

No. 47079-9-II

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

JAMES J. WHITE,

Appellant,

vs.

CITY OF LAKEWOOD,

Respondent.

BRIEF OF RESPONDENT, CITY OF LAKEWOOD

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I. INTRODUCTION

Although it has been regarded as a broad mandate for the full and fair production of records, the Washington Public Records Act (“PRA”), chapter 42.56 RCW, is not without its limits. While the PRA places the primary responsibility for compliance upon the agency, an agency necessarily cannot do its job without some degree of effective communication from the requestor. And, when the requestor is silent for a year since the agency believed that its responses were fully compliant with the PRA, such a claim is not only time-barred, but if proper, support an award of penalties on the low end of the \$0-\$100 per day penalty scale which the PRA now provides.

In this case, the City of Lakewood suffered an adverse decision from this Court in an unrelated PRA case on September 4, 2013. Mr. White, an attorney, retained counsel of his own the next day to pursue claims relative to three PRA requests dating to mid-late 2012. He filed suit on September 6, 2013. Two of the three requests had been responded to by September 5, 2012 – one day past the applicable statute of limitations. Mr. White acknowledges that, until suit was filed, he made no attempts to voice any dissatisfaction with Lakewood’s prior handling of his three PRA requests.

On cross-motions, the Pierce County Superior Court properly found that two of the three requests were subject to the one-year statute of limitation set forth in RCW 42.56.550(6). As to the third request, it also properly applied the factors set forth by case law and imposed a per-day penalty of \$10/day. The decision below should be affirmed in full.

II. RESTATEMENT OF FACTS

A. The Underlying Search Warrant.

On May 18, 2012, Officer Shawn Noble of the Lakewood Police Department applied to Pierce County Superior Court Judge Kathleen Stolz for a warrant to search a residence in the City of Lakewood. (CP 43-46). According to the affidavit in support of the warrant, in mid-May 2012, a confidential informant conducted two controlled buys of cocaine from individuals residing in an address on San Francisco Avenue, in Lakewood. Id.

The warrant was served on May 24, 2012. (CP 47). The search turned up a few grams of marijuana, a few glass pipes and approximately \$250 in currency. (CP 48). The residents of the property were not charged with crimes arising from the execution of the warrant. (CP 400, Findings of Fact (FF) 2.3). No further direct investigation of this location has been made. Id.

In Spring 2012, Plaintiff White was asked to investigate whether the Lakewood Police had violated the rights of the residents at the San Francisco Avenue address. (CP 299)¹. As part of his investigation, Mr. White submitted a total of three public records act requests into this incident. Those requests and Lakewood's responses are detailed below.²

B. Request No. 1 – the June 27, 2012 Request.

On June 27, 2012 Mr. White submitted the following request:

Case #'s 12-145-0155/12-145-0156
-- would like to view any documents pertaining to search warrant for the property located at 5314 San Francisco Ave. SW # 1 & any lists or inventory of items recovered (May 18, 2012).

By letter dated July 3, 2012 this request was denied. Lakewood asserted claims of exemption under RCW 10.97.070(2) and RCW 42.56.240 and advised Mr. White that the investigation was on-going and that the release of records could interfere with the investigation.

C. Request No. 2 – the July 24, 2012 Request.

On July 24, 2012, Mr. White made a second PRA request from the City of Lakewood as follows:

This is an on-going request.
Case #'s 12-145-0155/12-145-0156

¹ The trial court's findings of fact state that the date was in June 2012 (CP 400, ¶ 2.4); while Mr. White's declaration gives the date as late May or early June 2012. (CP 299, ¶ 3). The actual month is immaterial to the discussion.

² Except where a specific Clerk's Paper cite is given, the discussion in the following paragraphs is taken near-verbatim from the trial court's findings of fact. (CP 401-402).

-- would like to view any documents/emails/communications/reports pertaining to search of 5314 San Francisco Ave. SW # 1 & any lists or inventory of items recovered. (May 18, 2012).

By letter dated September 5, 2012, Lakewood produced two documents. It is disputed when this letter and the attached documents were placed in the mail. Regardless, Mr. White received this letter on either Friday, September 7, 2012 or Monday, September 10, 2012.

D. Request No. 3 – the September 24, 2012 Request.

On September 24, 2012, Mr. White made a third request for public records of the City of Lakewood seeking the following:

This is an ongoing request. Case #'s 12-145-0155/12-145-0156

-- Would like to view search warrants/information/documents provided to Judge Stolz.
-- location 5314 San Francisco Ave. SW # 1

This request was denied by letter dated October 2, 2012. As with the first request, Lakewood asserted claims of exemption under RCW 10.97.070(2) and RCW 42.56.240 and advised Mr. White that the investigation was on-going and that the release of records could interfere with the investigation.

All three requests were closed by letters. Each advised Mr. White that he could contact the City and supplied a phone number for such contact. (CP 68, 74, 108). But, according to Mr. White, for the next year,

his communications were limited to “the initial making of the public records requests at issue, [and] receiving the responses to those requests.” (CP 340; Answer to Interrogatory No. 9).

