

NO. 73843-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JAMIE WALLIN,

Appellant,

v.

CITY OF EVERETT,

Respondent

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COURT OF APPEALS
STATE OF WASHINGTON

RESPONDENT'S BRIEF

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I. INTRODUCTION

This case is governed by the Public Records Act's one-year statute of limitations. RCW 42.56.550(6).

By his own admission Jamie Wallin chose not to review the installment of records that the City of Everett produced in response to his PRA request for more than 14 months. The installment included a redacted record and redaction log with a proper citation and brief explanation. The City's installment and claim of exemption was sufficient as a matter of law to trigger the PRA's one-year statute of limitations. Thus, when Wallin finally got around to filing his PRA lawsuit one year and 353 days after he asserts his claim accrued, it was untimely and the trial court properly dismissed his complaint.

This Court should affirm the trial court's dismissal. In addition, the Court should take the opportunity to hold that the PRA's one-year statute of limitations applies to all PRA actions. While the trial court properly found that Wallin's claim was governed by the one-year statute of limitations however that statute is interpreted, this case shows how the current ambiguities in the law unnecessarily complicate the statute of limitations issue in PRA cases.

II. ADDITIONAL ASSIGNMENT OF ERROR

The trial court erred when it ruled in its order on reconsideration that the PRA's one-year statute of limitations did not apply to all PRA claims. See Clerk's Papers (CP) at 7 (first full paragraph).

III. ISSUES ON APPEAL

A. Restatement of Issues

1. Did the trial court properly dismiss Wallin's lawsuit when it was filed more than one year after the claim had accrued?

2. Is the one-year statute of limitations triggered when the City claimed an exemption for one record and produced a redacted copy of that record along with a redaction log that included a statutory citation to an exemption and a brief explanation?

3. Did the trial court properly find that Wallin waived any challenge to the adequacy of the City's redaction log by waiting to raise such a challenge for the first time in a motion for reconsideration?

4. Did the trial court properly find that the City's redaction log was adequate, where the City included (1) the redacted record, (2) a citation to an exemption and (3) a brief explanation describing how the exemption applied?

B. Issues Related to Additional Assignment of Error

Does the PRA's one-year statute of limitations apply to all PRA claims filed under RCW 42.56.550?

Should this Court overrule its prior decision in *Tobin v. Worden*, 156 Wn. App. 507, 233 P.3d 906 (2010), where that opinion has been criticized and rejected by Division II in a published decision and by a separate panel of judges from Division I in an unpublished decision?

IV. STATEMENT OF THE CASE

A. Factual Allegations in the Complaint¹

Plaintiff/Appellant Jamie Wallin is an inmate in a Washington State Penitentiary. CP 112, ¶3. In August 2012, Wallin made a PRA request to the City of Everett for 24 specific items. CP 113, ¶5.1. In a letter dated October 9, 2012, the City asserted that medical records that were responsive to one of the 24 items were exempt and another record could not be produced because the third-party medical waiver Wallin had included did not comply with statutory requirements. CP 114 ¶5.5. Wallin chose to drop this request rather than provide a proper waiver. CP 121 ¶5.26.

¹ The following is a summary of the relevant facts alleged in the complaint, which for the purpose of a motion filed under CR 12(b)(6), must be presumed to be correct. All citations are to the clerk's papers page number followed by the paragraph number in the Complaint.

The City mailed an installment of responsive records to Wallin on December 13, 2012. CP 115, ¶5.7. The December 13, 2012 production included a redacted record and corresponding redaction log. CP 119 ¶5.21.

Wallin became aware of the City's December 13, 2012 records production no later than January 10, 2013, when he was informed that the installment had been intercepted by the mailroom because the responsive records violated the Department of Correction's policy on inmate mail. CP 116 ¶5.10. Wallin therefore arranged for the records to be sent to his grandmother, who received the records on February 5, 2013. CP 117 ¶5.16.

The City's December 13, 2012 letter that accompanied the first installment stated that the City would produce another installment. CP 124 ¶5.34. It also included a page from Wallin's original request listing the 24 items requested with check marks next to the 16 items that were included in this production. CP 118-19 ¶ 5.19. Finally, one of the 16 items was redacted and accompanied by a redaction log that included a "brief explanation" and statutory citation supporting the redaction. CP 119, ¶5.21; CP 122, ¶5.28.

Wallin claims that he never received another installment of records and that the City failed to produce seven records he requested or assert

that those records were exempt. CP 124 ¶5.36. The seven unproduced records were immediately identifiable by reviewing the check list included in the City's December 13 production. CP 119, ¶5.21.

The City sent Wallin another letter dated January 17, 2013, notifying Wallin that the City had been notified about the records seizure. CP 117-18 ¶5.17. This is the last contact Wallin claims he received from the City in response to this request and is the date he alleges that his cause of action accrued. CP 124 ¶5.34; CP 126 ¶5.45.

