

NO. 39713-7-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II**

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JEFFREY R. MCKEE,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,  
a Washington State Agency,

Respondent.

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APPEAL FROM THURSTON COUNTY  
SUPERIOR COURT

The Honorable Anne Hirsch

Cause No. C8-2-00527-2

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**APPELLANT'S OPENING BRIEF**

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## I. INTRODUCTION

The Public Records Act (PRA) empowers citizens to file suit if an agency refuses to release records that should be public. An Agency cannot shroud its refusal in mystery, or combine several records requests into one single response, inflating the amount to obtain such records and not identify what records are responsive to which request. Rather, to make sure that citizens and courts have enough information to evaluate an agency's refusal or response, the PRA requires agencies to explain specifically why each withheld record is exempt from disclosure. A citizen has up to one year after such a claim of exemption, or after the last production of requested records, to challenge the agency's action in court.

in this case, the respondent Washington State Department of Corrections (WDOC) repeatedly refused to provide records to the Appellant Mr. McKee, then some five months later acknowledged that it had access to the requested records but would never identify the cost to purchase any one specific request. When Mr. McKee requested WDOC identify the cost for each individual request, WDOC refused to responde.

the court's reasoning also promotes litigation by forcing a citizen to initiate a suit just to get a proper response of identifying the cost to obtain the specific records.

The plain language of the Act makes clear that the one-year statute of limitations commences only upon a legally sufficient claim of exemption from disclosure, or a last production of requested records. A contrary interpretation would promote litigation based on guesswork, defeating the purpose of the Public Records Act to make information promptly available so that people may hold government accountable.

The trial courts finding that the Attorney General had substantially complied with the bonding requirements defeats the legislative intent in requiring every such public official holding such special and extraordinary official powers which are peculiarly susceptible to abuse. The strict compliance with the mandatory bonding requirement is unambiguous and the trial court erred in finding substantial compliance.

In dismissing Mr. McKee's suit as untimely, the trial court misconstrued the one-year statute of limitations that was adopted by legislature in 2005. This court should reverse the dismissal because:

1. The one-year limitation period begins to run only when the agency states a valid "claim of exemption." The WDOC's mere refusal to identify the records, without explaining why they are exempt or cannot identify the cost for an individual request, was not a valid claim of exemption under the PRA nor was it a production as defined by statute.

2. The statute of limitations starts to run with an agency's final production of records or claim of exemption, when all available information is known. The trial failed to acknowledge the last production of the records and the first production of a "exemption log".

3. The PRA must be construed in favor of disclosure. The general policies underlying statutes of limitation do not override the PRA's strongly worded mandate to protect the public interest in open government.

In essence, the trial court held that an agency can combine and inflate its response to two or more requests by a citizen making the records unattainable to an average citizen.

During litigation of this action WDOC sent the records to Mr. McKee without any identifying marks as to which record related to which request. WDOC had never notified Mr. McKee that any of the records he had requested were exempt from disclosure until after litigation had commenced at which time a privilege privilege log was produced.

Mr. McKee also moved the court to disqualify the defendants counsel, Washington State Attorney General Rob McKenna and his assistant Attorney General Jean E. Meyn, for the formers failure to execute and maintain a official bond before taking office.

The trial court erroneously held that the March 2, 2007, letter constituted a production of the records starting the one year statute of limitations. This letter never identified how much it would cost to get any one of the three separate records Mr. McKee had requested, instead it required Mr. McKee to purchase some 294 pages of records related to other request to get the few records for just one request. Such reasoning incorrectly shifts the burden of proof from agencies to citizens, encourages needless litigation and defeats the purpose of the PRA to facilitate public access to information.

**II. ASSIGNMENT OF ERROR**

1. The trial court erred in dismissing plaintiff's Public Records Act claim based on the one year statute of limitations RCW 42.56.550(6).

2. The trial court erred in denying Plaintiff's motion to disqualify the Attorney General and his assistance pursuant to RCW 2.44.020.

**III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Did the Defendants produce the Public Records in their March 2, 2007, letter?

2. Does the March 30, 2007, letter to Defendant's requesting an itemization of costs start the one year statute for review.

