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No. 80532-6

BY RONALD R. CARPENTER

SUPREME COURT OF THE STATE OF WASHINGTON

RENTAL HOUSING ASSOCIATION OF PUGET SOUND,

Appellant,

v.

CITY OF DES MOINES,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

The Public Records Act (PRA) empowers citizens to file suit if an agency refuses to release records that should be public. An agency cannot shroud its refusal in mystery. Rather, to make sure that citizens and courts have enough information to evaluate an agency's refusal, the PRA requires agencies to explain specifically why each withheld record is exempt from disclosure. A citizen has up to one year after such a claim of exemption, or after the last production of requested records, to challenge the agency's action in court.

In this case, the respondent City of Des Moines repeatedly refused to be specific about what records it was withholding from appellant Rental Housing Association of Puget Sound (RHA), contrary to the PRA. Nor would the City explain which of the PRA's limited exemptions allegedly applied to each record, although such an explanation was required. Yet even though the City waited eight months to provide even a minimal description of each withheld record, and then waited another two months after that to clarify vague descriptions, and notwithstanding that the City never provided *any* response regarding certain requested records, the trial court allowed the City to invoke the one-year statute of limitations to bar

RHA's suit. The court erroneously held that the statute of limitations commenced the moment the City refused to release some 600 pages of unidentified records, regardless of the fact that RHA was deprived of the information needed to determine what the withheld documents were and if the claim of exemption was proper. Such reasoning incorrectly shifts the burden of proof from agencies to citizens, encourages needless litigation and defeats the purpose of the PRA to facilitate public access to information. In dismissing Appellant RHA's suit as untimely, the trial court misconstrued the one-year statute of limitations that was adopted by the Legislature in 2005. This court should reverse the dismissal because:

1. The one-year limitation period begins to run only when the agency states a valid "claim of exemption." The City's mere refusal to release records, without identifying the records or explaining why they're exempt, was not a valid claim of exemption under the PRA.

2. When an agency agrees to reconsider its response to a records request, admits that a prior response was deficient, or asks for more time to respond, all of which the City did here, the agency waives the statute of limitations as to the preceding period. It is inequitable for an agency to tell

a records requester not to rely on the agency's past answers, only to use those same answers as a basis to dismiss the requester's suit.

3. The statute of limitations starts to run with an agency's final production of records or claim of exemption, when all available information is known. The trial court failed to address what constituted the final claim.

4. The PRA must be liberally construed in favor of disclosure. The general policies underlying statutes of limitation do not override the PRA's strongly worded mandate to protect the public interest in open government.

5. The re-submission of RHA's public records request on January 25, 2006, commenced a new process and new limitations period, such that none of the City's responses prior to that date were relevant to the statute of limitations.

In essence, the trial court held that an agency can endlessly delay meeting its own obligations under the PRA without losing the ability to use the statute of limitations as a defense. This reasoning absolves the government of its responsibility to explain and justify its secrecy from the beginning, and actually rewards a "hide the ball" strategy. The trial

court's reasoning also promotes litigation by forcing the citizen to initiate a suit without knowing the facts necessary to determine if records truly are exempt, or even if they contain the kind of information that is worth fighting for. Nothing in the Act suggests that the Legislature intended for citizens to incur the expense of filing suit before the government has met its obligation to release all information that can be released, and to explain with particularity anything not released. On the contrary, the Public Records Act is intended to promote citizen access to government information.

The plain language of the Act makes clear that the one-year statute of limitations commences only upon a legally sufficient claim of exemption from disclosure, or a last production of requested records. A contrary interpretation would promote litigation based on guesswork, defeating the purpose of the Public Records Act to make information promptly available so that people may hold government accountable. Because the trial court misconstrued the statute of limitations, this court should reverse dismissal of RHA's suit and remand the matter for trial and an award of penalties and costs.

II. ASSIGNMENT OF ERROR

A. Decision in Error

The trial court erred by entering an order of dismissal on July 23, 2007, and by misconstruing RCW 42.56.550(6), which says that a PRA action “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.”

B. Issues Pertaining to Error

1. Did the trial court err by interpreting the PRA statute of limitations to commence with the agency’s vague assertion that 600 pages were exempt from disclosure requirements, when the agency did not identify the records being withheld nor explain why each record was allegedly exempt, and when the PRA requires a claim of exemption to address each record specifically?

2. Did the trial court err by failing to recognize that the statute of limitations does not start to run until an agency makes its *final* claim or partial claim of exemption, when the Legislature evidenced an intent for the statute of limitations to commence only when an agency has finished providing all available information, and when the agency

promised to reconsider its first response and delayed its detailed assertions as to why records were allegedly exempt?

3. Did the trial court err by failing to recognize that the one-year period for filing suit begins anew when a citizen re-submits its records request?

4. Did the trial court err by concluding that records were not produced "on a partial or installment basis" when the agency responded to a records request in more than one part?

5. Did the trial court err by dismissing a PRA suit based on the statute of limitations, when the agency acted inequitably?

6. Did the trial court err by dismissing a PRA suit based on the statute of limitations, when the agency never provided any response regarding some requested records?

