

COURT OF APPEALS  
DIVISION II

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

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ROBERT EARLE JOHNSON,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

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**ANSWERING BRIEF OF RESPONDENT**

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ROBERT M. MCKENNA  
Attorney General

SARA J. DI VITTORIO, WSBA #33003  
Assistant Attorney General  
Corrections Division  
P.O. Box 40116  
Olympia, WA 98504-0116  
(360) 586-1445

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## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUE PRESENTED .....	1
III.	COUNTER STATEMENT OF THE CASE.....	1
	A. Substantive Facts .....	1
	B. Procedural Facts.....	2
IV.	STANDARD OF REVIEW.....	3
V.	ARGUMENT .....	4
	A. Mr. Johnson’s Claim Is Barred By The Statute of Limitations .....	4
	1. The Superior Court Properly Applied RCW 42.56.550(6) In Determining That Mr. Johnson’s Claim Was Barred By The One Year Statute Of Limitations.....	4
	2. If RCW 42.56.550(6) Is Silent As To Productions Of All Responsive Records In Their Entirety At One Time, Then The Catch-All Two-Year Statute Of Limitations Applies To Bar Mr. Johnson’s Claim .....	10
VI.	CONCLUSION.....	11
VII.	CERTIFICATE OF SERVICE.....	12

## TABLE OF AUTHORITIES

### Cases

<i>Atchison v. Great Western Malting Co.</i> , 161 Wn.2d 372, 166 P.3d 662 (2007).....	5
<i>Barnum v. State</i> , 72 Wn.2d 928, 435 P.2d 678 (1967).....	3
<i>Bennett v. Dalton</i> , 120 Wn. App. 74, P.2d 265 (2004).....	5
<i>Brown v. McPherson's, Inc.</i> , 86 Wn.2d 293, 545 P.2d 13 (1975).....	3
<i>Contreras v. Crown Zellerbach Corp.</i> , 88 Wn.2d 735, 565 P.2d 1173 (1977).....	3
<i>Crisman v. Crisman</i> , 85 Wn. App. 15, 931 P.2d 163 (1997).....	5
<i>Dodson v. Continental Can Co.</i> , 159 Wash. 589, 294 P. 265 (1930) .....	5
<i>Elliott v. Dep't of Labor and Indus.</i> , 151 Wn. App. 442, 213 P.3d 44 (2009).....	6
<i>Huff v. Roach</i> , 125 Wn. App. 724, 106 P.3d 268 (2005).....	4, 5
<i>Janicki Logging &amp; Construction Co. v. Schwabe, Williamson &amp; Wyatt</i> , 109 Wn. App. 655, 37 P.3d 309 (2001).....	5
<i>Jones v. Jacobsen</i> , 45 Wn.2d 265 P.2d 979 (1954).....	4
<i>Reading Co. v. Koons</i> , 271 U.S. 58, 46 S. Ct. 405, 70 L. Ed. 835 (1926).....	4

<i>Reid v. Pierce County</i> , 136 Wn.2d 195 (1998).....	3
<i>Rental Housing Ass'n of Puget Sound v. City of Des Moines</i> , 165 Wn.2d 525, 199 P.3d 393 (2009).....	6
<i>Seven Gables Corp. v. MGM/UA Entertainment Co.</i> , 106 Wn.2d 1, 721 P.2d 1 (1986).....	8
<i>State v. Contreras</i> , 124 Wn.2d 741, 880 P.2d 1000 (1994).....	8
<i>Tobin v. Worden</i> , 156 Wn. App. 507, 233 P.3d 906 (2010).....	7, 8, 10

**Statutes**

RCW 4.16 .....	10
RCW 4.16.130 .....	10
RCW 4.16.150 .....	11
RCW 40.14 .....	9, 10
RCW 42.56.100 .....	10
RCW 42.56.550(1).....	9
RCW 42.56.550(3).....	3
RCW 42.56.550(6).....	passim

## **I. INTRODUCTION**

After inmate Robert Earle Johnson filed a public records request, the Department of Corrections (the Department) promptly produced the sole record responsive to Mr. Johnson's request. More than three years later, Mr. Johnson filed this lawsuit alleging that the Department had complied only in part with his public records request. RCW 42.56.550(6) imposes a one-year limitation to bring an action under the Public Records Act (the PRA), therefore, Mr. Johnson's claim is time-barred and this Court should affirm the superior court's order of dismissal.

## **II. ISSUE PRESENTED**

The Department's last production of records to Mr. Johnson occurred on August 24, 2006, over two years before Mr. Johnson filed his PRA suit. Is Mr. Johnson's action untimely under the one year statute of limitations established for PRA suits by RCW 42.56.550(6)?

