NO. 97775-5

SUPREME COURT OF THE STATE OF WASHINGTON

HEALTH PROS NORTHWEST, INC.,

Petitioner,

v.

STATE OF WASHINGTON et al.,

Respondents.

THE STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

For the second time in this case, Health Pros Northwest (HPNW) asks this Court to take review to determine whether the Public Records Act (PRA) requires an agency to provide an estimated date by which the agency will fully respond to a public records request. The Court of Appeals has rejected this argument three times in published decisions, and it is contrary to the plain language of RCW 42.56.520. Consideration of an argument repeatedly rejected by the Court of Appeals does not present an issue of substantial public interest. Just as the Court declined to take review of this issue on HPNW's first attempt, it should again decline review.

However, this Court should accept review of the Court of Appeals' conclusion that RCW 42.56.520(1)(c) requires agencies who cannot complete a request within five business days to provide an estimate of time by which the agency will provide records. Based on this misconstruction of the statute, the Court of Appeals concluded that the specific words that the Department of Corrections (Department) used in its five-day response were insufficient because it informed HPNW that the Department was gathering records and would respond further to its request by a certain date, rather than specifically providing an estimate of time for the first installment. This interpretation conflicts with this Court's prior interpretations of RCW 42.56.520(1)(c) and the plain language of that statute. Additionally, this

aspect of the Court of Appeals' decision presents an issue of substantial public interest because it creates uncertainty for agencies who cannot complete a response to a request within five business days. The impact of the Court of Appeals' ambiguous decision will be significant for all state and local agencies because a significant percentage of requests received by agencies cannot be completed within five business days. This Court should grant review on this issue and reverse.

II. ISSUES PRESENTED FOR REVIEW

Issue Raised by HPNW's Petition: Does the PRA always require an agency to provide an estimate of time within five business days by which the agency will complete its response to a public records request?

Issue Raised by the Department's Answer: Does RCW 42.56.520(1)(c) require an agency to inform the requester when it will begin producing records as part of its initial five-day response?

III. STATEMENT OF THE CASE

A. The Department Receives HPNW's Request and Promptly Begins Responding to the Request

On February 10, 2017, HPNW, through its attorney, submitted a lengthy public records request to the Department. Because an understanding of the request's scope is necessary to understand the Department's response, HPNW's initial request is quoted verbatim:

- All emails, letters, notes and other documents containing information on scheduling, requesting of HPNW staff, Facility Work Orders, and Last Minute Needs, sent in relation to any contractors involved with contracts K10580, K10904 and K10701, including any amendments to any of the above contracts.
- All phone records of calls, including date and time, made to Health Pros Northwest.
- All text messaging records, including content, date and time, sent from Washington DOC on-call managers to the Health Pros Northwest on-call phone.
- All emails, letters, notes and other documents containing DOC's responses, discussions or conversations in relation to contract questions or concerns brought forth by either the Washington DOC or Health Pros Northwest.
- All emails, letters, notes and other documents in relation to any discipline, demotion or reprimands from May 1, 2014-present, whether verbally or in writing, formal or informal, that specifically involved any of the following DOC Staff members: Susan Williamson, Eric Hernandez, Cynthia Ray Anderson, Debra Eisen, Kevin Bovenkamp, Barbara Braid, Nancy Fernelius, Nancy Manlapid, Patricia Paterson, Norman Goodenough, Danny Straub, Julie Workman, Billy Heinsohn, Ronna Cole and Mary Jo Currey.
- All emails, letters, notes or other documents sent to Health Pros Northwest from any Washington DOC employee or contractor.
- All emails, letters, notes or other documents received by Washington DOC from Health Pros Northwest.
- All emails, letters, notes and other documents from March 1, 2014-Present that include any of the following names: Health Pros Northwest, Matt Noren, Nick Bamer, Stephani Eang, Bethany Stout, or Wendie Dotson.
- All emails, letters, notes, records or other documents sent by DOC staff or contractors, in regards to bullying, harassment or complaints at the hands of Susan Williamson.

- All emails sent by or received from Susan Williamson that include complaints, remarks or statements with content regarding Health Pros Northwest, any staff member or contractor of Health Pros Northwest.
- All emails, letters, notes and other documents containing information in relation to the development, planning, meetings, and discussion in relation to RFQQ11118.
- Dates of signatures for the contract awarded from RFQQ11118.
- All emails, letters, notes, and other documents between Washington DOC personnel and other companies who offer similar or same services at (sic) Health Pros Northwest between March 1, 2014 and September 1, 2016.
- All emails, letters, notes and other documents containing information on the non-extension of Health Pros Northwest contract for an additional two-year period.
- All emails, letters, notes and other documents containing information on the extension of Health Pros Northwest contract for two additional two month periods, ultimately ending on August 30, 2016.
- All emails, letters, notes and other documents dealing with the RFQQ writing process, proposal review process, appeal process, and award process for RFQQ11118
- All emails, letters, notes and other documents containing information regarding one or more current vendors not holding a current Washington Department of Health Nursing Pool license after contract start date, for contract award resulting from RFQQ11118
- All emails, letters, notes and other documents containing information regarding the permanent hiring and/or employment offers, including date of first contact from DOC hiring personnel, to any current or past Health Pros Northwest employees or applicants including

-Yvonne Duncan	-Susan Leon
-Pamela Woods	-Kim Wond
-Melanie Ogburn	-Roberta Lucas
-Gloria Almero	-Cindy Walsh
-Vickie Reza	-Marilyn Baker
-John Sordetto	-Clinton Fridley

-Jasmin Barahona	-Luella Hutto
-Nick Tansil	-Mary Weber
-Lisa Murphy	-Leo Castonguway
-Anne Gaetz	-Leza Taverniti
-Shamra Kimbrel	-Debra Moore
-Heidi Hanson	-Lutricia Cisco
-Delaena Anderson	-Kathleen Waybrant
-Heidi Stein	-Joe Power-Drutis
-Kerri Delbridge	-Maria Contreas
-Rebecca Messinger	-Mary Richards
-Ronni Ruiz	-Tracie Adams
-Lorraine Goodrich	-Jodi Homan
-Laurie Kingtalk	-Heidi Johnson
-Jillian Nestell	-Mary Tipton
-Marjorie Hinga	-Maria Rigolo
-Aaron Thompkins	-Rachel Bates
-Bridget Sippel	-Lynne Barnes
-Kathryn Riley	-Teresa Ledbetter
-Brandi Brown	-David Cejmer
-Florence Ngugi	-Christie Kimberlin
-Dawn Tate	-Jolie Hanke
-Sabrina Bright	-Vivienne Green
-Christina Asiimwe	-Melanie Blakesley
-Gina Cain	-Kimberlee Cunningham
-Fatima Doelling	-Ken Dyer
-Vitoria Ferreira	-Andrea Franse
-Autumn Hamilton	-Ashley Harrington
-Margaret Hooley	-Betsy Johnson
-Sarah Kamau	-Robin Law
-Noella Masengesho	-Charles Mason
-Mia Mehline	-Donna Miles
-Mikealeen Miller	-Jeanne Moore
-Willette Morrison	-Colleen Murphy
-Melody Nelms	-Kathy Nurkowski
-Charlene Pike	-Jeff Powell
-Marla Rader	-Susan Rhoads
-Michele Rodgers	-Keith Schafer
-Kendra Scott	-Magdalena Smith
-Mikaba Snowden	-Audrey Snyder
-Cheryl St. Sauver	-Ashley Tang

-Sharon Thomas	-Jada Thompson
-Fran Vetter	-Kim Williams
-Sharon Galliher	-Victoria Anderson (Hall)
Mercy Wainaina	

CP 138-41.

