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NO. 60929-7-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BILL TOBIN and SUSAN TOBIN, a marital community,

Appellants,

v.

STEPHANIE WORDEN, individually and as Director, King County
Department of Development and Environmental Services; PAULA
ADAMS, individually and as Communications Director, King County
Department of Development and Environmental Services, and; KING
COUNTY DEPARTMENT OF DEVELOPMENT AND
ENVIRONMENTAL SERVICES, a subdivision of KING COUNTY,
WASHINGTON, A Municipal Corporation,
Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY

BRIEF OF APPELLANT

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I. INTRODUCTION

This case arises out of appellants Bill and Susan Tobin's requests for public records under the Washington Public Records Act, RCW 42.56 et. seq. ("PRA") from the respondents named above ("King County").

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in granting King County's motion for summary judgment on October 12, 2007.
2. The trial court erred in denying the Tobins' motion for reconsideration on November 1, 2007.

B. Issues Pertaining to Assignments of Error

1. Whether the one-year statute of limitations, RCW 42.56.550(6), which applies only to actions involving a "claim of exemption or the last production of a record on a partial or installment basis," operates to bar the Tobins' complaint under the PRA when King County never claimed any exemptions, and never produced records on a partial or installment basis?
2. If RCW 42.56.550(6) does not apply, whether RCW 4.16.080, the three-year statute of limitations, applies?
3. Whether dismissal of the Tobins' claims on a motion for summary judgment was proper when King County raised an issue of fact

for the first time in its reply brief (i.e. whether production of a heavily-redacted one-page complaint was production of records on a partial or installment basis as contemplated by the statute) and the trial court resolved the disputed issue of fact against the non-moving parties?

III. STATEMENT OF CASE

A. Introduction

On this appeal from an order of summary judgment, the court accepts the evidence presented by the nonmoving parties, Bill and Susan Tobin, and resolves all reasonable inferences of credibility in their favor. Duckworth v. Langland, 95 Wn. App. 1, 8, 988 P.2d 967 (1998), *review denied*, 138 Wn.2d 1002 (1999); Kahn v. Salerno, 90 Wn. App. 110, 117, 951 P.2d 321, *review denied*, 136 Wn.2d 1016 (1998); Pacific N.W. Group A v. Pizza Blends, Inc., 90 Wn. App. 273, 951 P.2d 826 (1998). This statement of facts is written in light of this legal standard, accepting as true all of the Tobins' evidence presented.

B. Factual and Procedural History

1. First Request – the Tobin Complaint

In early April of 2005 the Tobins' property on Vashon Island was for sale, and they had accepted an offer to buy. CP 116 ¶ 4.5. Then, on the morning of April 18, 2005, the Tobins' realtor told them that a man named Gregory Wessel from King County Department of Development and

Environmental Services (“DDES”) had called. CP 146 ¶ 3. Mr. Wessel stated that he had received an anonymous complaint alleging that there were buildings on the Tobins property that did not have proper permits. Id.

Right after hearing from his realtor Mr. Tobin called Mr. Wessel and arranged for Mr. Wessel to view the property the following day. CP 146 at ¶ 4. When Mr. Wessel arrived at the Tobins’ property on April 19, 2005, he discussed the complaint with the Tobins. Id. at ¶ 6. However, when Ms. Tobin asked to see a copy of the complaint, Mr. Wessel responded that he did not have it with him. Id.

On April 22, 2005, Plaintiff Susan Tobin filed a public records request with Defendant Stephanie Worden, Director of DDES. CP 115 at ¶ 4.1. Ms. Tobin asked to be provided “a copy of any complaints filed against my Vashon Island property, parcel 3523029045.” CP 125. The complaints requested were undeniably public records.

Pursuant to RCW 42.56.520, DDES was required to respond to Mrs. Tobin’s request “within five business days” and in one of three ways; 1) by providing the record; 2) by acknowledging that the agency had received the request and by providing a reasonable estimate of the time needed to respond; or 3) by denying the public record request. On or about May 5, 2005, outside the five day statutory period, the Tobins received a document from DDES in the mail. CP 127-128. The document

was not accompanied by a cover letter or any other correspondence referencing the public records request of April 22, 2005. All that the envelope contained was a photocopy of a handwritten, partially redacted “complaint” alleging that the Tobin property contained buildings constructed without a permit. The hand-addressed envelope bore a DDES return address and a postmark of May 3, 2005. CP 127-128.

