No. 91427-3

SUPREME COURT
STATE OF WASHINGTON

JOHN F. KLINKERT,

Petitioner

v.

WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION,

Respondent

Court of Appeals, Division One, Case No. 71461-9
Appeal from Superior Court of Snohomish County

CORRECTED PETITION FOR REVIEW

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INTRODUCTION

1. I should point out that in this Corrected Petition for Review I have changed the main focus of my argument from arguing for the three-year statute of limitations in RCW 4.16.080(6) to arguing simply that the one-year statute of limitations in section RCW 42.56.550(6) of the Public Records Act itself has never begun to run for my lawsuit. Although I still think (as I argued in my Court of Appeals Appellant's Brief and Reply Brief) that the three-year statute outside the Act in RCW 4.16.080(6) is the proper default statute of limitations for Public Records Act cases if the one-year statute does not apply, I now realize that for my lawsuit the one-year statute actually does apply but simply has never been triggered because the Washington State Criminal Justice Training Commission (the "Training Commission") has never provided me with an adequate privilege log as required by this Court's holding in Rental Housing Association of Puget Sound v. City of Des Moines, 165 Wash.2d 525, 199 P.3d 363 (2009), which is a prerequisite for the one-year statute to begin to run.

2. One of the reasons the Court of Appeals opinion itself conflicts with this Court's prior Public Records Act decisions on the "other statute" issue is that the Court of Appeals opinion never mentioned my own "other statute" and "conflict" arguments, which I made in my Court of Appeals

Appellant's Brief and Reply Brief. I made the "conflict" with an "other statute" argument in my Appellant's Brief at pages 28-30 and in my Reply Brief at pages 13, 15-17. In particular, I cited Progressive Animal Welfare Society v. University of Washington, 125 Wash.2d 243, 884 P.2d 592 (1994) (PAWS II), for the "conflict" argument in my Appellant's Brief at 28-30 and in my Reply Brief at 15.

3. The "other statute" cases I cite in this Corrected Petition for Review involve only Washington statutes, not federal statutes or regulations, so there is no problem regarding federal preemption of the Public Records Act or Washington case law interpreting the Public Records Act.

4. The Court of Appeals opinion, if allowed to stand, could be a disaster for records requesters because, as I point out later in this Corrected Petition, the opinion undercuts and actually conflicts with section RCW 42.56.210(3) of the Public Records Act as well as this Court's gloss on that section in Rental Housing Association of Puget Sound v. City of Des Moines, supra.

A. IDENTITY OF PETITIONER

Petitioner pro se John F. Klinkert asks this Court to accept review of the published decision of the Court of Appeals, Division I, terminating review of this Public Records Act case. I am the records requester, the

plaintiff pro se in the trial court, and the appellant pro se in the Court of Appeals.

B. COURT OF APPEALS DECISION

The Court of Appeals, Division I, filed its published decision for Case No. 71461-9 on February 9, 2015. I have included a copy of the Court of Appeals decision in the Appendix, at pages A-1 – A-6.

C. ISSUES PRESENTED FOR REVIEW

1. Public Records Act section RCW 42.56.030 says that "[i]n the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern." However, RCW 43.101.400(1), which is here the "other act," says that "all investigative files of the [Washington State Criminal Justice Training] [C]ommission compiled in carrying out the responsibilities of the commission under [Chapter RCW 43.101]" are "exempt from public disclosure." Does RCW 43.101.400(1) "conflict" with the Public Records Act?

2. The Supreme Court in Sanders v. State, 169 Wash.2d 827, 240 P.3d 120 (2010), distinguished between "disclosure" of (the existence of) public records and their "production." If RCW 43.101.400(1) allows the Training Commission to avoid producing records in its investigative file for Deputy Paul Schene, should the Training Commission have at least disclosed the existence of all records by providing me with a listing of the

records on a privilege log that satisfied the requirements of Rental Housing Association of Puget Sound v. City of Des Moines, 165 Wash.2d 525, 199 P.3d 363 (2009)?

3. Has the Public Records Act's one-year statute of limitations in RCW 42.56.550(6) ever begun to run for my lawsuit against the Washington State Criminal Justice Training Commission?