3. Does the September 9, 2008, letter from defendants start the one year statute for a proper claim of exemption?

4. Does the Defendant's "silent withholding" of responsive records waive their claim of the one year statute?

5. Does RCW 43.10.010 require total compliance in bonding the Attorney General?

6. Did the Attorney General substantially comply with the bonding requirements of RCW 43.10.010?

#### IV. STATEMENT OF THE CASE

Mr. McKee is a prisoner of Washington State. Between April 1, 2006 to June 2, 2007, Mr. McKee was transferred from the Washington State Department of Corrections ("WDOC") to the Corrections Corporation of America ("CCA") Florence Corrections Center ("FCC") in Florence Arizona. The CCA was under contract with WDOC to house its prisoners due to the prison overcrowding. CP 312 - 314.

While Mr. McKee was at CCA/FCC he filed three grievances with CCA/FCC regarding various issues he was having. After Mr. McKee had exhausted all levels of the grievance system he submitted three separate Public Records Act requests to WDOC. The three records requests Mr. McKee submitted are as follows; October 9, 2006, letter requesting "any and all" records related to grievance No. 06-0479W, which WDOC received on October 17, 2006. CP 340; "any and all" records related to grievance No. 06-0501W, which WDOC received on October 17, 2006. CP 344; and "any and all" records related to grievance No. 06-0500W, which WDOC received on October 17, 2006. CP 346.

WDOC, Public Disclosure Coordinator Lyn Francis responded by letter dated October 18, 2006, claiming Mr. McKee would need to contact FCC for these records and that WDOC did not have access to any FCC grievance records.

Ms. Francis did not give a specific person or address to obtain FCC grievance records. CP 348.

Mr. McKee clarified his request for the FCC grievance records by letter dated October 26, 2006. WDOC received this clarification on November 1, 2006. CP 350.

Mr. McKee sent Ms. Francis a supplemental letter on October 31, 2006, notifying her of the contract provisions between CCA and WDOC and that CCA officials were not responding to Washington State prisoners requests for public records. Mr. McKee again requested the records be provided to him by WDOC. CP 352.

Ms. Francis responded to these two letters by letter dated November 14, 2006, denying Mr. McKees request on her belief that WDOC could not access CCA grievance records. Ms. Francis responded to Mr. McKees claim that there was not a procedure in place for Washington State inmates to request Public Records stating "...there is a procedure for prisoners to request and obtain public records." Ms. Francis did not identify what that process was. CP 354-355.

On January 25, 2007, Ms. Francis responded to several public records requests Mr. McKee had been submitting since October, 2006. In this response letter MS. Francis Acknowledged that there was no specific process to obtain the FCC records and that she would "act as liaison" to obtain the records Mr. McKee had previously requested.

including the three grievance records requests. Mr. Francis did not give an estimate of the time to produce these records instead only asked Mr. McKee if he was still interested in obtaining them. CP 360 - 361 .

Mr. McKee responded on February 1, 2007, to Ms. Francis letter, which WDOC received on February 12, 2007, stating that he was still interested in obtaining all the records listed in her 1/25/07 letter. Mr. McKee further requested that WDOC waive the copying and postage fee due to the untimely response to his requests. WDOC never responded to this letter. CP 363 .

WDOC Administrative Assistant Rose Marquis wrote to Mr. McKee by letter dated March 2, 2007, identifying thirteen of Mr. McKees previous request including the three grievance request identifying a total of 291 pages for all thirteen requests and a cost of \$62.25 to copy and send all these records. There was no claim in this letter that any of the records were exempt from disclosure nor did it identify how many pages were related to each individual request. CP 365 -366 .

Mr. McKee wrote to WDOC Francis on March 30, 2007, regarding the March 2, 2007, letter he received from Ms. Marquis.

Mr. McKee specifically requested an itemization of the "number of documents and cost of shipping for each request". CP 372. This request was never responded to.

Mr. McKee again requested Ms. Marquis itemize the number of pages and cost for each individual request by letter dated January 3, 2008. Again this request was never responded to. CP 42.

Finally, WDOC Public Disclosure Manager Denis Vaughn assigned tracking numbers to each of Mr. McKee's pending requests. She also notified him that Cynthia Hood would be handling his request from that point forward. Significantly Ms. Vaughn still did not offer Mr. McKee notice of how much money it would cost to obtain any of the individual groups of records he had previously requested CP 44.

Based on the WDOC's absolute refusal to provide Mr. McKee with notice of how much it would cost for him to obtain any of the individual groups of records he had previously requested, he was forced to order them all at once. CP 46.

