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No. 92161-0

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

MIKE BELENSKI,

Petitioner,

v.

JEFFERSON COUNTY,

Respondent,

ANSWER TO AMICUS CURIAE BRIEF ALLIED DAILY
NEWSPAPERS, et al

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I. INTRODUCTION

Respondent Jefferson County hereby answers the amicus brief filed by Allied Daily Newspapers of Washington, et al in this matter. Amici advocate an unworkable, unsound interpretation of RCW 42.56.550(6) which emasculates the statute of limitations that the legislature intended to apply in PRA cases. The Court should affirm dismissal of Belenski's untimely claims brought more than two years after the County's response under either statute of limitations in RCW 42.56.550(6) or RCW 4.16.130.

II. ARGUMENT

A. **Plaintiff Failed to Preserve the Statute of Limitations Argument by Failing to Contest the Applicability of the Two Year Statute of Limitations.**

Amici is incorrect in asserting that the issues here were properly preserved. The trial court in this matter dismissed the public records claims on other grounds, namely the internet access logs were not public records. Although the Court of Appeals reversed on that issue, it affirmed dismissal of one count of the Plaintiff's Complaint on the grounds that the claims were not brought within two years from the agency's response to Plaintiff's September 2010 public records request. The County argued that this was an alternative basis for affirming on this specific claim.

Despite the County's identification of the statute of limitations defense as an alternative ground for affirmance, the Plaintiff did not argue for a discovery rule nor did he contest the application of RCW 4.16.130 in his reply to the County's argument. As such these issues were not preserved at the time Division II wrote their opinion. Plaintiff belatedly attempted to raise these issues for the first time in a motion for reconsideration.

Amici incorrectly claims that there is an admission that Jefferson County knowingly and intentionally withheld public records in its response. No such admission is present in the record and none is cited. Indeed, the Amici fails to appreciate that there are no factual findings by the trial court concerning the applicability of the statute of limitations or Belenski's allegations concerning any fraudulent action of the County to induce him not to file his lawsuit, as is necessary in order to apply either equitable tolling or application of the discovery rule, the theories relied upon by the Appellant.

**B. Division II's Opinion Does Not Conflict with
Established Case Law or the Public Records Act.**

Amici acknowledged that a requestors required to sue within one year of the agencies producing the last responsive record or within one year of the claiming of exemption for records that it withholds. Amici

Brief at 3. Amici interprets RCW 42.56.550(6) as requiring that the agency has “actually produced all responsive records” in order to trigger the statute. *Id.* However, this language is not found either in the language of RCW 42.56.550(6) nor in its legislative history. If the legislature had intended all responsive records to be produced it would have included the word “all”. It did not do so and Amici’s interpretation seeks to import language not used by the legislature. This is evidence that the legislature did not intend the result which Amici advocates.

Moreover, Amici’s argument assumes its own conclusion so as to eviscerate any statutes of limitations where the agency is alleged to have done less than a perfect job of responding, or responded in a manner that does not claim an exemption or provide records in multiple installments. One must question why an agency would need be sued at all if it is held to a standard of perfection in its response to the records request.

Amici’s position is also contrary to *Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011). In *Neighborhood Alliance*, the Court recognized that an agency has a duty to conduct a reasonably adequate search. However, the reasonableness of the search is independent from whether responsive records are actually located. In characterizing the duty to search, the Court stated as follows:

The adequacy of the search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents. ... What will be considered reasonable will depend on the facts of each case. ... When examining the circumstances of a case then, the issue of whether the search was reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not found. *Truitt v. Department of State*, 283 U.S. at DC 86, 897 F.2d 540, 542 (1990); *Meeropol v. Meese*, 252 U.S. at DC 381, 395, 790 F.2d 942, 956 (1986) ('A search need not be perfect, only adequate').

Neighborhood Alliance, 172 Wn.2d 702, 720 (2011).

If the statute of limitations is not triggered until every responsive record is produced, as Amici contend, then searches must be perfect in order to trigger the statute of limitations. This is contrary to the duty laid out in *Neighborhood Alliance*. Amici's argument therefore eviscerates the statute of limitations unless the agency's response is itself perfect. No court has ever held agencies to a standard of perfection simply to trigger a statute of limitations.

Amici's argument is to the contrary to the stated purposes of statutes of limitations which is to bar stale claims. The purpose of statutes of limitations is to shield defendants and the judicial system from stale claims. When plaintiffs sleep on their rights, evidence may be lost and memories may fade. *Crisman v. Crisman*, 85 Wn. App. 15, 19, 931 P.2d 163 (1997); *Burns v. McClinton*, 135 Wn. App. 285, 293, 143 P.3d 630, 633 (2006), as amended (Feb. 13, 2008).