Rather than arrange to have someone review the December 13, 2012 installment, Wallin chose to allow the records to sit at his grandmother's house, un-reviewed, for over a full year. CP 118 ¶5.18. Wallin eventually arranged for his father to review the records in April 2014, fourteen months later. CP 118 ¶5.18. Because the December 13, 2012 production included a checklist showing that the City has only produced 16 items, one of which was redacted with a proper redaction log, Wallin was immediately able to determine that the City had not produced seven of the requested items and had not asserted any exemption to justify withholding those items. CP 118-19 ¶¶5.19-21.

One year and 353 days after the cause of action accrued, Wallin's lawsuit was commenced against the City on January 5, 2015. CP 112-129.

He waited until February 17, 2015 to have the complaint served on the City. CP 37.

In his claim, he alleges that his “cause of action accrued, at a minimum, on or after January 17, 2013.” CP 126 ¶5.45. According to the allegations in the complaint, upon receipt of the City’s January 17, 2013 letter, Wallin either knew or should have known

- The City was withholding medical records (item 8) per the City’s October 9, 2012 letter, which Wallin subsequently excluded from his request (CP 114 ¶5.5; CP 115 ¶5.7)
- The City had asserted an exemption applied to one of the records (item 24), which it produced in a redacted form along with a redaction log (CP 122, ¶5.28)
- The City had produced 16 of the 24 items he had requested no later than December 13, 2012 (CP 118-19, ¶5.19; CP 121 ¶5.26)
- The City considered the request complete as of January 17, 2013 (CP 124, ¶5.34; CP 126, ¶5.45)

B. Procedural Facts

Wallin’s cause of action against the City accrued on January 17, 2013. One year and 353 days later, Wallin’s lawsuit against the City was formally commenced on January 5, 2015, when Superior Court Judge J. Wilson signed the order waiving the filing fee based on indigency.²

² CP 76-77; *see also Margetan v. Superior Chair Craft Co.*, 92 Wn. App. 240, 963 P.2d 907 (1998) (lawsuit not “commenced” for purpose of statute of limitations until filing fee paid or waived); Karl Tegland, 14 WASH. PRAC. §7.5 (“Unless the court has waived the filing fee, the action is not

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).

Wallin's primary argument in opposition to the City's motion to dismiss was that the City was bound by the ex parte court order waiving the filing fee, because that order implicitly "found" that the two-year statute of limitations applied. CP 35-42. Wallin has not raised this frivolous argument on appeal.

Secondarily, Wallin argued that the one-year statute of limitations was not triggered under *Tobin v. Worden*, 156 Wn. App. 507, 233 P.3d 906 (2010) because only one installment of records was produced and the City had withheld seven records without asserting any exemption for those seven records. CP 43-47. Wallin did not allege that the City's single claim of exemption was improper or challenge the adequacy of the City's redaction log.

After oral argument, the trial court ruled the one-year statute of limitation applied and dismissed the complaint. CP 2-3.

3. Motion for Reconsideration

Wallin then moved for reconsideration and for the first time, argued that the City's redaction log was deficient and therefore did not serve to trigger the one-year statute of limitations. CP 24-25. The City

opposed reconsideration, demonstrating that its claim of exemption was legally adequate and arguing that Wallin could not raise this claim for the first time on reconsideration. CP 8-16.

The trial court's order denying reconsideration was accompanied by a four-page memorandum in which the Court agreed that Wallin was barred from arguing that the City's claim of exemption was inadequate because it was being raised for the first time on reconsideration. CP 4-5. The trial court then went on to rule in the alternative that the claim of exemption was adequate and had therefore triggered the PRA's one-year statute of limitations. CP 4-7.

The trial court, however, opined that the PRA's one-year statute of limitations would not apply in some cases. CP 7.

Wallin filed a timely notice of appeal. CP 1-7.

V. ARGUMENT

A. Summary of Argument

In 2005, the Legislature adopted a new one-year statute of limitations specifically for public records lawsuits. At that time, the provisions of the PRA were located in the former Public Disclosure Act, title 42.17 RCW (2005). Prior to the 2005 amendment, public records act claims were governed by the same five-year statute of limitations that applied to campaign finance/disclosure violations. See former RCW

42.17.410 (2005). The current statute of limitations provision first adopted in 2005 purports to apply to “actions under this section” but then lists two specific accrual events: (1) “the agency’s claim of exemption” or (2) “the last production of a record on a partial or installment basis.” RCW 42.56.550(6); see also Laws of 2005, ch. 483 §5 (originally codified at former RCW 42.17.340(6)).

