No. 91571-7

SUPREME COURT
OF THE STATE OF WASHINGTON

ISABELLE BICHINDARITZ,

Petitioner,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MONICA J. BENTON

ANSWER TO PETITION FOR REVIEW

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A. Introduction.

The Court of Appeals properly reversed a $723,290.50 Public Records Act (PRA) penalty the trial court had imposed on respondent University of Washington for failing to produce over 12,000 pages of documents on the same day petitioner Isabelle Bichindaritz requested them. The Court of Appeals also properly refused to allow Bichindaritz to assert violations that occurred outside the PRA's one-year statute of limitations, and rejected her attempt to convert the PRA into a vehicle for pre-trial discovery. Because the Court of Appeals' unpublished decision is wholly consistent with Washington law and raises no issues of substantial public interest, this Court should deny review.

B. Statement of the Case.

1. Petitioner's 2009 PRA request.

On September 9, 2009, Isabelle Bichindaritz, a former professor denied promotion and tenure at the University's Tacoma Institute of Technology, asked the University to produce a "complete" copy of her personnel file, and every email "related to" her from among 96 individuals in 11 different University departments on two campuses. (Op. 1-2) (Petition Appendix)

Within a month of this 2009 request, the University assembled 25,000 pages of responsive documents. (Op. 2) It produced approximately half of these documents to Bichindaritz in six stages over 14 months, as its Office of Public Records continually reviewed and redacted documents related to Bichindaritz's three tenure applications, a time intensive process because so many of the documents contained information exempt from disclosure under the PRA.[1] (Op. 2) Bichindaritz delayed picking up documents for months at a time and did not pick up two entire stages of documents, including the stage 6 production that was completed on December 9, 2010. (CP 316-18) Bichindaritz closed her 2009 PRA request on February 7, 2011. (Op. 3)

2. Petitioner's 2011 PRA request.

Four months after closing her 2009 request, on June 7, 2011, Bichindaritz asked the University "to restart processing the

[1] Many of the documents were exempt under the Family Educational Rights and Privacy Act, which prohibits disclosure of "education records" and other "personally identifiable information." 20 U.S.C. § 1232g(b)(1)-(2). *See* RCW 42.56.070(1) (prohibiting disclosure of records exempted by "other statute"); RCW 42.56.230(1) (student personal information exemption). Other documents contained personnel evaluations exempt under RCW 42.56.230(3). *See Dawson v. Daly*, 120 Wn.2d 782, 799-800, 845 P.2d 995 (1993), *overruled on other grounds by Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994).

documents from my first public records request." (Op. 3; CP 318, 425) The University began anew the process of reviewing and redacting the remaining 12,000 pages. (Op. 7) Over the next five months, the University produced these pages to Bichindaritz in four stages – a timeframe Bichindaritz acknowledged was reasonable. (Op. 4, 7-8)

3. Petitioner's 2010 gender discrimination lawsuit.

In August 2010, Bichindaritz sued the University for gender discrimination in U.S. District Court. (Op. 3) Following a six-day trial in April 2012, Judge Robert Lasnik found that the University had not discriminated against Bichindaritz. (Op. 4; CP 1388-90) Judge Lasnik noted that the University had no obligation in the federal suit to produce documents referencing her nationality because Bichindaritz did not request them, having instead "intentionally chose[n] not to pursue a national origin claim in this litigation." (*Compare* CP 1321 *with* Petition 3; *see also* CP 1328-29)

The Ninth Circuit affirmed Judge Lasnik's decision. *Bichindaritz v. Univ. of Washington*, 550 Fed. Appx. 412 (9th Cir. 2013). In a motion to vacate Judge Lasnik's decision filed while the appeal was pending, Bichindaritz claimed three of the 25,000 pages

of documents the University produced under the PRA would have bolstered her federal suit had they been disclosed earlier. But Bichindaritz actually used two of these documents as exhibits in the federal trial. (CP 1363) And while Bichindaritz now argues the third document – an email written by a professor at the Institute referencing an unidentified "nursing person" on one of Bichindaritz's tenure review committees who "hinted that we might be picking on Isabelle's teaching because she was a woman" (CP 237) – would have undermined the credibility of the Institute's Director, Orlando Baiocchi, Judge Lasnik found that the absence of that email "in no way affected the outcome" of her trial. (*Compare* Petition 15 *with* Brief of Appellant Appx. D)[2]

