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NO. 63433-0-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

SHAWN FRANCIS,

Plaintiff-Appellant,

v.

THE DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

BRIEF OF APPELLEE DEPARTMENT OF CORRECTIONS

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COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

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I. COUNTER STATEMENT OF THE ISSUE

The Legislature expressly provided in RCW 42.56.550(6) that actions under the Public Records Act “must be filed within one year of the agency’s claim of exemption or the last production of a record on a partial or installment basis.”

Did the superior court err when it dismissed Mr. Francis’ Public Records Act action as time-barred under the one year statute of limitations and declined to apply the discovery rule, which contravenes the plain language of RCW 42.56.550(6), to modify the accrual date of Mr. Francis’ claim?

II. COUNTER STATEMENT OF THE CASE

Plaintiff, Shawn Francis, is a prisoner in the custody of the Department of Corrections (DOC). Clerk’s Papers (CP) 24. On December 31, 2008, he filed a Complaint for Violation of the Public Records Act naming DOC as the Defendant. CP 21-26. Plaintiff’s Complaint alleged that he submitted a Public Records Act (PRA) request to DOC on August 21, 2007, for purchase orders of items purchased for the Extended Family Visit (EFV) program between January and February 2007. *Id.* at ¶ 4.1.

According to the Complaint, Jane McKenzie, a DOC Public Disclosure Coordinator responded to the request on August 23, 2007,

acknowledging the request and asking for clarification. *Id.* at ¶ 4.2. Mr. Francis clarified and expanded the request on September 27, 2007. *Id.* at ¶ 4.3. On October 3, 2007, another Public Disclosure Coordinator, Kathy Kopoian, acknowledged the clarification and on October 22, 2007, notified Mr. Francis that one document was available upon payment of photocopying and postage costs. *Id.* at ¶¶ 4.4, 4.5. Mr. Francis tendered payment and on November 5, 2007, Ms. Kopoian sent the one page responsive to the request with redactions for exempt account information. *Id.* at ¶¶ 4.6, 4.7. Mr. Francis did not allege that DOC improperly claimed or applied this exemption. *Id.* Nor did Mr. Francis allege any technical violations related to DOC's acknowledgment and response to his request within the time frames and procedural requirements of the PRA. *Id.*

In the Complaint, Mr. Francis alleged that there were more documents responsive to his request and that DOC was withholding the records in violation of the PRA. *Id.* at ¶¶ 4.8, 4.9. He sought an order compelling DOC production of the requested records as well as costs and statutory penalties. *Id.* at § VI.

DOC moved to dismiss the action under CR 12(b)(6) as time-barred under the one year statute of limitations set forth in RCW 42.56.550(6). CP 16-20. Mr. Francis filed a response arguing for application of the discovery rule to modify the accrual date of his claim.

CP 9-15. DOC filed a reply. CP 3-8. After hearing oral argument from the parties, the superior court dismissed the action. CP 2.

III. ARGUMENT

A. Standard Of Review.

Appellate review of a trial court ruling under CR 12(b)(6) is *de novo*. *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 376, 166 P.3d 662 (2007). Dismissal under CR 12(b)(6) is appropriate where it appears beyond a reasonable doubt that no facts exist that would justify recovery, even while accepting as true the allegations contained in the plaintiff's complaint. *Reid v. Pierce County*, 136 Wn.2d 195, 201 (1998). A motion to dismiss questions only the legal sufficiency of the allegations in a pleading. *Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 742, 565 P.2d 1173 (1977); *Brown v. McPherson's, Inc.*, 86 Wn.2d 293, 298, 545 P.2d 13 (1975). "The only issue before the trial judge is whether it can be said there is no state of facts which plaintiff could have proven entitling him to relief under his claim." *Contreras*, 88 Wn.2d at 742; *Barnum v. State*, 72 Wn.2d 928, 929, 435 P.2d 678 (1967).

Where, as in this case, the Plaintiff's action is barred by the statute of limitations, there are no facts upon which Plaintiff is entitled to relief and dismissal of the action is required.

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B. The Superior Court Properly Applied The Plain Language Of RCW 42.56.550(6) In Determining That Mr. Francis' Claim Was Barred By The One Year Statute Of Limitations.