The current statute of limitations is ambiguous. 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). The *Bartz* court expressly rejected the 2010 Division I decision 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 installments. *Tobin v. Worden*, 156 Wn. App. 507, 233 P.3d 906 (2010). A separate panel of judges from Division I subsequently agreed in an unpublished decision with the Division II’s *Bartz* ruling that all PRA claims are subject to a one-year statute of limitations. *Mahmoud v. Snohomish County*, noted at 184 Wn. App. 1017, 2014 WL 5465404 at *5 & n.38.³

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

This court should take the opportunity to overrule the *Tobin* decision and rule that the one-year statute of limitations applies to all PRA claims. The *Tobin* decision is based on an interpretation 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.

Even if *Tobin* applied, however, Wallin's claim is still subject to the one-year statute of limitations because the City of Everett properly claimed at least one exemption, thus triggering the one-year statute of limitations under *Tobin*. Wallin's claim that each record is subject to an independent statute-of-limitations analysis has already been rejected by the courts and is contrary to the text of the PRA.

Finally, Wallin's challenge to the City's claim of exemption was not raised in a timely matter and fails on its merits.

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).

B. Standard of Review

The only issue in this appeal is whether Wallin's claim against the City of Everett is governed by the PRA's one-year statute of limitations or by the two-year default statute of limitations in RCW 4.16.130.⁴ If the one-year statute of limitations applies, the trial court's order must be upheld because it is uncontested that Wallin filed this lawsuit at least one year and 353 days after his cause of action accrued, according to the complaint, on January 17, 2013.

Because the trial court dismissed Wallin's lawsuit as a matter of law in response to the City's CR 12(b)(6) motion, the Court's review is de novo and is based exclusively on the allegations in the Complaint, which it must presume are correct. *Nissen v. Pierce County*, 183 Wn.2d 863, 872, 357 P.3d 45 (2015). The trial court is not, however, required to accept erroneous legal conclusions contained in the complaint. *Haberman v. WPPSS*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987).

The trial court's order of dismissal should be upheld when a "plaintiff includes allegations that show on the face of the complaint that there is some unsurmountable bar to relief." *Nissen*, 183 Wn.2d at 872. When the complaint alleges facts that show the claim that was filed after the applicable statute of limitations period has run, dismissal under CR

⁴ The two-year statute of limitations in RCW 4.16.130 applies to any cause of action where the Legislature has noted provided for such a statute.

12(b)(6) is proper. *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 374, 166 P.3d 662 (2007).

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).

When the literal meaning of a statute leads to an absurd result, a Court should treat 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).

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.

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. The PRA’s One-Year Statute of Limitations Applies to All PRA Claims

Plaintiffs are not allowed to “sleep on their rights” and must diligently investigate potential claims to comply with the statute of limitations. *O’Neil*, 89 Wn. App. at 73.⁵ 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,

⁵ Note, the Legislature has expressly determined that that any difficulties caused by incarceration do not excuse compliance with statutes of limitations, at least not after the convict has been sentenced. *See* Laws of 1992, Ch. 188 (amending RCW 4.16.190 to remove provision that tolled claims for persons who are incarcerated and limiting the tolling to persons who have not yet been sentenced); House Bill Report for HB 1025 (adopted in Laws of 1992, ch. 188) (testimony in favor of amendment noting inmates have increased access to courts and legal resources); *Gausvick v. Abbey*, 126 Wn. App. 868, 883, 107 P.3d 98 (2005) (rejecting constitutional challenge to amendment of broad tolling provision and adoption of tolling provision only for pre-sentence incarceration based on person’s need to defend against criminal charges).

or only to claims where an agency has asserted an exemption or produced records in installments. The plain language of the 2005 amendment could be interpreted to support either interpretation.

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

The Public Records Act provides for two types of PRA claims: (1) inadequate response claims and (2) failure to produce claims. *Yakima County v. Yakima Herald*, 170 Wn.2d 775, 809, 246 P.3d 768 (2011). In 2005, the PRA was still part of the former Public Disclosure Act and therefore both types of public records claims were governed by the Public Disclosure Act's general five-year statute of limitations. See former 42.17.410 (2005); *see also Yousoufian*, 152 Wn.2d at 437 (noting this fact). Although the Legislature passed legislation in 2005 that recodified the PRA into chapter 42.56 RCW, that legislation did not take effect until July 1, 2006. See Laws of 2005, ch. 274 §502. Thus, for almost a one-year period, the newly adopted statute of limitations was part of the Public Disclosure Act. See Laws of 2005, ch. 483 (amending former RCW 42.17.340) (effective date July 24, 2005).

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”).

The plain language of the 2005 amendment supports the first broad interpretation in that the new statute of limitations purports to govern “[a]ctions under this section,” – which would cover both types of public records claims included in former RCW 42.17.340 (2005). But the plain language supports the narrower interpretation in that it only lists two triggering events that will not occur in every claim filed under that section: an “agency’s claim of exemption” or the “the last production of a record on a partial or installment basis.” Thus the new language is ambiguous and the Court must consider the intent of the Legislature to resolve this ambiguity.