4. Petitioner's 2012 PRA lawsuit.

On February 23, 2012, Bichindaritz sued the University under the PRA. (Op. 4) King County Superior Court Judge Monica Benton ("the trial court") dismissed with prejudice "all claims . . . arising from the University's response to Plaintiff's September 9, 2009 public records act request . . . [as] barred by the one-year statute of limitations set forth in RCW 42.56.550(6)." (CP 70)

[2] The Court of Appeals declined to address the University's request to take judicial notice of Judge Lasnik's order because it was irrelevant given its holding that the University did not violate the PRA. (Op. 11)

Following trial by affidavit, however, the trial court held that the University violated the PRA by failing to produce 12,000 pages of documents on June 7, 2011, the very day Bichindaritz submitted her second PRA request, because the University had previously "assembled" those documents. (CP 1128-49) The trial court penalized the University $723,290.50, accepting Bichindaritz's allegation that the University intentionally delayed its production to gain an advantage in Bichindaritz's federal discrimination lawsuit. (Op. 5-6; CP 1145-47) With fees, judgment against the University totaled $826,248.53. (Op. 6)

The Court of Appeals reversed in an unpublished decision. Division One held that it "was unreasonable to expect the University to *produce* the remaining 12,000 pages the same day Bichindaritz reopened her request simply because it had already *assembled* those documents," (Op. 7-8) (emphasis in original) and that alleged delays in responding to her 2009 PRA request that "occurred more than one year before February 23, 2012, the date Bichindaritz filed suit under the Act .... [were] time barred under the one-year statute of limitations." (Op. 8)

C. Argument for Denial of Review.

Washington courts have repeatedly held that an agency complies with the PRA by responding to a records request within a reasonable time, considering the scope and nature of the request. *See, e.g., West v. Dep't of Licensing*, 182 Wn. App. 500, 331 P.3d 72 (ten months reasonable time for "complex" request), *rev. denied,* 339 P.3d 634 (2014); *Andrews v. Wash. State Patrol*, 183 Wn. App. 644, 334 P.3d 94 (2014) (courts apply a "flexible approach that focuses upon the thoroughness and diligence of an agency's response" in determining compliance with the PRA), *rev. denied,* 182 Wn.2d 1011 (2015). Ignoring this settled law, Bichindaritz asks this Court to create new duties not found anywhere in the PRA – including duties to perpetually maintain records from closed requests, and to prioritize the requests of litigants – and to subvert the PRA's one-year statute of limitations by including "time outside the statute of limitations" under the guise of "context or motive." The Court of Appeals properly rejected petitioner's arguments as inconsistent with the letter and purpose of the PRA and with Washington precedent. This Court should deny review. RAP 13.4(b).

1. Agencies do not have a perpetual duty to process and maintain records from closed PRA requests. Requesters cannot revive time-barred claims by submitting serial requests for the same documents.

An agency's duties under the PRA cease the moment a requester closes a document request, either by affirmatively canceling it or failing to pick up an installment of records. RCW 42.56.120 ("the agency is not obligated to fulfill the balance of the request" after "an installment of a records request is not claimed or reviewed"); WAC 44-14-040(10) ("When the requestor ... withdraws the request ... the public records officer will close the request.").[3] If an agency could be held liable for violating the PRA based on the "context" of closed – and time-barred – requests, as Bichindaritz argues, agencies would have a perpetual duty to maintain and process records. But the PRA imposes no such duty. Nor does the PRA contemplate that requesters can indefinitely preserve their right to seek judicial relief under the PRA. The Court of Appeals correctly rejected Bichindaritz's novel arguments as

[3] WAC ch. 44-14 contains the Attorney General's model regulations for PRA compliance. The model regulations, issued pursuant to RCW 42.56.570(2), are non-binding advisory regulations representing "best practices" for agencies to comply with the PRA. *See* WAC 44-14-00001-00003.

inconsistent with established law. Its unpublished decision presents no grounds for review under RAP 13.4(b).