Civil Rule 3(a) states that an action shall not be deemed commenced for tolling any statute of limitations except as provided by RCW 4.16.170, which provides that the action is deemed commenced when the complaint is filed or summons is served, whichever comes first. The complaint must be filed with the clerk of the court who may refuse to accept a filing if it is inconsistent with the rules of practice. CR 5(e). Reasons for refusal include not providing the filing fee or the absence of an approved waiver of the filing fee. *Margetan v. Superior Chair Craft Co.*, 92 Wn App, 240, 246, 963 P.2d 907, 910 (1998). In this case it is undisputed that Mr. Francis filed his initial Complaint for Violation of the Public Records Act on December 31, 2008, and served the Complaint on February 11, 2009; thus the action is deemed commenced and the statute of limitations tolled as of December 31, 2008. *See* CP 18, 23.

Mr. Francis' action alleging that DOC provided an incomplete response to his August 23, 2007, request is time barred under the plain language of the PRA. In 2005, the Legislature amended the PRA's statute of limitations to require plaintiffs to file any action within one year of the date of an agency's claim of exemption or last production of a record. RCW 42.56.550(6) provides:

Actions under this section *must* be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.

(Emphasis added). The last production of a record by the DOC to Mr. Francis' request was on October 22, 2007, more than fourteen months prior to the filing of this action.

Washington courts have long held that statutes of limitations begin to run against a cause of action on the date the plaintiff first becomes entitled to seek relief in the courts. *E.g., Jones v. Jacobsen*, 45 Wn.2d 265, 269, 273 P.2d 979 (1954); *Huff v. Roach*, 125 Wn. App. 724, 729, 106 P.3d 268 (2005). Under the plain language of RCW 42.56.550(6), the Legislature has determined that an action under the PRA accrues, and the statute of limitations begins to run, upon the agency's claim of exemption or upon the last production of a record on a partial or installment basis. As a statute of limitations, RCW 42.56.550(6) acts to eliminate a plaintiff's right to maintain a cause of action, as it relates to specific records, beyond the time period specified within the statute.

Both the United States Supreme Court and the Washington Supreme Court recognize that statutes of limitations are intended to provide finality. *Reading Co. v. Koons*, 271 U.S. 58, 63, 46 S. Ct. 405, 70 L. Ed. 835 (1926); *Atchison v. Great Western Malting Co.*, 161 Wn.2d

372, 382, 166 P.3d 662 (2007). *See also Janicki Logging & Construction Co. v. Schwabe, Williamson & Wyatt*, 109 Wn. App. 655, 662, 37 P.3d 309 (2001). The “obvious” purpose of such statutes is to set a definite limitation upon the time available to bring an action, without consideration of the otherwise underlying merit. *Dodson v. Continental Can Co.*, 159 Wash. 589, 596, 294 P. 265 (1930) (quoting *Reading Co.*, 271 U.S. 58); *see also Atchison*, 161 Wn.2d at 382. Statutes of limitations exist “to shield defendants and the judicial system from stale claims;” plaintiffs are not permitted to “sleep on their rights” because of the risk that “evidence may be lost and witnesses’ memories may fade.” *Crisman v. Crisman*, 85 Wn. App. 15, 19, 931 P.2d 163 (1997).

Hence, statutes of limitations are strictly applied, and courts are reluctant to find an exception unless one is clearly articulated by the legislature. *E.g., Huff v. Roach*, 125 Wn. App.724, 732, 106 P.3d 268 (2005); *Bennett v. Dalton*, 120 Wn. App. 74, 85-86, 84 P.2d 265 (2004); *Janicki*, 109 Wn. App. at 662. Washington courts have also consistently rejected interpretations that would allow a party to manipulate the date an action accrues or the tolling of a statute of limitations. *E.g., Atchison*, 161 Wn.2d at 381-82 (choice of personal representative should not be allowed to govern accrual of wrongful death action); *Huff*, 125 Wn. App. at 732 (rejecting an interpretation that would allow manipulation of accrual of

legal malpractice claims). This is particularly true in cases governed by explicit statutory directives such as the PRA and not by the common law. *See Elliott v. Dep't of Labor and Indus.*, 2009 WL 2357950 at 3 (2009) (declining to apply the discovery rule to modify the accrual date of an industrial insurance claim where the plain language of the statute specified that a claim had to be brought within one year of the injury/accident).

In this case, DOC made records available under the PRA on October 22, 2007, in accordance with RCW 42.56.070(1) and RCW 42.56.080.¹ CP 25 at ¶ 4.5. The date for calculating when the statute of limitations began to run was when the documents were made available for inspection and copying. At that time the DOC had discharged its obligation under the PRA, and it was then up to Mr. Francis to arrange to pay for and take the records or to schedule a time for inspection, which he did. It is well settled that DOC's obligation under the PRA is to make records available and not to guarantee actual receipt or inspection.

