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COURT OF APPEALS

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STATE OF WASHINGTON  
*JW*

No. 40831-7-II

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

01/10/18/10/10/10

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ROBERT EARLE JOHNSON,

Appellant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR  
THURSTON COUNTY

The Honorable Richard D. Hicks

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APPELLANT'S OPENING BRIEF

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ROBERT E. JOHNSON, pro se  
DOC #126696

MONROE CORRECTIONAL COMPLEX  
PO Box 888  
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## I. INTRODUCTION.

Appellant Robert Earle Johnson, ("Mr. Johnson") is a prisoner at Monroe Correctional Complex-Twin River Unit, proceeding as a pro se litigant. Mr. Johnson does not have the degree of skills and efficiency the court expect from an attorney. Harnes v. Kerner, 404 U.S. 519, 30 L.Ed.2d 652 (1972); Pena v. Gardner, 976 F.2d 469, 471 (9th Cir. 1992); Wright and Miller Federal Practice and Procedure §1217 (3rd ed. 2004).

On December 16, 2009, Mr. Johnson filed a Public Records Act (PRA) lawsuit against Department of Corrections (DOC). The lawsuit was predicated on DOC silently withholding public records, and failure to claim an exemption, which is required by statute. DOC further failed to provide a privilege log, which is required by the governing law.

The documents Johnson sought were relating to the removal or deletion of DOC Policy 590.100 § V.A. 9-Extended Family Visiting (EFV), and were relevant to his lawsuit against DOC that was pending in the federal district court at Tacoma, Washington where he was challenging section V.A. 9 of DOC 590.100.

Mr. Johnson sought the removal of DOC 590.100 § V.A. 9 through the Public Disclosure Unit (PDU). PDU provided Mr. Johnson with a single e-mail. He was not satisfied with the e-mail, and therefore, sought the same documents through McNeil Island Corrections Center (MICC) Public Disclosure Coordinator, who said in a letter that she would

search MICC's official files, and forwarded his request to DOC Headquarters in Olympia. Eleven months later, August 2007, DOC Headquarters notified Mr. Johnson that there were no additional documents to the 1 e-mail provided to him in August 2006.

A private citizen, not connected to DOC, requested the same documents as Mr. Johnson and was instantly provided 292 pages.

The trial court dismissing Johnson's action issued an order that was fundamentally misconceived the plain language of RCW 42.56.550(6), and its purposes. The totality of evidence in this case is incontestable, therefore, the trial court's ultimate findings regarding RCW 42.56.550(6), and Rental Housing Ass'n v. City of Des Moines, 165 Wn.2d 525 (2009) are based on a misreading of the governing laws. This is reversible error.

## II. ASSIGNMENT OF ERROR

### A. ASSIGNMENT OF ERROR

1. The court erred in dismissing Mr. Johnson's claims and Motion To Show Cause by finding claims time-barred under RCW 42.56.550(6).

2. The trial court erred in interpreting the statutory plain language of RCW 42.56.210(3), its analysis of Washington Supreme Court opinion in Rental Housing Ass'n v. City of Des Moines, 165 Wn.2d 525 (2009).

3. The trial court abused its discretion when it failed follow mandatory authority of Washington Supreme Court, and failed to follow the governing statutory law, and properly interpret its plain language.

4. The trial court order to dismiss Johnson's PRA claims conflict with the holding of Washington Supreme Court case Rental Housing Ass'n v. City of Des Monies, 165 Wn.2d 525 (2009), and violates stare decisis.

## B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in its conclusion that the one year statute of limitation was triggered when DOC provided Mr. Johnson with a single e-mail, and silently withheld other documents without claiming an exemption and without providing a privilege log? [Assignment of Error #1].

2. Whether the trial court erroneous interpretation of RCW 42.56.210(3), and silently withholding documents constitute reversible error? [Assignment of Error #2].

3. Whether the trial erred where no "claim of exemption was made, and no production of documents were provided "on a partial" or "installment basis", to trigger the one year statute of limitation, but dismissed Mr. Johnson's claims as untimely filed? [Assignment of Error #3].