III. RELEVANT FACTS

Appellant RHA is the largest association of rental housing owners in the Pacific Northwest, with more than 4,400 members. On July 20, 2005, RHA sent a request to the City Clerk of Des Moines for documents concerning the city's new "Crime Free Rental Housing Program" and related business license requirements. CP 49. The requested documents

included those concerning the program's actual or estimated operating costs and fee revenues. CP 50.¹

¹ The complete request included:

1. All minutes of all meetings or hearings at which the Ordinance/Program was considered or addressed.
2. All tape-recordings or transcriptions of all meetings or hearings at which the Ordinance/Program was considered or addressed.
3. All documents regarding or addressing the Ordinance/Program that were provided to City Council members for or in connection with consideration of the ordinance.
4. All documents including but not limited to staff reports, memos or analyses prepared by or for the City (before, during or after adoption of the Ordinance) addressing or pertaining to the Ordinance/Program.
5. All documents concerning the actual and/or estimated costs of operating the Ordinance/Program.
6. All documents concerning the actual and/or estimated revenue from business licenses and Crime Free Rental Housing Endorsement fees generated pursuant to the Ordinance/Program.
7. All documents addressing or explaining the types of 'criminal activity' for which the City may assess a penalty pursuant to Section 10 of the Ordinance.
8. All documents addressing or explaining the circumstances under which the City may suspend or revoke a business license or crime free rental housing endorsement pursuant to section 6 of the Ordinance.
9. All documents addressing or explaining how a citizen can bring his or her property into compliance with the City's 'Crime Prevention Through Environmental Design' program.
10. All documents concerning the factors considered in establishing the initial amount of the Crime Free Rental Housing Endorsement fee and in adjusting the amount of that fee annually.
11. All documents concerning crime statistics for rental housing in comparison to other property uses in the city, such as non-rental housing, shopping malls, commercial areas, etc., and/or comparing crime statistics for various types of rental housing (single-family versus multi-family, comparisons by location, etc.)
12. All documents concerning the actual and/or estimated costs of police responses to calls relating to rental housing units, or comparing the costs of police responses to calls relating to rental housing to costs of police responses to calls relating to other kinds of property, or containing data from which such calculations can be made.

CP 50-51.

In a letter the next day, the City Clerk told RHA to call his office “[i]f you do not receive a complete response within two weeks.” CP 54.

However, a complete response did not come within two weeks. Rather, on August 17, 2005, City Attorney Linda Marousek gave RHA less than half of the documents it had requested, along with a letter to RHA stating:

You have advised our Assistant City Attorney that you have requested these documents in preparation for potential litigation by rental property owners challenging the City’s Crime Free Rental Housing Ordinance and the fees imposed under the ordinance. As you review these documents, I am sure you will keep in mind the heavy burden of proof borne by those who challenge either the statutory or constitutional validity of a city ordinance.

CP 56.

At the same time, the City Attorney claimed that about 600 pages of requested documents were being withheld for the following reason:

...because they are drafts, notes and interagency memoranda not relied on in public action; *or*...attorney work product *or* subject to attorney/client privilege.

CP 61 (bold italics added).²

² The City cited former RCW 42.17.310(1)(i) and (1)(j), which have been re-codified as RCW 42.56.280 and RCW 42.56.290, respectively.

The City Attorney's August 17, 2005 letter did not describe any of the individual documents being withheld. Id. For example, the title, author, date, recipient, content and type of each document was concealed. Id. Nor did the City Attorney's letter explain why any individual record was allegedly exempt from disclosure. Id. Instead, the letter merely listed the following general categories of withheld documents without characterizing any of them as falling under any specific PRA exemption:

- Inter-office legal opinions and memoranda;
- Copies of reported cases decided by the Washington Supreme Court and Courts of Appeals dealing with rental housing ordinances;
- Copies of newspaper articles regarding the crime-free rental housing ordinance and possible litigation;
- Copies of treatises and articles dealing with the legality of crime-free rental housing ordinances;
- Copies of treatises and articles dealing with the Washington Landlord/Tenant Act (RCW 59.18);
- Attorney notes regarding preparation for teaching the 'legal issues' portion of the Landlord Training Workshop;
- Copies of similar crime-free rental housing ordinances from other municipalities;
- Copies of 'edits, drafts, re-drafts, & redlined versions' of the crime-free rental housing ordinance; and
- Copies of 'edits, drafts, re-drafts, & redlined versions of the Agenda Items prepared for presentation to the City Council.

CP 61-62. In listing these general categories, the City Attorney gave no indication which documents were considered drafts, notes or interagency

memoranda, which were considered attorney work product, and which were allegedly subject to attorney-client privilege, or why. Id.

RHA responded that some of the categories of records being withheld by the City – treatises, articles, ordinances and appellate court opinions – “clearly would not fall under any” of the various PRA exemptions to disclosure. CP 64. RHA asked that such non-exempt records be disclosed as required by the PRA. CP 65.

As for the other categories of records that the City said it was withholding – attorney notes for a landlord training workshop, drafts of legislation, and interoffice legal memos – RHA asked the City to provide a log specifically describing each withheld document and the basis for withholding each document. Id. RHA also reminded the City that it had yet to produce numerous requested documents, including those regarding how to comply with the “Crime Prevention Through Environmental Design” (CPTED) program, records showing which landlords had paid fees for the crime-free program, and records identifying which properties had been certified as crime-free. CP 65-66. RHA also questioned why no copies of e-mails had been produced. CP 65.

In an October 12, 2005 letter, the City Attorney responded:

At this time, we believe that we have properly withheld exempt public records, stating the specific exemption in the terms required...However, at your request, *I will re-review the applicable statutes and case law concerning these exemptions.*

CP 68 (italics added). The City Attorney also said that the City Clerk would launch a new search for requested records. The City Attorney pledged to “attempt to provide a complete response by November 18, 2005.” Id.

November 18, 2005, passed without any word about the “re-review” results. CP 70. Then on November 23, 2005, the City Attorney told RHA to expect a complete response by December 9, 2005. Id. That date passed and still, the “re-review” results did not come. CP 72.

On January 25, 2006, RHA submitted a new request for the same records it had been seeking since July 20, 2005. RHA wrote to the City Attorney “to demand that the city immediately produce long overdue records, along with documentation justifying the withholding of any records.” Id. RHA warned that, without “immediate assurance from the City that the responsive documents will be promptly produced,” RHA would file a suit under the PRA. Id. RHA also renewed its request for “a statement of the specific exemption upon which the City relies to withhold

each record (or part thereof), together with an explanation of how the exemption applies to the record withheld.” CP 74. Also, because so much time had passed since RHA first asked for documents pertaining to costs and revenues of the Crime Free Rental Housing Program, RHA’s January 25, 2006 letter included a request for additional cost and revenue information generated after RHA made its original July 20, 2005 records request. CP 73-74.