Nearly one year later, on Monday March 20, 2006, the Tobins met with DDES agent Cheryl Lux and Deputy King County Prosecuting Attorney Jina Kim, in connection with the on-going administrative code enforcement action against their property. CP 119 ¶ 4.19. At that meeting, the Tobins’ attorney, David S. Vogel, verbally renewed his clients’ request to view the unredacted original complaint. Id. Without raising any claims of exemption, Ms. Lux told the Tobins that the complaint was “missing from the file.” Id.

The Tobins’ heard nothing more about this request from the defendants until October 12, 2006. CP 119-20 ¶ 4.21. On October 12, 2006, at a prehearing conference pertaining to their administrative proceedings, Mr. Vogel again asked the defendants to produce the unredacted original Tobin complaint. Id. The defendants verbally advised the plaintiffs for the first time that the complaint was “lost in the copying process.” CP 120 ¶ 4.21.

On October 30, 2006, a deputy prosecuting attorney finally provided Mr. Vogel with a copy of the complete contents of the file. CP 120 at ¶ 4.22. The materials provided did not include a copy of an anonymous complaint letter.

2. Second Request – the Ferguson Complaint

While investigating the veracity of the complaint that they had received in the mail on May 5, 2005, the Tobins discovered that Mr. Wessel had previously been involved or acquainted with a very similar type of complaint against another property on Vashon Island. CP 114 at ¶ 4.11. In an email dated November 24, 2004, Mr. Wessel alleges that he received an anonymous letter complaining of an unpermitted accessory dwelling unit (ADU) at 15131 91st Avenue SW on Vashon Island (the Ferguson property). CP 132. Noting the similarity between the anonymous letter in their situation and the anonymous letter referenced by Mr. Wessel in the November 24, 2004, email, Ms. Tobin made another public records request on June 3, 2005, to Paula Adams, DDES Communications Director, for the anonymous letter regarding the Ferguson property. CP 134.

On June 9, 2005, Defendant Adams responded to Mrs. Tobin's public records request of June 3, 2005. CP 136. The response consisted of a copy of a telephone complaint form from the Ferguson file and a cover letter with a reference to the Ferguson code enforcement case number. CP136-

137. DDES did not produce the record requested. The record DDES did provide corresponded to another ongoing complaint, not the one Mrs. Tobin referred to.

Realizing that the phone complaint record was not the document that she had requested, on or about June 13, 2005, Ms. Tobin reiterated her request for the anonymous letter that Mr. Wessel had referred to in his November 24, 2004 email. CP 139-140. DDES responded to the Tobin request again, and again the response was incorrect. CP 142-143. This time the response contained a cover letter apologizing for the error in the previously produced document and stated that the enclosed letter fulfilled the original request. CP 142. However, the letter enclosed was an exact copy of the handwritten complaint that the Tobins had received in response to the request for the complaint against their property, and it did not reference the Ferguson issue at all. CP 143.

On October 12, 2006, at a prehearing conference pertaining to their administrative proceedings regarding the code violations, the Tobins and their attorney David Vogel discussed and renewed their request for materials from the Ferguson case. CP 119 at ¶ 4.21. Deputy prosecutor Kim agreed to provide the requested materials, and on October 30, 2006, the prosecuting attorney finally provided Mr. Vogel with a copy of the

complete contents of the file. CP120 at ¶4.22. The materials provided did not include a copy of an anonymous complaint letter.

On November 22, 2006, the King County Hearing Examiner conducted a hearing relating to the Plaintiffs' property. At that hearing the court considered issues related to the handling of the Tobin complaint and the Ferguson complaint. CP120 at ¶ 4.24. On February 23, 2007, the Hearing Examiner issued an order dismissing the code enforcement action against the Plaintiffs' property. CP 145-149. The Examiner held that the loss of the Tobin complaint "violat[e]d the public trust." CP 149 at ¶ 20. No rulings were made regarding the Ferguson document. CP 145-149.

