action.

There is no compelling reason to adopt the argument of the County and its Amici. This Court has made it clear that a requestor has the right to know what records are being withheld and why, and there is no reason to change that.

5. A Discovery Rule should be applied if it furthers justice

WAPA argues against the application of a “Discovery Rule” (Br. 7-9).

This Court should apply a discovery rule if it furthers justice. US Oil v. Department of Ecology, 96 Wn.2d 85, 93, 633 P.2d 1329 (1981) (“*We have a duty to construe and apply limitation statutes in a manner that furthers justice.*”).

As was presented above, Belenski had no knowledge on October 5, 2010 that IALs relevant to his subject request existed. WAPA’s arguments ignore the fact that the County knowingly and intentionally concealed IALs relevant to Belenski’s request (CP 138).

WAPA also fails to cite any legal authority that would allow the County, or any other agency, to make a legal determination as to whether a requested record is responsive to a request or whether a requested record is a public record, and then remain silent regarding its determination. This gives requesters the misleading impression that all records relevant to the request have been disclosed and is contrary to the PRA, PAWS II, and RHA.

Public records requestors must rely on agencies to disclose the records that are relevant to the request. Knowledge as to what relevant records exist lies only with the agency. Since the County silently withheld records by not disclosing the IALs relevant to the subject request and discovery of those silently withheld records did not occur until January 3, 2012, application of a discovery rule is appropriate in this case. Otherwise, without a discovery rule, agencies can hide records from requestors, and escape accountability and liability for their actions,

by running out the SOL clock. See US Oil v. Department of Ecology, 96 Wn.2d 85, 93-94, 633 P.2d 1329 (1981) (Discovery rule applied in case where one party relies on the other party to provide accurate information.).

The arguments by WAPA fail to explain how a requestor would learn of an agency's secret legal determination, and obtain enough information to reasonably be able to seek judicial review pursuant to RCW 42.56.550(3).

WAPA advocates for a public records landscape where agencies that lie and conceal records are treated the same as those that are truthful and follow the requirements the PRA. That is not the landscape of real life, nor should it be the public records landscape. WAPA's position is that it doesn't matter what response an agency provides to a requestor, the SOL clock begins to run, regardless of whether a privilege log has been produced and claim of exemption made, regardless of whether records relevant to the request have been disclosed, regardless of whether the requirements of the PRA have been satisfied, regardless of whether records have been silently withheld. All that matters is to get the SOL clock running so as to shield WAPA or any other agency from the consequences of failing to follow the PRA. This Court should soundly reject such an argument.

C. CONCLUSION

The County has treated the mandates of the PRA, and this Court's rulings, as if they are mere suggestions — or impediments to be side-stepped, outmaneuvered or just ignored.

Statutes of Limitations were used as instruments of injustice.

The County has benefited by knowingly and intentionally concealing records relevant to Belenski's public records request for IALs.

This Court is respectfully asked to overturn the Division Two Opinion on the issue of the Statute of Limitations and remand the case for a determination by the trial court of appropriate fees, costs and penalties.

Respectfully submitted this 27th day of April, 2016.



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DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the date specified below, I served a copy of the following document upon Respondent and Attorney for Amicus, via e-mail per service agreement of the parties:

APPELLANT'S ANSWER TO AMICUS CURIAE BRIEFS OF
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS,
WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS
AND ALLIED DAILY NEWSPAPERS, et al.

As follows:

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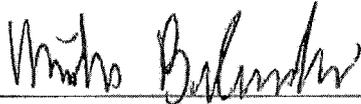
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Dated this 27th day of April, 2016 at Mats Mats, Washington.



Mike Belenski, Petitioner

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Subject: Belenski v. Jefferson County - Supreme Ct #92161-0 - Appellant's Answer to Amicus Curiae Briefs

Good Afternoon.

Please find attached for filing Appellant's Answer to the Amicus Curiae Briefs of the Washington Association of Prosecuting Attorney's, the Washington State Association of Municipal Attorney's and Allied Daily Newspapers, et al.

Case Name: Belenski v. Jefferson County

Case Number: 92161-0

Please contact me if you have any questions.

Respectfully,

Mike Belenski
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