Not until January 26, 2006 – more than two months later than promised – did the City Attorney finally divulge the results of her “re-review” of the law pertaining to whether the withheld records were exempt from disclosure. CP 77. The City Attorney wrote:

I do apologize for the delay in my response, and I do appreciate the opportunity to now provide you, for your careful consideration, a complete discussion of the well-settled legal authority on which the City will rely if your firm initiates public disclosure litigation. The conclusion remains unchanged: We believe that we have properly withheld exempt public records, stating the specific exemptions in the terms required by RCW 42.17.310(4).³

CP 78 (emphasis in original). The City Attorney said that the PRA exemption for “drafts, notes and interagency memoranda” applied to three

³ The cited statute has been recodified as RCW 42.56.210.

of the general categories mentioned in the August 17, 2005, letter - inter-office legal memoranda, draft versions of the crime-free rental housing ordinance, and draft versions of City Council agenda items. CP 79. The City Attorney then asserted that *all* of the general categories of withheld records were exempt either as attorney work product “or” as subject to attorney-client privilege, again without describing any specific record or explaining what particular characteristics of each record purportedly made it exempt. *Id.* Although attorney work product is not the same as attorney-client privilege, the City did not distinguish between the two. *Id.* Finally, the City Attorney said that “all responsive records have already been provided,” without explaining why there were no copies of e-mails, no records regarding how to comply with CPTED, no records of fee payments, and no records identifying crime-free properties. CP 78-81. Thus, six months after requesting records from the City, RHA still lacked a basis to understand what was withheld and why.

Frustrated by the lack of specific information, RHA sent another letter to the City on February 2, 2006, threatening to file suit if the City did not provide the necessary descriptions (a “privilege log”) by February 10, 2006. CP 88. The RHA letter quoted this court’s opinion in Progressive

Animal Welfare Society v. University of Washington, 125 Wn.2d 243, 271, 884 P.2d 592 (1995) (“PAWS”), as stating that “an agency’s response to a requester must include specific means of identifying any individual records which are being withheld in their entirety.” CP 84 (emphasis in original). The RHA letter also: 1) reminded the City of the PRA requirement to redact exempt information when possible, instead of withholding entire documents; 2) reiterated that the City had neither produced records of e-mails nor offered any reason for withholding them; 3) explained that the drafts of ordinances and agenda items were no longer exempt from disclosure because the City had completed its deliberative process regarding the crime-free rental program; and 4) pointed out that the City cannot withhold entire attorney’s files based solely on generalized claims of work product or attorney-client privilege. CP 85-87.

In response, the City Attorney telephoned counsel for RHA and stated a desire to cooperate and avoid litigation. CP 2117, ¶ 16. The City Attorney promised to describe with particularity each of the withheld documents so that RHA could, *at last*, evaluate whether a suit was warranted. CP 2118.

Meanwhile, on March 1, 2006, the City provided additional documents purportedly in response to the January 25, 2006 records request by RHA. Id., ¶ 17. The March 1, 2006 production of records included evaluation forms for the “Landlord 101” training class that duplicated records released in August 2005 in response to RHA’s original, July 2005 records request. Id.

Then on March 8, 2006, the City Attorney sent a letter to RHA stating:

The enclosed documents are the final installment of the City of Des Moines response to your January 25, 2006 public disclosure request.

CP 2176. This “final installment” included cost and revenue information for the period *before* the original July 20, 2005 records request was made.

CP 2176-77. Meanwhile, despite the City Attorney’s stated interest in avoiding litigation, the City *still* did not provide a privilege log describing each withheld record and the reason why each record was allegedly exempt. CP 2176-78.

Not until April 14, 2006, nine months after the original records request, did the City acknowledge in writing that a description of each withheld document was required by the PRA, as stated in this court’s

opinion in PAWS. CP 90-91. The City's April 14, 2006 privilege log did not, however, provide details sufficient to support non-disclosure. For example, the log gave the dates that the City printed out copies of appellate court opinions, but did not identify the case names, dates of publication or even which court issued the opinions, and offered no justification in the PRA for withholding such widely available documents from RHA. CP 92. As for withheld articles, the log gave only the month of publication and the number of pages, omitting titles, dates of publication, and names of authors and publishers. CP 93. Again, there was no indication why newspaper articles, freely available to wide audiences, should be withheld from RHA. Id.⁴ The log also gave the date and number of pages of an unidentified city's ordinance, but offered no clue as to why a municipal law (and the name of the municipality) should be concealed from the public. Id. The log also described 17 memos or e-mails in which the Des Moines City Attorney's office communicated externally with other offices of the City. CP 92. The log contained no

⁴ For example, one article that was withheld improperly, and released only after RHA filed suit, was published in the King County Journal on April 17, 2002. CP 218-220. The City offered no justification for withholding such innocuous details as the name of the newspaper that published the article. Also withheld was a copy of Chapter 38 of McQuillin's treatise on landlord law, identified in the log only as a "McQuillin section." CP 93, 200.

details establishing that such memos or e-mails were written in anticipation of litigation or otherwise contained protected information. Id.

RHA responded by asking the City to identify authors, recipients, and other details regarding twelve withheld documents, and to produce withheld documents that clearly were not exempt. CP 97-98. On June 16, 2006 – eleven months after receiving RHA’s original records request – the City Attorney revealed additional details about the withheld records in an attempt to justify their continued non-disclosure. CP 100. However, the City still did not identify the authors of some of the withheld documents. CP 101 (“From a member of the public” and “From an organization”).

