

NO. 416824-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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JEFFREY McKEE,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

12 JAN 31 PM 12:08  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY [Signature] DEPT. OF CORRECTIONS

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY

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OPENING BRIEF OF APPELLANT

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## I. INTRODUCTION

This case concerns the proper interpretation of the one-year statute of limitations contained in the Public Records Act (PRA) which applies only to actions involving a “claim of exemption or the last production of a record on a partial or installment basis.” RCW 42.56.550(6). As discussed below, the Department of Corrections, (“DOC” or “the Department”), responded to Mr. McKee’s November 24, 2006, public records request by informing him that the DOC had no responsive documents to produce, and suggested he try to obtain the records he sought from the Corrections Corporation of America (CCA), Florence Corrections Center (FCC), a private correctional facility under contract with the Washington Department of Corrections, where Mr. McKee was then housed.

Mr. McKee did just that; he hand delivered a second public records request to Mr. J.C. Miller, a DOC Contract Monitor at CCA/FCC. Mr. Miller told Mr. McKee that he was not aware of any procedure whereby CCA/FCC could respond to inmate requests for public records. A short while later the DOC answered Mr. McKee’s letter to Mr. Miller reiterating that the DOC had no responsive records, and that Mr. McKee should contact the appropriate person at CCA/FCC with his requests. Ultimately the DOC produced no

records responsive to Mr. McKee's November 2006 requests and claimed no exemptions for records not produced.

Then, in August 2009, Mr. McKee learned that the DOC had failed to produce, or even disclose the existence of, documents directly responsive to his November 24, 2006 request. Roughly ten months after discovering that the agency had silently withheld public records from him without claiming an exemption, Mr. McKee filed a complaint for violations of the Public Records Act.

After suit was filed the Department moved to stay discovery and for dismissal of the case. The trial court ruled that the Department's December 18th, 2006 response that there were no records . . . "began the running of the statute of limitations," and it dismissed Mr. McKee's case.

Mr. McKee will argue here that under well settled law when an agency withholds requested records, in whole or in part, the agency must explain why those records are exempt. Where the agency fails to claim an exemption for a record it does not produce, and further, fails to disclose the existence of a record in its possession and thereby fails to disclose sufficient information to a requestor to inform that party of a cause of action under the PRA, Mr. McKee will argue that RCW 4.16.080, the three year statute of

limitations, begins to run upon the requestor's discovery that the agency has violated the PRA.

This case will determine whether public agencies will be at liberty to silently withhold public records thereby forcing requestors to file suit and conduct discovery, all at great public and private expense, to protect their compelling interest in open government. As discussed below, the PRA is structured to create strong incentives for agencies to be organized, efficient, provide the "fullest assistance" to requestors, and to promptly disclose non-exempt records upon request. Under the framework implemented by the trial court's decision, agencies can easily skirt the PRA's affirmative duty to disclose non-exempt records and escape the PRA's consequences of doing so. Because the trial court's ruling is at odds with the letter and spirit of the Public Records Act, Mr. McKee respectfully requests this Court reverse.

## II. ASSIGNMENTS OF ERROR

### A. Assignments of Error

1. The trial court erred by entering the order of November 5, 2010, granting the Department's motion for summary judgment dismissing Mr. McKee's PRA claims. Sub# 29.<sup>1</sup>

2. The trial court erred by entering the order of December 9, 2010, denying Mr. McKee's motion for reconsideration of the November 5, 2010 order. Sub# 33.

3. The trial court erred in finding that the respondent's "December 18th, 2006 [response] that there were no records . . . began the running of the statute of limitations." VRP 15, lines 2-4.<sup>2</sup>

4. The trial court erred in finding that "RCW 42.56.550 applies [when an agency fails to identify and produce] any records [and] the one-year statute of limitations runs just as when there would be a claim of exemption or completion of providing records on an installment basis." VRP 15, lines 5-11.

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<sup>1</sup> Counsel will file a corrected brief replacing citations to Sub# with cites to Clerk's Papers shortly.

<sup>2</sup> A copy of the VRP is attached hereto as Appendix A.

5. The trial court erred in finding, *sub silentio*, that Mr. McKee knew, or should have known, that the respondent failed to disclose or produce all requested records.

**B. Issues Pertaining to Assignments of Error**

Issue 1: Whether the one-year statute of limitations, RCW 42.56.550(6), which is triggered only by 1) a claim of exemption or 2) the last production of a record on a partial or installment basis, operates to bar Mr. McKee's lawsuit when: 1) the DOC never claimed an exemption, and 2) DOC never produced records on a partial or installment basis?

Issue 2: Whether "a response that there were no records" starts the one-year statute of limitations running where this language or meaning is not in the statute.

Issue 3: Whether the discovery rule should apply to Public Records Act cases where the agency gives notice that no responsive records exist, then after one year has elapsed gives notice that it had not produced all responsive records it had at the time?

Issue 4: Whether the discovery rule should apply to Public Records Act cases where the plain and simple terms of the statute of limitations do not apply to the facts of a particular case?

Issue 6: Whether RCW 4.16.080, the three-year statute of limitations, applies to factual scenarios where RCW 42.56.550(6) does not apply.

Issue 7: Whether the trial court found *sub silentio* that Mr. McKee knew or should have known the DOC withheld records and therefore dismissed the case without permitting discovery?

### III. STATEMENT OF CASE

#### A. Facts

Between May 5, 2006, and January of 2007, Appellant Jeffrey McKee was domiciled at the Corrections Corporation of America (CCA) Florence Corrections Center (FCC). CCA/FCC is a private prison under contract with the Washington Department of Corrections to house Washington State prisoners. Sub# 5; Affidavit of Jeffrey R. McKee (herein after Att. A) at Page 1 Paragraph 1-2.

On or about November 24, 2006, Mr. McKee submitted a Public Records request (hereinafter "First Records Request") to the Department for all records related to a pod restriction he was placed on. (Sub# 5, Att. A, Ex. 1). In his letter Mr. McKee wrote:

By this letter I am requesting any and all documents related to the pod restriction that was placed on me here at FCC/CCA on November 21, 2006 by Captain Rodriguez.

Please ensure this includes the reason for the restriction and any and all infractions related to this.

Id., emphasis added

Several days later, on November 29, 2006, Mr. McKee submitted a second, more detailed request relating to his pod restriction to James C. (J.C.) Miller, the Department's on-site contract monitor. (Hereinafter "Second Records Request"). Sub# 5; Att. A, Ex. 4 at par. 1. Mr. McKee handed his Second Records Request to Mr. Miller personally. In this request Mr. McKee wrote:

Dear Mr. Miller:

By this letter and per our conversation, I am making these public disclosure requests under WDOC/CCA Contract CoCo6376 §§ 4.14 and 9.12. These contract provisions require CCA to compile records and to comply with the Public Disclosure Act (PDA), respectively.

1) Any and all documents to include e-mail, notes, phone records, infraction reports/wri[te]-ups, log books that relate to the pod restriction that was placed on myself on November 21, 2006.

2) A copy of the grievance log showing the dates, times, disposition, and subject of all grievances filed by myself from July 17, 2006 to present here at FCC.

3) All and every document including notes, e-mail, phone records, investigation reports, used in the emergency grievance filed for the return of my legal documents on October 11, 2006.

4) All and any documents to include notes, e-mail, video/au[i]do recordings, investigation reports, pertaining to the emergency grievance I filed here at FCC on October 17, 2006 9:45pm. Grievance was handed to C/O Vega.

5) Any and all documents including the original grievance I handed to C/M Gary Howerton on August 4, 2006 for the eighteen day delay in delivering me my legal mail.

6) Any and all documents pertaining to the grievance I filed for Audray Rodriguez violation of policy 14-5.4 handed to C/M Walker on October 26, 2006 here at FCC.

7) Any and all records pertaining to the investigation and results of the grievance I filed for FCC refusing my medication for five months. This was handed to C/M Walker on November 3, 2006.

8) Any and all records pertaining to the investigation and conclusion by Investigator Scott D. Hatten for his investigation of grievances I filed here at FCC. This is to include phone records, notes, e-mail, audio/vid[i]o recordings, facts and findings.

9) Any and all records including e-mail, notes, phone records and documents pertaining to the legal copy's that [were] withheld on September 19, 2006 by Nita Luna and shown to WC/M J.C. Miller. Thank you for responding within the terms and time frames of the Public Disclosure Act.

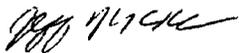
Id.

On November 30, 2006, the Department received Mr. McKee's First Records Request. Sub# 5; Att. A, Ex. 1. Five days later, on December 5, 2006, Lyn Francis, Public Disclosure

Coordinator, wrote in response to Mr. McKee First Request. Ms. Frances reiterated Mr. McKee's request,<sup>3</sup> and wrote "[i]t will take up to an additional ten (10) business days for me to search and see if there are any documents available for this request." Sub# 5; Att. A, Ex. 2.