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

At least three absurdities arise from this second narrow interpretation of the statute of limitations. 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).

In *Tingey*, the Court was addressing a similar issue to that in this case – whether a claim was covered by the three-year catch-all statute of

limitations period for oral contracts or the more recently enacted and more specific six-year limitations period for “accounts receivable.” The court of appeals had ruled that some “accounts receivable” claims, including the claim at issue, were still governed by the three-year catch-all provision.

The Supreme Court rejected the court of appeal’s interpretation because it turned on an arbitrary distinction regarding what specific accounting and bookkeeping practices a plaintiff used. *Tingey*, 159 Wn.2d at 658-59, 663-54. It was contrary to the purpose of a statute of limitations to have it turn on such an inconsequential and fact-specific detail, which would lead to more litigation. *Tingey*, 159 Wn.2d at 665. “A reading that produces absurd results must be avoided because it will not be presumed that the legislature intended absurd results.” *Tingey*, 159 Wn.2d at 664 (quotations omitted).

Here, a plaintiff’s 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 withhold claim turn on whether or not an agency produced the records in one or two installments?

Take for example the “inadequate response claim” at issue in *West v. Department of Natural Resources*, 163 Wn. App. 235, 243, 258 P.3d 78 (2011). There, the agency failed to respond within five days – responding instead in eleven days – but otherwise adequately responded to the request. The Court nevertheless held that the agency violated the PRA by not providing an adequate initial response, and was therefore liable for daily penalties. *West*, 163 Wn. App. at 243. The case therefore stands for the proposition that under the PRA’s strict-compliance mandate, a requestor may maintain an “inadequate response” claim if an agency misses the five-day deadline even if the agency otherwise fully complies with the act.

Under the narrow interpretation of the statute of limitations, if an agency missed the five-day deadline but produced all responsive records on day eleven without asserting an exemption, the requestor could bring an inadequate response claim up to five years later (at least at the time the new limitations period was enacted); but if the agency produced the records in two installments on day eleven and day twelve, the one-year statute of limitations would apply. It would be absurd to think the Legislature intended such disparate treatment of PRA claims based on a discretionary decision by the agency.

Finally – as the case at bar demonstrates – this narrow interpretation is subject to manipulation by requestors, who seek to have an agency produce records in a single installment to extend the time the requestor has to file suit. See CP 123 ¶5.32 (noting Wallin specifically directed the City “DO NOT mail the requested records in installments”).

Third, it would be absurd to find that the Legislature intended the narrow interpretation of the statute of limitations because that narrow interpretation would greatly undermine another part of the same 2005 amendment. In the same legislation that first adopted the one-year statute of limitations, the Legislature also created a new tool to deal with broad requests that allowed agencies to use installments to test if a requestor really wanted the records requested. In section 1 of Laws of 2005, ch. 483, the Legislature expressly authorized the use of installments. Then, in section 2, the Legislature 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.” The purpose of this second change is described in the Attorney General’s Model Rules (which were authorized in section 4 of this same legislation): “The provision is also designed to allow an agency to only assemble the first installment and then see if the requestor claims or reviews it before assembling the next installments.” WAC 44-14-04004(3).

If the narrow interpretation of the one-year statute of limitations were adopted, however, it would make the installment tool less effective because any time it was used as intended to test a requestor's interest and the requestor failed to pick up a first installment, which did not include a claim of exemption, then the five-year statute of limitations would have applied. It would be absurd to assume the Legislature would adopt this new tool for agencies and then penalize the agencies for using it.

Instead, the much 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." While the language actually used is not as clear, this is the only reasonable interpretation that would fulfil the intent of the Legislature.

3. The available evidence suggests the Legislature intended the new one-year statute of limitations to apply to all PRA claims

While the legislative history of the 2005 amendment is not conclusive with regards to the intent of the Legislature, 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. *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 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), included at CP 108.

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 340(6), and does not cite to the five-year provision in former RCW 42.17.410 (2005), which still would have applied to some PRA claims if the Legislature had intended to adopt the narrow interpretation of the one-year statute of limitations. 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 still governed by five-year statute of limitations in .410, then the Attorney General would have cited to both statutes of limitation in the model rules. Thus it can be presumed from this failure to cite to

.410, the Attorney General 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.⁶

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.

4. Wallin failed to file his claim within the one-year statute-of-limitations period

Under this broad interpretation, the one-year statute of limitations applies. According the complaint, Wallin's claim against the City of Everett accrued on January 17, 2013, but Wallin waited for nearly two years to file his claim on January 5, 2015, almost a full year after the statute of limitations expired. Thus, the trial court properly dismissed Wallin's lawsuit as untimely.

