

No. 91255-6

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

FILED
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KAMAL MAHMOUD,

Petitioner,

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON CRF

v.

SNOHOMISH COUNTY,

Respondent.

Court of Appeals Case No. 70757-4-1
Appeal from the Superior Court of the
State of Washington for King County

PETITION FOR REVIEW

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I. INTRODUCTION

This petition seeks review of a Division One opinion effectively annulling Washington's Public Records Act (PRA), chapter 42.56 RCW, mandate that all public records must be disclosed or produced upon request. Contrary to Supreme Court precedent the Opinion bars otherwise valid PRA claims by finding that the PRA's one-year statute of limitations was triggered when a governmental agency withheld responsive records and provided defective exemption logs that failed to identify the withheld responsive records. This Court should accept review under RAP 13.4(b)(4) because the Opinion rewards governmental secrecy since agencies can trigger the PRA's statute of limitations by producing partial records and failing to disclose, in any manner, that responsive documents were withheld from the public. This Court should also accept review under RAP 13.4(b)(1) because the Opinion conflicts with this Court's *en banc* decision, Rental Hous. Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525 (2009) ("RHA"), which holds that the PRA statute of limitations is not triggered when an agency provides a defective exemption claim to a PRA request.

The Opinion deals a substantial blow to public's right to public records. The Opinion is a stepping stone to judicially amend the PRA by narrowly

interpreting the statute of limitations. The Opinion has accomplished what the legislature did not have the will to do when it could not pass Substitute Senate Bill 5022 (SSB 5022) in 2011 which would have narrowed the Statute of Limitations. SSB 5022, 62nd Leg., 2011 Reg. Sess. (Wash. 2011). The Court should accept review to correct this mistake prior to it becoming a larger problem.

II. IDENTITY OF PETITIONER

Petitioner Kamal Mahmoud requests this Court to accept review of the opinion of the Court of Appeals, Division I, terminating review of this PRA case. Mr. Mahmoud, the records requestor, is the plaintiff in the trial court and the appellant/cross-respondent in the Court of Appeals, Division One.

III. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, Petitioner seeks review of the Court of Appeals' opinion, *Kamal Mahmoud v. Snohomish County*, No. 70757-4-I (Oct. 27, 2014) (Appendix A), which: (1) affirmed the King County Superior Court's February 8, 2013, and April 17, 2013 orders as to the dismissal of five claims on the basis of the PRA statute of limitations (Appendix B-C); (2) affirmed the May 10, 2013 order denying Mr. Mahmoud's motion for reconsideration (Appendix D); (3) reversed the July 19, 2013 order and penalties relating to the sixth claim (Appendix E); and (4) reversed the August 27, 2013 award of costs and attorney

fees (Appendix F). An order denying motion to publish was entered on December 10, 2014. The decision is referred to as “the Opinion.”

IV. ISSUES PRESENTED FOR REVIEW

1. Is the PRA’s one-year statute of limitations triggered when an agency responds to a requester without producing or disclosing all responsive records in its possession?

2. Are exemptions logs that fail to disclose all withheld records sufficient to trigger the PRA’s one year statute of limitations with respect to the undisclosed withheld records?

3. Did the trial court err when finding the County’s search for emails and its failures to follow leads to locate the undisclosed responsive emails in response to PRA requests by Mr. Mahmoud were responsible as a matter of law?

4. Did the trial court err when it found the County’s claims for exemption in response to Mr. Mahmoud’s PRA requests were adequate as a matter of law?

5. Did the trial court err when it found the County’s delays in responding to certain PRA requests were adequate as a matter of law?

6. Did the trial court err in the amount of its attorney fee award?

7. Is Mr. Mahmoud entitled to reasonable attorney’s fees on prevailing claims through final resolution of his PRA lawsuit?

V. STATEMENT OF THE CASE

Plaintiff/Appellant Kamal Mahmoud was born in Kuwait and is a practicing Muslim. CP 417. He was employed by Defendant/Respondent Snohomish County from July 10, 2006 until December 31, 2009. Id. In May 2009, Mr. Mahmoud filed an internal EEO complaint alleging that his supervisors removed him from a position based on discrimination and/or retaliation. Id.

Mr. Mahmoud sought records related to the decision to terminate his position. He made six requests (and three re-requests) under the PRA to the County that are at issue here.¹ CP 120, 129-30, 132-33, 379, 388, 392-93, 402, 973-79, 1562, 2435-38. The County produced some records in response to some of the requests, but failed to identify, produce, or claim an exemption for over 400 records requested. CP 418-19, 423-971.

On June 30, 2011, Mr. Mahmoud filed a complaint in King County Superior Court against the County, alleging, *inter alia*, that it had discriminated and retaliated against him based on his protected class and activities. CP 3-10.²

During litigation, Mr. Mahmoud issued discovery requests to the County. CP 1129-30, 1137. On March 12, 2012, for the first time, the County produced hundreds of records responsive to the previous PRA requests. CP 418-19, 423-

¹ Mr. Mahmoud made one other PRA request (PDR #10-08644) that is not at issue in this appeal.

² These claims were resolved during mediation and subsequently dismissed.

971. However, the County had not previously produced or claimed exemptions for these records. CP 128-29, 384-86, 390, 404-05, 417-18, 423-971, 1564. These responsive documents were not listed or identified on any exemption log. On August 30, 2012, Mr. Mahmoud amended his complaint alleging PRA violations. CP 18-23. The following summarizes each PRA request and its outcome below.

A. Mr. Mahmoud's Request 09-05374

On July 31, 2009, Mr. Mahmoud made his first PRA request for a copy of the records in the investigation file arising from his internal EEO complaint. CP 129-130. The County identified the request as PDR-09-05374. CP 125-126.

1. The County's Response

The County provided no documents in response to Mr. Mahmoud's PRA request. CP 128-29. Instead, on August 7, 2009, the County claimed a categorical exemption to the records, but failed to identify them with any specificity; instead, it simply stated that the responsive records were exempt because the investigation was "still being conducted" citing RCW 42.56.250(5). Id.

2. The County Failed to Respond to Mr. Mahmoud's Subsequent PRA Requests for the Same Records

Based on the County's failure to provide a substantive response, on October 20, 2009, two and a half months after the County's response and about five months after the EEO investigation began, Mr. Mahmoud's counsel, re-issued the

request under the PRA for the same records to the County. CP 129-30, 132-33.

The request, sent by mail and email, specifically stated,

it is imperative that Mr. Mahmoud first receive Mark Knudson's investigation file concerning Mr. Mahmoud's complaint of discrimination about Max Phan, Bruce Duvall and Art Louie [Mr. Mahmoud's supervisors].... Please provide the requested public records to Mr. Mahmoud no later than the close of business on Friday, October 23, 2009."

CP 132-33. The County failed to respond to this PRA request. CP 128.

On February 11, 2010, Mr. Mahmoud, again through counsel, requested the same records under the PRA by sending a certified letter and email to the County. CP 2435-38. This request came six months after the County's August response and about nine months after initiating the EEO investigation. Id.

The County again failed to respond in any manner. CP 418. The County did not indicate whether the investigation was "still being conducted" or otherwise claim an exemption. Id. Nor did it disclose the existence of any responsive records. Id. The County cannot dispute that the responsive records existed and the requests went to the correct addresses. Id.

Since the County failed to respond at all to either request, Mr. Mahmoud had no idea whether responsive records were being withheld appropriately. In other words, the County silently withheld these records.

3. The County Failed to Produce All Responsive Documents

On or about February 8, 2012, Mr. Mahmoud made a request to the County under CR 34 for documents related to his civil discrimination claims. CP 1129-30, 1137. Pursuant to CR 34, on March 14, 2012, the County finally produced the investigation notes and transcripts of the interviews from the EEO complaint identified in PDR #09-05374 and Mr. Mahmoud's follow-up requests of October 2009 and February 2010. CP 418, 422-536. Thus, it is indisputable the County withheld these documents. It did not attempt to claim an exemption in response to his two subsequent requests for these records pursuant to the PRA and withheld them for over two and a half years. CP 128-129, 417-18, 422-536.

4. Disposition at Trial Court and Division One

Upon reconsideration, the trial court ruled that the PRA SOL barred the first request of July 31, 2009 and dismissed the claim; the trial court also dismissed the other claims, in which Mr. Mahmoud's counsel subsequently re-requested the records, based on a two-year SOL under RCW 4.16.130. CP 1056.

Division One found the County's August 2009 claim of a categorical exemption triggered the PRA statute of limitations; it also found that the County was under no obligation to respond to the subsequent requests for records.³

³ Division One characterized the re-requests as simply "following up" with no response required;

B. Mr. Mahmoud's Requests 09-05375, 10-01666, 10-08592, and 10-08593

From July 31, 2009 to December 5, 2010, Mr. Mahmoud made four PRA requests for all emails on any county network drive sent to and from various identified individuals for identified date ranges. CP 48, 379, 392-93, 402.

1. The County's Responses

For each of the responses, the County failed to produce all the responsive records that were in its possession; these records were also not identified on any exemption log. CP 132-33, 417-18, 1130, 1139, 1144-1390, 1639, 2435-38. They were eventually produced by the County years later pursuant to CR 34 during discovery in Mr. Mahmoud's discrimination case. CP 384-86, 417-19, 736, 745-956, 958-71, 1130, 1139, 1144-1390, 1639.

Mr. Mahmoud had no way of knowing the County was maintaining these records until they were produced in discovery. Indeed, on several occasions he was suspicious that the County was withholding these records and he asked to reopen the PRA requests in order to obtain the emails; but the County responded that they were likely destroyed and failed to take action. CP 395-96, 418-19, 973-79. Without access to the County's network, which he did not have at that time,

however, the County's CR 30(b)(6) designee for PRA practices and policies admitted that by re-requesting records under the PRA, the County should "reopen the request." CP 2463.

he could not challenge these false assertions the records did not exist until he actually and eventually discovered their existence in discovery.

It is undisputed the County searched for the responsive emails only in the email accounts of the individuals identified in the request: it did not search all locations explicitly stated in the request, (“any other county network drive”), nor did the County relay to Mr. Mahmoud that it narrowed the scope of the search in contrast to his request. CP 1077-78. The County failed to present any evidence it searched for these records. CP 1074-78.

