NO. 90943-1

SUPREME COURT OF THE STATE OF WASHINGTON

John Andrews,

Petitioner,

v.

Washington State Patrol,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

John Andrews requested recordings of potentially confidential attorney client privileged phone calls from the Washington State Patrol (Patrol). The Patrol diligently and promptly responded to the request while instituting extraordinary measures to ensure that its staff did not inadvertently hear portions of the privileged recordings. Mr. Andrews does not dispute that the Patrol produced the records within a reasonable amount of time. Rather, he complains that the Patrol missed its own self-imposed deadline for producing records, and he filed a public records lawsuit two days after a deadline was missed.

The superior court and Court of Appeals properly rejected Mr. Andrews' claim because an agency does not automatically violate the Public Records Act (PRA), chapter 42.56 RCW, simply by missing a self-imposed deadline. Rather, the Court of Appeals properly looked at all of the facts and determined that the Patrol did not violate the Act because the Patrol diligently responded to Mr. Andrews' request. Contrary to Mr. Andrews' argument, this conclusion does not conflict with precedents from this Court or the Court of Appeals. Consequently, discretionary review is unwarranted, and Mr. Andrews' petition should be denied.

II. ISSUE PRESENTED FOR REVIEW

This Court should deny review because the decision below does not meet any of the RAP 13.4(b) criteria. However, if the Court were to accept review, the following issue would be presented: When the PRA does not expressly state that an agency violates the Act by missing a self-imposed deadline for producing records, did the Court of Appeals properly conclude that, under all of the circumstances, the Patrol's failure to meet a self-imposed deadline did not violate the Act?

III. COUNTER STATEMENT OF THE CASE

A. Recorded Interpreter Phone Calls.

When a suspect is arrested for Driving Under the Influence (DUI), a Patrol officer may transport the suspect to the District 1 headquarters located in Tacoma, Washington. CP at 67. District 1's headquarters has a room with a breathalyzer machine referred to as the BAC (Breath Alcohol Content) room. CP at 67. Before a suspect provides a breath sample, an officer must read the Implied Consent Warnings. CP at 67. If the suspect is under arrest, the officer must provide *Miranda* warnings to the suspect. CP at 67.

When a suspect requires language interpretation assistance to understand the Implied Consent or *Miranda* warnings, a Patrol officer should arrange for an interpreter to read the warnings to the suspect.

CP at 67. District 1's BAC room has a phone line that directly connects to the Language Line. CP at 67. The Language Line is a service that provides an interpreter to translate the officer's statements to the suspect. CP at 67. The BAC room's direct line to the Language Line is digitally recorded to a hard drive. CP at 68. The reason the Patrol records this line is to preserve the interpreter's translation of the Implied Consent or *Miranda* warnings. CP at 68.[1]

When a suspect requests to speak with an attorney, Patrol officers should honor that request. CP at 68. Patrol officers assigned to District 1 generally call the Pierce County Department of Assigned Counsel for an attorney. CP at 68. The District 1 BAC room has a phone line that is not recorded. CP at 68. When a suspect in the BAC room requests an attorney, the Patrol officer uses the non-recorded phone line to contact a defense attorney. CP at 68. After the officer reaches an attorney, the officer gives the phone to the suspect and then leaves the room. CP at 68.

In situations where the suspect requires an interpreter, Patrol officers will call a defense attorney on the non-recorded line in the BAC room. CP at 68. The officer then places the attorney on speaker phone and the Language Line interpreter on speaker phone. CP at 68. At this

[1] In general, the Language Line interpreter does not reside in Washington. CP at 68. Consequently, in a subsequent court proceeding, the interpreter may be unavailable to testify that he or she translated the Implied Consent or *Miranda* warnings to the suspect. CP at 68.

point, the officer leaves the BAC room to allow the suspect to speak with the attorney with the aid of the interpreter. CP at 68. Since the phone line to the Language Line is recorded, this line may have recorded conversations between a suspect, Language Line interpreter, and the attorney. CP at 68.

An officer may also contact the Patrol's communications dispatch for a Language Line interpreter. CP at 68. Calls between an interpreter and a suspect for Implied Consent Warnings are generally recorded by dispatch. CP at 32. When connecting a suspect to an interpreter and an attorney, the dispatcher should place the call on hold. CP at 32. By placing the call on hold, the suspect is able to communicate with the attorney and interpreter, but the call is not recorded by Patrol dispatch. CP at 32. If the dispatcher did not place the call on hold, it is possible that dispatch may have recorded a conversation between an attorney, suspect, and interpreter. CP at 32.

