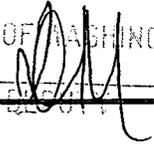


FILED
COURT OF APPEALS
DIVISION II

11 SEP 15 PM 12:47

NO. 42052-0-II

STATE OF WASHINGTON
BY 

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

SHAWN D. GREENHALGH,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

RESPONDENT'S BRIEF

ROBERT M. MCKENNA
Attorney General

KIMBERLY D. FRINIELL, WSBA #31451
ASSISANT ATTORNEY GENERAL
CORRECTIONS DIVISION
P.O. BOX 40116
OLYMPIA, WA 98504-0116
(360) 586-1445

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTER STATEMENTS OF THE ISSUES2

III. STATEMENT OF THE CASE3

 A. Factual History3

 B. Procedural History6

IV. STANDARDS OF REVIEW7

V. ARGUMENT9

 A. The Lower Court Appropriately Exercised Its Discretion
 In Allowing The Department To Amend Its Answer9

 B. The Public Records Act One-Year Statute Of Limitations
 Bars Mr. Greenhalgh’s Claims14

 C. The Department’s Voluntary Administrative Appeal
 Process Does Not Toll The Public Records Act Statute Of
 Limitations19

 D. If Mr. Greenhalgh’s Action Is Not Time-Barred, This
 Case Should Be Remanded For Determination On The
 Merits22

 E. Mr. Greenhalgh Is Not A Prevailing Party Under The
 PRA And Therefore Is Not Entitled To Attorney Fees
 And Costs.....24

VI. CONCLUSION25

TABLE OF AUTHORITIES

Cases

<i>Atchison v. Great Western Malting Co.</i> 161 Wn.2d 372, 166 P.3d 662 (2007).....	15, 16, 22
<i>Bennett v. Dalton</i> 120 Wn. App. 74, 84 P.3d 265 (2004).....	16, 22
<i>Bingham v. Lechner</i> 111 Wn. App 118, 45 P.3d 562 (2002).....	9
<i>Caruso v. Local Union 690 of Int’l Bhd. of Teamsters</i> 100 Wn.2d 343, 670 P.2d 240 (1983).....	8
<i>Caruso v. Local Union No. 690</i> 100 Wn.2d 343, 670 P.2d 240 (1983).....	9
<i>City of Seattle v. Megrey</i> 93 Wn. App. 391, 968 P.2d 900 (1998).....	9
<i>Crisman v. Crisman</i> 85 Wn. App. 15, 931 P.2d 163 (1997).....	15
<i>Del Guzzi Constr. Co. v. Global Nw. Ltd.</i> 105 Wn.2d 878, 719 P.2d 120 (1986).....	7
<i>Dodson v. Continental Can Co.</i> 159 Wn. 589, 294 P. 265 (1930).....	15
<i>Elliott v. Dep’t of Labor and Indus.</i> 151 Wn. App. 442, 213 P.3d 44 (2009).....	16
<i>Farmers Ins. Co. of WA v. Miller</i> 87 Wn.2d 70, 549 P.2d 9 (1976).....	13
<i>Friedlander v. Friedlander</i> 80 Wn.2d 293, 494 P.2d 208 (1972).....	8

<i>Greenhalgh v. DOC</i> 160 Wn. App. 706, 248 P.3d 150 (2011).....	17
<i>Gronquist v. DOC</i> 159 Wn. App. 576, 247 P.3d 436 (2011).....	17
<i>Herron v. Tribune Publ'g Co.</i> 108 Wn.2d 162, 736 P.2d 249 (1987).....	9, 10, 11
<i>Huff v. Roach</i> 125 Wn. App. 724, 106 P.3d 268 (2005).....	15, 16, 22
<i>In re Marriage of Nicholson</i> 17 Wn. App. 110, 561 P.2d 1116 (1977).....	8
<i>Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt</i> 109 Wn. App. 655, 37 P.3d 309 (2001).....	15, 16, 22
<i>Jones v. Jacobsen</i> 45 Wn.2d 265, 273 P.2d 979 (1954).....	15
<i>Limstrom v. Ladenburg</i> 98 Wn. App. 612, 989 P.2d 1257 (1999).....	21
<i>Mahoney v. Tingley</i> 85 Wn.2d 95, 529 P.2d 1068 (1975).....	13
<i>O'Conner v. Dep't of Soc. & Health Servs.</i> 143 Wn.2d 895, 25 P.3d 426 (2001).....	8
<i>Ockerman v. King Cnty. Dept. of Dev. And Env. Srvc.</i> 102 Wn. App. 212, 6 P.3d 1214 (2000).....	21
<i>Progressive Animal Welfare Soc. v. Univ. of Wash.</i> 125 Wn.2d 243, 884 P.2d 592 (1994).....	21
<i>Reading Co. v. Koons</i> 271 U.S. 58, 46 S. Ct. 405, 70 L. Ed. 835 (1926).....	15
<i>Rental Housing Ass'n of Puget Sound v. City of Des Moines</i> 165 Wn.2d 525, 199 P.3d 393 (2009).....	14

