

No. 73843-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JAMIE WALLIN,

Appellant,

v.

CITY OF EVERETT, ET AL,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Anita L. Farris, Judge

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. PRA CLAIMS ARE CONTROLLED BY TWO SEPARATE STATUTE OF LIMITATION PERIODS

There is no dispute that the Legislature made significant changes to the former Public Disclosure Act (PDA) (previously codified at chapter 42.17 RCW) through two amendments in 2005. The passage of House Bill 1133 reorganized the PDA into the Public Records Act (PRA) (now codified at chapter 42.56 RCW), and House Bill 1758 incorporated a number of substantive alterations to provisions within the Act. One of those changes was a new shorter statute of limitations period which replaced prior longer statute of limitation periods applicable to PRA claims. Compare RCW 42.56.550(6) (one-year statute of limitations) with Laws of 1982, ch. 147, § 18 (five-year statute of limitations), and Laws of 1973, ch. 1, § 41 (six-year statute of limitations).

The dispute however, arises when interpreting the Legislature's intent in shortening the statute of limitations and whether the one-year limitations period applies to all PRA claims irrespective of the particular material facts of the case; or whether PRA claims are subject to two separate limitation periods.

The City argues, generally, that the failure of the Attorney General to cite to both the one-year and five-year statutes of limitation in the model rules (chapter 44-14 WAC)

conclusively demonstrates legislative intent that the one-year statute of limitation applies to all PRA claims. Respondent's Brief at 24-25. And also argues that the narrow plain language interpretation of the 2005 amendment in Tobin v. Worden leads to absurd results. Respondent's Brief at 18.

But other evidence gleaned from the Legislature repudiates the City's claim and corroborates prior judicial interpretations that the plain language of the one-year limitation period applies only to certain PRA claims triggered by one of two triggering events contained within the statute, and all remaining PRA claims fall under the two-year general "catch-all" limitation period codified at RCW 4.16.130.

a. The Legislature Enacted The PRA's One-Year Statute Of Limitations To Apply Only To Certain Claims.

The first indicator of the Legislature's intent for the one-year limitation period to apply only to certain PRA claims is through comparison of the plain language between the former and current statutes themselves.

The former five-year limitation period contained in the Public Disclosure Act, see Laws of 1982, ch. 147, § 18, stated:

Any action brought under the provisions of this chapter must be commenced within five years after the date when the violation occurred.

The current one-year limitation period contained in the Public Records Act, see Laws of 2005, ch. 483, § 5, 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.

Upon examination, the former five-year period used simple language that acted inclusive of all claims brought under the Act. Adversely, the current one-year period acts exclusive of certain claims brought under the Act. The difference is significantly telling.

As it stands now, the current limitation period contains two triggering mechanisms: first, an agency's claim that requested documents are exempt from production; or second, when the documents are last produced by the agency on a "partial or installment basis." RCW 42.56.550(6). See Rental Housing Ass'n v. City of Des Moines, 165 Wn.2d 525, 199 P.3d 393 (2009)(examining first triggering mechanism for statute of limitations purposes); Tobin v. Worden, 156 Wn.App. 507, 513, 233 P.3d 906 (2010)(citing plain language of RCW 42.56.550(6) and holding that statute must be triggered). Consequently, the one-year limitations period will not apply to all claims brought under the PRA. See Page 5 fn.1, *infra*.

Therefore, it can be presumed that the Legislature, in using the particularized language that it did, fully intended to exclude certain PRA causes of action from its one-year limitations period because the "legislature is presumed to intend the plain meaning of its language." State v. Garcia, 179 Wn.2d 828, 836, 318 P.3d 266 (2014).

The second indicator of legislative intent is a review of the House Bill Report for House Bill 1758.

According to the Washington House Bill Report, 2005 Regular Session, House Bill 1758, H. 59, 1st Sess. (March 5, 2005), it stated in its "Brief Summary of Second Substitute Bill" section that the new language imposed "a one year statute of limitations for certain public records-related suits" (emphasis added). That would most certainly indicate that the Legislature did not intend that the newly-enacted one-year limitations period would apply to all PRA claims. Instead, it indicates a legislative intent to exclude certain types of suits under the PRA.

The third indicator of legislative intent is the lack of amendment to the statute since 2005.