This Court should adopt a rule of law that effectuates the legislative purpose in adopting a statute of limitations. Amici focus exclusively on the admittedly beneficial purposes of the PRA without consideration of the purpose of the statute of limitations, which is at issue here. The Court's mission is to effectuate both the purposes of the PRA to provide access to records and the purpose of the statute of limitations which is to limit the liability of agencies and prevent unlimited, open-ended liability for stale claims for which witnesses and evidence may no longer be available.¹ The purposes behind the statutes of limitations are important and this Court cannot ignore the legislatures actions in limiting claims under the Public Records Act.

One recent case weighing against Amici's position is *Block v. City of Gold Bar*, 189 Wn. App. 262, 273-274, 355 P.3d 266 (2015), review denied (March 4, 2016). In *Block*, Division I rejected a similar argument that failure to locate a record is a per se violation of the Public Records Act. Although the statute of limitations was not the issue in *Block*, this similar argument based on the same reasoning and advanced by the same

¹ The need for timely judicial review is accentuated by the PRA's unique placement of the burden of proof on agencies, who must show their response is proper. RCW 42.56.550(1). Agencies cannot do so if the records of their response are not available because they were lawfully discarded after expiration of the records retention period, which is coincident with the longer of the statutes applied to PRA cases—two years. See CORE Records Retention Schedule, §GS2010-014 Rev. 2.

counsel for Amici here, was rejected based on *Neighborhood Alliance*.

An agency's search for records does not have to be complete in order for its response to conform with the Public Records Act and to trigger a statute of limitations.

C. If Amici are correct that RCW 42.56.550(6) was not applicable, the Court of Appeals correctly applied RCW 4.16.130.

If the Amici are correct that the statute of limitations in RCW 42.56.550(6) is not triggered by an agency's response that it has "no responsive records", then the Court of Appeals correctly applied the catchall statute of limitations to fill in the gaps. RCW 4.16.130 has historically been recognized as a catchall provision to ensure that a limitation for any possible cause of action not covered by other provisions would apply. See *Stenberg v. Pacific Power and Light Company, Inc.*, 104 Wn.2d 710, 721, 709 P.2d 793 (1985); *Citizens National Bank v. Lucas*, 26 Wash. 417, 418, 67 P. 252 (1901).

If Amici are correct that the one-year statute of limitations is not applicable because it only applies where agencies provide multiple installments of records or claim an exemption, then the two-year statute of limitation should be applied to all other potential agency responses. This is the result reached by Division II below. Otherwise, the interpretation offered by Amici eviscerates the statute of limitations, in clear

contradiction to the legislative intent to limit actions and reduce the statutes of limitations from five years to one.²

After setting forth the numerous possible claims that this Court has allowed under the Public Records Act, Amici fails to answer the critical question: What statute of limitations applies when an agency conducts an inadequate search? What statute of limitations applies when there is a failure to locate a record and produce any records? What statute of limitations applies when an agency considers a record nonresponsive to the request? What statute of limitation applies when an agency does not believe records satisfy the statutory definition of Public Records and therefore has “no responsive records”? These are the questions posed by this case but are left unanswered by Amici. Amici suggests that there is no statute of limitations because the agency has not produced “all responsive records actually in existence at the time of the request”. The Amici’s position leaves the plaintiffs free to sue decades later if a single record is missed after a reasonable search is conducted. This is inconsistent with *Neighborhood Alliance* and with the legislative intent evident in shrinking the statute of limitations from five years to one year.

² Amici’s citation to the *Wade’s Eastside Gun Shop v. Department of Labor Industries*, __ Wn.2d __, 2016 WL 1165441 (March 24, 2016) is especially curious and irrelevant to the issues in this case. This case had nothing to do with statute of limitations, but rather decided the amount of daily penalties could be imposed on a per page basis within broad discretion of the trial court. It is inapposite to any of the issues in this case.

Historically Washington Courts have answered these questions by resorting to RCW 4.16.130 the “catchall” statute of limitations providing for two years where no other statute of limitations would otherwise apply. As such, the Court of Appeals decisions beginning with *Johnson v. Department of Corrections, supra*, and continuing with the ruling here in *Belenski v. Jefferson County*, correctly applied the two-year statute of limitations. This established rule has functioned well under the PRA to prevent a flood of untimely claims.