In addition to the complete failure to produce or disclose all responsive records in its possession, when it did produce responsive records and/or exemption logs, the County generally responded well after its estimated date to respond and without justification for the delay. CP 52, 132-33, 1583-90. Moreover, almost all the exemption logs failed to identify how the claimed exemptions applied to the records in question and the number of pages exempted. CP 384-86, 399-405, 1588, 1564.

2. Disposition at Trial Court and Division One

The trial court found the County failed to trigger the statute of limitations but that its searches were reasonable. CP 991-993; 1829-30. It also found the exemption claims, the delays in production, and the failure to re-open the

searches, did not violate the PRA. CP 1829-30.

Division One reversed the trial court and found that the PRA's statute of limitations was triggered even though the County failed to disclose or produce all responsive records. The Opinion fails to address the issue that the documents withheld were never listed on any of the exemption logs. It failed to rule whether the searches were reasonable.

C. Mr. Mahmoud's Request #10-05383

On July 23, 2010, Mr. Mahmoud requested journal entries and certain other records concerning him, made by his former supervisor. CP 1597-98.

1. The County's Response

The County failed to provide the responsive records by the initial estimated date. CP 388. On August 16, 2010 the County responded, purportedly producing "all documents responsive to [Mr. Mahmoud's] request". CP 390. It claimed one record as exempt, but failed to explain how it was exempt or the number of pages. Id.

2. The County Failed to Produce All Responsive Documents

Mr. Mahmoud again requested the journal in discovery. CP 1129-30, 1137. In response, the County produced records responsive to the PRA request, which it had failed to produce and were not claimed as exempt. CP 419, 1622-27.

3. Disposition at Trial Court and Division One

The trial court found the County violated the PRA by conducting an unreasonable search and failing to produce the additional records. CP 1829-30. However, it also found the exemption claim was adequate. Id. Nevertheless, Mr. Mahmoud prevailed under the PRA on this claim. Id.

Division One reversed the trial court's decision that the PRA's statute of limitations was not triggered when the County failed to disclose or produce the additional responsive records. It failed to rule whether the search was reasonable.

D. Mr. Mahmoud's Prevailing Attorney's Fees and Costs

Mr. Mahmoud's submitted a fee petition to the trial court after he prevailed on a PRA claim. CP 1847-59. His attorney's fees for PRA claims totaled \$194,240. CP 1991-92, 2084. He sought a reduced amount of \$126,385 to exclude the work on the unsuccessful claims. CP 1915-16. The County asserted a fee award between \$36,547.24 and \$38,571.24 was reasonable. CP 1940.

Mr. Mahmoud asserted his fees and costs attributable to his prevailing claim were inextricably intertwined with the other PRA claims. CP 1861-62. To the extent his attorneys could segregate their fees, they did. CP 1854, 1998, 2085.

It is clear that the trial court did not consider these facts, despite its rationale for reducing the fee request. CP 2117. Rather, the trial court awarded

Mr. Mahmoud 1/7th of the already reduced fee request. Id. This did not take into account that one of the claims was dismissed prior to work being performed, and the other facts set forth above. CP 1861. The Opinion failed to address this issue.

IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. This Court should accept review under RAP 13.4(b)(4) because Division One's opinion abolishes the mandate that public records must be disclosed or produced upon request

The PRA mandates broad disclosure of public records unless the responding agency demonstrates that the record falls within a specific exemption. RCW 42.56.070(1); see also, 42.56.030 (“The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.”) The PRA's disclosure provisions must be liberally construed and its exemptions narrowly construed. RCW 42.56.030.

As set forth above, for Mr. Mahmoud's above-identified PRA requests, the County failed to produce or disclose all the responsive records it had in its possession. See, CP 418-19, 423-971 (the County failed to produce or identify over 450 responsive records on any exemption log). When Mr. Mahmoud finally discovered this fact because the County produced the previously undisclosed requested records in subsequent litigation (over a year past its final response to

the last PRA request), he sought recourse through the PRA. However, Division One found Mr. Mahmoud failed to timely file his claims. The Opinion fails to recognize the statute of limitations cannot be triggered because the records were never produced in response to the request or identified on any exemption log.

The PRA explicitly states the statute of limitations (SOL) is triggered in one of two ways. RCW 42.56.550(6). First, an agency triggers the SOL by properly claiming an exemption. *Id.* The second way is by actually producing the responsive record(s) on a partial or installment basis. *Id.* An agency produces a record when it is “made available for inspection and copying.” *Sanders v. State*, 169 Wn.2d 827, 836, 240 P.3d 120 (2010). Once the SOL is triggered, a claimant has one year to file a claim. RCW 42.56.550(6).

Division One’s Opinion interprets the PRA’s state of limitations triggering event in a manner that abolishes the very purpose of the PRA: to wit, according to the Opinion, governmental agencies are only required to disclose some, but not all, of the responsive records it has in its possession in order to trigger the PRA’s statute of limitations. The Opinion explicitly concedes that the County failed to produce or even disclose all the responsive records in its possession (e.g., for Request 10-05383,⁴ “[t]he County concedes it did not produce all responsive

⁴ The Opinion previously and explicitly stated that for this request the County’s agent conceded he

records. But we do not reach the merits of this claim because the PRA statute of limitations also bars this claim.”) Opinion at 15. The Opinion goes on to state: “For all of Mr. Mahmoud’s requests, the County claimed an exemption, produced records, or both. This triggered the one-year state of limitations under RCW 42.56.550(6).” Opinion at 18.

In order to reach this conclusion however, the Opinion ignores the fact that the County did not disclose the withheld responsive records on any exemption log much less produce them. As this Court has made clear, under the PRA: “Records are either ‘disclosed’ or ‘not disclosed.’” A record is disclosed if its existence is revealed to the requestor in response to a PRA request, regardless of whether it is produced... A document is never exempt from disclosure, it can only be exempt from production.” Sanders, 169 Wn.2d at 836.

Ironically, the Opinion states, “[t]he PRA statute of limitations contains triggering events that enable a requester to know if a cause of action has accrued....” Opinion at 17. But if an agency fails to disclose all the responsive records in its response(s) to a PRA request how does a requester know that a claim exists? The answer, of course, is that a requester cannot know what an agency is failing to disclose and whether a PRA claim exists -- which is why this Opinion is

failed to identify or produce responsive records. Opinion at 5.

fatally flawed and undercuts the very mandate of the PRA requiring disclosure of all public documents upon request.

Under this Opinion, a governmental agency has been provided guidance that an exemption log that fails to list all withheld responsive documents will still trigger the statute of limitations: any exemption, albeit incomplete, serves to trigger the statute of limitations.

B. This Court should accept review under RAP 13.4(b)(1) because Division One's opinion conflicts with decisions of this Court

This Court has held that the PRA's statute of limitations is not triggered when an agency fails to adequately identify records when claiming they are exempt from disclosure. RHA, 165 Wn.2d at 538-39. Here, the Opinion has found that the PRA's statute of limitations was triggered even though the County failed to disclose, produce or claim an exemption for hundreds of responsive records.

This finding completely contradicts this Court's reasoning in RHA, which states:

The key issue then is when a "claim of exemption" under RCW 42.56.550(6) is effectively made. We find the reasoning of *PAWS II* guides our resolution of this issue. ... Of particular significance here, the Court in *PAWS II* denounced the "silent withholding" of information in response to a PRA request:

Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed. Moreover, without a specific identification of each individual record withheld in its entirety, the reviewing court's ability to

conduct the statutorily required de novo review is vitiated.

Id. at 270, 884 P.2d 592 (citation omitted). We emphasized the need for particularity in the identification of records withheld and exemptions claimed...

Id. 536-538 (emphasis added), quoting PAWS II, 125 Wn.2d 243, 270 (1994).

Here, the County has conceded, “the claimed exemption must provide what records are being claimed as exempt, what exemption is claimed, and how that exemption applies to the records.” Respondent Brief at 22. It further conceded it “did not specifically identify individual records in the investigative file” when claiming an exemption as to Request 09-05374. Id. at 23; see also, CP 128. The County failed to identify the records it withheld on any exemption log as to the other requests at issue.⁵

These admissions and failures contradict RHA’s holding requiring “an agency’s response to a requester [to] include specific means of identifying any individual records which are being withheld in their entirety.” RHA, 165 Wn.2d at 538. Such conduct violates the PRA and constitutes “silent withholding” as denounced by this Court and set forth above. RHA does not allow the County to trigger the PRA SOL while “silently withholding” such records as this would

⁵ The County failed to produce or identify over 450 responsive records on any exemption log. See, CP 418-19, 423-971. This constitutes over 450 separate records responsive to at least six separate PRA requests (and not including the “follow-up” requests which the County’s CR 30(b)(6) designee admitted “re-opens” the corresponding requests). CP 2462-63.

completely undermine the very purpose and letter of the PRA. Thus, the Opinion conflicts with RHA by finding that the PRA SOL was triggered given the County's failures to disclose the individual records being withheld.

In addition, when the County actually did claim exemptions to withhold other records, it repeatedly failed to explain how the purported exemptions applied to the records nor did it provide sufficient information to determine if the exemption was applicable. CP 128-30, 399-402, 411-13, 415-16, 1564, 1593-95, 1600, 1614-19. It also failed to identify the number of pages withheld. Id.

To properly claim an exemption under the PRA, an agency must include the record's "number of pages" and "an explanation of how [the exemption] applies to the individual agency record." RHA, 165 Wn.2d at 538; Sanders v. State, 169 Wn.2d at 846 (finding the mere identification of a record and claimed exemption to be deemed as a "brief explanation" violates the PRA as it would render the relevant PRA clause superfluous.); see also, City of Lakewood v. Koenig, ___, P.3d ___ (Dec. 11, 2014) (holding that agencies must explain why an exemption applies to a withheld record). After describing the sort of information deemed adequate to make a proper exemption under the PRA, RHA concluded that an agency's failure to provide such information:

was insufficient to constitute a proper claim of exemption and thus

did not trigger the one-year statute of limitations under RCW 42.56.550(6) The City's...reply letter 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

Without the information a privilege log provides, a public citizen and a reviewing court 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. Failure to provide the sort of identifying information a detailed privilege log contains defeats the very purpose of the PRA to achieve broad public access to agency records. See RCW 42.56.030.