<i>Richards v. Richards</i> 5 Wn. App. 609, 489 P.2d 928 (1971).....	8
<i>Romjue v. Fairchild</i> 60 Wn.App. 278, 803 P.2d 57 (1991).....	12, 13
<i>Sanders v. State</i> 169 Wn.2d 827, 240 P.3d 120 (2010).....	17
<i>Sprague v. Sumitomo Forestry Co.</i> 104 Wn.2d 751, 709 P.2d 1200 (1985).....	9
<i>Tobin v. Worden</i> 156 Wn. App. 507, 233 P.3d 906 (2010).....	16, 17, 18
<i>Wilson v. Horsley</i> 137 Wn.2d, 500, 974 P.2d 316 (1999).....	9, 14

Statutes

RCW 42.17.310	4, 18
RCW 42.56.290	5, 18
RCW 42.56.520	19, 20, 21
RCW 42.56.550	passim
RCW 42.56.565	2, 23
RCW 5.60.060	5, 18

Rules

RAP 18.1.....	24
WAC 137-080-140.....	20, 21

I. INTRODUCTION

Shawn Greenhalgh, a Washington State prisoner, appeals the dismissal of a time-barred action brought under the Public Records Act (PRA), RCW 42.56.550. Mr. Greenhalgh's claims stemmed from two public records requests responded to by the Department of Corrections (the Department) on March 29, 2007 and April 23, 2007, respectively. In both responses, the Department properly withheld documents and properly claimed exemptions, thereby triggering the one-year statute of limitations set forth in RCW 42.56.550(6).

Mr. Greenhalgh waited until May 2008, more than a year after the Department's responses, to file a lawsuit challenging the Department's response to his PRA requests. Except for discovery propounded by Mr. Greenhalgh in November 2008, Mr. Greenhalgh's case sat dormant until February 11, 2011, when Mr. Greenhalgh sought summary judgment. In response to the summary judgment motion the Department raised statute of limitations as an affirmative defense and sought an order to amend its answer to include statute of limitations as an affirmative defense. The lower court granted the Department's motion to amend its answer and dismissed Mr. Greenhalgh's PRA claims as time-barred under RCW 42.56.550(6). The lower court's orders should be affirmed as the amended answer was not prejudicial and Mr. Greenhalgh's claims were time-barred.

II. COUNTER STATEMENTS OF THE ISSUES

1. Did the lower court properly exercise its discretion in allowing the Department to amend its answer when the Department's amended answer did not cause undue delay or unfair surprise?
2. The Department properly claimed exemptions in its March and April 2007, final responses to Mr. Greenhalgh's public records requests, thereby triggering the one-year statute of limitations set forth in RCW 42.56.550(6). Are Mr. Greenhalgh's claims time barred when he failed to file them within a year of the Department's denials?
3. Does the PRA's clear and unambiguous one-year statute of limitations prevent Mr. Greenhalgh from tolling that statutory limit by filing a voluntary administrative appeal at a time of his choosing?
4. The case below was dismissed on procedural grounds, thereby limiting the record. If it is determined that the statute of limitations does not apply, should the case be remanded to allow the lower court to rule on the merits and determine if under RCW 42.56.565(1) Mr. Greenhalgh is entitled to penalties?
5. Should the Court deny Mr. Greenhalgh attorney fees and costs, as Mr. Greenhalgh has not prevailed against the Department in getting

records released and therefore is not a prevailing party under RCW 42.56.550?

III. STATEMENT OF THE CASE

A. Factual History

On February 23, 2007, Mr. Greenhalgh sent the Department a PRA request seeking documents related to the Department's determination that it would charge \$.20 per page for public records and \$.10 per page for copying offenders' legal pleadings. CP 34.¹ Specifically, Mr. Greenhalgh sought:

1. Per RCW 43.56.120, an agency's fees for copying public records shall not exceed the amount necessary to reimburse the agency for its actual costs incident to copying. I request any and all records which explain how the [Department] determined it must charge \$.20 per page in order for it to be fully reimbursed for such copying; and
2. I request any and all records which explain how the [Department] determined that it need not charge in excess of \$.10 per page for copying offender legal pleadings in accordance with DOC 590.500 in order to be fully reimbursed for such copying, if it's actual cost is \$.20 per page.