After a significant delay while Mr. McKee gathered the funds to cover all of the records, he remitted nearly \$100.00 in September, 2008. CP 50.

Inexplicably, the WDOC produced only the FCC grievances themselves. None of the records that were "considered by" the decision-makers in the underlying grievances had been produced. CP 53 - 147. Also once Mr. McKee received the responsive records, he was then notified that two pages were exempt from disclosure. CP 50. (September 9, 2008, Hood letter).

The trial court in this case ruled that Mr. McKee was one day late in filing his three Public Records complaints based on the March 2, 2007, letter as the last production of these records. CP 365 then see Notoce of Appeal at Exhibit C.

Mr. McKee had filed these three Public Records suites on March 4, 2008. The defendants contend that the March 2, 2007 letter constituted a production of the documents and that he filed his three complaints on March 4, 2008. This would have made the last day to file the complaints on March 3, 2008. CP 290.

The three complaints were filed separately with Grievance number 06-0500W given cause No. 08-2-00527-2, CP 202 request CP 346, 06-0479W given cause No. 08-2-00528-1 CP 304, request CP 340, and 06-0501W given cause No. 08-2-00529-9 CP 306 request CP 344.

The defendants filed a motion to consolidate these three cases and the court granted the motion to consolidating the three causes under cause No. 08-2-00527. CP 278 .

During litigation Mr. McKee discovered that the Attorney General, Rob McKenna and his assistant Jean E. Meyn were without authority to represent WDOC in this matter because Mr. McKenna had failed to execute a bond in his name prior to taking office and maintaining such bond pursuant to RCW 43.10.010. Mr. McKee filed a motion challenging the Attorney Generals authority under RCW 2.44.020. CP 5 - 6 .

Ms. Meyn produced a partial blanket bond as proof of their authority to represent WDOC in this matter. CP 14 - 19 .

At oral argument on this issue the Honorable Judge Anne Hirsch orally ruled that Rob McKenna had "substantially" complied with the statute and denied Mr. McKee's motion. See Notice of Appeal at Exhibit D.

In this appeal, this court can remind public agencies that the public's right to know is an essential right, regardless of which member of the public requests public records.

This case also affords the court the opportunity to determine what constitutes a production of a record and last production of a record according to the statute.

The plain language of the Act makes clear that the one-year statute of limitations commences only upon a legally sufficient claim of exemption from disclosure, or a last production of requested records. A contrary interpretation would promote litigation based on guess work, defeating the purpose of the Public Records Act to make information promptly available so that the people may hold government accountable. The resulting effect of the trial courts ruling in this case gives a government agency the power to take two separate records requests from an unsuspecting citizen combine the two requests into one answer identifying a total of 5,000 pages when one request was only one page but requiring the citizen, without notification of the one document, to purchase 4,999 records before he could obtain the one responsive record. Because the trial court misconstrued the statute of limitations, this court should reverse dismissal of Mr. McKee's suit and remand the matter for trial and an award of penalties and costs.

Because the trial court misconstrued the bonding requirements for Mr. McKenna as substantial compliance instead of the plain language of actual compliance the Attorney General should be disqualified from this appeal and representing the the state on remand.

**V. ARGUMENT**

**1. Standard of Review.**

Because the trial court decided this case on the basis of affidavits and documents and without testimony, review is de novo, and the appellate court can decide issues of both fact and law. Brouillet v. Cowles Publishing Co., 114 Wn.2d 788, 793 (1990); Ames v. Fircrest, 71 Wn.App. 284, 292 (Div. 2 1993). The appellate court is not bound by the trial court's findings on disputed factual issues.

Progressive Animal Welfare Society v. University of Washington, 125 Wn.2d 243, 884 P.2d 592 (1995) Id. 525-53. Although review is de novo, a decision based on affidavits is a decision on the merits and is not treated as a summary judgment motion on appeal. Brouillet at 794; Ames at 292-93. Statutory construction is a question of law reviewed de novo. State v. Smith, 80 Wn.App. 535, 539 (Div. 1, 1996).

**A. WDOC's March 2, 2007 Letter Did Not Constitute A "Production" Of The Grievance Because It Never Identified The Number Of Pages And Cost To Purchase.**

In 2005, the Legislature adopted a new statute of limitations for the Public Records Act. Laws of 2005, Chap. 483, sec. 5. The statute says that a public records action:

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

RCW 42.56.550(6). The question here is: what constitutes "production of a record" for the statute of limitations?

