SUPREME COURT
OF THE STATE OF WASHINGTON

101413-9
NO. 55498-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SANDRA EHRHART, individually and as personal representative of the Estate of Brian Ehrhart,

Petitioner,

v.

KING COUNTY, operating through its health department, Public Health - Seattle & King County,
Respondent.

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# SANDRA EHRHART'S PETITION FOR REVIEW

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## I. INTRODUCTION

Seeking answers in the wake of her husband's death, Ms. Ehrhart requested documents under Washington's Public Records Act. Some were produced, and, it turned out, hundreds were silently withheld—especially the unflattering ones. This was both unknown, and unknowable, to Ms. Ehrhart. She did not learn about the hidden documents until receiving belated responses to discovery in a tort case just over a year later. Based on a body of law developed in Division II—which is antithetical to the legislature's "strongly worded mandate," *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978), as well as this Court's prior holdings—Ms. Ehrhart's claims were dismissed as time-barred.

This Court should accept review, overturn *Dotson v. Pierce Cty.*, 13 Wn. App. 2d 455, 472, 464 P.3d 563, *as amended* (July 8, 2020), and confirm that the discovery rule applies to silently withheld records under the PRA. The *Dotson* framework not only creates a perverse incentive structure—in which

government agencies *benefit* from favorable burden shifting and a "bad faith" standard—when they hide records for over a year, while conversely, the requesters is put in an impossible position. Ms. Ehrhart had no way of knowing she had a cause of action until a year elapsed. The only way to preserve her cause of action would be a blind lawsuit, in violation of CR 11, based upon records she had no idea were withheld at the time. The burden is now on the requester to ferret out secret wrongdoing, and the burden is *off* the agency to be transparent in the first place.

But Division II went even further than that. The County's defense—accepted by Division II—was that the "risk manager" who oversaw records collection did not, herself, do anything wrong:

> …there is no evidence that Larsen knowingly chose not to disclose responsive documents, as there was in *Belenski*. Although, in hindsight, it appears that not all responsive documents were disclosed, there is no evidence in the record that Larsen knew that those documents existed at the time she closed the request. Therefore, the response may have been objectively false, but given there is no evidence Larsen knew it was false nor is there any evidence

> that Larsen made a deliberate attempt to mislead; it was not deceptive or dishonest for the purposed of equitable tolling.

Op. at 8-9. It was undisputed that the actual records custodians withheld documents. Yet the case was dismissed on summary judgment because Ms. Larsen did not, herself, do anything "deceptive or dishonest." *Id.* By this logic, government can: (a) install a "records manager" who tells everybody to do a good job; (b) ignore whether record-holders are actually producing responsive records to the "records manager"; and (c) if government gets caught, emphasize that the "records manager" had no idea. The actual records holders can, as in this case, say nothing—and win, dispositively, by motion.

These issues are deeply significant—so much so that at least two other cases involving this precise issue are working their way through the appellate courts right now. *See Earl v. City of Tacoma* (Washington Supreme Court No. 101143-1); *Terry Cousins v. State of Washington* (Washington Supreme Court No. 100755-8).

Government is availing itself to the problematic incentive structure erected by *Dotson*. This Court should accept review and consider whether that is consistent with the PRA statute and public interest.

## II. STATEMENT OF THE CASE

### A. The County Withholds Hundreds of Documents Responsive to Ms. Ehrhart's Public Records Requests

Following her husband's death, his wife, Sandra, sought answers. On March 24, 2017,[1] Ms. Ehrhart, through counsel, submitted a public records request to King County requesting:

1. All records regarding Hantavirus incidents in 2016 or 2017;

2. All records in your possession regarding the hazards, dangers, and/or mortality rates of Hantavirus;

3. All communications—internal or external—about Hantavirus in 2017;

4. All documents reflecting any effort made by King County to make the public aware of Hantavirus in 2017;

[1] Ms. Ehrhart, through counsel, also submitted a public records request to the County in October 2017, which is not at issue in this appeal.

5. All documents reflecting any effort made by King County to make the public aware of Hantavirus in any year other than 2017;

6. All policies, practices and/or procedures pertaining to public awareness and notification of health hazards;

7. All documents reflecting or referring to a duty or obligation on the part of the county to advise the public of health hazards;

8. All communications with or about Maureen Waterbury;

9. All communications with or about Brian Ehrhart and/or his contraction of Hantavirus;

10. All studies, investigations you've performed, or conclusions rendered this year pertaining to Hantavirus or the county's response thereto;

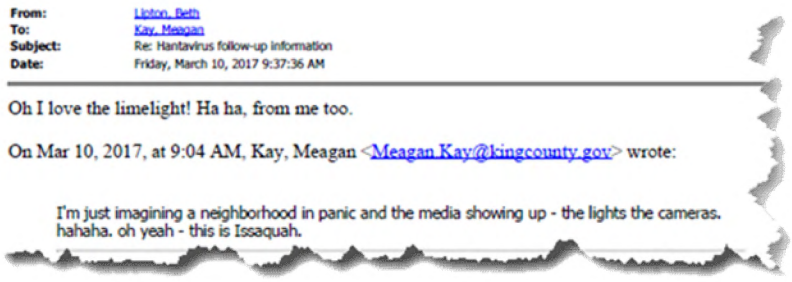
11. All statutory claims for damages filed against King County Public Health, pertaining in any way to a public health hazard; and

12. All settlement of any claims against King County Public Health pertaining in any way to its response to a public health hazard.