¹ Because Mr. Francis' Complaint would be time barred under either circumstances, the court need not decide whether the statute of limitations begins to run on the date records were made available, October 22, 2007, or the date they were sent upon payment, November 5, 2007. Nevertheless, it is the Department's position that the proper date for calculating when the statute of limitations begins to run is when a requestor is notified that documents are available. At such time the agency has discharged its obligation to make records available for inspection and copying under RCWs 42.56.070(1) and .080, and it is then up to the requestor to arrange for payment of the records or to schedule a time for inspection. An agency does not control when or even if a requestor arranges to inspect or pay for and take copies of records that have been produced.

Livingston v. Cedeno, 135 Wn. App. 976, 980-81, 146 P.3d 1220 (2006), *affirmed*, 186 P.3d 1055 (2008).

Assuming the truth of Plaintiff's allegations as is required under CR 12(b)(6), his cause of action accrued on October 22, 2007, and he was required to file his action by October 22, 2008, to be considered timely under RCW 42.56.550(6). It is undisputed that Plaintiff did not file the Complaint until more than two months later on December 31, 2008, and thus his action is barred by the statute of limitations and was properly dismissed by the superior court.

C. The Discovery Rule Does Not Apply to a Cause of Action Under the Public Records Act.

The clear statutory language of RCW 42.56.550(6) defines precisely when a cause of action accrues under the PRA and the time within which a claim must be filed. While in other causes of action² the Legislature has directed that the statute of limitations may be subject to the discovery rule, under which a cause of action accrues when the plaintiff knew or should have known enough facts existed to support a right to sue, the discovery rule does not apply in every case. *See, e.g., O'Neil v. Estate of Murtha*, 89 Wn. App. 67, 72, 947 P.2d 1252 (1997). Indeed, if it intended for the rule to apply the Legislature could have codified it in the

PRA as recently as 2005 when it amended the statute of limitations to one year, but it did not. Rather, the Legislature provided a precise trigger in RCW 42.56.550(6), which is manifestly clear to the public, agencies, and the courts. The statute of limitations begins to run when the agency claims an exemption or the last production of a record, which occurred in this case on October 22, 2007.

This Court's recent opinion in *Elliott v. Dep't of Labor and Indus.*, 2009 WL 2357950 (2009), is instructive. In *Elliott*, this Court declined to apply the discovery rule to modify the statutory accrual date of a cause of action under the Industrial Insurance Act. *Id.* at 1. Under the Industrial Insurance Act, the claimant must file within one year after the day upon which the injury/accident³ occurred. *Id.* at 2 (citing RCW 51.28.050). Mr. Elliott argued for application of the discovery rule on the basis that he did not know of his injury related to the accident until he was diagnosed with post-traumatic stress disorder. *Id.* at 1-2. In declining to apply the discovery rule, this Court noted that "an industrial insurance claim is 'governed by explicit statutory directives and not by the common law.'" *Id.* at 3. Because the statute explicitly stated that an

² See, e.g., *McLeod v. Northwest Alloys, Inc.*, 90 Wn. App. 30, 35, 969 P.2d 1066 (1998) (discussing the Uniform Trade Secrets Act); RCW 4.16.350(3) (medical negligence); and RCW 4.16.080(6) (official misappropriation of funds).

injury is indistinguishable from the accident that caused it, the statute of limitation for filing a claim begins to run when the accident occurs and not when the worker discovers the injury. *Id.* at 3-4.

Like the Industrial Insurance Act, the PRA is governed by explicit statutory directives and not by the common law. Like the Industrial Insurance Act, the PRA provides for an explicit legislatively-mandated trigger of the statute of limitations (last production of a record) without regard to whether the requestor later learns that a responsive document was not produced. Just as the Industrial Insurance Act is to be liberally construed in favor of the injured worker, the PRA is to be liberally construed in favor of free and open examination of public records. RCW 42.56.030; RCW 42.56.330(3). However, “when the intent of the legislature is clear from reading of a statute, there is no room for construction.” *Elliott v. Dep’t of Labor and Indus.*, 2009 WL 2357950 at 4 (quoting *Johnson v. Dep’t of Labor and Indus.*, 33 Wn.2d 399, 402, 205 P.2d 896 (1949)). Applying the principles identified in *Elliott*, this Court should hold that the superior court did not err in declining to apply the discovery rule to modify the explicit statutory directive of RCW 42.56.550(6) governing claim accrual under the PRA.