In accordance with RCW 42.56.040(1) WDOC published Washington Administrative Code (WAC) 137-08 to ensure compliance with the Public Records Act; Parmelee v. Clark, 147 Wa.App 748, 201 P.3d 1022 (2009) Id. 753-54. WDOC also adopted an unpublished policy providing more particulars about how the department is to respond to requests. Parmelee at 755. This policy specifically states

"After compiling records to a request, Department staff will notify the requestor in writing of the exact copying charges for the requested records."  
(underline mine)

CP 393 DOC Policy 280.510 III. (B)

Ms. Marquis March 2, 2007 letter (CP 365-366) did not identify the exact copying charges for any of the three grievance records requests instead she identified a cost of \$58.20 to copy some thirteen separate requests leaving Mr. McKee to guess how many pages were responsive to any one of the three grievance records. This was not in accordance with WDOC's own policy or RCW 42.56.100 giving the "fullest assistance to inquirers and the most timely possible action on request for information". "Although an agency can change or adapt its policies, it acts arbitrarily if it departs from its established precedents without "announcing a principal reason" for the departure" Johnson v. Ashcroft, 286 F.3d 696 (3rd Cir. 2002).

"...longstanding Supreme Court precedents demands that administrative agencies fully state the reason for their action." Ester v. Principi, 250 F.3d 1068 (7th Cir. 2001). WDOC has never explained their rational for not identifying the number of pages for each request therefore it cannot be said that WDOC produced the records responsive to the three grievance records requested here.

In WDOC's Memorandum in Support of Summary Judgment they rely on RCW 42.56.550(6) to support their claim that the March 2, 2007, letter was the last production of the record (CP 289-90), and the trial court agreed. The court failed to take into account that the Public Records Act "is a strongly worded mandate for broad disclosure of public records" Hearst v. Hoppe, 90 Wa.2d 123, 127, 580 P.2d 246 (1978). The Act's disclosure provisions must be liberally construed, and its exemptions narrowly construde. RCW 42.17.010(11); RCW 42.17.251; RCW 42.17.920. Courts are to take into account the Act's policy "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". RCW 42.17.340(3). The **agency bears the burden of proving** that refusing to disclose "is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records". RCW 42.17.340(1).

**Agencies have a duty to provide "the fullest assistance to inquirers and the most timely possible action on requests for information" RCW 42.56.290 former 42.17.290.**

American Civil Liberties Union of Washington (ACLU) v. Blaine School District No. 503, 95 Wa.App. 106, 975 P.2d 536 (1999) (bold mine) citing Progressive Animal Welfare Society (PAWS) v. University of Washington, 125 Wa.2d 243, 884 P.2d 592 (1995) at 251-52.

WDOC was required to give the **"fullest"** assistance to Mr. McKee in its March 2, 2007, letter (CP 365-66) by providing the exact cost for each individual request pursuant to their own policy and procedures (CP 393) to be considered a "production" of the requested records starting the one year statute of limitations (RCW 42.56.550(6)).

**B. Mr. McKee's March 30, 2007, appeal letter Started The One Year Statute For Review.**

When Mr. McKee received the March 2, 2007, letter (CP 365-66) requesting payment for thirteen (13) individual requested records he did not have the funds that he had when he originally made the request some five months prior (CP 37 at Lines 12-19). Because of this Mr. McKee appealed the March 2, 2007, letter to WDOC Public Disclosure Coordinator Lyn Francis on March 30, 2007. CP 372.

In this appeal Mr. McKee specifically requested the records indicated in Ms. Marquis March 2, 2007, letter be itemized so Mr. McKee so he could "purchase these documents in order of importance". CP 372. Mr. McKee had also made an offer to resolve the matter if WDOC simply waived the copying and postage fee "since the requests have gone way further than the time allowed under the PDA." Id.

Ms. Marquis responded to this appeal on April 3, 2007, acknowledging receipt of his appeal. CP 374. Ms. Marquis did not respond to the appeal for itemization, "Failure to respond constitutes a violation of the act..." Smith v. Okanogan County, 100 Wa.App. 7, 994, P.2d 857 (00) at 19-20 citing Blaine Sch. Dist. No. 503, 86 Wn.App at 698-99. Ms. Marquis did however deny Mr. McKee's offer for waiver of the copying and postage fee, "the payment for these requests will not be waived". CP 374. Although the record does not specifically reflect the date WDOC received Mr. McKee's appeal letter, it is obvious that Ms. Marquis received it by April 3, 2007. CP 374.