It is important to note that in his reply brief to the Court of Appeals, Belenski did not contest the County’s argument that RCW 4.16.130 controls in this situation. He never mentioned that statute. He did not contest the argument that under *Johnson v. Department of Corrections*, dismissal under the two-year statute of limitations was proper. He attempted to challenge this outcome only after Division II issued its opinion finding his claims barred by RCW 4.16.130. As such he waived his right to further contest that issue.

D. Amici rely on *Tobin v. Worden* to interpret the statute of limitations, which the Court should overrule due to its absurd result.

The current statute of limitations in the Public Records Act is ambiguous and incomplete for the reasons listed above. Division II has ruled that the one-year statute of limitations applies to any “action under

this section,” even if the records are produced in a single installment and the agency does not make any claim of exemption. *Bartz v. DOC*, 173 Wn. App. 522, 297 P.3d 737 (2013). *Bartz* expressly rejected the 2010 Division I opinion in *Tobin*, which held that the one-year statute of limitations is only triggered if there is a “claim of exemption” or records are produced in multiple installments. *Tobin v. Worden*, 156 Wn. App. 507, 233 P.3d 906 (2010).

Another panel of judges from Division I subsequently agreed in an unpublished decision with the Division II’s *Bartz* ruling that it is absurd to conclude, as Amici argue, that the legislature intended no time limitation for PRA actions where the agency’s response is a single production, is incomplete, or that that legislature intended different statutes of limitations for different categories of PRA requests, given its deliberate shortening of limitations period from five years to one year. *Mahmoud v. Snohomish County*, noted at 184 Wn. App. 1017, 2014 WL 5465404, review denied, 182 Wn.2d 1027 (April 29, 2015), at *5 & n.49.³ Thus, in at least one

³ This unpublished decision is not binding and not cited as precedent; rather it is cited to illustrate the need for this Court to address the uncertainty created by *Tobin*. See, e.g., *State v. Evans*, 177 Wn.2d 186, 195 -97 & nn.1-2, 298 P.3d 724 (2013) (citation to unpublished decision does not violate GR 14.1(a) when cited to demonstrate historical interpretation of a statute rather than as precedent); *State v. Arreola*, 176 Wn.2d 284, 297 & n.1, 290 P.3d 983 (2012) (same).

instance, Division One has split from its own holding in *Tobin*, ruling that all PRA claims are subject to a one-year statute of limitations. *Id.*, at n.38.

The splits in the lower courts demonstrate that the Court should now clarify the law, by overruling *Tobin* and adopting the reasoning in *Bartz*. The Court can resolve the conflict by holding that the one-year statute of limitations applies to all PRA claims. The statute of limitations, like all such statutes, commences on the accrual of the action, which is the later of the date of the agency's response, its claim of exemption or the last provision of records if it responds in installments.

E. The PRA's One-Year Statute of Limitations Was Intended to Apply to All PRA Claims

Tobin is based on a misinterpretation of the statute of limitations that would have been absurd at the time the one-year statute of limitations was adopted in 2005 and is contrary to the Attorney General's contemporary interpretations of the amendment, which show an intent that the new statute would apply to all PRA claims. Because the amendment was requested by the Attorney General and tasks the Attorney General with adopting model rules, the Attorney General's intent is relevant to the intent of the legislature. Especially relevant is the fiscal note prepared by the Attorney General in support of the bill, which was submitted as Attorney General request legislation. A dispute regarding two possible statutes of limitations

presents a question of law, subject to de novo review. *Walker v. Wenatchee Valley Truck & Auto Outlet, Inc.*, 155 Wn. App. 199, 206, 229 P.3d 871 (2010). Likewise questions of statutory interpretation are reviewed do novo. *Rental Housing Ass'n v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009).

Statutes of limitation reflect the legislative judgment that “that it is better for the public that some rights be lost than that stale litigation be permitted.” *O’Neil v. Estate of Murtha*, 89 Wn. App. 67, 73, 947 P.2d 1252 (1997) (citation omitted); *see also Allen v. State*, 118 Wn.2d 753, 759, 826 P.2d 200 (1992) (noting legislative determination in favor of barring stale claims). “The ‘obvious’ purpose of such statutes is to set a definite limitation on the time available to bring an action, without consideration of the merit of the underlying action.” *Bartz*, 173 Wn. App. at 538 n.19.

When the literal meaning of a statute leads to an absurd result, a Court should treat that statute as ambiguous and look to the intent of the Legislature to interpret the statute, disregarding the absurd literal interpretation. *Tingey v. Haisch*, 159 Wn.2d 652, 152 P.3d 1020 (2007) (when interpreting a statute of limitations, “the court will avoid literal reading of a statute which would result in unlikely, absurd, or strained consequences.”) (quotation omitted); *Bartz v. DOC*, 173 Wn. App. 522,

537-38, 297 P.3d 737 (2013) (same, interpreting 2005 amendment to the PRA statute of limitations).