3. Procedural History

On or about July 19, 2007, the Tobins filed a complaint in the Snohomish County Superior Court alleging violations of the PRA. On or about August 27, 2007, the Tobins filed their first amended complaint. CP 113-150. King County filed both an answer to the complaint and a motion for summary judgment on or about September 24, 2007. CP 105-110 & 95-104. In the motion for summary judgment, King County stated that the Tobins complaint was time barred by the statute of limitations. CP 96, 99-104. On or about October 1, 2007, the Tobins filed a Response to the motion for summary judgment. In their response the Tobins raised the argument that RCW 42.56.550(6) did not apply because it dealt with claims

of exemption or production of records on a partial or installment basis. CP 79-80. King County filed its Reply to Plaintiff's Response on or about October 8, 2007. In the Reply, King County argued that the agency's response was a "partial" response; asserting for the first time a factual/legal argument the agency had not asserted in its original Motion for Summary Judgment. CP 61.

Immediately after the hearing, on October 12, 2007, the trial court entered its order granting King County's Motion and dismissing the Tobin's case. CP 41-42. On or about October 22, 2007, the Tobins timely filed a motion for reconsideration. The Tobins sought, among other things, a chance to respond to King County's new factual/legal assertion asserted in its Reply brief that its production of the Tobin document was a "partial" production consistent with the statute. CP 18-40. On or about November 11, 2007, the court filed its order denying the Tobins' Motion for Reconsideration. CP 5-6. The Plaintiffs timely filed this appeal.¹

¹ Not long after filing their appeal the Tobins learned that our Supreme Court had accepted review in *Rental Housing Association of Puget Sound v. City of Des Moines*, 165 Wash. 2d 525, 199 P.3d 393 (2009). ("RHA"). Because there appeared to be an overlap between the issues raised in RHA and the instant case, the parties mutually sought a stay on the instant proceedings, which was granted.

IV. ARGUMENT

A. Standard of Review.

Judicial review of all agency actions taken or challenged under RCW 42.56.520 shall be *de novo*. Soter v. Cowles Pub'g Co., 162 Wn.2d 716, 731, 174 P.3d 60 (2007); RCW 42.56.550 (3). Statutory construction is a question of law, which also is reviewed *de novo*. Pacheco v. Ames, 149 Wn.2d 431, 436, 69 P.3d 324 (2003). In addition, “[i]t is well settled under Washington law that this court reviews a summary judgment *de novo*.” Fell v. Spokane Transit Auth., 128 Wn.2d 618, 625 (1996).

Where the record consists entirely of declarations, affidavits and other documentary evidence, the appellate Court stands in the same position as the Trial Court and is not bound by the Trial Court’s factual determinations. Progressive Animal Welfare Soc’y v. University of Wash., 125 Wn.2d 243, 252, 884 P.2d 592 (1994) (“PAWS II”). In such instances the Court of Appeals can and should engage in the same inquiry as the Trial Court and review all of the facts in the record together with the Trial Court’s findings *de novo* and make an independent determination of all matters found to be in error. Ames v. City of Fircrest, 71 Wn.App. 284, 292, 857 P.2d 1083 (1993) (with complete record, appellate Court can decide issues of fact and law).

“Summary judgment is proper when reasonable persons looking at all the evidence could reach only one conclusion.” Morinaga v. Vue, 85 Wn.App. 822, 828 (1997), *review denied*, 133 Wn.2d 1012 (1997). “Only where it appears from the pleadings, depositions and affidavits on file that a party will not be able to present an issue of material fact before the trier of fact should a summary judgment be granted.” Cofer v. County of Pierce, 8 Wash.App. 258, 262 (1973). If there are disputed issues of material fact, summary judgment is improper and the issues must be resolved at trial. CR 56(c). The trial court’s findings and its reasoning are entitled to no deference on appeal. Chelan County Deputy Sheriff’s Ass’n v. Chelan County, 109 Wn.2d 282, 294 n.6 (1987).