D. STATEMENT OF THE CASE

1. Factual Background

The Washington State Criminal Justice Training Commission (hereafter, the "Training Commission"), trains sheriff's deputies and police officers at its academy and certifies all full-time peace officers in the state of Washington – sheriff's deputies, police officers, and state troopers. RCW 43.101.085(6). Law enforcement agencies such as the King County Sheriff's Office are required to notify the Training Commission when a deputy is fired for misconduct. RCW 43.101.135. The Training Commission may investigate alleged misconduct by reviewing a law enforcement agency's internal affairs investigation, which the agency is required to produce upon the Training Commission's request. RCW 45.101.135. The files which the Training Commission "compiles" during its investigations of alleged misconduct are stated as exempt from public disclosure in RCW 43.101.400(1).

My first records request on October 27, 2009

On October 27, 2009 I made my first public records request to the Training Commission's then Public Records Officer Leanna Bidinger by email, asking the Training Commission for, among other things,records related to two deputies in the King County Sheriff's Office (KCSO)

> any and all documents, transcripts, emails, handwritten notes, recordings or images which the CJTC has that are related to the 11/29/08 incident in King County where two King County Sheriff's Deputies, Deputy Paul Schene and Deputy Travis Brunner assaulted a 15-year-old girl, Malika Calhoun, in a holding cell in SeaTac. CP 70

The Training Commission's first response on November 18, 2009: Its first purported privilege log

On November 18, 2009 Ms. Bidinger responded by email. (CP 72) Her email contained two attachments. One attachment (CP 74) was a letter stating that Ms. Bidinger had sent me two discs, each containing one record.

The second attachment (CP 77) was a one-page purported privilege log in chart form, containing only two lines. And one of these two lines claimed to identify one record that was 713 pages long.

This supposed 713-page record almost consists probably of many records produced during the King County Sheriff's Office's (KCSO) internal IIU investigation of Deputy Paul Schene and Deputy Travis Brunner which KCSO had sent to the Training Commission after KCSO

completed its IIU investigation and Sheriff Sue Rahr had fired Deputy Schene. (CP 106)

My first protest to the Training Commission on November 30, 2009

On November 30, 2009 I emailed Ms. Bidinger (CP 79) protesting that the privilege log did not meet the requirements for privilege logs stated in Rental Housing Association of Puget Sound v. City of Des Moines, 165 Wash.2d 525, 199 P.3d 393 (2009). Ms. Bidinger never replied to my protest.

My second protests and Greg Baxter's August 5, 2010 denial

On March 22, 2010 Greg Baxter replaced Ms. Bidinger as the Training Commission's Public Records Officer, a fact which I learned on August 4, 2010. (CP 82)

On August 3, 2010 I sent to Ms. Bidinger, and on August 4, 2010 I sent to Mr. Baxter, emails complaining about the Training Commission's claim that all the King County Sheriff's records which the Sheriff's Office had sent to them relating to Deputy Paul Schene's termination constituted only one 713-page record. (CP 87-91) On August 5, 2010 Mr. Baxter denied the validity of my protest and continued to claim that the 713-pages constituted only one record. (CP 87-91)

Greg Baxter's email reply on August 5, 2010 claiming that the one-line entry for one record of 713 pages on the purported privilege log was

adequate (CP 87) was his most recent defense of the purported privilege log. It failed to acknowledge the existence of individual records that were responsive to my first public records request on October 27, 2009 to Leanna Bidinger, and therefore it was equivalent to a "silent withholding" of requested public records under Progressive Animal Welfare Society v. University of Washington (PAWS II), 125 Wash.2d 243, 884 P.2d 292 (1994).