B. Mr. Andrews' Public Records Request For Recorded Phone Calls Between DUI Suspects And Their Attorneys.

In March 2012, Mr. Andrews submitted a public records request to the Patrol asking for, among other things, recordings of phone calls between arrested individuals and their attorneys. CP at 6. The Patrol timely acknowledged Mr. Andrews' request within five business days and

estimated twenty days to produce responsive records. CP at 7. The Patrol's public records officer, Gretchen Dolan, subsequently sent Mr. Andrews an email that extended the estimated response period for another twenty days to May 1, 2012. CP at 8. During this period, Mr. Andrews left messages with Ms. Dolan about the delay. CP at 101. Ms. Dolan did not return his phone calls. CP at 101.

Due to an administrative oversight, Ms. Dolan did not send another extension letter to Mr. Andrews on May 1, 2012. CP at 34. This oversight was not intended to deny Mr. Andrews' public records request. CP at 34. Rather, the oversight was due to the current volume of pending public records requests and subpoenas duces tecum. CP at 34. Specifically, the Patrol had received over one thousand records requests since March 15, 2012. CP at 34.

At the same time, in order to identify the digital recordings that potentially contained attorney-client privileged conversations, without listening to the recordings, Patrol personnel gathered Language Line billing records, officers' reports, and digital recordings from the phone line that recorded the call. CP at 31. Ms. Dolan then reviewed the reports, which corresponded to the digital recordings from the District 1 headquarters' direct line to the Language Line, to determine whether the officer noted that the suspect was connected with an attorney. CP at 31.

Specifically, Ms. Dolan reviewed the Language Line billing records. CP at 198. Then, she reviewed the reports that corresponded to the Language Line billing records to determine whether the reports referenced an officer connecting the suspect to an attorney. CP at 199. At the same time, Patrol personnel were simultaneously working to respond to an additional 1,882 subpoenas duces tecum and public records requests that had come in the door. CP at 34.

C. Procedural History.

On May 3, 2012, two days after the Patrol missed its self-imposed deadline to produce records, Mr. Andrews filed this lawsuit and scheduled a show cause hearing for May 11, 2012. CP at 3, 11. On May 9, 2012, the Patrol filed a response to the show cause hearing. CP at 13. In the Patrol's response, the agency estimated that responsive records would be produced to Mr. Andrews by May 31, 2012. CP at 23. On May 25, 2012, the Patrol mailed the responsive records to Mr. Andrews. CP at 85. The Patrol also provided a detailed privilege log that identified the date and time of the potentially privileged recordings, the officer's name, and the suspect's name. CP at 85, 90.

In his lawsuit, Mr. Andrews' claim was premised on the fact that the Patrol failed to respond by its self-imposed deadlines. CP at 103-10. The superior court rejected Mr. Andrew's claim and granted summary

judgment to the Patrol. CP at 205-06. The Court of Appeals affirmed. Mr. Andrews now seeks discretionary review.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. Standard For Accepting Review.

The purpose of discretionary review is to provide guidance regarding issues of broader import than just a specific, fact-bound controversy between parties. This is amply demonstrated by the criteria governing discretionary review. A petition is accepted only when an issue of such broader import is presented: a conflict between the Court of Appeals decision and a decision of this Court, a conflict within the Court of Appeals, a significant constitutional question, or a question of significant public interest. RAP 13.4(b).

Mr. Andrews argues that the Court of Appeals' flexible approach for determining whether an agency timely produced public records is in conflict with this Court's decisions and other Court of Appeals decisions. He is mistaken.

Where agencies have failed to perform actions expressly required by the PRA, courts have concluded that the PRA was violated. In contrast, when the PRA is silent on an agency's obligation, courts have consistently applied a flexible reasonableness standard to determine whether an agency has complied with the PRA. Importantly, this Court

has disavowed reading additional language into the PRA to exact additional remedies from agencies - such as rejecting the contention that the failure to provide a brief explanation merits a free-standing daily penalty. Accordingly, the Court of Appeals decision is consistent with precedent and this Court should deny review.

B. The Court Of Appeals Properly Concluded That A Fact-Driven Reasonableness Standard Should Determine Whether the Patrol Timely Produced Records.

1. Courts apply a reasonableness standard where the PRA is silent.

The Court of Appeals' decision is consistent with this Court's previous decisions that apply a reasonableness standard where the PRA does not expressly obligate an agency to perform a particular action. "In construing the PRA, [this Court] look[s] at the [PRA] in its entirety in order to enforce the law's overall purpose." *Rental Hous. Ass'n v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009) (citation omitted). "If the statute's meaning is plain on its face, then courts must give effect to its plain meaning as an expression of what the Legislature intended." *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 437, 98 P.3d 463 (2004) (citation omitted) (internal quotation marks omitted). This Court "will not add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *Id.* (citation omitted)

(internal quotation marks omitted). The Court of Appeals' decision below is consistent with the plain language of the PRA and this Court's precedent.