By December 7, 2006, Mr. McKee had not yet received a response to either of his two records requests so he wrote again to Ms. Francis to let her know this, and to ask her to tell him what the proper procedure was for requesting public records from FCC/CCA:

Per your November 14, 2006 letter you have assured me that there is a procedure here at FCC for prisoners to request public records. you have failed to inform me of the procedure and after my conversation with Miller where he reviewed your letter he stated that he was not aware of any such procedure. Again please inform me of the proper procedure to request public records from FCC/CCA so I may resolve my issues

Sincerely   
Jeffrey R. McKee

Sub# 5; Att. A, Ex. 5.

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<sup>3</sup> Ms. Francis wrote: "In your November 24 letter, you have requested, '... any and all documents related to the pod restriction that was placed on me here at FCC/CCA on November 21, 2006 by Captain Rodriguez ...'" Id.

On that same day, December 7, 2006, Ms. Francis wrote to Mr. McKee, responding to his Second Records Request, directed to J.C. Miller at FCC/CCA. With respect to each of the items numbered 1-4 in his letter of November 29, 2006, Ms. Frances wrote "I have previously responded to this request." Sub# 5; Att. A, Ex. 6, at 1. As to the balance of Mr. McKee's enumerated requests, Ms. Francis wrote:

5. For grievances filed against the Florence Correction Center, you must contact the appropriate person there, e.g. the Grievance Coordinator, with your request.

6. For grievances filed against the Florence Correction Center, you must contact the appropriate person there, e.g. the Grievance Coordinator, with your request.

7. For investigations into grievances against the Florence Correction Center, performed by staff at the Florence Correction Center, you must contact the appropriate person there with your request.

8. For investigations into grievances against the Florence Correction Center, performed by staff at the Florence Correction Center, you must contact the appropriate person there with your request.

9. If the staff that withheld the legal copies are employed by the Florence Correction Center, you must contact the appropriate person there with your request.

Id.

On December 18, 2006, Ms. Francis received an email from Mr. J.C. Miller, discussing the McKee records request. In his email Mr. Miller wrote:

Good afternoon Lyn, per our previous conversation relating to offender McKee's request, the State of Washington did not generate any documents related to Offender McKee being on pod restriction. Also, there is know (sic) infraction related to this incident. Corrections Corporation of America/Florence Correction Center (CCA/FCC) has answered a kite from Offender McKee addressing this issue as well as a log book that talks about pod restriction but once again these are all documents generated by CCA/FCC. . . .

Sub# 5; Att. A, exh. 8.

On December 26, 2006, Ms. Francis followed up with a subsequent response to Mr. McKee's First Request, stating that the Department had no responsive records to this request (Att. A, Ex. 3). Ms. Francis further wrote that if CCA/FCC generated any records related to the pod restriction, Mr. McKee would ". . . need to contact appropriate staff at FCC with this request.") Ms. Francis did not address Mr. McKee's questions set forth in his December 7, 2006, request asking her to tell him of the procedure involved whereby prisoners at FCC may request public records, as she first mentioned in her November 14, 2006, letter. Sub# 5; Att. A, Ex. 5. Nor did she pass along the information relating to DOC's

possession of responsive documents that Mr. Miller provided in his December 18, 2006, email.

In August of 2009, Mr. McKee, in response to unrelated records requests, received a copy of the December 18, 2006, email sent by Mr. J.C. Miller to Ms. Frances and other DOC employees. Mr. Cooper's email told Mr. McKee that the DOC had not produced or informed him of records responsive to his First and Second Requests, including the CCA/FCC response to a kite from Mr. McKee, and the log book in its possession. Sub# 5; Att. A, exh. 8. While DOC later argued that Mr. McKee "knew or should have known that the records he sought included a kite and a response from CCA/FCC" related to correspondence originally generated by Mr. McKee (SUB# 14, page 6, line 23; VRP page 4, lines 4-10), Mr. McKee stated throughout the proceedings that he did not recall sending a kite, and even if he had remembered sending a kite, in his experience a common practice at CCA/FCC was to disregard them and not respond. SUB# 5, page 3, line 12; SUB# 26, Attach. A, page 1, par. 2; VRP page 11, line 11.

On or about June 28, 2010, within one year of learning that the DOC had wrongfully withheld public records, Mr. McKee filed

his complaint for violations of the Public Records Act in Thurston County Superior Court.

**A. Procedural History**

In his complaint Mr. McKee asserted that the DOC's actions violated several provisions of the PRA, and the DOC was therefore subject to imposition of statutory penalties.

On July 30, 2010, the Department filed its Answer. *Inter alia*, the DOC claimed that Mr. McKee's Complaint was filed outside the one-year statute of limitations governing Public Records Act cases.

On August 23, 2010, the Department filed and served a Motion to Stay Discovery and Dismiss, arguing that Mr. McKee's claims were time-barred by RCW 42.56.550(6), which requires that certain actions filed under RCW 42.56.550 "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." Sub# 14; 16. The DOC also argued that since Mr. McKee's complaint was "deficient as a matter of law," factual discovery would be an unnecessary burden on the Department and the Court ought to stay discovery pending dismissal of the case. Sub# 16, at page 13.

On October 28, 2010, Mr. McKee filed his Response to the Department's Motion for Stay and to Dismiss. Sub# 26. On

November 4, 2010, the Department filed its Reply. Sub# 27.

Because Mr. McKee was incarcerated and unable to timely respond to the DOC's Motion for Stay and to Dismiss, the briefing schedule was extended and the hearing stood over until November 5, 2010.

On November 5, 2010, the Court heard oral argument on the Department's motion. Mr. McKee appeared by phone; Mr. Ohad M. Lowy, Assistant Attorney General representing the Department of Corrections, appeared in person. Mr. Lowy opened, stating:

MR. LOWY: We're before the Court on a public records action brought by Mr. McKee on allegations that occurred three and a half years ago while Mr. McKee was incarcerated at the Corporation of America/Florence Corrections Center under the supervision of DOC. Mr. McKee only now brings his cause of action in spite of statute of limitations. Interestingly, Mr. McKee's complaint and own evidence demonstrates conclusively that in December of 2006 he was aware or should have known of the existence of documents that were responsive to his request as he is the one who created those documents and his documents were responded to.

I won't go too much into the facts, but this all started --

THE COURT: Is that right, all the documents are ones that were created by Mr. McKee?

MR. LOWY: Well, not all. I should say some of the documents that he created.

VRP p. 3 line 23 to p. 4, line 16.

In return, Mr. McKee argued:

MR. McKEE: As the State pointed out, it's not clear -- there was no explicit reason given for reducing the statute of limitations from five years to one year. The only thing that really is clear is that what starts the statute of limitations is the last production of a document on a partial installment basis or a claim of exemption. In this case the State had failed to do either of the two.

The State knew back in December of 2006 that it had responsive records to this request. They knew that pursuant to the contract those records belonged to the State of Washington and that they had a fiduciary duty to disclose those, but for whatever reason they failed to do so which did not start the statute of limitations.

VRP p. 10, line 9, et seq. Mr. McKee further pointed out that:

As far as knowing or should have known there were records created, I don't recall ever sending a kite and if I did I would not have expected a response, as stated in my declaration, because common practice and the scheme of things there in Florence, Arizona was to not respond to kites. . . .

VRP p. 11, lines 11-16. Mr. Lowy interjected with an objection at this point, and the Court stated:

THE COURT: I think the discovery rule is not the real issue in this matter. The matter that we are addressing first is just the statute of limitations straight across.

VRP p. 11, lines 22-25.

After hearing from both the parties the Court articulated oral findings and conclusions as follows:

THE COURT: The facts of this case are that on November 24th, 2006 Mr. McKee made his first request for records. I think that records request was supplemented on November 29th with a somewhat more specific request. On December 18th, 2006, the Department responded that it didn't have records. The response was that its contractor, CCA, didn't have records, and Mr. McKee was advised that he could separately contact CCA.

I will find that December 18th, 2006 was a response that there were no records and that began the running of the statute of limitations. I will further find that RCW 42.56.550 applies and that when there is a denial of any records the one-year statute of limitations runs just as when there would be a claim of exemption or completion of providing records on an installment basis. The response in December 2006 started that one-year statute running.

This case is dismissed.

VRP p. 14. Line 18, et seq. At the conclusion of the hearing the trial court signed an order dismissing the case. Sub# 29.

On November 18, 2010, Mr. McKee filed a CR 59 Motion for Reconsideration. Sub# 31. On December 2, 2010, the Department filed its Response. Sub# 32. On December 9, 2010, the Court entered its final order in the matter, dismissing Mr. McKee's case. Sub# 33. On January 12, 2011, Mr. McKee timely appealed.

## IV. ARGUMENT

### A. Standard of Review.

Judicial review of all agency actions taken or challenged under RCW 42.56.520 shall be de novo. Soter v. Cowles Pub'g Co., 162 Wn.2d 716, 731, 174 P.3d 60 (2007); RCW 42.56.550(3).