Bichindaritz's proposed "context" rule (Petition 17) would require agencies to indefinitely retain documents from closed requests; a requester could "reopen" a request at any time and the agency would be liable if it failed to produce the documents on the very same day. To the contrary, an agency may dispose of assembled documents after a request is closed. WAC 44-14-04006 (after a request is closed "[a]n agency is not required to keep assembled records set aside indefinitely"); WAC 44-14-040(6)(b) (agency may "refile the assembled records" after closing a request). The Model Rules further discourage a requester from wasting agency time and public resources by closing a request and then submitting a second request for identical documents by providing that "[o]ther public records requests can be processed ahead of a subsequent request by the same person for the same . . . records." WAC 44-14-040(6)(b).

The Court of Appeals correctly recognized that the PRA's statute of limitations would have no meaning if parties could file and then withdraw a PRA request, fail to timely bring suit, and nevertheless recover on the time-barred request by bringing suit on

a new request purporting to "reopen" the initial request. (Op. 8) Rather than condone such artifices that would "preserve [an] . . . action indefinitely," "society benefits when it can be assured that a time comes when one is freed from the threat of litigation." *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 652, ¶ 34, 310 P.3d 804 (2013); *Estates of Hibbard*, 118 Wn.2d 737, 745, 826 P.2d 690 (1992); *see also Bartz v. State Dep't of Corr. Pub. Disclosure Unit*, 173 Wn. App. 522, 536, ¶ 30, 297 P.3d 737 (rejecting argument "that the legislature intended no statute of limitations for PRA actions involving the production of a single volume of documents"), *rev. denied sub nom.* 177 Wn.2d 1024 (2013).

Bichindaritz concedes that the statute of limitations began running on her 2009 PRA request when she "withdr[ew] her claim in February 2011." (Petition 16) The one-year statute of limitations under RCW 42.56.550(6) therefore expired on her 2009 request on February 8, 2012, before she filed her lawsuit on February 23, 2012. The Court of Appeals properly refused to impose a perpetual duty on agencies to process and maintain records from closed requests, or to allow requesters to revive time-barred claims by submitting serial requests for the same documents.

2. The Court of Appeals properly refused to consider time-barred conduct for "context or motive."

The Court of Appeals also properly rejected Bichindaritz's argument that it could include "time outside the statute of limitations" when deciding whether the University complied with the PRA, correctly reasoning that any purported delays that "occurred more than one year before February 23, 2012 . . . are time barred under the one-year statute of limitations in RCW 42.56.550," and that regardless Bichindaritz forfeited any right to challenge that conclusion by failing to appeal the trial court's order dismissing her claims based on her 2009 request. (Op. 8-9) Its unpublished decision raises no issues of public interest and does not conflict with any Washington precedent. RAP 13.4(b).

The PRA's one-year statute of limitations "is a legislative declaration of public policy" meant to provide finality that "the courts can do no less than respect." *Cost Mgmt.*, 178 Wn.2d at 651, ¶ 33 (internal quotation omitted). Under the PRA, Bichindaritz's 2009 and 2011 requests are separate and distinct, governed by separate limitations periods. *Greenhalgh v. Dep't of Corr.*, 170 Wn. App. 137, 150, ¶ 32, 282 P.3d 1175 (2012) ("each written request for records under the PRA [is] a single request"). An agency may treat

serial requests under the PRA as distinct even if they request the same records, just as the University did. WAC 44-14-040(6)(b) ("a subsequent request by the same person for the same or almost identical records . . . can be processed as a new request"). Whether the University complied with the PRA in responding to Bichindaritz's 2011 request can be judged based only on how it responded to *that* request, not on how it responded to Bichindaritz's 2009 request for which judicial review was time-barred.

Including "time outside the statute of limitations" under the guise of considering "context or motive" (Petition 17), would impermissibly impose liability for conduct occurring outside the limitations period – a result this Court has expressly rejected. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 438, 98 P.3d 463 (2004) (PRA statute of limitations acts as "a limitation on the penalty period"); *see also Cost Mgmt.*, 178 Wn.2d at 651-52, ¶¶ 32-35 (rejecting party's attempt to "reach[] back beyond the legal statute of limitations" because it would allow "recovery for the stale, time-barred, portion of its claim"); *Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 382, ¶ 19, 166 P.3d 662 (2007) (rejecting "loophole" to avoid the statute of limitations).