The Department began working on the request almost immediately by gathering responsive records and then reviewing each responsive record to determine if it needed to be redacted or withheld. This search ultimately spanned every one of the Department's prison facilities and included searches by numerous employees of both hard copy files as well as electronic files. CP 186-92.

On February 15, 2017 (five business days after HPNW's request), the Department sent HPNW an email acknowledging the records request. CP 146-48. This email provided the Department's interpretation of the request, sought clarification of portions of the request, and ended by stating the following:

> Department staff will begin to gather and identify records, if any, responsive to your request. I will respond further as to the status of your request within 45 business days, on or before April 20, 2018. If you have any questions please contact me at the address below.

CP 146-148. The assigned Public Records Specialist indicated that she used this language in her prior five-day letters and that she had "never had a

requester complain about this language or express any confusion about what this language means." CP 127.

The Department continued to work on HPNW's request. Nine days before the Department's estimated first response date of April 20, the Department sent a cost letter for a first installment of 695 pages of records and mailed the records after receiving payment. CP 129, 131. Two weeks after receiving this installment of records, HPNW filed the present lawsuit.

Meanwhile, the Department continued to review and produce records in response to HPNW's request. After receiving payment, the Department produced a second installment of 1,633 pages of records on May 30, 2017. CP 132. On June 27, 2017, the Department sent HPNW a cost letter for a third installment of 9,128 pages of records and also provided detailed information about the progress of the Department's response to the request. CP 133, 194-95. In this email, the Department asked if HPNW wanted to prioritize any portion of its nineteen-part request. CP 195. HPNW responded by indicating that it wanted the Department to prioritize the request in whatever order will allow the Department to most quickly respond to the entire request. CP 200. After receiving payment, the Department mailed the third installment. CP 134. On August 16, 2017, the Department sent HPNW a cost letter for a fourth installment of 4,306 pages

of records. CP 135. The Department was continuing to search for and review responsive records at the time of the hearing below. CP 135.

B. Proceedings in the Trial Court and Court of Appeals

Shortly after the first installment, HPNW filed this lawsuit alleging the Department violated the PRA in its five-day response and that the Department's time estimate was not reasonable. The trial court rejected the second argument and made a factual finding that "thus far, [the Department] is acting diligently in response to Health Pros Northwest, Inc.'s public records request." CP 249.[1] The trial court also rejected HPNW's argument that the Department was required to provide an estimate of when it was going to fully respond to the request. CP 249. The trial court, however, concluded that the language in the Department's initial five-day response violated the PRA because the Department had failed to provide an estimate of when it would begin producing records. CP 248. As a consequence, the trial court awarded $10,000 in attorney's fees to HPNW. CP 250.

After this Court denied HPNW's request for direct review, the case was heard by Division II of the Court of Appeals. The Court of Appeals affirmed the trial court in all respects in a published opinion. First, the Court of Appeals rejected HPNW's appeal. In doing so, the Court followed prior

[1] HPNW has never assigned error to this finding; it is a verity on appeal as a result. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 450, 229 P.3d 735 (2010).

published Court of Appeals decisions concluding that an agency is not required to provide an estimate of when it is going to complete its response to the request. The Court of Appeals also rejected the Department's cross-appeal and concluded that an agency is required to provide an estimate of when records will be provided to comply with RCW 42.56.520(1)(c).

IV. ARGUMENT

A. The Court Should Again Deny Review of HPNW's Argument That the PRA Requires an Agency to Provide an Estimate of When the Agency Will Completely Respond to a Request

HPNW asks the Court to review an interpretation of the PRA that has been consistently rejected by the Court of Appeals and to which the Legislature has acquiesced. Contrary to HPNW's argument, the Court of Appeals' decisions—starting in 2014 with *Hobbs v. State*, 183 Wn. App. 925, 939-40, 335 P.3d 1004 (2014)—did not significantly change the PRA landscape by rejecting a requirement that agencies must provide an estimated date by which they will complete their response to a request. Furthermore, although HPNW argues that the Court of Appeals only permitted review of the timeliness of the agency's initial response, this statement mischaracterizes the Court of Appeals' decision. In fact, the Court of Appeals explicitly stated that the PRA "did not limit a court to reviewing only an agency's initial estimate." Appendix A, Slip Op., at 15. Thus, the Court should decline to accept review on the issue raised by HPNW.

1. HPNW's Argument Has Been Rejected by Every Appellate Court to Have Addressed the Issue

HPNW argues that the PRA requires agencies "to provide an estimate of when they expect to *fully* respond to the request." Petition, at 4 (emphasis in original). The Court of Appeals has repeatedly recognized that RCW 42.56.520 does not impose such a requirement. *See* Appendix A, Slip Op., at 6; *Hikel v. City of Lynnwood*, 197 Wn. App. 366, 372-76, 389 P.3d 677 (2016); *Hobbs v. State*, 183 Wn. App. 925, 939-40, 335 P.3d 1004 (2014). After *Hobbs* and *Hikel*, the Legislature has not amended the statute to impose such a requirement, even though it did react to another aspect of the *Hikel* decision by amending RCW 42.56.520 to reject the conclusion that agencies violate the PRA by seeking clarification in a five-day response. *See* Laws of 2017, ch. 303, § 3. This legislative acquiescence further supports the Court of Appeals decision here. *See City of Fed. Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009).

Although courts have declined to create a requirement that an agency must provide an estimate of when it is going to complete its response to a given request, courts have also consistently recognized that a requester can nevertheless challenge the timeliness of an agency's response. When a requester disagrees with an agency's timelines, the requester is able to go to court to require the agency to prove that it is responding in a reasonably

prompt manner to a request. RCW 42.56.550(2); *see also Rufin v. City of Seattle*, 199 Wn. App. 348, 357-58, 398 P.3d 1237 (2017) (reviewing reasonableness of agency response); *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 859, 288 P.3d 384 (2012) (same). In this case, the trial court explicitly found that the Department was acting diligently in responding to the request. CP 249.

Contrary to HPNW's argument that the plain language supports its argument, HPNW's interpretation adds words to the statutory language. HPNW's argument conflates the words "respond" and "fully respond." One way to illustrate why HPNW's interpretative gloss is inconsistent with the plain meaning of the word "respond" is to ask this question: Has the Department responded to HPNW's request? The answer to that question is that it clearly has. But if someone wanted to know if the Department has completed its response to HPNW's request, then that person would need to ask a different question, i.e. has the Department completed it response or fully responded to the request?