The City Attorney’s June 16, 2006 letter contended that correspondence from the public, allegedly regarding potential litigation, was exempt from disclosure because it was “contained in the file used by the City Attorney’s Office as we prepared the ordinance.” CP 102. The City Attorney’s letter also asserted that materials from a landlord training workshop, including evaluations written by attendees and a workshop schedule, were exempt from disclosure solely because they were “contained in the file used by the Assistant City Attorney as he prepared for and presented legal training for the workshop.” CP 101-02. The letter

concluded with a suggestion “to not engage in public disclosure litigation.” CP 103.

Counsel for RHA responded by leaving a phone message for the City Attorney stating that RHA would file suit unless the City produced a number of withheld public records. CP 2120-21 (¶ 25). In a June 20, 2006 e-mail, the City Attorney said:

I will be out of the office beginning June 30, returning July 11. If you must file this action (must you?), please give me at least another week to ten days after that to catch up in the office and be prepared to respond to a show cause order...

CP 2121, ¶ 26. The City Attorney and counsel for RHA then spoke and agreed to cooperate in setting a litigation briefing schedule. *Id.*

On January 16, 2007, RHA filed suit alleging that the City had improperly withheld records since at least April 14, 2006, the date that the City first provided a privilege log purporting to identify individual records it was withholding. CP 3, 14. In February 2007, in an attempt to settle the suit, the City made another production of documents responsive to the original July 2005 records request. CP 2121, ¶ 28. At a meeting on February 12, 2007, the City provided a “Transaction Detail Report” revealing the dates and amounts of 2005 revenue collections from the

Crime Free Rental Housing Program. Id., CP 2201. The report included revenue information from early 2005, which was requested in RHA's original July 20, 2005 letter seeking cost and revenue records for the program, as well as in the January 25, 2006 letter again requesting immediate production of the information. Finally, in a continued effort to settle the suit, "shortly before the hearing, the City disclosed all of the files previously withheld." City's Answer to Statement of Grounds for Direct Review at p. 4.

After taking more than 18 months to complete its response to RHA's July 20, 2005 records request, the City moved to dismiss RHA's suit based on the PRA statute of limitations, which says that an action "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." CP 29.⁵ In a July 23, 2007 memorandum decision, the trial court stated:

I am persuaded that the proper date to measure the running of the statute is the date the exemption is claimed (here, August 17, 2005), not the date a privilege log is produced. The purpose of the privilege log is to provide the requesting party with the basis to analyze whether the production is adequate and whether to file an action

⁵

See RCW 42.56.550(6).

seeking production and/or penalties under the Act...

Even if the City had not provided any explanation for its failure to provide the documents in the City Attorney file, the RHA would still have remedies under the Act. The determination of whether a statute of limitations had run would be confounded significantly if it were measured by the content of the response rather than the clear line created by a government entity's claim of an exemption or the last production in the case of installment productions.

I am also convinced that this case did not involve production on a partial or installment basis.

CP 2288-89. RHA appealed dismissal of its suit and sought direct review by this court based on broad public interest in construing the new PRA statute of limitations. CP 2291.

IV. ARGUMENT

A. Standard of Review.

Because the trial court decided this case on the basis of affidavits and documents and without testimony, review is de novo, and the appellate court can decide issues of both fact and law. Brouillet v. Cowles Publishing Co., 114 Wn.2d 788, 793 (1990); Ames v. Fircrest, 71 Wn. App. 284, 292 (Div. 2 1993). The appellate court is not bound by the

trial court's findings on disputed factual issues. PAWS, 125 Wn.2d at 252-53. Although reviewed de novo, a decision based on affidavits is a decision on the merits and is not treated as a summary judgment motion on appeal. Brouillet at 794; Ames at 292-93.⁶ Statutory construction is a question of law reviewed de novo. State v. Smith, 80 Wn. App. 535, 539 (Div. 1, 1996).

B. The City's August 2005 Letter Did Not Constitute A "Claim of Exemption" Because It Did Not Explain Why Each Withheld Record Was Allegedly Exempt.

In 2005, the Legislature adopted a new statute of limitations for the Public Records Act. Laws of 2005, Chap. 483, sec. 5. The statute says that a public records action:

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). The question here is: what constitutes "the agency's claim of exemption" for statute of limitations purposes?

⁶ The City did not move for summary judgment, but moved to dismiss the complaint based on a lack of jurisdiction over RHA's claims. CP 33. Dismissal based on a lack of subject matter jurisdiction is reviewed de novo. Ricketts v. Washington State Board of Accountancy, 111 Wn. App. 113, 116 (Div. 1 2002).

No published opinion has examined this question.⁷ However, the answer is readily apparent in the plain language of the PRA. RCW 42.56.210(3) says exactly how a claim of exemption must be made.

1. A claim must address each record specifically.

When interpreting the PRA, the court's primary objective is to ascertain and give meaning to legislative intent. Koenig v. City of Des Moines, 158 Wn.2d 173, 181, 142 P.3d 162 (2006). "[W]e begin with the statute's plain language and ordinary meaning." Id. Thus, in determining what constitutes a "claim of exemption" under the PRA, this court looks first to the plain language of the statute.

In general, the PRA mandates that:

agencies shall, upon request for identifiable public records, make them promptly available to any person.

RCW 42.56.080. While there are limited exemptions from this requirement (see, e.g., RCW 42.56.240 & .270), an agency cannot simply declare a record to be exempt without providing a specific explanation.

The PRA says:

⁷ Before RCW 42.56.550(6) took effect on July 24, 2005, public records actions had to be filed "within five years after the date when the violation occurred." RCW 42.17.410. The legislative bill reports and journals are silent as to the reason for the change, from a five-year to a one-year period.

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) (bold italics added).⁸ Thus, the plain language of the PRA shows the Legislature's intent for agencies to make a claim of exemption in a very specific way (stating a specific exemption and explaining how it applies to a specific record). *Id.*

As this court said in PAWS:

[W]ithout a *specific identification of each individual record* withheld in its entirety, the reviewing court's ability to conduct the statutorily required de novo review is vitiated. *The plain terms of the Public Records Act*, as well as proper review and enforcement of the statute, *make it imperative that all relevant records or portions be identified with particularity*. Therefore, in order to ensure compliance with the statute and to create an adequate record for a reviewing court, an agency's response to a requester must include specific means of identifying any individual records which are being withheld in their entirety.