Loeffelholz v. Univ. of Washington, 175 Wn.2d 264, 285 P.3d 854 (2012), does not support Bichindaritz's argument that the University's response to her 2009 request may establish a violation of the PRA in responding to her 2011 request. (Petition 18) *Loeffelholz* involved a hostile work environment claim, which this Court recognized is a "unique" cause of action based not on a singular event, but on "the cumulative effect of individual acts." 175 Wn.2d at 273, ¶ 17. Only under those circumstances was "unrecoverable conduct . . . admissible as *background evidence* to give context" to whether the post-limitations conduct "was a natural extension of the [pre-limitations] conduct." *Loeffelholz*, 175 Wn.2d at 276, 278, ¶¶ 25, 30 (emphasis added). But under the PRA, one request cannot be an "extension" of another – each request is distinct. *Greenhalgh*, 170 Wn. App. at 150, ¶ 32; WAC 44-14-040(6)(b).

Regardless, the "context" Bichindaritz asks this Court to consider only confirms that the University complied with the PRA. When Bichindaritz closed her initial request in February 2011, the University retained 12,000 pages of documents it had yet to review, despite no obligation to do so. When Bichindaritz submitted a new request for the remaining documents, the University promptly

responded, reviewing and producing 12,000 pages in five months. Bichindaritz conceded that six months was a reasonable time period to review and produce the remaining 12,000 pages.[4] (CP 1415-16)

Moreover, the trial court did not base its conclusion that the University violated the PRA on the "context" provided by pre-limitations conduct. As the Court of Appeals recognized, "[t]he court decided a *violation* had occurred based only on the five-month production of the final 12,000 pages between June and November 2011." (Op. 9) (emphasis in original) The Court of Appeals properly rejected the trial court's decision that five months was too long "on the unsustainable assumption that documents are ready to be produced as soon as they are assembled." (Op. 9) Bichindaritz now shuns that assumption despite having invited the trial court to make it. (Op. 5: noting the trial court's findings and conclusions were "adapted from a set proposed by Bichindaritz").

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[4] Bichindaritz cites no support for her assertion that "4,038 pages could have been produced on the same day they were requested." (Petition 7) As Bichindaritz herself recognizes, "the record does not indicate" what happened to the 4,038 pages of "Stage 6" documents that she failed to pick up. (Petition 8) When she closed her 2009 request, WAC 44-14-040(6)(b) allowed the University to refile those documents with the 8,000 pages of unreviewed documents. Consistent with her prior concession, Bichindaritz makes no argument that five months was an unreasonable amount of time to review and produce 8,000 pages.

Bichindaritz's invitation to adopt an unprecedented "context" rule that creates potentially unlimited liability is little more than a backdoor challenge to the statute of limitations ruling she failed to appeal. As the Court of Appeals held, that ruling "remains in effect as a conclusion of law precluding redress of violations that may have occurred before February 23, 2011." (Op. 9) *See also Beltran v. State Dept. of Social and Health Services,* 98 Wn. App. 245, 254, 989 P.2d 604 (1999) (unappealed summary judgment is "the law of the case"), *rev. granted,* 140 Wn.2d 1021 (2000). The Court of Appeals' rejection of Bichindaritz's reliance on time-barred conduct in an unpublished decision presents no issue for review.

3. The PRA is not a substitute for civil discovery.

The PRA is a tool for *all* citizens to "remain[] informed so that they may maintain control over the instruments that they have created." RCW 42.56.030; RCW 42.56.080. Bichindaritz proposes a rule that contravenes this policy. She would instead require agencies – and their neutral public records officials – to provide preferential treatment to PRA requests that are made to bolster a private litigant's claims against a public agency. The PRA forbids agencies from prioritizing the requests of litigants, commanding

that agencies "shall not distinguish among persons requesting records." RCW 42.56.080. Further, "the public records act was not intended to be used as a tool for pretrial discovery." *Limstrom v. Ladenburg*, 136 Wn.2d 595, 614 n.9, 963 P.2d 869 (1998). The Court of Appeals correctly refused to accept Bichindaritz's contention that the University was required to prioritize her request because she had sued the University in separate litigation.