My second, and different, records requests of August 3, 2010, relating to Deputy Schene and Deputy Brunner

On August 3, 2010, not knowing that Ms. Bidinger had been replaced by Greg Baxter as the Training Commission's Public Records Officer, I made a public records request via email to Ms. Bidinger requesting all documents related to Deputy Paul Schene that contained

> "the handwriting, handwritten initials, hand printing, or signatures of King County Sheriff's Deputy Paul Schene which the CJTC has that are related to the 11/29/08 incident..."

and I made an identical request to Ms. Bidinger for all documents handwritten by Deputy Travis Brunner. (CP 93, CP 95)

On August 5, 2010, I made the same two requests via email to Greg Baxter, the Training Commission's new Public Records Officer. (CP 97-99)

Greg Baxter's August 5, 2010 denials of my second records request, and his two purported email privilege logs

Later the same day, August 5, 2010, Greg Baxter replied to me via email (CP 101-2) that as to Schene-related records the email was serving as a privilege log for a 713-page investigative file prepared by the King County Sheriff's Office and that "RCW 43.100.400 specifically exempts from public disclosure the entirety of such WSCJTC files." Yet he had emailed me about two hours earlier that he had no Deputy Schene-related handwritten or handprinted records that I had requested, (CP 101-2), and he never explained why he said he didn't have them.

Also on the same day, August 4, 2010, Greg Baxter replied to me via email (CP 104) that as to Brunner-related records the email was serving as a privilege log for a 713-page investigative file prepared by the King County Sheriff's Office and that "RCW 43.100.400 specifically exempts from public disclosure the entirety of such WSCJTC files."

2. Procedural History

On August 5, 2010, Greg Baxter, the Public Records Officer for the Training Commission, sent me the two short emails referred to above at the top of this page, each of which claimed to be a privilege log for a 713-page IIU file [which by implication comprised only one record]. (CP 102-4)

I filed my original Complaint against the Training Commission in Snohomish County Superior Court on July 30, 2013, five days before the expiration of the three-year statute of limitations in RCW 4.16.080(6) relating to lawsuits – like mine -- for statutory penalties. (CP 116)

I filed my First Amended Complaint on October 24, 2013 (CP 56) and served it on the Training Commission on the same day.

The Training Commission filed its CR 12(b)(6) motion to dismiss on November 7, 2013. (CP 42)

The CR 12(b)(6) motion to dismiss was heard in Snohomish County Superior Court on December 12, 2013 by the Honorable Marybeth Dingledy. (CP 9)

Superior Court Judge Dingeldy filed her initial order of dismissal with prejudice later on the same day as the hearing, December 12, 2013 (CP 5), and on January 2, 2014, Judge Dingledy filed the corrected order. (CP 1)

On January 30, 2014, I filed a Notice of Appeal in Snohomish County Superior Court and in Division I of the Court of Appeals.

The Court of Appeals decision (See Appendix A1-A6) affirmed the trial court's dismissal in a short opinion, ruling that the Training Commission's statute RCW 43.101.400 is an "other statute" that exempted the Training Commission from disclosing its investigative file. The opinion does not mention the crucial issue of whether the "other statute"

conflicts with the Public Records Act, a point I argued in my Appellant's Brief at pages 28-30. According to the opinion, because the Training Commission's claimed exemption was justified, its privilege log satisfied the Public Records Act's one-year statute of limitations in RCW 42.56.550(6). Thereby the Court of Appeals opinion (See Appendix A1-A6) was able to avoid discussing the ultimate issue in my appeal (stated in my Appellant's Brief at Pages 37-43), namely, what is the applicable statute of limitations and its trigger date or event in situations where the Public Records Act's one-year statute of limitations does not apply.

G. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

PRELIMINARY SUMMARY OF ARGUMENT

The Public Records Act in RCW 42.56.030 specifies that "In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern."

This court in Sanders v. State, 169 Wash.2d 827, 240 P.3d 120 (2010), made a distinction between "disclosure" (of the existence) of public records and their "production."

In my lawsuit against the Washington State Criminal Justice Training Commission ("the Training Commission"), the records which the Training Commission claims to be exempt under the "other statute" – RCW

43.101.400 – might or might not actually be exempt from production, but the Court of Appeals opinion did not rule on that issue.