E. Mr. White Files Suit.

On September 4, 2013, this Court issued a decision in a separate PRA case involving Lakewood, *City of Lakewood v. Koenig*, 176 Wn. App. 397, 309 P.3d 610 (2013) *aff'd*, 182 Wn.2d 87, 343 P.3d 335 (2014).³ Mr. White hired counsel the next day (September 5, 2013). (CP 301, ¶ 12). Suit was commenced the following day (September 6, 2013). (CP 301, ¶ 12).

After suit was filed, Lakewood undertook a review of its productions. It made two subsequent disclosures in September and October 2013. (CP 40, 32 (noting October date)).

In November 2014, the Pierce County Superior Court heard cross-motions on this case. Mr. White sought a show cause order against Lakewood, while Lakewood sought dismissal. In response to the parties’ motions, the superior court (1) dismissed all claims arising from the first two PRA requests; and (2) imposed per day penalties against Lakewood in the amount of \$10/day. (CP 405-407). This appeal follows. (CP 408).

³ *Koenig* was expressly referenced in the Complaint. (CP 5, ¶ 24).

III. ARGUMENT

At primary issue in this case is a one-sentence statute which reads in full,

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).

This court reviews agency actions under the PRA and questions of statutory interpretation de novo. *Neigh. Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011). Applying de novo review, the Pierce County Superior Court properly dismissed two of the three PRA claims asserted by Mr. White as barred under the one year statute of limitations contained in RCW 42.56.550(6). With respect to the third claim, the trial court properly weighted the factors contained in *Yousoufian v. Office of Ron Sims, King County Executive*, 168 Wn.2d 444, 229 P.3d 735 (2010) (“*Yousoufian V*”), and properly determined that only two of those factors merited extended discussion.

The trial court's decision should be affirmed in all respects.⁴

Accordingly, Mr. White should also be denied his attorney fees.

⁴ Before the trial court, Mr. White asserted a claim that Lakewood destroyed records, violating RCW 42.56.100, thereby entitling him to relief. (CP 6, ¶¶ 27-29). This claim was dismissed and Mr. White does not appeal the dismissal of that claim on appeal.

A. The Statute of Limitations Bars the First and Second Requests.

Under RCW 42.56.550(6), actions under the PRA “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). In this case, two of the three requests forming the basis of this action are time-barred under a plain reading of RCW 42.56.550(6). Specifically, the June 27, 2012 request is barred under the first clause of RCW 42.56.550(6)(claim of exemption). The July 24, 2012 request is principally barred under the second clause (production of records on partial or installment basis).

Upon receiving a public records request, RCW 42.56.520 outlines the three options an agency possesses:

Within five business days of receiving a public record request, an agency, must respond by either (1) providing the record; (2) acknowledging that the agency, has received the request and providing a reasonable estimate of the time the agency, will require to respond to the request; or (3) denying the public record request.

The first of these requests were denied on the overarching ground that there was an on-going criminal investigation, and thus exempt pursuant to RCW 42.56.240. The second, identified that materials were redacted. Both informed Mr. White that his “request for public records

will be considered closed unless [he] respond[s] to the contrary.” Mr. White did not respond.

In this case, Lakewood’s explanation provided Mr. White with sufficient information to make a threshold determination about the City’s exemption and if he had a cause of action under the PRA. And, under a plain reading of RCW 42.56.550(6) where the records are either exempt or the requester was notified that the request was considered closed, both are clearly time-barred.

1. Claims Arising From the June 27th Request Were Properly Dismissed Because Lakewood’s Claims of Exemption Were Sufficient to Trigger the Statute of Limitations.

Mr. White’s June 26th request was denied under RCW 10.97.070(2) and RCW 42.56.240. Mr. White complains that Lakewood’s logs “d[o] not identify what records were being withheld or how the statutory exemptions might apply to the withheld records.” (Br. of Appellant at p. 18). But given the nature of the claim of this latter exemption, this reasoning is flawed.

Under RCW 42.56.240, an agency may exempt from public disclosure certain intelligence information and investigative records compiled by investigative and law enforcement agencies, the nondisclosure of which is essential to effective law enforcement or for the

protection of any person's right to privacy. However, this latter exemption provides “a broad categorical exemption from disclosure of all information contained in an open active police investigation file...” *Newman v. King County*, 133 Wn.2d 565, 575, 947 P.2d 712 (1997)(emphasis added). The scope of records included in this exemption extends to publicly available documents, such as newspaper articles, “placed in the investigation file satisfy the requirement that the information is compiled by law enforcement.” *Id.*, 133 Wn.2d at 573

Recently, in *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 243 P.3d 919 (2010), the Washington Supreme Court summarized that “the investigative records exemption provides a blanket exemption.” *Id.*, 170 Wn.2d at 593. Furthermore, the Court went on to observe that this “exemption was necessarily categorical in that instance because the decision as to what information may or may not compromise an open investigation is best left to law enforcement, rather than a court reviewing records in chambers.” *Id.*

Having invoked RCW 42.56.240 for withholding the June 26th request, given the nature of the exemption, there is no information which is producible. The request sought records pertaining to the search warrant. Although Mr. White seeks an identification of what records were being withheld or how the statutory exemptions applied, under *Newman* and

Serko, no such explanation would have been possible given that the exemption applies to all records compiled as a result of the investigation.

