NO. 101769-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TERRY COUSINS, as personal representative of the ESTATE OF RENEE FIELD, deceased,

Petitioner,

v.

STATE OF WASHINGTON and DEPARTMENT OF CORRECTIONS,
Respondent.

AMICUS CURIAE MEMORANDUM BY WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

Munia F. Jabbar, WSBA #48693
FRANK FREED SUBIT & THOMAS LLP
705 Second Ave. Suite 1200
Seattle, WA 98104-1798
Telephone: (206) 682-6711
Facsimile: (206) 682-0401
mjabbar@frankfreed.com

Jeffrey L. Needle, WSBA #6346
LAW OFFICES OF JEFFREY NEEDLE
705 Second Ave. Suite 1050
Seattle, WA 98104-1798
Telephone: (206) 447-1560
Facsimile: (206) 447-1523
jneedle@jneedlelaw.com

Attorneys for Washington Employment Lawyers Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

WASHINGTON STATUTES

COURT RULES

I. INTRODUCTION AND INTEREST OF AMICUS

The Washington Employment Lawyers Association ("WELA") has approximately 210 members who are admitted to practice law in the State of Washington. WELA advocates in favor of employee rights in recognition that employment with fairness and dignity is fundamental to the quality of life. WELA has appeared in numerous cases before this Court involving employee rights and is a chapter of the National Employment Lawyers Association.

Public employers in the State of Washington employ hundreds of thousands of employees and include all agencies of the State of Washington, counties, municipalities, school districts, public power districts, and fire and police, among others. WELA members routinely advise and represent public employees and former public employees who seek information about their employment under the Public Records Act ("PRA"), RCW 42.56 *et seq*.

This case presents an issue about when the PRA statute of limitations should begin to run. The Court of Appeals ruled in *Cousins v. Washington State DOC*, No. 56996-5-II (2023) that the one-year statute of limitations begins to run from the date of the agency's formal closure letter, even if additional documents are discovered and produced years later. This decision is inconsistent with the statutory mandate for a liberal construction and that agencies "provide for the fullest assistance to inquirers and the most timely possible action on requests for information." RCW 42.56.100. The lower court's ruling allows an agency to avoid accountability despite its inaction or lack of diligence in providing a prompt response to a records request.

WELA argues that the Court should grant the Petition for Review.

//

//

II. SUMMARY OF ARGUMENT

The Washington Public Records Act recognizes that the people of the state of Washington have a right to remain informed so that they can maintain control over the instruments of governments which they have created. RCW 42.56.030. "Courts shall take into account the policy of (the act) that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3). "Courts must avoid interpreting the PRA in a way that would tend to frustrate that purpose." *Worthington v. Westnet*, 182 Wn.2d 500, 507, 341 P.3d 995 (2015). The PRA requires a liberal construction and that exemptions be narrowly construed. RCW 42.56.030.

In *Belenski v. Jefferson County*, 186 Wn.2d 452, 378 P.3d 176 (2016), the Court ruled that an agency response to a PRA request that it "has no responsive records" is sufficient to start the statute of limitations "[r]egardless of whether this answer was

truthful or correct." *Id.* at 461. "The county's definitive, final response . . . was sufficient to put him on notice that the County did not intend to disclose records or further address this request." *Id.* But the Court in *Belenski* did not address a case where an agency insisted that it had no additional responsive documents and then produced additional documents for years thereafter.

When the agency produces additional responsive records after a "definitive, final response" it necessarily supersedes the formal closure and those records constitute a "last production of a record on a partial or installment basis" within the meaning of RCW 42.56.550(6), and a new start of the statute of limitations. Only in that way can the Court give effect to all words contained in the statute. *See Judd v. American Tel. and Tel., Co.*, 152 Wn.2d 195, 95 P. 3d 337 (2004) ("all words in a statute should be given effect").

The Court of Appeals in *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 464 P.3d 563 (2020) rejected this interpretation of *Belenski. Id.* at 471. Relying on *Dotson,* the Court in *Cousins*

instead adopted a so-called "bright line" that the one-year statute of limitations begins to run when an agency closes a PRA request, regardless of whether the agency has conducted a diligent search, regardless of whether additional documents are produced more than one year after the agency has closed the request, and regardless of whether an agency has closed the request and later reopened it upon the discovery of additional documents. Slip opinion at 10. This extreme application of the bright line rule is not compelled by *Belenski* and fails to give effect to all words in the statute. Moreover, the bright line rule adopted in *Cousins* is in conflict with *Cantu v. Yakima School District*, 23 Wn. App. 2d. 57, 514 P.3d 661 (2022), which holds that an unreasonable delay in the production of records can be a constructive denial and a violation of the PRA.

The decision of the Court of Appeals is in conflict with a published decision of the Washington Supreme Court, there exists a significant question of Washington law, and the Petition for Review presents an issue of substantial public interest that

should be determined by the Supreme Court. RAP 13.4(b)(2)(3)(4). The Petition for Review should be Granted.