RCW 42.56.520 sets the starting of the statute of limitations when a requester challenges the agency's response to a records request:

(3) "Agency's..., shall establish a mechanisms for the most prompt possible review of decisions denying inspection, and such review **shall be deemed complete at the end of the second business day following the denial of inspection and shall constitute final agency action...for the purpose of judicial review.** (bold/underline mine)

In accordance with this statute WDOC published WAC 137-08

-140(2) Parmelee at 753-54 which provides:

"...Such review shall be deemed complete at at the end of the second business day following denial of disclosure, and **shall constitute final agency action for the purpose of judicial review.** (bold mine).

"The PDA requires every governmental agency to disclose any public record upon request, unless the record falls within certain very specific exemptions... Courts construe the act broadly and its exemptions narrowly... the PDA is a "strongly worded mandate for broad disclosure of public records"... Any written information about the conduct of government is a public record, "regardless of physical form or characteristics"... The purpose of the PDA is to keep officials and institutions accountable to the people... The Court's task to give effect to the legislative purpose as expressed in statute." Daines v. Spokane County, 111 Wa.App. 342, 44 P.3d 909 at 347 (citations omitted);

"...we are required to construe the PDA liberally in favor of disclosure, we interpret statutes according to their plain meaning whenever possible, and our primary goal in interpreting a statute is to give effect to legislative intent." Yousoufian v. Office of Ron Sims, 114 Wa.App. 836, 60 P.3d 667 (2003) at 848. The literal meaning of RCW 42.56.520(3) "final agency action" construed liberally, given the "fullest effect" to the Public Records Act would make April 5, 2007, the starting of the one year statute (RCW 42.56.550(6)) for judicial review. This would make Mr. McKee's complaint well within the time frames.

C. The September 9, 2008, Cynthia Hood Letter Was The First Claim Of Exemption Under RCW 42.56.550(6)

While WDOC had the three grievance records some time before the March 2, 2007, letter they never notified Mr. McKee that any of the records were exempted. It was not until after Mr. McKee received the records did WDOC notify him that there was two (2) pages exempt from disclosure:

"In regard to PDU-1194, there was a mistake made in counting records. The count was given as 291 when it was actually 284; and 2 of those pages are exempt from disclosure. (A denial form is included with the copies). CP 50 (underline mine).

RCW 42.56.550(6) provides:

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

The September 9, 2008, letter (CP-50) was the first time WDOC ever notified Mr. McKee that there were exempt records related to his request. While this action was in summary judgment our State Supreme Court recently decided that when a response to a records request is required and the agency believes that some of the records are exempt from disclosure the statute of limitations does not begin until a "privilege log" is provided. Rental Housing Association of Puget Sound v. City of Des Moines, 165, Wn.2d 525, 199, P.3d 393 (2009). Because WDOC never produced a privilege log ~~are~~ <sup>or</sup> even claimed any of the records were being withheld the statute of limitations did not begin to run until September 9, 2008.

D. WDOC Silent Withholding of Records Toals  
The Statute Of Limitations.

When WDOC finally produced the records responsive to the three grievance records they did not provide the records the decision makers reviewed to make their decisions to deny the grievance's.

In Mr. McKee's October 9, 2006, request he specifically requested: \_\_\_\_\_

"Any and all records that were considered by Audrey Rodriguez Grievance Coordinator, Warden S. Rogers any CCA/FCC staff and or Washington DOC personell [sic] in their decision of grievance No. 06-0479W to render their decision including but not limited to investigations, e-mails, notes, records, vidieos [sic], acts or omissions." CP 340

It appears what WDOC sent in response to this was the actual grievance. CP 53 - 114.

In this grievance Mr. McKee was complaining about not having any legal research access and materials to attack his criminal conviction on direct appeal. CP 59 - 62. A look at the response to this grievance shows that staff partidipating in the grievance at least reviewed some records. These records would be the Law Library schedulè from Mr. Wright:

"Mr. Wright Law Librarian via phone call stating library scheduled [sic] is posted." ... Instructions for computer use has been discussed and agrees to provide written instructions." CP 56.

The posted extended law library houres:

"...the hours open for the Law Library have been extended to accomodate the inmates." CP 75.