⁶ Note, 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 record until the one-year period expires. If an agency intentionally hid a record and falsely told the requestor that no record existed, the Court has the authority to find that the agency is equitably estopped from raising the statute of limitations. See, e.g., *Peterson v. Groves*, 111 Wn. App. 306, 310-11, 44 P.3d 894 (2002) ("Estoppel is appropriate to prohibit a defendant from raising a statute of limitations defense when a defendant has fraudulently or inequitably invited a plaintiff to delay commencing suit until the applicable statute of limitations has expired.") (quotation omitted). Here, according to the Complaint, the City made no effort to hide the fact that it had withheld seven records, and even provided a check list to demonstrate this fact. CP 119, ¶5.21.

D. Wallin’s Claim Is Subject to the One-Year Statute of Limitations Because the City Made a Claim of Exemption

Even if *Tobin* controlled, however, it would not support Wallin’s claim that the two-year statute of limitations applies because the City made a claim of exemption with its December 13 installment, , which under *Tobin* would have triggered the one-year statute of limitations. See RCW 42.56.550(6) (“Actions ... must be filed within one year of the agency’s claim of exemption”).

The City asserted exemptions in its October 9, 2012 letter and in its December 13, 2012 installment. CP 114, 121-22, ¶¶ 5.5, 5.26-28. By asserting an exemption for even one record, the City triggered the one-year statute of limitations for the entire request. See *Greenhalgh v. DOC*, 170 Wn. App. 137, 149-50, 282 P.3d 1175 (2012).

Wallin makes two specious arguments regarding why the City’s “claim of an exemption” did not trigger the one-year statute of limitations, both of which were properly rejected by the trial court.

1. Wallin’s PRA request is governed by a single statute of limitations that was triggered because the City made at least one claim of exemption

Wallin claims that RCW 42.56.550(6) requires an agency to assert an exemption for each and every record withheld before the statute of limitations is triggered. He therefore asserts that the City’s claim of exemption for one of the items he requested did not trigger one-year

statute of limitations. This is the exact same argument that was rejected by the Court of Appeals in *Greenhalgh*.

There, the court had to determine when the statute of limitations was triggered for two requests that each sought two categories of records. In response to the first request for two categories of records, the agency produced six documents and claimed an exemption for a few other records. *Greenhalgh*, 170 Wn. App. at 147. In response to the second request for two categories of records, the agency stated that it had no records responsive to one category of records and records responsive to the second category of records were exempt. *Greenhalgh*, 170 Wn. App. at 147-48. The requestor then filed suit over one year later and used discovery to obtain records that he asserted were responsive to the first category of records in his second request, which the agency had said did not exist. *Greenhalgh*, 170 Wn. App. at 148. Ultimately, the trial court dismissed the lawsuit as untimely under the one-year statute of limitations and the requestor appealed.

On appeal, the requestor claimed that the one-year statute of limitations did not bar his lawsuit because he had really made four separate requests, rather than two requests, and the agency did not assert an exemption for one of his requests when it told him no responsive records existed. *Greenhalgh*, 170 Wn. App. at 148. (“In an attempt to

avoid this result [dismissal], [the requestor] makes a novel argument: he made four distinct PRA requests and the DOC failed to claim an exemption for one of those four requests.”).

The Court of Appeals rejected this argument, noting that courts have consistently treated a request that contains multiple parts as a single PRA request. *Greenhalgh*, 170 Wn. App. at 149-50 (citing numerous cases including *Sanders v. State*, 169 Wn.2d 827, 837, 240 P.3d 120 (2010)). It held that a “person makes a single records request if he sends a single letter to an agency requesting multiple categories of documents.” *Greenhalgh*, 170 Wn. App. at 150. Therefore, the statute of limitations was triggered whenever an agency makes at least one claim of exemption – even when the lawsuit involves other records not included within that claim of exemption. *Greenhalgh*, 170 Wn. App. at 150.

Here, Wallin’s lawsuit only involves his one PRA request made in one letter in August 2012. In his complaint, he affirmatively alleges that the City produced one redacted record along with a redaction log that cited to an exemption and provided a brief explanation in its December 13, 2012 production. CP 119, ¶5.21, CP 122 ¶5.28. He also asserts that his claim accrued on January 17, 2013, when the City told him it had fully responded to his request. CP 124, ¶5.34; CP 126, ¶5.45.

Thus, under *Greenhalgh*, because the City had made at least one claim of exemption in response to his PRA request, the one-year statute of limitations was triggered and Wallin's response is untimely.