Under CR 12(b)(6), a motion to dismiss questions only the legal sufficiency of the allegations in a pleading. The court need not find that any support for the alleged facts exists, or would be admissible in trial, as would be its duty on a motion for summary judgment. The question under CR 12(b)(6) is basically a legal one, and the facts are considered only as a conceptual background for the legal determination. Brown v. MacPherson's, Inc., 86 Wn.2d 293, 298, 545 P.2d 13 (1975). A motion to dismiss must be denied "if *any* set of facts could exist that would justify recovery." Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988) (emphasis added). The burdens on the defendants in a 12(b)(6) motion to dismiss are onerous, and such motions are to be "sparingly" granted. See *3A Orland and Tegland, Wash. Prac.*, at 237. As set out in the plaintiffs' complaint, the facts alleged entitle the plaintiffs to relief and their claims are not time-barred by any applicable statute of limitation.

In exercising review of any issue brought under the Public Records Act the statute commands that:

Courts shall take into account the policy of this chapter 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 42.56.550(3). The Act further directs that “The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.”

RCW 42.56.030; Progressive Animal Welfare Soc’y v. University of Wash., 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (“PAWS II”).

As discussed below, the trial court’s order must be reversed because, *inter alia*, the trial court’s ruling that “a denial of any records [starts] the one-year statute of limitations run[ning] just as when there would be a claim of exemption or completion of providing records on an installment basis,” does not accurately reflect the language or meaning of RCW 42.56.550(6). This decision, if upheld, will force citizens to file suit under the PRA long before they possess all necessary information on the merits of their action thereby squandering precious judicial, private and public resources. The trial court’s ruling is contrary to the PRA’s stated policy that it “shall be

liberally construed . . . to promote this public policy and to assure the public interest will be fully protected.” RCW 42.56.030.

**B. The PRA requires a liberal interpretation of the strict standards it imposes upon agencies responding to public records requests.**

As recently reaffirmed by the State Supreme Court, Washington’s Public Disclosure Act is a strongly worded mandate for broad disclosure of public records.<sup>4</sup> Rental Housing Ass’n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 535, 199 P.3d 393 (2009) *citing* Hearst Corp. v. Hoppe, 90 Wn.2d 123,127, 580 P.2d 246 (1978). Accordingly, “[t]he mandate of liberal construction requires the court to view with caution any interpretation of the statute that would frustrate its purpose” ACLU v. Blaine Sch. Dist. No., 503, 86 Wn. App. 688, 693, 937 P.2d 1176 (1997). Interpreting the PRA to allow an agency to be so disorganized and unacquainted with the PRA that it does not know what it has, conduct a careful and full search, and produce all non-exempt records, would frustrate the purpose of the Act.

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<sup>4</sup> Washington Courts know the importance of the public's access to public records and that the Act is interpreted in favor of disclosure. See RCW 42.56.030; .550(3). See *generally* Hon. C. Kenneth Grosse, ch. 2 "The Public Records Act: Legislative History and Public Policy," Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws (Wash. State Bar Assoc. 2006), ch. 2 ("Grosse") (attached as Appendix B).

Setting forth strict standards for agencies to meet, the Act requires an agency to promptly make available all non-exempt public records upon request. RCW 42.56.080; RCW 42.56.520. Within five business days of receiving a public record request, an agency must respond in one of three ways: 1) providing the record; 2) acknowledging that the agency has received the request and providing a reasonable estimate of the time needed to respond; or 3) denying the public record request. RCW 42.56.520.

“Denials of requests must be accompanied by a written statement of the specific reasons therefore.” Smith v. Okanogan County, 100 Wash.App. 7, 13, 994 P.2d 857 (2000) (citations omitted). Claimed exemptions must be stated with specificity and explained in the response to the request. RCW 42.56.210(3). The PRA “shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.” RCW 42.56.030.

Courts shall take into account the policy of this chapter 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 42.56.550(3). When an agency does not adhere to the statutory requirements for a response outlined above, it

violates the Act and the requesting individual is entitled to statutory penalties. Id.

Here the Department of Corrections possessed non-exempt public records that Mr. McKee specifically sought, yet it withheld these records from Mr. McKee claiming that it had produced all records in its possession, and telling Mr. McKee to go elsewhere to find them. The Department never claimed an exemption, and it never claimed that it was producing records on a partial or installment basis. RCW 42.56.550(6). Thus neither of the simple statutory triggering events occurred, so when Mr. McKee discovered in August, 2009, that the DOC failed to provide him with the records he sought, and filed his suit in August, 2010, his action was timely.

**C. The one-year statute of limitations, RCW 42.56.550(6), does not begin to run until an agency claims an exemption or last produces a record on a partial or installment basis. Tobin v. Worden, 156 Wn. App.507, 233 P.3d 906 (2010).**

Until July 24, 2005, the statute of limitations for all claims under the PRA was five years. See e.g. Yousoufian v. Ron Sims, 152 Wn.2d 421, 436-437, 98 P.3d 463 (2005) (citing RCW 42.17.410). Following the Yousoufian decision the Legislature recodified the PRA and added the following provision: "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.” RCW 42.56.550(6). Because the DOC has not produced records there is no “last production of a record on a partial or installment basis,” and this provision of the statute does not apply.<sup>5</sup> Thus an analysis of whether the statute of limitations has run, or even started, must begin with the law regarding exemptions, RCW 42.56.210(3).

The question of when an agency’s response to a request for records is sufficient to trigger the statute of limitations was recently addressed in Rental Housing Ass’n v. City of Des Moines, 165 Wn.2d 525, 199 P.3d 393 (2009) (RHA). In RHA the requester filed suit more than a year after some of its requests were denied but less than a year after the agency finally complied with the requester’s demand for a privilege log. The Supreme Court held that the agency had not made a “claim of exemption” for purposes of RCW 42.56.550(6) until the agency complied with RCW 42.56.210(3) by providing the log of withheld records required by PAWS II, 125 Wn.2d at 271 n.18. RHA, 165 Wn.2d at 537-38; see

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<sup>5</sup> Even if DOC had produced records in installment form, because it has not yet produced the records indicated in Mr. J.C. Miller’s December 18, 2006, email, the final installment has yet to come.

also Tobin v. Worden, 156 Wn. App. 507, 233 P.3d 906 (2010) (statute of limitations in RCW 42.56.550(6) was never triggered where agency never claimed an exemption or produced records on partial or installment basis).

In PAWS II the Court clarified the former RCW 42.17.310, (recodified as RCW 42.56.210(3)), holding that the PRA forbids silent withholding of records, and that “proper review and enforcement of the statute, make it imperative that all relevant records or portions be identified with particularity.” PAWS II, 125 Wn.2d at 271. RHA, 165 Wn.2d 525, 538, 199 P.3d 393 (2009). When an agency withholds requested records, in whole or in part, the agency must identify the records and explain why the records are exempt:

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.

RCW 42.56.210(3). DOC’s actions here violated RCW 42.56.210(3). It did not claim an exemption for the records it withheld, nor could any of its correspondence with Mr. McKee reasonably be understood as a claim of exemption. Liberally

construing the PRA in favor of disclosure and narrowly construing its exemptions results in the logical conclusion that the statute of limitations here has yet to commence. RCW 42.56.030; RCW 42.56.070(1).

**1. The plain language of the statute supports Mr. McKee's argument that the one-year statute of limitations applies only to claims of exemption or production of records on a partial or installment basis.**

If a statute is clear on its face, its meaning is to be derived from the language of the statute alone. Killian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). If the statute's meaning is plain, courts must give effect to that plain meaning without resort to the tools of statutory construction. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). As stated by the Supreme Court in Berrocal v. Fernandez, 155 Wn.2d 585, 590, 121 P.3d 82, 84 (2005):

Where statutory language is " 'plain, free from ambiguity and devoid of uncertainty, there is no room for construction because the legislative intention derives solely from the language of the statute.' " Bravo v. Dolsen Cos., 125 Wash.2d 745, 752, 888 P.2d 1 47 (1995) (*quoting* Krystad v. Lau, 65 Wash.2d 827, 844, 400 P.2d 72 (1965)). "In undertaking this plain language analysis, the court must remain careful to avoid 'unlikely, absurd or strained' results." Burton v. Lehman, 153 Wash.2d 416, 423, 103 P.3d 1230 (2005) (*quoting* State v. Stannard, 109 Wash.2d 29, 36, 742 P.2d 1244 (1987)). "Only where the legislative intent is not clear from the words of a statute may the

court 'resort to extrinsic aids . . . .' " Burton, 153 Wash.2d at 423, 103 P.3d 1230 (quoting Biggs v. Vail, 119 Wash.2d 129, 134, 830 P.2d 350 (1992)).

Where the language and meaning of RCW 42.56.550(6) is plain, simple and clear, the trial court's construction of the statute, and in effect, broadening the conditions upon which the statute of limitations starts, is inconsistent with the PRA and as such the decision must be reversed.