HPNW argues that the Court of Appeals' decisions that have rejected its argument represented "an unwarranted change in what had been settled law." Petition, at 20. However, HPNW does not cite a single case that has adopted its interpretation of the PRA or supports its argument. Rather, HPNW relies entirely upon a WSBA Deskbook and model rules

promulgated by the Attorney General's Office. The Court of Appeals correctly recognized that neither the Deskbook nor the non-binding Model Rules could change the plain statutory language. Therefore, contrary to HPNW's arguments, the Court of Appeals did not change settled law when it decided *Hobbs* in 2014. And in following *Hobbs*, the Court of Appeals in this case certainly did not change settled law.

HPNW's argument that the Court of Appeals' interpretation of the plain statutory language has undermined the PRA is also unavailing. HPNW has pointed to no evidence that the Court of Appeals' consistent interpretation of the PRA since 2014 has resulted in untoward consequences. In light of the practical realities of handling requests, the PRA is best served by communication between the agency and the requester. When an agency receives a large request, it has no way to accurately and reliably predict an estimated "completion" date in five business days and any such estimate would be completely speculative. HPNW recognizes that any initial estimate is speculative and subject to revision. HPNW's Opening Brief, at 20 n.9. In fact, when pressed in the Court of Appeals on what would be a reasonable time for responding to its own request, HPNW acknowledged that it did not have an answer to that question. Wash. Court of Appeals oral argument, *Health Pros Northwest, Inc. v. State of Washington*, No. 52135-1-II (June 24, 2019), at 8 min., 18

sec.-30 sec. Rather than coming up with a speculative date that needs to be revised repeatedly, an agency complies with the spirit and statutory requirements of the PRA by letting the requester know when the agency will respond further to the request. Therefore, because the Court of Appeals' consistent interpretation of the PRA did not upset settled law or undermine the PRA, this issue is not an issue of substantial public interest.

2. The Court of Appeals' Opinion Does Not Prohibit Judicial Review after an Agency's First Installment

Throughout this litigation, the Department has agreed that a court has the ability to review the entirety of an agency's response to a public records request to ensure that the agency is responding within a reasonable timeframe. This concession is not a litigation strategy unlikely to be repeated, as HPNW argues, but is instead an accurate reflection of the overwhelming appellate authority that recognizes a court's ability to conduct such a review. *See, e.g.*, *Andrews v. Wash. State Patrol*, 183 Wn. App. 644, 653-54, 334 P.3d 94 (2014). In this very case, the trial court conducted such a review and found that the Department was acting diligently in response to HPNW's request. CP 249. HPNW has never challenged that finding in any stage of its appeals. Consistent with the review conducted by the trial court, the Court of Appeals recognized that "[t]he plain language of former RCW 42.56.550(2) did not limit a court to

reviewing only an agency's initial estimate." Appendix A, Slip Op., at 15. In other words, the Court of Appeals, the trial court, the Department, and prior appellate decisions all agree that a trial court can review the reasonableness of an agency's entire response under RCW 42.56.550(2). Review of an issue on which there is no disagreement does not present an issue of substantial public interest.

HPNW's petition, however, claims that the Court of Appeals actually prohibited judicial review of anything beyond an agency's initial response. Petition, at 14. HPNW's arguments are divorced from the facts of this case because the trial court conducted a review of the agency's response through the time of the hearing in the trial court. HPNW has not appealed that portion of the trial court's decision.[2] Although HPNW claims that RCW 42.56.550(2) only allows for "one review" of the agency's timeframes,

[2] HPNW has repeatedly asserted that the Department is going to take twelve years to produce all the records. The Department does not adopt the estimate that HPNW has created. Indeed, the estimate appears to be based on a false equivalency. HPNW reasons that the Department produced 15,000 pages in seven months, that the Department had 350,000 pages to review, and that therefore the Department will take another twelve years to produce the remaining 350,000 pages. This logic fails to acknowledge that records reviewed does not necessarily equate to records produced. And because they are not equivalent, HPNW's estimate is logically incorrect. Furthermore, it also fails to recognize that some records may take less time to review because they are not as sensitive. In other words, there are many variables that HPNW's own twelve-year estimate fails to take into account. Hence the reason that the Department has consistently maintained that it cannot come up with a meaningful estimate of when it will complete its response to HPNW's very large public records request. As the Court of Appeals concluded, it is not required to do so.

there is no language in the statute that requires that interpretation, and the Court of Appeals did not adopt that interpretation.

Similarly, HPNW's claims that review of an estimated date of completion provides the only meaningful way to ensure the agency is responding promptly are also unsupported. If a court can review each part of the agency's response as well as the reasonableness of the response as a whole—as the trial court did here—such a review seems to provide at least as much opportunity for courts to review the reasonableness of an agency's response. Indeed, if a requester is given only one date (a date of completion) at the outset, the requester has only one chance to challenge the agency's estimate. For some large requests, this estimate may be a significant period of time, and as HPNW appears to recognize, it is bound to be very speculative. If the requester files the challenge right away and the agency prevails, there is no further recourse for the requester. Under the Court of Appeals' interpretation, an agency faces a potential challenge throughout the process and this incentivizes the agency to continue to respond reasonably. Simply put, HPNW's argument that trial courts will no longer be able to review any timeframes beyond the first installment is simply incorrect and not an issue presented by this case. Therefore, HPNW has failed to show that its petition raises an issue of significant public interest and its petition should be denied.

B. The Court Should Grant Review to Reject the Court of Appeals' Conclusion That An Agency Violates the PRA by Providing a Requester a Reasonable Estimate of When It Will Provide Further Response to a Request

The Court of Appeals erroneously concluded that an agency is required to provide an estimate of when it would produce records in order to meet the requirements of RCW 42.56.520(1)(c). This conclusion conflicts with this Court's decision in *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 432, 327 P.3d 600 (2013), and the plain language of RCW 42.56.520(1)(c). Moreover, the Court of Appeals' decision will create significant confusion for agencies because it does not provide clear, workable guidance about the manner in which agencies must respond in their five-day letters in order to comply with the PRA. As such, it presents an issue of significant public interest. This Court should grant review of this issue under RAP 13.4(b)(1) and (4).

1. The Court of Appeals Decision Conflicts with This Court's Prior Discussion of RCW 42.56.520(1)(c) and the Plain Statutory Language

RCW 42.56.520 identifies an agency's obligations to promptly respond to a public records request. Under the version of RCW 42.56.520 that was in effect at the time the Department received HPNW's request, an agency was required to respond within five business days by doing one of four things: 1) provide the requested records; 2) provide an internet address

and link to the agency's web site; 3) acknowledge the request and provide a reasonable estimate of time that the agency would require to respond to the request; or 4) deny the request. RCW 42.56.520 (2014).[3] Agencies are permitted additional time to respond to requests based upon the need to clarify the request, to locate and assemble records, to notify third parties affected by the request, or to determine whether any information is exempt. RCW 42.56.520(2).