³ This Court noted that an “injury” as defined by the Industrial Insurance Act is indistinguishable from the accident that caused it, regardless of when the physical effects of the injury become manifest. 2009 WL 2357950 at 3.

The purpose of the PRA is to provide a mechanism by which citizens can obtain information about the functions of government. The penalty and cost provisions in RCW 42.56.550(4) provide a significant incentive to agencies to comply with the very strict requirements of the PRA. The one-year statute of limitations in RCW 42.56.550(6) ensures that actions are filed timely to serve the goal of prompt public disclosure without resulting in disproportionate individual financial gain at the expense of other citizen taxpayers. *See* House Hearings on H.B. 1758, at 39:18 (testimony of Attorney General McKenna). In addition, unlike many statutes of limitations that act to prevent a potential litigant from all access to relief, the PRA does not preclude requestors from what they ultimately seek – disclosure of records. A requestor can always make a new request for records he believes were not included in the response to his original request. Requiring requestors to file a claim for penalties and costs within one year of production simply prevents a requestor from holding back and seeking higher penalties and provides finality for agencies and certainly for taxpayers regarding liability for potential penalties and costs. A requestor is not deprived of an opportunity to access public records.

Mr. Francis argues for application of the discovery rule based on a special relationship between the people and public officials. Opening Br.

of Appellant at 6-11. He cites *Potter v. City of New Whatcom*, 20 Wash. 589, 56 P.394 (1899) and *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 543 P.2d 338 (1975) for this proposition. However, these cases involved specific trust or fiduciary relationships not present in this case. DOC's relationship with Mr. Francis is no different from its relationship with any member of the public who requests a public record. DOC endeavors to discharge properly its statutory obligation to the public generally to locate, assemble and make available its records for inspection but it owes no fiduciary obligation to individual requestors.

Mr. Francis also relies on *U.S. Oil & Refining Company Co. v. State Dep't of Ecology*, 96 Wn.2d 85, 633 P.2d 1329 (1981) to support application of the discovery rule under the theory that a requestor must rely on the agency's self reporting to determine a violation. However, such reliance is misplaced. In *U.S. Oil* the court was applying RCW 4.16.100(2), a general limitations statute that provides that "[a]n action upon a statute for a forfeiture or penalty to the state" must be commenced within two years. *U.S. Oil*, 96 Wn.2d at 87-88. Unlike RCW 42.56.550(6), RCW 4.16.100(2) does not specify an explicitly defined event that triggers the accrual of a cause of action. The court interpreted this general statute of limitations in the context of the hazardous waste regulatory scheme at issue in *U.S. Oil*. *U.S. Oil*, 96 Wn.2d at 91. In the

absence of any legislative definition of when the cause of action for penalties accrued, the court concluded that the Department of Ecology (DOE) must rely on industry reporting to discover permit violations, and, without a discovery rule; the industry could discharge pollutants and escape penalties leaving the DOE with no enforcement mechanism. *Id.* at 92. Under the language of the PRA, the occurrence or knowledge of a violation is not required to trigger the one year period for judicial review; rather it is the agency's claim of exemption or last production. RCW 42.56.550(6). There is no uncertainty in the PRA regarding the running of the limitations period that requires this Court to engage in a balancing test. Additionally, a requestor has both administrative and judicial avenues to challenge the adequacy of an agency response. *See* RCW 42.56.520 and 42.56.550(1).

Another distinction is that DOE sought to penalize *U.S. Oil* for violating its permit by submitting inaccurate monitoring reports on 18 separate days. The penalties did not accumulate for each day that an inaccurate monitoring report was on file. *U.S. Oil*, 96 Wn.2d at 87. Thus, extending the accrual of DOE's enforcement claim by applying the discovery rule did not result in ever increasing daily penalties; rather, it simply allowed the state to assess a fixed penalty for each single reporting violation. In contrast, under the PRA, the Legislature has explicitly

defined claim accrual for statutory penalties that accumulate each day and has made a policy decision about the extent of agency liability and the risk to the taxpayers who ultimately pay these penalties. The courts should respect that policy decision of the Legislature and the plain language of the statute.