The grievance records for the previous two years:

"WDOC inmates have been @ FCC for approximatley 2 years and have had no complaints with access to legal materials etc.until the last shipment of inmates arrived." CP 76.

Receipts for typewriters:

"We have recently provided additional typewriters extended hours and a law library that is delegated strictly to WDOC offenders." CP 76.

Again in Mr. McKee's October 9, 2006, request letter for records related to grievance No. 06-0500W (CP 346) it appears that only the grievances themselves were sent.

In this grievance Mr. McKee was complaining about is legal property being taken and destroyed due to retaliation. CP 119. The response would indicate that the people reviewing the grievance reviewed some policy for inmate property storage and safety:

"You are allowed to to store your legal papers in a fire safe gray box. If you need a 2nd gray box for storing legal work you must request one of [sic] case/unit Mgr. for approval. CP 117.

Further the reviewing staff must have reviewed some record of how the unit was "shake-down" and that all other units were also shaken down:

"The shake-down that occurred involved all of the Washington population. All of Lima unit was searched the same way. CP 116.

None of these records were produced for these requests. Moreover WDOC has not stated any reason for not producing the records the decision makers "reviewed" to determine their decision for these grievances.

"The Public Records Act clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request." PAWS, 125 at 270; "Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption, and without providing a the explanation of how the exemption applies to the specific record withheld." Id.; "an applicant need not exhaust his or her own ingenuity to "ferret out" records through some combination of "intuition and diligent research". Daines v. Spokane County, 111 Wn.App. 342, 349, 44 P.3d 909 (02). The statute of limitations should be tolled until WDOC produces the records that were "reviewed" by the decision makers for the three grievance records.

"when an agency refuses a public disclosure request, its refusal "shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld", RCW 42.17.310(4).

"this requirement prevents an agency from "silently" denying access to documents - the agency must justify its refusal and the records withheld **must be identified** with particularity". Limstrom v. Ladenburg, 136 Wa.2d 595, 963 P.2d 869 (1998) Id. 618(bold mine).

"An agency's compliance with the Public Records Act is only as reliable as the weakest link in the chain. If any agency employee along the line fails to comply, the **agency's response will be incomplete, if not illegal.**" PAWS 125 Wa.2d at 269. (bold mine) "The Public records Act clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request Id 270. "The plain terms of the Public Records Act, as well as proper review and enforcement of the statute, make it imperative that all relevant records or portions of records be identified with particularity." Id. 271.

The record before the court is replete with evidence that there are more records responsive to Mr. McKee's requests. The WDOC, withholding responsive records without identifying the specific records and how an exemption applies can not be a proper and full response to start the statute of limitations period under RCW 42.56.550(6).

E. Substantial Compliance Is Plain Error

An extracting statutory scheme applies to the attorney general's official bonding requirement in Washington State.

First, RCW 43.10.010 mandates that:

Before entering upon the duties of his office, any person elected or appointed attorney general shall... execute and file with the secretary of state, a bond to the state, in the sum of five thousand dollars, with sureties to be approved by the governor, conditioned for the faithful performance of his duties and the paying over of all monies, as provided by law.

This specific official bonding requirement applicable to the attorney general is then enforceable under a generalized statute, which states that:

Every elective office shall become vacant on the happening of any of the following events: (6) [The incumbent's] refusal or neglect to... give or renew his or her official bond, or to deposit such... bond within the time prescribed by law.

RCW 42.12.010(6). An order finding non-compliance with an official bond requirement is self-executing. State ex rel Austin v. Superior Court, 6 Wn.2d 61, 64 (1940). Finally, the governor is given authority to require additional bonding of the attorney general under RCW 43.10.020, which states that:

If the governor deems any bond filed by the attorney general insufficient, he may require an additional bond for any amount not exceeding five thousand dollars.

If the attorney general fails to give such additional bond as required by the governor within twenty days after notice in writing of such requirement, his office may be declared vacant by the governor and filled as provided by law.

These statutory provisions are not vague or ambiguous. They specifically require each individual elected or appointed attorney general to "execute and file" an official bond. RCW 43.10.010. The attorney general's bond must also be approved by the governor. *Id.* Moreover, the execution, approval and filing must be accomplished by the attorney general "before entering upon the duties of his office". *Id.* Failure to comply with these specific statutory duties results in the automatic "Vacancy" of the office of attorney general. RCW 42.12.010(6).