⁸ See also RCW 42.56.070(1), which says that when it is necessary to delete personal information, the "justification for the deletion *shall be explained fully in writing*" (italics added).

PAWS, 125 Wn.2d at 270-71 (bold italics added). The identifying information for each record should include “the type of record, its date and number of pages, and, unless otherwise protected, the author and recipient.” Id. at 271. In other words, an agency can’t play “hide the ball” by describing only general categories of withheld records, or by alleging generally that unidentified records fall under either one exemption or another, as the City did in this case.

When the City initially refused in August 2005 to allow inspection of whole records without identifying any of them specifically, and without explaining how a specific exemption applied to each record, it did not comply with the plain terms of RCW 42.56.210(3). Therefore, the City’s August 2005 letter did not constitute a “claim of exemption,” and the trial court erred by concluding that RHA was required to file suit within one year of receiving the deficient letter. RCW 42.56.210(3) and .550(6).

2. The statute of limitations must be construed in harmony with the requirement for a claim of exemption to be specific.

It is a fundamental rule of statutory construction that a legislative enactment must be read as a whole, giving effect to each part. City of Bellevue v. East Bellevue Community Council, 138 Wn.2d 937, 946, 983

P.2d 602 (1999); Cox v. Helenius, 103 Wn.2d 383, 387, 693 P.2d 683 (1985); Burlington N., Inc. v. Johnston, 89 Wn.2d 321, 326, 572 P.2d 1085 (1977). Whenever possible, a statutory construction which nullifies, voids or renders meaningless or superfluous any section or words must be avoided. Burlington N., Inc. at 326. All provisions of an act must be considered in their relation to each other, and, if possible, harmonized to ensure proper construction. Skamania County v. Columbia River Gorge Comm'n, 144 Wn.2d 30, 45, 26 P.3d 241 (2001); State v. Smith, 80 Wn. App. at 540. Therefore, courts must construe RCW 42.56.550(6), which says that an action must be filed within one year of “the agency’s claim of exemption,” in a manner that is harmonious with RCW 42.56.210(3), which says that whenever an agency withholds a record it must explain how a specific exemption applies to the specific record being withheld.

Here, the trial court violated the rules of statutory construction by interpreting the statute of limitations in RCW 42.56.550(6) in a manner that nullifies and renders superfluous the RCW 42.56.210(3) requirement for a claim of exemption to be specific. Although RCW 42.56.210(3) says precisely what a claim of exemption must consist of, the trial court essentially concluded that a “claim of exemption” is whatever the agency

says it is. The trial court stated that reviewing courts would be “confounded significantly” if they had to evaluate “the content of the response” to a records request to determine if a valid claim of exemption was made. CP 2288.⁹ The trial court concluded that in order to have a “clear line” commencing the statute of limitations, courts must overlook an agency’s failure to make a claim of exemption properly. CP 2288-89.¹⁰

The PRA is not so indifferent. If each agency can decide for itself what a “claim of exemption” means, citizens are stripped of the right to be as fully informed as possible when deciding whether to sue. And RCW 42.56.210(3) is rendered superfluous.

The trial court acknowledged that a detailed “privilege log” is required by RCW 42.56.210(3). The trial court also recognized that the purpose of a log “*is to provide the requesting party with the basis to analyze whether the production is adequate and whether to file an action*”

⁹ The proposition that it is too confounding to assess compliance with RCW 42.56.210(3) is especially absurd in light of the City’s admission that its initial responses did *not* comply. When the City finally provided a privilege log in April 2006, after refusing to do so for eight months, it belatedly admitted that it *was* required to identify each withheld record individually instead of by general category. CP 90-91. When both parties agree that a standard wasn’t met, the standard is not confounding.

¹⁰ Courts do not lack a “clear line” for determining when a “claim of exemption” is made. A simple test may be derived from RCW 42.56.210(3) and PAWS as follows: 1) Did the agency state a specific exemption? 2) Did the agency identify each withheld record with particularity? 3) Did the agency explain how an exemption applies to each record withheld? Once all three components are satisfied, a claim of exemption is made, and the statute of limitations starts to run.

seeking production and/or penalties under the Act.” CP 2288 (*italics added*). Yet the court interpreted the statute of limitations so as to defeat that legislative purpose, such that a citizen is forced to sue just to avoid a statute of limitations defense, even though the citizen lacks a factual and legal basis to decide whether to file an action.

The trial court suggested that if an agency ignores its obligations under RCW 42.56.210(3), the burden is on the citizen to file suit just to get an explanation of what records are being withheld and why. The court said:

Even if the City had not provided *any explanation* for its failure to provide the documents in the City Attorney file, the RHA would still have remedies under the Act.

CP 2288 (*italics added*). In other words, in the court’s view, an agency can make it as difficult as possible for a citizen to evaluate the lawfulness of a records denial, and the agency can even avoid scrutiny altogether if the citizen does not sue within a year of the denial. Such an interpretation encourages the sort of behavior demonstrated here, where the City strung RHA along for months with vague assertions and false promises, then used its own delays in complying with the statute to avoid judicial review. The

court's interpretation also undermines RCW 42.56.550(1), which says that the burden of proof is on agencies to establish that withheld records are exempt.

In sum, the PRA statute of limitations must be harmonized with the requirement for agencies to be specific when claiming that records are exempt. Because RHA's suit was filed within a year of the agency's specific claim of exemption, this court should reverse dismissal.

C. The Statute of Limitations Must be Construed Liberally to Promote Judicial Review.

The PRA unequivocally directs courts to interpret its language in favor of disclosure:

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. *This chapter 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 (italics added).

