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SUPREME COURT
OF THE STATE OF WASHINGTON

MIKE BELENSKI,

Petitioner,

v.

JEFFERSON COUNTY,

Respondent.

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WASHINGTON STATE
SUPREME COURT *byh*

BRIEF OF AMICUS CURIAE WASHINGTON ASSOCIATION OF
PROSECUTING ATTORNEYS

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ORIGINAL

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I. INTRODUCTION

The Washington Association of Prosecuting Attorneys (WAPA) submits this amicus brief. As described in the accompanying Motion to File Amicus Brief, WAPA has an interest in the application of the statutes of limitations to claims filed under the Public Records Act (PRA).

II. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys (WAPA) represents the elected prosecutors of Washington State. Those persons advise and represent, in civil proceedings, County government agencies and officials. *See* RCW 36.27.020(1)-(3).

WAPA is interested in cases that impact the ability of county governments to apply statutes of limitations to civil proceedings. The resolution of this case involves an interpretation of RCW 42.56.550(6) and RCW 4.16.130, statutes that directly impact the finality of claims related to county governments' processing of public records requests. The resolution of this issue impacts the work of county prosecutors throughout the state.

III. STATEMENT OF FACTS

Jefferson County and Mr. Belenski have presented the facts relevant to this case, with citations to the record. In short, for purposes of this brief, this case involves a public records request for internet access logs (IALs) submitted to Jefferson County on September 27, 2010. CP 211.

Jefferson County denied the request on October 5, 2010, stating that it had no responsive records¹. CP 214. Mr. Belenski filed his claim regarding this public records request on November 19, 2012, more than two years after Jefferson County denied his request. CP 191. Of note, Mr. Belenski had previously requested and been provided IALs by Jefferson County and admits that he was “confused” by the county’s response because he had requested and been provided IALs in the past. CP 120-121.

IV. ISSUES

Whether RCW 42.56.550(6) applies to an agency’s singular response to a PRA request?

Whether the “discovery rule” applies to PRA claims?

V. ARGUMENT

Counties routinely deal with the scenario presented by this case: a PRA request is submitted, it is determined that no responsive records exist, either because the agency does not have records that fit the definition of “public records” or because the agency conducted a reasonable search and locates no responsive records, and the agency denies the request by sending a letter to the requestor. The agency then waits two years from the date of the denial letter and destroys the PRA

¹ Jefferson County’s position at the time was that IALs were not public records. As a result, they informed Mr. Belenski that no records responsive to a public records request existed. CP 631, 632, 698.

request file in accordance with RCW 40.14.070 and the Washington State Archives Local Government Common Records Retention Schedule (CORE) Version 3.0, Disposition Authorization Number GS2010-014 Rev. 2. This intersection of the PRA and RCW 40.14.070 puts the county in the position of being able to defend itself against PRA claims for the life of a valid PRA claim under RCW 42.56.550(6) or RCW 4.16.130. The legislature is presumed to have contemplated this in amending RCW 42.56.550(6) in 2005, when it shortened the statute of limitations for PRA claims from 5 years to 1 year. RCW 42.56.550(6) (2005) (amended by Laws of 2005, ch. 483, § 5).

A. RCW 42.56.550(6) Applies to An Agency's Denial of a Public Records Request.

This Court should adopt Division II's holdings in Johnson v. State Dep't of Corr., 164 WnApp. 769, 265 P.3d 216 (2011) review denied, 173 Wn.2d 1032, 277 P.3d 668 (2012) and Bartz v. State Dep't of Corr., 173 Wn.App. 522, 297 P.3d 737 (2013), review denied, 177 Wash.2d 1024 (2013), and conclude RCW 42.56.550(6) applies to an agency's singular response to a public records request. In so doing, the Court should overrule Division I's holding in Tobin v. Worden, 156 Wn.App. 507, 233 P.3d 906 (2010).

In 2005, the Legislature amended RCW 42.56.550(6) for the purpose of shortening the limitations period for actions brought under the PRA to one year. RCW 42.56.550(6) (2005) (amended by Laws of 2005, ch. 483, § 5). In so doing, the Legislature used the following language, "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." The logical conclusion regarding requests such as the one presented in this case is that the Legislature intended situations in which an agency denies a request to fall within the scope of "the agency's claim of exemption." To conclude otherwise would yield unreasonable, illogical, and absurd consequences.²

This Court should adopt the rationale of the court of appeals in Johnson and Bartz and should overrule Tobin. In Johnson, the agency responded with one production of records with no exemptions claimed. Mr. Johnson alleged that he located additional responsive records that were provided by the agency to another requestor that the agency should have provided in response to his request. Mr. Johnson filed suit more than two years after the agency's production of records in response to his request. In finding his claim time-barred, the court of appeals noted, "it

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

would be an absurd result to contemplate that, in light of two arguably applicable statutes of limitations, the legislature intended no time limitation for PRA actions involving single-document production. Johnson v. State Dep't of Corr., 164 Wn.App. 769, 777-78, 265 P.3d 216, 220 (2011), citing, Cannon v. Dep't of Licensing, 147 Wash.2d 41, 57, 50 P.3d 627 (2002) (“This court will avoid a literal reading of a provision if it would result in unlikely, absurd, or strained consequences.”) (footnote omitted). In Johnson, the court found RCW 4.16.130 barred Mr. Johnson’s claim.