III. ARGUMENT

A. *Belenski v. Jefferson County* Does Not Apply Where an Agency Produces Additional Documents After the Formal Closure of a PRA Request.

RCW 42.56.550(6) provides that: "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." In *Belenski v. Jefferson County*, 186 Wn.2d 452, 378 P.3d 176 (2016), the Supreme Court ruled that these events were not the exclusive method to start the statute of limitations. This language "indicates that the legislature intended to impose a one year statute of limitations beginning on an agency's final, definitive response to a public records request." *Id.*, at 460. An agency response that it "has no responsive records" is sufficient to start the statute of limitations "[r]egardless of whether this answer was truthful or correct." *Id.* at 461. "The county's definitive, final response to Belenski's PRA

request was sufficient to put him on notice that the County did not intend to disclose records or further address this request." *Id.* After this definitive response, the agency did not disclose additional records or further address the request.

The Court's decision in *Belenski* is limited to its facts and did not supersede the agency's "last production of a record" as one way to start the statute of limitations. *See* RCW 42.56.550(6). The Court in *Belenski*, however, did not contemplate the circumstance when the agency continues to produce records years after formally closing the PRA request. The ruling in *Belenski* only applies where an agency closes the PRA request without further response or the production of additional records. When an agency does produce additional documents after the formal closure it necessarily revokes its intention not "to disclose records or further address this request." *Id.* at 461. An agency's production of additional documents after closing the PRA request supersedes the formal closure and

constitutes a "last production of a record on a partial or installment basis" within the meaning of RCW 42.56.550(6).

Cousins relies on *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 464 P.3d 563 (2020), which misreads *Belenski*. Dotson submitted a PRA request for all records regarding Dotson's property. 13 Wn. App. 2d at 459. After producing the requested records, the agency sent a letter to Dotson in June 2016, formally closing the request. *Id.* at 461. Unlike *Belenski*, the agency in *Dotson* subsequently discovered records responsive to Dotson's PRA request on three occasions and sent them to Dotson upon each discovery. *Id.* at 462-64.

The Court in *Dotson* rejected the idea that the formal closure started the statute of limitations only where no additional records were produced. *Id.* at 471. Relying on *Belenski*, the Court held that the PRA statute of limitations "begins to run on an agency's definitive, final response to a PRA request," regardless of the subsequent production of additional documents. *Id.* *Dotson*'s erroneous reading of *Belenski* failed to give effect to

the PRA statutory language providing that the statute of limitations begins to run upon "the last production of a record." RCW 42.56.550(6). *See Judd v. American Tel. and Tel., Co.*, 152 Wn.2d 195, 203, 95 P. 3d 337 (2004) ("all words in a statute should be given effect"); *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.,* 128 Wn.2d 745, 762, 912 P.2d 472 (1996) (recognizing "the imperative to construe statutes so as to give effect to all words, clauses and sentences of the Legislature's handiwork"). Therefore, even after issuance of a closure letter, so long as the agency continues to produce records, the statute of limitations does not expire until one year after the "last production of a record on a partial or installment basis." RCW 42.56.550(6). This is only the interpretation that gives effect to all words in the statute. The statute of limitations starts to run after the agency's formal closure of the PRA request *or* after every new production of documents, whichever happens last.

Dotson is distinguishable from *Belenski* because the agency in *Dotson* continued to produce documents after closing

the request. Each additional production of documents should have superseded the agency's formal closing because it constituted a "last production of a record on a partial or installment basis" within the meaning of RCW 42.56.550(6), and a new start of the statute of limitations. The Court in *Cousins* relied upon and compounded *Dotson*'s misreading of *Belenski.*

The Court in *Dotson* does not pretend to address a case where the agency reopens the PRA request, which is what happened in *Cousins*. Slip opinion at 5. However, "an agency's labelling should not dispositive . . . ." *See* Glasgow, J., dissenting, slip opinion at *Id.* at 17. Rather, five factors should apply to determine when a PRA response is final for the purpose of applying the statute of limitations. *Id. See also Cantu v. Yakima School District*, 23 Wn. App. 2d. 57, 89, 514 P.3d 661 (2022) ("We consider the totality of circumstances to determine if the [agency] was providing 'the fullest assistance to inquirers and the most timely possible action on requests for information"). The Court should adopt a consistent test to determine both the start of

the statute of limitations and an unreasonable delay to produce documents.

Finally, *Dotson* and *Cousins* fail to heed *Belenski*'s caution to avoid "absurd results" in PRA interpretation. *See Belenski*, 186 Wn.2d at 460-461. More than two years after the closing letter, the agency in *Cousins* produced over 1,000 pages over several installments. Slip opinion at 1-2. Barring Cousins' claim based on the premature closing letter leads to a quintessentially "absurd result."

B. An Unreasonable Delay in Producing Records Constitutes a Constructive Denial to Produce Records and a Violation of the PRA.

In *Cantu v. Yakima School District*, 23 Wn. App. 2d. 57, 514 P.3d 661 (2022), the Court held that an unreasonable delay in producing responsive records can itself be a PRA violation. The practical effect of *Cousins* is to time-bar some plaintiffs' unreasonable delay PRA claims before they even ripen.