The policy of protecting the public interest in open government is reflected throughout the statute. For example, an agency must delete exempt information from records rather than withhold entire records, if possible. RCW 42.56.210(1). An agency withholding information has the burden to prove that an exemption applies to the “specific information or records” at issue. RCW 42.56.550(1). Violations bring penalties. RCW 42.56.550(4).

1. Judicial oversight is essential to ensuring disclosure.

The strong policy in favor of disclosure is enforced through the citizen suit provision. The PRA authorizes “any person having been denied an opportunity to inspect or copy a public record” to file an action in superior court. RCW 42.56.550(1). If a citizen prevails in a PRA action, the court is required to award all costs and attorney fees as well as a penalty of \$5 to \$100 for each day that the citizen was denied access to public records. RCW 42.56.550(4). This court has recognized, in fact, that “judicial oversight is essential” to ensuring that government agencies comply with the PRA’s disclosure mandate. Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 100, 117 P.3d 1117 (2005) .

An agency cannot avoid penalties by releasing records belatedly, if the records should have been public at the time the citizen requested them, as in this case where the City of Des Moines improperly withheld articles, treatises, court opinions and other public records until after RHA filed suit. Id. at 101.¹¹ Rather, the provision for costs, fees and sanctions “has been treated by this court as a penalty to enforce the strong public policies underlying the [PRA].” Id. (citation omitted).

Thus, judicial oversight - including imposition of penalties for improper concealment of public records - is at the heart of the PRA scheme. Only through litigation, or the threat of it, can the citizen hold accountable those agencies that would rather operate without scrutiny. Accordingly, if the PRA is to be liberally construed in favor of disclosure, the statute of limitations must be interpreted to protect the citizen’s right to judicial review of agency secrecy.

¹¹ The City of Des Moines incorrectly argues that because it belatedly released records requested by RHA after the suit was filed, there is nothing important or urgent at stake in the appeal. Answer to Statement of Grounds for Direct Review at pp. 5-6. This contradicts the strong statement in Spokane Research & Defense Fund that a PRA suit is not mooted by disclosure of documents after litigation commences, and that penalties must be assessed for *any* period of improper withholding in order to fulfill the purposes of the PRA. Id. at 102-03.

2. The trial court erroneously construed the statute of limitations to defeat rather than promote the public interest in judicial review.

Instead of construing the statute of limitations liberally to protect the public interest in judicial oversight, the trial court found that the right to sue is cut off at the earliest possible time, based on an agency's first vague and inadequate response. This restrictive view of the statute fails to "assure that the public interest will be fully protected" because it encourages agencies to be vague. RCW 42.56.030. If citizens cannot effectively evaluate whether records are withheld improperly, they must either litigate based on guesswork or decline to seek judicial oversight.

When construing the PRA, courts must "take into account the policy...that free and open examination of public records is in the public interest, even though such examination may cause inconvenience." RCW 42.56.550(3). By concluding that the statute of limitations starts to run with *any* initial response to a records request, no matter how evasive, the trial court improperly placed the agency's interest in convenience above the public's interest in free and open examination of public records. It may well be inconvenient for an agency to provide a detailed explanation for its secrecy, and for a court to measure the proffered explanation against

the specific standards of the PRA. Such inconvenience cannot override the mandate to construe the PRA liberally in favor of citizen access to information. RCW 42.56.030. Proper construction would not allow agencies to avoid judicial scrutiny simply by using evasive tactics, as the City did here. Accordingly, dismissal of the suit should be reversed.

D. The Statute of Limitations Starts to Run With the Final Claim of Exemption When There Are Successive or Partial Claims.

The PRA does not say when the statute of limitations starts to run if an agency makes more than one claim or partial claim of exemption. However, by requiring actions to 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,” the Legislature signaled an intent for the one-year limitation period to start with the *last* agency response. RCW 42.56.550(6) (italics added).¹²

This court will “seek help in interpreting [a] statutory section by determining legislative intent in the context of the *whole* statute and its

¹² It is of no matter that the word “last” does not precede “claim of exemption.” *There is supposed to be only one claim of exemption*, specific to each record, to be provided at the time the agency refuses to release information. RCW 42.56.210(3). Whereas RCW 42.56.080 specifically authorizes agencies to produce records on a partial or installment basis, the PRA contains no such authorization to make partial or incomplete claims as to why records are exempt. Therefore, the Legislature had no reason to anticipate and address the situation here, where the City made more than one deficient claim before finally meeting the requirements of RCW 42.56.210(3).

general purpose.” City of Seattle v. State Dep’t. of Labor & Industries, 136 Wn.2d 693, 701, 965 P.2d 619 (1998) (italics in original) (citation omitted). When RCW 42.56.550(6) is viewed in the context of the *whole* statute, including the PRA’s general purpose to promote disclosure, it reflects the Legislature’s intent to wait until citizens are as fully informed as possible before imposing a one-year deadline to sue. Provisions to help citizens make informed decisions about filing suit include RCW 42.56.210(3), requiring agencies to be specific about a claim of exemption; and RCW 42.56.550(6), waiting until an agency’s “last production of records” before the one-year limitation period begins. Thus, just as only the last partial production of records makes the clock start ticking, only the last partial claim of exemption does so, because that is when the citizen has all the information bearing on a decision to sue.

Knowing an agency’s rationale for withholding records is just as important as seeing everything that can be released. After all, the full record is needed for de novo review. PAWS, 125 Wn.2d at 270-71. It is a waste of citizen and court resources to pursue an administrative appeal without a complete record, including the agency’s stated rationale. There is no reason to believe that the Legislature intended for citizens to have all

available records, but not all available explanation, before deciding whether to sue.