Courts can determine legislative intent by looking to the surrounding circumstances when the bill was enacted. *Francis v. DOC*, 178 Wn. App. 42, 60, 313 P.3d 457 (2013). In addition, contemporary interpretations of legislation by the Attorney General can provide insight into the intent of the legislature, particularly when the Attorney General is statutorily designated to play a role in the implementation of the legislation. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 308-09, 268 P.3d 892 (2011) (construction of statute by the attorney general can “shed light on the intent of the legislature” in some circumstances); *In re Sehome Park Care Ctr., Inc.*, 127 Wn.2d 774, 780, 903 P.2d 443 (1995) (“In interpreting a statute, we accord great weight to the contemporaneous construction placed upon it by officials charged with its enforcement[.]”). Legislative bill reports and fiscal notes can also help courts determine the intent of the Legislature. *Baker v. Tri-Mountain Resources, Inc.*, 94 Wn. App. 849, 854 & n.3, 973 P.2d 1078 (1999) (noting use of bill reports and fiscal notes to determine legislative intent); *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 746, 985 P.2d 262, 286 (1999).

Enforcement of the statute of limitations is particularly important in PRA claims because the statute of limitations serves a secondary role of

limiting agency liability for daily penalties in addition to the primary goal of barring stale claims. *See Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 437, 98 P.3d 463 (2004) (statute of limitations serves as the “only limitation on the number of days comprising the penalty period”).

The general purpose of the 2005 amendment adding a one-year statute of limitations was to limit agency liability after the Supreme Court ruled in *Yousoufian* that daily penalties were mandatory, even when a requestor purposefully delays filing a lawsuit. *See Yousoufian*, 152 Wn.2d at 437. The parties and courts, however, are divided on the issue of whether the new one-year statute of limitations applies to all PRA claims, or only to claims where an agency has asserted an exemption or produced records in installments.

1. The 2005 amendment of the statute of limitations is ambiguous.

When the new statute of limitations came into effect as part of the Public Disclosure Act, there were two possible interpretations of that statute: either (1) the new one-year limitation period applied to all types of public records claims (the “broad interpretation”) brought under former RCW 42.17.340 or (2) the one-year limitation period only applied to such claims if records were produced in “a partial or installment” basis or the agency asserted at least one exemption and the five-year limitation period

would apply to all claims where one of those two conditions were not met (the “narrow interpretation”).

As noted above, when interpreting the amendment, the Court should avoid absurd interpretations, and consider the surrounding events, statutes in legislative documents and consider contemporaneous interpretations by the Attorney General’s Office.

2. The narrow interpretation of the 2005 amendment in *Tobin* leads to nonsensical results.

Amici urge that the decision in *Belenski* conflicts with *Tobin*. Brief at 14-16. However, at least two absurdities arise from the narrow interpretation of the statute of limitations adopted by *Tobin*. First, as noted by the *Bartz* Court, it would be absurd for the Legislature to adopt two distinct limitations periods under the current circumstances:

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 537 (footnotes omitted).

Second, it would be absurd for the limitations period to turn on whether an agency asserted an exemption or exercised its discretionary authority to produce records in installments, especially because those decisions may have no relationship to the claim being brought. The

Supreme Court has refused to adopt interpretations of the statute of limitations periods that turn on fact-specific actions within the control of a party that do not otherwise correlate with whether a longer or shorter limitations period should apply. *See, e.g., Tingey v. Haisch*, 159 Wn.2d 652, 152 P.3d 1020 (2007).

A PRA claim will often have no relationship to the claim of an exemption or the use of installments and it would therefore be arbitrary to have the issue of which limitation period applies turn on those two issues. Why should the limitations period for an inadequate response claim, for example, turn on whether or not the agency claimed an exemption? Or why should a wrongful withholding claim turn on whether or not an agency produced the records in one or two installments or failed to locate any responsive records?

Instead, the more logical explanation for the awkward triggering language in the new one-year statute of limitations was that the drafters were trying to take into account the new installment process and were simply trying to make clear that each separate installment would not trigger a different statute of limitations period. A clearer way to have stated this would have been something like: “actions under this section must be filed within one year of the agency’s claim of exemption or the final production of a record, which would be the last installment if records are produced on

a partial or installment basis.” This is the only reasonable interpretation that would fulfil the intent of the Legislature.