As more fully discussed below, the trial court’s order on summary judgment must be reversed because, inter alia, the trial court indulged in impermissible and erroneous factual assumptions related to the sum and substance of the county’s response, e.g. whether the response was a response “on a partial or installment basis” as permitted by statute. Such assumptions were fundamentally incompatible with the mandate that the court view the evidence in a light favoring the non moving party and resolve all reasonable inferences from the evidence against the moving party. Folsom v. Burger King, 135 Wn.2d 658, 663 (1998). Because there are disputed issues of material fact concerning whether the defendants intended their response to

be a partial response “on a partial or installment basis,” or whether the county never intended to explain its withholding critical parts of the record as required by RCW 42.56.210(3),² this case should be remanded for trial.

B. The PRA requires a liberal interpretation of the strict standards it imposes on agencies responding to requests for public records.

In exercising review of this case, the statute commands that:

Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.

RCW 42.56.550 (3). The statute further directs Courts that “The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.” RCW 42.56.030; PAWS II, *supra* at 251.

As recently reaffirmed by the State Supreme Court, Washington’s Public Disclosure Act is a strongly worded mandate for broad disclosure of public records. Rental Housing Ass’n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 535, 199 P.3d 393 (2009) *citing* Hearst Corp. v. Hoppe, 90 Wn.2d 123,127, 580 P.2d 246 (1978). Setting forth strict standards for agencies to meet, the Act requires an agency to promptly make

² RCW 42.56.210 (3) states, “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.”

available all non-exempt public records upon request. RCW 42.56.080; RCW 42.56.520. Within five business days of receiving a public record request, an agency must respond in one of three ways: 1) providing the record; 2) acknowledging that the agency has received the request and providing a reasonable estimate of the time needed to respond; or 3) denying the public record request. RCW 42.56.520. When an agency does not adhere to the statutory requirements for a response outlined above, it violates the Act and the requesting individual is entitled to statutory penalties. Smith v. Okanogan County, 100 Wash.App. 7, 13, 994 P.2d 857 (2000) (citations omitted). “Denials of requests must be accompanied by a written statement of the specific reasons therefore.” Id. Claimed exemptions must be stated with specificity and explained in the response to the request. RCW 42.56.210(3). The PRA “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.

Here King County never claimed an exemption – despite that it produced a heavily redacted document – and it never claimed that it was producing records on a partial or installment basis. The county instead silently withheld information from the Tobins until March 20, 2006, when King County first told the Tobins that the original complaint was missing from the file. See First Amended Complaint at 7. The County only

formally went on record as having lost the original complaint on October 12, 2006, when the county told the Hearing Examiner that the complaint was lost in the copying process. *Id.* The County never responded to the Tobins in writing, as required by RCW 42.56.520.

C. The one-year statute of limitations, RCW 42.56.550(6), only applies to responses where the agency claims an exemption or produces records on a partial or installment basis.

Until July 24, 2005, the statute of limitations for all claims under the PRA was five years. *See e.g. Yousoufian v. Ron Sims*, 152 Wn.2d 421, 436-437, 98 P.3d 463 (2005) (citing RCW 42.17.410). Following the Yousoufian decision the Legislature amended the statute and added the following section: “Actions under this section must be filed within one year of the agency’s claim of exemption or the last production of a record on a partial or installment basis.” RCW 42.56.550(6) (former RCW 42.17.340(6)) (*See* Disposition List at CP 92-94)).

1. The plain language of the statute supports the Tobins’ argument that the one-year statute of limitations only applies to claims of exemption or production of records on a partial or installment basis.

The plain language of RCW 42.56.550(6) makes it clear that this particular statutory provision does not apply to the Tobins’ case. If a statute is clear on its face, its meaning is to be derived from the language of the

statute alone. Killian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002).

If a statute is ambiguous, then the court will resort to principles of statutory construction and the legislative history. Id. If the statute's meaning is plain, courts must give effect to that plain meaning without resort to the tools of statutory construction. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). As stated by this court in Berrocal v. Fernandez, 155 Wn.2d 585, 590, 121 P.3d 82, 84 (2005):

Where statutory language is “ ‘plain, free from ambiguity and devoid of uncertainty, there is no room for construction because the legislative intention derives solely from the language of the statute.’ ” Bravo v. Dolsen Cos., 125 Wash.2d 745, 752, 888 P.2d 1 47 (1995) (quoting Krystad v. Lau, 65 Wash.2d 827, 844, 400 P.2d 72 (1965)). “In undertaking this plain language analysis, the court must remain careful to avoid ‘unlikely, absurd or strained’ results.” Burton v. Lehman, 153 Wash.2d 416, 423, 103 P.3d 1230 (2005) (quoting State v. Stannard, 109 Wash.2d 29, 36, 742 P.2d 1244 (1987)). “Only where the legislative intent is not clear from the words of a statute may the court ‘resort to extrinsic aids’ ” Burton, 153 Wash.2d at 423, 103 P.3d 1230 (quoting Biggs v. Vail, 119 Wash.2d 129, 134, 830 P.2d 350 (1992)).