CP 5463-64. The request was routed to "Risk Management," which responded to it outside the normal processes for handling

PRA requests. The County, through Penny Larsen, sought out County employee, Meagan Kay, for guidance about key words and records custodians. CP 108-109; 114-115 (County Dep. Tr. 62:16-63:3; 82:21-83:7)).

This was an odd choice, to be sure. Dr. Kay had open disdain for the grieving family and panicked neighborhood:



**From:** Lipton, Beth
**To:** Kay, Meagan
**Subject:** Re: Hantavirus follow-up information
**Date:** Friday, March 10, 2017 9:37:36 AM

Oh I love the limelight! Ha ha, from me too.

On Mar 10, 2017, at 9:04 AM, Kay, Meagan <Meagan.Kay@kingcounty.gov> wrote:

I'm just imagining a neighborhood in panic and the media showing up - the lights the cameras. hahaha. oh yeah - this is Issaquah.

CP 120. Furthermore, Dr. Kay "was on scheduled family leave until mid-February. She was not even involved in Hantavirus investigations that occurred before that time…" CP 122. Thus, according to the County, she had nothing to do with the subject matter of the public records request she was now overseeing.

In any event, "three key words" were generated to produce records responsive to the entire request: Brian Ehrhart, Hantavirus, and Maureen Waterbury. CP 104; CP 315. The

custodians were expected to "use their judgment" as to whether records were responsive, and told to err on the side of "over disclosure." CP 105. But there was no tracking system to confirm what they did or withheld. CP 106-107.[2]

Over the next 4 or 5 months, the records came in several installments, ostensibly completing on **August 7, 2017** when the County informed Ms. Ehrhart that it considered the request closed. CP 254. In total, the County provided 521 documents. CP 5463-64.

### B. Ms. Ehrhart Learns Of The Withheld Documents In Belated Responses To Written Discovery—Just After The One-Year Statute Elapsed

Ms. Ehrhart ultimately filed suit on June 21, 2018, and propounded written discovery with the Complaint. Responses were stonewalled and delayed for months, however. During this

[2] County personnel were not told to search personal devices or computers, despite apparent use of personal Gmail accounts. Nor did anybody check for records held by the Board of Health (the actual governing body) or Patty Hayes (the agency's director). Both were intimately involved with Hantavirus.

time-frame, the County was (1) sanctioned for "bad faith" and "gamesmanship"; (2) compelled to make witnesses available for deposition; and (3) subject to additional discovery sanctions, which the trial court reserved.

The County moved for summary judgment and, on **September 21, 2018**, one business day before the Ehrharts' response was due, the County disclosed roughly 20,000 documents.

This document dump included close to ***500 documents*** responsive to Ms. Ehrhart's public records requests, produced for the first time. CP 220, ¶ 4(a); CP 5468-78; CP 714-5462. Based on the voluminous documents the County improperly withheld, Ms. Ehrhart promptly amended her Complaint to add a claim for violating Washington's Public Records Act. CP 21-32.

The newly produced documents could not realistically make it into the record, and the trial court ruled on what was previously in front of it. "The court granted partial summary judgment for [Ms.] Ehrhart on the failure to enforce exception

[to the public duty doctrine], 'conditioned on a finding by the jury that [King] County's action was not appropriate.'" *Ehrhart v. King Cty.*, 195 Wn.2d 388, 395–96, 460 P.3d 612 (2020) (quoting Verbatim Transcript of Proceedings (Sept. 28, 2018), at p. 23).

The County moved for, and was granted, discretionary review by the Washington Supreme Court. Given their cruciality to the issues framed before the Court, Ms. Ehrhart tried to offer some documents she belatedly received from the County. The County brought two separate motions to strike them, which this Court granted under RAP 9.12. CP 80-95; CP 96-97.

This Court ultimately reversed Judge Speir and ordered that Ms. Ehrhart's tort claims against the County be dismissed based on the public duty doctrine. *Ehrhart*, 195 Wn.2d at 410.

### C. Ms. Ehrhart's Public Records Act Claim is Dismissed On Summary Judgment As Time-Barred

On remand, only Ms. Ehrhart's Public Records Act claim remained. The parties cross-moved for summary judgment. The central issue was whether the one-year statute of limitations for

PRA claims set forth in RCW 42.56.550(6) should be tolled, given that Ms. Ehrhart had no way of knowing the County had, undisputedly, silently withheld close to 500 responsive.

At the summary judgment hearing, the trial court's tolling analysis largely focused on whether the withheld documents would have changed the outcome of the tort case. *See* CP 628 (beginning the hearing: "as I read the Supreme Court ruling, it seemed to me that it wouldn't have made any difference to the Supreme Court…"). Ultimately, it found tolling unavailable for the same reason:

> And I'm going to tie that back into this issue that I raised from the beginning, which was the Supreme Court's ruling on the public duty doctrine and finding as a matter of law, and would these documents have made any difference.
>
> Because it has been my personal experience as a judge and coincidentally, King County was the person or entity that had failed to disclose a smoking-gun document, if you will, in another case. And it was evident on the face of that document that that document was damning to the county, and because the public duty doctrine didn't apply….it would have created potentially much greater liability.