The PRA expressly requires an agency to: (1) acknowledge a request within five business days; (2) redact any exempt information from a record; (3) identify any records withheld from disclosure; and (4) briefly explain how the statutory exemptions apply to the withheld record. RCW 42.56.520; RCW 42.56.210(1); RCW 42.56.210(3). An agency that does not meet one of these obligations has violated the PRA.

Additionally, RCW 42.56.550 provides a cause of action when:

> (2) Upon the motion of any person who believes that an agency has not made a *reasonable estimate of the time that the agency requires to respond to a public records request*, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable.
>
> . . . .
>
> (4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or *the right to receive a response to a public record request within a reasonable amount of time* shall be awarded all costs, including reasonable attorney fees . . .

(emphasis added). "The operative word is reasonable." *Forbes v. City of Goldbar*, 171 Wn. App. 857, 864, 288 P.3d 384 (2012) (internal quotation marks omitted).

In his petition for review, Mr. Andrews does not argue that the Patrol took an unreasonably long time to respond to his request nor does he argue that the Patrol violated one of the express PRA requirements. Instead, he argues that the Patrol automatically violated the PRA because it did not produce records by its own self-imposed deadline. The Court of Appeals properly rejected Mr. Andrews' per se violation approach and instead considered all of the facts to determine whether the Patrol's response time was reasonable and whether the Patrol offered its fullest assistance to the requestor. In doing so, the court properly concluded that courts should take a flexible approach to determine if an agency's failure to comply with a self-imposed deadline denies the requestor access to a record. "The PRA contains no provision requiring an agency to strictly comply with its estimated production dates." *Andrews v. Wash. State Patrol*, ___ Wn. App. ___, 334 P.3d 94, 97 (2014). "In fact, the statute gives an agency additional time to respond to a request based upon the need to locate and assemble the information requested." *Id.* (*citing* RCW 42.56.520) (internal quotation marks omitted).

In reaching its conclusion, the Court of Appeals relied on the reasoning in *Ockerman v. King Cnty. Dep't of Dev. and Envtl. Serv.*, 102 Wn. App. 212, 6 P.3d 1214 (2000). *Ockerman* held that, since the PRA does not require an agency to explain its estimated production date, an

agency is not required to do so. *Id.* "Similarly here, the legislature did not include a provision requiring an agency to disclose records within its initial estimated response date." *Andrews*, 334 P.3d at 98. The Court of Appeals also noted that "RCW 42.56.520 does not limit the number of extensions an agency may require to respond to a request." *Id.* "The statute simply requires an agency to provide a reasonable estimate, not a precise or exact estimate, recognizing that agencies may need more time than initially anticipated to locate the requested records." *Id.* (*citing* RCW 42.56.520) (internal quotation marks omitted). This logic and holding is consistent with this Court's precedent applying reasonableness standards where the PRA is silent. Accordingly, this Court should deny discretionary review.

2. The Court of Appeals' decision is consistent with this Court's precedent.

Mr. Andrews cites three cases to argue that the Court of Appeals' decision is contrary to this Court's prior decisions. *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010); *Neighborhood Alliance of Spokane Cnty v. Cnty of Spokane*, 172 Wn.2d 702, 261 P.3d 119 (2011); *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 259 P.3d 190 (2011). But these cases do not support Mr. Andrews' argument that the PRA is automatically violated whenever an agency misses a self-

imposed deadline. To the contrary, where the PRA is silent on how a court should apply the statute, this Court has adopted a fact-based reasonableness analysis.

In *Neighborhood Alliance*, this Court noted that "[t]he PRA is silent about what constitutes an adequate search . . ." *Neighborhood Alliance*, 172 Wn.2d at 719. In response to this legislative silence, this Court adopted a reasonableness standard to evaluate the adequacy of an agency's search for responsive records. "The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents." *Id.* at 720 (citation omitted). "What will be considered reasonable will depend on the facts of each case." *Id.* (citation omitted). "This is not to say, of course, that an agency must search *every* possible place a record may conceivably be stored, but only those places where it is *reasonably likely* to be found." *Id.* (emphasis in original). Tellingly, this Court declined to find that an agency's failure to conduct an adequate search merits a free-standing penalty. *Id.* at 724-25.

This Court reached a similar result in *Sanders*. *Sanders* involved RCW 42.56.210(3) which specifically directs agencies to provide a brief explanation of how a statutory explanation applies to a withheld record. Applying the statute's plain language, this Court found "a fair middle

ground under the PRA: the agency's failure to provide a brief explanation should be considered when awarding costs, fees, and penalties . . ." *Sanders*, 169 Wn.2d at 848. At the same time, this Court declined to hold that the failure to provide a brief explanation merits a free-standing penalty because RCW 42.56.550 does not authorize such an award. *Id.* at 860-61.