The "other statute" conflicts with the Public Records Act as interpreted by this Court

To the extent that the word "disclosure" in RCW 43.101.400(1) implies or is interpreted (as it should be under Sanders v. State, supra) as disclosure of the existence (as opposed to "production") of individual records in the Training Commission's investigative file for Deputy Paul Schene, this other statute does conflict with the Public Records Act's requirement in RCW 42.56.210(3) requiring "a brief explanation of how the exemption applies to the record withheld." In particular, RCW 43.101.400(1) conflicts with Progressive Animal Welfare Society v. University of Washington, 125 Wash.2d 243, 884 P.2d 592 (1994) (PAWS II), Sanders v. State, supra, and Rental Housing Association of Puget Sound v. City of Des Moines, 154 Wash.2d 525, 199 P.3d 363 (2009), as I show below.

The Court of Appeals opinion itself conflicts with this Court's Prior cases on the Public Records Act

Moreover, because the agency involved, the Training Commission, has not yet provided me with an adequate privilege log as required by Rental Housing Association, supra, for each record the Training Commission claimed as exempt from production, the one-year statute of

limitations in the Public Records Act in RCW 42.56.550(6) has not yet been triggered, and therefore my lawsuit should not have been dismissed as untimely by the trial court, which dismissal the Court of Appeals opinion affirmed.

ARGUMENT

By failing to completely confront the question of whether the "other statute" – RCW 43.101.400 – "conflicts" under RCW 42.56.030 with the Public Records Act, the Court of Appeals decision itself conflicts with previous decisions of the Supreme Court dealing with "other statute" conflicts with the Public Records Act.

The Court of Appeals failed to note the qualification to the "other statute" exception, the qualification in RCW 42.56.030, which says "In the event of conflict between the provisions of this chapter [i.e., RCW Chapter 42.56, *et seq.*, the Public Record Act] and any other act, the provisions of this act shall govern." [Emphasis added]. Because RCW 43.101.400(1) conflicts with the Public Records Act and therefore the Act governs, the Training Commission was required to provide me, and should have provided me, with an adequate privilege log.

1. PAWS II rules that the Public Records Act prevails in conflict situations

The Public Records Act as interpreted by this Court in Progressive

Animal Welfare Society v. University of Washington, 125 Wash.2d 525, 199 P.3d 363 (1994) (PAWS II), requires the Act to prevail over an "other statute" in situations where the other statute conflicts with the Act. PAWS II was an "other statute" case, and the Supreme Court in PAWS II cited the "other statute" conflict provision in the Act, stating that "...if such other statutes mesh with the Act, they operate to supplement it. However, in the event of a conflict between the Act and other statutes, the provisions of the Act govern." PAWS II, 125 Wash.2d at 262 [citing RCW 42.17.920, now RCW 42.56.030]. Although the PAWS II court did not rule on whether the other statute in question did conflict with the Public Records Act, the PAWS II court required identification, and thereby "disclosure" of the existence, of individual records claimed as exempt from production, by stating in its footnote 18 the items needed to adequately identify a record withheld from production under a claim of exemption contained in an "other statute." PAWS II, 125 Wash.2d at 278. The Supreme Court did not assess daily penalties against the agency for not having identified, i.e., not disclosing the existence of, records claimed as exempt from production, but it did order the trial court on remand to determine and award costs and attorney fees. PAWS II, 125 Wash.2d at 272.

I argued PAWS II regarding the "other statute" conflict issue in my Court of Appeals Appellant's Brief at 28-30 and in my Reply Brief at 13 and 15-17, but the Court of Appeals ignored my argument, not even mentioning the "conflict" issue in its opinion.

2. **Hangartner v. City of Seattle prepared the way for Sanders v. State**

In Hangartner v. City of Seattle, 151 Wash.2d 439, 90 P.3d 26 (2004), this Court expressly ruled that the Washington statute containing the attorney-client privilege (RCW 5.60.060(2))is an "other statute", but in Hangartner the "agency" (both the City of Seattle and, apparently the company with whom it had contracted to build the City's current monorail, considered together as one "agency") had already provided an adequate privilege log to the records requester for all records the agency claimed as exempt from production under the "other statute", i.e., under the attorney-client privilege. Hangartner did not involve a dispute over the adequacy of a privilege log, but the case is important as the "other statute" case cited by this Court in Sanders v. State, 169 Wash.2d 827, 240 P.3d 120 (2010) where his Court ruled that even though records claimed as exempt might have been exempt from production, they were not exempt from disclosure and therefore required descriptions on a privilege log of all individual records claimed as exempt from production under the

attorney-client privilege. Hangartner, 240 P.3d at 130. That is, in Hangartner an agency's privilege log was adequate but in Sanders the agency's privilege log was not adequate.