¹ In his opening brief Mr. Greenhalgh's page number references do not coincide with the numbering system provided by the Court in its Clerk's Papers Index. *See e.g.* Opening Brief at 2-3 (Mr. Greenhalgh references the documents the Department provided in response to his first request as CP 34, 38-42. The documents are actually found at CP 40-45.); Opening Brief at 3 (Mr. Greenhalgh references the Department's April 23 letter as CP 44. The Document is actually found at CP 47.) So as to use the numbering provided by the Court, throughout this brief the Department utilizes the numbering system provided by the trial Court in the June 1, 2011, Clerk's Papers Index.

CP 34. The Department received the request on February 27, 2007 and responded on March 5, 2007, four business days after receipt, with a request for twenty additional business days to gather responsive records.

CP 35. On March 14, 2007, the Department notified Mr. Greenhalgh that six pages of responsive records were available for him to purchase. CP

36. On March 29, 2007, upon receiving payment for the responsive records, the Department provided Mr. Greenhalgh with the responsive records as well as an exemption log for three pages which were withheld based on former RCW 42.17.310(1)(i) because they contained attorney-client privileged information. CP 37–40.

On April 12, 2007, Mr. Greenhalgh sent the Department a second PRA request. CP 46. In this request, Mr. Greenhalgh sought the Department's formulas for determining it would charge \$.20 per page for public records and \$.10 per page for copying legal pleadings. *Id.* Specifically, Mr. Greenhalgh sought:

1. The [Department's] formula for determining its copying fee, \$.20 per page, necessary to reimburse itself for providing copies of public records, as published in WAC 137-08-110(1); and
2. The [Department's] formula for determining its copying fee, \$.10 per page, necessary to reimburse itself for providing copies of offender's legal pleadings, as published in DOC Policy #590.500.

CP 46. The Department responded on April 23, 2007, notifying Mr Greenhalgh that the only 3 pages responsive to his April 12, 2007 PRA request were exempt from disclosure pursuant to RCW 42.56.290 and RCW 5.60.060(2)(a) because they contained attorney-client privileged information. CP 47.

On July 14, 2007, Mr. Greenhalgh wrote to the Department appealing the March 14 and April 23 denial letters. CP 48–49. In appealing the Department’s March 14, 2007 denial letter, Mr. Greenhalgh argued that the Department incorrectly determined that the responsive documents were exempt from disclosure. CP 48.² In appealing the Department’s April 23, 2007 denial letter, Mr. Greenhalgh did not appeal the exemptions set forth in the April 23 denial letter, but instead argued that there must be additional responsive records. CP 49.³ The Department responded to Mr. Greenhalgh’s appeals on August 29, 2007, upholding the

² In his opening brief, Mr. Greenhalgh asserts that in his appeal of the March 14th denial letter, he “questioned Ms. Shaves statement that there were no responsive documents to his first category, insisting that there must be public records.” Opening Brief at 3- 4. The record does not support this assertion. The text quoted is not contained in Mr. Greenhalgh’s appeal letter, and the only issue raised in the appeal letter was the applicability of the attorney-client exemption claimed by the Department. CP 48.

³ In his opening brief, Mr. Greenhalgh asserts that in his appeal of the April 23rd denial letter, he “request[ed] production of the records related to the other category of his request that had been withheld based on the claimed exemption.” Opening Brief at 4. Despite his assertion otherwise, nowhere in his appeal letter does Mr. Greenhalgh question the Department’s claimed exemption or discuss the records that were provided by the Department. CP 49.

exemption and reiterating that there were no additional responsive records to his April 12, 2007 request. CP 50 – 51.

B. Procedural History

On May 1, 2008, Mr. Greenhalgh filed suit against the Department. CP 3–11. The original complaint was never served on the Department. On July 22, 2008, Mr. Greenhalgh filed an amended complaint, asserting that the Department violated the PRA by failing to provide the required documentation to justify charging \$.10 per page for legal copies and \$.20 per page for PRA requests, and failing to justify charging \$.20 per page for PRA requests. CP 140–146. The Department filed an Answer to the First Amended Complaint on August 12, 2008. CP 13–15.