Id. at 536-41. By finding that the County's inadequate exemption claims triggered the PRA's statute of limitation, the Opinion again conflicts with RHA.

C. The County's Response to Request 09-05374 Did Not Trigger the SOL

In this case, the County similarly did not comply with the PRA when it claimed a categorical exemption in response to Mr. Mahmoud's PRA request for records pertaining to an internal EEO investigation. The County denied the request under RCW 42.56.250(5) and failed to identify any of the records with specificity by simply stating the investigation was ongoing. CP 128-29.

Just as in RHA, the County's response 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 rather than categorically asserting the investigative process exemption as to all withheld documents. Thus, just as in RHA, the County's response failed to trigger the PRA SOL and the Opinion erred by finding that the County's categorical exemption triggered the PRA SOL.⁶

Likewise, the County's complete failures to respond at all to Mr. Mahmoud's re-requests for these records months after the response above, could not be deemed an adequate disclosure under RHA. Here, the Opinion simply misread the requests (by stating that future productions to another PRA request met the County's PRA obligations) and refused to consider the County's concession that a re-request for the same information, re-opens the request, requiring a response. See, Opinion at 13.

D. The Opinion conflicts with other Court of Appeals decisions because the County's last incomplete response cannot trigger the PRA SOL

The County's incomplete production of records did not trigger the PRA SOL as to records that were never produced or claimed as exempt, namely the 450 plus undisclosed records. Division One previously analyzed when the PRA SOL is triggered with respect to an incomplete production under the PRA:

⁶ This Court declined to recognize a categorical exemption for internal investigations into police officers as proper under the PRA. Sargent v. Seattle Police Dept., 179 Wn.2d 376, 392 (2013). The Opinion instead asserted the County's internal EEO investigation was more akin to "an open active police investigation file." Opinion at 12, quoting Sargent, 179 Wn.2d at 392.

“partial” production as used in RCW 42.56.550(6) cannot be construed as simply withholding part of a record without explanation, as the county did here when it provided the redacted document, because such a “partial,” i.e., incomplete, production is not authorized by the PRA. RCW 42.56.210(3) prohibits an agency's withholding of a part of a record unless it claims an exemption....

The county asserts that RCW 42.56.550(6) simply contemplates the agency’s last response and contends that its last response, admittedly incorrect, was when it sent the second wrong document. But as discussed above, the statutory language is clear that the one-year statute of limitations is only triggered by two specific agency responses—a claim of exemption and the last partial production—not simply the agency’s “last” response. Had the legislature determined that the agency’s last response would suffice, it would have expressly so stated.

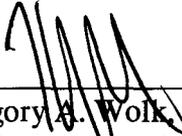
Id. at 514. Division 2 has also held that the PRA SOL is not triggered until there is a complete and full production. McKee v. Washington State Department of Corrections, 160 Wn. App. 437, 446 (2011) (“the trial court must first determine whether the agency folly [sic] and timely produced the requested records and then determine the applicable statute of limitations.”) The Opinion cannot be reconciled with these decisions as set forth above.

V. CONCLUSION

Because the Opinion conflicts with this Court’s decision in RHA, as well as the Division One and Two decisions, and this case involves the substantial public interest of the public’s right to access its records, review should be granted.

RESPECTFULLY SUBMITTED this 9th day of January, 2015.

REKHI & WOLK, P.S.

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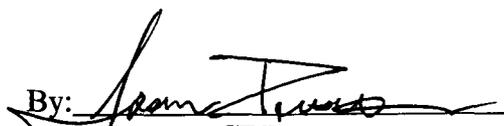
CERTIFICATE OF SERVICE

I, Jason Proctor, certify that a copy of the foregoing **Petition for Review** was caused to be electronically served (through the consent of opposing counsel) on January 9, 2015, to the following counsel of record at the following email addresses:

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The foregoing statement is made under the penalty of perjury under the laws of the United States of America and the State of Washington and is true and correct.

DATED this 9th day of January, 2015.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KAMAL MAHMOUD,)	NO. 70757-4-1
)	
Appellant,)	DIVISION ONE
)	
v.)	
)	UNPUBLISHED OPINION
SNOHOMISH COUNTY, a political)	
subdivision of Washington state,)	
)	FILED: October 27, 2014
Respondent.)	
_____)	

LEACH, J. — Kamal Mahmoud appeals trial court orders dismissing his claims against Snohomish County (County) arising from five of six Public Records Act¹ (PRA) requests. He contends that because the County's responses violated the PRA, no statute of limitations bars his claims. Mahmoud also appeals the court's attorney fee award and denial of his motion for reconsideration. The County cross appeals, arguing that the statute of limitations bars all six of Mahmoud's claims. The County's responses to each of Mahmoud's public records requests triggered the one-year PRA statute of limitations, which bars all six of Mahmoud's claims. Accordingly, we affirm the trial court as to the dismissal of five claims on the basis of the PRA statute of limitations and reverse the trial court's order and penalties relating to the sixth

¹ Ch. 42.56 RCW.

claim. We affirm the trial court's denial of Mahmoud's motion for reconsideration and reverse the trial court's award of costs and attorney fees.

FACTS

Mahmoud worked as a civil engineer for Snohomish County from July 2006 to December 31, 2009. In May 2009, he filed an internal Equal Employment Opportunity (EEO) complaint, alleging unlawful discrimination and/or retaliation. Mahmoud later made six requests to the County under the PRA, seeking documents related to his termination.² The County claimed a categorical exemption for one request and produced responsive records for five requests.

1. 09-05374

On August 3, 2009, Mahmoud requested a copy of the County's EEO investigation file "to include all interview notes, documents, emails, and findings related to my complaint." On August 7, the County notified Mahmoud that responsive records were exempt from production "at this time" under RCW 42.56.250(5).³ In letters dated October 20, 2009, and February 11, 2010,

² Mahmoud made a seventh request (10-08644) not at issue in this appeal.

³ Former RCW 42.56.250(5) (2005) exempts from public inspection and copying "[i]nvestigative records compiled by an employing agency conducting a current investigation of a possible unfair practice under chapter 49.60 RCW or of a possible violation of other federal, state, or local laws prohibiting discrimination in employment."

Mahmoud's attorney wrote "to follow up" and "check on the status" of Mahmoud's request for the investigation file and of a second request filed the same day. The County did not respond to either of these letters. The EEO investigation closed in late March 2010.

2. 09-05375

Also on August 3, 2009, Mahmoud requested "all emails sent to and from" six county employees, "including any archived emails on the individuals [sic] C drive, P drive, or any other county network drive," from January 1, 2008, to the present. The County first responded on August 5, 2009, and next on October 21, 2009, when Department of Public Works Manager Pamela Miller produced a CD (compact disc) of "approximately 4,700 emails." On April 2, 2010, Miller notified Mahmoud that a DVD (digital video disk) with a second installment was ready for him, along with a redaction log for both installments. On June 4, 2010, Mahmoud e-mailed Miller that the records did not include "most of the info I requested." On June 7, Miller responded that the County's Department of Information Services (DIS) captured "all emails within the parameters you specified," but that due to earlier deletions and the "state recommended archive schedule . . . it may very well be that many of the emails were not required to be retained."

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3. 10-01666

On March 15, 2010, Mahmoud requested all e-mail sent or received by four county employees between January 1, 2009, and March 1, 2009. Mahmoud also requested "policies or procedures related to preservation, back-up, and/or archiving of emails by the Department of Information Services." On May 20, the County produced an installment of records. It produced four more installments and an exemption log on June 11, June 29, July 12, and November 22, 2010.

4. 10-05383

On July 23, 2010, Mahmoud requested

any and all entries made by [supervisor] Max Phan from January 2008 to August 2009 in his "journal" and/or other notes and files, concerning Kamal Mahmoud. This request is intended to include but not be limited to any entries regarding alleged complaints regarding Mr. Mahmoud received by Mr. Phan from [certain county employees], or any other individual.

After initially responding on July 28, the County attached to an August 16 e-mail "all documents responsive to your request." The e-mail noted that there were no redactions and that the County withheld one document: a memorandum from Phan to Steven Bladek "exempt from disclosure pursuant to RCW 5.60.060(2)(a)."⁴ The e-mail concluded, "This request is now considered closed."

In March 2012, in response to Mahmoud's discovery requests, the County produced additional journal entries that it had not provided previously or claimed

⁴ RCW 5.60.060(2)(a) concerns the attorney-client privilege.

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as exempt. Phan conceded in a declaration that he had "additional journal entries related to Mr. Mahmoud and his work with the County," but that because these were not directly related to complaints about Mahmoud, he "did not understand his request to be seeking those records. As a result, I did not produce those records in response to PDR #10-05383. This was a mistake on my part."

5. 10-05392

On December 5, 2010, Mahmoud requested all e-mail sent or received by three county employees between October 1, 2008, and January 31, 2009, "including any archived emails on the individuals [sic] C drive, P drive, or any other county network drive," as well as copies of policies related to e-mail preservation. On December 9, 2010, the County produced records related to e-mail preservation. On January 19, 2011, Miller notified Mahmoud that DIS had completed the search and found no e-mail responsive to his request. In response to Mahmoud's question about what happened to the e-mail, she said that "since its [sic] 2 years ago it would be my assumption that they have been deleted since they weren't located."

6. 10-08593

On January 14, 2011, the County produced records in response to Mahmoud's request for e-mail records of two county employees from September

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1, 2009, to December 31, 2009. On February 25 and 28, 2011, the County produced two more installments and an exemption log.

On June 30, 2011, Mahmoud filed a complaint against the County in King County Superior Court, alleging discrimination and retaliation.⁵ On August 30, 2012, sometime after receiving the County's discovery responses, Mahmoud amended his complaint to add claims for PRA violations.