**2. The statute at issue is not ambiguous, it is unequivocally clear and devoid of uncertainty.**

RCW 42.56.550(6) simply states: "[a]ctions 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). Giving these words their plain meaning, the one year statute of limitations applies only when 1) the agency claims an exemption, or 2) the agency produces the last record on a partial or installment basis. If the legislature had intended the one-year statute of limitations apply to all "actions under this section," it would have placed a period at the end of the word "year" and eliminated the rest of the sentence.

The language of the limitation, as written, reflects a rational basis consistent with the entirety of the Public Records Act. In the

two circumstances described by RCW 42.56.550(6), agency action on the request has reached an end, the requestor has notice of fact sufficient to determine whether to file suit, and there is no reason to delay litigation and let the penalties mount.

But where a public official does not produce records at all in response to a records request, and does not claim any exemption, and tells the requestor that it has no records, a one year statute would make no sense. Under these facts, the requestor has no notice that the agency violated the Act. Only after the requestor learns that an agency did not produce all responsive records it had at that earlier time, does the requestor have notice of the violation and facts sufficient to sustain a lawsuit.

“As noted above, a cause of action cannot accrue until ‘there exists a claim capable of present enforcement.’ [Cite omitted.] It would be most unfair to hold that the period of limitations has begun to run before the plaintiff can possibly prove a cause of action....”

Neubauer v. Owings-Corning Fiberglass Corp., 686 F.2d 570, 573 (7th.Cir. 1982).

The burdens imposed on the requestor to ascertain non-disclosed facts would be insurmountably huge and directly contrary to the thrust of the Act. Requestors would be required to file suit

without being able to “conduct a reasonable inquiry into the facts.” CR 11. The litigation expense would be significant, and requestors may be exposed to CR 11 sanctions. Where CR 11 has been violated, a trial court may impose “an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.” CR 11. This result would have a chilling effect on open government, and is fundamentally at odds with the PRA where essentially all burdens come to rest at the foot of the agency. Application of the discovery rule is consistent with the liberal construction of the PRA, which is replete in all cases involving the PRA.

**D. The Discovery Rule is a judicially created remedy based both on fundamental fairness and the relationships between the parties and must be applied to the Public Records Act.**

The purpose of the discovery rule is to avoid inequitable and harsh results that flow from the rigid application of the statute of limitations. It simply makes no logical or equitable sense to require people to act upon that which they could not reasonably know. As long as a plaintiff did not know, and could not have known through

due diligence, the cause or elements of their claim and who was responsible for generating that cause or those elements of their claim, it is fundamentally unfair and illogical to require them to act. To deny such plaintiffs their day in court *because of what they did not know* would strip a whole class of citizens of a basic right to have their case heard, rendering them “victims unblamably left without a remedy” White v. Johns-Manville Corp., 103 Wn.2d 344, 356, 693 P.2d 687 (1985).

This result, juxtaposed with the policy and provisions of the Public Records Act, which was implemented in 1972 to rectify a concern over “secrecy in government and the influence of private money on governmental decision making,” would be illogical and manifestly unfair. Nast v. Michels, 107 Wn.2d 300, 304, 730 P.2d 54 (1986), *quoting* 1972 Voters Pamphlet, at 10. The special purpose of the PRA can only preclude foreclosing rights of requestors in situations as presented here.

- 1. The special relationship between citizens and their government requires that the discovery rule be applied to Public Records Act cases.**

The Legislature and Washington Courts Court have recognized the special relationship between citizens and their government, and the vital role that the PRA plays in facilitating and

sustaining a healthy relationship. “The PDA enables citizens to retain their sovereignty over their government and to demand full access to information relating to their government’s action. RCW 42.17.010, .251.” Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 429-30, 98 P.3d 463 (2005). As our Supreme Court has noted:

The Public Disclosure Act was passed by popular initiative and stands for the proposition that, “full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society. RCW 42.17.010(11).’ The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. RCW 42.17.251.

PAWS II, 125 Wn.2d 243, 250-51, 884 P.2d 592 (1994).

As the PAWS II Court went on to observe, “the Legislature leaves no doubt about its intent” in passing the Public Disclosure Act:

“The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. The public records subdivision of this

chapter shall be liberally construed and its exceptions narrowly construed to promote this public policy. RCW 41.17.251.”

PAWS II, 125 Wn.2d 243, 260, 884 P.2d 592 (1994). Preservation of the special relationship between citizens and government indicates that a judicial decision threatening the efficient functioning of the PRA is not within a trial court’s discretion.

**2. Application of the discovery rule eliminates the one-year statute of limitations.**

To prevail and remove statute of limitations issues from this case under a discovery rule analysis, a plaintiff needs only to show that he or she lacked, and could not reasonably be expected to have obtained, knowledge of the DOC’s violations of the Act within the one-year statutory period. A plaintiff’s real or imputed knowledge of the elements of their cause of action is normally a question of fact. North Coast Air Services Limited v. Grumman Corporation, 111 Wn.2d 315, 759 P.2d 405, 407 (1988). There are strong reasons of judicial economy and policy in PRA cases to permit trial courts to inquire into whether reasonable minds could only conclude that a requestor could not, with reasonable diligence, have discovered sufficient relevant facts to support a PRA claim.

Under the facts set forth in the materials Mr. McKee filed in the trial court, it is plain that he did not know and could not have known within the period defined by RCW 42.56.550(6), whether DOC had adequately searched its files for records falling within the scope of his requests, and/or accurately conveyed the results of its searches to him.<sup>6</sup>

Three times Mr. McKee wrote to the DOC asking for access to non-exempt records. On November 24, 2006, he wrote to Lynn Frances requesting “any and all documents” related a previous pod restriction. Sub# 5; Att. A, exhibit 1; Sub# 14, page 2. On November 29, 2006, Mr. McKee wrote and personally delivered a request to J.C. Miller, DOC’s on-site contract monitor. Sub# 5; p. 2; Att. A, Exhibit 4. In this letter Mr. McKee reiterated his earlier request and specified the types of records he was seeking.

On December 5, 2006, Ms. Frances responded to Mr. McKee’s first letter indicating that DOC needed another ten days to

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<sup>6</sup> The recently decided Neighborhood Alliance of Spokane v. Spokane County, 172 Wn.2d 702, 261 P.3d 119 (2011), clarifies what constitutes an adequate search. In short, while a search need not be perfect, it “must be reasonably calculated to uncover all relevant documents.” Bearing in mind the DOC’s duty to provide the “fullest assistance” and the “most timely possible action on requests” when processing requests, it would appear that the DOC fell far short of performing its statutory duties here. RCW 42.56.100.

respond. Sub# 5; Att. A, Exhibit 2. On December 7, 2006, Ms. Frances responded to Mr. McKee's second letter variously stating "I have previously responded to this request" or directing Mr. McKee to contact CAA/FCC for the records. Id. Exhibit 6. Finally, on December 26, 2006, despite her receipt of the information contained in J.C. Miller's email of December 18, 2006, that DOC possessed a "log book that talks about pod restriction," Ms. Frances wrote Mr. McKee stating that DOC was not in possession of any of the records he sought. Id., Exhibit 3. Ms. Frances again told Mr. McKee that he needed to submit his request to CAA/FCC. Id.

It is not logical to expect that more correspondence by Mr. McKee, such as a subsequent request for the same records again, would produce a different result, namely that records whose existence DOC denied would later be identified and produced. When an agency fails to acknowledge the existence of a requested record, either in producing the record or describing the record and the statutory basis for denying production, a requester typically has little reason to suspect that the unidentified record exists. This confidence in our state agencies is healthy, and the assumption that an agency has acquitted itself well is

reasonable and productive of citizens' confidence in government. However, on both policy and fairness grounds, where the PRA imposes onerous burdens of compliance on public agencies, and those agencies alone have control over accrual of the cause of action, routine application of the one-year statute of limitations invariably will allow agencies to escape the statutory consequences of negligent or unlawful acts.

**(a) The PRA imposes expansive obligations and strict standards on state agencies when requests for records are received.**

The Public Records Act applies very high standards of conduct and accountability to all state agencies. “[D]eclared by the sovereign people to be the public policy of the State of Washington,” the PDA mandates that:

[T]he people have the right to expect from their elected representatives at all levels of government the *utmost of integrity, honesty and fairness in their dealings*;

[P]ublic confidence in government at all levels is essential and must be promoted *by all possible means*;

[M]indful of the right of individuals to privacy and of the desirability of the efficient administration of government, *full access to information* concerning the conduct of government on every level must be assured as a *fundamental and necessary precondition to the sound governance of a free society*;

[T]he provisions of this act shall be liberally construed to promote . . . full access to public records so as to assure

continuing confidence in . . . governmental processes, and so as to assure that the public interest will be fully protected.