The current one-year limitations period took effect on July 24, 2005. See Laws of 2005, ch. 483, § 5 (amending former RCW 42.17.340)(effective date July 24, 2005). Thus far, there has been only one legislative amendment to RCW 42.56.550 since 2005; and that, unrelated to the one-year limitations period. See Laws of 2011, ch. 273, § 1 (amending statute to reduce lowest possible daily penalty amount from \$5 to \$0); RCW 42.56.550(4).

To date, the PRA's statutory limitations period, with its plain two-event triggering language which excludes certain PRA suits, and with multiple judicial interpretations by both the

Supreme Court and Court of Appeals since 2009,¹ has been in effect for over 10½ years. And for that entire time, the Legislature has declined to amend the wording of the statute. That declination is yet another indicator of legislative intent that the one-year period only applies to certain PRA claims as interpreted by prior case law. See Brotherton v. Kralman Steel Structures, Inc., 165 Wn.App. 727, 740, 269 P.3d 307 (2011) ("The legislature is presumed to be familiar with prior judicial construction of its acts and its failure to amend a statute for a considerable period of time after it has been judicially construed indicates an intent to concur in that construction.").

The City's argument that the one-year statute of limitations applies to all PRA claims because the Attorney General did not cite to both the five-year and one-year

¹ See, e.g., Rental Housing Ass'n v. City of Des Moines, 165 Wn.2d 525, 199 P.3d 393 (2009) (Supreme Court examining first prong of one-year limitations statute); Tobin v. Worden, 156 Wn.App. 507, 233 P.3d 906 (2010) (Division One holding one-year statute triggers only upon one of two occurrences contained in the statute); McKee v. Washington State Dept. of Corr., 160 Wn.App. 437, 248 P.3d 115 (2011) (Division Two remanding for further proceedings on question of applicable one- or two-year statute of limitations); Johnson v. State Dept. of Corrections, 164 Wn.App. 769, 265 P.3d 216 (2011) (Division Two applying two-year "catch-all" limitation period contained in RCW 4.16.130 to PRA claim); Belinski v. Jefferson County, 187 Wn.App. 724, 350 P.3d 689 (2015) (Division Two holding that a request for records under the PRA is subject to two separate limitation periods). See also Reed v. City of Asotin, 917 F.Supp.2d 1156 (E.D.Wash. 2013) (district court applying two-year statute of limitation period to state PRA claim).

statute of limitation periods in the model rules, WAC 44-14-08004(2),² is a meritless argument at best, and is controverted by other reliable evidence as demonstrated above.

If the Legislature had intended to include all PRA causes of action within the one-year limitations period, irrespective of the facts, then "it would have expressly so stated." Tobin, 156 Wn.App. at 515. Instead, it used specific triggering language which excludes "certain" claims from the one-year period. It is a fundamental rule of construction that the "court is required to assume the Legislature meant exactly what it said and apply the statute as written." In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000) (quoting In re Custody of Smith, 137 Wn.2d 1, 8, 969 P.2d 21 (1998)).

b. The Legislature Intended For The Two-Year "Catch-All" Statute Of Limitations To Apply To All Other PRA Claims Not Covered By The PRA's One-Year Period.

In the mid-1800s, a statutory limitation period was enacted which controls a cause of action when there are no other applicable statutes of limitation. That "catch-all" statute provides:

An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action have accrued.

² See also Washington State Register, 05-23-166 (proposed model rules).

RCW 4.16.130 [Code 1881 §33; 1877 p 9 §32; 1854 p 364 §7; Rem. Rev. Stat. §165]. See also Stenburg v. Pacific Power & Light Co., 104 Wn.2d 710, 721, 709 P.2d 793 (1985)(Supreme Court stating that RCW 4.16.130 "serves as a limitation for any cause not fitting into the other limitation provisions").

Thus, since the specific language used by the Legislature in its 2005 amendment to the statute of limitations does not apply to the fact-pattern of every PRA claim, and is plainly triggered by only a "claim of exemption" or "last production of a record on a partial or installment basis," it can be presumed that the Legislature intended the default two-year catch-all statute to apply to PRA claims in those cases where the one-year statute does not apply, irrespective of the Legislature's lack of reference in the PRA to the general provision of RCW 4.16.130; the application of the two-year statute is automatic.