The superior court properly dismissed this claim on statute of limitations grounds.

2. Claims Arising From the July 24th Request Were Properly Dismissed Because Over a Year Had Passed Since Lakewood's Last Production of Records on a Partial or Installment Basis.

Entirely unaddressed by Mr. White is the fact that the trial court asserted an independent ground for the dismissal of the July 24th request.

In its Conclusions of Law, it noted,

Mr. White's claims arising from the June 27, 2012 and July 24, 2012 PRA requests are time-barred by operation of RCW 42.56.550(6). In both instances, the City made either a claim of exemption or made a single production of records triggering the commencement of the statute of limitations, on July 3, 2012 and September 5, 2012 respectively.

(CP 402; Concl. of Law ¶ 3.2)(Emphasis added).

Mr. White neither assigns error, identifies as an issue, nor dedicates any appreciable briefing to the trial court's determination that Lakewood "made a single production of records," on September 5, 2012, thereby triggering the statute of limitations, rendering his September 6, 2013 filing one day too late. What he seeks to do is rewrite the statute such that the statute is triggered, when the agency's correspondence is

either mailed or the requestor receives the mailing. This interpretation is not borne out by the statute.

When interpreting a statute, it is a court's duty to give effect to the plain language of a statute. An unambiguous statute requires no judicial interpretation. *Western Telepage v. City of Tacoma*, 140 Wn.2d 599, 608, 998 P.2d 884 (2000). A court cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). An appellate court assumes the legislature means exactly what it says. *Id.*, 148 Wn.2d at 727.

RCW 42.56.550(6) is unambiguous as to what is necessary to trigger the statute of limitations.⁵ Actions under the PRA “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). Here, the unambiguous language of RCW 42.56.550(6) focuses on the agency's conduct, not the requestor's. In other words, the focus is agency-centric, not requestor-centric. Lakewood's denials of these two requests via letters which predate the one-year filing of the filing of this lawsuit render this

⁵ Division I of this Court has determined that some of the language in RCW 42.56.550(6) is “somewhat ambiguous.” *Tobin v. Worden*, 156 Wn. App. 507, 513, 233 P.3d 906 (2010). If a statute is “somewhat ambiguous,” it likely follows that it is mostly unambiguous. In *Bartz v. Dep't of Corr. Pub. Disclosure Unit*, 173 Wn. App. 522, 538, 297 P.3d 737 (2013), this Division expressly disagreed with portions of *Tobin*. Whether this disagreement extends to this quoted language is not entirely clear.

litigation untimely. Claims based on these two requests are therefore untimely.

Jurisprudence from this Court confirms this outcome. This Court has already recognized that under RCW 42.56.550(6), “[t]he PRA's one-year statute of limitations is clearly triggered by either 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.’” *Greenhalgh v. Dep't of Corr.*, 170 Wn. App. 137, 147, 282 P.3d 1175 (2012)(quoting, *Tobin v. Worden*, 156 Wn. App. 507, 513, 233 P.3d 906 (2010); RCW 42.56.550(6))(Emphasis added). The date of the agency’s correspondence is appropriately used in determining when the statute of limitations is triggered. *Greenhalgh*, 170 Wn. App. at 147. “The legislature intended that the PRA's one-year statute of limitations would apply to PRA requests completed by an agency's single production of records.” *Bartz v. Dep't of Corr. Pub. Disclosure Unit*, 173 Wn. App. 522, 538, 297 P.3d 737 (2013).

Although Mr. White does not assign error to it, and such a claim should otherwise be barred, multiple sources throughout the record confirm the trial court’s determination that September 5, 2012 is the date of Lakewood’s last production of a record on a partial or installment basis. The assigned paralegal assigned to the case prepared the letter dated the 5th. That paralegal, Elvira Gorash, testified in her deposition that she was

unaware of what time that day on September 5th it would have gone out in the mail, or even if it would have been actually mailed the following day. (CP 243-44). Mr. White seemingly assails her testimony, but he never meaningfully rebuts it. It should be further highlighted that in 2012 -- the year of his requests -- Lakewood received over a thousand PRA requests. (CP 346). By mid-November 2014 – when the motions at issue were heard, Lakewood has received nearly 1500 requests, with approximately 250 open requests in various stages of processing. (CP 346). That a single routine letter from a single request would stand out defies common sense.

Outside of the PRA context, this Court has already rejected such a stringent rule of the sort advocated by Mr. White. In *Wash. Fed. Sav. v. Klein*, 177 Wn. App. 22, 311 P.3d 53 (2013), Division I of this Court rejected a challenge to the sufficiency of mailing of a notice to creditors. The legal assistant to the personal representative swore in an affidavit that she “have given, or caused to have given,” the notice. *Id.* 177 Wn. App. at 25. Division I rebutted the parade of horrors asserted by a creditor whose creditor’s claim was rejected as untimely,

To prove mailing in accordance with [the statute], if it is not enough for a legal assistant to say that she “caused” actual notice to be given by mailing, then what is enough? Must she say that she personally took the document to the mail room? Or that she personally put it on the mail truck

or in an official postbox? No. The familiar standard of “reasonably calculated to apprise” encompasses the remote possibility that any one of these links may break down in a given case. The office messenger may drop the envelope into the dustbin on the way to the mail room, the wind may blow it off the truck into the street, or a careless postal employee may direct it to the dead letter office. The fact that mailed notice satisfies due process reflects a judgment that such mistakes are very rare.