In November 2008, Mr. Greenhalgh came into possession of records he believed were responsive to the February and April 2007 requests. *See* CP 20. On February 13, 2010, the Assistant Attorney General representing the Department passed away. CP 129. In February 2011, Mr. Greenhalgh filed a motion for summary judgment, arguing the Department withheld documents responsive to his February 23, 2007 request and therefore he was entitled to penalties and attorney fees. CP 17–30. The Department responded, asserting that Mr. Greenhalgh's claims were barred by the statute of limitations. CP 70–77. Mr. Greenhalgh replied, arguing that the Department waived its statute of

limitations affirmative defense by not pleading it in the answer, and that his appeal to the Department constructively tolled the statute of limitations. CP 79–91. The Department in turn filed a motion to amend the answer to add statute of limitations as an affirmative defense. CP 109–111. Mr. Greenhalgh opposed the Department’s motion to amend, arguing the Department engaged in undue delay and surprise, and that if the Department was allowed to amend its answer it would prejudice Mr. Greenhalgh and result in inequity. CP 118–121.

The lower court heard arguments on the motions on April 1, 2011. The court granted the motion to amend the answer, and denied Mr. Greenhalgh’s summary judgment motion, ruling his claims were time barred under RCW 42.56.550(6). CP 133. Accordingly, the lower court dismissed Mr. Greenhalgh’s complaint with prejudice. CP 133.

IV. STANDARDS OF REVIEW

There are two standards of review applicable in this case. First, the Court is asked to consider whether the lower court properly exercised its discretion in allowing the Department to amend its answer. The determination as to whether to allow a party to amend a pleading is reviewed for manifest abuse of discretion. *Del Guzzi Constr. Co. v. Global Nw. Ltd.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986). A court’s decision regarding a motion for leave to amend will not be disturbed on

appeal except “for a manifest abuse of discretion or a failure to exercise discretion.” *Id. citing Caruso v. Local Union 690 of Int’l Bhd. of Teamsters*, 100 Wn.2d 343, 351, 670 P.2d 240 (1983). “To constitute an abuse of manifest discretion, the discretion must have been exercised upon a ground, or to an extent, clearly untenable or manifestly unreasonable.” *In re Marriage of Nicholson*, 17 Wn. App. 110, 114, 561 P.2d 1116 (1977) citing *Friedlander v. Friedlander*, 80 Wn.2d 293, 304, 494 P.2d 208 (1972). The appellate court would need to find that no reasonable person would have ruled as the lower court did. *Id. citing Richards v. Richards*, 5 Wn. App. 609, 613, 489 P.2d 928 (1971).

For the remaining issues, the Court is asked to consider whether the PRA claims were filed outside the one-year statute of limitations established by RCW 42.56.550(6), and whether the Department’s voluntary appeal process tolls the one-year statute of limitations period. In reviewing a documentary record to determine whether a PRA claim was filed within the statute of limitations period, the Court conducts a de novo review of the lower court decision. *O’Conner v. Dep’t of Soc. & Health Servs.*, 143 Wn.2d 895, 904, 25 P.3d 426 (2001) (when record consists only of affidavits, memoranda of law, and other documentary evidence the appellate court stands in the same position of the lower court.) De novo review is also appropriate when determining whether the statute of

limitations has been tolled. *Bingham v. Lechner*, 111 Wn. App 118, 127, 45 P.3d 562 (2002), citing *City of Seattle v. Megrey*, 93 Wn. App. 391, 393, 968 P.2d 900 (1998).

V. ARGUMENT

A. The Lower Court Appropriately Exercised Its Discretion In Allowing The Department To Amend Its Answer

Civil Rule 15(a) allows for the amendment of pleadings and requires that leave to amend “shall be freely given when justice so requires”. The decision to grant leave to amend the pleadings is within the discretion of the lower court. *Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 763, 709 P.2d 1200 (1985). The civil rules, particularly CR 15, “serve to facilitate proper decision on the merits, to provide parties with adequate notice of the basis for claims and defenses asserted against them, and to allow amendment of the pleading except where amendment would result in prejudice to the opposing party.” *Wilson v. Horsley*, 137 Wn.2d, 500, 505, 974 P.2d 316 (1999) (citing *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983)); *Herron v. Tribune Publ’g Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987). The determination of prejudice may involve a consideration of factors including whether amendment would cause undue delay, unfair surprise, or jury confusion. *Herron*, 108 Wn.2d at 165-66.