> So there on it, the face of the document, the Court could find equitable tolling because, you know, it's obvious why the county would not produce the document. If I look at some of these documents…I didn't see anything on the face of any document that would show me that the county was acting in bad faith, had deceived the plaintiff or plaintiff's counsel, or had made any assurances to the plaintiff or plaintiff's counsel….

CP 697-698. Based on the purported absence of a "smoking gun" document that would have changed the tort case, the trial court ruled that Ms. Ehrhart's "failure to file [her] claim within one year from the closing of the first request" dictated "summary judgment to King County on that basis." CP 698-99.

Ms. Ehrhart moved for reconsideration, emphasizing that there was no "smoking gun" standard, and that bad faith in this context is a factual issue when, as here, "a cursory search and delayed disclosure well short of even a generous reading of what is reasonable under the PRA." *See Francis v. Washington State Dep't of Corr.*, 178 Wn. App. 42, 63-64 (2013), *as amended on denial of reconsideration* (Jan. 22, 2014). Unfortunately, the hearing was largely for naught. The trial court expressed that it

"allowed this to go forward on reconsideration, in part," simply to "clarify [her prior] ruling" granting the County's cross motion for summary judgment. *See* Verbatim Report of Proceedings, 16:16-21.

Ms. Ehrhart timely appealed to Division II, which affirmed the trial court's dismissal, and afterward, denied reconsideration. Ms. Ehrhart now seeks review.

## III. IDENTITY OF PETITIONER AND DECISION BELOW

Petitioner Sandra Ehrhart seeks review of Division II of the Court of Appeals' decision, attached as Appendix A.

## IV. ISSUES PRESENTED FOR REVIEW

1. Whether the discovery rule should apply to silently withheld records under the PRA?

2. Alternatively, if *Dotson* applies rather than the discovery rule, should equitable tolling be applied under *Francis v. Washington State Dep't of Corr.*, 178 Wn. App. 42, 63-64 (2013), *as amended on denial of reconsideration* (Jan. 22, 2014) and *Belenski v. Jefferson Cnty.*, 186 Wn.2d 452, 456, 378 P.3d

176 (2016), when a substantial number of records are withheld without explanation (*i.e.*, who has the burden to explain the withholding and who is entitled to favorable inferences).

## V. WHY REVIEW SHOULD BE GRANTED

### A. *Dotson*—And By Extension The Decision Below—Conflict With This Court's Holding In *U.S. Oil* That The Discovery Rule Should Apply When "The Plaintiff Lacks The Means Or Ability To Ascertain That A Wrong Has Been Committed."

The discovery rule reflects Washington courts' "duty to construe and apply limitation statutes in a manner that furthers justice." *U.S. Oil & Ref. Co. v. State Dep't of Ecology*, 96 Wn.2d 85, 93, 633 P.2d 1329, 1334 (1981). Thus, "[i]n determining whether to apply the discovery rule, the possibility of stale claims must be balanced against the unfairness of precluding justified causes of action." *U.S. Oil & Ref. Co.*, 96 Wn.2d at 93.

Unfortunately, relying on its own precedent, *Dotson v. Pierce Cnty.*, 13 Wn. App.2d 455, 464 P.3d 563 (2020), Division II refused to apply the discovery rule. It reasoned "the legislature determined that allowing a one-year period to sue following the

closing of a request strikes an appropriate balance between ensuring compliance with the PRA through access to penalties and limiting the amount of PRA litigation." Op. at 12.

This statement is true in the literal sense, but does not answer the relevant question. A requester who, for example, receives a questionable redaction or is advised of a withheld record, certainly can think through her legal rights within a year. But the one-year period is quite irrelevant to a requester like Ms. Ehrhart, who had no idea anything was amiss in the first place (because she was told it was not).

This rationale was illustrated in *U.S. Oil*, when the wrong was a quiet discharge of pollutants into a river. The defendant was under a legal obligation to "self-report," but failed to do so, leaving the plaintiff in the dark. After two years, the plaintiff learned of the discharge and sued for statutory penalties. If the statute of limitations was triggered by the discharge, then the suit was time-barred. But this Court correctly recognized the inequity of that outcome. Such a rule would allow the

corporation to benefit from its own unlawful failure to report the discharge. This Court also recognized the absurdity of assuming that the legislature wanted to bar plaintiffs from bringing suits in circumstances "where the plaintiff lacks the means or ability to ascertain that a wrong has been committed." *U.S. Oil*, 96 Wn.2d at 93. Accordingly, the discovery rule "dictated" that plaintiff's suit was not time barred.

Though cited to Division II, *U.S. Oil* was not even mentioned in the decision. The unstated premise is, seemingly, that the legislative intent was to make government agencies *better off* by silently withholding records in violation of the PRA; and in turn, requesters *worse off* for failing to blindly file a lawsuit within the year, without contemporary knowledge of a wrong being done to them.