In *Bainbridge Island Police Guild*, also cited by Mr. Andrews, this Court relied on express language in former RCW 42.56.230(2) to conclude that only information that is highly offensive and lacks a legitimate public interest is exempt from disclosure. 172 Wn.2d at 416-18. This Court also applied the plain language of RCW 42.56.550(4) to find that a requestor is a prevailing party when an agency fails to disclose a responsive record regardless of whether the requestor already had a copy of the record. *Neighborhood Alliance*, 172 Wn.2d at 726-27.

In short, this Court follows the PRA's plain language. When the PRA directs an agency to perform a specific action in response to a request, the agency's failure to do so violates the statute. But, where the PRA is silent on how an agency should process a request, this Court applies a reasonableness approach. The Court of Appeals properly applied this approach to evaluate whether the Patrol violated the requestor's right to a response when the Patrol missed its own self-imposed deadline.

As such, the Court of Appeals' decision does not conflict with this Court's precedent and discretionary review should be denied.

3. The Court of Appeals' decision is consistent with its previous decisions.

The Court of Appeals decision also does not contradict its previous PRA decisions. Where the PRA is silent on the specific contours of an agency's responsibilities, the Court of Appeals likewise applies a reasonableness standard. For example, the PRA is silent on whether an agency must produce records electronically to fully assist a requestor. The Court of Appeals approached this issue by directing the trial court to evaluate "whether it is reasonable and feasible for the [agency] to do so." *Mechling v. City of Monroe*, 152 Wn. App. 830, 850, 222 P.3d 808 (2009); *see also Mitchell v. Wash. State Dep't of Corr.*, 164 Wn. App 597, 607, 277 P.3d 670 (2011). Likewise, Division Two recently applied the reasoning in the present case to find that the State Auditor's office did not violate the PRA when it diligently worked to respond to a public records request and voluntarily cured each of the requestor's alleged violations before the request had been closed. *Hobbs v. State*, ___ Wn. App. ___, 335 P.3d 1004, 1010-12 (2014).

Like this Court, when the PRA requires a specific agency action, the Court of Appeals has found that an agency's failure to do so violates

the PRA. *Mitchell,* 164 Wn. App. at 604-5 (agency's failure to provide a brief explanation of redactions violated RCW 42.56.230(1)'s plain language); *Gronquist v. Wash. State Dep't of Corr.*, 175 Wn. App. 729, 746, 309 P.3d 538 (2013) (agency's failure to provide an initial response within five business days violated RCW 42.56.520's plain language). These cases do not stand for the proposition that a court must strictly construe the PRA against an agency by creating a new cause of action based on an agency's failure to meet a self-imposed deadline. Rather, they follow the axiomatic rule that courts interpret a statute by its plain language.

Accordingly, the Court of Appeals' reasonableness standard to determine whether an agency provided the fullest assistance is consistent with its previous decisions. The PRA requires an agency to provide an initial response within five days and to produce records within a reasonable amount of time. The PRA also anticipates that an agency may need to extend an estimated response date. RCW 42.56.520; WAC 44-14-04003(6) ("Extended estimates are appropriate when the circumstances have changed."). The PRA does not state that an agency violates the PRA if it misses its own self-imposed deadline. The Court of Appeals reasonably looked at all of the facts in determining that no violation had occurred in this case. The Court of Appeals' flexible

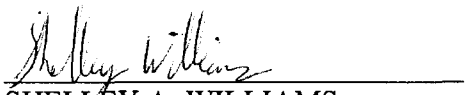
approach is consistent with precedent and the PRA's language. Consequently, discretionary review is unnecessary.

V. CONCLUSION

For these reasons, the Patrol respectfully requests this Court to deny discretionary review.

RESPECTFULLY SUBMITTED this 11th day of November, 2014.

ROBERT W. FERGUSON
Attorney General



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NO. 90943-1

WASHINGTON STATE SUPREME COURT

John Andrews, Petitioner, Washington State Patrol, Respondent.	DECLARATION OF SERVICE

I, Toni Kemp, declare as follows:

On November 12, 2014, I sent via electronic mail a true and correct copy of State's Answer To Petition for Review and Declaration of Service addressed as follows:

JOHN ANDREWS
jandrews@bcalawyers.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of November, 2014, at Seattle, Washington.

T Kemp

TONI KEMP

OFFICE RECEPTIONIST, CLERK

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Dear Sir or Madam:

Attached for filing, please find the Washington State Patrol's Answer to Petition for Review and Declaration of Service.

Thank you,

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