3. Sanders v. State distinguishes between "disclosure"and "production"

Sanders v. State, 169 Wash.2d 827, 240 P.3d 120 (2010), explicitly makes a distinction between disclosure and production. Most of the PRA cases I have read actually use "disclosure" to mean "production", but Sanders v. State, supra, clarifies the correct usage of the two words. Individual records can be exempt from production but never from disclosure of their existence. Disclosing their existence requires describing them individually, and in order to do this, the Training Commission must group the 713 pages into records. Almost certainly the King County Sheriff's Office, when it sent the 713 pages of records to the Training Commission, had already done this for the Training Commission, i.e., it was not an additional task the Training Commission needed to perform.

1. Records are either "disclosed" or "not disclosed." A record is disclosed if its existence is revealed to the requester in response to a PRA request, regardless of whether it is produced.

2. Disclosed records are either "produced" (made available for inspection and copying) or "withheld" (not produced). A document [note the use as a synonym for "record"] may be lawfully withheld if it is "exempt" under one of the PRA's enumerated exemptions. A document not

covered by one of the exemptions is, by contrast, "nonexempt." Withholding a nonexempt document is "wrongful withholding" and violates the PRA. [Citation omitted]

3. A document is never exempt from disclosure. It can be exempt only from production. An agency withholding a document must claim a "specific exemption," i.e., which exemption covers the document. RCW 42.56.210(3). [Footnote omitted] The claimed exemption is "invalid" if it does not in fact cover the document." Sanders v. State, 169 Wash.2d. 827, 240 P.3d 120, 125 (2010)

Sanders quotes the trial court's correct ruling that the PRA

> "require[s] an agency claiming an exemption to 'include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld ' CP at 1717 (quoting RCW 42.56.210(3) [footnote omitted] [emphasis added" Sanders v. State, supra, 169 Wash.2d. 827, 240 P.3d at 130

According to Sanders v. State, supra, which cites both PAWS II, supra, and Hangartner, supra, as "other statute" cases, under the Public Records Act, an agency claiming an exemption under an "other statute" (here the Washington statute RCW 5.60.060(2) containing the attorney-client privilege) must provide an adequate privilege log to avoid daily penalties. That is, even an agency which claims that withheld records are exempt from production under the exemption contained in an "other statute" must "disclose" those records individually on an adequate privilege log.

Sanders is an example of the Public Records Act prevailing over an "other statute" in a situation of "conflict with" the Act even though the Sanders court did not expressly mention the conflict. Sanders cites PAWS II as the forerunner of Rental Housing Association's requirement for providing an adequate privilege log.

I have already shown above on pages 19-20 that Sanders distinguishes between "disclosure" and "production" of records under the Public Records Act. But Sanders is also relevant here because in footnote 4 at 240 P.3d 143 Sanders expressly acknowledges that it itself is an "other statute" case when it cites Hangartner as a fellow "other statute" case dealing with the same attorney-client privilege at issue in Hangartner. Sanders holds at 240 P.3d 126 that the defendant agency, the Washington Attorney General's Office (AGO) on its privilege log should have stated not only an applicable exemption but should also have provided for each record claimed as exempt from production a brief explanation of who the exemption applied to that record. That is, even though the Attorney General provided a privilege log, something called an "entire document index (EDI)", the privilege log did not contain an explanation for each record withheld, how the exemption applied to that record. And the Sanders court cited Rental Housing Association, supra, for that rule. Sanders, 240 P.3d at 130. The Sanders court also assessed daily statutory

penalties against the Attorney General's Office for its failure to provide an adequate privilege log. Sanders at 240 P.3d 137-139.

