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No. 63433-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION ONE
AUG 25 2009

SHAWN FRANCIS, Appellant;

v.

DEPARTMENT OF CORRECTIONS, Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
SNOHOMISH COUNTY

The Honorable Michael Downes
No. 08-2-10813-7

REPLY BRIEF OF APPELLANT FRANCIS

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A. INTRODUCTION

Shawn Francis has argued that the discovery rule must be applied to Public Records Act (PRA) because of the special relationship between the citizen and her government. He also argued that because the agency has control over disclosure, hence the accrual date, the discovery rule must be applied under the reasoning of *U.S. Oil & Refining Co. v. Dep't of Ecology*, 96 Wn.2d 85, 633 P.2d 1329 (1981). Mr. Francis now replies to the Department of Corrections' Response.

B. SUMMARY OF ARGUMENT

Mr. Francis will first show that the statutory scheme of the Public Records Act requires application of the discovery rule to the date of accrual. He will then show that the Department of Corrections' argument shifts the burden to requesters to recognize when a PRA response is inadequate and would provide agencies an incentive to conceal the existence of documents that they would prefer to keep from the public. He will also demonstrate that the Department's argument for a strict reading of the PRA's statute of limitations contravenes the PRA's mandate for liberal construction favoring the people of Washington and requiring agencies to provide the fullest assistance in making all public records available upon request.

C. ARGUMENT

1. THE PRINCIPLES UNDERLYING STATUTES OF LIMITATION ARE NOT VIOLATED BY APPLICATION OF THE DISCOVERY RULE IN PUBLIC RECORDS ACT CASES.

The policy behind strict adherence to the statute of limitation is not affected by application of the discovery rule to PRA cases. Washington courts have recognized that statutes of limitation exist to prevent plaintiffs from “sleep[ing] on their rights” and to allow legal claims to go stale. See *Crisman v. Crisman*, 85 Wn. App. 15, 19, 931 P.2d 163 (1997) (citing *Douchette v. Bethell Sch. Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991)). The discovery rule has been rejected in circumstances which would allow a plaintiff the opportunity to “manipulate the date an action accrues.” Brief of Appellee Department of Corrections (“Response Brief”) at 6 (citing *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 381-82, 166 P.3d 662 (2007); *Huff v. Roach*, 125 Wn. App. 724, 732, 106 P.3d 268 (2005)). None of these concerns are affected by the application of the discovery rule to the Public Records Act (“PRA”).

The discovery rule contains built in safeguards that prevent a requester from sleeping on her claims under the PRA and from manipulating the date of accrual of the cause of action. Applying the discovery rule to the

PRA requires the claim to accrue when the requester knows or should know that she has “been denied an opportunity to inspect or copy a public record by an agency,” or when she “believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request.” RCW 42.56.550. As a consequence, issues of fact may exist regarding how and when the requester knew about the agency’s failure to acknowledge a record’s existence or whether a requester exercised due diligence.¹ A requester simply can not “sleep on” her right to receive requester records or to manipulate the accrual date. If a requester knows or should know response is inadequate, that requester must act diligently to exercise her rights under the PRA. The Department’s concern about unfair exposure to penalties is consequently unfounded.

The Department also argued that courts are less likely to apply the discovery rule when a statute of limitations is statutory and does not explicitly adopt the discovery rule. Response Brief at 7 (citing *Elliott v. Dep’t of Labor and Indus.*, 2009 WL 2357950 at 3 (2009)). The Department’s argument both ignores the statutory framework of the PRA and the legislative

¹It is important to note that the Department set forth no facts in its’ summary judgment motion and reply that would raise questions about whether Mr. Francis sat on his hands or manipulated the accrual date.

history of the Industrial Insurance Act. The PRA, unlike the Industrial Insurance Act, explicitly requires courts to liberally construe its provisions in favor of the public policy of allowing citizens to remain informed.² RCW 42.56.030. As such, the statute of limitations must also be construed liberally.

Elliott is easily distinguishable because the legislature included a provision for the discovery rule to apply to occupational diseases, not injuries. *Id.* at 5 (citing *Rector v. Dep't of Labor and Indus.*, 61 Wn. App. 385, 810 P.2d 1363 (1991)). Furthermore, in the industrial injury context the legislature had purposefully changed the statute by amending the law to remove the discovery rule. *Id.* at 366. In both situations, unlike the PRA, the legislature considered the discovery rule and chose to modify the legislation accordingly.

The Department's reliance on the Legislature's failure to codify the discovery rule in the PRA is misguided. The PRA does not contemplate that an agency will entirely fail in its most basic duty to acknowledge the existence of a responsive document. *See* RCW 42.56.520 (outlying the three

²The Act was so favored that it was explicitly provided the power to preempt other statutes. RCW 42.56.030 ("In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.")

alternatives by which an agency *must* respond to a request). The PRA requires that, at a minimum, an agency acknowledge that record exists when it is identifiable based on a request. When a request needs no clarification, the agency *must* either produce the record or describe the record and cite the exemption on which the agency bases denial of production. *Id.* Further, the PRA requires that agencies make all records available upon request. Because the mandatory language of the statute has not provided for inadequate responses by agencies, it cannot be argued that the Legislature intended not to apply the discovery rule in such cases.