When an agency receives a request that it cannot fulfill within five business days, RCW 42.56.520(1)(c) expressly permits agencies to take more time. But agencies must still acknowledge the request and provide a reasonable estimate of time required to respond. The Court of Appeals correctly recognized that the word respond means to "say something in return: make an answer." Appendix A, Slip Op., at 17. Yet, the Court of Appeals went on to conclude this meant that an agency is required to estimate when it will provide records.

The Court of Appeals' analysis conflicts with this Court's discussion of RCW 42.56.520(1)(c) in prior decisions. In *Resident Action Council*, this Court discussed at length an agency's obligations under the PRA in order to provide "clear and workable guidelines." *Resident Action*

[3] In 2017, the Legislature added a fifth option that explicitly allows agencies to seek clarification of a request in its five-day response. *See* Laws of 2017, ch. 303, § 3.

Council, 177 Wn.2d at 431. The Court described RCW 42.56.520(1)(c) as allowing an agency to "notify [the] requester it needs a reasonable amount of time to determine appropriate further response." *Id.* at 432. This Court reiterated a similar interpretation in *Belenski v. Jefferson County*, 186 Wn.2d 452, 378 P.3d 176 (2016), when it recognized that an agency can respond to a request in three ways: produce records, deny the request with a proper claim of exemption, or "ask for more time or clarification." *Belenski*, 186 Wn.2d at 456-57.

Unlike these prior decisions, the Court of Appeals interpreted the word "respond" to be the equivalent of producing a record. However, this interpretation makes little sense in light of the surrounding statutory provisions. One of the other options available to an agency in its five-day response is "providing the record." RCW 42.56.520(1)(a). But when the Legislature gave an agency the option to provide an estimate, the Legislature used different language and required an agency to provide a "reasonable estimate of the time the agency will require to respond to the request." RCW 42.56.520(1)(c). That different language should be given different meaning. *Ass'n of Wash. Spirits & Wine Distrib. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 353, 340 P.3d 849 (2015). Additionally, RCW 42.56.520(2) specifically identifies a number of

circumstances in which an agency could need more time. Not every circumstance identified in RCW 42.56.520(2) involves producing a record.

The Court of Appeals suggested that they were rejecting the Department's interpretation because it would "allow the agency to indefinitely postpone requests by providing these nonresponsive responses." Appendix A, Slip Op., at 19. In doing so, the Court of Appeals misconstrued the Department's position to be that an agency is permitted to provide a requester an estimate of when it will provide a next estimate. The Department has never taken such a position nor is this the natural consequence of its position. Instead, the Department has argued that RCW 42.56.520(1)(c) allows an agency to acknowledge a request and provide a reasonable estimate of when it will respond further to the request. After all, an agency should not be penalized when it provides an estimate of its next response date using the same terminology (i.e. "respond" or "response") that is used in the statue itself. In reaching a contrary conclusion, the Court of Appeals' decision conflicts with this Court's prior interpretations of RCW 42.56.520(1)(c) and the plain statutory language.

2. The Ambiguities and Practical Problems Created by the Court of Appeals' Decision Raise Significant Issues of Substantial Public Interest

Because the PRA is a difficult area of the law, this Court has "endeavor[ed] to provide clear and workable guidance to agencies insofar

as possible." *Resident Action Council*, 177 Wn.2d at 431. Lack of clarity in the PRA creates unnecessary confusion in an area where such confusion creates significant monetary risk for agencies. The PRA permits a requester to obtain costs and attorney's fees if the agency fails to provide a response to a request within a reasonable amount of time. RCW 42.56.550(4). The Court of Appeals has construed RCW 42.56.550(4) to provide costs and attorney's fees if the agency fails to provide an adequate five-day response. *See, e.g.*, *West v. Wash. State Dep't of Natural Resources*, 163 Wn. App. 235, 244, 258 P.3d 78 (2011). Those costs and fees can be significant. In this case, the trial court awarded $10,000 of attorney's fees against the Department based on the trial court's conclusion that the Department's five-day letter violated the PRA. The trial court did not find that the Department's five-day letter was somehow unreasonable; it actually found that the Department was acting diligently. Nevertheless, the trial court concluded that the words used by the Department were inadequate. Because—as this case demonstrates—the consequences of using the wrong words in a five-day letter can be significant for an agency, it is extremely important for agencies to have clear guidance.

The Court of Appeals' decision lacks that clear guidance. The Court of Appeals' interpretation appears to require an agency that cannot fulfill a request within five business days to provide an estimate of when it will

produce a first installment of records. However, the precise scope of that requirement and its application to other circumstances is not entirely clear. For example: How does an agency respond when it does not know if it has any responsive records? How does an agency respond if it knows that it has records but is unsure if the records are non-exempt? How does an agency respond if it has records but needs to notify third parties of the release of records? Is a response that an agency will provide records, if any are located, sufficient? Or does the agency actually need to promise records? Oftentimes agencies will not know if they are actually going to provide records within five business days, and the Court of Appeals' decision seems to require agencies to promise something that they may not be able to do. Under the Court of Appeals' approach, agencies will still need to tell the requester when records are going to be provided, but such a promise may by necessity be speculative. This lack of clarity will create administrative problems (as well as liability) for agencies.

In contrast, the Department's interpretation of the statute allows an agency to be candid with the requester and gives the agency some flexibility in its five-day letter. Under the Department's interpretation, it would allow an agency to use language—"further response"—that is similar to the specific language in RCW 42.56.520. The Department's interpretation recognizes that the five-day letter is merely the first step in communication

between the requester and the agency. As long as the agency gives the requester a reasonable timeframe, the PRA does not require an agency to use certain magic words in its initial response letter.

Interpreting RCW 42.56.520(1)(c) in this manner also makes practical sense. For large request, like HPNW's request in this case, additional time is needed so the agency can locate records and/or determine whether records are exempt. RCW 42.56.520(2). Agencies are expressly permitted to respond by providing installments of records while the agency gathers and responds to requests. RCW 42.56.080(2). For such requests, the focus should be on the diligence and timeliness of the response—issues resolved by the trial court in the Department's favor and not challenged here—not on the precise words used by the agency in its opening letter.

The Court of Appeals dismissed the practical concerns in a sentence. But despite this cursory dismissal, the decision will have a significant practical effect on all agencies. Data from Joint Legislative Audit and Review Committee (JLARC) indicates that state and local agencies combined receive more than 889 public records requests per day and only slightly more than 50 percent can be completed within five business days.[4]

[4] In 2017, the Legislature commissioned JLARC to gather data about public records requests. JLARC received data from 774 public agencies. These agencies received 143,162 public records requests from July 23, 2017, to December 31, 2017. Only 56% of requests received by such agencies were closed within five business days. The data is available at http://leg.wa.gov/jlarc/reports/2019/PubRecordsDataCollection/default.html.

As illustrated by the Court of Appeals' decision, the manner in which the courts have characterized the language that an agency must use to comply with the five-day requirement has not been consistent and does not reflect the range of circumstances that an agency might face. This Court should grant review to provide clarity.