- 1. Each assertion of exemption must be examined in determining when the limitation period begins.**

Here, the City vaguely asserted that 600 pages of unidentified records were exempt, then agreed to reconsider that statement, and gradually made increasingly detailed assertions as to why the records allegedly were exempt. The City's successive statements created a mixed question of fact and law as to which (if any) of the statements constituted a "claim of exemption" causing the one-year limitation period to start. However, the trial court failed to look beyond the City's initial August 2005 assertion that 600 pages of unidentified records were exempt, not even considering that the assertion was effectively withdrawn in October 2005 when the City agreed to reconsider its position. Even if the August 2005 letter had constituted a valid claim of exemption, the court erred by failing to recognize that it was effectively withdrawn and that it is the final, complete claim that matters.

When an agency agrees to reconsider an assertion that records are exempt, as the City did here, the citizen can no longer rely on that

assertion as a reason to sue or not sue. Therefore, the statute of limitations should not start to run until the agency clarifies its position. Otherwise, citizens could be forced to file suit needlessly just to avoid a statute of limitations defense, before they know whether the agency's reconsideration will lead to a release of requested records or a more satisfactory explanation for withholding them. That would waste public and judicial resources and thwart the PRA requirement for agencies to fully explain their actions. RCW 42.56.210(3).

Nothing in the PRA suggests that the Legislature intended to punish citizens like RHA who wait in good faith for the final word from an agency that asks for more time to respond. In sum, when an agency agrees to reconsider its claim of exemption, the court must construe the statute of limitations to start with the agency's final "claim of exemption" rather than its first one, if the policies of the PRA are to be fulfilled.

2. The statute of limitations did not start to run before January 26, 2006, when the City finished reconsidering its position.

On January 26, 2006, the City revealed results of its purported reconsideration of PRA exemptions, unfortunately just alleging again that 600 pages of still-unidentified records were exempt. Because the January

2006 letter exhibited the same failure to comply with RCW 42.56.210(3) as the original August 2005 response, it did not constitute a valid “claim of exemption,” as explained above. However, assuming for argument’s sake that the trial court is correct that even a deficient claim causes the one-year limitation period to begin, then the court should have found that the limitation period began no sooner than January 26, 2006, when the City’s reconsideration was complete. By concluding that the period began with the August 2005 assertion, even though the City agreed to reconsider that assertion, the court failed to give effect to the legislative intent for the statute of limitations to start running once an agency completes its response to a records request. Because RHA filed suit within a year of the January 26, 2006 letter conveying results of the City’s reconsideration of its position, the suit was timely and dismissal should be reversed.

3. The statute of limitations did not commence before the last of the City’s partial claims of exemption.

As explained above, the City did not identify each withheld record individually until April 2006, although it was required to do so from the outset. RCW 42.56.210(3). Even then, the City did not provide authors, recipients and dates of some records, contrary to this court’s decision in

PAWS, 125 Wn.2d at 270-71. Those missing details were not offered until June 2006, nearly a year after RHA's original records request. Thus, the City's explanation for withholding records came in increments, akin to providing records on a "partial or installment basis," over a ten-month period from August 2005 to June 2006. Because the Legislature clearly intended to wait until the last "partial" agency response before imposing a one-year deadline to sue, the one-year limitation period did not begin before April 2006 for those records identified in the privilege log, nor before June 2006 for the last records to be identified. Accordingly, RHA's January 2007 suit was timely and dismissal should be reversed.

E. The Trial Court's Interpretation of the PRA is Not Supported by Any Policy Considerations.

In general, there are two policies effectuated by any statute of limitations: 1) creating a sense of certainty and finality "by eliminating the fears and burdens of threatened litigation"; and 2) protecting defendants against stale claims because they are more likely to involve untrustworthy evidence. Kittinger v. The Boeing Co., 21 Wn. App. 484, 486-87, 585 P.2d 812 (Div. 1, 1978). When plaintiffs sleep on their rights, evidence may be lost and memories may fade. Huff v. Roach, 125 Wn. App. 724, 732, 106 P.3d 268 (Div.3, 2005).

The purpose of limitation statutes generally is to require parties to exercise their rights within a reasonable time “without inflicting an avoidable injustice on the injured party.” First Maryland Leasecorp v. Rothstein, 72 Wn. App. 278, 283, 864 P.2d 17 (Div. 3 1993). Courts have a duty to construe statutes of limitation “in a manner that furthers justice.” Id., citing U.S. Oil & Ref. Co. V. Dep’t of Ecology, 96 Wn.2d 85, 93, 633 P.2d 1329 (1981).

Here, the trial court’s construction of the PRA statute of limitations was unjust and unsupported by any policy. Because this case is based on an administrative record, there was no danger of faded memories or lost evidence, so the policy of preventing stale claims was not applicable. And if the City was concerned about finality, it would not have repeatedly asked RHA to allow more time for response to the July 2005 records request and to delay litigation. Thus, there was no policy reason to inflict injustice on the injured party, RHA. First Maryland Leasecorp, 72 Wn. App. at 283. Furthermore, because RHA put the City on notice of its potential liability before the limitation period expired, the general purpose of time limitations was served. United States v. Kubrick, 444 U.S. 111,

117, 100 S. Ct. 352, 62 L.Ed.2d 259 (1979); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 182, 94 S. Ct. 2140, 40 L.Ed.2d 732 (1974) (FN2).

Even if there had been a policy reason to cut off RHA's claims, it would not take precedence over the PRA's overriding policy of protecting the public interest in disclosure. As this court said, "*disclosure of public records remains our primary objective even when reconciling competing policy considerations* expressed in the act." Koenig v. City of Des Moines, 158 Wn.2d at 187 (citation omitted) (italics added). Because the PRA statute of limitations must not be applied unjustly, nor given precedence over the policy of protecting public disclosure, dismissal of RHA's suit should be reversed.

F. RHA's January 25, 2006 Records Request Restarted the Clock.

The trial court completely overlooked RHA's argument that, even if the one-year statute of limitations somehow barred claims based on the original July 20, 2005 records request, it made no difference because RHA *asked for exactly the same records* on January 25, 2006. CP 2095 (FN 8). In the January 25, 2006 letter to the City, RHA demanded immediate production of the "long overdue" records that it had first requested on July 20, 2005. CP 72. This new request for the same information

effectively restarted the time from which the statute of limitations would run. It is common sense that the limitation period could not start in August 2005 for claims that arose five months later, in January 2006.