3. Legislative History shows that the Legislature intended the new one-year statute of limitations to apply to all PRA claims

The legislative history behind 2SHB 1758, which amended the PRA statute of limitations and reduced the statute from a five-year period to one year, supports the application of the statute to all PRA claims. The Final Bill Report for 2SHB 1758 (attached as Appendix A) begins by outlining the two claims by which judicial review was then available under the PRA: denial of records or unreasonable estimates of time by the agency. FBR at 2. It then described the action taken by the bill as follows:

Any action involving a person who is denied a public record or believes an agency's time estimate is unreasonable 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.

Final Bill Report, 2SHB 1758 at 4. (Emphasis added).

The emphasized language shows an intent to apply the one-year statute to “any action” involving a person who is denied a public record. The date for commencement is to be from the later of the claim of exemption or production of records, when those actions are taken. However, subsequent cases have added other PRA claims that implicate an action under the PRA where there is neither an exemption claimed nor

records produced in installments. One such response is where the agency cannot locate the requested records. Another is where the request seeks records that are not “public records” as defined by the PRA. Still another type of response would be where the agency locates records that are not responsive to the request.

In addition to the Final Bill Report, the best evidence shows that the Attorney General’s Office, who requested and drafted the 2005 amendment, intended the amendment to apply to all PRA claims. Under the circumstances of this case, the Court can presume that the Legislature shared the same intent as Attorney General’s Office which requested this legislation and is required to administer it. *See Five Corners*, 173 Wn.2d at 308-09 (Legislature’s intent can be gleaned from intent of the Attorney General as determined by contemporaneous interpretations).

First, the fiscal note submitted by the Attorney General’s Office with HB 1758 shows it was the Attorney General’s unambiguous intent to have the new one-year statute of limitations apply to all PRA claims:

Section 5 [of HB 1758] ... shorten[s] the statute of limitations for bringing actions for penalties from the current five-year limit to one year. The AGO sees this as a balanced approach that provides adequate incentives to agencies to comply with the Act, but prevents abuses of the process by those who may make requests and then wait several years before bringing an action for penalties.

Attorney General Fiscal Note for HB 1758 (2005) (Appendix B).

The Attorney General's office implicitly confirmed this interpretation when it proposed its new set of model rules in November 2005, which were required by the same legislation that included the new statute of limitations. See Laws of 2005, ch. 483 §4.

The proposed model rules first appeared in the Washington State Register exclusively with references to the former Public Disclosure Act, title 42.17 RCW, where the PRA was located until July 1, 2006. See Wash. State Reg. 05-23-166 "Model rules on public record" (filed November 23, 2005). In proposed new section WAC 44-14-08004(2), the Attorney General describes the statute of limitations as follows:

Statute of limitations. The statute of limitations for an action under the act is one year after the agency's claim of exemption or the last production of a record on a partial or installment basis. RCW 42.17.340(6) (2005).

The significance of this language is that it cites exclusively to the newly adopted one-year limitation period. Although statement still parrots the ambiguous triggering language, if the Attorney General had thought the amendment only applied to certain claims and other claims were governed by a different statute of limitations, then the Attorney General would have said so. Thus, it can be presumed from the citation only to the newly adopted provision, the Attorney General who requested this legislation intended the one-year statute of limitations to apply to all PRA claims. And

under the *Five Corners* decision, this intent can be imputed to the Legislature.⁴

In summary, the Court should adopt the broad interpretation of the PRA's one-year statute of limitations made by the *Bartz* court because it furthers the intent of the Legislature and avoids the absurd and arbitrary results that flow from the narrower interpretation made in the *Tobin* decision and advanced by Amici.

III. CONCLUSION

For the foregoing reasons, the Court should reject the interpretation made by Amici Allied Daily Newspapers, et.al. and affirm the Court of Appeals dismissal of Belenski's untimely claims brought more than two years after the County responded to his records request. This claim was untimely under both RCW 42.56.550(6) and RCW 4.16.130.

⁴ Even though the one-year statute of limitations applies to all PRA claims, this does not mean an agency can avoid liability under the PRA by intentionally and silently withholding a responsive public record until the one-year period expires. If an agency intentionally hides such a record and fraudulently induces the requestor not to sue because it falsely claims no record existed, the Court has the authority to find that the agency is equitably estopped from raising the statute of limitations under the doctrine of equitable tolling. *See, e.g., Peterson v. Groves*, 111 Wn. App. 306, 310-11, 44 P.3d 894 (2002) The availability of equitable tolling on a fact specific, case-by-case basis renders adoption of a general discovery rule unnecessary.