This is expressly indicated through the Legislature's knowledge of the laws it creates and the areas in which it legislates. See In re Estate of Evans, 181 Wn.App. 436, 446, 326 P.3d 755 (2014)(court stating that "the legislature is presumed to know the law in the area in which it is legislating"; and "is likewise presumed to enact laws with full knowledge of existing laws").

If you consider that the Legislature, when enacting the one-year statute to apply to only certain claims, had already

had a statutory provision in place that would automatically apply to those other PRA claims not fitting into the one-year statute, then the seeming facial ambiguity of RCW 42.56.550(6) disappears entirely and you are left with a simplicity where two separate limitation periods control all PRA claims which, in turn, serves the Legislature's purpose in limiting agency liability while at the same time benefiting requesters.

c. The Application Of Two Separate Statute Of Limitation Periods To PRA Claims Serves The Legislature's Purpose In Limiting Agency Liability.

In the Respondent's Brief, the City correctly notes that the statute of limitations serves the purpose of limiting agency liability for daily penalties. Repondent's Brief at 15 (citing Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 98 P.3d 463 (2004)). The City then delves into argument that a narrow (i.e., plain language) interpretation under Tobin would be absurd given the Legislature's deliberate shortening of the PDA's five-year limitation period to one-year under the PRA. Respondent's Brief at 18 (citing Bartz v. Dept. of Corr., 173 Wn.App. 522, 297 P.3d 737 (2013)).

To support its view, the City uses an example of an "inadequate response claim" as set forth in West v. Department of Natural Resources, 163 Wn.App. 235, 258 P.3d 78 (2011), to illustrate an apparent "nonsensical" result of the application of a narrow plain language interpretation of the one-year

statute of limitations. The City asserts that:

...if an agency missed the five-day deadline but produced all responsive records on day eleven without asserting an exemption, the requestor could bring an inadequate response claim up to five years later (at least at the time the new limitations period was enacted); but if the agency produced the records in two installments on day eleven and day twelve, the one-year statute of limitations would apply.

Respondent's Brief at 20. The City then concludes that it would be "absurd" to think that the Legislature intended such "disparate treatment" of PRA claims based on an agency's discretionary decision to produce records in installments. Id. at 20; see also id. at 22.

The City's response rests on several legal and factual flaws. First, the City conflates its argument with regard to the "law in effect at the time." The one-year limitations period did not become effective until July 24, 2005. See Laws of 2005, ch. 483. So, which limitations period an agency would have been subject to around the time of the enactment would have been solely dependant on the particular day the requester made the request; it would not turn on how the agency responded to the request (i.e., use of installments). Second, all requests made on or after July 24, 2005 would have been subject to the one-year period; and, if not triggered, would have then fell under the two-year catch-all limitation period codified at RCW 4.16.130--not the prior five-year period. Third, agencies are only liable for daily penalties

for the period of time the requester was "denied the right to inspect or copy [a] public record." RCW 42.56.550(4). So, using the City's example, the agency would have only been liable for daily penalties for either six or seven days (from the expiration of the five-day response time under RCW 42.56.520 till the record was produced)--regardless of the length of the statutory limitations period. See Alliance v. Spokane County, 172 Wn.2d 702, 725, 261 P.3d 119 (2011)(daily penalties are applicable only for the time the requester was denied the right to inspect or copy a public record, and "will not continue to accrue after a document is produced".). Finally, if the agency fully and timely complies with all of the PRA's mandates and provisions, and produces all requested records as sought after by the requester, then no cause of action would exist to begin with--regardless of which statute of limitations period would apply. Consequently, the City's argument is inundated with illogical reasoning and devoid of any merit.

Contrary to the City's position, the Legislature's enactment of two separate statute of limitation period for PRA claims serves the Legislature's purpose in limiting agency liability.

For example, even for those claims that would properly fall under the two-year catch-all statute where an award of daily penalties is mandated under RCW 42.56.550(4), the

maximum period for agency liability is still three years less than it was before the 2005 amendment. Even at a maximum penalty of \$100 per diem, that in and of itself saves an agency almost \$110,000 in potential daily penalties. But, as noted above, daily penalties can only be awarded when the agency refuses to produce, or silently withholds, public records upon request. Alliance, 172 Wn.2d at 725. Other PRA claims brought by requesters are entitled to award of costs and reasonable attorney fees only. RCW 42.56.550(4).