4. Whether the trial court's order conflicts Washington Supreme Court recent case Rental Housing Ass'n v. City of Des Monies, 165 Wn.2d 525 (2009), and the elements of the one year statute of limitations under RCW 42.56.550(6) violates the doctrine of stare decisis? [Assignment of Error #4].

## III. STATEMENT OF THE CASE

Mr. Johnson's Notice of Appeal's relevant facts pages 3 through 6, and exhibits are incorporated as if rewritten and set forth herein. Mr. Johnson's Clerk's Papers are the only record before this court for review. Mr. Johnson will make reference to the record via the Appearance Docket SUB# and CODE/CONN.

Mr. Johnson was transferred from Washington State Penitentiary to McNeil Island Corrections Center (MICC) for the sole purpose of continuing EFV's with his wife of 24 years. Shortly after he arrived MICC terminated his EFV's. MICC and DOC administration determined that his sentence was too long (no positive prognosis of release) to continue participating in the EFV program pursuant to DOC Policy 590.100 § V.A. 9. Motion To Show Cause (MTSC), SUB# 16, 2.1.

After Mr. Johnson talked to several prisoner with sentences similar to his and others longer sentences than his who were participating in the EFV Program, he filed a lawsuit in the federal district court at Tacoma, Washington on June 13, 2005. This lawsuit was against the DOC Secretary, and DOC employees based on discrimination. Mr. Johnson challenged DOC 590.100 § V.A. 9 as being racially applied. MTSC, SUB# 16, 2.2.

On June 8, 2006, one year after Mr. Johnson filed the 2005 lawsuit challenging DOC 590.100 § V.A. 9, DOC Secretary removed section V.A. 9 of DOC 590.100. MTSC, SUB# 16, Exhibit #GDJ-001.

After DOC denied the existence of any documents relating to the removal section V.A. 9 of DOC 590.100 Mr. Johnson, on August 16, 2006, filed a Public Records Act request. MTSC, SUB# 16, 2.4, Exhibit GDJ #002.

On August 24, 2006, DOC Public Disclosure Unit (PDU) responded to Mr. Johnson PRA request in a letter telling him the only information they have was a e-mail. MTSC, SUB# 16, 2.6, Exhibit GDJ 003.

The August 24, 2006, letter further expressed that the most current version of DOC 590.100 was revised in October 1, 2005. The Department withheld these documents. MTSC, SUB# 16, Exhibit GDJ #12.

On September 10, 2006, Mr. Johnson submitted an expanded request to MICC Public Disclosure Coordinator. MTSC, SUB# 16, Exhibit GDJ #005.

MICC Public Disclosure Coordinator forwarded Mr. Johnson's request to DOC DOC Headquarters. MTSC, SUB# 16, Exhibit GDJ #006.

There were several letters exchanged between MICC Coordinator and Mr. Johnson until DOC Headquarters response eleven months after original request was submitted via MICC Coordinator. RSP, SUB# 18, Lines 2-5; MTSC, SUB# 16, Exhibits GDJ #007, GDJ #008, and GDJ #009.

On August 23, 2007, DOC Headquarters acknowledging receipt of MICC Coordinator, and acknowledging the documents Mr. Johnson requested. MTSC, SUB# 16, Exhibit GDJ #0010.

On August 27, 2007, DOC Headquarters sent Mr. Johnson a letter reminding him of the one page e-mail he was provided a year earlier, stating in pertinent part: "I note that in August 2006, you were provided a 1 page memo responsive to a similar request. There are no additional records responsive to your request. As such your request is considered closed." MTSC, SUB# 16, Exhibit GDJ #0011.

When a private citizen requested the same documents verbatim to Mr. Johnson first PRA request, that person on June 3, 2009, was immediately provided 292 pages. MTRC, SUB# 34, page 4; and MTRC, SUB# 34, Attachment E.

Mr. Johnson's 2006 PRA request was for drafts, e-mails, and other documents relating to the removal of section V.A. 9 of DOC 590.100, which he was told only one e-mail existed. MTSC, SUB# 16, Exhibit GDJ #0011.