The main purpose of statutory construction “is to carry out the intent of the legislature by examining the language of the statute. . . [w]ords are given their plain meaning unless a contrary intent appears.” State v. Smith, 80 Wn.App. at 539 (citations omitted). It is axiomatic that statutes will not be construed to render strained interpretations. Id. at 540, citing Stone v. Chelan County Sheriff's Dep't, 110 Wn. 2d, 806, 809, 756 P.2d 736 (1988).

The operative language of RCW 42. 56.550(6) states: “[a]ctions 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.” Giving these words in this statute their plain meaning, the one year statute of limitations applies only in the following two situations: 1) when the agency responds to a records request by claiming an exemption, and the requesting party desires to file suit to compel the release of the alleged exempt material, and/or 2) when the agency responds to a request for records by distributing or making available the sought-after records on a partial or installment basis. Arguably the agency should notify the requestor that a particular installment is the last, because otherwise the requestor would have no way of knowing when, in the context of claimed exemptions or serial installments, which installment was the last. *See* WAC 44-14-04004 (1) (agency should provide requestor a cover letter or e-mail briefly describing the records provided and informing the requestor that the request has been closed); WAC 44-14-04004 (5) (Agency should notify requestor that the entire request or an installment is available for inspection and ask the requestor to contact the agency to arrange for a mutually agreeable time for inspection. The notification should recite that if the requestor fails to inspect or copy the records or make other arrangements within thirty days of

the date of the notification that the agency will close the request and refile the records).

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 evinced an intention to start the clock with the agency’s **last** response, when all the facts are available. RCW 42.56.550(6). Here the county’s last response came on October 12, 2006. CP 119-20 ¶ 4.21. On this date the Tobins’ attorney, David Vogel, repeated the Tobins’ request to produce the unredacted original Tobin complaint. Id. The defendants verbally notified the Tobins for the first time that the complaint was “lost in the copying process.” CP 120 ¶ 4.21. If the defendants assert that their communicating the loss of the original unredacted document to the Tobins falls under the “last production of a record on a partial or installment basis” category, the statute of limitations would then run on October 12, 2007, and plaintiffs lawsuit is not barred by any applicable statute of limitation.

Neither of the two scenarios to which RCW 42.56.550(6) applies is present here; DDES never claimed an exemption, and it never claimed it was producing records “on a partial or installment basis” as contemplated by

RCW 42.56.550(6), RCW 42.56.080,³ RCW 42.56.120,⁴ and/or the Model Rules, Chapter 44.14 WAC.⁵

2. Reading the statute of limitations in light of legislative intent and other portions of the statute supports the conclusion that the one-year statute of limitations applies only to claims of exemption, or to production of larger sets of requested records on a partial or installment basis.

In general, when construing a statute the court's purpose is to ascertain and give effect to the intent of the Legislature. Condit v. Lewis Refrigeration Co., 101 Wn.2d 106, 110, 676 P.2d 466 (1984); State v. Keller, 98 Wn.2d 725, 728, 657 P.2d 1384 (1983). Each provision must be viewed in relation to other provisions and harmonized if at all possible to insure proper construction of every provision. Burlington Northern, Inc. v. Johnston, 89 Wn.2d 321, 326, 572 P.2d 1085 (1977). Statutes should not be interpreted so as to render any portion meaningless, superfluous or

³ RCW 42.56.080 states in pertinent part: "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." (emphasis added)

⁴ RCW 42.56.120 states in pertinent part: "If an agency makes a request available on a partial or installment basis, the agency may charge for each part of the request as it is provided."