Contrary to Wallin's claims, the Supreme Court did not hold in *Rental House Association v. City of Des Moines* that the statute of limitations would only be triggered if an agency asserted an exemption for each and every record it withholds. See *Rental House Association v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 292 (2009) ("*RHA*"). Instead, the issue in that case was whether a city had properly made any "claim of exemption" at all. Because of the city withheld numerous unknown records based on a single claim of an exemption, the city's claim did not "provided enough information for a requestor to make a threshold determination of whether the claimed exemption was proper" for any of the withheld records. *RHA*, 165 Wn.2d at 539 (citing to WAC 44-14-04004(4)(b)(ii)).

Here, in contrast, the City produced a redacted document with a proper citation and explanation in full compliance with RCW 42.56.210 and the *RHA* case.⁷ This was sufficient to allow Wallin to make a threshold determination, thus trigger the statute of limitations.

⁷ For more on the adequacy of the City's assertion of the exemption, see section V.DV.D.3 *infra*.

While the City’s assertion of an exemption for one record would not explain the justification for the other records it failed to produce, that does not matter for purposes of when a cause of action accrues.⁸ The Court can evaluate this claim by looking to analogy to cases that are governed by the discovery rule.⁹ When the discovery rule applies, a plaintiff’s claim does not accrue until the plaintiff “discovers or in the exercise of reasonable diligence should have discovered” the basic facts that give rise to a claim. *Quinn v. Connelly*, 63 Wn. App. 733, 736, 821 P.2d 1256 (1992). This only requires knowledge that “some actual and appreciable damage occurred,” but a “plaintiff need not know [the] full amount of the damage[.]” *Zaleck v. Everett Clinic*, 60 Wn. App. 107, 112, 802 P.2d 826 (1991). Nor does it require a plaintiff to have knowledge of the legal basis for the claim. *Gevaart v. Metro Construction, Inc.*, 111 Wn.2d 499, 501-02, 760 P.2d 238 (1988).

Here, unlike in *RHA*, Wallin knew the City had claimed at least one exemption for on specific record when the City produced a redacted record and a redaction log that cited an exemption with a brief explanation

⁸ Because Wallin had requested specific records, and because the failure to provide an brief explanation supports an independent cause of action, *see City of Lakewood v. Koenig*, 182 Wn.2d 87, 343 P.3d 335 (2014), Wallin had enough information to file a claim based on the seven unproduced records.

⁹ While Wallin has not claimed that the discovery rule applies in this case, it is worth noting that PRA claims are not governed by a discovery rule because the PRA provides for a specific point of accrual and the claim is purely statutory. *See, e.g., In re Parentage of C.S.*, 134 Wn. App. 141, 139 P.3d 366 (2006) (discovery rule does not apply when accrual event designated by statute)

for that redaction. This knowledge allowed him to make a threshold determination on whether he should file suit against the City. Even if the City had improperly withheld other records, that information only goes to the issue of the scope of harm, not the existence of a claim in the first instance. Thus, Wallin's claim is like that rejected in *Zaleck*, where the plaintiff claimed he did not know how bad he was injured. For the purposes of trigger the statute of limitations, courts only require acts that show a claim exists, not the full scope of that claim. It is unlike the plaintiff's claim in *RHA*, where the requestor could not even determine what specific records were being withheld.

2. Wallin waived any claim that the City had not properly claimed any exemption by raising the claim for the first time on reconsideration

Not only did Wallin fail to challenge the sufficiency of the City's claim of exemption prior to his motion for reconsideration, Wallin affirmatively acknowledged in his complaint and prior pleadings that the City had asserted an exemption and produced a "redaction log." *See, e.g.*, CP 119, ¶5.21, CP 122 ¶5.28. In the Complaint, Wallin did not challenge this redaction or the adequacy of the redaction log; instead he asserted the City had not "claimed any exemption to the seven records being withheld by the City to which this cause of action directly relates[.]" CP 126, ¶5.43. Moreover, his cause of action only alleges that the City "failed to

produce all requested records” and “withheld records in their entirety without author of law”. CP 126, ¶¶6-7.

Likewise, in response to the City’s motion to dismiss, Wallin acknowledged the City had asserted an exemption, but claimed that the City needed to assert an exemption for each record supposedly withheld for the claim to accrue. *See, e.g.*, CP 45-46 (arguing the production of the redact log did not matter because his “cause of action is based solely on the failure of the City to produce the remaining seven withheld records”).¹⁰

Thus, when Wallin alleged on reconsideration that the City’s redaction log was inadequate and therefore did not trigger the statute of limitations, this was the first time that argument had been raised and the trial court properly ruled it was untimely. CP 4.