RCW 42.17.010(2), (5), (11) (emphasis added); A.C.L.U. v. Blaine School Dist. No. 503, 95 Wn. App. 106, 975 P.2d 536 (1999). This statutory declaration of purpose serves as a basis for imposition of various statutory and common law duties, for example:

- “Agencies have a duty to provide ‘the fullest assistance to inquirers and the most timely possible action on requests for information.’” PAWS II, 125 Wn.2d at 252 (*quoting* RCW 42.17.290 (now RCW 42.56.100)).
- Agencies have the burden of proof “to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.” RCW 42.56.550(1)
- “Responses to request for public records shall be made promptly by agencies. . . .” RCW 42.56.520.
- Denials of requests must be accompanied by a written statement of the specific reasons therefor.” *Id.*

The PRA “treats a failure to properly respond as a denial.” Soter v. Cowles Publ’g. Co., 162 Wn.2d 716, 750, 174 P.3d 60 (2007) (citing RCW 42.56.550(2), (4) (formerly RCW 42.17.340)). Thus for purposes of costs, statutory penalties and attorney fees, an inadequate search is

comparable to a denial because the result is the same. See Neighborhood Alliance of Spokane v. Spokane County, 172 Wn.2d 702, 261 P.3d 119 (2011), *citing* RCW 42.56.550(4).

Under Neighborhood Alliance of Spokane v. Spokane County, 172 Wn.2d 702, 261 P.3d 119 (2011), a case decided after the trial court entered its ruling here, the Supreme Court clarified what constitutes an adequate search for requested records. While a search need not be perfect, the Court wrote, it “must be reasonably calculated to uncover all relevant documents.” In particular:

- Public entities are required to make more than a perfunctory search and to follow obvious leads as they are uncovered.
- A search should not be limited to one or more places if there are additional sources for the information requested.
- A public entity must search those places where a responsive record is reasonably likely to be found.

Neighborhood Alliance also establishes when a requestor challenges the adequacy of an agency’s search in court, the agency bears the burden of showing, beyond material doubt, that its search was adequate by providing “reasonably detailed, nonconclusory affidavits” identifying “the search terms and the type of search performed,” and establishing “that all places likely to

contain responsive materials were searched.” *Id.* Application of the discovery rule would permit Mr. McKee to challenge the adequacy of the DOC’s search, and as a private attorney general under the Act, to ask a court to impose statutory penalties, costs and attorney fees. Because the agency, not the requestor, has control of the accrual of the cause of action, agencies must not be permitted to escape statutory consequences of negligent or unlawful acts by invoking the one-year statute of limitations.

The discovery rule contains built in safeguards that prevent requesters from sleeping on their claims under the PRA and from manipulating the date of accrual of the cause of action. Applying the discovery rule to the PRA requires the claim to accrue when the requester knows or should know that they have “been denied an opportunity to inspect or copy a public record by an agency,” or when she “believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request.” RCW 42.56.550. As a consequence, issues of fact may exist regarding how and when the requester knew about the agency’s failure to acknowledge a record’s existence or whether a requester exercised due diligence, all of which would be subject to proof at trial or an evidentiary hearing.

**4. The trial court erred in dismissing the case as time barred when the correct statute of limitations allows for three years to file a claim.**

The trial court erred when it held that “RCW 42.56.550 applies . . . when there is a denial of any records [and] the one-year statute of limitations runs just as when there would be a claim of exemption or completion of providing records on an installment basis” and dismissed the case as time barred. VRP at 14. This interpretation strains the meaning of the statute beyond any reasonable interpretation consistent with the PRA, and renders the phrase “within one year of an agency’s claim of exemption or the last production of a record on a partial or installment basis” superfluous. As noted above, had the Legislature intended the result accomplished by the trial court, it would have inserted a period after “one year,” therefore making the statute of limitations cover all conceivable scenarios in the public records context.

The PRA is silent regarding limitations on claims such as Mr. McKee’s where the agency had in its possession a responsive public record, where it denied that it had the responsive public record, and where the agency produced no records and no claim of exemption as required by RCW 42.56.210(3).

**5. Applying RCW 4.16.080, the three year statute of limitations, in cases where the agency's response fails to meet statutory requirements, agrees with Washington decisional law and the policies behind the PRA.**

Bearing in mind the mandate for a liberal construction of the Public Records Act in this case, (RCW 42.56.030; PAWS II, *supra* at 251), and the mandate that agencies provide the "fullest assistance" and the "most timely possible action on requests" when processing requests (RCW 42.56.100) the correct statute of limitations to apply is RCW 4.16.080. The relevant portions of this statute state:

The following actions shall be commenced within three years:

(2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;

(6) [A]n action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state . . . .

Because actions under RCW 4.16.080 may be commenced at any time within three years after the precipitating event, under RCW 42.56.550(4), Mr. McKee is entitled to pursue statutory penalties for non-disclosure. His case is not barred by the passage of time.

If there is any doubt about which statute of limitations should apply, Washington state case law favors application of the statute with the longer time frame. Stenberg v. Pacific Power & Light Co., 104 Wn.2d 710, 715, 709 P.2d 793 (1985) *citing* Shew v. Coon Bay Loafers, Inc., 76 Wn.2d 40, 51, 455 P.2d 359 (1969)). As stated above, the PRA “shall be liberally construed and its exemptions narrowly construed to . . . assure that the public interest will be fully protected.” RCW 42.56.030. RCW 4.16.080 comports both with Washington state law and the policy of the PRA, and should be the operative statute of limitations in this case.

Requiring claims to be filed in one year only when an agency has claimed an exemption or upon the last production of a record on a partial or installment basis but allowing for three years for less certain responses is consistent with fully protecting the public interest. When an agency claims an exemption or produces the last record in an installment in compliance with the statute, the requestor has notice of any violation that may have occurred. Presumably the requestor either has been given a reason for why the record is not produced, or can tell from the installments whether everything they requested is included. Having that notice makes it fair to require the requestor to act within a year should they believe the agency

wrongfully withheld records or has not produced everything as requested. However, in cases like the case at bar, the requestor is not on such clear notice that the agency failed to disclose all records. Providing the requestor with more time to investigate prevents them from bringing claims before they are ripe, and provides the agency with an opportunity to comply with the statute.

**E. The Trial Court Erred in Granting Summary Judgment Before Mr. McKee Could Conduct Discovery.**

The trial court erred in finding, *sub silentio* that Mr. McKee knew or should have known of the DOC's violation, dismissing the case without permitting discovery. "The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Washington State Physicians Ins. Exchange & Ass'n v. Fisons, 122 Wn.2d 299, 341, 858 P.2d 1054 (1993) (citation and internal quotation marks omitted).

Washington recognizes a "broad right of discovery which is subject to the relatively narrow restrictions of CR 26(c)." Doe v. Puget Sound Blood Center, 117 Wn.2d 772, 782, 819 P.2d 370 (1991). This broad right of discovery is necessary to ensure [the constitutional right of access courts] to the party seeking the

discovery. It is common legal knowledge that at least basic, if not extensive, discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense. *Id.* This is especially true in a case centering on proving the existence of allegedly wrongfully withheld records. The trial court should have permitted Mr. McKee the opportunity to establish that the DOC knew or should have known that it failed to produce disclosable records, and that he was unaware of this until after the one-year statute of limitations ran.

**G. Jeffrey McKee is Entitled to Reasonable Attorney Fees for this Appeal.**

Mr. McKee respectfully requests an award of attorney's fees pursuant to RAP 18.1. The PRA provides for an award of reasonable attorney's fees:

**Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive 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.**

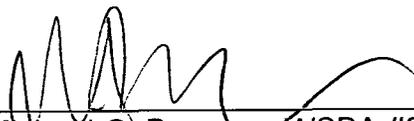
RCW 42.56.550(4) (emphases added). This is a mandatory provision of the Act designed to assure that litigants enforcing the Public Disclosure Act will be able to obtain competent legal representation. A.C.L.U. v. Blaine School Dist. No. 503, 95 Wn.

App. 106, 115, 975 P.2d 536 (1999). This provision includes awards of fees on appeal. See Progressive Animal Welfare Soc'y v. UW (PAWS I), 114 Wn.2d 677, 690, 790 P.2d 604 (1990). If this Court reverses the trial court's decision, then Mr. McKee is the prevailing party and he is entitled to attorney's fees for this appeal.

## V. CONCLUSION

Because Mr. McKee's claims do not involve [1] an exemption relating to the requested documents, or [2] production of records on a partial or installment basis, his claims are not barred by the one year statute of limitations. The Public Records Act is meaningless if an agency can unlawfully withhold disclosure and production of records and, as a reward, escape liability under the Act. The trial court erred in its apprehension and application of law. Mr. McKee therefore asks this Court to reverse the trial court's dismissal of his case and allow the matter to proceed.

Respectfully submitted this 30th day of January, 2012.



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Michael G. Brannan, WSBA #28838  
Attorney for Jeffrey McKee

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**DECLARATION OF SERVICE**

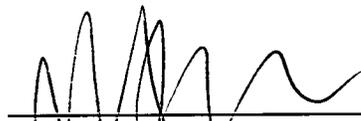
The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on January 30, 2012, I caused this document to served electronically through email to the attorney(s) listed below.