⁵ See WAC 44-14-04004 (1) & (5). Please note that the Model Rules are advisory only and arguably represent "best practices." The Model Rules are not binding on agencies.

questionable. Avlonitis v. Seattle Dist. Court, 97 Wn.2d 131, 138, 641 P.2d 169, 646 P.2d 128 (1982).

The statutory scheme embodied by the PRA *in toto* contemplates and essentially defines the meaning of “production of records on a partial or installment basis.” Nowhere in the language of the statute is there support for King County’s proposition that production of a heavily redacted one page record without a claim of an exemption constitutes “production on a partial or installment basis” as contemplated by the law. This court needs to look no further than related provisions of the Public Records Act.

For example, RCW 42.56.080 states in pertinent part: “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.” (Emphasis added). In the instant case the option of providing the one page Tobin complaint on a partial or installment simply was not an option, because the one page complaint was not “part of a larger set of requested records.” Id.

Similarly, RCW 42.56.120 states: “If an agency makes a request available on a partial or installment basis, the agency may charge for each part of the request as it is provided.” If an installment of a records request

is not claimed or reviewed, the agency is not obligated to fulfill the balance of the request.” (Emphasis added). Clearly the PRA intends that the term “partial or installment basis” applies to a “larger set of requested records” (RCW 42.56.080), not a one-page complaint that can easily be produced in its entirety. Given that the complaint was only one page, the county could have and should have claimed an exemption if it wanted to redact a portion of the Tobin complaint. Instead the county apparently lost the original complaint retaining only the redacted photocopy, and it then tortured the language of the statute to convince the trial court that by providing a “partial” record it was providing records on a “partial or installment basis” and thus the one-year statute of limitations foreclosed the Tobins’ right to sue. But where the county lost the original complaint and produced the only responsive record it had, completely and in its entirety, and failed to notify the Tobins of this fact until October 12, 2006, (CP 120 ¶ 4.21), means that there was no “partial” production on a “partial or installment basis,” because there was nothing more to produce. The trial court erred in construing the county’s actions and erred in dismissing the case.

3. The trial court erred in dismissing the case as time barred when the correct statute of limitations allows for three years to file a claim.

The trial court erred when it applied RCW 42.56.550(6) as the controlling statute of limitations and dismissed the case as time barred. Presumably it did so relying on the construction offered by King County in the Reply brief of the summary judgment motion.⁶ King County's interpretation reads as follows, "the simple, logical, and common-sense reading of this language is that all actions under RCW 42.56.550 . . . must be brought within one year." King County's Reply in Support of Summary Judgment, pg. 13, CP 67 (emphasis added). This interpretation strains the meaning of the statute to the point of absurdity, and renders the phrase "within one year of an agency's claim of exemption or the last production of a record on a partial or installment basis" superfluous. The county's argument flagrantly disregards statutory construction; had the Legislature intended the result King County proposes, it would have inserted a period after "one year," therefore making the statute of limitations cover all conceivable scenarios in the public records context.

The PRA is silent regarding limitations on claims such as the Tobins', where the records produced were not complete, contained no claim

⁶ King County's initial Motion for summary judgment just asserts that RCW 42.56.550(6) applies. The motion goes on to state that the effective date is the start date for claims not yet brought. Defendant King County's Motion for Summary Judgment, pg. 7.

of exemption as required by RCW 42.56.210 (3), and no response in writing as required by RCW 42.56.520 (“Denials of requests must be accompanied by a written statement of the specific reasons therefor.”). Indeed, the statute does not authorize partial production, meaning less than complete production, if there is only one document responsive to the request unless the agency affirmatively claims an exemption under RCW 42.56.210 (3).

Specifically RCW 42.56.210(3) requires that when an agency provides a redacted copy of a public record sought, such as occurred in the request for the Tobin complaint, the agency “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.” The redacted complaint the Tobins received in the mail contained no such claim of exemption, or any explanation or statement of how an exemption would apply. Moreover, the request for the Ferguson complaint was never fulfilled; instead the Tobins received the same handwritten complaint they had received in response to their request regarding their own property.

4. Applying RCW 4.16.080, the three year statute of limitations, in cases where the agency’s response fails to meet statutory requirements, agrees with Washington decisional law and the policies behind the PRA.