Respectfully submitted this 27th day of April, 2016.



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Appendix A

FINAL BILL REPORT

2SHB 1758

C 487 L 05
Synopsis as Enacted

Brief Description: Revising public disclosure law.

Sponsors: By House Committee on Appropriations (originally sponsored by Representatives Kessler, Nixon, Haigh, Chandler, Clements, Schindler, Hunt, Hunter, Hinkle, Takko, B. Sullivan, Miloscia, Buck and Shabro; by request of Attorney General).

House Committee on State Government Operations & Accountability
House Committee on Appropriations
Senate Committee on Government Operations & Elections

Background:

The Public Disclosure Act (PDA) requires all state and local government agencies to make all public records available for public inspection and copying unless they fall within certain statutory exemptions. The provisions requiring public records disclosure must be interpreted liberally and the exceptions narrowly in order to effectuate a general policy favoring disclosure.

For example, records that are relevant to a controversy to which a state or local agency is a party, but would not be available to another party under the superior court rules of pretrial discovery, are exempt from public disclosure. The Washington Supreme Court has defined "relevant to a controversy" as "completed, existing, or reasonably anticipated litigation." *Dawson v. Daly*, 120 Wn.2d 782, 791 (1993).

I. Requirements for Maintaining Records

Public records must be made available for inspection and copying during normal office hours. State and local agencies may make reasonable rules and regulations to provide full access to public records, to protect public records from damage, and to prevent excessive interference with other essential functions of the agencies.

State and local agencies are required to maintain indexes providing identifying information regarding certain records. Local agencies do not have to provide an index if doing so would be unduly burdensome. However, such local agencies must issue and publish a formal order specifying the reasons maintaining an index would be unduly burdensome and make available any indexes maintained for agency use.

II. Responding to Requests

An agency must respond to requests for public records promptly. Within five business days of a request, an agency must:

- provide the record;
- acknowledge receipt of the request and provide a reasonable estimate of the time that is required to respond to the request. The agency may take additional time to clarify the intent of the request, to locate the requested information, to notify third persons or agencies affected by the request, or to determine whether the requested information is protected by an exemption; or
- deny the request.

The Washington Supreme Court recently ruled that a public agency does not have to comply with an overbroad request. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448 (2004). According to the court, a proper request for public records "must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting *all* of an agency's documents" (emphasis original). *Id.*

III. Copying Public Records

An agency must allow the public to use its facilities for copying public records unless to do so would unreasonably disrupt the operation of the agency. An agency may not charge for locating public documents and making them available for copying. However, an agency may impose a reasonable charge for providing copies of public records and for the use of agency equipment. Charges for photocopying may not exceed the actual per page cost published by the agency. If the agency has not published a per page costs for copying, the costs may not exceed 15 cents per page.

IV. Judicial Remedies

A person who is denied a public record or who believes an agency's time estimate is unreasonable may appeal the agency decision in the superior court of the county in which the record is maintained. In such court actions, the agency has the burden to prove, by a preponderance of the evidence, that the agency action was valid. If the person prevails in the action, he or she must be awarded all costs of maintaining the action, including reasonable attorney fees.

Summary:

I. Requirements for Maintaining Records

By February 1, 2006, the Attorney General must adopt an advisory model rule for state and local agencies addressing:

- providing fullest assistance to requesters;
- fulfilling large requests in the most timely manner;
- fulfilling requests for electronic records; and
- any other issues pertaining to public disclosure as determined by the Attorney General.

II. Responding to Requests

An agency may not reject or ignore requests to inspect or copy public records solely on the grounds that the request is overly broad. The agency may make records available 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.

Every state and local agency must appoint and publicly identify an individual whose responsibility is to serve as a point of contact for members of the public in requesting disclosure of public records and to oversee the agency's compliance with the public records disclosure requirements of the PDA. An agency's public records officer may appoint an employee or official of another agency as its public records officer. State agencies must publish contact information regarding the public records officer in the state register. Local agencies must publish the contact information in a manner reasonably calculated to give notice to the public.

III. Copying Public Records

An agency may require a deposit not to exceed 10 percent of the estimated cost of providing copies of a request and may charge a person per installment. An agency may cease fulfilling a request if an installment is not claimed or received.

IV. Judicial Remedies

An action against a county involving a person who is denied a public record or who believes an agency's time estimate is unreasonable may be brought in the superior court of the county or in either of the two judicial districts nearest to the county. Any action involving a person who is denied a public record or believes an agency's time estimate is unreasonable 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.