Stated plainly, *Dotson* was wrongly decided. This is a context in which the discovery rule is absolutely appropriate—

and in many cases, like this one, the *only* mechanism for a just outcome.[3]

### B. Division II's Novel Approach To Equitable Tolling Is In Direct Conflict With This Court's Decision In *Belenski v. Jefferson County*

According to the Court of Appeals—although responsive documents were hidden, and although no justification was given—because there was no evidence *that Ms. Larsen knew* about it, there could be no tolling. Op. at 8-9.

This analysis finds no support in any case law or precedent. As juries across the state are correctly instructed, organizations act through their "officers and employees. Any act or omission of an officer or employee is the act or omission of

[3] The discovery rule is well-developed, and trial courts can easily weed out claims in which the requester has been dilatory. Wrongdoing on the part of the requester can also be addressed in the penalty phase of the PRA proceeding.

the [organization]." WPI 50.18. This is not limited to the "officers or employees" the defendant hand-picks.[4]

As a matter of both common sense and PRA precedent—in which the burden to prove a reasonable search is on the agency—this is wrong. It also defies this Court's prior holdings. In *Belenski v. Jefferson Cty.*, 186 Wn.2d 452 (2016), for example, Jefferson County responded to a public records request for internet access logs by incorrectly stating that it had no responsive records. *Id.* at 455. The requester knew the County's response was inaccurate because he had requested and received internet access logs from the County in the past. *Id.* It later emerged that the County possessed the records but "mistakenly" believed they did not need to produce them because "they are not 'natively viewable' and would need to be 'pulled out of a database and generated in a human readable format.'" *Id*. at 455-

[4] **None** of the 15 custodians, who actually collected the responsive documents, explained or acknowledged the missing records. *See* CP 315-316.

56. The requester brought a PRA claim against the County for failing to produce the requested logs.

This Court held that the action was technically untimely (especially since the requestor already had some of the wrongfully unproduced documents) but remanded for the trial court to determine whether tolling should apply:

> … 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

*Id*. at 461-62 (emphasis added).

This is exactly the point, here. A "dishonest response" ("mistaken" or otherwise), leading to withholding, can factually support equitable tolling under *Belenski*—as it should. Allowing public agencies to avoid liability by waiting out the one-year statute only incentivizes the exact conduct the PRA seeks to prohibit. *See Progressive Animal Welfare Soc. v. Univ. of*

*Washington*, 125 Wn.2d 243, 270, 884 P.2d 592 (1994) ("The Public Records Act clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request.").

Indeed, *Belenski* and the decision below cannot coexist. In *Belenski*, the action was remanded to the trial court to determine whether equitable tolling should apply—even though the plaintiff knew about the problem from the beginning. Here, Ms. Ehrhart had no idea that the County had silently withheld nearly half of the responsive documents, yet her claims were dismissed as a matter of law. If anything, the reasoning of *Belenski* applies perforce to our case. The lack of diligence that gave the Court pause in *Belenski* is simply not present here.

At a minimum, Ms. Ehrhart demonstrated a factual issue.

### C. The Decision Below Is Also Inconsistent With Division II's Own Precedent

In *Francis v. Washington State Dep't of Corr.*, 178 Wn. App. 42, 313 P.3d 457 (2013), bad faith was found when an agency spent 15 minutes searching for records and failed to

search all of its records storage locations. In so holding, the Court emphasized that an agency must have reasonable procedures in place and prove that it complied with them in a reasonable manner. *Id.* at 62.

In our case, the County offered no evidence of compliance by any of the more than a dozen records custodians. It, again, limited its analysis to a single "risk management" employee, who told everybody to do a good job and assumed they did so (when they, undisputedly, did not). This reasoning of course renders *Francis* a nullity; as now an agency can simply point to a records manager—who is perhaps blissfully ignorant and, like Ms. Larsen, uninvolved in the actual searching—while immunizing any degree of wrongdoing by the custodians. Division II's decision below holds that this is a *dispositive* defense to a PRA action.

Suffice to say, this is antithetical to the PRA and poor public policy. The burden should be on government to be honest

and transparent; not on widows like Ms. Ehrhart to sleuth out the wrongdoing, and then prove an evil motive.

*Francis*, if nothing else, holds that the benefit of question goes to the requester, not government. "Absent any countervailing evidence showing justification… shows that the [responding agency] did not act in good faith[.]" *Id*. at 64. The agency should not profit by its failure to explain its own failures. The issue should have been resolved in Ms. Ehrhart's favor; or at a minimum, resolved as a factual issue at trial.

**D. This Is An Issue Of Substantial Public Importance**

In a time of unprecedented distrust of public institutions, including and especially Public Health, allowing them to hide documents and operate in secrecy only exacerbates the divide. Sunlight is the best disinfectant, *Cogan v. Kidder, Mathews & Segner, Inc.*, 97 Wash.2d 658, 663, 648 P.2d 875 (1982) (quoting L. Brandeis, OTHER PEOPLE'S MONEY, ch. 15 (1914)), and that is precisely why the PRA exists. *See Doe ex rel. Roe v. Washington State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63, 66 (2016) ("The

PRA's primary purpose is to foster governmental transparency and accountability by making public records available to Washington's citizens.") (citing *City of Lakewood v. Koenig,* 182 Wash.2d 87, 93, 343 P.3d 335 (2014)). The statute itself directs that it be "liberally construed and its exemptions narrowly construed... to assure that the public interest will be fully protected." RCW 42.56.030. Courts therefore start with a presumption in favor of disclosure, not withholding. *See id.* ("affirmative duty").