The trial court denied the County's motion for summary judgment, ruling that Mahmoud's claims were not time barred. The court granted in part the County's motion for reconsideration, ruling that Mahmoud's claims arising from request 09-05374 were barred by either the one-year PRA statute of limitations, RCW 42.56.550(6), or the general two-year statute, RCW 4.16.130. But the court denied the County's motion for reconsideration as to Mahmoud's other five claims, again ruling that they were not time barred.

On April 17, 2013, after a show cause hearing, the court dismissed with prejudice Mahmoud's claims arising from requests 09-05375, 10-01666, 10-08592, and 10-08593, ruling that the County had complied with the PRA. But the court held that the County violated the PRA when it "failed to provide seven journal entries and one note responsive to public records request #10-05383."

⁵ The parties resolved these claims through mediation, and they are not at issue in this appeal.

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The court imposed penalties of \$18,000⁶ and awarded Mahmoud \$18,055 in attorney fees: one seventh of his request.

Mahmoud appeals the court's dismissal of five of his claims, the attorney fee award, and denial of his motion for reconsideration. The County cross appeals the trial court's denial of its motion for summary judgment, contending that the trial court should have dismissed all six claims on the basis of the statute of limitations. Mahmoud has also filed a motion to strike a portion of the County's reply brief under RAP 10.1(c). Mahmoud seeks attorney fees and costs for his appeal, as well as fees, costs, and sanctions for the motion to strike.

STANDARD OF REVIEW

We review agency actions under the PRA and questions of statutory interpretation de novo.⁷ We also review de novo a trial court's summary judgment decision.⁸ Although a party generally may not appeal denial of summary judgment,⁹ we may consider this issue when it involves a purely legal question.¹⁰ A court should grant summary judgment only if

⁶ The court assessed a penalty of \$30 a day for a period of 600 days.

⁷ Neigh. Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 715, 261 P.3d 119 (2011); Rental Hous. Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 536, 199 P.3d 393 (2009); RCW 42.56.550(3).

⁸ Walston v. Boeing Co., 173 Wn. App. 271, 279, 294 P.3d 759 (2013), aff'd, No. 88511-7, 2014 WL 4648090 (Wash. Sept. 18, 2014).

⁹ Waller v. State, 64 Wn. App. 318, 338, 824 P.2d 1225 (1992).

¹⁰ See Walston, 173 Wn. App. at 288; McKasson v. Johnson, 178 Wn. App. 422, 423-24, 315 P.3d 1138 (2013).

“after considering all the pleadings, affidavits, depositions or admissions and all reasonable inferences drawn therefrom in favor of the nonmoving party, it can be said (1) that there is no genuine issue as to any material fact, (2) that all reasonable persons could reach only one conclusion, and (3) that the moving party is entitled to judgment as a matter of law.”¹¹

Whether to award costs and attorney fees is a question of law reviewed de novo, while this court reviews the reasonableness of attorney fee awards for abuse of discretion.¹² An abuse of discretion standard also applies to a trial court’s denial of a motion for reconsideration.¹³ A court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons.¹⁴

ANALYSIS

The PRA

The PRA “is a strongly worded mandate for broad disclosure of public records.”¹⁵ Courts liberally construe the PRA in favor of disclosure and narrowly construe its exemptions.¹⁶ The PRA requires every government agency to produce for inspection and copying any public record upon request unless it falls within a specific, enumerated exemption.¹⁷

¹¹ Walston, 173 Wn. App. at 279 (quoting Baker v. Schatz, 80 Wn. App. 775, 782, 912 P.2d 501 (1996)).

¹² Sanders v. State, 169 Wn.2d 827, 866-67, 240 P.3d 120 (2010).

¹³ Brinnon Grp. v. Jefferson County, 159 Wn. App. 446, 485, 245 P.3d 789 (2011).

¹⁴ State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

¹⁵ Soter v. Cowles Publ’g Co., 162 Wn.2d 716, 731, 174 P.3d 60 (2007) (quoting Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)).

¹⁶ RCW 42.56.030.

¹⁷ Sanders, 169 Wn.2d at 836; RCW 42.56.070(1).

A party must file a PRA action “within one year of the agency’s claim of exemption or the last production of a record on a partial or installment basis.”¹⁸ The PRA does not require an agency to “create or produce a record that is nonexistent,”¹⁹ and so an agency response may also include notice that the requested documents do not exist.²⁰

The agency has the burden to establish that a specific exemption applies.²¹ An agency response withholding 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.”²² This “brief explanation” should cite the statute granting an exemption and “should provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper.”²³ An insufficient

¹⁸ RCW 42.56.550(6).

¹⁹ Fisher Broad.-Seattle TV LLC v. City of Seattle, 180 Wn.2d 515, 522, 326 P.3d 688 (2014 (internal quotation marks omitted) (quoting Gendler v. Batiste, 174 Wn.2d 244, 252, 274 P.3d 346 (2012)); WAC 44-14-04004(4)(a).

²⁰ See Greenhalgh v. Dep’t of Corr., 170 Wn. App. 137, 148, 282 P.3d 1175 (2012); WAC 44-14-04004(4)(a) (“An agency is only required to provide access to public records it has or has used. An agency is not required to create a public record in response to a request.”).

²¹ Neigh. Alliance, 172 Wn.2d at 715.

²² RCW 42.56.210(3).

²³ Rental Hous. Ass’n, 165 Wn.2d at 539 (quoting WAC 44-14-04004(4)(b)(ii)).

claim of exemption does not trigger the one-year statute of limitations under RCW 42.56.550(6).²⁴

County's Cross Appeal

In its cross appeal, the County argues that the trial court erred by not dismissing all six of Mahmoud's claims on summary judgment based on the statute of limitations. Mahmoud argues that because the County violated the PRA, no statute of limitations began to run. We agree with the County. In response to each of Mahmoud's six requests, the County claimed an exemption, produced records, or both. For each request, Mahmoud filed his PRA claim more than one year later.

Request 09-05374

Mahmoud argues that the County's incomplete categorical exemption claim for the EEO file and its failure to respond to his two "re-requests" prevented the PRA statute of limitations from beginning to run. Citing Rental Housing Ass'n of Puget Sound v. City of Des Moines,²⁵ Mahmoud challenges the sufficiency of the County's exemption claim because it did not "explain which individual exemption applied to which individual record rather than categorically asserting the investigative process exemption as to all withheld documents." Thus, he

²⁴ Rental Hous. Ass'n, 165 Wn.2d at 539.

²⁵ 165 Wn.2d 525, 539-40, 199 P.3d 393 (2009).

claims, just as in Rental Housing Ass'n, the County's response did not to trigger the PRA statute of limitations.

We disagree. In Rental Housing Ass'n, the City did no more than "generally assert[] the controversy and deliberative process exemptions as to all withheld documents."²⁶ Here, the County cited the applicable portion of the statute, which exempts "[i]nvestigative records compiled by an employing agency conducting a current investigation of a possible unfair practice under chapter 49.60 RCW or of a possible violation of other federal, state, or local laws prohibiting discrimination in employment."²⁷

Mahmoud also cites Sargent v. Seattle Police Department²⁸ to support his assertion that our Supreme Court "recently declined to recognize a similar categorical exemption as proper under the PRA." But Mahmoud mischaracterizes Sargent. In Sargent, the plaintiff requested records from the Seattle Police Department (SPD) about criminal and internal investigations into his confrontation with an SPD officer.²⁹ The SPD claimed a categorical exemption under RCW 42.56.240(1), the effective law enforcement exemption.³⁰

²⁶ Rental Hous. Ass'n, 165 Wn.2d at 539-40.

²⁷ Former RCW 42.56.250(5) (2005).

²⁸ 179 Wn.2d 376, 314 P.3d 1093 (2013).

²⁹ Sargent, 179 Wn.2d at 383.

³⁰ This provision exempts "[s]pecific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies" where nondisclosure "is essential to effective law enforcement or for the protection of any person's right to privacy."

The court held in Sargent that once the police referred the case to the prosecutor, “nondisclosure [was] not categorical and automatic”³¹ because “referral to prosecutors signals the police’s conclusion of its investigation and is a bright line for termination of the categorical exemption.”³² But the court reaffirmed its holding in Newman v. King County³³ that to protect the integrity of an ongoing police investigation, a categorical exemption may apply to an “open active police investigation file.”³⁴ In Newman, the court concluded that the requested documents pertained to an open case, their production would have placed a burden on the agency’s ability to perform its given role, and the agency still contemplated enforcement proceedings.³⁵ Although the County did not conduct a criminal investigation of Mahmoud’s EEO claim, as in Newman the relevant records pertained to an open case, future remedial proceedings were possible, and production before the case was closed would have impaired the investigating agency’s ability to perform its given role. The County’s explanation provided Mahmoud with sufficient information to make a threshold determination about the County’s exemption claim and if he had a cause of action under the PRA.

³¹ Sargent, 179 Wn.2d at 388 (citing Cowles Publ’g Co. v. Spokane Police Dep’t, 139 Wn.2d 472, 479-80, 987 P.2d 620 (1999)).

³² Sargent, 179 Wn.2d at 389.

³³ 133 Wn.2d 565, 947 P.2d 712 (1997).

³⁴ Sargent, 179 Wn.2d at 392 (quoting Newman, 133 Wn.2d at 575).

³⁵ Newman, 133 Wn.2d at 575.

Mahmoud also argues that his attorney's letters to the County on October 20, 2009, and February 11, 2010, "re-issued" his request for the investigation file and that the County failed either to claim an exemption or to produce a responsive record, as the statute requires. But on August 7, 2009, the County responded to Mahmoud's request for the investigation file by claiming an exemption. We disagree that these letters constitute two new public records requests that the County improperly ignored. Additionally, in the letters, the attorney appears to confuse request 09-05374 with Mahmoud's second request, 09-05375, for which the County had provided time estimates for production. Mahmoud's contention that the County made no response ignores the fact that the County produced records for 09-05375 on October 21, 2009, and April 2, 2010: one installment following each of the letters.

Under RCW 42.56.550(6), the limitations period for request 09-05374 expired on August 7, 2010. Because Mahmoud did not amend his complaint to include his PRA claims until August 30, 2012, his claims are time barred under the PRA.