V. CONCLUSION

The Department respectfully requests that the Court deny review of HPNW's argument that an agency must provide an estimate of when the agency is going to complete its response to a request. The Court should grant review and reverse the Court of Appeals' interpretation of the PRA that requires an agency to estimate when it will produce a first installment of records because it conflicts with this Court's prior decisions, is contrary to the plain statutory language, and will create significant administrative problems for all state and local agencies.

RESPECTFULLY SUBMITTED this 14th day of November, 2019.

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CERTIFICATE OF SERVICE

I certify that I served all parties, or their counsel of record, a true and correct copy of THE STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS' ANSWER TO PETITION FOR DISCRETIONARY REVIEW by US Mail Postage Prepaid to the following addresses:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 14th day of November, 2019, at Olympia, Washington.

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APPENDIX A

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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

HEALTH PROS NORTHWEST, INC., a Washington corporation, Appellant/Cross-Respondent, v. THE STATE OF WASHINGTON and its DEPARTMENT OF CORRECTIONS, Respondent/Cross-Appellant.	No. 52135-1-II PUBLISHED OPINION

CRUSER, J. — Health Pros Northwest Inc. (HPNW) brought action against the Department of Corrections (DOC) for violations of the Public Records Act (PRA), ch. 42.56 RCW. In its timely initial response to HPNW's PRA request, the DOC stated that it would provide at a later date an estimate for when the first installment of records would be produced. HPNW asserted that the DOC's response violated former RCW 42.56.520(3) (2010). The superior court ruled that former RCW 42.56.520(3) did not require an agency to provide an estimate of when it will *finish* producing records responsive to a request. However, the court further ruled that the DOC's initial response did not comply with former RCW 42.56.520(3) because the agency did not provide HPNW with an estimated date on which the agency would begin producing records. HPNW appealed and the DOC cross appealed.

We hold that (1) former RCW 42.56.520(3) required an agency to provide an estimate of when it would provide the first installment of records, not when it would fully respond to the

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request and (2) an agency's response that states only a date by which the agency will give an estimate for when the first installment of records will be produced does not comply with former RCW 42.56.520(3). Accordingly, we affirm.

FACTS

I. REQUEST FOR RECORDS

On February 10, 2017, HPNW submitted a public records request to the DOC. HPNW requested categories of records related to a contract HPNW entered into with the DOC. The request was three pages long and contained 18 parts, including multiple subparts.

On February 15, the DOC sent HPNW an e-mail with its initial response to the request. This e-mail acknowledged receipt of the request and provided the DOC's interpretation of the request. The DOC did not provide a date on which it would produce the requested records. Instead, the DOC stated it "will respond further as to the status of your request within 45 business days, on or before April 20, 2017." Clerk's Papers (CP) at 25.

II. FIRST INSTALLMENT

On April 11, the DOC sent HPNW an e-mail with the cost for the first installment of records. That same day, HPNW mailed the payment to the DOC. HPNW's attorney also responded to the DOC's e-mail and asked how many installments the DOC expected to produce and when the DOC expected to produce each installment. The DOC responded,

> (1) It is unknown how many installments there will be. Due to the large and complex nature of this request, [we] anticipate there will be easily over 10 installments, but that is simply a "guess-timate."
> (2) How our process works is, we offer one installment at a time. The Specialist does not continue to work on the request until payment for that installment is received.

CP at 31.

HPNW responded to this e-mail by stating that the agency's answer was "not within the letter of [sic] spirit of the Open Public Records Act." CP at 29. HPNW asserted that the agency is required to provide the requestor a reasonable estimate of when the agency would completely respond to the request. HPNW also requested that to the extent the DOC would require more than an additional 45 days to fully respond, the agency should "provide a full and complete explanation based in specific evidentiary facts why such an extraordinary response time is required." CP at 30. In response, the DOC informed HPNW that it may appeal the agency's response to its request.

On April 17, the DOC provided HPNW with the first installment of the requested records, which contained 673 pages of responsive documents. The DOC informed HPNW that "[s]taff [will] continue to gather and review records responsive to your request" and that the DOC will "follow up with you within 40 business days, on or before, June 12, 2017." CP at 36. After receiving the DOC's letter, HPNW sent an e-mail asking how the DOC's response time complied with the statutory obligation to provide a prompt response. In an e-mail, the DOC Public Records Specialist explained that her current caseload has over 100 requests and that she could not stop working on other requests to get to HPNW's request.

III. COMPLAINT

On May 2, HPNW filed a complaint in superior court, asking the court to find that the DOC violated former RCW 42.56.520 (2010) in its initial response to HPNW. HPNW also asked the court to determine whether the DOC's time estimate was "reasonable" and if the court found the estimate was unreasonable, to enter an order declaring what time estimate was reasonable.

After being served with the complaint, the DOC continued to produce installments of records. On May 30,[1] the DOC produced the second installment of 1,633 pages of documents. On July 3, the DOC produced the third installment of 9,119 pages of documents. On August 22, after HPNW had filed its opening brief below, the agency produced a fourth installment of 4,306 pages of documents. The DOC asserted in its response brief below that it had provided HPNW 15,531 pages and that the DOC had approximately 350,000 additional pages to review.

IV. HEARING

On September 8, the superior court held a hearing on two issues: (1) whether the DOC initially responded to HPNW's request as required by former RCW 42.56.520, and (2) whether the DOC was required to provide a reasonable estimate of the time it would need to *fully* respond to the request in order to have complied with its obligation to provide a reasonable estimate of the time required to respond within the meaning of former RCW 42.56.550 (2011).

The superior court ruled that the DOC's initial response did not comply with former RCW 42.56.520(3) because it did not provide HPNW with an estimated date on which the agency would begin producing records. The court entered the following declaratory judgment:

> The Court DECLARES that [former] RCW 42.56.520(3), as construed by the Court of Appeals in *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004 (2014), only requires an agency to provide an estimate of when it will produce its *first* installment of records responsive to the public records request, and does not require the agency to produce an estimate of when it will *finish* producing records responsive to such a request, such that the Court has no jurisdiction to compel the agency to provide such an estimate.

[1] The court's findings of fact state that the agency produced a second installment on May 22, but the record reflects that this occurred on May 30.

CP at 251. And the court concluded that the DOC had acted with reasonable diligence in response to HPNW's request.

The parties stipulated and agreed that HPNW should be awarded $10,000 in attorney fees for the violation found by the superior court. Thus, the superior court awarded HPNW $10,000 in attorney fees and $212.50 in costs.

HPNW appealed and the DOC cross appealed.[2]

ANALYSIS

I. STANDARD OF REVIEW

"Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo." Former RCW 42.56.550(3). The resolution of the issue in this case involves statutory interpretation. "When interpreting a statute, our primary duty is to give effect to the legislature's intent." *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 437, 98 P.3d 463 (2004). In interpreting a statute, we first look at the statute's plain meaning. *Fisher Broad.-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 527, 326 P.3d 688 (2014). We give effect to a statute's meaning if the meaning is plain on its face. *Yousoufian*, 152 Wn.2d at 437. In determining the plain meaning, we consider "'all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.'" *Fisher*, 180 Wn.2d at 527 (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)).