June 2009 Mr. Johnson received drafts and e-mails from

a private citizen. MTSC, SUB# 16, page 11, second paragraph; and MTSC, SUB# 16, Exhibits GDJ 0012 & GDJ 0013.

#### IV. STANDARD OF REVIEW

This is an appeal from a motion to show cause predicated on the PRA's one year statute of limitation, which is reviewed de novo in this court. State v. Schultz, 146 Wn.2d 540, 544, 48 P.3d 301 (2002); State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). This court also review challenges to an agency actions under the PRA de novo. Soter v. Cowles Publ'g Co., 162 Wn.2d 716, 731, 174 P.3d 60 (2007); RCW 42.56.030. The one year statute of limitation should only be triggered where an exemption is claimed, and a privilege log is produced. Rental Housing Ass'n v. City of Des Moines, 165 Wn.2d 525, 540-41, 199 P.3d 393 (2009). In this case DOC never effectively claimed an exemption to trigger the statute of limitation under RCW 42.56.550(6).

#### V. LEGAL ARGUMENT

THE TRIAL COURT ERRED IN NOT GRANTING  
MR. JOHNSON'S MOTION TO SHOW CAUSE  
BECAUSE DOC WITHHELD DOCUMENTS AND  
NEVER EFFECTIVELY CLAIM AN EXEMPTION  
TO TRIGGER THE ONE YEAR STATUTE  
OF LIMITATION PURSUANT TO  
RCW 42.56.550(6).

DOC never made a claim of exemption to trigger the one year statute of limitation, thus Mr. Johnson's PRA suit was timely filed December 16, 2009.

The statute of limitation is not triggered until the agency provides the requestor with a proper claim of

exemption and the agency files a privilege log identifying the exemptions under which it is withholding documents.

Rental Housing Ass'n v. City of Des Moines, 156 Wn.2d 525, 199 P.3d 393 (2009).

Here, the language of RCW 42.56.550(6) is clear that a PRA suit must be filed within one year of either: (1) an agency's claim of exemption or (2) the last production of a record on a partial or installment basis. Neither of these conditions are present here.

**a. Claim of Exemption and Privilege Log: Error No. 1.**

On July 20, 2005, Rental Housing Ass'n (RHA), made its first Public Records Act (PRA) request of 12 different categories of documents to the City of Des Moines (City) relating to the crime free rental housing program (Program). The City responded to RHA's request and provided 593 pages of documents relating to the Program, but refused to provide other documents claiming exemptions. The City's August 17, 2005, letter did not describe individual documents and did not provide a privilege exemption log. The letter did no more than give a general characterization of the withheld documents. RCW 42.56.210(3), RCW 42.56.550(6).

The Washington Supreme Court held that: "The City's reply letter to the RHA on August 17, 2005, was insufficient to constitute a proper claim of exemption and thus did not trigger the one-year statute of limitations under RCW 42.56.550(6)." Id. at 539-540.

The Supreme Court further opined: "We conclude that the

City did not state a proper claim of exemption to trigger RCW 42.56.550(6), the one-year statute of limitations on PRA suit, until April 14, 2006, when it provided RHA with a privilege log. ... Accordingly, RHA timely filed suit against the City on January 16, 2006." Id. at 541.

It should be noted that Rental Housing Ass'n v. City of Des Moines, is the only published case that has addressed when the one-year statute of limitations is triggered.

Even though the City provided RHA with records on a partial or installment basis throughout 2006-2007, nevertheless, once the agency failed to properly claim an exemption no other compliance to the PRA statute will trigger the one-year statute of limitation. The Rental court with strict compliance held: "Because we hold that the City never effectively claimed an exemption to trigger the statute of limitation under RCW 42.56.55 (6) until April 14, 2006. We do not reach these additional issues." Rental, 165 Wn.2d at 541 footnote 3.

Mr. Johnson filed a PRA request and received a one page e-mail. A different person filed the same PRA request as Mr. Johnson and received 292 pages of documents immediately. MTRC, SUB# 34, Attachment E.

The documents he sought were relating to the removal of DOC Policy 590.100 § V.A. 9-Extended Family Visits-the same policy he was challenging.