Requests 09-05375, 10-01666, 10-08592, and 10-08593

Mahmoud also contends that the County's exemption logs for 09-05375, 10-01666, and 10-08593 were "deficient and violated the PRA" and thus did not trigger the one-year limitations period. Again citing Rental Housing Ass'n, he

argues that an agency does not make a sufficient exemption claim unless the claim includes the number of pages of each withheld document. This argument fails. In Rental Housing Ass'n, the court found the City's response deficient because it lacked not only the number of pages but also the type of record, date, author, recipient, or any explanation of which specific exemption applied to each record.³⁶ Such a response would not give a requester enough information to know if the claimed exemptions were proper. Here, the fact that the County did not list each record's number of pages does not "defeat[] the very purpose of the PRA to achieve broad public access to agency records."³⁷ To the contrary, the County's logs satisfied the "brief explanation" requirement of RCW 42.56.210(3) by including the date, citation to statutory exemption, author, recipient, and type and description of each record. This triggered the one-year statute of limitations, which expired for the last of these three requests no later than late February 2012.

Mahmoud also argues that the County's single production in response to request 10-08592 was incomplete and therefore could not trigger the limitations period. But "it would be an absurd result to conclude that the legislature intended no statute of limitations for PRA actions involving the production of a single

³⁶ Rental Hous. Ass'n, 165 Wn.2d at 539-40.

³⁷ Rental Hous. Ass'n, 165 Wn.2d at 540.

volume of documents.”³⁸ Courts avoid a literal reading of a statute if it would result in “unlikely, absurd, or strained consequences.”³⁹ The County’s single production of records on December 9, 2010, or, alternatively, its final response on January 19, 2011, triggered the one-year statute of limitations, which expired at least seven months before Mahmoud filed his PRA claims.

Request 10-05383

For request 10-05383, the County produced records and claimed a partial exemption on August 16, 2010. The County concedes it did not produce all responsive records. But we do not reach the merits of this claim because the PRA statute of limitations also bars this claim.

Finally, Mahmoud argues that under a common law discovery rule, any statute of limitations should have been tolled until March 2012, when he “discovered the responsive records” during the course of litigation. He contends that until this point, he was “forced to rely upon the County’s multiple false assurances,” not realizing that he had a cause of action.

³⁸ Bartz v. Dep’t of Corr. Pub. Disclosure Unit, 173 Wn. App. 522, 536, 297 P.3d 737, review denied, 177 Wn.2d 1024 (2013); see also Johnson v. Dep’t of Corr., 164 Wn. App. 769, 777, 265 P.3d 216 (2011). But see Tobin v. Worden, 156 Wn. App. 507, 514, 233 P.3d 906 (2010).

³⁹ Johnson, 164 Wn. App. at 777-78 (quoting Cannon v. Dep’t of Licensing, 147 Wn.2d 41, 57, 50 P.3d 627 (2002)).

The discovery rule provides an exception to the general rule that a plaintiff's cause of action accrues at the time that the act or omission occurred.⁴⁰ "Under the discovery rule, a cause of action accrues when the plaintiff knew or should have known the essential elements of the cause of action."⁴¹ Washington courts have applied the rule to claims "in which the plaintiffs could not have immediately known of their injuries due to professional malpractice, occupational diseases, self-reporting or concealment of information by the defendant."⁴² But courts "continue[] to emphasize the exercise of due diligence by the injured party."⁴³ The rule postpones the running of a statute of limitations only until a plaintiff, through the exercise of due diligence, "knows or should know the relevant facts" of a cause of action.⁴⁴

As a threshold matter, we note the incompatibility of Mahmoud's discovery rule argument with his argument that the County's responses never triggered the PRA statute of limitations. A statute that never began to run cannot be tolled. We also note that no Washington state court has applied the discovery rule in the

⁴⁰ In re Estates of Hibbard, 118 Wn.2d 737, 744-45, 826 P.2d 690 (1992).

⁴¹ Allen v. State, 118 Wn.2d 753, 757-58, 826 P.2d 200 (1992) (footnote omitted).

⁴² Hibbard, 118 Wn.2d at 749-50.

⁴³ Hibbard, 118 Wn.2d at 746; Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 772, 733 P.2d 530 (1987).

⁴⁴ Allen, 118 Wn.2d at 758.

context of the PRA.⁴⁵ But even if the discovery rule applies to PRA claims, we decline to apply it here. The record shows that Mahmoud and his counsel repeatedly asserted the existence of records he now claims the County silently withheld. Given that many of the requested documents came from Mahmoud's own files, he had reason to know of their existence. Even the diary entries the County concedes it improperly withheld concerned interactions between Mahmoud and his supervisor, not communications between parties unknown to Mahmoud. Mahmoud knew or should have known the relevant facts of his cause of action within the PRA limitations period, and his arguments to the contrary are unpersuasive.⁴⁶

The PRA statute of limitations contains triggering events that enable a requester to know if a cause of action has accrued, and the legislature enacted no discovery rule exception.⁴⁷ For all of Mahmoud's requests, the County

⁴⁵ Two federal district courts have applied an "inherent discovery rule" to PRA claims. See Anthony v. Mason County, No. C13-5473, 2014 WL 1413421, at *4-5 (W.D. Wash. Apr. 11, 2014) (order granting motion to amend and strike); Reed v. City of Asotin, 917 F. Supp. 2d 1156, 1166-67 (E.D. Wash. 2013).

⁴⁶ See Gevaart v. Metco Constr., Inc., 111 Wn.2d 499, 502, 760 P.2d 348 (1988) (personal injury claim time barred because plaintiff knew injury-causing step sloped downward and could have determined by exercise of due diligence that step did not conform to code and was a construction defect); Reichelt, 107 Wn.2d at 770-73 (because of his own knowledge, consultations with an attorney, and Occupational Safety and Health Act training, plaintiff reasonably should have known the essential elements of his negligence claim before three-year limitations period ran).

⁴⁷ See O'Neil v. Estate of Murtha, 89 Wn. App. 67, 73-74, 947 P.2d 1252 (1997).

claimed an exemption, produced records, or both. This triggered the one-year statute of limitations under RCW 42.56.550(6). For each request, Mahmoud filed his PRA claims more than a year after this limitations period expired.

Because Mahmoud's claims fail under the one-year PRA statute of limitations, we do not analyze them under RCW 4.16.130, the two-year "catchall" statute of limitations that applies to claims "not otherwise provided for," as two Division Two cases have done for certain PRA claims.⁴⁸ But we agree that "it would be an absurd result to contemplate that in light of two arguably applicable statutes of limitations, the legislature intended no time limitation" for PRA actions where the agency's response is a single production or incomplete.⁴⁹

Our state legislature recently enacted a law requiring training in PRA compliance for public officials after finding that "inadvertent error or a lack of knowledge on the part of officials and agencies regarding their legal duties to the public" has resulted in PRA violations as well as burdensome litigation and administration costs for state and local governments.⁵⁰ Among the legislature's goals are "improving citizen access to public records and encouraging public

⁴⁸ See Bartz, 173 Wn. App. at 536-38; Johnson, 164 Wn. App. at 778 n.14.

⁴⁹ Johnson, 164 Wn. App. at 777; see also Bartz, 173 Wn. App. at 537 (also absurd to conclude that legislature intended different statutes of limitations for different categories of PRA requests, given its deliberate shortening of limitations period from five years to one year).

⁵⁰ ENGROSSED S. B. (E.S.B.) 5964, at § 1, 63d Leg., Reg. Sess. (Wash. 2014).

participation in governmental deliberations.”⁵¹ These goals do not include promoting gamesmanship or the exploitation of stale claims in order to exact cumulative penalties and attorney fees from shorthanded local governments.

“[T]he rights of citizens to observe the actions of their public officials and to have timely access to public records are the underpinnings of democracy and are essential for meaningful citizen participation in the democratic process.”⁵² But citizens have the responsibility not to sleep on those rights. Here, Mahmoud knew or could have known the relevant facts related to his cause of action within the one-year PRA statute of limitations. Because he filed his PRA claims outside that period, his claims are time barred.

We may affirm the trial court on any ground the record supports.⁵³ On the basis of the PRA statute of limitations, we affirm the trial court’s dismissal of claims related to requests 09-05374, 09-05375, 10-01666, 10-08592, and 10-08593 and reverse the trial court’s order and penalties related to request 10-05383. We affirm the trial court’s denial of Mahmoud’s motion for reconsideration.

⁵¹ E.S.B. 5964, at § 1.

⁵² E.S.B. 5964, at § 1.

⁵³ Otis Hous. Ass’n v. Ha, 165 Wn.2d 582, 587, 201 P.3d 309 (2009).

Attorney Fees

The PRA entitles a prevailing party to “all costs, including reasonable attorney fees.”⁵⁴ Because Mahmoud is not a prevailing party under the PRA, we reverse the trial court’s award and deny Mahmoud’s request for appellate fees and costs.

Mahmoud’s Motion to Strike

The County filed a reply brief containing sections “related to the County’s cross appeal” and “related to Mr. Mahmoud’s appeal.” Mahmoud asks us to strike the latter section as an improper surreply under RAP 10.1(c). Mahmoud also requests attorney fees and costs for bringing the motion, as well as sanctions against the County under RAP 10.7.

Under RAP 10.1(c), a respondent seeking review may file a brief in reply “to the issues presented by respondent’s review.” While the first half of the County’s reply addresses Mahmoud’s response to its cross appeal, the second half consists of additional arguments related to Mahmoud’s appeal, exceeding the scope of the rule. We grant Mahmoud’s motion to the extent of disregarding

⁵⁴ RCW 42.56.550(4). Our Supreme Court has interpreted this provision to include fees and costs on appeal. Sanders, 169 Wn.2d at 869.

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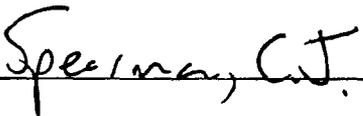
the material not related to the cross appeal⁵⁵ but do not award sanctions or attorney fees related to the motion.