## **III. COUNTER STATEMENT OF THE CASE**

### **A. Substantive Facts**

Robert Earle Johnson submitted a public records request, pursuant to the Public Records Act (PRA), to the Department on August 16, 2006. CP 22. Mr. Johnson's request sought records related to the

removal of a section from Department policy 590.100.<sup>1</sup> On August 24, 2006, the Department responded to his request, producing one unredacted, responsive record. CP 24. No exemption log was provided as no records were withheld and no redactions were made to the one produced record. *Id.*

On September 10, 2006, Mr. Johnson submitted another nearly identical request. CP 28. The Department responded to this request on September 18, 2006. CP 31. Almost a year later, on August 27, 2007, after repeated correspondence between Mr. Johnson and the Department, Mr. Johnson was informed that there were no other records responsive to his September 10, 2006, request beyond the record initially provided to him on August 24, 2006. CP 41.

On December 16, 2009, Mr. Johnson filed this lawsuit alleging that he has not been provided all responsive records in response to his August 10, 2006 request and his September 10, 2006 request. CP 50.

## **B. Procedural Facts**

Mr. Johnson filed his Complaint alleging violation of the PRA in Thurston County Superior Court on December 16, 2009. CP 50. The

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<sup>1</sup> Although Mr. Johnson argues that the same request was submitted by a private citizen, to which 292 pages or records were provided in response, the requests were not, in fact, the same. Although the content of the requests was similar, the request from the private citizen was received in 2009 rather than 2006, thus there were three more years worth of responsive records located. CP 119.

Department responded to Mr. Johnson's motion to show cause by asserting that dismissal was required as Mr. Johnson's case was untimely under RCW 42.56.550(6). CP 49-77. On April 23, 2010, the Thurston County Superior Court granted the Department's motion to dismiss. CP 86. The Court determined Mr. Johnson's action was untimely under RCW 42.56.550(6). *Id.* This appeal followed.

#### IV. STANDARD OF REVIEW

Judicial review of all agency actions under the PRA is *de novo*. RCW 42.56.550(3). 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 Mr. Johnson is entitled to relief and dismissal of the action is required.

## V. ARGUMENT

### A. Mr. Johnson's Claim Is Barred By The Statute of Limitations

#### 1. The Superior Court Properly Applied RCW 42.56.550(6) In Determining That Mr. Johnson's Claim Was Barred By The One Year Statute Of Limitations

The PRA requires plaintiffs to file any action within one year of the date of an agency's "claim of exemption or last production of a record on a partial or installment basis." RCW 42.56.550(6). 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 a specific records request, beyond the time period specified within the statute.

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). Both the United States Supreme Court and the Washington Supreme Court recognize that statutes of limitations are intended to promote 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 merit of the underlying action. *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).

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*, 125 Wn. App. at 732; *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.*, 151 Wn. App. 442, 447, 213 P.3d 44 (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 the present case, it is undisputed that the final production of a record to Mr. Johnson was on August 24, 2006, and that, one year later, the Department's August 27, 2007 response re-asserted that the earlier-produced record was the only record responsive to either of his requests. No exemption log was provided because no records were withheld and no redactions were made. Consequently, Mr. Johnson's claim accrued on August 24, 2006, when the sole responsive record was produced. As such, the statute of limitations expired on August 24, 2007, more than two years before this lawsuit was filed. Mr. Johnson's claims are time-barred and must be dismissed as a matter of law.

Mr. Johnson asserts that the holding of *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009), is controlling as to the facts of his case. However, *Rental Housing* dealt with the sufficiency of the content of an exemption log for the purpose of determining when the statute of limitations begins to run in a public

records case. *Id.* at 541. Here, unlike in *Rental Housing*, no responsive records were withheld; thus, no exemption log needed to be provided. *Rental Housing* is inapposite.

Nor is this Court bound by Division I of the Court of Appeals' recent decision in *Tobin v. Worden*, 156 Wn. App. 507, 233 P.3d 906 (2010). There, Division I held that production of a single record that was the entirety of a records request did not trigger the one-year statute of limitations set out in RCW 42.56.550(6). *Id.* at 513. Stating that it must give effect to the plain meaning of the provision "as an expression of legislative intent," Division I held that the one-year statute of limitations can only be "triggered by one of two occurrences: (1) the agency's claim of an exemption or (2) the agency's last production of a record on a partial or installment basis." *Id.* Consequently, Division I reasoned that an agency's production of "a single document that is the entirety of the requested record" does not trigger the statute of limitations. *Id.* at 514.

However, Division I's reading of RCW 42.56.550(6) renders the statute of limitations a nullity if an agency responds to a public records request by producing all responsive records in their entirety at one time. This nonsensical result cannot have been what the Legislature intended when it amended RCW 42.56.550(6) to shorten the limitations period from five years to one year.

