FILED
SUPREME COURT
STATE OF WASHINGTON
10/5/2022 1:02 PM
BY ERIN L. LENNON
CLERK

NO. 101143-1*

SUPREME COURT OF THE STATE OF WASHINGTON

LISA EARL,

Petitioner,

v.

CITY OF TACOMA,

Respondent.

WASHINGTON COALITION FOR OPEN GOVERNMENT'S AMICUS CURIAE MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW OF PETITIONER LISA EARL

Michele Earl-Hubbard, WSBA # 26454
Allied Law Group LLC
P.O. Box 33744
Seattle, WA 98133
(206) 443-0200
michele@alliedlawgroup.com
Attorney for Amicus Curiae Washington Coalition for Open Government

Judith Endejan, WSBA #11016
5109 23rd Ave W
Everett, WA 98203-1526
jendejan@gmail.com
(206) 799-4843
Attorney for Amicus Curiae Washington Coalition for Open Government

**Filed 10/4/2022 in Case No. 99368-8, the number used by Respondent on its 8/26/2022/most recent filing in this appeal.*

FILED
SUPREME COURT
STATE OF WASHINGTON
10/4/2022 4:20 PM
BY ERIN L. LENNON
CLERK

No. 99368-8

SUPREME COURT OF THE STATE OF WASHINGTON

LISA EARL,

Petitioner,

v.

CITY OF TACOMA,

Respondent.

WASHINGTON COALITION FOR OPEN GOVERNMENT'S AMICUS CURIAE MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW OF PETITIONER LISA EARL

Michele Earl-Hubbard, WSBA # 26454
Allied Law Group LLC
P.O. Box 33744
Seattle, WA 98133
(206) 443-0200
michele@alliedlawgroup.com
Attorney for Amicus Curiae Washington Coalition for Open Government

Judith Endejan, WSBA #11016
5109 23rd Ave W
Everett, WA 98203-1526
jendejan@gmail.com
(206) 799-4843
Attorney for Amicus Curiae Washington Coalition for Open Government

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. IDENTITY AND INTEREST OF AMICUS

The Washington Coalition for Open Government ("WashCOG"), a Washington nonprofit corporation, is an independent, nonpartisan organization dedicated to promoting and defending the public's right to know in matters of public interest and in the conduct of the public's business. WashCOG's mission is to help foster open government processes, supervised by an informed and engaged citizenry, which is the cornerstone of democracy. Access to public records under the Public Records Act, Chapter 42.56 RCW ("PRA") is an essential tool of democracy that should be protected and encouraged.

WashCOG represents a cross-section of the Washington public, press, and government as exemplified by WCOG's board of directors.[1]

WashCOG is the state's freedom of information association, Washington citizens' representative organization on

[1] A description of WashCOG's board of directors can be found at https://www.washcog.org/board (last visited 10/4/2022).

the National Freedom of Information Coalition, and a champion of the public's right of access through its educational programs and participation as *Amicus Curiae* in court proceedings. Recognizing the importance of WashCOG's advocacy for citizens' rights under the PRA this Court has frequently granted permission for WashCOG to serve as *Amicus Curiae* in cases involving important, unresolved issues arising under the PRA. This is such a case. The Court of Appeals erroneously determined that the one year statute of limitations in RCW 42.56.550(6) barred Ms. Earl's cause of action for clear Public Records Act ("PRA") violations that she could not have known about during the limitation period because the City of Tacoma ("City") solely possessed knowledge of the facts of this violation.

The Court of Appeals also erred by finding that equitable tolling did not apply to Ms. Earl's claim. In making these errors the Court of Appeals ignored well-settled precedent from this Court. If this decision is left uncured by this Court, public agencies will be incented to perform inadequate searches in

response to PRA requests and to silently withhold public records. They will easily escape accountability for these PRA violations, because they are in sole control of the facts regarding the public agency response to a PRA request. These clearly predictable results alarm WashCOG because they are contrary to the letter and spirit of the PRA and will deny justice to Washington citizens. This Court should accept review of Ms. Earl's case.

II. ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals in Division II commit error by holding that the "discovery rule" or "equitable tolling" principles do not apply to toll the one-year statute of limitations in RCW 42.56.550(6) when the PRA requester is denied access to the necessary facts for a PRA cause of action by the public agency in control of those facts beyond the limitation period?

III. NATURE OF CASE AND DECISION BELOW

WashCOG adopts the Statement of the Case and Identity of Petitioner and Decision Below stated by Petitioner.

IV. REASONS WHY THIS COURT SHOULD ACCEPT REVIEW OF THE COURT OF APPEALS DECISION.

A. The Court of Appeals Decision is in Conflict with Decisions of this Court regarding the "Discovery Rule".

The Court of Appeals' decision issued a narrow, crabbed view of how the PRA's statute of limitations should apply when the agency withholds the information needed to determine whether a cause of action exists for a PRA violation. The Court of Appeals erroneously reasoned that the "discovery rule"[2] does not apply "where the legislature specifies an accrual event for a cause of action" in a limitations statute like RCW 42.56.550(6). **Earl v. Tacoma**, No. 56160-3-II, 2022 Wash. App. LEXIS 1422 at *18 (Wn. Ct. App. Div. II, July 12, 2022). Not so. This Court has ruled that the "discovery rule" can apply in cases where the party, who would benefit from a statute of limitations, controls the facts and withholds them, thereby

[2] The discovery rule states that a statute of limitation does not begin to run until the plaintiff, using reasonable diligence, would have discovered the cause of action. **Peters v. Simmons**, 87 Wn.2d 400, 404, 552 P.2d 1053 (1976); **Ruth v. Dight,** 75 Wn.2d 660, 453 P.2d 631 (1969)

preventing the discovery of a cause of action, irrespective of whether the statute of limitations contains a "triggering event".

In **U.S. Oil & Ref. Co. v. State**, 96 Wn. 2d 85, 633 P. 2d 1329 (1981), this Court found that the "discovery rule" applied to toll the statute of limitations to allow the State to assess and recover a penalty for a pollution violation that could only be discovered by the "self-reporting" of the polluter. This Court reasoned

> In determining whether to apply the discovery rule, the possibility of stale claims must be balanced against the unfairness of precluding justified causes of action….That balancing test has dictated the application of the rule where the plaintiff lacks the means or ability to ascertain that a wrong has been committed.

(citations omitted) 96 Wn.2d at 93.

That the Legislature failed to adopt the "discovery rule" in one limitations statute, when it did in another, meant nothing in **U.S. Oil & Ref. Co., Id.** ("That the legislature has not acted is not determinative. ") Rather, this Court reasoned

> Statutes of limitation operate upon the premise that "when an adult person has a justiciable grievance, he usually knows it and the law affords him ample opportunity to assert it in the courts." …That premise is also inapplicable where the plaintiff must rely on the defendant's self-reporting. Where self-reporting is involved, the probability increases that the plaintiff will be unaware of any cause of action, for the defendant has an incentive not to report it. Like the other cases which have employed the rule, this is a case where if the rule were not applied the plaintiff would be denied a meaningful opportunity to bring a suit. Like those plaintiffs, this plaintiff lacks the means and resources to detect wrongs within the applicable limitation period. Not applying the rule in this case would penalize the plaintiff and reward the clever defendant. Neither the purpose for statutes of limitation nor justice is served when the statute runs while the information concerning the injury is in the defendant's hands

Id. at 93-94.

The Court of Appeals ignored **U.S. Oil & Ref. Co.**,[3] even though Ms. Earl's case presents the same situation. She lacked

[3] **See also Williams v. Dept. of Labor & Indus.,** 45 Wn.2d 574, 277 P.2d 338 (1954), where this Court ignored a statute that had a definite "triggering event" statute of limitations to allow the plaintiff to recover for an occupational disease of silicosis because he was not informed by his doctor that this disease was an "occupational disease."

the means to detect the City's PRA violation within the one-year period of RCW 42.56.550(6).