There is nothing about a reward system for silent withholding, followed by a proceeding in which the burden of proof to show "bad faith" is on the requester, that tracks these principles. Moreover, people respond to incentives. And the structure created by *Dotson*, in which agencies benefit from silent withholding, will invariably lead good officials act less good; and bad officials to act worse.

This issue is not going away, *see Earl v. City of Tacoma* (Washington Supreme Court No. 101143-1); *Terry Cousins v.*

*State of Washington* (Washington Supreme Court No. 100755-8), because, respectfully, justice is not being done right now. Review should be granted to remedy this and reaffirm the importance of government transparency and openness.

## VI. CONCLUSION

For the reasons above, review should be granted.

RESPECTFULLY SUBMITTED this 28th day of October, 2022.

I certify that this document contains less than 5,000 words in accordance with RAP 18.17.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that, on the date indicated below, a copy of the foregoing document was forwarded for service upon counsel of record in the manner indicated below:

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DATED this 28th day of October, 2022.

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# APPENDIX

| *Pages:* | *Description:* |
|---|---|
| | |
| A1 – A13 | *Ehrhart v. King County*<br>(8/30/22 Unpublished Opinion) |
| A-14 | *Ehrhart v. King County*<br>(9/28/22 Order Denying Motion for Reconsideration) |

Filed
Washington State
Court of Appeals
Division Two

August 30, 2022

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| SANDRA EHRHART, individually and as personal representative of the Estate of Brian Ehrhart,<br><br>Appellant,<br><br>v.<br><br>KING COUNTY, operating through its health department, Public Health – Seattle & King County; SWEDISH HEALTH SERVICES, a non-profit entity; and JUSTIN WARREN REIF, an individual,<br><br>Respondents. | No. 55498-4-II<br><br>UNPUBLISHED OPINION |

PRICE, J. — Sandra Ehrhart appeals the superior court's order granting King County's motion for summary judgment on her Public Records Act (PRA), chapter 42.56 RCW, claim related to a March 2017 PRA records request. Although Ehrhart's claim was filed more than one year after the March 2017 PRA request was closed, she argues that her claim should be permitted under equitable tolling and the discovery rule. Ehrhart has failed to meet her burden to establish equitable tolling applies, and the discovery rule does not apply to PRA claims. Accordingly, we affirm the superior court.

## FACTS

In February 2017, Brian Ehrhart[1] tragically died of hantavirus. *Ehrhart v. King County*, 195 Wn.2d 388, 391, 393, 460 P.3d 612 (2020). In June 2018, Ehrhart sued King County, alleging its negligence in issuing public health advisories regarding hantavirus caused Brian's death. *Id.* at 394.

The parties filed cross motions for summary judgment regarding the public duty doctrine. *Id.* The superior court granted partial summary judgment to Ehrhart. *Id.* at 395-96. King County sought, and was granted, discretionary review from our Supreme Court. *Id.* at 396. On discretionary review, our Supreme Court held that, as a matter of law, the public duty doctrine barred Ehrhart's negligence claim against King County and ordered that Ehrhart's negligence claim be dismissed. *Id.* at 397, 410-11. In October 2018, while discretionary review of her negligence claim was pending, Ehrhart amended her complaint to include a PRA claim.

### I. FACTS REGARDING PRA REQUEST

Ehrhart's attorney made a public records request in March 2017 that serves as a basis for the PRA claim. The request sought the following documents:

> -All records regarding Hantavirus incidents in 2016 or 2017;
>
> -All records in your possession regarding the hazards, dangers, and/or mortality rates of Hantavirus;
>
> -All communications—internal or external—about Hantavirus in 2017;
>
> -All documents reflecting any effort made by King County to make the public aware of Hantavirus in any year other than 2017;

[1] Brian was the spouse of appellant Sandra Ehrhart. *Ehrhart v. King County*, 195 Wn.2d 388, 391, 460 P.3d 612 (2020). Because Brian shared the same last name as Sandra Ehrhart, we will refer to him by his first name for clarity. We intend no disrespect.

> -All policies, practices and/or procedures pertaining to public awareness and notification of a health hazard;
>
> -All documents reflecting or referring to a duty or obligation on the part of the county to advise the public of health hazards;
>
> -All communication with or about Maureen Waterbury and/or her contraction of Hantavirus;
>
> -All communications with or about Brian Ehrhart and/or his contraction of Hantavirus;
>
> -All studies, investigations you've performed, or conclusions rendered this year pertaining to Hantavirus or the county's response thereto;
>
> -All statutory claims for damages filed against King County Public Health, pertaining in any way to its response to a public health hazard; and
>
> -All settlements of any claims against King County Public Health, pertaining in any way to its response to a public health hazard.

Clerk's Papers (CP) at 325-26. Penny Larsen, the senior public records analyst at King County's Office of Risk Management Services, estimated that a response to the records request would be completed in three weeks. Larsen also reproduced the items in the request into a numbered list to facilitate identifying the subparts of the request.