In 2005, the Legislature amended RCW 42.56.550(6) for the purpose of shortening the limitations period for actions brought under the PRA to one year. *Tobin*, at 512 *citing* RCW 42.56.550(6) (2005) (amended by Laws of 2005, ch. 483, § 5). In *Tobin*, Division I essentially concluded that the Legislature, in so doing, also intended to eliminate the statute of limitations entirely for situations in which an agency responded to a public disclosure request by providing the sole record responsive to the request, without redacting or claiming any exemptions. Such a result is absurd. The Legislature clearly did not intend for this result when it reduced the statute of limitations from five years to one year.

The logical conclusion is that the Legislature intended situations in which a single record is produced with no exemptions to fall within the scope of “last production on a . . . partial basis.” To conclude otherwise would yield unreasonable, illogical and absurd consequences.<sup>2</sup>

Primary among these consequences is that state and local agencies would be discouraged from responding in full to records requests in a single production. Rather, to obtain a limitation period and to avoid the risk of excessive penalties associated with ancient claims, a prudent

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<sup>2</sup> Courts must construe statutes to avoid “unlikely, strange or absurd consequences.” *State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994); *see also Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 6, 721 P.2d 1 (1986) (courts should avoid statutory interpretations that “would render an unreasonable and illogical consequence”).

agency would be motivated to produce records in installments regardless of the size of the production or the capacity to rapidly assemble the full production. While this approach is permitted by the PRA, it would engender additional administrative costs and inconvenience requestors by requiring multiple inspections or delaying receipt of copies that might otherwise have been made immediately available.

Another consequence would be the impossibility of agencies being able to defend stale—or even ancient—claims. An agency has the burden of proof to establish its compliance with the PRA, no matter how stale or ancient the claim. RCW 42.56.550(1), (2). However, public agencies do not retain all of their records indefinitely; they are authorized to destroy records that have reached the end of their designated retention period. *See generally* RCW 40.14. The reasoning of *Tobin* effectively nullifies retention schedules adopted under RCW 40.14, since any agency that failed to permanently retain all public records would be unable to defend itself against a claim filed years later alleging that not all records were properly located, assembled, and provided. This interpretation of RCW 42.56.550(6) would permit a requestor who receives a single, ostensibly final production of records to sue years, if not decades later, on an

allegation that not all records were located, assembled and provided.<sup>3</sup> The untenable consequence of that interpretation is not that agencies complying in good faith with RCW 40.14 would lose these suits, but that they would be unable to even attempt a defense.

**2. If RCW 42.56.550(6) Is Silent As To Productions Of All Responsive Records In Their Entirety At One Time, Then The Catch-All Two-Year Statute Of Limitations Applies To Bar Mr. Johnson's Claim**

Contrary to Division I's conclusion in *Tobin*, at most RCW 42.56.550(6) could be read as silent on the length of the limitation to bring an action when an agency produces a single responsive record. The clear legislative intent to shorten the limitations period for PRA actions generally to one year is inconsistent with an intent to leave the door open for an undefined period when an agency produces a single responsive record. As such, RCW 42.56.550(6) could be viewed as simply setting the parameters for when the one-year statute of limitations applies, and remaining silent as to other situations.

Applying this approach, this Court could look more broadly at statutory solutions for issues of statute of limitations. RCW 4.16 provides different statutes of limitations for different causes of actions. The Legislature provided in RCW 4.16.130 a catch-all limitation to an action

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<sup>3</sup> RCW 42.56.100 precludes an agency from destroying a record, in compliance with the applicable retention schedule, until a public record request is "resolved." Without a statute of limitations, a public records request can never be "resolved."

providing “[a]n action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued.” RCW 4.16.150. Plaintiff’s action would also be time barred under RCW 4.16.150, and therefore dismissal of his case was proper.

## VI. CONCLUSION

For all of the foregoing reasons, the Department respectfully requests that this Court affirm the superior court’s dismissal of Mr. Johnson’s PRA Complaint.

RESPECTFULLY SUBMITTED this 22nd day of October, 2010.

ROBERT M. MCKENNA  
Attorney General



SARA J. DI VITTORIO, WSBA #33003  
Assistant Attorney General  
Attorney General's Office  
Corrections Division  
PO Box 40116  
Olympia WA 98504-0116  
(360) 586-1445

**VII. CERTIFICATE OF SERVICE**

I certify that I served a true and correct copy of the foregoing document on all parties or their counsel of record as follows:

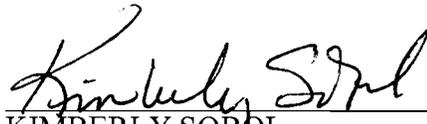
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MONROE CORRECTIONAL COMPLEX, TRU  
PO BOX 888  
MONROE WA 98272-0888

EXECUTED this 22nd day of October, 2010, at Olympia,  
Washington.

  
\_\_\_\_\_  
KIMBERLY SOBOL  
Legal Assistant