[2] The parties sought direct review in the Supreme Court. The Supreme Court transferred the case to this court. *See* Order transferring to Division Two, *Health Pros Northwest, Inc. v. State*, No. 95109-8, (Wash. July 11, 2018).

However, when a statute is ambiguous we look to principles of statutory construction, legislative history, and relevant case law to provide guidance in interpreting it. *Yousoufian*, 152 Wn.2d at 434. A statute is ambiguous if it is amenable to more than one reasonable interpretation. *Id.* at 433.

II. REASONABLE ESTIMATE TO RESPOND

HPNW argues that former RCW 42.56.520(3) required an agency responding to a public records request to provide an estimate of when it expects to "*fully* respond to a public records request." Br. of Appellant at 4. HPNW acknowledges the authority contrary to its position, specifically *Hobbs*, and asks us to reach a decision contrary to our decision in that case. As a result, HPNW contends that the superior court erred in its reliance on *Hobbs* in ruling that former RCW 42.56.520(3) did not require the agency to produce an estimate of when it will finish producing records. We disagree and continue to follow the holdings in *Hobbs* and *Hikel v. City of Lynwood*, 197 Wn. App. 366, 389 P.3d 677 (2016).

A. PRINCIPLES OF LAW

Former RCW 42.56.520 required, in relevant part,

> Responses to requests for public records shall be made promptly by agencies. . . . Within five business days of receiving a public record request, an agency . . . must respond by either (1) providing the record; (2) providing an internet address and link on the agency's web site to the specific records requested, except that if the requester notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record or allow the requester to view copies using an agency computer; (3) *acknowledging that the agency . . . has received the request and providing a reasonable estimate of the time the agency . . . will require to respond to the request*; or (4) denying the public record request.

(Emphasis added.)[3]

If necessary, an agency can make public records available "on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection." Former RCW 42.56.080 (2016).

Former RCW 42.56.550(2) provided in relevant part,

> 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 record 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. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

B. PLAIN MEANING OF FORMER RCW 42.56.520(3)

1. *HOBBS* AND *HIKEL*

HPNW argues that former RCW 42.56.520(3), which stated that an agency must provide "*a reasonable estimate of the time the agency . . . will require to respond to the request,*" required the DOC to provide an estimate of when the production of the records requested in this case would be complete. (Emphasis added.) In *Hobbs*, we addressed this same issue of

> whether RCW 42.56.520 requires an agency to respond to a public records request by providing a reasonable estimate of when the agency will be able to provide the *completed* response to the request, or whether it is sufficient for the initial response

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[3] The legislature amended former RCW 42.56.520 in July 23, 2017. LAWS OF 2017, ch. 303, § 3. The amended statute adds that an agency may respond by

> [a]cknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and asking the requestor to provide clarification for a request that is unclear, and providing, to the greatest extent possible, a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request if it is not clarified.

RCW 42.56.520(1)(d).

> to include only a reasonable estimate of the time it will take the agency to produce the first installment of responsive records.

183 Wn. App. at 942. *Hobbs* explained that there are two ways for an agency to respond to a request: (1) by making "the records available for inspection or copying" or (2) by responding by "including an explanation of the exemption authorizing the agency to withhold the records." *Id.* *Hobbs* additionally noted that under RCW 42.46.080, an agency is allowed to produce records on a "'partial or installment basis.'" 183 Wn. App. at 942. *Hobbs* rejected Hobbs's interpretation of former RCW 42.56.520 as requiring the agency to provide an estimate of the reasonable amount of time needed to complete a request, stating that it would not add words to the statute. 183 Wn. App. at 942. Thus, *Hobbs* held that the agency complied with the plain language of former RCW 42.56.520 because the agency gave a reasonable estimate of the time required to provide the first installment of records. 183 Wn. App. at 942.

Here, HPNW contends that *Hobbs* is flawed because the most natural reading of former RCW 42.56.520(3) is that an agency was required to provide a reasonable estimate of the time needed to complete the request. Moreover, HPNW asserts that while the court in *Hobbs* criticized Hobbs for adding the word "fully" in the statute, the *Hobbs* court then added the word "initially" before the word "respond" in its interpretation of the statute. Thus, HPNW argues that *Hobbs* is subject to the same criticism that the court directed at Hobbs.

However, the court in *Hobbs* held that an agency's response, providing a reasonable estimate of the time it will take to produce the first installment of records, was sufficient to comply with former RCW 42.56.520. 183 Wn. App. at 942. And *Hobbs* did not hold that the production of records in installments was the only way an agency could respond. *Id.* at 942-43. Instead, *Hobbs* held that the agency complied with the plain language of former RCW 42.56.520, which

"require[d] that the agency provide a reasonable estimate of the time required to respond to the request." 183 Wn. App. at 942. Therefore, we reject HPNW's argument that the court's interpretation in *Hobbs* added words to the statute and we continue to follow our decision in *Hobbs*.

Likewise, in *Hikel*, five days after a public records request was made, the agency acknowledged receipt of the request and asked for clarification. 197 Wn. App. at 370. Hikel argued that the agency violated the PRA because it did not provide him with a reasonable estimate of the time it would take to respond to the request. *Id.* at 372. The *Hikel* court concluded that "[a] response that does not either include access to the records or deny the request must contain the agency's estimate of the time it will take to respond." *Id.* at 373. The court held that the request for clarification was deficient because it did not contain a time estimate of when the agency would respond. *Id.* at 373-74. Furthermore, the court rejected Hikel's argument that the agency violated the PRA by not providing an estimate of when Hikel would receive all of the requested documents. *Id.* at 375-76. The court followed *Hobbs* and said that the requestor's interpretation would add language to the statute. *Id.* at 376.

After the *Hikel* decision, the legislature amended former RCW 42.56.520 and added a fifth option for how an agency may respond. LAWS OF 2017, ch. 303, § 3. The amended statute states that an agency may acknowledge that it has "received the request and ask[] the requestor to provide clarification for a request that is unclear, and provid[e], to the greatest extent possible, a reasonable estimate of the time the agency . . . will require to respond to the request if it is not clarified." RCW 42.56.520(1)(d). However, the legislature did not amend the statute to add that the agency must give an estimate of the time it would take to "fully" respond to the request.

We "presume[] that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision." *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009); *see State v. Ervin*, 169 Wn.2d 815, 826, 239 P.3d 354 (2010). Here, the legislative amendments made after *Hikel* favors the conclusion that the legislature did not intend to require that the agency provide a reasonable estimate of the time needed to fully respond to the request.