177 Wn. App. at 31.

In the PRA context, an agency may discharge its obligation to make a record available to a requestor in a number of manners. At no cost to a requestor, the records shall be “available for inspection and copying during the customary office hours of the agency.” RCW 42.56.090; RCW 42.56.120. Similarly, an agency may, upon appropriate payment for the cost of reproduction of copies, mail or otherwise transmit the records to the requestor. RCW 42.56.120; *American Civil Liberties Union of Washington v. Blaine School District No. 503*, 86 Wn. App. 688, 937 P.2d 1176 (1997). An agency may likewise communicate its response in a number of ways, be it telephonic, electronically, or as here, using the US Mail.

By advocating for a different approach, Mr. White seemingly suggests that this Court read into RCW 42.56.550(6) a “discovery rule,” or a rule that the governing date is when the requestor receives the records.

This Court should reject this approach both as a legal and as a factual matter.

Statutes of limitations are intended to promote finality. *Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 382, 166 P.3d 662 (2007)(citation omitted). “The statute of limitations is not a defense to the merits of the cause of action; it is a procedural rule enacted and applied to prevent fraud and error and to promote the speedy settlement of disputes.” *Evans v. Yakima Valley Grape Growers Assoc.*, 52 Wn.2d 634, 641, 328 P.2d 671 (1958). “The statute of limitations is ‘a legislative declaration of public policy which the courts can do no less than respect.’” *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 651, 310 P.3d 804 (2013) (quoting *JM Arthur & Co. v. Burke*, 83 Wash. 690, 693, 145 P. 974 (1915)). The courts are “reluctant to apply exceptions to legislative time limits.” *In re Bonds*, 165 Wn.2d 135, 143, 196 P.3d 672 (2008). Despite the strong focus on the agency’s acts under RCW 42.56.550(6), Mr. White requests that this Court rewrite the statute to effectively make it requestor-centric or make the date of receipt. Given the statutory language, together with other contexts in which the date an act is performed results in a subsequent trigger, this approach is untenable.

“[C]ourts will not, as a general rule, read into statutes of limitations an exception which has not been embodied therein, however

reasonable such an exception may seem, even though the exception would be an equitable one.” *O’Neil v. Estate of Murtha*, 89 Wn.App. 67, 74, 947 P.2d 1252 (1997). The creation of a discovery rule will not apply in every case. *Id.* The PRA contains a cause of action created by statute. If the legislature had intended for a different trigger date to be applied, it was capable of incorporating one into the PRA itself. It, however, has chosen not to. Indeed, this Court has already recognized that, “[i]t would also be absurd to conclude that the legislature intended to create a more lenient statute of limitations for one category of PRA requests in light of its 2005 deliberate and significant shortening of the time for filing a claim from five years, under the old public disclosure act, to one year, under the PRA.” *Bartz*, 173 Wn. App. at 537.

Lakewood’s approach is consistent with other approaches which the courts have used for other cases. As an example, for making certain court filings, “it is not the responsibility of the court or the remaining parties to notify the dismissed party of entry of final judgment; he or she must conduct his or her own monitoring.” *Doolittle v. Small Tribes, Inc.*, 94 Wn. App. 126, 139, 971 P.2d 545 (1999). Subject to certain limitations, in breach of contract cases, the statute of limitations is triggered upon breach, rather than upon discovery of a breach. *See, 1000 Virginia Ltd. P’ship v. Vertecs*, 158 Wn.2d 566, 146 P.3d 423 (2006).

And, where authorized, a number of rules and statutes provide that service of original service of process is deemed complete upon mailing. *Jones v. Stebbins*, 122 Wn.2d 471, 860 P.2d 1009 (1993); *Diehl v. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 213, 103 P.3d 193 (2004)(discussing actions under Administrative Procedures Act).

Lakewood's approach also serves to create a bright-line rule for agencies and requestors alike. Upon receipt of a request, if not shortly thereafter, the requestor will know if there is a probable PRA violation which may give rise to suit, or to work with an agency to secure any additional responsive documents. *See e.g., Hobbs v. Wash. State Auditor's Office*, 183 Wn. App. 925, 941 fn. 12, 335 P.3d 1004 (2014).

The fundamental goal of the PRA, as expressed by the PRA itself; "The people insist on remaining informed so that they may maintain control over the instruments that they have created." RCW 42.56.030. As Lakewood noted before the trial court, the goal of the PRA is to ensure access to the records, while penalties, fees and costs language in RCW 42.56.550(4) serve as the means to that end. When these roles become reversed, and these financial outlays become the end-of-the-day goal while the records become means to that end, transparency is not fostered. "[T]he purpose of the PRA is best served by communication between agencies

and requestors, not by playing ‘gotcha’ with litigation.” *Hobbs*, 183 Wn.App. at 941 fn. 12.