I argued in my Appellant's Brief at Pages 26-27, in order for the Training Commission to adequately disclose (the existence of) the individual records in Deputy Schene's investigative file, it must list them individually on a privilege log, even though the Training Commission might eventually not need to produce them.

The Training Commission's purported two-line (and later August 5, 2010 email privilege logs) privilege log never showed, nor could they show, how (or whether) the Training Commission's claimed exemption applied to each of the (presumably) variable-length records in the file that contained 713 pages of records. This is important, because some of the records actually might not be exempt even though they were in a file sent to the Training Commission by the King County Sheriff's Office.

4. **The Court of Appeals opinion conflicts with Rental Housing Association of Puget Sound v. City of Des Moines**

As to the Public Records Act's one-year statute of limitations contained in RCW 42.56.550(6), Rental Housing Association of Puget Sound v. City of Des Moines, 165 Wash.2d 525, 199 P.3d 363 (2009), one of this Court's interpretations of RCW 42.56.210(3) requiring "a brief explanation of how [an] exemption applies to the record withheld",

requires an agency to provide a listing of each individual record claimed as exempt before the one-year statute can begin to run, and therefore the Court of Appeals opinion – which did not require an adequate privilege log which satisfies Rental Housing Association's requirement for a listing of individual records – conflicts with RCW 42.56.210(3) of the Public Records Act and this Court's holding in Sanders v. State, supra. Rental Housing Association at 199 P.3d 399 cited PAWS II's footnote 18 that specified the items to be included for each record listed on an adequate privilege log. Rental Housing Association expressly stated, "RHA argues that the limitations period did not begin to run until at least April 14, 2006, when the City first provided a privilege log identifying individual records it was withholding under a claim of exemption. We agree." Rental Housing Association at 199 P.3d at 394. And also, "We conclude that the City did not state a proper claim of exemption to trigger RCW 42.56.550(6), the one-year statute of limitations on PRA suits, until April 14, when it provided RHA with a privilege log." Id. at 199 P.3d 400. Thus the Public Records Act, as interpreted by Rental Housing Association, PAWS II, and Sanders, prevails over the "other statute", here the Training Commission's RCW 43.101.400.

5. My situation in this lawsuit is the same as that of the plaintiff in Rental Housing Association

My lawsuit against the Training Commission deals with a situation where an agency (the Training Commission) provides some records to a requester in one installment but withholds some records under a claim of exemption and fails to provide an adequate privilege log. This was precisely the same situation as that of the plaintiff in Rental Housing Association, supra.

In my Appellant's Brief at pages 22-30, I pointed out that the first prong of the two prongs of the one-year statute of limitations in RCW 42.56.550(6) never satisfied Rental Housing Association's requirement of a valid privilege log, and also that Sanders v. State, supra, required disclosure on a privilege log of each record, so that the first prong of the one-year statute was never satisfied. Any discussion in my Appellant's Brief about the second prong (dealing with records provided installments) was actually irrelevant, as was my discussion of what statute of limitations applies if the one-year statute is not triggered. And the Training Commission itself has never argued expressly that the second prong was actually triggered.

In my First Amended Complaint at pages 7-8 (CP 62-63) I pointed out, without further argument there, that the Training Commission had not

provided records in installments, implying that the second prong of the one-year statute (regarding installments) was irrelevant. And at pages 23-26 of my Appellant's Brief I argued that the Training Commission has never provided the privilege log required by Rental Housing Association. However, rather than arguing further that the one-year statute (and also that no statute of limitations) was ever triggered, I mistakenly argued that the relevant statute of limitations was the three-year statute in RCW 4.16.080(6) for lawsuits seeking statutory penalties. I should simply have pointed out that the one-year statute was never triggered at all.

However, the Training Commission, in its motion to dismiss in superior court, claimed that both prongs of the one-year statute of limitations were triggered because the Training Commission's two-line privilege log was adequate and also that the Training Commission on November 18, 2009 "produced records for the last time in response to [my] public records request of October 7. 2009." (CP 6) [Emphasis in original]. But the "last time" was actually the first and only time the Training Commission provided any responsive records to me. There were no installments. I mistakenly argued the three-year statute for both prongs, something I need not have done, because the first prong has never yet been triggered.