Moreover, in 2011, RCW 42.56.550(4) was amended by the Legislature to reduce the minimum penalty amount from \$5 per diem to \$0. Laws of 2011, ch. 273, § 1. That change acted to further limit agency liability--even to the point of no liability whatsoever (with exception of costs and attorney fees)--for claims that fall under the statutory two-year catch-all period.

Further, for causes of action falling under the two-year catch-all statute, e.g., right to receive a response claims under RCW 42.56.550(2), or inadequate search claims, no daily penalties can be imposed against the agency. RCW 42.56.550(4) (imposition of costs and attorney fees only for vindication of "right to receive a response to a public record request within a reasonable amount of time"); Alliance, 172 Wn.2d at 724-25 (prevailing party on inadequate search claim where no records were produced is entitled only to costs and attorney fees).

While there is indeed a difference in the statutory limitation period that is applied to a claim depending on the agency's response to a request for public records (i.e., claim of exemption or use of installments), that difference does not "punish" agencies (as the City argues), but instead actively incentivizes agencies to be more careful when asserting applicable exemptions and complying with all of the PRA's mandates in order to produce relevant and responsive public records upon request. This benefits requesters and comports with the core purpose of the PRA to "provide full public access to public records". RCW 42.56.100.

After all, it is only when the agency acts negligently, or intentionally in bad faith, that the Act is violated thereby making agencies liable for an award of daily penalties to the requester; and not when the agency fully complies with all of the PRA's provisions. See, e.g., Alliance, 172 Wn.2d at 725 ("penalties will not accrue at all if the agency carries its burden of showing [it has complied with the PRA]").

While the City argues that the Legislature would not intend to treat PRA claims disparately based on an agency's use of installments to produce records as opposed to producing the records at one time, thus, a one-year versus a two-year statute of limitations period, in reality however, the two separate limitation periods promotes full disclosure and production of all non-exempt public records to the requester.

This is most illustrated through the lens of practical consideration and reasonable conclusion. For example, if an agency acts in a rush to produce records and thereby produces a single volume of nonexempt records, the search itself may end up being perfunctory at best under the circumstances and fail to uncover relevant and responsive records which violates the PRA's mandates. See, e.g., Alliance, 172 Wn.2d at 719 (agency required to make more than a perfunctory search and to follow obvious leads as they are uncovered). As a consequence, the agency may be in possession of responsive records which then end up being silently withheld by the agency. In that case, the two-year statute of limitations properly applied to that fact-pattern gives the requester adequate time for further investigation and inquiry as to the adequacy of the search and whether all responsive records were located. In other words, such time would be necessary for the requester to "ferret out" additional responsive records in spite of the fact that it was the duty of the agency and not the requester. Cf. Daines v. Spokane County, 111 Wn.App. 342, 44 P.3d 909 (2002) (an applicant need not exhaust his or her own ingenuity to ferret out records through some combination of intuition and diligent research). That amount of time, as envisioned by the Legislature when enacting the one-year triggering language, is necessary for the requester to establish whether or not he or she has a cause of action against the agency.

On the other hand, using the above example, if the agency had taken the time to perform a reasonable search and thereby produce the responsive records in installments "that are part of a larger set of requested records [that] are assembled or made ready, RCW 42.56.080, then there is less chance that the agency would fail to uncover records responsive to the request.

Needless to say, while the City argues that it would be absurd for the limitations period to turn on whether an agency exercises its discretionary authority to produce records in installments, see Respondent's Brief at 18, the above example pointedly illustrates that a hurried and negligent effort on the part of the agency could very well result in an improper withholding of public records from the requester.

In any event, while the City maintains that the one-year limitation period applies to all PRA claims, prior Supreme Court and Court of Appeals' decisions have held otherwise.

d. Prior Judicial Decisions Have Applied Both The One-Year and Two-Year Statutes of Limitation Periods To PRA Claims.

Contrary to the City's misdirected assertion that all PRA claims are subject solely to the PRA's one-year limitations period, multiple judicial decisions have interpreted that PRA claims are subject both to the one-year period as well as the two-year catch-all period when the one-year period does not trigger.