Service List

Ohad M. Lowy Assistant Attorney General P.O. Box 40116 Olympia, WA 98504	<input type="checkbox"/> Hand Delivered <input type="checkbox"/> Mailed <input type="checkbox"/> Faxed: <input checked="" type="checkbox"/> EMAIL: <u>OhadL@atg.wa.gov</u> <u>candied@atg.wa.gov</u>
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Signed at Seattle, Washington on January 30, 2012.



MICHAEL G. BRANNAN, WSBA # 28838  
Attorney for Jeffrey McKee

## Appendix A



A P P E A R A N C E S

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1 NOVEMBER 5, 2010

2 THE HONORABLE PAULA CASEY, PRESIDING

3 \* \* \* \* \*

4 THE COURT: Is this Mr. McKee on the  
5 telephone?

6 MR. McKEE: This is.

7 THE COURT: And Mr. Lowy is here. I will have  
8 him speak to make sure you can hear him.

9 MR. LOWY: This is Ohad Lowy, Assistant  
10 Attorney General.

11 THE COURT: So we are now doing the hearing  
12 that was previously scheduled. We are having the  
13 actual hearing today.

14 Just for the record, the reason we had the  
15 continuance last time is because Mr. McKee wanted  
16 more time for his filings to reach the Court. I have  
17 received Mr. McKee's response to the defendant's  
18 motion to dismiss. It has many attachments which I  
19 have reviewed. I have also received a reply from Mr.  
20 Lowy. We are ready to go.

21 I will hear from you, Mr. Lowy.

22 MR. LOWY: Thank you, Your Honor.

23 We're before the Court on a public records action  
24 brought by Mr. McKee on allegations that occurred  
25 three and a half years ago while Mr. McKee was

1           incarcerated at the Corporation of America/Florence  
2           Corrections Center under the supervision of DOC. Mr.  
3           McKee only now brings his cause of action in spite of  
4           statute of limitations. Interestingly, Mr. McKee's  
5           complaint and own evidence demonstrates conclusively  
6           that in December of 2006 he was aware or should have  
7           known of the existence of documents that were  
8           responsive to his request as he is the one who  
9           created those documents and his documents were  
10          responded to.

11           I won't go too much into the facts, but this all  
12          started --

13                    THE COURT: Is that right, all the documents  
14          are ones that were created by Mr. McKee?

15                    MR. LOWY: Well, not all. I should say some  
16          of the documents that he created.

17           This all started when plaintiff wrote a letter on  
18          November 24th, 2006 asking for records related to his  
19          pod restriction that occurred on November 21st, 2006.  
20          On November 29th, 2006, he wrote another letter  
21          asking for records from the same pod restriction,  
22          this time specifying the type of records he was  
23          seeking, including log books and infraction reports.  
24          DOC responded that they would search for those  
25          documents.

1           On December 18th, 2006, Lyn Francis, by  
2           plaintiff's own exhibits, the public disclosure  
3           coordinator, was informed that CCA/FCC had responded  
4           to a kite from plaintiff and they had a log book as  
5           well. Ms. Francis was also informed that CCA/FCC did  
6           not have any infraction related paperwork.

7           On December 26th, 2006, plaintiff was informed by  
8           DOC that there was no infraction related paperwork  
9           and that any other documents he needed he would need  
10          to contact CCA/FCC and that DOC did not possess those  
11          responsive records. As plaintiff wrote the kite  
12          prior to December 6th, 2006, which elicited a  
13          response, plaintiff knew or should have known at that  
14          time whether there were responsive records responsive  
15          to his requests.

16          Washington courts have long held that statute of  
17          limitations begin to run against a cause of action on  
18          the date the plaintiff first becomes entitled to seek  
19          relief in the courts. Both the U.S. Supreme Court  
20          and the Washington State Supreme Court recognize that  
21          statute of limitations are intended to provide  
22          finality. The obvious purpose of such statute of  
23          limitations is to set a definite limitation upon the  
24          time available to bring such an action without  
25          consideration of otherwise underlying merits.

1 Statute of limitations are strictly applied, and the  
2 courts are reluctant to find an exception unless one  
3 is clearly articulated by the Legislature.

4 Now, there is -- the Public Records Act requires  
5 the plaintiff to file action within one year of the  
6 agency's claim of exemption or last production of  
7 records on a partial installment basis. That is RCW  
8 42.56.550(6). The statute of limitations in that  
9 case acts to eliminate a plaintiff's right to  
10 maintain a cause of action as it relates to a  
11 specific records request beyond the time period  
12 specifically within the statute.

13 Now, admittedly the RCW was amended in 2005 and  
14 admittedly that statute is badly written and not  
15 clear. The *Tobin* case strictly construed that to say  
16 that the legislative intent would only trigger if an  
17 agency's claim of exemption or an agency's last claim  
18 of record on a partial installment basis occurs. The  
19 State believes that is a misinterpretation. Clearly,  
20 as *Tobin* acknowledged, the purpose of amending the  
21 statute was to limit and reduce the statute of  
22 limitations.

23 However, if this Court feels that it's bound by  
24 the *Tobin* decision in its interpretation, the  
25 question is what is the law then in cases such as

1       ours where the Department says we don't have  
2       responsive records or even where they give one  
3       installment of records? *Tobin* then is really for the  
4       limited proposition of when the one-year limitation  
5       does apply if the Court applies *Tobin*. In that case  
6       all the case law, both *Tobin* and *Rental Housing*  
7       *Association* that plaintiff relies on, all clearly  
8       state that the legislative intent was to reduce the  
9       statute of limitations.

10       In our reply on page two, I think the *Rental*  
11       *Housing* cites to the previous statute of limitations  
12       of five and six years. So clearly when the  
13       Legislature wants to have a longer period they will  
14       specifically cite that period, as they did in  
15       previous years, five years, six years. So the  
16       question is once again what applies in this case.  
17       The Legislature in this case took out the five-year  
18       statute of limitations, but clearly they did not  
19       intend to have an unlimitless period of time for  
20       someone to bring a cause of action.

21       RCW 4.16.130 provides a catchall that for any  
22       action of relief not provided for, it shall be  
23       commenced within two years after the cause of action  
24       has occurred. When the Court construes a statute, it  
25       assumes that the Legislature knew other statutes were

1 in place and reads them and tries to read statutes  
2 together. Obviously in this case if the one-year  
3 statute of limitations does not apply and the  
4 legislative intent was not to create an unlimitless  
5 time period to bring an action, six, seven, 12 years  
6 down the road -- if they wish to have done that, they  
7 would have explicitly done so as they did in the  
8 past. Clearly, then RCW 4.16.130 would have applied,  
9 providing a two-year statute of limitations. That  
10 would fit strictly in with the legislative intent to  
11 bring back the limitations.

12 Plaintiff also makes a discovery rule argument.  
13 It does not apply. I won't go into too much detail.  
14 Probably both legally but factually in this case he  
15 was aware of responsive documents because he created  
16 those documents and they were responded to him, so he  
17 was aware at that point. It's not -- I think in his  
18 complaint plaintiff tries to put some extra emphasis  
19 on the e-mail that he received in August, but he was  
20 in the same position back in 2009 as he was when he  
21 received that e-mail. He knew he sent that kite. He  
22 knew there was a response to it. Therefore, he knew  
23 at that point there were at least some responsive  
24 records to his request.

25 If the Court does deny the State's motion to

1 dismiss in full, the plaintiff does fail to state a  
2 claim for which relief may be requested for. In his  
3 first cause of action plaintiff alleges that DOC  
4 responded seven days past their estimate provided  
5 with their five days later -- he claims violating RCW  
6 42.56.520.

7 THE COURT: Why don't we deal with the statute  
8 of limitations first.

9 MR. LOWY: Sure, sure.

10 In plaintiff's reply brief -- first I should say  
11 this is a motion to dismiss on the pleadings. The  
12 plaintiff should not be bringing outside  
13 documentation. As the State is limited to address  
14 what he has provided in his complaint, so is the  
15 plaintiff. Those exhibits should not be factored in  
16 or those arguments involving that.

17 Additionally, *Rental Association* in this case --  
18 this is not an exemption case. *Rental Association*  
19 deals with a claim of exemption and what triggers the  
20 one-year statute of limitations. This is not a case  
21 where the state claimed an exemption, so that case  
22 does not apply in this matter.

23 Additionally, in his response plaintiff does not  
24 set forth arguments why the two-year statute of  
25 limitations would not apply, especially because it

1 would fit strictly in with the statute of limitations  
2 and the legislative intent of going back from the  
3 five-year statute of limitations which it expressly  
4 took out of the statute. It obviously was not their  
5 intent to create an unlimitless statute of  
6 limitations time period.

7 THE COURT: Mr. McKee.

8 MR. McKEE: Thank you, Your Honor.

9 As the State pointed out, it's not clear -- there  
10 was no explicit reason given for reducing the statute  
11 of limitations from five years to one year. The only  
12 thing that really is clear is that what starts the  
13 statute of limitations is the last production of a  
14 document on a partial installment basis or a claim of  
15 exemption. In this case the State had failed to do  
16 either of the two.