Bearing in mind the mandate for a liberal construction of the Public Records Act in this case, (RCW 42.56.030; PAWS II, *supra* at 251), and the

mandate that agencies provide the “fullest assistance” and the “most timely possible action on requests” when processing requests (RCW 42.56.100) the correct statute of limitations to apply is RCW 4.16.080. The relevant portions of this statute state:

The following actions shall be commenced within three years:

(2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;

(6) [A]n action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state

Because actions under RCW 4.16.080 may be commenced at any time within three years after the precipitating event, under RCW 42.56.550(4), the Tobins are entitled to pursue statutory penalties for non disclosure.

Their case is not barred by the passage of time.⁷

If there is any doubt about which statute of limitations should apply, Washington state case law favors application of the statute with the longer time frame. Stenberg v. Pacific Power & Light Co., 104 Wn.2d 710, 715, 709 P.2d 793 (1985) citing Shew v. Coon Bay Loafers, Inc., 76 Wn.2d 40,

⁷ This analysis of course resolves all inferences against the Tobins as to when the clock started to tick; on the date the county produced the redacted record with no letter of explanation or claim of exemption, or the date the county verbally told the Tobins that the complaint was missing from the file, and essentially that they’d gotten all they’re going to get. CP 119 ¶ 4.19.

51, 455 P.2d 359 (1969)). As stated above, the PRA “shall be liberally construed and its exemptions narrowly construed to . . . assure that the public interest will be fully protected.” RCW 42.56.030. RCW 4.16.080 comports both with Washington state law and the policy of the PRA, and should be the operative statute of limitations in this case.

Requiring claims to be filed in one year only when an agency has claimed an exemption or upon the last production of a record on a partial or installment basis but allowing for three years for less certain responses is consistent with fully protecting the public interest. When an agency claims an exemption or produces the last record in an installment in compliance with the statute, the requestor is on notice. Presumably when this happens, the requestor either has a reason for why the record is not produced, or can tell from the installments whether everything they requested is included. Having that notice makes it fair to require the requestor to act within a year should they believe the agency wrongfully withheld records or has not produced everything as requested. However, in cases like the Tobins, where the agency provided a redacted record with no explanation, or when the agency provided the wrong record and the requests were repeated, even in the context of unrelated litigation, the requestor is not on such clear notice that the final installment has arrived. Providing the requestor with more

time to investigate prevents them from bringing claims before they are ripe, and provides the agency with an opportunity to comply with the statute.

D. The Trial Court erred in Granting Summary Judgment when a Material Fact was Raised by the Moving Party Without Giving the Plaintiffs an Opportunity to Respond.

Summary judgment was improperly granted by the trial court because there is a genuine dispute over a material fact. The factual dispute was raised for the first time by the moving party, King County, in its Reply brief for the summary judgment motion. Prior to that, the County had never referred to DDES' production of documents as a "partial" response. At that point, the Tobins could not respond to that allegation except in a motion to reconsider. Whether or not the county's response was "partial" or "part of an installment" is a question of fact, and the court should not have resolved this issue against the Tobins and summarily dismissed their case.

In the county's answer to the Tobins' complaint, King County never characterized any of the documentation provided in response to the requests as a "partial" response. King County's Answer, CP 105-110. Neither did King County characterize any of its responses as "partial" in its motion for summary judgment. With respect to the Tobins' first request of Friday, April 22, 2005, the motion stated, "King County responded by mailing a redacted copy of the only written complaint against this property"

King County Motion for Summary Judgment, pg. 2, CP 96 (emphasis added).

King County's statement regarding the second request of June 3, 2005 also left out any mention of the response being a response "on a partial or installment basis," and merely stated:

King County responded by mailing a copy of the code enforcement 'complaint research form' detailing the receipt of the anonymous complaint. The response was thus received

King County Motion for Summary Judgment, pg. 3, CP 97. Not only does King County fail to classify its third response of June 13, 2005 as a response "on a partial or installment basis," but it characterized its response as complete. In the cover letter accompanying the response, the county "apologiz[ed] for the prior confusion and stated that DDES 'believe[d] the enclosed letter fulfills your original request.'" King County Motion for Summary Judgment, pg. 4, CP 98 (emphasis added). But again, the county failed to claim any exemption, despite that it did not produce the unredacted record, and it failed to advise the Tobins that a subsequent installment would be available as it was producing the records on a partial or installment basis.