In Rental Housing Ass'n v. City of Des Moines, on an issue of first impression, the Supreme Court considered for the first time the first prong of the one-year statute of limitations ("claim of exemption"). The court held that the city's reply letter did not constitute a proper claim of exemption under RCW 42.56.550(6) and did not trigger the running of the one-year limitations period. 165 Wn.2d 525, 199 P.3d 393 (2009).

In Tobin v. Worden, this Court ruled that the one-year statute of limitations is only triggered by one of the two occurrences contained in the plain language of the statute, and held that under the facts of the case the statute did not trigger. 156 Wn.App. 507, 233 P.3d 906 (2010).

In McKee v. Washington State Dept. of Corr., Division Two remanded back to the trial court on the question of whether the one- or two-year statute of limitations applied under the facts of the case. 160 Wn.App. 437, 248 P.3d 115 (2011).

In Johnson v. State Dept. of Corrections, Division Two held that the two-year "catch-all" statute of limitations period under RCW 4.16.130 applied to bar claim under the PRA. 164 Wn.App. 769, 265 P.3d 216 (2011).

In Belinski v. Jefferson County, Division Two held that claims under the PRA are subject to two separate statutory limitation periods. 187 Wn.App. 724, 350 P.3d 689 (2015).

And in Reed v. City of Asotin, the United States District

Court for the Eastern District of Washington applied the two-year catch-all statute of limitation to a state PRA claim. 917 F.Supp.2d 1156 (E.D.Wash. 2013).

Overall, since 2009, multiple judicial opinions have consistently applied the plain language interpretation of RCW 42.56.550(6); and have applied the two-year statutory period when the one-year statute failed to trigger.

In opposition, the City cites to Bartz v. Dept. of Corr., 173 Wn.App. 522, 297 P.3d 737 (2013), to support their claim that the one-year statute of limitations applies to all PRA actions. Respondent's Brief at 18. In Bartz, Division Two stated it would be absurd to conclude that the Legislature intended two separate statute of limitation periods for PRA claims. 173 Wn.App. at 537. However, the City fails to point out to this Court that Division Two later in Belinski instead held that "[a] request for records under the PRA is subject to two separate limitation periods." 187 Wn.App. at 739. Division Two refused to follow its earlier decision in Bartz and instead followed its earlier ruling in Johnson and dismissed the claim under the two-year statute of limitations. Belinski, 187 Wn.App. at 739.

The City also cites to an unpublished opinion by this Court in Mohmoud v. Snohomish County, 184 Wn.App. 1017, 2014 WL 5465404, for the proposition that this Court "agreed" with the Division Two Bartz court that all PRA claims are subject

to the one-year statute of limitations. Respondent's Brief at 10. But the City mischaracterizes Mahmoud. This Court in Mahmoud instead stated that "[t]he PRA statute of limitations contains triggering events that enable a requester to know if a cause of action has accrued", and held that based on the facts of the case, the one-year statute had triggered because "[f]or all of Mahmoud's requests, the County claimed an exemption, produced records, or both." And this Court, when referring to Bartz, simply stated that it was only absurd to conclude that the Legislature intended no statute of limitations for PRA actions. 184 Wn.App. 1017.

All PRA claims then, are governed by two separate statute of limitations periods; and which one will apply depends on the facts of each individual case.

e. Mr. Wallin Timely Filed His PRA Action Within The Proper Two-Year Statute Of Limitations Period.

As the next section illustrates, because the City did not make a proper claim of exemption or produce records on an installment basis, the one-year limitations period failed to trigger and Mr. Wallin's claim was properly filed under the correct statutory two-year catch-all period.

2. THE CITY'S ACTIONS DID NOT TRIGGER THE ONE-YEAR STATUTE OF LIMITATIONS PERIOD UNDER THE PRA.

In order for RCW 42.56.550(6) to begin running, one of the two triggering events must occur. Here, neither occurred.

a. The City Did Not Make A Last Production Of A Record On A Partial Or Installment Basis.

The second prong of RCW 42.56.550(6) is not at issue in this case; the City does not dispute that only one volume of records were made available to Mr. Wallin. Consequently, the second prong did not trigger the running of the one-year statute of limitations.

b. The City Failed To Claim A Proper Exemption Under The PRA And Rental Housing Association.

The City argues that the City's response to Mr. Wallin triggered the running of the statute of limitations under the PRA because the City made at least one claim of exemption. Respondent's Brief at 26. The City's contention, and its supporting arguments, are wholly without merit.