In Bartz, the court of appeals went further and found RCW 42.56.550(6) bars a claim when the agency responds with one installment of records and claims no exemptions. In rejecting Tobin and following Johnson, the court of appeals stated, “It 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 536-37.

Similar to Johnson and Bartz, it is absurd to conclude that the legislature intended for endless litigation of PRA claims where an agency has conducted a reasonable search for records and found none or has made

a legal decision that records are not “public records”. Adopting this absurd interpretation would severely impact counties and would have the effect of nullifying the Secretary of State’s authority to establish records retention guidelines. A county has the burden of proof to establish its compliance with the PRA, no matter how stale the claim. RCW 42.56.550(1), (2). Any county that failed to permanently retain all responses to all public records requests would be unable to defend itself against a claim filed years later alleging that not all records were properly located, assembled, and provided. This interpretation of RCW 42.56.550(6) would permit a requestor who receives notification that no responsive records exist to sue years, if not decades, later and would preclude a county from defending such a suit.

WAPA is interested in an application of RCW 42.56.550(6) to PRA claims when an agency finally responds to a request – whether that response is to provide responsive records, deny the request, provide records in installments, or claim an exemption. Absent the protections the statute of limitations provides, counties are in the tenuous position of choosing to ignore their records management obligations or face the consequence of not being able to defend stale claims to the detriment of the public coffers. This Court should reject the absurd result adopted by the Tobin court.

B. A “Discovery Rule” Should Not Be Read Into the Statutes of Limitations Limiting PRA Claims

Statutes of limitations are strictly applied, and courts are reluctant to find an exception unless one is clearly articulated by the legislature. See, e.g., Huff v. Roach, 125 Wn. App. 724, 732, 106 P.3d 268 (2005); Bennett v. Dalton, 120 Wn. App. 74, 85-86, 84 P.2d 265 (2004); Janicki Logging & Construction Co. v. Schwabe, Williamson & Wyatt, 109 Wn. App. 655, 662, 37 P.3d 309 (2001). This is particularly true in cases governed by explicit statutory directives, such as the PRA, and not by the common law. See Elliott v. Dep’t of Labor and Indus., 151 Wn. App. 442, 447, 213 P.3d 44 (2009).

In amending the PRA statute of limitations in 2005, the legislature clearly expressed its intent that claims must be filed within one year. The legislature did not require that “all of the records” be produced before the statute of limitations is triggered. Similarly, the legislature did not conclude that the statute of limitations did not begin to run until the plaintiff “discovered” the potential violation. The legislature was clear in enacting a one year statute of limitations and this Court should not read a discovery rule exception into the plain language of RCW 42.56.550(6).

Additionally, the application of the discovery rule is particularly inappropriate in this case. Mr. Belenski knew IALs were being created. CP 120-121. Mr. Belenski previously requested and received IALs. Id. He had enough information as of October 5, 2010, to challenge Jefferson County's assertion that no records existed. There was no fraud, misrepresentation, or violation of a quasi-fiduciary duty on the part of the County which would make the application of the discovery rule appropriate. See Crisman v. Crisman, 85 Wn. App. 15, 20-22, 931 P.2d 163, 166-67 (1997) (discovery rule applied in cases where the defendant fraudulently conceals a material fact); Favors v. Matzke, 53 Wn. App. 789, 796, 770 P.2d 686, 690 (1989) (discovery rule applied where there was a duty to disclose the existence of a material fact rising from the quasi-fiduciary relationship between the plaintiff and defendant). There is no evidence anywhere in the record of this case that Jefferson County purposefully or maliciously withheld these records; rather they made a legal determination that they did not have responsive records and informed Mr. Belenski in the time-period required by the PRA.

The legislature evidenced a clear intent to limit PRA litigation by shortening the limitations period in 2005 and by providing the alternative statute of limitations in RCW 4.16.130. Inserting a common law "discovery rule" into either of these statutes of limitations would

eviscerate this clear intent. As noted above, counties could be sued decades later – decades after a file has been destroyed in accordance with records retention requirements – and face substantial liability if a discovery rule were inserted. Counties are keenly interested in this issue as, recently, counties have been encountering broader, vaguer requests, such as “provide all records that relate to” a subject or person. With requests this broad and vague, counties are likely to miss a public record, no matter how thorough the search for responsive records. The removal of a definitive statute of limitations by reading a “discovery rule” into either RCW 42.56.550(6) or RCW 4.16.130 would put a county in a position of facing substantial, per day penalties for endless periods of time. This clearly leads to an absurd result – a result contrary to the clarity and definitiveness provided by the Legislature’s actions in 2005. This Court should reject such an absurd result – especially on the facts of Mr. Belenski’s case.

VI. CONCLUSION

The Court of Appeals properly applied the law and correctly determined Mr. Belenski’s action regarding his September 27, 2010, request is time-barred. This Court should affirm the Court of Appeal’s ruling on this issue. In the alternative, this Court should overrule Tobin v.

Worden and hold RCW 42.56.550(6) bars claims filed more than one year
after an agency's singular response to a public records request.

Respectfully submitted this 28th day of March, 2016.

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Good morning,

Attached is Snohomish County's Motion to File Amicus Brief, and the Amicus Brief. Please file these documents with the Washington St. Supreme Court. Copies of these documents are also being provided to Petitioner, Respondents and Amici.

Supreme Court #92161-0
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Please contact me at (425) 388-6349 if there are any questions or if you need any additional information in order to process this filing. Thank you.

Sincerely,

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