In the present case, the lower court properly determined that the Department's amended answer did not result in prejudice to Mr. Greenhalgh, as there was no undue delay, or unfair surprise. The only issue raised by the Department's amended answer was the affirmative defense of statute of limitations, a purely legal issue. CP 109–111. Issues of fact were not raised and there was no need for additional discovery related to the amended affirmative defense. *Id.* As there were no new issues of fact, amendment of the answer did not result in undue delay.

Below, Mr. Greenhalgh argued that the Department engaged in undue delay by not moving to amend its answer until after summary judgment had been filed; however, the standard is not whether the party engaged in undue delay, but whether the amendment would result in undue delay. CP 118–121; *Herron*, 108 Wn.2d at 165-66. The amendment of the answer in this case did not result in delay. The motion for summary judgment was noted, responded to, and was heard by the court on April 1, 2011, regardless of the amendment to the answer. CP 17 and 133. Additionally, the amended answer raised a purely legal issue that required no additional discovery nor changes to Mr. Greenhalgh's litigation strategy. *See* CP 17–69, 79–91, and 118–121. Rather, the amended answer went to the merits of the case and whether or not Mr.

///

Greenhalgh was entitled to relief, under clear statutory authority. CP 109–111.

In *Herron*, the court considered the lower court’s decision to deny the plaintiff’s motion to amend the complaint to raise additional theories of liability which would have required the defendants “to contact an entire new set of witnesses and begun new efforts to secure evidence.” *Heron*, 108 Wn.2d at 168. Here, the amended answer did not change the factual scenario before the Court, nor did it require any changes in the motion for summary judgment. *See* CP 17–69, 79–91, and 118–121. As such, Mr. Greenhalgh’s argument that the lower court should have denied the Department’s request to amend its answer because the Department engaged in undue delay, is without merit.

Similarly, allowing the Department to amend its answer did not create unfair surprise, particularly in light of the clarity of the statute governing Mr. Greenhalgh’s action. RCW 42.56.550(6) is clear that a requestor has one year from the date of an agency’s “claim of exemption or last production of a record on a partial or installment basis.” The factual record is clear that the agency claimed exemptions in responding to Mr. Greenhalgh’s two requests. CP 37–39 and 47. After the denial letters containing the exemption claims were sent on March 29, 2007 and April 23, 2007, respectively, the agency neither produced more records on a

partial or installment basis nor claimed additional exemptions. *Id.* As such, based on the plain language of the statute, the statute of limitations began to run on March 29, 2007 and April 23, 2007 for the respective requests. With such a clear statutory framework and facts that fit squarely within that framework, allowing the Department to add a statute of limitations defense to its answer did not create unfair surprise. Therefore, the lower court did not err by allowing the Department to amend its answer.

Mr. Greenhalgh not only incorrectly claims that this issue is subject to de novo review, he also incorrectly argues that the Department waived its statute of limitations affirmative defense by not pleading it in its answer. Opening Brief at 10. The Department pled the statute of limitations affirmative defense in its amended answer. CP 109–111. As demonstrated above, the lower court properly allowed the amendment and there is nothing in the record before this Court demonstrating that the Department's behavior was inconsistent with asserting a statute of limitations defense.

Mr. Greenhalgh argues that a Defendant waives its affirmative defenses after engaging in discovery, relying on *Romjue v. Fairchild*, 60 Wn.App. 278, 280–282, 803 P.2d 57 (1991). Opening Brief at 11–12. Mr. Greenhalgh claims that the Department engaged in discovery on

substantive issues prior to raising the defense, and therefore the defense is waived. But there is nothing in the record before this Court regarding discovery in this case, and this argument was properly dismissed by the lower court. *See* CP 81–83 and CP 131–133.

Moreover, the court in *Romjue* determined that something more than discovery needed to take place for an affirmative defense to be waived. *Romjue*, 60 Wn.App. at 280–282. In *Romjue*, the court determined that the Defendant waived his insufficient service affirmative defense when along with conducting substantive discovery Defendant’s counsel failed to raise the issue in response to a letter from Plaintiff where Plaintiff stated that Defendant had been served and then Plaintiff waited until after the statute of limitations had run to bring the defense. *Id.* Furthermore, the Washington State Supreme Court has stated that “the affirmative defense requirement is not to be construed absolutely, particularly where it does not affect the substantial rights of the parties.” *Farmers Ins. Co. of WA v. Miller*, 87 Wn.2d 70, 76, 549 P.2d 9 (1976); *citing Mahoney v. Tingley*, 85 Wn.2d 95, 529 P.2d 1068 (1975).