The Court of Appeals in Ms. Earl's case glossed over the judicial policy behind the "discovery rule" incorrectly ruling that because the Legislature specified a "triggering event" in RCW 42.56.550(6) there is no exception. This ignores this Court's clear view that a limitations statute should not bar claims "while the information concerning the injury is in the defendant's hands" as a matter of judicial policy to promote fairness and justice, despite the language (or lack thereof) in a statute.

B. The Court of Appeals Decision is in Conflict with Decisions of this Court regarding Equitable Tolling.

The Court of Appeals also ignored cases from this Court which applied the doctrine of equitable tolling even without evidence of bad faith, deception or false assurances. The Court of Appeals refused to apply it to Ms. Earl's case, insisting that in PRA litigation the foregoing criteria must be present. Again,

this Court disagrees with that interpretation of the legal principle of equitable tolling. This could not be clearer from this Court's statement in **In re Fowler,** 197 Wn. 2d 46, 55, 479 P.3d 1164 (2021):

> We see no reason for such a limitation. Such a limitation would undermine the purpose of equitable tolling—to ensure the fundamental fairness when extraordinary circumstances have stood in the petitioner's way. Accordingly, the Court of Appeals erred when it stated that "Washington courts require bad faith, deception, or false assurances caused by the opposing party or the court" in order to justify equitable tolling.

This Court also held that equitable tolling applies "upon a finding of fraud, oppression, **or other equitable circumstances**." **Millay v. Cam,** 135 Wn.2d 193, 206, 955 P.2d 791 (1998) (emphasis supplied).

In **Belenski v. Jefferson County**, 186 Wn.2d 452, 454-455, 378 P.3d 176, 178 (2016), this Court stated that equitable tolling **could** apply in PRA cases:

> We hold that the one year statute of limitations in the PRA applies to Belenski's claim and that this limitations period **usually** begins to

> run on an agency's final, definitive response to a records request. However, we remand this case for the trial court to determine whether equitable tolling should toll the statute of limitations."

(emphasis added).

Equitable tolling and application of the discovery rule are equitable principles applied to provide relief for a plaintiff who legitimately could not have discovered actionable facts before a statute of limitations ran. **That is the case here.**

The City should be held accountable for its PRA violations. It would be unjust and unfair to deny Ms. Earl the right to hold the City accountable, as she is entitled to, for its serious PRA violations under the facts of her case. Clearly, both the discovery rule and equitable tolling apply here to prevent this injustice.

C. Equitable Tolling and the Discovery Rule should Apply in PRA cases to promote the PRA's Purpose.

> The PRA is a strongly worded mandate for disclosure of public records. The purpose of the act is "nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of

> the people and the accountability to the people of public officials and institutions."

Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 251, 884 P.2d 592 (1994) ("**PAWS II**"); **see also** RCW 42.56.030. To effectuate the PRA's purpose, the legislature declared that the PRA "shall be liberally construed and its exemptions narrowly construed." RCW 42.56.030. The language of the PRA must be interpreted in a manner that furthers the PRA's goal of ensuring that the public remains informed so that it may maintain control over its government. **Id.**;**see, e.g., Yakima County v. Yakima Herald–Republic**, 170 Wn.2d 775, 797, 246 P.3d 768 (2011); **Wade's Eastside Gun Shop v. Dept. of Labor & Industries and Seattle Times**, 185 Wn.2d 270, 277, 372 P.3d 97 (2016). The Court of Appeals did not interpret RCW 42.56.550(6) in accordance the above directives.

This Court has repeatedly interpreted the PRA to further the PRA's purpose, requiring agencies to conduct a reasonable

search for records as part of its response obligations, to identify with specificity **all** responsive records not being produced to prevent "silent withholding" and to provide a meaningful exemption log for all withheld records. The City did not abide by the foregoing obligations. Under the Court of Appeals decision the City will not be held accountable and the PRA is undermined because the statute of limitations bars a requester from suing under the PRA due to the very PRA violations (denial of sufficient information) at issue in the litigation! This Court has said in PRA cases "We will also avoid absurd results." **Resident Action Council v. Seattle Housing Authority,** 177 Wn.2d 417, 431, 327 P.3d 600 (2013).