Civil Rule 59 “does not permit a plaintiff to propose a new theory of the case that could have been raised before entry of the adverse decision.” *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). In *Wilcox*, the appellate court ruled that the trial court properly denied reconsideration because the plaintiff’s theory relied on

¹⁰ Although any argument raised in the ex parte indigency pleadings would not be sufficiently preserved in an appeal on the merits, a review of those pleadings show that Wallin did not challenge the adequacy of the City’s redaction and redaction log and was only challenging the city’s failure to claim any exemption for the seven unproduced records. *See, e.g.*, CP 66.

different evidence that was known at the time the original motion was filed. Indigency

Wallin claims on appeal that he had raised this issue prior to reconsideration, but even his own quotations prove that this is incorrect – Wallin only claimed that the City failed to provide a privilege log “or otherwise claimed ‘exemption’ to the seven silently withheld records.” Appellant’s Opening Brief at 25 (quoting CP 66). None of these challenges were to the adequacy of the one exemption Wallin affirmatively admits the City claimed in his complaint.

Moreover, in response to a motion to dismiss, the Court may only consider facts that are “consistent with the complaint.” *Haberman v. WPPSS*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987). Here, Wallin repeatedly asserted in the Complaint that the City had asserted an exemption and even quoted the City’s brief explanation, but never suggested in any way that the explanation was deficient. Instead, the Complaint sets up the explanation as an example that is contrasted with the lack of any explanation for the seven records that were not produced. In other words, the Complaint relies on the properly asserted exemption for the decline notice as evidence that no exemption had been asserted for the seven unproduced documents. Compare CP 119, ¶5.21 and CP 122, ¶5.28 with CP 125-26, ¶¶ 5.40-.45.

In light of Wallin's affirmative assertion in his Complaint that the City had properly asserted an exemption for the decline notice, the trial court properly rejected Wallin's new claim on reconsideration challenging the adequacy of the one exemption that City did raise.

3. The City's production of a redacted record and accompanying citation and brief explanation was sufficient under *RHA* to trigger the one-year statute of limitations

Even if the issue of the adequacy of the City's exemption log was properly raised below and properly before this Court on appeal, the trial court acted within its discretion when it ruled that the City had properly claimed an exemption, thus triggering the statute of limitations. CP 4-5.

When an agency withholds or redacts a record, it must cite an exemption and provide a brief explanation of how that exemption applies to the record at issue. RCW 42.56.210. When records are withheld, the agency must also provide identifying information about each withheld record. *RHA*, 165 Wn.2d at 538. When an agency fails to provide a brief explanation, a requestor can maintain a cause of action for the failure to provide an adequate response. *City of Lakewood v. Koenig*, 182 Wn.2d 87, 343 P.3d 335 (2014). When an agency withholds a large volume of records based on a single assertion of an exemption, leaving the requestor with no information to make a threshold determination about how the cited exemption applies to any one specific record, the agency has not

made a claim of exemption sufficient to trigger the statute of limitations. *RHA*, 165 Wn.2d at 541.

Whether a brief explanation is sufficient “will depend upon both the nature of the exemption and the nature of the document or information” at issue. *Lakewood*, 182 Wn.2d at 95. It does not turn on whether the proper exemption has been cited or whether the “correct” explanation has been provided. *Lakewood*, 182 Wn.2d at 97. Instead, the explanation must merely allow the requestor to make a threshold determination of whether the exemption cited has been properly asserted. *Lakewood*, 182 Wn.2d at 97. When determining whether the “brief explanation” is sufficient for redacted records, the Court may also consider the unredacted information on the face of the record itself. *Lakewood*, 182 Wn.2d at 95.

In *RHA*, the city of Des Moines withheld hundreds of pages of records based on two exemptions, but did not identify each document that was withheld or explain how either exemption specifically applied to any particular document. *RHA*, 165 Wn.2d at 528-29. The Court held that this assertion of exemptions did not qualify as a “claim of exemption” sufficient to trigger the statute of limitations because the information provided by Des Moines “did not (1) adequately describe individually the withheld records by stating the type of record withheld, date, number of

pages, and author/recipient or (2) explain which individual exemption applied to which individual record[.]” *RHA*, 165 Wn.2d at 539. Without this information, the requestor could not make a “threshold” determination regarding whether the records are being properly withheld because the requestor “cannot know (1) what individual records are being withheld, (2) which exemptions are being claimed for individual records, and (3) whether there is a valid basis for a claimed exemption for an individual record.” *RHA*, 165 Wn.2d at 540. Therefore, requestor cannot make a reasoned determination whether to file a lawsuit, which therefore justified the Court’s ruling that the statute of limitations had not been triggered. *RHA*, 165 Wn.2d at 540.

The Court also looked at the issue of the brief explanation in *City of Lakewood v. Koenig*, where the Court considered the question of whether the failure to include an adequate “brief explanation” justified an independent cause of action. To reach its holding that the failure to provide an adequate explanation supported an independent “inadequate response” claim, the Court analyzed two of Lakewood’s “brief explanations,” one of which was insufficient (brief explanation for redacting driver’s license numbers) and another one that it found was sufficient (brief explanation justifying the redaction of birth dates). *Lakewood*, 182 Wn.2d at 96-97.