Larsen contacted three individuals in the Communicable Diseases and Epidemiology Department at Public Health — Seattle and King County in order to gather information on identifying appropriate records custodians and search terms. Larsen identified 15 potential custodians of records and identified search terms tailored to each subpart of the request. Larsen "directed the identified custodians to search their emails, network or hard drive files, paper files, notebooks, SharePoint, databases and any other locations where records may exist." CP at 315. Larsen also sent the custodians a guide to responding to PRA requests and instructed the custodians

to be overly-inclusive in their responses. Larsen repeatedly followed up with the custodians and offered to assist them with their searches.

On April 27, Larsen provided the first installment of responsive records. Larsen also informed Ehrhart's attorney that there had been an unexpected delay in searching for records because the staff members of the communicable disease work group were involved in "mission critical investigations." CP at 335. Larsen estimated that additional documents would be provided in three to four weeks. Additional responsive records were provided on May 5 and June 8. On August 7, Larsen mailed the final installment of records and notified Ehrhart's attorney that the records request was now considered closed.

On October 25, Ehrhart's attorney filed another public records request with King County. On October 31, Larsen responded to this request as well. The first installment of responsive records was provided on December 13. On February 14, 2018, Larsen sent a final installment of documents and notified Ehrhart's attorney the request would be closed unless he contacted Larsen within 30 days to clarify or discuss further research for responsive documents.

After filing her negligence claim in June 2018, Ehrhart sought discovery from King County. In response, King County produced thousands of documents. In reviewing these documents, Ehrhart identified 514 documents that appeared to be responsive to and existing at the time of her March 2017 PRA request. As a result, Ehrhart amended her complaint in October 2018 to include claims for PRA violations.

## II. CROSS MOTIONS FOR SUMMARY JUDGMENT

Ehrhart moved for summary judgment and assessment of penalties under the PRA. Ehrhart asserted that King County's responses to discovery in the negligence claim produced over 1,000

documents that were responsive to her public records requests and had not been produced. Ehrhart also alleged she was "tricked" by King County because the responses to the March 2017 PRA request included some documents that were created after her request, leading her to believe that King County was producing all responsive documents created after her request. CP at 55. Specifically, Ehrhart claimed that there were 1,695 documents that were created between the time of her March 2017 PRA request and the time that the request was closed that were "culled" from production and withheld. CP at 55.

Throughout her motion, Ehrhart also repeatedly claimed that withholding of the documents impacted the outcome of her tort claim. Ehrhart specifically referenced "smoking-guns" in the allegedly withheld documents. CP at 48. In her argument regarding penalties, Ehrhart focused heavily on the argument that the county had escaped liability due to allegedly withholding the documents.

King County filed a cross motion for summary judgment. King County argued that Ehrhart's claim related to the March 2017 PRA request was barred by the statute of limitations. King County argued that Ehrhart failed to file the PRA complaint within one year of the date the request was closed—August 7, 2017. King County also argued that the discovery rule did not apply to toll the statute of limitations and that Ehrhart could not meet her burden to establish King County acted in bad faith for the purposes of establishing equitable tolling. And King County argued that it conducted an adequate search for both PRA requests.

King County supported its motion with Larsen's declaration detailing the search for records described above. In her declaration, Larsen also explained she began working on issues related to public records in 2005 and has received extensive training and certification in responding to PRA

requests. As senior public records analyst, Larsen provided training and mentoring to other public records officers and co-wrote the county's guide for responding to PRA requests. At the time of Ehrhart's request, the public records officer for Public Health was on special assignment, so Larsen was contracted by Risk Management to work on the request. Larsen specifically declared:

> At the time I fulfilled both of the requests, I had no knowledge of any intended or future lawsuit by the Ehrhart family against the County. I did not produce or withhold any records in anticipation of any litigation.

CP at 321. Larsen's declaration provided no discussion of, or explanation for, the documents Ehrhart argues were responsive and not disclosed, besides noting that any disclosure of documents that post-dated the request was inadvertent.

In reply, Ehrhart argued that equitable tolling was warranted because of King County's "egregious and deceptive conduct." CP at 441. Ehrhart argued that she "had no idea the County was holding back its smoking gun documents," and, therefore, it would be fundamentally unfair to allow King County to avoid liability based on the statute of limitations. CP at 443. Ehrhart also argued that applying the statute of limitations was inconsistent with the policy underlying the PRA. And Ehrhart asserted that "bad faith is established both by the sheer volume of documents improperly withheld, as well as the damning nature of those documents compared to the ones provided." CP at 445.

The superior court dismissed all claims arising out of the March 2017 PRA request as barred by the statute of limitations. The superior court also ruled that any claims based on documents that post-dated the request were dismissed. Ehrhart filed a motion for reconsideration, and the superior court denied it. Ehrhart then stipulated to dismissal of claims related to the October 2017 PRA request.

Ehrhart appeals the superior court's order granting King County's motion for summary judgment on claims arising out of the March 2017 PRA request.

## ANALYSIS

Ehrhart argues that the superior court erred in dismissing her claims related to the March 2017 PRA request as untimely.[2] We disagree.