In this case, there is nothing before the Court regarding any actions taken by the Department other than raising a statute of limitations affirmative defense in the first dispositive pleading submitted by the Department, and a properly admitted amended answer. CP 70–77, 109–

117 and 131-132. The lower court did not abuse its discretion in allowing the Department to amend its answer. *Wilson*, 137 Wn.2d 500 (1999) The Department did not waive its statute of limitations affirmative defense. The lower court's decision should be affirmed.

B. The Public Records Act One-Year Statute Of Limitations Bars Mr. Greenhalgh's Claims

In 2005, the legislature amended RCW 42.56.550(6) to shorten the limitations period for actions brought under the PRA to one year. RCW 42.56.550(6) (2005) (amended by Laws of 2005, ch. 483, § 5). The statute provides: "Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis." *Id.* When the meaning of statutory language is plain on its face, courts must give effect to that plain meaning as an expression of legislative intent. *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009). Here, the plain language of the statute is clear that the one-year statute of limitations is 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. 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 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 & Constr. 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 Wn. 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.3d 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 Department sent Mr. Greenhalgh the final responses to his two PRA requests on March 29, 2007, and April 23, 2007, respectively. CP 37–39 and 47. Consequently, Mr. Greenhalgh's claims accrued on those dates, when he was provided with the final communications and claims of exemption. *See Tobin v. Worden*, 156 Wn. App. 507, 233 P.3d 906 (2010). As such, the statute of

limitations expired on April 23, 2008, at the latest, which is before Mr. Greenhalgh's lawsuit was filed. Mr. Greenhalgh's claims are time-barred.

Mr. Greenhalgh argues that because he sought two types of documents in each of his requests, and exemptions were only claimed to one type of document in each request, the triggering events for the one-year statute of limitations were not met. Opening Brief at 16–19. Mr. Greenhalgh cites *Tobin v. Worden*, 156 Wn.App. 507, 233 P.3d 906 (2010) to support his argument. *Id.* Mr. Greenhalgh's reliance on *Tobin* is misplaced. The Court in *Tobin* determined that the Defendant failed to claim an exemption or produce partial installments for two separate PRA requests, submitted on two different dates, and therefore, the one-year statute of limitations had not been triggered in either instance. *See Tobin v. Worden*, 156 Wn.App. 507, 233 P.3d 906 (2010).⁴

⁴ Mr. Greenhalgh argues that the *Tobin* decision stands for the proposition that seeking two types of documents in one request amounts to separate requests. Opening Brief at 16–19. Nothing in *Tobin* stands for the proposition set forth by Mr. Greenhalgh. *See Tobin v. Worden*, 156 Wn.App. 507, 233 P.3d 906 (2010). In *Tobin* the requestor submitted two separate requests, on two different dates, each time seeking a different type of document. *Id.* Therefore, *Tobin* does not stand for the proposition propounded by Mr. Greenhalgh. The Courts, in handling PRA cases, have treated requests for multiple types of documents contained in one PRA request as one request. *See e.g. Sanders v. State*, 169 Wn.2d 827, 837, 240 P.3d 120 (2010) (when referring to a request seeking two different types of documents, the Court refers to “the request.”); *Ockerman v. King Cnty. Dept. of Dev. And Env. Svcs.*, 102 Wn. App. 212, 214 – 215, 6 P.3d 1214 (2000) (despite Plaintiff seeking two separate types of documents the court referred to it as a ‘request’); *Greenhalgh v. DOC*, 160 Wn. App. 706, 708, 248 P.3d 150 (2011) (despite plaintiff seeking two different types of information the court referred to it as a “request”); *Gronquist v. DOC*, 159 Wn. App. 576, 581, 247 P.3d 436 (2011) (Despite Plaintiff seeking fourteen different types of information the court referred to it as a “request”).

Unlike what happened in *Tobin*, in this case the Department cited exemptions in responding to both of Mr. Greenhalgh's requests. CP 37–39 and 47. In response to the February 23rd request the Department sent Mr. Greenhalgh a letter, including a Denial of Public Records form, setting forth that three pages of documents responsive to Mr. Greenhalgh's request were being withheld under former RCW 42.17.310(1)(i).⁵ CP 37–39. In response to Mr. Greenhalgh's April 12th request, the Department sent Mr. Greenhalgh a letter informing him that three pages of documents responsive to that request were being withheld under RCW 42.56.290 and RCW 5.60.060(2)(a). CP 47. Therefore, pursuant RCW 42.56.550 the one-year statute of limitations was triggered by the Department's claim of an exemption in each public records request response. RCW 42.56.550(6). This comports with the decision in *Tobin*, in which the Court stated that when an agency properly claims an exemption to a public records request, the one-year statute of limitations begins to run. *Tobin v. Worden*, 156 Wn. App. 507, 513, 233 P.3d 906 (2010).