In *Cantu* the Plaintiff filed several PRA requests with the Yakima School District. The first PRA request was filed on

October 27, 2016. In February 2017, the District sent Cantu documents containing headers with the misunderstanding that she would identify the emails desired based upon the headers. Because she did not respond for 10 months, the District falsely assumed that the request was satisfied. *Id.* at 67-70.

On April 5, 2018, Cantu submitted an additional PRA request. The District estimated it could respond by July 16 but failed to meet this deadline. *Id.* at 71-73. On September 13, 2018, the District emailed Cantu a web link to an empty directory. *Id.* The request was never formally closed.

On September 24, 2018, Cantu filed suit against the District, claiming that her April 5 records request had been effectively denied. *Id*. The Superior Court dismissed the claim on the grounds that it had not been completely ignored, and that any violation was cured by the eventual production of records. *Id*. at 87.

The Court of Appeals reversed. It held that "an agency's inaction, or lack of diligence in providing a prompt response can

ripen into a constructive denial for purposes of fees, costs, and penalties under the PRA." It also concluded that whether an agency was reasonably diligent in responding to a records request was a factual issue. *Id.* at 88.

The PRA requires an adequate search that is reasonably calculated to uncover all relevant records. RCW 42.56.520. What is reasonable depends on the facts and circumstances of each case. *Cantu*, 23 Wn. App. 2d. at 83. Whether there has been a diligent search for records must "tak[e] into account prior requests by the plaintiff and communication between the requester and the agency. . . . We consider the totality of circumstances to determine if the [agency] was providing 'the fullest assistance to inquirers and the most timely possible action on requests for information.'" *Id.* at 89 (quoting RCW 42.56.100).

Here, the original records request was made on July 21, 2016. Two installments were produced over the following 10 months. Plaintiff then notified DOC that numerous documents

had not been produced, and DOC produced four more installments between July 26, 2017 and September 20, 2018. *See* Amended Petition for Review, at 5-6. Cousins received a seventh installment on January 17, 2019 with a letter stating that the request had been closed. *Id.* at 7. Numerous correspondence between Cousins and different PRA specialists followed in an attempt to obtain responsive records. *Id.* at 7-10. Finally, on July 15, 2020, a DOC specialist notified Cousins that her request had been reopened. *Id.* at 11. From July 2020 until August 2021, the DOC sent Cousins approximately 1,000 additional pages in several installments. *Id.* at 12.

There is compelling evidence that Ms. Cousins' PRA request was ignored for years. Without justification the agency failed to produce all responsive records for more than five years after the original request, approximately 31 months after the request was formally closed, and more than 17 months after the statute of limitations had expired. This delay constitutes a constructive denial of records and violation of the statute. *Id.* at

88-95. At a minimum, there exists a question of fact about whether the circumstances of this case reflect a lack of diligence by the DOC. *Id.* at 94.

The ruling in *Cousins* allows an agency to avoid accountability for this violation of the PRA because the statute of limitations starts from the premature closing of a PRA request despite the production of additional records for years thereafter. This ruling is not compelled by *Belenski* and is inconsistent with the PRA's purpose which "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." *Burt v. Wash. State Dept. of Corrections,* 168 Wn.2d 828, 832, 231 P.3d 191 (2010).

IV. CONCLUSION

The Petition for Review should be GRANTED.

//

Dated this 11th day of May, 2023.

In compliance with RAP 18.17(b) this document contains 2488 words.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

By /s/ Jeffrey Needle
Jeffrey Needle, WSBA #6346
Munia Jabbar, WSBA #48693

LAW OFFICES OF JEFFREY NEEDLE

May 11, 2023 - 11:58 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,769-3
Appellate Court Case Title:	Terry Cousins v. State of WA and Department of Corrections
Superior Court Case Number:	21-2-00050-2

The following documents have been uploaded:

- 1017693_Motion_20230511115542SC641935_8312.pdf
  This File Contains:
  Motion 1 - Other
  The Original File Name was Motion for Leave.pdf
- 1017693_Other_20230511115542SC641935_0422.pdf
  This File Contains:
  Other - Amicus Curiae Memorandum
  The Original File Name was WELA Cousins ACM - Final.pdf

A copy of the uploaded files will be sent to:

- Tim.Feulner@atg.wa.gov
- TrishW@mhb.com
- correader@atg.wa.gov
- jneedle@jneedlelaw.com
- joe@mhb.com

Comments:

1. Motion for Leave to File Amicus Curiae Memorandum by WELA 2. Amicus Curiae Memorandum by WELA

Sender Name: Lonnie Lopez - Email: lrlopez.paralegal@gmail.com
Filing on Behalf of: Jeffrey Lowell Needle - Email: jneedle@jneedlelaw.com (Alternate Email:)

Address:
705 Second Avenue, Suite 1050
Seattle, WA, 98104
Phone: (206) 447-1560

Note: The Filing Id is 20230511115542SC641935