CONCLUSION

Because Mahmoud filed his PRA claims outside the one-year PRA limitations period, all of his claims are time barred. On this basis, we affirm the trial court's dismissal of five claims and reverse the trial court's order and penalties relating to the sixth claim. We also reverse the trial court's award of costs and attorney fees, affirm the trial court's denial of Mahmoud's motion for reconsideration, and grant Mahmoud's motion to strike to the extent of disregarding the portion of the County's reply that exceeds the scope of its cross appeal. We decline to award sanctions or attorney fees related to the motion to strike.



WE CONCUR:


_____

⁵⁵ See Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 469-70, 229 P.3d 735 (2010) (granting motions to strike portions of amicus briefs as noncompliant).

APPENDIX B

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FILED
KING COUNTY, WASHINGTON

The Honorable Michael C. Hayden
Monday, February 4, 2013
2:00 p.m.

FEB 08 2013

**SUPERIOR COURT CLERK
GARY ZOVICK
DEPUTY**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

KAMAL MAHMOUD,

Plaintiff,

v.

SNOHOMISH COUNTY, a political subdivision
of Washington state

Defendant.

No. 11-2-22706-5 SEA

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION FOR RECONSIDERATION
OF ORDER DENYING DEFENDANT'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT RE: PRA CLAIMS

~~[PROPOSED]~~

This matter came before the Court on Defendant Snohomish County's Motion for Reconsideration of Order Denying Defendant's Motion for Partial Summary Judgment Re: PRA Claims, the parties having appeared through their attorneys of record, the Court having reviewed the record herein, heard the arguments of counsel, and the Court having considered the following:

1. Defendant Snohomish County's Motion for Reconsideration of Order Denying Defendant's Partial Summary Judgment Re: PRA Claims;
2. Plaintiff's Response in Opposition to Defendant Snohomish County's Motion for Reconsideration of Order Denying Defendant's Partial Summary Judgment Re: PRA

ORDER GRANTING AND DENYING DEFS.'S MOTION FOR RECONS.
OF ORDER DENYING DEF.'S MOTION FOR
PARTIAL SUMMARY JUDGMENT RE PRA CLAIMS
CASE NO. 11-2-22706-5 SEA

Page 1 of 3

Rakhi & Wolk, P.S.
1411 Fourth Avenue, Suite 1101
Seattle, WA 98101
Phone: (206) 388-5887
Facsimile: (206) 388-3924

CRIMINAL

1 Claims; and

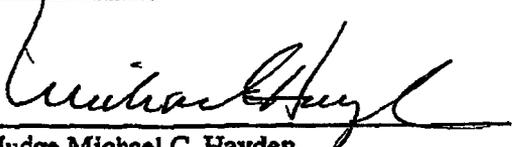
2 3. Defendant Snohomish County's Reply in Support of its Motion for Reconsideration of
3 Order Denying Defendant's Partial Summary Judgment Re: PRA Claims.

4
5 NOW, THEREFORE IT IS HEREBY ORDERED:

6 1. That the Defendant Snohomish County's Motion for Reconsideration of Order
7 Denying Defendant's Partial Summary Judgment Re: PRA Claims is GRANTED in part, as
8 Plaintiff's claim arising from his July 31, 2009 letter (identified as Public Records Request #09-
9 05374) is time-barred by the statute of limitations under RCW 49.56.550(6); Plaintiff's other
10 claims related to Public Records Request #09-05374 are time-barred by the statute of limitations
11 under RCW 4.16.130; and
12

13 2. That the Defendant Snohomish County's Motion for Reconsideration of Order
14 Denying Defendant's Partial Summary Judgment Re: PRA Claims regarding Public Records
15 Requests #09-05375, #10-01666, #10-05383, #10-08592, and #10-08593, is DENIED, in part, as
16 Plaintiff's claims regarding Public Records Requests #09-05375, #10-01666, #10-05383, #10-
17 08592, and #10-08593 are not time-barred by the statute of limitations under either RCW
18 49.56.550(6) or RCW 4.16.130.
19

20
21 SO ORDERED this 8 day of Feb 2013.

22
23 
24 Judge Michael C. Hayden
25
26

1 *Presented by:*

2 **REKHI & WOLK, P.S.**

REKHI & WOLK, P.S.

3
4 By: 

By: 

5 Hardeep S. Rekhi, WSBA No. 34579

Gregory A. Wolk, WSBA No. 28946

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11 *Attorney for Plaintiff*

Attorney for Plaintiff

12 *Approved as to form by:*

13 **MARK K. ROE**

Snohomish County Prosecuting Attorney

14
15 By: 

Sara Di Vittorio, WSBA No. 33003

16 Lyndsey M. Downs, WSBA No. 37453

17 Deputy Prosecuting Attorneys

Snohomish County Prosecutors - Civil Div.

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20 Telephone: (425) 388-6330

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21 Email: sara.di.vittorio@co.snohomish.wa.us

Email: l Downs@snoco.org

22 *Attorneys for Defendant*

23
24
25
26
ORDER GRANTING AND DENYING DEFS.'S MOTION FOR RECONS.

OF ORDER DENYING DEF.'S MOTION FOR
PARTIAL SUMMARY JUDGMENT RE PRA CLAIMS

CASE NO. 11-2-22706-5 SEA

Page 3 of 3

Rekhi & Wolk, P.S.

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APPENDIX C

FILED
KING COUNTY, WASHINGTON

APR 17 2013

The Honorable Michael Hayden

SUPERIOR COURT CLERK
GARY POVICK
DEPUTY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

KAMAL MAHMOUD,

Plaintiff,

vs.

SNOHOMISH COUNTY,

Defendant.

No. 11-2-22706-5 SEA

ORDER

This matter came before the court on the Court's order to show cause on April 8, 2013. Plaintiff appeared by and through his attorneys, Hardeep Rekhi and Greg Wolf, and Defendant appeared by and through its attorney, Deputy Prosecuting Attorney Sara J. Di Vittorio. The court considered the oral argument of the parties and considered the following records:

1. Defendant's Response to the Court's Order to Show Cause, with attached declarations and exhibits;
2. Plaintiff's Opposition to Defendant's Response to the Court's Order to Show Cause RE: Defendant's Liability Under the Public Records Act, with attached declarations and exhibits; and,
3. Defendant's Reply to Plaintiff's Opposition to Defendant's Response to the Court's Order to Show Cause Re Defendant's Liability Under the Public Records Act.

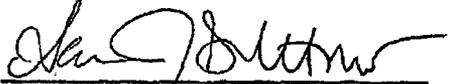
ORDER
CASE NO. 11-2-22706-5 SEA
Page 1 of 3

ORIGINAL

Snohomish County
Prosecuting Attorney - Civil Division
Robert J. Drexel Bldg., 8th Floor, MS 904
1000 Rockefeller Ave.
Everett, Washington 98201-4066
(425)388-6330 Fax: (425)388-6333

1 *Presented by:*

2 MARK K. ROE
3 Snohomish County Prosecuting Attorney

4 

5 Sara J. Di Vittorio, WSBA No. 33003
6 Deputy Prosecuting Attorney
7 Attorneys for Snohomish County

8 *Approved as to form by:*

9 Rekhi & Wolk, P.S.

10 
11 Hardeep S. Rekhi, WSBA No. 34579
12 Attorney for Plaintiff

13 
14 Greg Wolk, WSBA No. 28946
15 Attorney for Plaintiff

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APPENDIX D

FILED
KING COUNTY, WASHINGTON

MAY 10 2013

SUPERIOR COURT CLERK
GARY BOVICK
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

KAMAL MAHMOUD

Plaintiff,

vs.

SNOHOMISH COUNTY.

Defendant.

No. 11-2-22706-5 SEA

**ORDER DENYING PLANTIFF'S
MOTION FOR RECONSIDERATION**

THIS MATTER having come before the undersigned Judge of the King County Superior Court having reviewed the files and records herein and for good cause shown, hereby enters an Order Denying Plaintiff's Motion for Reconsideration.

DATED this 10TH day of MAY 2013



Judge MICHAEL C. HAYDEN
King County Superior Court

ORDER DENYING MOTION FOR RECONSIDERATION

King County Superior Court
516 Third Avenue
Seattle, Washington 98101

ORIGINAL

APPENDIX E

The Honorable Michael C. Hayden
Friday, June 28, 2013
11:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

KAMAL MAHMOUD,

Plaintiff,

v.

SNOHOMISH COUNTY, a political subdivision
of Washington state

Defendant.

No. 11-2-22706-5 SEA

**[PROPOSED] ORDER
GRANTING PLAINTIFF'S
MOTION FOR PENALTIES FOR
DEFENDANT'S VIOLATION OF
THE PRA AND ENTRY OF
JUDGMENT**

This matter came before the Court on Plaintiff Kamal Mahmoud's Motion for Penalties for Defendant's Violation of the PRA, the parties having appeared through their attorneys of record, the Court having reviewed the record herein, heard the arguments of counsel, and the Court having considered the following:

1. Plaintiff's Motion for Penalties for Defendant's Violation of the PRA & Entry of Judgment;
2. The Declaration of Hardeep S. Rekhi and Exhibits attached thereto;
3. Defendant's Response in Opposition to Plaintiff's Motion for Penalties for Defendant's Violation of the PRA & Entry of Judgment and any declarations and exhibits attached thereto; and
4. Plaintiff's Reply in Support of his Motion for Penalties for Defendant's Violation of the PRA & Entry of Judgment and any declarations and exhibits attached thereto.

**[PROPOSED] ORDER GRANTING PLAINTIFF'S
MOTION FOR PENALTIES FOR DEFENDANT'S
VIOLATION OF THE PRA AND ENTRY OF JUDGMENT
CASE NO. 11-2-22706-5 SEA**

Page 1 of 9

Rekhi & Wolk, P.S.
1411 Fourth Avenue
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Phone: (206) 388-5887

1 NOW, THEREFORE THE COURT MAKES THE FOLLOWING FINDINGS OF
2 FACT AND CONCLUSIONS OF LAW:

3 1. On April 17, 2013, this Court held, "Defendant violated the public records act when it
4 failed to provide seven journal entries and one note responsive to public records request
5 #10-05383."