2. MODEL RULES

The legislature has directed the attorney general to adopt model rules on public records compliance. Former RCW 42.56.570(2) (2007). The attorney general's model rules for processing PRA requests are found in former WAC 44-14-04003 (2007). HPNW relies on former WAC 44-14-04003(4)(b) in support of its claim that an agency must provide a reasonable estimate of when it will "**fully** respond" to a request. Br. of Appellant at 19 (alteration in original). Former WAC 44-14-04003(4)(b) did, indeed, suggest that an agency should provide a reasonable estimate of the time it will require to "fully respond" to a PRA request:

> Within five business days of receiving a request, an agency must provide an initial response to requestor. The initial response must do one of four things:
>
> (a) Provide the record;
>
> (b) Acknowledge that the agency has received the request and provide a reasonable estimate of the time it will require to *fully* respond;
>
> (c) Seek a clarification of the request; or
>
> (d) Deny the request.

Former WAC 44-14-04003(4) (emphasis added).

Notably, former WAC 44-14-04003 was amended and the model rule now suggests that an agency should, in its initial response:

> (a) Provide the record;
> (b) Acknowledge that the agency has received the request and provide a reasonable estimate of the time it will require to *further* respond;
> (c) Seek a clarification of the request and if unclear, provide to the greatest extent possible a reasonable estimate of time the agency will require to respond to the request if it is not clarified; or
> (d) Deny the request. RCW 42.56.520. An agency's failure to provide an initial response is arguably a violation of the act.

WAC 44-14-04003(5) (emphasis added).

Further, "[t]he model rules, and the comments accompanying them, are advisory only and do not bind any agency." Former WAC 44-14-00003 (2006); *see Mitchell v. Dep't of Corr.*, 164 Wn. App. 597, 606, 277 P.3d 670 (2011). We additionally note that the attorney general's office has since amended former WAC 44-14-04003 and deleted the word "fully" and replaced it with "further," which supports the conclusion that an agency is not required to provide an estimate for the completed response to a request. Therefore, we do not rely on the model rules because they are advisory only. Former WAC 44-14-00003.

3. *PUBLIC RECORDS ACT DESKBOOK*

HPNW also relies on Washington's *Public Records Act Deskbook* guide to argue that former RCW 42.56.520 required an agency to provide a reasonable estimate of when it will fully respond to the request. The *Deskbook* states,

> The agency must provide its initial response within five days. When the agency cannot complete its response within that five-day period and needs no clarification, the agency can take a "reasonable" amount of time to complete the request, but must provide this "reasonable" time estimate to the requestor.
>
> . . . .
>
> The reasonable time estimate should include both the date of the first installment, if there will be installments, and the date the agency estimates the request will be completed.

Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws § 6.5, at 6-22 (2d ed., 2014).

The guide suggests that an agency must provide two estimates: (1) the date of the first installment, and (2) the date the request will be completed. *Public Records Act Deskbook, supra.* However, the plain language of former RCW 42.56.520(3) requires only "a reasonable estimate of the time the agency . . . will require to respond to the request." It does not require two estimates. We do not follow the *Deskbook* because it is not binding authority and the *Deskbook*'s interpretation is not supported by the plain language of former RCW 42.56.520.

4. LEGISLATIVE PURPOSE

HPNW argues that the legislature's purpose of ensuring that agencies provide "prompt" responses can only be served by a statutory construction requiring the agency to provide an estimate of the time required to produce *all* responsive records. We disagree.

Former RCW 42.56.550(3) required that courts "take into account the policy of [the PRA] 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." Former RCW 42.56.080 mandated that agencies, upon request, make public records "promptly" available. Former RCW 42.56.520(1) further provided that responses to requests "shall be made promptly by agencies."

HPNW relies on former RCW 42.56.550(2), which is a closely related statute that used the same language as former RCW 42.56.520(3) that states a "reasonable estimate of the time the agency . . . require[s] to respond to the request." Former RCW 42.56.550(2) provided,

> 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*

> *record 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. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

(Emphasis added.)

HPNW argues that its construction of former RCW 42.56.520(3) as requiring the agency to provide an estimate of the time it requires to fully respond to the request harmonizes both former RCW 42.56.520(3) and former RCW 42.56.550(2). HPNW asserts that the legislature, through these two statutes, has required agencies to provide requestors with an estimate of the time it will take to fully respond to the request and has given court authority to review whether the agency's estimate of the time required to fully respond to the request is reasonable.

"As a policy matter, the purpose of the PRA is best served by communication between agencies and requesters." *Hobbs*, 183 Wn. App. at 941 n.12. The operative word in former RCW 42.56.550(2) is "reasonable" and not "prompt" or "immediate." Additionally, legislative amendments made to former RCW 42.56.520(2) following *Hikel* recognized that additional time may be required to respond to a request "based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request." Therefore, we reject HPNW's arguments.

5. "JURISDICTIONAL" GAP

HPNW also argues that our interpretation in *Hobbs* results in a "'jurisdictional gap.'" Br. of Appellant at 24; Appellant's Reply Br. at 15. HPNW says that under our construction in *Hobbs*, the court has authority to review only the agency's estimate of the time the agency required to produce its *initial* installment of records. Therefore, HPNW argues that the courts then lose

jurisdiction under former RCW 42.56.550(2) to review the pace at which an agency is responding to a public records request because review is limited to the *initial* installment. HPNW claims that the courts reacquire jurisdiction only under former RCW 42.56.550(1) once the agency takes final agency action. We disagree because former RCW 42.56.550(2) allowed a requestor to challenge an agency's "estimate of the time that the agency requires to respond" in court and permitted courts to require an agency to show that its estimate was reasonable.

As an initial matter, we address the claim that the issue is one of "jurisdiction." HPNW used the term "jurisdiction" below, and the superior court adopted that framing by saying, "[T]he Court has no *jurisdiction* to compel the agency to provide such an estimate" in its written ruling. CP at 251 (emphasis added). However, HPNW has not shown that this issue is jurisdictional. "'Subject matter jurisdiction' refers to a court's ability to entertain a type of case, not to its authority to enter an order in a particular case." *In re the Marriage of Buecking*, 179 Wn.2d 438, 448, 316 P.3d 999 (2013). "[I]f a court can hear a particular class of case, then it has subject matter jurisdiction." *Id.*

HPNW's true complaint seems to be that the superior court, relying on *Hobbs*, held that it did not have the *authority* under former RCW 42.56.520(3) to compel the agency to provide an estimated date on which the PRA request would be fully completed. This argument is more fairly characterized as an error of statutory interpretation. That is not the same as the court lacking subject matter jurisdiction over actions brought under the PRA. It appears, rather, that the terms "jurisdiction" and "jurisdictional" were used improperly in the proceedings below. Therefore, we review this claimed error as one of statutory interpretation rather than one of jurisdiction.

The plain language of former RCW 42.56.550(2) did not limit a court to reviewing only an agency's initial estimate. Instead, it stated,

> 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 record 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.

Former RCW 42.56.550(2).

The plain language of former RCW 42.56.550(2) applied to all time estimates and not just the estimate for the initial installment.[4]

Here, the superior court's conclusions of law show that it also recognized that "the agency conceded that the Court is entitled to review the diligence with which the agency is producing records in response to the public records request." CP at 249. The superior court concluded, "[T]hus far, the agency is acting diligently in response to Health Pros Northwest, Inc.'s public records request." *Id.* The court's oral ruling also suggested that the court considered the agency's entire response, including its response after the first installment. Thus, we hold that there is no "jurisdictional gap" created by interpreting former RCW 42.56.520(3) as not requiring an agency to give an estimate of the time it will need to fully respond to a PRA request.