Finding that equitable tolling and the discovery rule can apply in PRA cases is consistent with the logic in this Court's decisions[4] because it holds agencies accountable for PRA compliance when the requester has no means to determine such

[4] **See, e.g., Rental Housing Ass'n v. Des Moines**, 165 Wn.2d 525, 199 P.3d 393 (2009); **Resident Action Council,** 177 Wn. 2d 417.

compliance. Such a finding would also deter agency misconduct in responding to PRA requests. In **Belenski** this Court recognized the "legitimate concerns that allowing the statute of limitations to run based on an agency's dishonest response could incentivize agencies to intentionally withhold information and then avoid liability due to the expiration of the statute of limitations… such an incentive could be contrary to the broad disclosure mandates of the PRA and may be fundamentally unfair in certain circumstances." 186 Wn.2d at 461-62.

In sum, this Court should accept review of the Court of Appeals decision and find that equitable tolling and the discovery rule apply in PRA litigation, such as Ms. Earl's. Such a ruling would further the purposes of the PRA and be in the public interest:

- To prevent PRA requesters from suing prematurely to avoid a potential one-year statutory bar.
- To incent agencies to conduct thorough, reasonable searches when responding to PRA requests.
- To incent agencies to identify all responsive records and disclose the ones to be withheld, with sufficient justification for the withholding.

- To hold agencies accountable when they do not meet their statutory obligations.
- To place the burden on the agencies, rather than requesters, who are not in a position to know when a record is "silently withheld".
- To promote fundamental concepts or fairness and justice.

V. CONCLUSION

For the foregoing reasons, Amicus Curiae WashCOG asks that the Court accept review of the Court of Appeals decision in Ms. Earl's case. In addition, as a requestor deprived of a public record that was not exempt, Ms. Earl is entitled to an award of statutory penalties under the PRA and her fees and costs. **City of Lakewood v. Koenig,** 182 Wn.2d 87, 97-99, 343 P.3d 335, 340 (2014); **Yakima Herald–Republic**, 170 Wn.2d at 809-10.

VI. CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to RAP 18.17(c)(9) the following document contains 2,258 words.

Respectfully submitted this 4th day of October, 2022.

By: *s/Michele Earl-Hubbard*
Michele Earl-Hubbard,
WSBA # 26454
Allied Law Group LLC
P.O. Box 33744
Seattle, WA 98133
(206) 443-0200
michele@alliedlawgroup.com

By: *s/Judith Endejan*
Judith Endejan,
WSBA #11016
5109 23rd Ave W
Everett, WA 98203
(206) 799-4843
jendejan@gmail.com

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on October 4, 2022, I filed with the State Supreme Court and delivered through the Court's portal a copy of the foregoing Amicus Curiae Memorandum and this Certificate of Service by email pursuant to agreement to the following:

James E. Lobsenz, WSBA # 8787
Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020
lobsenz@carneylaw.com
Attorney for Appellant

Michelle Yotter, WSBA #49075
Deputy City Attorney for City of Tacoma
747 Market Street, Suite 1120
Tacoma, WA 98402-3701
(253) 591-5885
myotter@cityoftacoma.org
Attorney for Respondent

Dated this 4th day of October, 2022, at Shoreline, Washington.

s/Michele Earl-Hubbard
Michele Earl-Hubbard

SUPPLEMENTAL CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on October 5, 2022, I re-filed with the State Supreme Court in Case Number 101143-1 via its portal and delivered through the Court's portal a copy of the same foregoing Amicus Curiae Memorandum and this Supplemental Certificate of Service by email to the following and any other attorneys that have appeared in this action with the appellate court for service through the portal:

James E. Lobsenz, WSBA # 8787
Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020
lobsenz@carneylaw.com
Attorney for Appellant

Michelle Yotter, WSBA #49075
Deputy City Attorney for City of Tacoma
747 Market Street, Suite 1120
Tacoma, WA 98402-3701
(253) 591-5885
myotter@cityoftacoma.org
Attorney for Respondent

Bree R. Black Horse, WSBA #47803
KILPATRICK TOWNSEND & STOCKTON
ACLU-WA Cooperating Counsel
1420 Fifth Avenue, Suite 3700
Seattle, Washington 98101
brblackhorse@kilpatricktownsend.com
(206) 467-9600
Attorneys for Amici Curiae ACLU-WA

Jaime Cuevas, Jr., WBSA #51108
ACLU-WA Cooperating Counsel
61 W Wapato, Rd.
Wapato, WA 98951
Jr@ramseycompanies.com
Attorneys for Amici Curiae ACLU-WA

Nancy Talner, WSBA #11196
La Rond Baker, WSBA #43610
ACLU OF WASHINGTON FOUNDATION
PO Box 2728
Seattle, WA 98111
(206) 624-2184
talner@aclu-wa.org; baker@aclu-wa.org
Attorneys for Amici Curiae ACLU-WA

Bryan V. Pham, WSBA #46249
GENERAL PUBLIC PRACTICE & INDIAN LAW CLINIC
AT GONZAGA UNIVERSITY SCHOOL OF LAW
721 N. Cincinnati Street
PO Box 3528
Spokane, WA 99220
pham@gonaga.edu
Attorney for Amici Curiae General Public Practice & Indian Law Clinic at Gonzaga University School of Law

Brooke Pinkham, WSBA #39865
CENTER FOR INDIAN LAW AND POLICY
901 12th Avenue
Seattle, WA 98122-1090
pinkham@seattleu.edu
Attorney for Amici Curiae Center for Indian Law and Policy

Robert S. Chang, WSBA #44083
Ronald A. Peterson Law Clinic
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY
1112 East Columbia Street
Seattle, WA 98112
changro@seattleu.edu
Attorney for Amici Curiae Fred T .Korematsu Center for Law and Equality

Dated this 5th day of October, 2022, at Shoreline, Washington.

s/Michele Earl-Hubbard
Michele Earl-Hubbard

ALLIED LAW GROUP LLC

October 05, 2022 - 1:02 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,143-1
Appellate Court Case Title:	Lisa Earl v. City of Tacoma
Superior Court Case Number:	19-2-10487-8

The following documents have been uploaded:

- 1011431_Briefs_20221005125903SC288540_1219.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was 2022-10-05 refiled Amicus Memorandum Earl v Tacoma.pdf
- 1011431_Motion_20221005125903SC288540_3223.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was 2022-10-5 refiled WCOG Motion for leave to file Amicus Memorandum.pdf

A copy of the uploaded files will be sent to:

- BRBLackhorse@kilpatricktownsend.com
- baker@aclu-wa.org
- changro@seattleu.edu
- jr@ramseycompanies.com
- laurwilson@kingcounty.gov
- lobsenz@carneylaw.com
- myotter@cityoftacoma.org
- pham@gonzaga.edu
- pinkhamb@seattleu.edu
- rhorst@kilpatricktownsend.com
- rrsmith@kilpatricktownsend.com
- talner@aclu-wa.org
- yount@gonzaga.edu

Comments:

(1) Motion to file Amicus Curiae Memorandum in support of Petition for Review per RAP 13.4(h) and (2) Amicus Curiae Memorandum in support of Petition for Review. (These were filed yesterday 10-4-2022 in case # 99368-8, a number used by Respondent in its latest filing in this matter. I am re-filing today in the correct cause number.)

Sender Name: Michele Earl-Hubbard - Email: michele@alliedlawgroup.com
Address:
PO BOX 33744
SEATTLE, WA, 98133-0744
Phone: 206-443-0200

Note: The Filing Id is 20221005125903SC288540