This case is also distinguished from *U.S. Oil* because there is no inherent incentive for an agency not to produce a record under the PRA. In fact, the opposite is true. An agency may inadvertently fail to locate a record; but if it has located a record, production of that record cuts off the risk of penalties and costs. In *U.S. Oil*, self reporting industries have the opposite incentive. If the industry reports an illegal discharge, it does not eliminate the possibility of penalties but is likely guaranteeing a penalty for a permit violation.

Moreover, Mr. Francis did not lack “the means and resources to detect wrongs within the applicable limitation period,” the concern expressed in *U.S. Oil. Id.* at 93-94. Under the PRA, the process of agency compliance is inherently transparent because the agency must meet statutory obligations to timely respond and correspond with requestors and to make records available. *See* RCW 42.56.520. When the agency informs the requestor as to the availability of records, the requestor is entitled to inspection and able to inquire further as to the adequacy of the

response through follow up correspondence, follow up PRA requests, or ultimately to commence an action.

Just as the PRA mandates that agencies comply with its strict procedural requirements or be subject to daily penalties and costs, so too does the PRA limit a plaintiff's right to obtain such penalties and costs. As mentioned above, neither Mr. Francis, nor any requestor, is denied the right to access public records through application of the statute of limitations. Rather, only the statutory claim for penalties and costs is legislatively extinguished by intent and design.

The Legislature has carefully and purposefully limited the statutory cause of action for penalties and costs for good policy reasons. Agencies are staffed with human beings charged with exercising their best efforts in complying with the strict procedural requirements of the PRA. These human beings are not machines who can guarantee that all employees in a large agency have been contacted, that all hard files have been perfectly and meticulously hand searched, and that all conceivable keyword searches have been conducted for electronic records. It is conceivable that some records may be overlooked or accidentally left out of a response. Recognizing the inherent fallibility in any such human endeavor, the Legislature imposed strict procedural requirements and penalties for

noncompliance, but also decided to specifically define by when a statutorily created cause of action for penalties and costs may be brought.

To discard the Legislature's directive, as Mr. Francis suggests, would subject agencies to stale claims that are many years old: such as when two resourceful requestors compare notes years after receiving responses, or a requestor makes a follow up request years after an initial request and discovers that some responsive documents were not provided. Conceivably, application of the discovery rule would permit a requestor to postpone inspection or receipt past the one year statute of limitations and then bring a stale action if he believes the response was insufficient. These scenarios would result in extremely stale actions being prosecuted for huge financial windfalls to the detriment of the public at large and contrary to the express purpose of the PRA to promote prompt disclosure and, if necessary, prompt judicial review.⁴

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⁴ This Court, however, should not open the door to further litigation on this issue and ignore the express language of the PRA: the Court should hold that the discovery rule does not apply to actions under the PRA. However, had the superior court applied the discovery rule to this case the action still would have been time-barred. Under the discovery rule an action accrues when the plaintiff knows, or in the exercise of due diligence should have discovered the relevant facts; regardless of whether the plaintiff also knows that these facts are enough to establish a legal cause of action. *Matter of Estates of Hibbard*, 118 Wn.2d 737, 744 (1992); *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992). The responsive document sent to Mr. Francis on November 5, 2007, at which time he had sufficient notice of the facts to prompt him to inquire into the adequacy of the response.

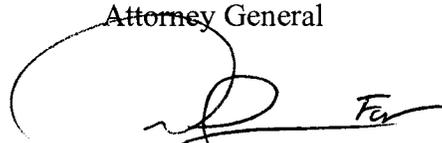
In sum, Washington courts have strictly applied statutes of limitations in order to comply with the legislative purpose of promoting finality. RCW 42.56.550(6) explicitly states the circumstances for claim accrual under the PRA. Exceptions and mechanisms for manipulating accrual or tolling are disfavored. Where the discovery rule is not mandated by statute and the Legislature had defined specifically when the statute of limitations begins to run, the statutory language should not be judicially amended.

IV. CONCLUSION

For the foregoing reasons, DOC respectfully requests that this Court affirm the superior court's order dismissing this action as time-barred under the one year statute of limitations set forth in RCW 42.56.550(6).

RESPECTFULLY SUBMITTED this 10th day of August, 2009.

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A handwritten signature in black ink, appearing to read "J. Howell" with a stylized flourish.

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CERTIFICATE OF SERVICE

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EXECUTED this 10th day of August, 2009, at Olympia,
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