As the Department claimed exemptions in responding to both of Mr. Greenhalgh's requests, the one-year statute of limitations applied to both requests and began to run on March 29, 2007, and April 23, 2007, respectively. *See* RCW 42.56.550(6). As such, Mr. Greenhalgh was

⁵ Re-codified as RCW 42.56.290.

required to bring his claims regarding the February 2007 request by March 29, 2008 and his claims regarding his April 2007 request by April 23, 2008. *Id.* Mr. Greenhalgh did not file his first complaint until May 1, 2008; therefore, his claims are time-barred.

C. The Department's Voluntary Administrative Appeal Process Does Not Toll The Public Records Act Statute Of Limitations

RCW 42.56.550(6) clearly states that actions “must be filed within one year of the agency’s claim of exemption or last production of records on a partial or installment basis.” Mr. Greenhalgh argues that his voluntary administrative appeal to the Department regarding the responses to the two PRA requests, which he filed over three months after receiving the first denial of records, tolled this statute of limitations. Opening Brief at 19-24. This argument is without merit.

The Department claimed exemptions on March 19, 2007, and April 23, 2007. CP 37–39 and 47. No further exemptions were claimed and no further documents were produced on a partial or installment basis. Thus, pursuant to the plain language of RCW 42.56.550(6), the statute of limitations began to run on those dates. Additionally, while RCW 42.56.520 states that an agency must establish a mechanism for review of agency denials, it goes on to say that an agency’s action is deemed final “the second business day following the denial of inspection”. Thus, at the

latest, the Department's actions were final on March 31, 2007, and April 25, 2007, respectively, two days after the Department sent Mr. Greenhalgh the denial letters claiming exemptions. *See* RCW 42.56.520.

Mr. Greenhalgh argues that the language in WAC 137-080-140 and Department policy 280.510, which allow requestors to appeal a denial of records, tolls the one-year statute of limitations set forth in RCW 42.56.550(6). Opening Brief at 19–24. Neither the WAC nor the policy make seeking administrative review mandatory. Additionally, the language contained in WAC 137-080-140 mirrors the language in RCW 42.56.520 which states that “review will be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action . . . for the purposes of judicial review.” RCW 42.56.520; WAC 137-080-140. Further, Department policy merely states that if a “requestor disagrees with a decision to deny [a] request, in whole or in part, s/he *may* appeal to the Department Appeals Officer for Review. . . . Any further appeal will be made to the Superior Court per RCW 42.56.” CP 107–108 (Department Policy 280.510 (VI)(A – B)).

The language of the WAC and policy, read in concert with RCW 42.56.550(6), provides that if a requestor submits a voluntary administrative appeal of a denial to an agency, whether the agency

responds within two days or not, the denial becomes final and the statute of limitations begins to run, at the latest, two days after the initial denial. RCW 42.56.520; RCW 42.56.550(6); WAC 137-080-140. This reading comports with the Court's mandate that when interpreting the PRA, courts are to read the statute as a whole, carrying out the clear and unambiguous terms. *Ockerman v. King County Dept of Dev. & Envt'l Servs.*, 102 Wn. App. 212, 216, 6 P.3d 1214 (2000).

Mr. Greenhalgh asks this Court to ignore the unambiguous language in the PRA and WAC. *See* RCW 42.56.520; RCW 42.56.550(6); WAC 137-080-140. Mr. Greenhalgh asks this Court to instead read the language as allowing requestors to toll the statute of limitations by filing a voluntary administrative appeal of a denial of records any time the requestor chooses (in this case over three months after the first denial of records). *See* Opening Brief at 19–24. Not only does this reading render the language in RCW 42.56.550(6) superfluous, it also creates absurd results, both of which are frowned on by the courts. *See Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 260, 884 P.2d 592 (1994); *Limstrom v. Ladenburg*, 98 Wn. App. 612, 617, 989 P.2d 1257 (1999).