The primary cases upon which Mr. White relies, *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009)(“*RHA*”) and *Johnson v. Dep't of Corr.*, 164 Wn. App. 769, 265 P.3d 216 (2011) are both unhelpful and distinguishable.

In *RHA*, an association of rental housing owners sought records from the City of Des Moines relating to its crime free rental housing program. Des Moines’ response consisted of a series of correspondence, but relevant here, the city withheld a number of records, and failed to identify what may have been withheld. The association sued, and on summary judgment, the case was dismissed under the one-year statute of limitations contained in RCW 42.56.550(6).

The Court began its analysis of RCW 42.56.550(6) by noting, “[t]he key issue then is when a ‘claim of exemption’ under RCW 42.56.550(6) is effectively made.” *RHA*, 165 Wn.2d at 537. After tracing its precedent, the Court concluded that “a valid claim of exemption under the PRA should include the sort of ‘identifying information’ a privilege log provides. Indeed, RCW 42.56.210(3) requires identification of a specific exemption and an explanation of how it applies to the individual agency record.” *RHA*, 165 Wn.2d at 538 (internal citation omitted). The

Court ultimately held that the exemption log insufficient because the city did not adequately describe individually the withheld records by stating the type of record withheld, date, number of pages, and author/recipient or explain which individual exemption applied to which individual record rather than generally asserting the exemption. *Id.*, 165 Wn.2d at 539-540.

RHA is unhelpful because, as noted above, RCW 42.56.550(6) contains two triggers for the one year statute of limitations: the claim of an exemption or the last production of a record on a partial or installment basis. *Greenhalgh*, 170 Wn. App. at 147. *RHA* addresses only one of these triggers, i.e., the claim of exemption. It does not address the other trigger, i.e., the last production on an installment basis. Nor, does it appear, as argued by the parties that resolution of this clause was necessary to the disposition of *RHA*. Put simply: *RHA* did not address the situation faced in this case.

In *Johnson*, this Court considered which one of three possible limitation periods could apply: the one year statute of limitations contained in RCW 42.56.550(6); the two year “catch-all” statute of limitations contained in RCW 4.16.130; or whether the statute of limitations had yet to be triggered. Without deciding which one of the three limitation periods applied, this Court wrote,

The latest possible date on which Johnson's single-document action accrued was September 3, 2007, which was (1) one week after the date of Schave's August 27, 2007 letter to Johnson explaining that there were no other documents; and (2) the reasonable time by which Johnson should have received that letter.

164 Wn.App. at 778-779 (Emphasis added).

Johnson predates both *Bantz* and *Greenlaugh*, is supported by no legal analysis or citation to authority and should be treated, at best, as dicta. *See e.g., State v. Watkins*, 61 Wn. App. 552, 559, 811 P.2d 953 (1991)(noting, that a statement is dicta when “unsupported by legal analysis, and thus has no precedential or persuasive value.”). Ultimately, however, the Court also determined that the requestor’s claim was barred regardless of which statute of limitations applied. *Id.* It was therefore unnecessary to engage in any analysis of RCW 42.56.550(6).

If, as Mr. White claims, an agency may be induced to improperly withhold notification to a requestor of any claims of exemption, a requestor is not without a remedy. Our Supreme Court has recognized that equitable doctrines may be applicable in PRA cases. *Yousoufian v. King County Executive*, 152 Wn.2d 421, 438, 98 P.3d 463 (2004)(“*Yousoufian II*”)(use of laches in statute of limitations context). One such doctrine which may be applicable (and which Mr. White does not assert) is that of equitable tolling. Equitable tolling is allowed only

“when justice requires.” *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). “The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff.” *Id.*

In an appropriate case, these factors may be met. The best evidence supporting any such claim will presumably be the post-marked envelope by which the agency’s correspondence is sent to the requestor – and such envelope will be in the exclusive possession of the requestor. If a requestor can point to a significant delay between the date of the agency letter and when the correspondence was mailed, in an appropriate case, the requestor may be entitled to tolling.

But while Mr. White does not advance a tolling argument, his arguments and the development of the factual record underscore the need to confirm that RCW 42.56.550(6) provides a bright-line rule based on the date of the agency action. Here, Mr. White never produced any such postmarked envelope which would have been in his sole possession and could have shed considerable light on the veracity of Ms. Gorash’s testimony, thereby rebutting it. As our Supreme Court recognized,

[W]here relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which

the finder of fact may draw is that such evidence would be unfavorable to him.

Pier 67, Inc. v. King County, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977).

Although Mr. White advances a number of legal arguments why the statute of limitations should otherwise be extended, he fails to set forth an adequate factual claim to rebut the trial court's determination. This, particularly in light of the fact that he would have had sole possession of the date upon which the records were postmarked is appropriately construed against him.