6 2. Plaintiff's public records request # 10-05383 stated:

7
8 Please provide any and all entries made by Max Phan from January
9 2008 to August 2009 in his 'journal' and/or other notes and files,
10 concerning Kamal Mahmoud. This request is intended to include but
11 not limited to any entries regarding alleged complaints regarding Mr.
12 Mahmoud received by Mr. Phan from Ray Desimone, Jeff Rivers,
13 David Schnell, Joanne Becker, or any other individual.

14 3. Plaintiff's request was received by the County on July 23, 2010. Defendant initially
15 responded to the request on July 28, 2010. Ms. Miller, Defendant's agent, stated the
16 records would be available on August 6, 2010. Defendant next contacted Plaintiff on
17 August 16, 2010, ten days after the expected production date; at that time, Defendant
18 provided Plaintiff with responsive records and stated the following in an email to
19 Plaintiff:

20 None of these documents have been redacted and there is only one
21 document that is being withheld. That document is a Memorandum
22 from Max Phan to Steven Bladek dated June 30, 2009 and it is
23 exempt from disclosure pursuant to RCW 5.60.060(2)(a). This
24 request is now closed."

25 Defendant did not provide all responsive records, including seven journal
26 entries and one note.

4. On March 4, 2013, Defendant's agent responsible for the production, Mr. Phan,
explained the failure to produce the responsive records by declaring:

1 I understood [Mr. Mahmoud's] request to be seeking journal entries
2 related to complaints made to me about him by Raymond Desimone,
3 Jeffery Rivers, David Schnell, JoAnne Becker, or any other
4 individual. As a result, those are the portions of my journal I
5 produced. I had additional journal entries related to Mr. Mahmoud
6 and his work with the County in my journal unrelated to complaints
7 made about him, but I did not understand his request to be seeking
8 those records. As a result, I did not produce those records in
9 response to PDR # 10-05383, this was a mistake on my part. I had
10 no intent to keep these additional records from Mr. Mahmoud, rather
11 I did not understand that he was requesting these additional records.
12 I acted in good faith in providing the records to Ms. Miller I thought
13 Mr. Mahmoud was requesting.

14 ...

15 With regard to the specific records Mr. Mahmoud provided to the
16 Court with his declaration, I have reviewed the records...I did not
17 consider these statements to be a complaint about Mr. Mahmoud.
18 These were notations I wrote for my own use to recall when I
19 worked with Mr. Mahmoud in coaching sessions regarding his
20 communication issues. These were not instances of someone
21 reporting a complaint to me and asking me to take corrective action
22 or a situation where someone was reporting dissatisfaction with Mr.
23 Mahmoud's work. I did not and do not consider these to be
24 complaints.

25 On March 26, 2013, Defendant and Mr. Phan reiterated this position.

- 26
5. To establish the number of days a record is not produced, the Court must start on the day the request is made or received. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 102 (2005).
 6. Here, Defendant has conceded that Plaintiff made and Defendant received the request on July 23, 2010. Defendant first produced the responsive records that were not produced in response to Plaintiff's public records request on March 14, 2012. Six hundred (600) days elapsed between the date of the request and the date of production for the responsive records that were not produced.

1 7. In *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010) the Court
2 established four "principal" factors for determining an appropriate daily penalty: (1) the
3 existence or absence of a public agency's bad faith; (2) the economic loss to the party
4 requesting the documents; (3) the public importance of the underlying issues to which
5 the request relates, and whether "the significance of the issue to which the request is
6 related was foreseeable to the agency"; and (4) the degree to which the penalty is an
7 "adequate incentive to induce further compliance." *Yousoufian*, at 459.

8
9 **8. Absence of a Public Agency's Bad Faith Factor:** The Court finds Defendant did not
10 act in bad faith when it violated the PRA.

11 **9. The Economic Loss To The Party Factor:** Plaintiff concedes he did not suffer
12 economic loss based on Defendant's PRA violation. The Court accepts this concession.

13 **10. Public Importance Of The Underlying Request Factor:** The Court finds that there is
14 public importance to the underlying issues to which the request relates because Plaintiff
15 made the request in an attempt to uncover facts to establish violations of the Washington
16 Law Against Discrimination (WLAD). Moreover, the Court finds the public importance
17 of the issue was foreseeable to Defendant.

18
19 **11. Adequate Incentive To Induce Further Compliance Factor:** The Court does not find
20 the need to impose an extra penalty to induce further compliance.

21 **12.** Here, one of the four principal factors weighs in favor of an increased penalty amount.

22 **13.** In *Yousoufian* the Court also identified mitigating factors. They are: (1) a lack of clarity
23 in the PRA request, (2) the agency's prompt response or legitimate follow-up inquiry for
24 clarification, (3) its good faith, honest, timely, and strict compliance with all PRA
25 procedural requirements and exceptions, (4) proper training and supervision of the
26

1 agency's personnel, (5) the reasonableness of any explanation for noncompliance by the
2 agency, (6) the helpfulness of the agency to Plaintiff, and (7) the existence of agency
3 systems to track and retrieve public records. *Yousoufian*, 168 Wn.2d at 467.

4 **14. Lack of Clarity:** Here, Defendant concedes the request is clear. The Court accepts this
5 concession.

6 **15. The Timeliness of Defendant's Response.** Defendant initially responded promptly,
7 within the five days required by RCW 42.56.520. However, in producing the initial and
8 final production, Defendant produced the records ten days after its estimate had expired
9 without providing Plaintiff with an update. Further, all responsive records were not
10 received for nearly two years after the initial request.

11 **16. Good Faith, Honest, Timely, And Strict Compliance by Defendant:** The Court finds
12 that Defendant acted in good faith and honestly, but that it did it not timely and strictly
13 comply with all PRA procedural requirements.

14 **17. Proper Training and Supervision of the Agency's Personnel:** The Court does not
15 make a finding on this factor.

16 **18. The Reasonableness Of Any Explanation:** The Court finds that it was reasonable for
17 Defendant to misinterpret the request but that the interpretation was not reasonable.

18 **19. The Helpfulness Of The Agency To The Requestor:** The Court does not make a
19 finding as to this factor.

20 **20. Agency Systems To Track And Retrieve Public Records:** The Court does not make a
21 finding as to this factor.

22 **21. In conclusion,** the Court finds some of the above-identified facts support the mitigating
23 factors that favor reducing the penalty amount.
24
25
26

1 22. In *Yousoufian* the Court also identified aggravating factors. They are: (1) a delayed
2 response by the agency, especially in circumstances making time of the essence, (2) lack
3 of strict compliance by the agency with all the PRA procedural requirements and
4 exceptions, (3) lack of proper training and supervision of the agency's personnel, (4)
5 unreasonableness of any explanation for noncompliance by the agency, (5) negligent,
6 reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency,
7 (6) agency dishonesty, (7) the public importance of the issue to which the request is
8 related, where the importance was foreseeable to the agency, (8) any actual personal
9 economic loss to the requestor resulting from the agency's misconduct, where the loss
10 was foreseeable to the agency, and (9) a penalty amount necessary to deter future
11 misconduct by the agency considering the size of the agency and the facts of the case.
12
13 *Id.* at 748.

14
15 **23. Delayed Response By The Agency:** As set forth above, Defendant did initially respond
16 promptly within five days as required by RCW 42.56.520. However, in producing the
17 initial and final production, Defendant produced the records ten days after its estimate
18 had expired without providing Plaintiff with an update. Further, Defendant delayed
19 production of all responsive records by 600 days. The records were only produced after
20 Plaintiff filed a lawsuit against the County alleging employment discrimination.

21
22 **24. Lack Of Strict Compliance With The PRA:** Defendant lacked strict compliance with
23 the PRA procedural requirements and exceptions; for example, even though Defendant
24 initially responded promptly, Defendant failed to timely produce all responsive records.
25 Defendant also failed to provide the records by the expiration of the initial estimated
26 production.

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25. Lack Of Proper Training: The Court does not find any evidence that Defendant's agents lacked proper training.

26. Unreasonableness Of Any Explanation For Noncompliance: The Court finds that it was reasonable for Defendant to misinterpret the request but does not agree with the interpretation.

27. Defendant's Noncompliance With The PRA: The Court finds Defendant actions were not reckless, wanton, in bad faith, or intentional when it failed to comply with the PRA request.

28. Agency Dishonesty: The Court does not find evidence of dishonesty by Defendant.

29. The Public Importance: The Court finds the issue to which the request was related was an issue of public importance.

30. Actual Personal Economic Loss: The Court finds there was no actual personal economic loss to Plaintiff.

31. A Penalty Amount Necessary to Deter Future Misconduct: As set forth above, the Court does not find the need to increase the penalty amount to deter future non-compliance.

32. The Court finds that some aggravating factors exist in favor of increasing the penalty amount.

33. The Court finds that the responsive records that were not produced were requested on the same date, produced on the same date, were authored by the same person, and involved the same subject. Thus, the records should be grouped into one grouping for purposes of assessing penalties.

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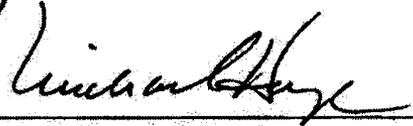
NOW, THEREFORE IT IS HEREBY ORDERED:

34. The responsive records that were not produced were all one record for the purposes of determining the total penalty amount;

35. That Plaintiff's Motion for Penalties for Defendant's Violation of the PRA is GRANTED; and

36. Pursuant to RCW 42.56.550(4) and the authority set forth above as well as the above Findings of Fact and Conclusions of Law, Judgment against Defendant is hereby made imposing a penalty of \$30.00 per day, for a period of 600 days, for a total penalty of \$18,000.00. Plaintiff will submit a motion for attorney's fees and costs within ten days of the entry of judgment to recover his mandatory reasonable attorney fees and costs pursuant to RCW 42.56.550(4).

SO ORDERED this 19 day of July 2013.



Judge Michael C. Hayden

Presented by:

REKHI & WOLK, P.S.

REKHI & WOLK, P.S.