Whether or not statute requires "substantial" or "strict" compliance is a matter of legislative intent that must be determined from the language of the statute itself. State v. Neal, 144 Wn.2d 600, 30 P.3d 1255 (2001). Where a statute does not specify that "substantial compliance" is required. Clark v. Horse Racing Comm'n, 106 Wn.2d 84, 91 (1986). Mr. McKee asserts that strict compliance is mandatory here.

The word "shal" is unambiguous and presumptively creates an imperative obligation, Crown Cascade, Inc. v. O'Neal, 100 Wn.2d 256, 261 (1983), unless a different legislative intent can be discerned. In Re Myers, 105 Wn.2d 257, 262 (1986). However, the court will not engage in judicial construction of the language of a statute where it is plain, unambiguous and certain because it's meaning will be discovered from the wording of the statute itself.

People's Organization For Washington Energy Resources

v. Utility & Transportation Comm'n, 101 Wn.2d 425, 429-30 (1984). Under these well-established rules, RCW 43.10.010 requires strict compliance.

Official bonds are required by law because certain officers are endowed with special and extraordinary official powers which are peculiarly susceptible to abuse. Nelson v. Bartell, 4 Wn.2d 174, 185 (1940). The legislative intent behind Washington State's official bonding scheme for attorney generals can be further discerned by examining the language of all applicable statutes together.

First, each individual elected or appointed attorney general must "execute and file" an official bond. RCW 43.10.010. A pre-existing blanket bond cannot suffice to accomplish this objective because it would render superfluous the mandate that execution, governor-approval and filing occur before a prospective attorney general enters upon the duties of office. See Progressive Animal Welfare Soc'y v. University of Washing, 125, Wn.2d 243, 260 (1994) (all of the statutory language must be given effect); Ockerman v. King County, 102 Wn.App 212, 216 (2000) (statute read as a whole and effect must be given to all language).

This conclusion is supported by the fact that the sureties underwriting a particular attorney general's official bond must be "approved by the governor". RCW 43.10.010.

That is because in Washington State, every official bond must be approved by the governor already. RCW 42.08.100. Because the language in RCW 43.10.010 cannot be rendered meaningless, the logical conclusion is that governor-approval of attorney general bonds is required "(b)efore [the attorney general enters] upon the duties of his office". Knowles v. Holly, 82 Wn.2d 694, 513 P.2d 18 (1973) (legislature does not take meaningless actions). This interpretation is consistent with a mandatory, step-by-step procedural requirement that every prospective attorney general must follow.

Initially, prospective attorney general must be appointed or elected. Next, they must successfully apply with at least two (2) sureties for an official bond. See RCW 42.08.150; then see The Trane Co. v. Randolph Plumbing, 44 Wn.App 438, 440 (1986) (suretyship is a contractual relationship in which one party agrees to be answerable for the debt or default of another). Then, each prospective attorney general; must execute (i.e. sign) their proposed official bond with the contracting sureties. That bond and the sureties must then be "approved by the governor". RCW 43.10.010. Finally, the official bond must be filed with the secretary of state. *Id.*

The governor-approval requirement found in RCW 43.10.010 is significant because it affirms a legislative intent to mandate individualized official bonds for each prospective attorney general.

Union Bay Preservation Coalition v. Cosmos Development, 127 Wn.2d 614, 620 (1995), citing In Re Santore, 28 Wn.App 319, 623 P.2d 702 (1981). In cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty. Id. That is not the case here.

What Washington State has done completely negates the legislative objectives underlying RCW 43.10.010. In 1985, Washington State purchased a "blanket bond" for the office of the attorney general. That blanket bond has then been maintained - by the state - without any elected or appointed attorney general ever having to individually "give or renew" an official bond for themselves. Obviously, this is not what the legislature had in mind.

As noted above, there are special procedural requirements applicable specifically to prospective attorneys general in Washington State. These requirements, mandatory "(b)efore [a prospective attorney general] enter(s) upon the duties of his office", have not been required of other officials. See e.g. RCW 36.16.050 (county officials); RCW 42.08.100 (secretary of state); RCW 43.17.100 (appointed state officers and employees). The distinction that the legislature has made between attorney generals and other officers further supports a finding that legislative intent was to impose additional accountability mechanisms upon the individuals who aspire to hold and

exercise the authority of this powerful office.