To justify the redaction of birthdates, Lakewood had cited to RCW 42.56.240(2) and explained “the date of birth together with a name has the potential to link a particular individual with a particular identity thus creating the potential to endanger an individual’s life, physical safety or property.” *Lakewood*, 182 Wn.2d at 92. The relevant portion of the exemption at issue exempts, “[i]nformation revealing the identity of persons who are witnesses to or victims of crime ... *if disclosure would endanger any person’s life, physical safety, or property.*” RCW 42.56.240(2) (emphasis added).¹¹ Thus, the adequate “brief explanation” effectively parroted the conditions listed in the exemption itself.

In contrast, to justify the redaction of driver’s license numbers, Lakewood had cited to several different statutes including RCW 42.56.050, .240(1) and RCW 46.52.120-.130, but provided no explanation, instead telling the requester: “Given what should be the self-evident nature of redacting an individual’s driver’s license number, we decline your invitation to provide further and unnecessary explanation.” *Lakewood*, 182 Wn.2d at 92 (quoting letter from Lakewood).

The City’s “brief explanation” was sufficient under *Lakewood*. To determine its sufficiency, the Court must consider both the explanation

¹¹ Note, if the requestor had challenged the assertion of this exemption, Lakewood would have had to produce specific evidence proving the risk to witness safety to justify the redaction. See *Sargent v. Seattle Police Dep’t*, 179 Wn.2d 376, 395-97, 314 P.3d 1093 (2013).

itself and any information that can be gleaned from the record at issue. *Lakewood*, 182 Wn.2d at 95.

Here, the exemption asserted is the deliberative process exemption – RCW 42.56.280 – which exempts certain recommendations and opinions. Wallin could glean much of the justification for the exemption by looking at the redacted record itself. See CP 17. The record is a “decline notice” in which the prosecutor notified the police department that it had not filed charges and explained that it likely would not, effectively recommending no further investigation by police. The redacted portion is the explanation for this recommendation. This is quintessential deliberative process information. Nevertheless, the City also explained that the redacted information was “The record constitutes/includes preliminary drafts, notes, recommendations and/or intra- agency memoranda in which opinions are expressed or policies formulated or recommended and which have not been publicly cited by our agency in connection with any agency action.” CP 122, ¶5.28.

The combination of the redacted document and the City’s explanation is more than sufficient to allow a requestor to make a threshold determination regarding whether the information was properly redacted.

Wallin does not assert to the contrary. Rather, he makes the unsupported assertion that the explanation is insufficient because it merely repeated the statutory language. But in *Lakewood*, the Court held that the City complied with the brief explanation requirement for its redaction of birthdates when the City did just that – repeat the statutory language. *Lakewood*, 182 Wn.2d 96. While repeating the statutory language might not always be sufficient, here where significant information can be gleaned from the redacted document itself, no more was required.

Because the City’s assertion of an exemption and brief explanation was sufficient to trigger the statute of limitations, Wallin’s untimely argument fails on its merits as well.

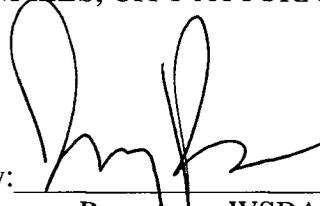
VI. CONCLUSION

“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.” *Burns v. McClinton*, 135 Wn. App. 285, 293, 143 P.3d 630 (2006). Here, Wallin slept on his rights when he had the installment of records from the City sit, unopened, at his grandmother’s home for fourteen months. Had he bothered to inspect those records, he would have immediately learned that the City had claimed an exemption for one redacted record that was produced, but had not produced seven other records.

Because the allegations in Wallin's complaint make it clear that the PRA's one-year statute of limitations applies in this case, the trial court properly dismissed Wallin's lawsuit without addressing the merits and this Court should affirm. As part of that ruling, the Court should also take the opportunity to overrule Tobin and find that the one-year statute of limitations in in RCW 42.56.550(6) applies to all "actions under this section".

RESPECTFULLY SUBMITTED this 15th day of January, 2016.

CITY OF EVERETT
JIM ILES, CITY ATTORNEY



By: _____
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CERTIFICATE OF SERVICE

I, Christina Wiersma, certify under penalty of perjury that true and correct copies of the above attached document were delivered via U.S. mail:

Plaintiff : Jamie Wallin, DOC. No 729164 Washington State Penitentiary R-A-304 1313 N. 13 th Ave. Walla Walla, WA 99362	(X) By U.S. Mail, Postage Prepaid () By Facsimile () By Electronic Mail () By Legal Messenger () Express Mail
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Executed at Everett, Washington, this 15th day of January, 2016.



Christina Weirsma