As the trial court's determination reflects, on September 5, 2012, Lakewood made either a production of records or claim of exemption. Mr. White acknowledges receiving these materials on either Friday, September 7, 2012, or Monday, September 10, 2012. This timeframe is fully consistent with the City's production of records on September 5, 2012. It is also consistent with RCW 42.56.550(6)'s requirement that a claim is barred unless brought within one year of the agency's production of records on a partial or full basis. The trial court should be affirmed.

B. Mr. White Is Not Entitled to Further Relief as to the First and Second Requests.

While the statute of limitations ought to bar any further consideration of the first and second requests, in the event that this Court reaches the issue, Mr. White is not entitled to further relief from this

Court. At best, any relief should be effectuated via a remand to superior court.

In this case, Lakewood argued – but the superior court did not reach – the issue that the requests were necessarily overbroad and that certain classes of documents which he now identifies could not have been identified within the original requests themselves. Because an appellate court “may affirm on any basis supported by the record, whether or not the trial court considered that basis,” *Amy v. Kmart of Wash., LLC*, 153 Wn. App. 846, 868, 223 P.3d 1247 (2009); should it be reached, this court should affirm the dismissal of these claims on the alternative ground raised in the trial court that these requests did not reach the sort of records which Mr. White post-suit now claims he sought, but were not produced.

As this Court recently reiterated, Washington case law requires that “[a] request under the PRA must be for an ‘*identifiable public record.*’” *Belenski v. Jefferson County*, --- Wn. App. ---, ¶ 34, 2015 Wash. App. LEXIS 1049, *19 (May 19, 2015⁶)(quoting, *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447-48, 90 P.3d 26 (2004))(emphasis by the *Belenski* Court). A requestor must “identify the documents with reasonable clarity to allow the agency to locate them.” *Belenski*, --- Wn. App. at ¶ 34 (quoting *Hangartner*, 151 Wn.2d at 447).

⁶ *Belenski* was decided several days after the filing of Mr. White’s opening brief.

In this vein, Mr. White sought with his first request, “any documents” and in his second request, “any documents/emails/communications/reports pertaining” to the search of the subject property. But, as this Court has already held, such requests are not requests for identifiable public records. *Wood v. Lowe*, 102 Wn. App. 872, 879, 10 P.3d 494 (2000). This is so because these requests “lack[] any meaningful description helpful for the person charged with finding the record.” *Id.* (citing, *Bonamy v. City of Seattle*, 92 Wn. App. 403, 411, 409, 960 P.2d 447 (1998)). Apropos to the case at bar, and as the *Wood* Court observed,

Here, Ms. Wood requested three things: (1) a copy of her personnel file; and (2) "any other information" or (3) "documentation" related to Ms. Wood's employment or the prosecutor's office generally. We can quickly dispose of the second and third requests.

First, Ms. Wood's request for "information" is not a request for an "identifiable public record." *Bonamy*, 92 Wn. App. at 411-12. Second, her request for "documentation" lacks any meaningful description helpful for the person charged with finding the record. See *Bonamy*, 92 Wn. App. at 411 (reasoning request "for general policy guidelines" too broad). Consequently, both requests fall outside the scope of the PDA and thus do not require a five-day response under RCW 42.17.320. *Bonamy*, 92 Wn. App. at 412.

102 Wn. App. at 879.

These two requests simply seek “documents pertaining to,” the search of the property at issue. As in *Wood*, this request lacks any

meaningful description which is helpful for the person charged with finding the record. What would be meaningfully ascertained is that police reports pertaining to the execution of the warrant were responsive and were produced. If there was an issue with Lakewood's interpretation of his request, Mr. White had ample time to discuss this matter with the City. For reasons known only to him, he decided to remain silent and not communicate his concerns to the City until he filed suit.

To claim that there should have been additional materials, in light of his overbroad request, is contrary to the holdings of *Wood*. If Mr. White had wanted, for example, the confidential informant files, he should have specifically requested these files (and using this example, the City would have likely claimed this file as exempt under RCW 42.56.240). Indeed, Mr. White's third PRA request for the search warrant records seemingly confirms that he was capable of identifying with specificity what specific records he sought. But such delay on Mr. White's part also thwarts the purpose of the PRA. *Hobbs*, 183 Wn.App. at 941 fn. 12.

Even if Mr. White is successful in overturning the trial court's determination that the statute of limitations does not bar either the first of his two requests and this Court believes that he may be entitled to some relief, he is not necessarily entitled to his desired remedy of a remand for an order directing production of records. The presumptive remedy in this

circumstance “is to remand to the trial court to make specific findings under the proper legal analysis and provide a suitable remedy.” *Zink v. City of Mesa*, 140 Wn. App. 328, 340, 166 P.3d 738 (2007)(citing, *Dawson v. Daly*, 120 Wn.2d 782, 792, 845 P.2d 995 (1993)).

The *Zink* guidance is particularly applicable here, given the nature of the language of these requests, and that there was post-litigation production. While this Court can – and should – affirm on any basis in the record, to the extent that a reversal may be warranted the scope of the reversal should be narrow. As the *Zink* court noted, the remedy is to,

direct the trial court to decide, in those instances in which the City denied the request, whether the record is exempt from disclosure or the City's conduct is otherwise excused under the P[R]A. Where the court's findings show a violation of the P[R]A, we leave it to the sound discretion of the trial court to impose appropriate penalties, costs, and attorney fees.