17 The State knew back in December of 2006 that it  
18 had responsive records to this request. They knew  
19 that pursuant to the contract those records belonged  
20 to the State of Washington and that they had a  
21 fiduciary duty to disclose those, but for whatever  
22 reason they failed to do so which did not start the  
23 statute of limitations. If the Court applies the  
24 doctrine of stare decisis to the *Tobin* case and  
25 *Rental Housing* case, then this Court must deny the

1 State's motion as the one-year statute of limitations  
2 has not began to run.

3 As far as the discovery rule, it doesn't really  
4 apply in this case because the Legislature set  
5 specific facts of when a statute of limitations runs.  
6 But if we did look into it, under *Crisman v. Crisman*  
7 it would fall under the discovery rule for fraud.  
8 Again, as I stated, the State knew of the responsive  
9 records and failed to disclose those which they had a  
10 fiduciary duty to inform me of.

11 As far as knowing or should have known there were  
12 records created, I don't recall ever sending a kite  
13 and if I did I would not have expected a response, as  
14 stated in my declaration, because common practice and  
15 the scheme of things there in Florence, Arizona was  
16 to not respond to kites. In fact, the counselor is  
17 saying that they just throw all the kites in the  
18 garbage and --

19 MR. LOWY: Your Honor, I would object at this  
20 point both for hearsay and argument outside the  
21 scope.

22 THE COURT: I think the discovery rule is not  
23 the real issue in this matter. The matter that we  
24 are addressing first is just the statute of  
25 limitations straight across.

1                   MR. McKEE: So again, as I pointed out,  
2                   there's only two incidences that start the statute of  
3                   limitations: The claim of exemption or the last  
4                   production of a document on a partial installment  
5                   basis.

6                   If we look into the separate opinions in the  
7                   *Rental Housing* case, we'll find that the one common  
8                   thing that the Court agreed on was that a state  
9                   agency can absolutely not silently withhold a record.  
10                  They have to identify the record which starts a basis  
11                  for the statute of limitations and gives the courts  
12                  and the requester something to base their suit on.  
13                  If you would reject this, then a requester would have  
14                  to justly naturally assume that every time it made a  
15                  request there were records silently withheld and he  
16                  would have to file a lawsuit in every instance he  
17                  ever made a request to fish out responsive records.  
18                  The Public Records Act explicitly does not allow  
19                  that.

20                  So therefore, Your Honor, I would respectfully  
21                  request that the State's motion be denied, an order  
22                  entered to disclose at least the two documents that  
23                  they have, and to immediately answer the discovery  
24                  requests.

25                  MR. LOWY: Can I reply, Your Honor?

1 THE COURT: Yes.

2 MR. LOWY: First, Your Honor, what Mr. McKee  
3 states in his declaration today is he does not recall  
4 sending a kite. That is not the same as I did not  
5 send a kite.

6 Additionally, Mr. McKee introduced evidence as  
7 part of his complaint indicating that he entered a  
8 kite and it was responded to. He entered that as the  
9 truth, what was contained in that e-mail. Mr. McKee  
10 cannot now try to backtrack on that and say well, I  
11 don't remember; maybe that didn't happen. Mr. McKee  
12 introduced those documents as the truth inside of  
13 them in his complaint as the basis of his lawsuit, so  
14 now he cannot try to create an issue as to the  
15 authenticity of those documents that he brings  
16 forward.

17 As we said, what *Tobin* talks about is when does  
18 the one-year statute of limitations apply? So the  
19 question is what happens then if this Court  
20 determines that a one-year statute of limitations  
21 does not apply? It's not a limitless time period.  
22 You don't have 20 years to bring a statute of  
23 limitations argument when it's clear that is not what  
24 the Legislature intended.

25 I was going to object to Mr. McKee when he brought

1 up the issues about the contract. That is not before  
2 the Court. He could have pled that in his complaint.  
3 The issue is not really what the State knew or when  
4 they knew it; the question is when did Mr. McKee know  
5 that? Mr. McKee through his own evidence knew that  
6 there were responsive documents in a kite, in a  
7 response to a kite that he received, so that's really  
8 the issue in this case is when did Mr. McKee know  
9 what? That was back in December of 2006. That is  
10 when he should have brought his cause of action or  
11 within a year or two of that period. Instead he sat  
12 on it for three and a half years.

13 We would ask at this point that the Court dismiss  
14 this case pursuant to the statute of limitations as  
15 set out either under the Public Records Act or the  
16 three-year statute of limitations as set out in RCW  
17 4.16.130.

18 THE COURT: The facts of this case are that on  
19 November 24th, 2006 Mr. McKee made his first request  
20 for records. I think that records request was  
21 supplemented on November 29th with a somewhat more  
22 specific request. On December 18th, 2006, the  
23 Department responded that it didn't have records.  
24 The response was that its contractor, CCA, didn't  
25 have records, and Mr. McKee was advised that he could

1 separately contact CCA.

2 I will find that December 18th, 2006 was a  
3 response that there were no records and that began  
4 the running of the statute of limitations.

5 I will further find that RCW 42.56.550 applies and  
6 that when there is a denial of any records the  
7 one-year statute of limitations runs just as when  
8 there would be a claim of exemption or completion of  
9 providing records on an installment basis. The  
10 response in December 2006 started that one-year  
11 statute running.

12 This case is dismissed.

13 MR. LOWY: Thank you, Your Honor.

14 MR. McKEE: All right. Thank you, Your Honor.

15 THE COURT: Mr. McKee?

16 (Mr. McKee hung up phone.)

17 THE COURT: So we will get an order.

18 MR. LOWY: For the record, I believe Mr. McKee  
19 has hung up the phone.

20 THE COURT: Yes, he has.

21 MR. LOWY: But I believe an order was provided  
22 with our motion to dismiss.

23 THE COURT: Probably.

24 MR. LOWY: I believe it's probably a very  
25 basic -- if I have a moment to look at my file --

1 THE COURT: If you have one with you, I will  
2 sign it. We can be off the record.

3 MR. LOWY: Your Honor, if I can hand you the  
4 proposed -- I think number two can be crossed out if  
5 the Court -- I don't think it is necessary, and I  
6 think it is not necessary with what the Court ruled.

7 THE COURT: Yes.

8 MR. LOWY: And I don't --

9 THE COURT: And so we don't need to have any  
10 discovery.

11 MR. LOWY: I don't know if the Court wants me  
12 to write down a notation that Mr. McKee was present  
13 at the hearing but hung up for entry.

14 THE COURT: So I am just adding "having heard  
15 argument from plaintiff and defendant's counsel."

16 Kathy, in your minutes can you just reflect that I  
17 signed the order after Mr. McKee had hung up.

18 (Proceedings were concluded.)

19  
20  
21  
22  
23  
24  
25



## Appendix B

## CHAPTER 2

### THE PUBLIC RECORDS ACT: LEGISLATIVE HISTORY AND PUBLIC POLICY

Hon. C. Kenneth Grosse

#### Summary

- §2.1 Legislative History
- §2.2 Public Policy
  - (1) Statements of Public Policy in the PRA
  - (2) Purpose for Adopting PRA
  - (3) Cases Describing Public Policy of PRA

#### §2.1 LEGISLATIVE HISTORY

To accurately understand the Public Records Act (PRA), it is necessary to return to the circumstances surrounding its creation.

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Ken Grosse is a native of the Pacific Northwest. He received his Bachelor's of Arts from the University of Washington in 1966 and his Juris Doctorate from the University of Washington School of Law in 1968 and was Projects Editor of the Law Review. He served as a law clerk to Washington State Supreme Court Justice Frank P. Weaver. From 1969 to 1972 he served as an assistant attorney general. In 1972 he entered private practice and in 1983 he joined former Governor Spellman as his counsel and subsequently as chief of staff. He was appointed to Division One of the Washington State Court of Appeals in January 1985, and is currently serving his third six-year term. He has twice been Presiding Chief Judge of the full Court of Appeals and was Chief Judge of Division One. Since joining the Court, he has served on numerous boards and commissions, including the Judicial Council, the Washington Courts 2000 Commission, the Board for Judicial Administration, Co-chair of the Commission on Justice, Efficiency and Accountability, and since 1986, Vice Chair of the Judicial Information System Committee overseeing the operations of the judiciary's computer-based information system, as well as Chair of the Data Dissemination Committee, developing and administering the judiciary's policy insuring public access to judicial information while safeguarding the legitimate concerns for privacy on the part of our citizens.

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## §2.1 / Legislative History & Public Policy

The year is 1972. Watergate is unfolding. Popular distrust of government—especially government secrecy—is at an all-time high. The federal government recently enacted its landmark Freedom of Information Act. See generally chapter 19, Introduction to the Federal Freedom of Information Act (FOIA).

A group of Washington citizens, the Coalition for Open Government, drafts an initiative to bring open government to Washington state. Initiative 276 is the product. It passes with a comfortable 72.01 percent margin and Washington's Public Records Act is born.