In conclusion, we reject HPNW's arguments and hold that the superior court correctly applied former RCW 42.56.520(3) when it concluded that the DOC was not required to include an estimate of when it will fully respond to the request in its initial response to a PRA request. It is

[4] The DOC conceded during oral argument that the agency has to give an estimate for each installment. Wash. Court of Appeals oral argument, *Health Pros Northwest, Inc. v. State of Washington*, No. 52135-1-II (June 24, 2019), at 12 min., 6 sec.-51 sec. We do not address this further because it was not briefed by the parties or raised as an issue.

sufficient under the plain meaning of former RCW 42.56.520(3) for an agency to provide a reasonable estimate of the time it will take the agency to produce the first installment.

III. NATURE OF THE DOC'S INITIAL RESPONSE

The DOC argues on cross appeal that the superior court erred in concluding that the DOC's initial response to HPNW's request violated former RCW 42.56.520(3). Here, the DOC responded to the request after five days by explaining, "[We] will respond further as to the status of your request within 45 business days, on or before April 20, 2017." CP at 25. In essence, the DOC issued a nonresponse. The "response" did not include a record, a web link to a record, an estimate of the time needed to produce the record, a request for clarification, or a denial of its obligation to produce the record. Based on the DOC's response, the DOC planned to provide one of those responses on April 20.

The DOC contends that agencies could comply with former RCW 42.56.520(3) by acknowledging the records request and providing a reasonable estimate of time that it needed to further respond to the request. The DOC believes that the superior court's interpretation of the statutory language was too narrow and ignores the other ways in which an agency may respond to a request. We conclude that the court did not err.

The DOC focuses on the meaning of the word "respond." Former RCW 42.56.520(3). The DOC contends that the word "respond" is a technical "term of art" in the PRA and asks that we not interpret "respond" based on its ordinary definition. "In general, words are given their ordinary meaning, but when technical terms and terms of art are used, we give these terms their technical meaning." *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 581, 311 P.3d 6

(2013). The dictionary defines "respond" as "to say something in return: make an answer." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1935 (2002).[5]

The DOC fails to support its claim that "respond" is a technical term of art with any reasoned argument, and its claim is conclusory. We decline the DOC's invitation to treat "respond" as a term of art and instead employ the ordinary meaning of the word, which is to "make an answer." WEBSTER'S, *supra*.

The DOC also contends that by informing HPNW that it would "respond further" to the public record request "within 45 business days" without providing the record, denying the request, or providing a reasonable estimate of the time it would need to make an answer to the request, it nevertheless complied with former RCW 42.56.520. CP at 25. The DOC misreads former RCW 42.56.520.

As noted above, former RCW 42.56.520 required an agency, within five business days of receiving a public record request, to respond to the request by providing the record or denying the request. *Hobbs*, 183 Wn. App. at 942. The statute further provided that in the event an agency could not make an answer to the request within five business days by doing one of those two things, the agency could provide a reasonable estimate of the time it required to respond to the request. Former RCW 42.56.520(3). The DOC contends that when the legislature permitted an agency to provide a reasonable estimate of the time the agency required to respond to the request, the legislature did not intend that to mean a reasonable estimate of the time the agency required to either provide the record or deny the request. Rather, the DOC claims that the statute permitted

[5] Later, in its reply brief, the DOC said that the ordinary dictionary definition of the word "respond" and the PRA use of the word "respond" as a term of art both support the DOC's interpretation.

an agency to provide an estimate of the time it would need to provide a *further estimate* of the time required to either provide the record or deny the request.

We disagree with the DOC. By either providing the records, providing an estimate of when the agency would provide records, or by denying the request, the agency makes an answer to the request. The DOC's interpretation of the word "respond," as allowing an agency to "respond" by saying it will respond to a request on a future specified date, is inconsistent with the plain meaning of the word "respond" because the agency is not providing an "answer" to the request.

In determining the plain meaning, we consider, in addition to its ordinary meaning, "'all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.'" *Fisher*, 180 Wn.2d at 527 (quoting *Dep't of Ecology*, 146 Wn.2d at 11). Related statutes provided that responses to requests "shall be made promptly by agencies." Former 42.56.520; *see* former RCW 42.56.080. The DOC's interpretation of the word "respond" would be inconsistent with the statute and related statutes because it would allow the agency to indefinitely postpone providing records.

The DOC makes additional policy arguments that its interpretation of former RCW 42.56.520(3) makes practical sense. The DOC argues that for larger public record requests, the agency may need additional time to locate records or determine whether records are exempt. Thus, the DOC asserts that its interpretation of former RCW 42.56.520(3) gives agencies flexibility to determine the appropriate response but still puts requestors on notice of when they will next hear from the agency. The DOC additionally argues that under the superior court's interpretation, there is no way for an agency to comply with the statute if the agency does not know in five days whether or not it has responsive records.

We reject the DOC's public policy arguments because the agency's construction would allow the agency to indefinitely postpone requests by providing these nonresponsive responses. Thus, we hold that the agency's initial response did not comply with the plain language of former RCW 42.56.520(3). Under former RCW 42.56.520(3) an agency had to at least give an estimate of when the first installment would be provided. We affirm the ruling of the superior court.

IV. ATTORNEY FEES

HPNW argues that it is entitled to reasonable attorney fees and costs under former RCW 42.56.550(4) both before the superior court and on appeal.

RAP 18.1(a) allows attorney fees and costs on appeal if authorized by statute. Former RCW 42.56.550(4) allowed the prevailing party against an agency in any action seeking the right to inspect or copy a public record or receive a response to a public record request to be awarded costs and reasonable attorney fees. Because HPNW prevailed in part at the superior court level, we affirm the superior court's award of attorney fees and costs. However, because HPNW is not the prevailing party on appeal and because they did not request fees and costs as to the cross appeal, HPNW is not entitled to attorney fees and costs on appeal. *See Sanders v. State*, 169 Wn.2d 827, 871, 240 P.3d 120 (2010).

CONCLUSION

We hold that former RCW 42.56.520(3) does not require agencies to provide an estimate of when the agency expects to fully respond to a public records request. We also hold that the DOC violated former RCW 42.56.520(3) in its initial response to HPNW. Accordingly, we affirm the superior court.

CRUSER, J.

We concur:

MAXA, C.J.

LEE, J.

Melby, Cherrie S (ATG)

From: Feulner, Tim J. (ATG)
Sent: Tuesday, September 17, 2019 10:36 AM
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To Counsel and Interested Parties:

Attached is a Published Opinion filed today, 9/17/2019.

This will be the only notice you will receive from the court.

Please contact the court at (253) 593-2970 if you have any questions or comments.

Thank you.

Hawker, Ashley
Judicial Administrative Assistant

CORRECTIONS DIVISION ATTORNEY GENERAL'S OFFICE

November 14, 2019 - 4:47 PM

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