2. THE PUBLIC RECORDS ACT POLICY SUPPORTS APPLICATION OF THE DISCOVERY RULE AND DEPARTMENT'S ATTEMPT TO SHIFT THE BURDEN TO REQUESTERS VIOLATES BOTH THE LETTER AND THE SPIRIT OF THE PUBLIC RECORDS ACT.

The Department's Response has attempted to shift the burden of knowledge and compliance to the requester. *See* Response Brief at 14-16. The Department suggested that Mr. Francis was "able to inquire further as to the adequacy response through follow up correspondence [or] follow up PRA requests." *Id.* at 14-15. Essentially, the Department argued that all requesters who do not exercise average prudence must be penalized for failing to inquire into that which they do not know. Mr. Francis disagrees with this analysis because it shifts the burden from the agency to the requester; and in the PRA,

the burden of compliance falls on the agency.

The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

RCW 42.56.550(1). The Department's argument is clearly counter to the explicit language contained within the PRA.

The Department's argument also fails because it is illogical to expect that follow up correspondence or a request for the same documents would somehow increase the likelihood that a record whose existence has not been acknowledged would somehow become identified in a later request for the same record. Unfortunately, when an agency fails to acknowledge the existence of a requested record, either in producing the record or describing the record and the statutory basis for denying production, a requester often has little means available to suspect that the unidentified record exists.

The agency, on the other hand, is in a much better position to be well-informed about the existence of a document.³ Consequently, an agency is burdened with duties commensurate with its more-informed position. Agencies have the duty to make *all* responsive documents available. RCW

³To prevent a potential suit, an agency can always produce records after initially informing the requester they do not exist with no penalty.

42.56.100. Additionally, agencies have the express duty to provide the “fullest assistance” to requesters and to provide “the most timely possible action” on requests. *Id.* These duties ensure that agencies consistently bear the burden of production by knowing what records are within their control and ensuring that those records are timely produced when requested.

The Department argued that *U.S. Oil & Refining Company v. Department of Ecology*, 96 Wn.2d 85, 633 P.2d 1329 (1981) is distinguishable because an agency lacks “inherent incentive” to not produce a record. Response Brief at 14. The PRA itself recognizes, however, that agencies often have reason not to want records to be made public. *See* RCW 42.56.550(3) (recognizing that examination of records “may cause inconvenience or embarrassment to public officials or others”). Courts are routinely faced with situations in which agencies have fought vigorously to prevent the release of public records. *See, e.g., Yousoufian v. Office of Ron Sims*, 165 Wn.2d 439, 460-461, 200 P.3d 232 (2009) (lambasting King County for its attempts to avoid timely response).

The penalty provision of the PRA was enacted because the Legislature recognized an inherent incentive for agencies to avoid making records public. While that incentive is commonly exhibited by agencies citing exemptions

that do not apply, concealing the existence of a responsive document could be a more effective means of preventing the disclosure of sensitive documents. Without the discovery rule, an agency that can avoid penalty for concealing a document if it can keep its existence secret for more than 365 days.

The Department also argued the discovery rule should not apply because of policy reasons pertaining to the fallibility of agency staff. This argument ignores the basic premise that an agency is held to a standard of strict liability. It is in the penalty phase where the trial court considers factual issues of duty, breach and motivation, among others. As Justice Sanders stated in his partial dissent in *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 98 P.3d 463 (2004):

At the expense of repetition, I quote the text of RCW [42.56.550(4)] once again: “it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he was denied the right to inspect or copy said public record.” The “discretion” referenced in the statute is not whether a penalty should be imposed, but rather how much a penalty should be. In other words, RCW [42.56.550(4)] establishes a strict liability penalty within the specified range which the trial court must impose if an agency violates the PDA.

Id. at 442 (citation omitted). Thus Defendant is again conflating two concepts, liability and penalties.

As for agency employees, requesters, too, are human beings. Unlike agency staff, they do not have inherent, detailed knowledge of the inner workings and availability of documents of the agency from whom they are requesting records. That is why people request public records in the first place. If a requester has made every reasonable effort to obtain requested information, what choice does he have but to believe that the agency has complied? To time-bar a claim when a requestor later discovers that the agency did not produce all the requested records would be in derogation of the PRA and the citizen and legislative intent behind it. Such a holding would allow an agency to avoid statutory liability by not fully complying with a request, whether by accident, ineptitude, or intent, until one year has passed. Such a scenario goes directly against the core purpose of the PRA – timely citizen oversight. RCW 42.56.030.

D. CONCLUSION

For the reasons stated above and in his Opening Brief, Mr. Francis respectfully asks this Court to reverse the trial court's order dismissing this case, hold that the statute of limitations has not expired, and allow Mr.

Francis to pursue his claim that the Department of Corrections violated its duty under the Public Records Act to produce all public records responsive to his request.

DATED this 24th day of August, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael C. Kahrs", with a long horizontal flourish extending to the right.

MICHAEL C. KAHRs, WSBA #27085
Attorney for Appellant Shawn Francis

CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on August 24, 2009, in Seattle, County of King, State of Washington, I emailed and deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

1. APPELLANT'S REPLY BRIEF

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By: 
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Date: 8/24/09