Votes on Final Passage:

| | | | |
|--------|----|---|---------------------------|
| House | 89 | 6 | |
| Senate | 42 | 4 | (Senate amended) |
| House | | | (House refused to concur) |
| Senate | | | (Senate receded) |
| Senate | 47 | 0 | (Senate amended) |
| House | 97 | 0 | (House concurred) |

Effective: July 24, 2005

Appendix B

Individual State Agency Fiscal Note

| | | |
|-----------------------------|---------------------------------|---|
| Bill Number: 1758 HB | Title: Public disclosure | Agency: 100-Office of Attorney General |
|-----------------------------|---------------------------------|---|

Part I: Estimates

No Fiscal Impact

The cash receipts and expenditure estimates on this page represent the most likely fiscal impact. Factors impacting the precision of these estimates, and alternate ranges (if appropriate), are explained in Part II.

Check applicable boxes and follow corresponding instructions:

- If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- Capital budget impact, complete Part IV.
- Requires new rule making, complete Part V.

| | | |
|---------------------------------|---------------------|-------------------------|
| Legislative Contact: | Phone: | Date: 02/03/2005 |
| Agency Preparation: Linda Moran | Phone: 360 753-2619 | Date: 02/03/2005 |
| Agency Approval: John Fricke | Phone: 360 753-2516 | Date: 02/08/2005 |
| OFM Review: Robin Campbell | Phone: 360-902-0575 | Date: 02/16/2005 |

Part II: Narrative Explanation

II. A - Brief Description Of What The Measure Does That Has Fiscal Impact

Briefly describe, by section number, the significant provisions of the bill, and any related workload or policy assumptions, that have revenue or expenditure impact on the responding agency.

This bill makes a number of changes and clarifications to the Public Disclosure Act:

Confirmation of Attorney-Client Privilege.

Section 1 confirms that the attorney-client privilege is an exemption from disclosure under the Public Disclosure Act. The Washington Supreme Court in the case of *Hangartner v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004), held that documents protected by the attorney-client privilege are exempt from public disclosure. Some observers viewed that as a change in the law. However, that decision confirmed the historical view that the AGO has had. So, section 1 of the bill would confirm this aspect of *Hangartner*.

Description of Scope of Attorney-Client Privilege in Understandable Terms.

Section 1 also would clarify in understandable language the scope of the attorney-client privilege. There has been a legitimate concern that the parameters of the privilege may be unclear or not understood by all. For example, some may have thought that documents were exempt from disclosure even if they were merely "copied" to an attorney. Following the *Hangartner* decision, former AGO Solicitor General Narda Pierce prepared a guidance document clarifying this and other aspects of the privilege. This bill sets forth the standards of the privilege in clear, simple terms, so state agency clients and the public can better understand it.

Requires Agencies to Respond to Broad Requests by Seeking Clarification.

Section 2 reverses the holding in *Hangartner* that agencies need not respond to requests that are "overbroad." Instead, the AGO would counsel agencies to seek clarification from the requester. This has been the historical practice of most state agencies when a broad request has been made.

Provision of Records on "Rolling Basis."

Section 2 also requires that records be provided on a rolling basis, if applicable. This means that if a smaller first batch of records is available as part of a request then that first batch must be provided when it is ready. This is the current practice of many agencies. It has been the experience that, upon receiving what is in effect a sample of the response, a requestor may abbreviate or even cancel the original request, thereby saving the agency time and resources.

Permits Audit of Copying Costs.

Section 3 provides that if an agency charges more than the standard \$0.15 per-page for copying based on the agency's actual cost of copying, the agency must document its actual costs. This documentation would be subject to audit by the State Auditor.

Designation of Public Records Contact Person.

Section 4 requires agencies to appoint public disclosure officers. Almost all agencies currently do so. Section 5 would require agencies to publicize contact information for their public disclosure officers.

Model Rules.

Currently, the Public Records Act, in RCW 42.17.290, allows agencies to adopt reasonable rules governing some aspects of the public records process. The AGO understands that many agencies, particularly local governments, may not have such rules. In an effort to provide assistance to such agencies, Section 5 would grant the Attorney General authority to adopt a model public records rule for state agencies and local governments by February 1, 2006. The model rule will address the following topics: providing the fullest assistance to requestors, indexing public records, fulfilling large requests in the most timely manner, fulfilling requests for electronic records, and other issues as determined by the Attorney General. It is hoped that, by developing such model rules, the AGO can assist state agencies and local governments adopt clear and consistent procedures for handling requests in an efficient manner.