At least the City made an effort to claim an exemption, although insufficient. In this case, DOC made

no effort whatsoever to claim an exemption in its August 24, 2006, letter to Mr. Johnson, which clearly states: "[t]he only information we have is an email documenting approval of the change." MTSC, SUB# 16, Exhibit GDJ #003. There were no exemption claimed; there were no assertion of future partial or installment of production; and there were no privilege log provided.

When DOC Headquarters finally responded to Mr. Johnson's PRA request via MICC Coordinator a year later in a August 27, 2007, letter reaffirming its August 24, 2006, letter. This letter also permanently shut-down any future request relating to DOC 590.100 § V.A. 9 made by Mr. Johnson. This letter unequivocally stated:

I note that in August 2006, you were provided a 1 page memo responsive to a similar request. There are no additional records responsive to your request. As such your request is considered colsed.

MTSC, SUB# 16, Exhibit GDJ #0011.

However, when Melinda Carter made the same PRA request, verbatimly for the same documents, relating to the removal of DOC 590.100 § V.A. 9, she was promptly provided 292 pages by the same PDU's Specialist who had refused Mr. Johnson's PRA request, but now acknowledged Mrs. Carter:

I have gathered 292 pages responsive to include the above criteria. To obtain these records please send a check or money order in the exact amount of \$63.35.

MTRC, SUB# 34, Attachment E.

This Court should take judicial notice that Mr. Johnson

still has not received an exemption claim nor a privilege log, thus the one-year statute of limitation has not been triggered. Rental, 165 Wn.2d at 539.

**b. Silently Withholding Public Records: Error No. 2.**

These 292 pages were withheld from Mr. Johnson, but provide to Carter is a clear violation of the PRA statute. The PRA prohibits the silent withholding of any public records in response to a PRA request. The plain language of RCW 42.56.210(3). reads:

Agency responses refusing, in whole or in part, inspection of any public record **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. (Emphasis added).

RCW 42.56.210(3).

Contrary to the trial court's order in the case sub judice, the language is clear that the PRA prohibits the withholding public records; to reiterate, a PRA suit must be filed within one-year of either, "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) (Emphasis added).

In this case the one-year statute of limitation has yet to be triggered. Rental, 165 Wn.2d at 541, & footnote 3. There is no exemption claimed, there is no production of document "on" a partial or installment basis, and there is no privilege log provided to Mr. Johnson. MTSC, SUB# 16, Exhibit GDJ #003; MTSC, SUB# 16, GDJ #0011. Now discern withheld documents. MTSC, SUB# 16, Exhibits GDJ #0012 & GDJ #0013.

When DOC withheld and refused to provide the PRA requested documents to Mr. Johnson, he was litigating a suit against DOC in the Western Washington Federal District Federal Court challenging the very same DOC Policy as being racially applied to him and other African American prisoners to preclude him from participating in the EFV program. The Rental Court based part of its reasoning and guidance to resolve the one-year statute of limitation in PAWS v. Unit. of Wash., 125 Wn.2d 243, 884 P.2d 592 (1994) where it unequivocally stated:

Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld. The PRA does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed.

Rental, Id. at 537 (quoting PAWS II, at 270).

The Rental court further held: "We emphasized the need for particularity in the identification of records withheld and exemption claim[.]" Id. at 537. Here, DOC provided Mr. Johnson with one e-mail and silently withheld 292 documents. No exemption claimed, and no privilege log provided.

Rental continues to stand for the principles that a proper claim of exemption and privilege log identifying the

exemption under which the agency is withholding records before the one-year statute of limitation can be triggered. The trial court has not demonstrated a compelling reason to overturn Rental court decision.

The trial court order in the instant case seems to imply that an "exemption claim" and "privilege log" are no longer necessary to trigger the one-year statute of limitation under RCW 42.56.550(6).

The trial court also seems to imply that a state agency, PDU, by providing a single document may secretly withhold 292 documents without declaring any "exemption", "privilege log", or giving a statement of its intent to provide a partial or installment disclosure. This conclusion is contrary to the Supreme Court holding in Rental; RCW 42.56.550(6); and RCW 42.56.210(3).