Forcing agencies to prioritize the requests of litigants, as Bichindaritz asks this Court to do, would impose unreasonable and costly burdens on public agencies. For example, if suing an agency on non-PRA claims places the agency on notice that "time [is] of the essence" (Petition 8), an agency's public record officials would be required to cross-reference PRA requests with all active litigation against the agency, prioritizing the requests of those who have sued the agency.

Likewise, the reasonableness of an agency's response cannot turn on discovery deadlines in other litigation. (Petition 9-12) The PRA does not require an agency to produce records in time for use in litigation; it requires that an agency respond "promptly" and "reasonabl[y]" considering the scope and nature of the request. RCW 42.56.520; *West*, 182 Wn. App. at 513-15, ¶¶ 41-47; *Andrews*,

183 Wn. App. 646, ¶ 2. And here, Bichindaritz ignores that she submitted her June 2011 request *after* discovery closed in the federal suit, precluding any response before the discovery cutoff. (*Compare* Petition 9 *with* CP 582)

Nor does the PRA require neutral public records officials to make value-laden decisions about which documents are most relevant to the requester's litigation against the agency. Instead, the PRA requires agencies to review documents for exemptions, as the University did here. RCW 42.56.070(1); *see also West*, 182 Wn. App. at 515 (agency has no "obligation to provide the installments in any particular order"). Moreover, because Bichindaritz never informed the University's public records officials why she needed the documents (and they appropriately did not ask, RCW 42.56.080), the University had no basis for knowing that Bichindaritz desired any documents more than others. (CP 319, 328) In short, Bichindaritz's request was not entitled to priority over requests from other citizens because she had sued the University.

The Court of Appeals correctly rejected Bichindaritz's argument that the PRA is a substitute for civil discovery intended to vindicate alleged discovery violations in separate litigation, even

after those allegations have been rejected by the judge that presided over that litigation. Its decision presents no grounds for review.

4. If this Court accepts review it should review the unaddressed issues raised by the University below.

Should this Court accept review, it should review the issues the Court of Appeals declined to address, including whether the trial court erred in concluding the University acted in bad faith; whether the University's request for an evidentiary hearing should have been granted; whether a penalty can be imposed on a per-page basis; whether the trial court erred in imposing post-judgment interest; whether the award of attorney fees is sufficiently

supported; and whether to take judicial notice of Judge Lasnik's ruling.[5] RAP 13.7(b) (App. Br. 31-50; Reply Br. 14-25).

D. Conclusion.

This Court should deny review of the Court of Appeals' unpublished decision.

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[5] Judge Lasnik rejected Bichindaritz's allegation that the University withheld documents to undermine her federal lawsuit, finding the University did not produce two emails referencing her national origin during discovery because *she did not request them*, and that the University's "discovery response played no part in how [she] fashioned her complaint." (*Compare* CP 1321 *with* Petition 3; *see also* CP 1328-29) Bichindaritz concedes that she in fact used these two emails in the federal trial. (Petition 11)

Judge Lasnik likewise rejected Bichindaritz's contention that the failure to produce the single "nursing person" email established a "corrupt motive," noting that "the University[] produc[ed] . . . significant evidence going to the same issue" including evidence of "concerns" of three of the University's top administrators, all female, "regarding gender balance in the Institute and the possibility that Dr. Bichindaritz had not been given the assistance, advice, and/or opportunities necessary to generate an acceptable tenure application." (App. Br. Appx. D) Judge Lasnik found that the late disclosure "in no way affected the outcome of" Bichindaritz's trial, including her cross-examination of witnesses. If Bichindaritz "lost witnesses and opportunities for discovery and cross-examination," it was the result of her own failure to utilize "the liberal rules of federal discovery [which] gave plaintiff an opportunity to obtain documents in this venue separate and apart from the PRA." (*Compare* App. Br. Appx. D *with* Petition 12, 15)

Dated this 18th day of May, 2015.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 18, 2015, I arranged for service of the foregoing Answer to Petition for Review, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 18th day of May, 2015.

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Attached for filing is the Answer to Petition for Review, in *Bichindaritz v. University of Washington*, Cause No. 91571-7. The attorney filing this document is Howard M. Goodfriend, WSBA No. 14355, e-mail address: howard@washingtonappeals.com.

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