The City first renews a frivolous argument it initially raised in the trial court alleging that Mr. Wallin put forth a "theory" that his one PRA request was really 24 separate PRA requests so the City's claim of exemption for one of the items requested did not trigger the one-year statute of limitations. Respondent's Brief at 26-28. The City then cites Greenhalgh v. DOC, to support prior judicial rejection of Wallin's alleged "theory," and asserts that under Greenhalgh the statute of limitations will trigger "whenever an agency makes at least one claim of exemption - even when the lawsuit involves other records not included within that claim of exemption." Id. at 28.

The City however, deliberately misconstrued the words in Mr. Wallin's complaint in order to induce the court to view Mr. Wallin's claims as "frivolous" and sway the court to the city's position; and mischaracterizes the legal and factual premise of Greenhalgh in its further attempt to do so with this Court.

Firstly, Greenhalgh did not hold, as the City erroneously asserts, that the one-year statute triggers whenever an agency makes at least one claim of exemption. In Greenhalgh, the court concluded that the statute triggered because: (1) in Greenhalgh's first request, the DOC produced six pages of documents but claimed an exemption for a few documents which all fell under the exemption for attorney-client privilege, and (2) in Greenhalgh's second request, the DOC withheld all three pages under the attorney-client exemption. In other words, the statute triggered only because all records withheld by the DOC fell under a single claim of exemption for each request; there were no other exemptions to claim as no other records were withheld. Greenhalgh, 170 Wn.App. at 147-48. Greenhalgh is therefore unlike this case where the City concedes that their single redaction exemption only applied to one of the records produced and did not apply to any of the seven records silently withheld by the City.

Secondly, what Mr. Wallin has been arguing all along is that because he requested from the City "24 separate and

distinct identifiable public records," CP 113, (as opposed to general categories of records), and due to the fact that the City failed to "claim[] any exemption to the seven records being withheld by the City," CP 126, the one-year statute of limitations failed to trigger because under Rental Housing the City is required to make a proper claim of exemption for all the records silently withheld by the City and not just the one record withheld in part. Mr. Wallin has not tried to advance some "theory" that his one request was really 24 separate requests. That is simply just a fetid attempt by the City at intentional misdirection--smoke and mirrors, if you will.

Along the same lines, the City purposely mischaracterizes Rental Housing in an attempt to distinguish it from this case.

The City stands in the position that its single redaction exemption was sufficient under Rental Housing because "the City produced a redacted document with a proper citation and explanation in full compliance with RCW 42.56.210 and the RHA case." Respondent's Brief at 29. The City argues that it was "sufficient to allow Wallin to make a threshold determination, thus trigger the statute of limitations." Id.

But if the single redacted document withheld in part (with its corresponding exemption) had been the only document withheld by the City, the City might have a leg to stand on. However, the City concedes that its exemption only applied to the one record, not all the records withheld.

Under Rental Housing, an agency is required to make a proper claim of exemption when multiple records are withheld in order to trigger the first portion of RCW 42.56.550(6).

There, the Supreme Court stated:

The plain terms of the Public Records Act, as well as proper review and enforcement of the statute, make it imperative that all records or portions be identified with particularity. Therefore, in order to ensure compliance with the statute and to create an adequate record for a reviewing court, an agency's response to a requester **must include specific means of identifying any individual records which are being withheld.**

Rental Housing, 165 Wn.2d at 538 (citation omitted)(emphasis added). The court then went on to say:

Consistent with this reasoning, a valid claim of exemption under the PRA should include the sort of 'identifying information' a privilege log provides. Indeed, RCW 42.56.210(3) requires identification of a specific exemption and an explanation of how it applies to the individual agency record. We must read 'claim of exemption' in RCW 42.56.550(6) in light of this requirement, as we construe the PRA as a whole.

Id. (citation omitted).

Both the PRA and Rental Housing require an agency to claim exemption and briefly explain the reason for withholding for each and every record withheld (or for each category of records, if applicable) through specific exemption and explanation of each record (or category). Silent withholding, as the City had done here, does not trigger the running of the one-year statute of limitations until the agency provides a proper claim of exemption to all records withheld. See Rental Housing, 165 Wn.2d at 539 (city's reply letter insufficient to

constitute a proper claim of exemption to trigger one-year statute because it did not "state[] the type of record withheld, date, number of pages, and author/recipient" or "explain which individual exemption applied to which individual record".).