### I. STANDARD OF REVIEW

We review summary judgment orders de novo.[3] *Sartin v. Est. of McPike*, 15 Wn. App. 2d 163, 172, 475 P.3d 522 (2020), *review denied*, 196 Wn.2d 1046 (2021). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A genuine issue of material fact exists if reasonable minds could disagree on the conclusion of a factual issue. *Sartin*, 15 Wn. App. 2d at 172. We review all facts and inferences in the light most favorable to the nonmoving party. *Id.*

[2] Ehrhart has abandoned her argument made to the superior court that the more than 1,600 documents created after the March 2017 PRA request were wrongfully withheld. Ehrhart makes no mention of these documents in her briefing and offers no argument or authority related to the superior court's dismissal of these claims. Therefore, we do not consider the superior court's order dismissing the claim related to documents that post-dated the March 2017 PRA request. *See Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290, *review denied*, 136 Wn.2d 1015 (1998) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.").

[3] At times on appeal, Ehrhart frames her argument in terms of whether the superior court abused its discretion in its reasons for granting King County's motion for summary judgment. Because we review summary judgment orders de novo, we do not review the superior court's reasoning for error. *See Chelan County Deputy Sheriff's Ass'n v. Chelan County*, 109 Wn.2d 282, 294 n.6, 745 P.2d 1 (1978) (findings of fact and conclusions of law are superfluous in summary judgment rulings and have no weight on appeal). Instead, we review the record de novo to determine whether Ehrhart has established that her claim was timely under either equitable tolling or the discovery rule.

The moving party "bears the initial burden to show there is no genuine issue of material fact." *Id.* The burden then shifts to the nonmoving party to "present specific facts that reveal a genuine issue of material fact." *Id.* If the nonmoving party fails to put forth sufficient evidence to create a genuine issue of material fact, then summary judgment is appropriate. *Id.*

## II. STATUTE OF LIMITATIONS

"The PRA is a broad public mandate that allows citizens access to public records." *Belenski v. Jefferson County*, 186 Wn.2d 452, 456, 378 P.3d 176 (2016). The PRA provides citizens with a cause of action to challenge violations of the act. *Id.* at 457. However, those actions must be filed within one year:

> 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).

Here, it is undisputed that Ehrhart's PRA claim was filed after the one-year statute of limitations had expired. King County responded to Ehrhart's March 2017 PRA request in installments. The last installment was provided on August 7, 2017. Under RCW 42.56.550(6), Ehrhart had one year—until August 7, 2018—to file a claim based on the March 2017 PRA request. Ehrhart did not file her PRA claim until October 2018, outside the statute of limitations. Therefore, there is no genuine issue of material fact that Ehrhart's claim was untimely under RCW 42.56.550(6).

Although Ehrhart's PRA claim was untimely under RCW 42.56.550(6), she argues that her claim should have been considered timely under the doctrine of equitable tolling or the discovery rule.

A. EQUITABLE TOLLING

RCW 42.56.550(6)'s one year statute of limitations may be subject to equitable tolling. *Belenski*, 186 Wn.2d at 461-62. We will allow equitable tolling when justice requires. *Price v. Gonzalez*, 4 Wn. App. 2d 67, 75, 419 P.3d 858 (2018). A party asserting equitable tolling bears the burden of pleading and proving " 'bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff.' " *Id.* (quoting *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (998)). Washington courts have applied the false assurances prong in narrow circumstances and have appeared to require a showing that the defendant "made a deliberate attempt to mislead." *Id.* at 76. "Courts typically permit equitable tolling to occur only sparingly, and should not extend it to a garden variety claim of excusable neglect." *Id.* We review decisions on whether to grant equitable relief de novo. *Trotzer v. Vig*, 149 Wn. App. 594, 607, 203 P.3d 1056, *review denied*, 166 Wn.2d 1023 (2009).

Here, Ehrhart first relies on *Belenski* to argue that King County's failure to disclose allegedly responsive documents warrants equitable tolling. But *Belenski* is distinguishable. In *Belenski*, the requester requested internet access logs. 186 Wn.2d at 455. Although the agency identified the records, it informed the requester there were no responsive documents because it believed it did not have to disclose documents that were not in a readable format. *Id.* at 455-56. Here, there is no evidence that Larsen knowingly chose not to disclose responsive documents, as there was in *Belenski*. Although, in hindsight, it appears that not all responsive documents were disclosed, there is no evidence in the record that Larsen knew that those documents existed at the time she closed the request. Therefore, the response may have been objectively false, but given there is no evidence Larsen knew it was false nor is there any evidence that Larsen made a

deliberate attempt to mislead; it was not deceptive or dishonest for the purposes of equitable tolling.

Second, Ehrhart supports her claim for equitable tolling by relying on *Francis v. Department of Corrections* to argue that King County's inadequate search is evidence of bad faith. 178 Wn. App. 42, 313 P.3d 457 (2013), *review denied*, 180 Wn.2d 1016 (2014). Like *Belenski*, *Francis* is distinguishable. In *Francis*, a prisoner requested records regarding prison policy. The agency spent only 15 minutes searching for records and apparently failed to search any of 17 records storage locations. *Id.* at 50. The court determined that the agency acted in bad faith because the record "clearly disclose[d] a cursory search and delayed disclosure well short of even a generous reading of what is reasonable under the PRA . . . ." *Id.* at 63. However, the court also recognized that an agency avoids the risk of a bad faith finding by having proper procedures in place and then complying with those procedures in a reasonable manner. *Id.* at 62.