What has been done here is not "actual compliance with respect to the substance essential to every reasonable objective of the statute". Union Bay, 127 Wn.2d at 620. Therefore, even substantial compliance has not been shown. Each prospective attorney general since 1985 has been illegally relieved of the official bonding procedural requirements altogether. Under the pre-existing "blanket bonding" scheme, Rob McKenna never had to go through any bond application process. Further, he has never executed any official bond. See Young v. Union Savings & Trust Co., 23 Wash. 360 (1900) (execution requiring signing); then See CP\_\_\_\_\_ and CP\_\_\_\_\_. Finally, Mr. McKenna has not obtained surety approval from the governor, nor has he filed an official bond that meets the aforementioned requirements. Not only did he fail to strictly comply with these requirements, the official bond he produced CP 14-19 does not even substantially comply with RCW 43.10.010. The people of Washington State had no assurance that Mr. McKenna was even bondable "(b)efore entering the duties of his office".

On this record, this court cannot - as a matter of law - find that Rob McKenna has "substantially complied" with RCW 43.10.010.

What if a prospective attorney general was not bondable with two (2) respectable sureties? The surety-approval requirement - in contrast to the bond content-and-form approval requirement found in RCW 42.08.100 - shows that the legislature did not want any fly-by-night sureties to be allowed to underwrite an official bond for a prospective Washington State Attorney General. Yet the pre-existing blanket bonding scheme advocated by defense counsel renders the statutory check-and-balance meaningless. As a consequence, neither Rob McKenna nor any other attorney general has had to apply for, execute, obtain governor-approval for or file an official bond for the past quarter-century.

The step-by-step procedure detailed in RCW 43.10.010 does not specify that "substantial compliance" is sufficient. Rather, the word "shall" is used. That creates a presumption of an imperative obligation. "(E)xecution", "approval" and "filing" of the official bond must occur before the would be attorney general "enter(s) upon the duties of his office". Clark, 106 Wn.2d at 91. There is nothing in the statutory scheme or in the record before this court that would support adoption of any "substantial compliance" standard.

F. Even if "substantial Compliance" Were Sufficient, It Has Not Been Shown Here. "Substantial Compliance" is "actual Compliance" in respect to the substance essential to every reasonable statute.

**V            This Court Should Award Mr. McKee Statutory  
Attorney Fees and Costs Under RCW 42.56.550(4).**

Pursuant to RAP 18.1, Mr. McKee hereby requests  
statutory attorney fees and expenses. RAP 18.1(a),(b).

The PRA provides:

Any person who prevails against an agency  
in any action in the courts seeking the  
right to inspect or copy any public record  
request within a response to a public record  
request within a reasonable amount of time  
shall be awarded all costs, including  
reasonable attorney fees, incurred in  
connection with such legal action.

RCW 42.56.550(4). This provision mandates fees and  
costs to the prevailing party at the trial court and on  
appeal. PAWS I, 114 Wn.2d at 690; Limstrom v. Ladenburg,  
85 Wn.App. 524, 534, 933 P.2d 1055 (1997).

**VI.            CONCLUSION-RELIEF SOUGHT**

Mr. McKee requests this court reverse the trial  
court's summary judgment dismissal of his three combined  
Public Record Act complaints with directions to re-open  
discovery as to any more records that may be responsive  
to Mr. McKee's requests.

Mr. McKee further requests this court disqualify  
The State Attorney General from representing the state  
in this court and at the trial court for its failure to  
execute an official bond.

DATED this 19th day of December, 2009

  
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IN THE COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

JEFFREY R. MCKEE,

APPELLANT,

v.

WASHINGTON STATE DEPARTMENT  
OF CORRECTIONS, et. al.,

Respondent.

NO. 39713-7-II

DECLARATION OF SERVICE

STATE OF WASHINGTON

COUNTY OF SPOKANE

ss.

I, Jeffrey R. McKee, under penalty of perjury under  
the laws of the State of Washington, declare as follows:

I am the appellant in the above named cause, proceeding  
pro se. On the date and in the manner indicated below, I  
caused the Brief of Appellant to be served on:

AAG, Jean E. Meyn  
Attorney General of Washington State  
PO BOX 40116  
Olympia, Wa 98512  
(Attorney for Respondent)

By the Airway Heights Corrections Center "legal Mail" system  
postage pre-paid (GR 3.1).

EXECUTED this 22<sup>nd</sup> day of January, 2010.

  
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