**c. Statutory Interpretation: Error No. 3.**

The trial court interpretation of the one-year statute of limitation and the decision in this case conflict with RCW 42.56.210(3), RCW 42.56.550(6), and the Supreme Court's decision in Rental Housing Ass'n v. City Des Moines, which also held: "Our purpose when interpreting a statute is to determine and enforce the intent of the legislature." 165 Wn.2d at 536. Under the "plain meaning rule", the Supreme Court examines the language of the statute, other provisions of the same act, and related statutes to determine whether it can ascertain a plain meaning. City of Seattle v. Allison, 148 Wn.2d 75, 81, 59 P.3d 85 (2002). When the

courts interprets a statute, it look first to the statute's plain language and assume the legislature means what it say. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). All of the language in the statute should be given effect and the courts may not render the plain language meaningless or superfluous as the trial court has in this case. State v. Williams, 62 Wn.App. 336, 338, 813 P.2d 1293 (1991).

The trial court's order is predicated on erroneous interpretation of RCW 42.56.550(6).

**d. Doctrine of Stars Decisis: Error No. 4.**

Under the doctrine of stars decisis the lower courts follow the higher court and earlier judicial decisions. This especially so in the State of Washington trial courts and appellate courts follow Washington State Supreme Court opinions unless "a clear showing that an established rule is incorrect and harmful before it is abandoned." City of Federal Way v. Koenig, 167 Wn.2d 341, 346-47 (2009) (quoting Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 147, 94 P.3d 930 (2004), which (quotes In re Right to Water of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1977)). The trial court has shown neither "harmful or decided incorrectly" in Rental, 165 Wn.2d 525.

Mr. Johnson attached a copy of the Rental case to his motion for reconsideration. MTRC, SUB# 34, Attachment A. Thus the trial court's decision appears to have the effect of overturning a precedent. The purposes of stars decisis are to: "promotes the evenhanded,

predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), Korning, 167 Wn.2d at 347.

If the trial court's order dismissing Mr. Johnson's claims for failure to timely file PRA suit against DOC is predicated upon erroneous view of the governing law, then the trial court abused its discretion. The trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based on untenable grounds. Staff Builders v. Whitlock, 108 Wn.App. 928 932 (2001).

The trial court's interpretation of the mandatory authority governing RCW 42.56.550(6) is contrary to the Rental's Court opinion, and a disregard for stars decisis.

#### VI. CONCLUSION

In the interest of justice, and all of the foregoing reasons, the facts, the applicable statutes, and case law, this court should find Mr. Johnson's PRA suit was timely filed, reverse the trial court order, remand, and appoint a different trial court judge to oversee this case.

Respectfully submitted this 9th day of August 2010.

  
Robert E. Johnson, #126696  
Monroe Correctional Complex  
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STATE OF WASHINGTON

BY \_\_\_\_\_  
ATTY

AFFIDAVIT OF SERVICE BY MAIL

I, ROBERT E. JOHNSON, CERTIFY UNDER THE PENALTY OF PERJURY AND UNDER THE LAWS OF THE STATE OF WASHINGTON AND FEDERAL LAWS THAT THE FOLLOWING IS TRUE AND CORRECT:

That on the 9<sup>th</sup> day of August 2010, I served the following by depositing the original and a copy to the Court of Appeals, and a copy to the Attorney General in the United States mail.

1. APPELLANT'S OPENING BRIEF
2. AFFIDAVIT OF SERVICE BY MAIL

addressed to:

- [x] Sara J. Di Vittorio  
Assistant Attorney General  
PO Box 40116  
Olympia, WA 98504-0116
- [x] Court of Appeals, Division II, Clerk  
950 Broadway, Suite 300  
Tacoma, WA 98402

I declared under the penalty of perjury under the laws of the State of Washington, pursuant to RCW 9A.72.085, and the laws of the United States pursuant 28 U.S.C. §1746, that the forgoing is true and correct.

EXECUTED this 9<sup>th</sup> day of August 2010, Monroe, WA.

  
Robert E. Johnson, #126696