Contrast this with the County's representation of the responses in its Reply brief: "The production of records in this case was partial because the records produced did not contain complete copies of the documents sought

by the plaintiffs.” King County Reply, pg. 2, CP 56. The county’s reasoning as to why the responses were “partial” is laid out below:

Contrary to plaintiff’s blanket assertion, King County produced records on a *partial* basis. Indeed, it is the very essence of plaintiffs’ complaint that King County’s responses to their public disclosure requests were incomplete, inadequate, and did not contain the records that the Tobins desired to receive. The Tobins may not have been provided the records they wanted, but beyond any doubt King County responded in at least a partial manner to the Tobins’ PDA requests.”

King County Reply, pg. 7, CP 61 (emphasis added). Under the County’s reasoning, an “inadequate, incomplete” or plain wrong submission of records constitutes a response “on a partial or installment basis” under the PRA, and subsequent requests for the actual or complete records sought count for naught. King County’s tortured interpretation of the statute would place such erroneous responses under the shorter one year statute of limitations.

When a material issue of fact exists, summary judgment is not proper. Whether or not the County’s responses to the Tobins’ requests were “partial” is a matter of disputed fact. Summary judgment was improper and this court should reverse.

E. The Tobins are Entitled to Reasonable Attorney Fees for this Appeal.

The Tobins respectfully request an award of attorney's fees pursuant to RAP 18.1. The PRA provides for an award of reasonable attorney's fees:

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

RCW 42.56.550(4) (emphases added). This is a mandatory provision of the Act designed to assure that litigants enforcing the Public Disclosure Act will be able to obtain competent legal representation. A.C.L.U. v. Blaine School Dist. No. 503, 95 Wn. App. 106, 115, 975 P.2d 536 (1999). This provision includes awards of fees on appeal. See Progressive Animal Welfare Soc'y v. UW (PAWS I), 114 Wn.2d 677, 690, 790 P.2d 604 (1990). If this Court reverses the trial court's decision, then the Tobins are the prevailing party and they are entitled to attorney's fees for this appeal.

V. CONCLUSION

The Tobins requested the Tobin document on April 22, 2005. King County's response was due April 29, 2005. On May 5, 2005, the King County produced an illegally redacted photocopy of the Tobin document with no explanation or exemptions claimed.

On March 20, 2006, the Tobins reiterated their public records request. The county advised at that time that the original document was “missing from the file.” On October 12, 2006, the county admitted for the very first time that the Tobin complaint was “lost in the copying process.” On this date the statute of limitations commenced, and because the county did not claim an exemption or produce records on a partial or installment basis, the correct statute to apply was RCW 4.16.080, the three-year statute of limitations.

On June 3, 2005, the Tobins requested the Ferguson records. The county’s response was due on June 10, 2005. On June 9, 2005 the county provided non-responsive materials to the Tobins, and on June 13, 2005, the Tobins reiterated their request for the Ferguson file.

On June 23, 2005, the county again provided non-responsive materials to the Tobins. On October 12, 2006, the Tobins reiterated their outstanding request for the Ferguson file. On October 30, 2006, the county surrendered documents to the Tobins, but the materials provided did not include a copy of the anonymous Ferguson complaint. The county thus has not yet produced the Ferguson complaint as required by Washington law.

These facts are not in dispute. The facts here reflect a near total failure by King County to produce requested public records. In light of the language found in the amended PRA provision which begins the one year

statute of limitations upon agency's *claim of exemption or the last production of a record on a partial or installment basis*, this one year statute of limitations does not apply to the Tobins' claims of outright failure to properly respond to their requests and simply produce the records.

Because the Tobins claims do not involve [1] an exemption relating to the requested documents, or [2] production of records on an partial or installment basis, their claims are not barred by the one year statute of limitations. The trial court erred in drawing inferences against the non-moving party, and it erred in its apprehension and application of law. For the foregoing reasons the Tobins respectfully request relief.

Respectfully submitted this 10th day of August, 2009.



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