Originally, the Public Records Act had two parts: (1) campaign finance and lobbying disclosures, and (2) public records. This deskbook analyzes only the public records portion of the Act. However, effective July 1, 2006, the public records portion of the Act was recodified on its own and was placed in Chapter 42.56 RCW. See Laws of 2005, ch. 274.

The validity of the PRA was challenged soon after its passage in the landmark 1974 case *Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911 (1974). In *Fritz*, the court reflects on the history of the initiative process, which was born of popular dissatisfaction with the unresponsiveness of government through the traditional channels, and observes that this same dissatisfaction led to the enactment of Initiative 276:

It has been said time and again in our history by political and other observers that an informed and active electorate is an essential ingredient, if not the *Sine qua non* in regard to a socially effective and desirable continuation of our democratic form of representative government. There certainly have been more obstacles in the past to the realization of an informed, active, and participating electorate than at the present time. With the advent of television and its technically proficient development today, and with dramatic improvements in our other modes of dissemination of information about government to the public, the dream and the faith of our founding fathers in an informed, active and participating electorate comes closer to realization today than at any other time in our history.

With improved means and methods of communication there is little reason to doubt that a substantial percentage of the public is better informed, more alert, interested, and, in fact, concerned today with matters of government than ever before in our history. We can note particularly that in recent years there has been more dissemination to the public of information.... There has been an increasing emphasis on the importance of the role of money, funds, and finances in regard to the aforementioned matters. There has been much emphasis on the importance of the availability of public information, public records, the right of the public to know. As a culmination of public interest and concern along the lines indicated, and

## Legislative History & Public Policy / §2.2(1)

due to the availability of the initiative process in our state, the electorate adopted Initiative 276 at the election in 1972 by a substantial majority of the votes cast.

*Fritz*, 83 Wn.2d at 283-84. For additional discussion of I-296 and the history of the PRA, see *Amren v. City of Kalama*, 131 Wn.2d 25, 30-31, 929 P.2d 389 (1997).

Citing to the *Fritz* opinion's recognition of the initiative process as a role for the people akin to a fourth branch of government, a 1975 Gonzaga Law Review article states:

Indeed, the Fourth Branch of government, the people, has spoken [in the PRA]: Any person has the *right* to inspect and copy *all* public records—which includes any writing regardless of physical form or characteristics...—unless it would unreasonably disrupt the operations of the agency, or the record specifically is exempt from disclosure. Other states have passed similar enactments and, like Washington, have used federal law, specifically the Freedom of Information act, as a model.

Michael C. McClintock, Steven A. Crumb, & F. Douglas Tuffley, *Washington's New Public Records Disclosure Act: Freedom of Information in Municipal Labor Law*, 11 GONZ. L. REV. 13, 16-17 (1975) (citations omitted).

The underlying guiding spirit of the PRA's genesis has served as the framework for the judiciary's application and interpretation of its provisions.

## §2.2 PUBLIC POLICY

### (1) Statements of public policy in the PRA

The PRA contains express provisions as to its purpose and policy:

- “It is hereby declared by the sovereign people to be the public policy of the state of Washington... That, mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.... The provisions of [the PRA] shall be *liberally construed* to promote... full access to public records so as to assure continuing public confidence of fairness of... governmental processes, and so as to assure that the public interest will be fully protected.” RCW 42.17.010 (emphasis added).

## §2.2(2) / Legislative History & Public Policy

- “The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. T[he PRA] shall be *liberally construed* and its *exemptions narrowly construed* to promote this public policy.” RCW 42.17.251/RCW 42.56.030 (emphasis added).
- “The provisions of this act are to be *liberally construed* to effectuate the policies and purposes of this act. In the event of conflict between the provisions of this act and any other act, the provisions of this act shall govern.” RCW 42.17.920 (emphasis added).

It is noteworthy that the Act specifies *three* times that courts must construe it liberally in favor of disclosure. See *King County v. Sheehan*, 114 Wn. App. 325, 338, 57 P.3d 307 (2002) (referring to the “thrice-repeated” mandate of interpreting the Act in favor of disclosure). Virtually no other legislation repeats three times how it should be interpreted. Courts should never ignore this “thrice-repeated” demand.

### (2) Purpose for adopting PRA

When interpreting an initiative, courts will look to the official voters pamphlet to determine the purpose of an act. The 1972 voters pamphlet on the PRA makes clear that the initiative:

[W]as partially intended to change the common law rule that a citizen could examine public records “required by law to be maintained” only if he or she could show a “legitimate interest”; and further, that examination of all other public records was “within the discretion of [the] official” having custody of the records. As explained by the voters pamphlet: “The initiative would require all such ‘public records’ of both state and local agencies to be made available for public inspection and copying by any person asking to see or copy a particular record....”

Michael C. McClintock, Steven A. Crumb, & F. Douglas Tuffley, *Washington’s New Public Records Disclosure Act: Freedom of Information in Municipal Labor Law*, 11 GONZ. L. REV. at 25-26 (citations and footnotes omitted).

Explanatory statements and arguments in the official voters pamphlet are tantamount to legislative history and can be used as an aid to construction. *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass’n*, 140 Wn.2d 615, 637, 999 P.2d 602 (2000); see also *Hearst*

## Legislative History & Public Policy / §2.2(3)

*Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978) (quoting I-296 voters pamphlet). The statement “for” Initiative Measure 276 expressly provided that the law “makes all public records and documents in state and local agencies available for public inspection and copying’ except those exempted to protect individual privacy and to safeguard essential governmental functions.” *Hearst Corp.*, 90 Wn.2d at 128.

### (3) Cases describing public policy of PRA

The Supreme Court has described the public policy of the PRA in extremely strong terms:

The stated purpose of the [PRA] is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. RCW 42.17.251. Without tools such as the [PRA], government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison, “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both.”

*Progressive Animal Welfare Soc’y v. Univ. of Wash. (PAWS II)*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (citations and footnotes omitted).

Several other cases discuss the public policy of the PRA:

- The purpose of the PRA is “to provide full access to non-exempt public records.” *Am. Civil Liberties Union of Wash. v. Blaine Sch. Dist. No. 503 (ACLU I)*, 86 Wn. App. 688, 695, 937 P.2d 1176 (1997).
- The PRA’s “primary purpose is to promote broad disclosure of public records.” *Yacobellis v. City of Bellingham (Yacobellis II)*, 64 Wn. App. 295, 301, 825 P.2d 324 (1992).
- “Access is the underlying theme of the act.” *ACLU I*, 86 Wn. App. at 696.
- The Act “is a strongly worded mandate for broad disclosure of public records.” *PAWS II*, 125 Wn.2d at 251 (quoting *Hearst Corp.*, 90 Wn.2d at 127); *see also Amren*, 131 Wn.2d at 31.
- “The purpose of the [PRA] is to keep public officials and institutions accountable to the people.” *Daines v. Spokane County*, 111 Wn. App. 342, 347, 44 P.3d 909 (2002).

## §2.2(3) / Legislative History & Public Policy

- “The [PRA] reflects the belief that the public should have full access to information concerning the working of the government.” *Newman v. King County*, 133 Wn.2d 565, 570, 947 P.2d 712 (1997).
- “The [PRA] enables citizens to retain their sovereignty over their government and to demand full access to information relating to their government’s activities.” *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 429-30, 98 P.3d 463 (2004).
- “The public policy behind the act is clearly based on the public’s right to the full disclosure of public documents.” *Am. Civil Liberties Union of Wash. v. Blaine Sch. Dist. No. 503 (ACLU II)*, 95 Wn. App. 106, 111, 975 P.2d 536 (1999).
- The PRA was “designed to provide open access to governmental activities.” *Amren*, 131 Wn.2d at 31.
- The public policy of the PRA “favors disclosure.” *Brouillet v. Cowles Publ’g Co.*, 114 Wn.2d 788, 793, 791 P.2d 526 (1990); *see also Prison Legal News, Inc. v. Dep’t of Corr.*, 154 Wn.2d 628, 645, 115 P.3d 316 (2005) (otherwise private health care information must be disclosed after personal identifying information redacted).
- “[P]ermitting a liberal recovery of costs [in PRA enforcement actions] is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public’s right to access to public records.” *ACLU II*, 95 Wn. App. at 115.
- The purpose of the PRA is “nothing less than the preservation of the most central tenets of the representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.” *PAWS II*, 125 Wn.2d at 251; *see also Kleven v. City of Des Moines*, 111 Wn. App. 284, 289, 44 P.3d 887 (2002).

See also chapter 6 (Statutory Construction of the Act), which discusses the public policy and statutory construction of the PRA in more detail.

An informed citizenry needs access to public records to have the knowledge of public issues necessary to maintain control over our government. The voters in 1972 understood this. Courts in the intervening years have recognized the Act’s purpose. The problem is applying these principles to everyday records requests. Despite the Act’s abundantly clear legislative intent, some agencies do not comply for a variety of reasons. The chapters that follow discuss day-to-day compliance and the methods of enforcing compliance.