140 Wn. App. at 340-341.

Here, Lakewood produced responsive records to these three requests on September 23, 2013. (CP 402, Findings of Fact ¶ 2.14; *see also* CP 33 (acknowledging production dates)). Given the statute of limitations issues discussed above, the trial court expressly declined to determine whether Lakewood's subsequent production would have satisfied these requests. If a remand is appropriate, the trial court should decide in the first instance, consistent with *Zink*, whether any of the

records are exempt, or Lakewood's conduct otherwise excused under the PRA.

C. The Trial Court Properly Assessed a \$10/Day Penalty.

Under RCW 42.56.550(4), "it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record."

An appellate court reviews a trial court's determination of appropriate daily penalties for an abuse of discretion. *Yousoufian V*, 168 Wn.2d at 458 (citation omitted). An abuse of discretion occurs when the trial court's decision is manifestly unreasonable or based on untenable grounds or reasons. *Yousoufian V*, 168 Wn.2d at 458-59. A trial court's decision is manifestly unreasonable if it adopts a view that no reasonable person would take despite applying the correct legal standard to the supported facts. *Yousoufian V*, 168 Wn.2d at 458-59 (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

In *Yousoufian V*, our Supreme Court explained, "depending upon the circumstances of a case, it may be within a trial court's discretion to begin a penalty determination at the minimum daily penalty amount[.]" 168 Wn.2d at 467 fn. 9. Thus, under RCW 42.56.550(4), the range of

penalties is from zero to one-hundred dollars a day. Evaluating these factors, the trial court properly assessed a \$10/day penalty.

The *Yousoufian V* Court expressly recognized that the multifactor analysis which it set forth,

We emphasize that the factors may overlap, are offered only as guidance, may not apply equally or at all in every case, and are not an exclusive list of appropriate considerations. Additionally, no one factor should control. These factors should not infringe upon the considerable discretion of trial courts to determine PRA penalties.

168 Wn.2d at 468.

In this case, the trial court's conclusions of law stated that it looked at all of the factors raised by the parties. (CP 404, Concl. of Law ¶ 3.6). It, however, only determined that two merited attention. As allowed by *Yousoufian*, it evaluated the agency's negligence, which is viewed as the dominant aggravating factor. The trial court handwrote into its Findings and Conclusions that it viewed Lakewood's "negligence as simple and not gross or egregious." (CP 403, Concl. of Law ¶ 3.5).

The trial court also appropriately recognized that Lakewood's acts were mitigated by its explanation for non-compliance. *Id.* As it separately detailed, upon receipt, each request was reviewed by the Lakewood Police Department, where an individual would conduct a computer inquiry detailing the status of the investigation. In this case, each search reflected

that the investigation was “active,” and this response was reported to those handling the PRA requests. (CP 402, Findings of Fact ¶ 2.11). The trial court recognized that had Lakewood conducted a separate inquiry, it is likely that the request would not have been denied. (CP 403, Concl. of Law ¶ 3.5).

Mr. White complains that the trial court should have increased the penalty due to what, he claims, is his alleged economic loss, lack of training and how a “meager penalty,” should be directed to a “frequent PRA violator.” (Appellant Br. at p. 33). In his moving materials, he claimed a number of aggravators were appropriate. (CP 29-30). The only ones which may have been arguably preserved for appellate review relate to training and economic loss.

Even if considered by this Court, each of these items was either addressed by the trial court or otherwise not supported by the record. For example, Mr. White argued that he allegedly lost a client as a result of Lakewood’s PRA responses. (VRP 24). But it is equally plausible that Mr. White lost a client because he failed to act diligently in meeting the client’s needs. Nevertheless, as the following colloquy reveals, the trial court acknowledged the argument,

[Mr. White’s attorney]: ... It's because of this Mr. White wasn't able to make a case for this client, keep this client. So that's one of the other --

THE COURT: Isn't that a bit speculative?

[Mr. White's attorney]: It is to an extent, but I think it is reasonable for the City of Lakewood to know that Mr. White was seeking this on behalf of a client and in a business context and that he could lose business --

THE COURT: Well, sure. There is nothing in this record that would indicate that the warrant by Judge Stolz was improvidently given, that this was an invalid search, that there was a civil rights violation.

[Mr. White's attorney]: But I think that was the client's allegation. And without being able to investigate that allegation, Mr. White couldn't represent that client and provide them the advice and information.

THE COURT: All right. I see your point. ...

VRP 24-25 (Emphasis added).

Given the acknowledged speculative nature of the claim, it was appropriate for the trial to decline to make any findings on its merits.

Similarly, although Mr. White claims that Lakewood is “a frequent PRA violator,” (Appellant Br. at p. 33); not only has he failed to preserve the issue on appeal, he offered no proof to support this allegation. A trial court is not required to make a finding where no proof has been adduced on a point, and it is therefore unnecessary for an appellate court to engage in extended discussion on such a point. *Russell v. Jackson*, 37 Wn.2d 66, 69, 221 P.2d 516 (1950).