Nonetheless, because the Training Commission has never provided me with an adequate privilege log, the one year statute of limitations in RCW 42.56.550(6) has not begun to run, and the Training Commission is subject to the daily statutory penalties, costs, and attorney fees specified in RCW 42.56. 550(4). Therefore my lawsuit should not have been dismissed as untimely by the superior court, and the Court of Appeals opinion should not have affirmed the superior court's dismissal.

F. CONCLUSION

I ask this Court to

(1) Reverse the Superior Court judge's dismissal of my lawsuit;

(2) Remand this case to Snohomish County Superior Court;

(3) Order the Training Commission on remand to file an Answer to my First Amended Complaint within the 10 days required by CR 12(a)(4)(A);

(4) Order the Training Commission on remand to provide me with a valid privilege log;

(5) Authorize on remand an in camera review of all records in the Training Commission's investigative file;

(6) Declare that in this situation, where an agency did not provide

records in installments and never provided a valid privilege log, the applicable statute of limitations, the one-year statute in section RCW 42.56.550(6) of the Public Records Act, was never triggered; and

(7) Award me costs for this appeal, costs in both the Court of Appeals and in this Supreme Court.

Dated this 16th day of April, 2015

Respectfully submitted,

John F. Klinkert

John F. Klinkert
Petitioner Pro Se

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOHN F. KLINKERT, Appellant, v. WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION, Respondent.	No. 71461-9-I DIVISION ONE PUBLISHED OPINION FILED: February 9, 2015

BECKER, J. — By statute, an investigative file sent by a law enforcement agency to the Washington State Criminal Justice Training Commission is exempt from public disclosure. Because the appellant in this case brought his action more than one year from the Commission's properly-stated claim of exemption, the trial court did not err by dismissing the action as time barred.

The Commission licenses all Washington police officers. RCW 43.101.085(6). Officers must be certified by the Commission as a condition of continuing employment. RCW 43.101.095(1). If an employer terminates an officer's employment for "disqualifying misconduct," the Commission may revoke the officer's certification. RCW 43.101.105(d). Washington law enforcement agencies are required to notify the Commission when an officer is so terminated. RCW 43.101.135. The Commission may request the agency's investigative file

documenting the misconduct leading to the termination, and the terminating agency is required to comply with such a request. RCW 43.101.135. Commission records that are exempt from public disclosure include "investigative files of the commission compiled in carrying out the responsibilities of the commission." RCW 43.101.400(1)(c).

On October 27, 2009, appellant John F. Klinkert submitted a public records request to the Commission, asking for documents involving a King County sheriff's deputy. The deputy had been terminated from his job after an internal investigation found he used excessive force against a juvenile arrestee in a holding cell. Klinkert asked the Commission to produce "*any and all* documents, transcripts, emails, handwritten notes, recordings or images" relating to that incident.[1]

On November 18, 2009, the Commission responded to Klinkert with a one-page exemption log for two documents that were being withheld. Both had been received from the King County Sheriff's Office. The first document was identified as a one-page "Notice of Hire/Termination" for the deputy dated September 24, 2009. The log explained, "This is a personnel action report and such reports are confidential and exempt from public disclosure under 43.101.400(1)."

The second document was identified as a 713-page investigative file on the deputy with a cover letter dated September 30, 2009. The log explained that

[1] The record reflects that Klinkert, a retired attorney, successfully obtained some records concerning this incident from the King County Sheriff's Office. At oral argument before this court, Klinkert said he wanted to make sure that the sheriff's office sent all the records it had to the Commission.

it was "additional documentation or information related to the personnel action report" regarding the deputy and "these are records that may be used by WSCJTC in an investigation of his certification. These documents cannot be disclosed under RCW 43.101.400(1)."

On November 30, 2009, Klinkert sent an e-mail advising the Commission that in his opinion, the exemption log did not meet the requirements of the law as stated in Rental Housing Association of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 199 P.3d 393 (2009). Klinkert received no answer to this e-mail.

On August 3, 2010, Klinkert wrote to the Commission complaining that the exemption log was inadequate because it did not itemize each document within the 713-page investigative file. He added a new request for all documents related to the incident containing the deputy's handwriting.