Mr. Greenhalgh's misinterpretation of the RCW, WAC and policy would allow a requestor to file a voluntary administrative appeal

of a denial anytime within a year of the denial, wait for the agency to respond and then file a lawsuit alleging a PRA violation and seeking penalties back to the date of the original denial. Not only does this reading strip RCW 42.56.550(6) of any meaning, it provides requestors a mechanism for manipulating the statute of limitations, an outcome consistently rejected by the courts. *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). Statutes of limitations are strictly applied, and this Court should be 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.3d 265 (2004); *Janicki*, 109 Wn. App. at 662. The legislature has not articulated an exemption to RCW 42.56.550; thus, Mr. Greenhalgh's claims were properly dismissed and the lower court's ruling should be affirmed.

D. If Mr. Greenhalgh's Action Is Not Time-Barred, This Case Should Be Remanded For Determination On The Merits

In the event the Court finds that Mr. Greenhalgh's claims were filed within the statute of limitations, this case should be remanded to the lower court to establish a record regarding the merits of this case.

Pursuant to RCW 42.56.565(1), a court shall not award penalties to a person serving a criminal sentence on the date his request was made, unless the court finds the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record. RCW 42.56.565(1). There is no question that Mr. Greenhalgh was a person serving a criminal sentence on the date the request was made. CP 17–18. However, because the Court dismissed this case on procedural grounds the record is insufficient to determine whether the Department’s response to Mr. Greenhalgh’s public record requests amounted to bad faith. *See* RCW 42.56.565; CP 133–134.

In his opening brief Mr. Greenhalgh argues that he is entitled to the maximum statutory penalties, and argues bad faith solely based on his continued assertion that the documents existed and that the author of a letter created in 1996 did not recall that she had authored a letter when she responded to an appeal in 2007. Opening Brief at 30–31. There has been no ruling from any court on the merits of this argument. Additionally, Mr. Greenhalgh’s assertions are insufficient to establish bad faith, and Mr. Greenhalgh fails to address the application of RCW 42.56.565(1) to this case. *See* Opening Brief at 24–33. Nor did the Department address the issue of bad faith in the lower court as the case was dismissed on procedural grounds. *See* RCW 42.56.565; CP 133–134. Therefore, the

record is insufficient on this matter and the Court should remand this matter back to the lower court should the Court determine that the statute of limitations did not apply.

E. Mr. Greenhalgh Is Not A Prevailing Party Under The PRA And Therefore Is Not Entitled To Attorney Fees And Costs

Mr. Greenhalgh requests attorney fees and costs be awarded to him pursuant to RCW 42.56.550(4) and RAP 18.1. Opening Brief at 33-34.

The attorney fees section of the PRA provides in pertinent part:

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

RCW 42.56.550(4). However, Mr. Greenhalgh has not prevailed against the Department in an action seeking to inspect or copy a public record or receive a response to a request under RCW 42.56.550. Therefore, he is not entitled to statutory attorney fees under the PRA

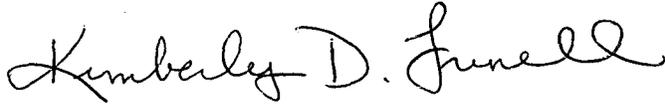
Similarly, Mr. Greenhalgh is not entitled to recovery for attorney fees on appeal. Pursuant to RAP 18.1(a) a party may be entitled to attorney fees if the applicable law grants him the right to recover on review. The PRA makes no mention of awarding of attorney fees on review. Rather it refers to the awarding of attorney fees at the lower court level, fees to which Mr. Greenhalgh is not entitled. As a result, he is not entitled to attorney fees for this appeal.

VI. CONCLUSION

For the foregoing reasons, the Department respectfully requests that Mr. Greenhalgh's appeal be denied and that the lower court's orders be affirmed.

RESPECTFULLY SUBMITTED this 14th day of September, 2011.

ROBERT M. MCKENNA
Attorney General



KIMBERLY D. FRINELL, WSBA #31451
Assistant Attorney General
Attorney General's Office
Corrections Division
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445
KimberlyF1@atg.wa.gov

FILED
COURT OF APPEALS
DIVISION II

11 SEP 15 PM 12:47

CERTIFICATE OF SERVICE

STATE OF WASHINGTON
BY DM
DEPUTY

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

- US Mail Postage Prepaid
- United Parcel Service, Next Day Air
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by _____

TO:

MICHAEL C KAHRS
KAHRS LAW FIRM
5215 BALLARD AVENUE NW SUITE 2
SEATTLE WA 98107

EXECUTED this 14th day of September, 2011, at Olympia,

Washington.

Dawn Walker
DAWN WALKER
Legal Assistant