Finally, Mr. White asserts that the trial court should have addressed how training should have increased the penalty factor. A fair read of the trial court's findings of fact and conclusions of law reflect that this was not a training issue, per se. This was more of a protocol/process issue. As reflected above, at the time, Lakewood did not take any subsequent steps to verify the status of any investigation beyond a computer inquiry.

Mr. White has failed to show that the trial court's imposition of a \$10/day penalty is manifestly unreasonable. It should be affirmed.

D. Even if Successful on Appeal, Mr. White is Not Entitled to Reasonable Attorney Fees Under RAP 18.1.

Attorney fees are properly awarded under RAP 18.1 only if Mr. White is deemed a prevailing party on appeal. For two reasons (putting to the side the fact that the judgment below should be affirmed and Lakewood deemed the prevailing party), Mr. White is not entitled to fees before this Court. First, Mr. White cannot show an entitlement to fees for what both parties acknowledge is a CR 68 offer of judgment made by Lakewood. Second, even assuming he obtained relief from this Court, further trial court proceedings would be necessary and an award of fees, if any, should abide by the result of any remand. We address each in turn.

In this case, the trial court did not award Mr. White reasonable attorney fees under the PRA. Instead, it reflected that it would be done by separate order. (CP 407, ¶ 3.3).

After entry of the judgment in this case, Mr. White sought an extension of time from the trial court to seek fees. (CP 422). For its part, Lakewood claimed costs in a timely-filed cost bill. (CP 427, 428). In conjunction with Mr. White's motion, both parties acknowledged for the first time the existence of an offer of judgment made by Lakewood pursuant to CR 68. (CP 427, ¶ 4). The trial court declined to defer consideration of fees pending the outcome of the appeal, but did contemplate hearing argument pending a timely request from Mr. White for fees. (CP 434-435).

Although the amount has not been identified by either party, as Mr. White (correctly) states “[t]he penalties offered in this offer of judgment were larger than those awarded by the [trial c]ourt.” *Id.* Under CR 68, when a plaintiff's recovery is less than the amount offered by a defendant, the defendant is deemed the prevailing party, precluding an award of costs to the plaintiff. *Tippie v. Delisle*, 55 Wn. App. 417, 420-421, 777 P.2d 1080, 1082 (1989).

Attorney fees are not included in the “costs” that can be shifted under CR 68, unless the relevant statute specifically defines attorney fees

as costs. *See Sims v. Kiro, Inc.*, 20 Wn. App. 229, 238, 580 P.2d 642 (1978). RCW 42.56.550(4) is such a statute. It provides, in relevant part:

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)(Emphasis added).

In those instances where the underlying statute defines attorney fees as an element of costs, the failure to obtain a result more favorable than the offer precludes an award of attorney fees altogether to the plaintiff. *Hodge v. Dev. Servs. of Am.*, 65 Wn. App. 576, 583-584, 828 P.2d 1175 (1992).

Although Lakewood's offer of judgment is not in the record on appeal (nor has it been filed with the superior court), Washington courts have recognized the applicability of CR 68 to PRA cases. *See e.g., O'Neill v. City of Shoreline*, 183 Wn. App. 15, 332 P.3d 1099 (2014). Here, both parties acknowledge that the amount recovered by Mr. White was less than the amount offered by Lakewood in satisfaction of this case. Accordingly, even if he were successful on appeal, this success does not necessarily translate into an award of fees on appeal.

Second, assuming that this matter were remanded, consistent with *Zink*, fees, if any, should abide the result of the remand, but with one caveat. 140 Wn. App. at 340-341. That caveat is this: independent of any CR 68 analysis, any fees pre-dating this Court's decision should be deemed forfeit. The trial court's January 2015 order contemplated a "timely motion," for such an award. (CP 434-435). Mr. White has never made an application to the trial court for any fees and costs. Where fees are not sought in a timely manner, they are deemed forfeit. *Corey v. Pierce County*, 154 Wn. App. 752, 773-774, 225 P.3d 367 (2010). Under any definition of reasonableness, by the time that this case is heard, any such deadlines will have passed. Accordingly, if fees are to be imposed, they should be decided by the trial court on remand, but those fees predating this appeal should be deemed forfeit.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

DATED: June 15, 2015.

CITY OF LAKEWOOD,
Heidi Ann Weather, City Attorney

By: _____

MATTHEW S. KASER, WSBA # 32239
Assistant City Attorney, City of Lakewood

CERTIFICATE OF SERVICE

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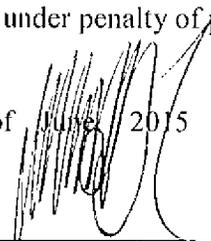
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The undersigned hereby declares, under penalty of perjury, that the foregoing statements are true and correct.

EXECUTED this 15th day of June, 2015 at Lakewood, Washington.



Matthew S. Kaser

LAKWOOD CITY ATTORNEY

June 15, 2015 - 3:01 PM

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