Here, the City has not, to date, claimed any statutory exemption or explained its withholding of: Item 1 (Shohomish County Corrections Report); Item 2 (Snohomish County Corrections Report); Item 9 (Statement [of witness]); Item 10 (Statement [of witness]); Item 11 (Handwritten note by [complainant]); Item 19 (Digital Photographs - 5 photos); or Item 20 (DVD's). CP 113 (§5.1), 125 (§5.40), 129.

The City's failure then, is insufficient under Rental Housing and the PRA to trigger the one-year limitation period. Cf. CP 122 (§5.28).

c. Mr. Wallin Properly Raised The Insufficient Exemption Issue Before Moving For Reconsideration.

The City falsely represents that Mr. Wallin did not raise the insufficient exemption issue with the trial court before moving for reconsideration, and thus, has waived the issue. Respondent's Brief at 31. However, Mr. Wallin did raise that specific issue many times, including in a memorandum of law (CP 66), in his revised complaint (CP 124, §5.34; 126, §5.43), and at the hearing on the City's motion to dismiss. See Appellant's Opening Brief at 25-26.

In fact, during the motion hearing, Mr. Wallin argued to the court that Rental Housing controlled the outcome of this case because the City withheld multiple records. Thus, the City was required to provide a proper privilege log to Mr. Wallin which covered all of the records withheld by the City. Unfortunately though, Judge Farris failed to have her court reporter at the hearing so the verbatim report of proceedings could not be provided to this Court. Appellant's Opening Brief at 26, n.3.

But even so, assuming, arguendo, that Mr. Wallin failed to raise the issue prior to moving for reconsideration, the fact that Mr. Wallin did indeed raise it in a CR 59 motion preserved the issue on appeal. See N.W. Wholesale, Inc. v. Pac. Organic Fruit, LLC, 183 Wn.App. 459, 480, 334 P.3d 63 (2014) ("By bringing a motion for reconsideration under CR 59, a party may preserve an issue for appeal that is closely related to a position previously asserted and does not depend upon new facts")(citation omitted).

The City flippantly tries to split hairs arguing that because Mr. Wallin did not challenge the sufficiency of the City's "redaction log" for the decline notice, and instead only "claimed that the City failed to provide a privilege log" for the seven silently withheld records, that he cannot argue the issue (because, as the City asserts, it is a new issue). Respondent's Brief at 31-34.

The fallacy of the City's argument is inherently obvious. If the City failed to provide Mr. Wallin with an exemption (privilege) log because the City did not "claim[] any exemption to the seven records being withheld by the City," (CP 126, ¶5.43), then by virtue of the fact that the City's redaction log only applied to one record, the redaction log was itself insufficient--both factually and legally--to constitute a proper claim of exemption under RCW 42.56.210(3) and Rental Housing, 165 Wn.2d 525, 199 P.3d 393 (2009), for all of the records withheld by the City; thereby failing to trigger the one-year statute of limitations. But even if that axiom was not already obvious through review of the record in this case (the complaint), the court can consider hypothetical facts not included in the record. Nissen v. Pierce County, 183 Wn.App. 581, 589, 333 P.3d 577 (2014)(court must presume a plaintiff's allegations to be true on motion for dismissal, and "may consider hypothetical facts not included in the record")(citation omitted).

Ultimately, the trial court abused its discretion by refusing to consider the facts and the law which was clearly established prior to the hearing on the City's motion to dismiss. Cf. CP 4.

B. CONCLUSION

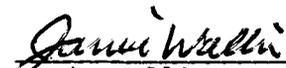
Public Records Act claims are governed by two separate statute of limitation periods. If the one-year statute under

RCW 42.56.550(6) does not trigger, then the claim falls under the two-year provision of RCW 4.16.130. Because the City failed to claim a proper exemption to all the records withheld from Mr. Wallin, his claim is governed by the correct two-year catch-all statute of limitations. Mr. Wallin timely filed his complaint within two years after his claim accrued.

Mr. Wallin then respectfully requests that this Court reverse the order of the trial court and remand for further proceedings, and award him his reasonable costs and fees incurred on appeal.

DATED this 3rd day of March, 2016.

Respectfully submitted,



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Pro Se