On August 5, 2010, the Commission responded to Klinkert by e-mail, stating that the exemption log was "fully adequate." The e-mail stated that it was permissible to withhold the entirety of the 713-page investigative file, so long as the privilege log provided enough information to the requester to understand whether the file was within the exemption. According to the e-mail, "Publishing an inventory of the investigative file's contents is not required . . . and could easily defeat our proper claim of privilege." Klinkert was informed that the Commission did have documents containing the deputy's handwriting, but they were inside the exempt 713-page investigative file, "part of a record we compiled in conducting an investigation into his certification."

On July 24, 2013, Klinkert filed suit in superior court, alleging that the Commission had violated the Public Records Act, chapter 42.56 RCW, by improperly withholding the requested records. The Commission moved to dismiss the complaint as barred by the Act's one-year statute of limitations. The trial court granted the motion. Klinkert appeals.

The Act requires that public agencies make all public records available for public inspection and copying, unless the record falls within the specific exemptions of RCW 42.56.070(6), chapter 41.56 RCW, or "other statute" which exempts or prohibits disclosure of specific information or records. RCW 42.56.070(1). Here, the exemption claimed by the Commission is found in an "other statute," namely RCW 43.101.400. It should be noted that this appeal is not concerned with RCW 42.56.240(1), the exemption for "specific intelligence information and specific investigative records . . . the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy."

When an agency responds to a request by refusing inspection of any public record in whole or in part, the response must include "a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." RCW 42.56.210(3); Progressive Animal Welfare Soc. v. Univ. of Wash., 125 Wn.2d 243, 271 n.18, 884 P.2d 592 (1994). The brief explanation can be in the form of a privilege log or withholding index and "need not be elaborate but should allow a requestor to make a threshold determination of whether the agency has properly

invoked the exemption." WAC 44-14-04004(4)(b)(ii), quoted in Rental Housing Association, 165 Wn.2d at 539. The adequacy of a public agency's response to a request for production is subject to judicial review in the superior court in the county in which the records at issue are maintained.

An action seeking judicial review of an agency's refusal to allow inspection or copying of a public record 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). If the claim of exemption does not provide sufficient identifying information, the one-year statute of limitations does not begin to run. Rental Housing Ass'n, 165 Wn.2d at 539-40.

In Rental Housing Association, the city of Des Moines responded to a public records request in August 2005 by withholding hundreds of pages of documents that were not individually identified. They were grouped into categories that included, among other things, appellate court opinions, treatises, newspaper articles, and ordinances from other municipalities. Rental Housing Ass'n, 165 Wn.2d at 529. In response to complaints that such documents were not exempt, the City provided a privilege log on April 14, 2006. The requesters filed suit on January 16, 2007. The Supreme Court rejected the City's argument that the one-year statute of limitation had expired. The City's response in August 2005 was insufficient to trigger the statute of limitations, the court held, because it did not contain enough details. The limitations period did not begin to run until the day the City provided an adequate privilege log—April 14, 2006. "Without the information a privilege log provides, a public citizen and a reviewing court cannot

know (1) what individual records are being withheld, (2) which exemptions are being claimed for individual records, and (3) whether there is a valid basis for a claimed exemption for an individual record." Rental Housing Ass'n, 165 Wn.2d at 540.

Klinkert contends his appeal is controlled by Rental Housing Association and that it was preposterous for the Commission to treat the investigative file as a single record. We disagree. The exemption log provided by the Commission on November 18, 2009, was sufficient to trigger the statute of limitations. It let Klinkert know that the entire 713-page investigative file was being withheld as exempt under RCW 43.101.400(1). That was enough information to enable Klinkert to evaluate, and a court to review, the Commission's decision to withhold the entire file. As soon as Klinkert received the one-page exemption log in November 2009, he could have brought suit asking the superior court to rule that each discrete document in the investigative file required its own separate entry in the exemption log. His suit—filed on July 24, 2013—was time barred, and the trial court correctly dismissed it.

Affirmed.

Becker, J.

WE CONCUR:

Leach, J.

Schindler, J.