Penalties.

Recently there has been controversy about the level of penalties that are appropriate for violations of the public's rights under the Act. The Supreme Court in *Yousoufian v. Sims*, 152 Wn.2d 421, 98 P.3d 463 (2004), rejected an argument that penalties should be determined on a per-record, per-day basis. However, since that opinion, there has been pressure to increase the penalties for failure to comply with the Act's disclosure requirements and perhaps adopt a per-record basis for the assessment of penalties. Section 5 attempts to find the appropriate balance by (1) rejecting the per-record basis for penalties as argued in *Yousoufian*; (2) increasing the penalty range (set in 1992 at \$5 to \$100 per-day) to \$50 to \$500 per-day; and (3) shortening the statute of limitations for bringing actions for penalties from the current five-year limit to one year. The AGO sees this as a balanced approach that provides adequate incentives to agencies to comply with the Act, but prevents abuses of the process by those who may make requests and then wait several years before bringing an action for penalties. Section 5 would also permit bringing actions against counties in adjoining counties.

The AGO does not anticipate a fiscal impact for this bill since the office currently provides client advice and litigation support to state agency clients on the Public Records law. The bill gives authority to the AGO to promulgate model rules. We also anticipate that this bill may require some client advice and perhaps some litigation support if a challenge to the law is filed. However, the AGO expects to handle this within existing resources.

II. B - Cash receipts Impact

Briefly describe and quantify the cash receipts impact of the legislation on the responding agency, identifying the cash receipts provisions by section number and when appropriate the detail of the revenue sources. Briefly describe the factual basis of the assumptions and the method by which the cash receipts impact is derived. Explain how workload assumptions translate into estimates. Distinguish between one time and ongoing functions.

II. C - Expenditures

Briefly describe the agency expenditures necessary to implement this legislation (or savings resulting from this legislation), identifying by section number the provisions of the legislation that result in the expenditures (or savings). Briefly describe the factual basis of the assumptions and the method by which the expenditure impact is derived. Explain how workload assumptions translate into cost estimates. Distinguish between one time and ongoing functions.

The AGO does not see a fiscal impact for this bill. The AGO currently provides client advice and litigation support to state agencies regarding the Public Records law. It is anticipated there may be some additional requests for client advice and the need to promulgate model rules developed under this bill. There also may be some litigation support if a challenge to this law is filed. However, the AGO expects to handle this work within existing resources.

Part III: Expenditure Detail

Part IV: Capital Budget Impact

Part V: New Rule Making Required

Identify provisions of the measure that require the agency to adopt new administrative rules or repeal/revise existing rules.

The AGO is granted authority under this bill to adopt model rules for public disclosure. This model rule will address the following topics: providing the fullest assistance to requestors, indexing public records, fulfilling large requests in the most timely manner, fulfilling requests for electronic records, and other issues as determined by the Attorney General. The intent of developing these model rules is for the AGO to assist state agencies and local governments adopt clear and consistent procedures for handling requests in an efficient manner.

DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the date specified below, I served a copy of the foregoing document upon Petitioner and Amici, via e-mail per service agreement of the parties:

RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEF ALLIED
DAILY NEWSPAPERS, et al

As follows:

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Snohomish County Public Records Deputy Prosecutor

Dated this 27th day of April, 2016 at Tumwater, Washington.



Jeffrey S. Myers

OFFICE RECEPTIONIST, CLERK

To: Marry Marze
Cc: Jeff Myers; 'mbelenski@gmail.com'; 'michele@alliedlawgroup.com'; dheid@auburnwa.gov; sara.divittorio@co.snohomish.wa.us
Subject: RE: Belenski v. Jefferson County; Cause No. 92161-0; Respondent's Answer to Amicus Curiae Brief Allied Daily Newspapers, et al

Received 4/27/16

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Marry Marze [mailto:Marry@lldkb.com]
Sent: Wednesday, April 27, 2016 2:42 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Jeff Myers <jmyers@lldkb.com>; 'mbelenski@gmail.com' <mbelenski@gmail.com>; 'michele@alliedlawgroup.com' <michele@alliedlawgroup.com>; dheid@auburnwa.gov; sara.divittorio@co.snohomish.wa.us
Subject: Belenski v. Jefferson County; Cause No. 92161-0; Respondent's Answer to Amicus Curiae Brief Allied Daily Newspapers, et al

Please find attached for filing Respondent's Answer to Amicus Curiae Brief Allied Daily Newspapers, et al in the *Belenski v. Jefferson County*, Supreme Court Cause No. 92161-0.

Thank you,

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