Federal case law supports the argument. Because the PRA was modeled after the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, this court often looks to judicial constructions of the FOIA in construing this state's PRA. Limstrom v. Ladenburg, 126 Wn.2d 595, 608, 963 P.2d 869 (1998); Hearst Corp. V. Hoppe, 90 Wn.2d 123, 128, 580 P.2d 246 (1978) (because the PRA closely parallels the FOIA, judicial interpretations of the federal act are "particularly helpful"). In cases involving the FOIA's six-year statute of limitations, federal courts have recognized that citizens can "resurrect" a claim simply by filing a new FOIA request. See, e.g., Spannaus v. U.S. Dept. of Justice, 824 F.2d 52, 61 (D.C. Cir. 1987); Citizens for Responsibility and Ethics in Washington v. Dep't. of the Interior, 503 F. Supp. 2d 88, 100-101 (D.D.C., 2007); Aftergood v. Central Intelligence Agency, 225 F. Supp. 2d 27, 30-31 (D.D.C., 2002).

In Aftergood, the court allowed the plaintiff to proceed with a suit that would have been time-barred if it was based on his original records

request, because the plaintiff had timely pursued a subsequent FOIA request that was “substantially identical” to the first one. 225 F. Supp. 2d at 31. Here, as in Aftergood, RHA started over on January 25, 2006, when it asked the City to immediately produce the same records that had been requested on July 20, 2005. The new records request was a separate and distinct attempt to obtain the City’s compliance with PRA disclosure requirements.

The RHA suit was timely because it was filed within one year of the agency’s claim of exemption (the April 16, 2006 privilege log) made by the City in response to the January 25, 2006 records request. Alternatively, the suit was timely because it was filed within a year of the last production of records responsive to the January 25, 2006 request. Therefore, dismissal should be reversed.

G. The City Provided Requested Records on a “Partial or Installment Basis” From August 2005 Until February 2007.

The PRA statute of limitations does not start to run until an agency’s “last production of records on a partial or installment basis.” RCW 42.56.550(6). Here, records responsive to RHA’s July 2005 records request were produced in August 2005, March 2006 (duplicate records), and February 2007. Nevertheless, the trial court concluded that records

were not produced “on a partial or installment basis.” CP 2289. This was error.

Neither the PRA nor the related “model rules” in WAC Chap. 44-14 define “partial or installment basis.” However, looking at the PRA as a whole, the meaning of the term is clear. RCW 42.56.080 says:

Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person including, if applicable, *on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure.*

(italics added). Thus, when a large set of requested records is not “assembled or made ready for inspection” all at one time, as in this case where the City waited until February 2007 to provide requested cost and revenue information, the records are produced on a “partial or installment basis.” Id. Because the last records produced in this case were part of a “larger set of requested records,” they were produced on a partial or installment basis. Id.

Even if the City is correct that it was entitled to shield from the public the requested cost and revenue information for the Crime-Free

Rental Housing program - an offensive proposition in light of the paramount public interest in knowing how its money is spent - it is simply irrelevant whether production of the information was "voluntary."¹³ The point is that the City *could have* produced the cost and revenue information along with all other requested records in a single, large production in August 2005. Instead, the City chose to wait until February 2007 to produce records that were clearly within the scope of the original record request.

By choosing to provide only part of the information that RHA requested in August 2005, and part in February 2007, the City produced records on a "partial or installment basis." Accordingly, the statute of limitations did not start to run before February 2007, when the last part of the large set of records requested by RHA was "assembled or made ready for inspection." RCW 42.56.080 and .550(6). Therefore, the suit was timely.

¹³ It is true that agencies are not required to create records at a citizen's request. In this case, the City apparently chose to put cost and revenue information into a newly created form rather than simply release the raw information, such as deposit slips or receipts for fee payments by rental property owners. There is *always* some record when money changes hands. Thus, it is subterfuge to argue that the cost and revenue information provided in February 2007 was somehow supplied "on a voluntary basis" just because the City chose to convert it from its original raw form.

H. The Statute of Limitations Never Commenced As To Claims That the City Withheld Certain Records Without Explanation.

In opposing the motion to dismiss the suit, RHA pointed out that the City had never provided copies of “Notice of Incident” reports, which are mailed to rental property owners each time police are called to their properties. CP 2092. The City did not claim that those records were exempt.

Also, RHA alleged in its complaint that “[t]o this date, the City has refused to disclose any documents that reflect the total amount of money it has collected through its crime-free program.” CP 5, ¶ 4.6. No exemption was claimed for revenue collections either.

Because there was never any “claim of exemption” or “last production” associated with these (and possibly other) non-exempt records that were never released, the statute of limitations never began to run as to the alleged failure to produce those records. In general, a PRA claim cannot be untimely when an agency’s “last production” is still due.

I. The City Waived the Statute of Limitations By Acting Inequitably.

An affirmative defense is waived if it is inconsistent with the defendant’s prior behavior or if the defendant has been dilatory in

asserting it. King v. Snohomish County, 146 Wn.2d 420, 424, 47 P.3d 563 (2002). Here, the City waived its right to use the statute of limitations as a defense by repeatedly asking RHA to allow more time for responses and by violating its own time estimates.

V. CONCLUSION

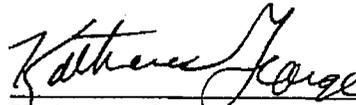
For the foregoing reasons, the Court should reverse the dismissal and remand the case for trial and an award of penalties and fees.

Dated this 19th day of November, 2007.

Respectfully submitted,

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By:



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VRHA(Den)\80532-6\Brief of Appellant FINAL 11 19 07

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