Here, Ehrhart has not shown that King County disregarded its procedures or performed a mere cursory search, as in *Francis*. King County presented ample evidence establishing that King County performed more than a cursory search because King County documented the aspects of Larsen's search, including regular communication with Ehrhart's attorney, identifying multiple potential custodians of records, selecting various search terms, and providing explicit instructions on conducting searches and responding to PRA requests. As a result of the search, Larsen compiled multiple installments of documents in response to Ehrhart's March 2017 PRA request. This effort is a far cry from the cursory search performed in *Francis*. Further, there is no evidence that Larsen disregarded policies or procedures in responding to Ehrhart's March 2017 PRA request. Therefore, *Francis* does not support the conclusion that King County acted with bad faith.

Ultimately, it is Ehrhart's burden to show King County acted in bad faith and Ehrhart has shown nothing more than King County's response failed to include all responsive records. The failure to identify and produce all responsive documents under these facts is not proof of bad faith.[4]

Ehrhart failed to establish that King County responded to her March 2017 PRA request in bad faith or engaged in deception or false assurance in a deliberate attempt to mislead. Therefore, the superior court correctly ruled that the timeliness of Ehrhart's claims related to the March 2017 PRA request was not saved by operation of equitable tolling.

B. DISCOVERY RULE

" 'Under the discovery rule, a cause of action accrues when the plaintiff knew or should have known the essential elements of the cause of action.' " *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 472, 464 P.3d 563 (quoting *Allen v. State*, 118 Wn.2d 753, 757-58, 826 P.2d 200 (1992)), *review denied*, 196 Wn.2d 1018 (2020). In *Dotson*, we held that the discovery rule does not apply to PRA cases because the PRA's statute of limitations contains a clear triggering event for the statute of limitations:

> The discovery rule generally applies in cases where "the statute does not specify a time at which the cause of action accrues." *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991). However, the PRA statute of limitations contains triggering events that enable a requester to know that a cause of action has accrued, and the legislature enacted no discovery rule exception. And Dotson cites no authority for applying the discovery rule to PRA actions that, as interpreted in *Belenski*, arise under a statute that specifies the statute of limitations

[4] Ehrhart appears to argue that the amount of documents that were not disclosed proves that King County's search was inadequate and, therefore, King County acted in bad faith. However, more than an inadequate search must be required to establish equitable tolling. *See Price*, 4 Wn. App. 2d at 76 ("Courts typically permit equitable tolling to occur only sparingly, and should not extend it to a garden variety claim of excusable neglect."). Accordingly, we address only whether Ehrhart met her burden to demonstrate that King County conducted the search in bad faith, not whether the search was adequate.

> begins to run at the time of the agency's "final, definitive response." 186 Wn.2d at 461.

*Dotson*, 13 Wn. App. 2d at 472 (footnote omitted).

Ehrhart argues that we should reject *Dotson* in this case because it is unfair to allow the statute of limitations to run when she did not know she had a claim against King County. We recognize that refusing to apply the discovery rule to PRA claims may preclude some claims when the requester does not know the precise details of a cause of action until later. However, after years of a longer statute of limitations for PRA claims, the legislature determined that allowing a one-year period to sue following the closing of a request strikes an appropriate balance between ensuring compliance with the PRA through access to penalties and limiting the amount of PRA litigation. *See Francis*, 178 Wn. App. at 62; *see also* LAWS OF 1973, ch. 1 § 41 (original initiative establishing six year statute of limitations); LAWS OF 2005, ch. 483 § 5 (establishing current one year statute of limitations). The application of the discovery rule here would erode this legislative decision. Moreover, in the egregious case, when a plaintiff can actually make a showing of bad faith, the cause of action may still be pursued under the doctrine of equitable tolling.

We decline to reject *Dotson*. Therefore, we decline to apply the discovery rule to Ehrhart's PRA claim and, accordingly, Ehrhart's claims related to the March 2017 request were untimely. The superior court did not err in granting King County's motion for summary judgment on Ehrhart's March 2017 PRA request.[5] We affirm.

[5] Ehrhart also argues that the superior court abused its discretion by denying her motion to reconsider. However, because the superior court properly granted King County's motion for summary judgment, it could not have abused its discretion in denying Ehrhart's motion for reconsideration.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

PRICE, J.

We concur:

MAXA, P.J.

LEE, J.

Filed
Washington State
Court of Appeals
Division Two

September 28, 2022

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| SANDRA EHRHART, individually and as personal representative of the Estate of Brian Ehrhart,<br><br>Appellant,<br><br>v.<br><br>KING COUNTY, operating through its health department, Public Health – Seattle & King County; SWEDISH HEALTH SERVICES, a non-profit entity; and JUSTIN WARREN REIF, an individual,<br><br>Respondents. | No. 55498-4-II<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

Appellant moves for reconsideration of the opinion filed August 30, 2022, in the above entitled matter. Upon consideration, the Court denies the motion. Accordingly, it is

**SO ORDERED.**

**PANEL:** Jj: MAXA, LEE, PRICE

**FOR THE COURT:**

PRICE, J.

**WILLIAMS KASTNER**

**October 28, 2022 - 4:03 PM**

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| **Appellate Court Case Title:** | Sandra Ehrhart, Appellant v. King County, Respondent (554984) |

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