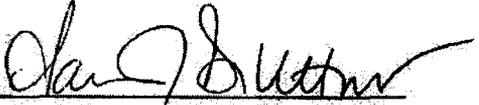
By: s/ Hardeep S. Rekhi
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Attorney for Plaintiff

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Approved as to form by:

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

Sara Di Vittorio, (WSBA No. 33003)
Lyndsey M. Downs, WSBA No. 37453
Deputy Prosecuting Attorneys
Snohomish County Prosecutors - Civil Div.
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Attorneys for Defendant

APPENDIX F

FILED

KING COUNTY

The Honorable Michael C. Hayden
Tuesday, August 6, 2013
No Oral Argument

AUG 28 2013

SUPERIOR COURT
GARY POWELL
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

KAMAL MAHMOUD,

Plaintiff,

v.

SNOHOMISH COUNTY, a political subdivision
of Washington state

Defendant.

No. 11-2-22706-5 SEA

[PROPOSED] ORDER
GRANTING PLAINTIFF'S
MOTION FOR ATTORNEYS'
FEES & COSTS

THIS MATTER CAME before the undersigned Judge of the above-entitled Court for Plaintiff's Motion for Attorneys' Fees & Costs under RCW 42.56.550(4), and the Court after having considered the following records:

1. Plaintiff's Motion for Attorneys' Fees & Costs;
2. The Declaration of Hardeep S. Rekhi and Exhibit attached thereto;
3. The Declaration of Gregory A. Wolk;
4. The Declaration of Jason Proctor;
5. Defendant's Response to Plaintiff's Motion for Attorneys' Fees & Costs and any declarations and exhibits attached thereto; and
6. Plaintiff's Reply in Support of his Motion for Penalties Attorneys' Fees & Costs and any declarations and exhibits attached thereto.

ORIGINAL

1 NOW, THEREFORE THE COURT MAKES THE FOLLOWING FINDINGS OF

2 FACT AND CONCLUSIONS OF LAW:

3 1. Plaintiff's attorney's fees in the amount of \$126,385.00, ^{has presented} ~~are reasonable. Although~~
4 ~~Plaintiff was not successful on all the alleged violations of the PRA for which he sought relief,~~
5 ~~he prevailed as to one of his Public Records Act (PRA) requests and much of the work relating~~
6 ~~to that request and the other requests for which he did not prevail involved the same legal~~
7 ~~issues; thus, the PRA work was intertwined and could not reasonably be segregated.~~

9 2. Plaintiff has presented sufficient evidence demonstrating that he is seeking fees solely
10 for his attorneys' (and their staff's) work on his PRA claim (minus 25.5 hours of clerical work)
11 as segregated according to four distinct periods: 1) Period One - from discovering that he had a
12 PRA claim to prevailing on his motion to amend the complaint in order to bring his PRA
13 claim; 2) Period Two - from amending the complaint to settling his employment claims; 3)
14 Period Three - from settling his employment claims to the Show Cause Hearing of April 16,
15 2013; and 4) Period Four - from the April 16th Show Cause Hearing to the present.

17 3. For Period One, I find that the hours that were specifically attributed to researching and
18 pursuing his PRA claim are reasonable. ~~The amount of work during this period would have~~
19 ~~been the same regardless of the number of PRA violations found against Defendant.~~

20 4. For Period Two, Plaintiff is only seeking half of his attorney's fees incurred for his
21 PRA claim. Because the legal issues among the various alleged violations were intertwined, I
22 find that reducing the total number of PRA related hours by half is reasonable.

24 5. For Period Three, again Plaintiff is only seeking half of his PRA fees incurred. Again,
25 because the legal issues among the various alleged violations were intertwined, I find that
26 reducing the total number of hours by half is reasonable.

2. The plaintiff's attorney has not segregated these fees attributed to the successful claims from those claims which were not successful.

6. For Period Four, Plaintiff is seeking only fees incurred for the PRA violation for which he prevailed. Thus, I am granting him all such fees incurred (including the hours preparing his motion for fees and costs), plus the hours incurred preparing his reply to the motion for costs.

7. I find that Plaintiff's attorneys' rates are reasonable. His attorneys each have ten years or more of complex litigation experience. Indeed, the Honorable Judge Lasnik recently found Mr. Rekhi's current rate reasonable. Likewise, Judge Lasnik found their paralegal's current rate to be reasonable. Given his experience, I agree with this finding. Finally, the rate charged for the attorneys' law clerks is reasonable as well.

8. Defendant does not dispute and I find that Plaintiff's costs in the amount of \$941.36 are reasonable as they only reflect the costs necessary for prevailing on his PRA claim: a) the total cost for filing the Complaint was \$232.49; b) the total cost of serving the Summons & Complaint was \$75.00; c) the cost for a legal messenger to deliver the Requests for Admissions was \$71.05; d) the total cost of the deposition of Suzie Phillips was \$495.35 (this deposition was dedicated to issues involving the PRA claim); e) costs to submit the working copies for the Motions to Show Cause dated 1/14/2013 and 1/16/2013 (these costs would have been incurred regardless of the number of PRA violations found) - the total cost was \$44.98; and f) the cost to submit working copies for Plaintiff's Response in Opposition to Defendant's Motion for Partial Summary Judgment Re PRA Claims was \$22.49.

NOW, THEREFORE IT IS HEREBY ORDERED:

3. That Plaintiff's Motion for Attorneys' Fees & Costs is GRANTED; and \$18,055

4. Defendant is Ordered to pay Plaintiff his attorney's fees in the amount of \$126,385 and costs in the amount of \$941.36. ~~The attorney's fees reflect the total requested fees in Plaintiff's billing records (\$121,455.00), minus clerical work (-\$3,675.00), plus Plaintiff's hours and fees~~

1 for drafting his Reply to his Motion for Fees (17.9 hours for the attorneys at a rate of \$350 and
2 15.6 hours for their paralegal at a rate of \$150 totaling 8,605.00).
3

4 SO ORDERED this 27 day of August 2013.
5

6
7 
8 Judge Michael C. Hayden
9
10
11

12 *Presented by:*

13 **REKHI & WOLK, P.S.**

REKHI & WOLK, P.S.

14
15 By: s/ Hardeep S. Rekhi
16 Hardeep S. Rekhi, WSBA No. 34579
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22 *Attorney for Plaintiff*

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E-Mail: greg@rekhiwolk.com
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I, Jason Proctor, certify and declare that I am now and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and am competent to testify as a witness. I am a Paralegal employed with Rekhi & Wolk, P.S., 1411 Fourth Avenue, Suite 1101, Seattle, Washington 98101-2243. On August 5, 2013 I served the within document(s):

- [PROPOSED] Order Granting Plaintiff's Motion for Attorneys' Fees and Costs

Attorneys for Defendant

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- Via Legal Messenger
- Via Facsimile
- Via Electronic Mail
- Via U.S. Mail
- Via Electronic Filing/Eservice

The foregoing statement is made under the penalty of perjury under the laws of the United States of America and the State of Washington and is true and correct.

DATED this 5th day of August, 2013.

By: _____
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APPENDIX G

[RCWs](#) > [Title 42](#) > [Chapter 42.56](#) > [Section 42.56.030](#)

[42.56.020](#) << [42.56.030](#) >> [42.56.040](#)

RCW 42.56.030

Construction.

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

[2007 c 197 § 2; 2005 c 274 § 283; 1992 c 139 § 2. Formerly RCW [42.17.251](#).]

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APPENDIX H

RCW 42.56.070

Documents and indexes to be made public.

(1) Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of *subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be explained fully in writing.

(2) For informational purposes, each agency shall publish and maintain a current list containing every law, other than those listed in this chapter, that the agency believes exempts or prohibits disclosure of specific information or records of the agency. An agency's failure to list an exemption shall not affect the efficacy of any exemption.

(3) Each local agency shall maintain and make available for public inspection and copying a current index providing identifying information as to the following records issued, adopted, or promulgated after January 1, 1973:

- (a) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
- (b) Those statements of policy and interpretations of policy, statute, and the Constitution which have been adopted by the agency;
- (c) Administrative staff manuals and instructions to staff that affect a member of the public;
- (d) Planning policies and goals, and interim and final planning decisions;
- (e) Factual staff reports and studies, factual consultant's reports and studies, scientific reports and studies, and any other factual information derived from tests, studies, reports, or surveys, whether conducted by public employees or others; and
- (f) Correspondence, and materials referred to therein, by and with the agency relating to any regulatory, supervisory, or enforcement responsibilities of the agency, whereby the agency determines, or opines upon, or is asked to determine or opine upon, the rights of the state, the public, a subdivision of state government, or of any private party.

(4) A local agency need not maintain such an index, if to do so would be unduly burdensome, but it shall in that event:

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(a) Issue and publish a formal order specifying the reasons why and the extent to which compliance would unduly burden or interfere with agency operations; and

(b) Make available for public inspection and copying all indexes maintained for agency use.

(5) Each state agency shall, by rule, establish and implement a system of indexing for the identification and location of the following records:

(a) All records issued before July 1, 1990, for which the agency has maintained an index;

(b) Final orders entered after June 30, 1990, that are issued in adjudicative proceedings as defined in RCW 34.05.010 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(c) Declaratory orders entered after June 30, 1990, that are issued pursuant to RCW 34.05.240 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(d) Interpretive statements as defined in RCW 34.05.010 that were entered after June 30, 1990; and

(e) Policy statements as defined in RCW 34.05.010 that were entered after June 30, 1990.

Rules establishing systems of indexing shall include, but not be limited to, requirements for the form and content of the index, its location and availability to the public, and the schedule for revising or updating the index. State agencies that have maintained indexes for records issued before July 1, 1990, shall continue to make such indexes available for public inspection and copying. Information in such indexes may be incorporated into indexes prepared pursuant to this subsection. State agencies may satisfy the requirements of this subsection by making available to the public indexes prepared by other parties but actually used by the agency in its operations. State agencies shall make indexes available for public inspection and copying. State agencies may charge a fee to cover the actual costs of providing individual mailed copies of indexes.

(6) A public record may be relied on, used, or cited as precedent by an agency against a party other than an agency and it may be invoked by the agency for any other purpose only if:

(a) It has been indexed in an index available to the public; or

(b) Parties affected have timely notice (actual or constructive) of the terms thereof.

(7) Each agency shall establish, maintain, and make available for public inspection and copying a statement of the actual per page cost or other costs, if any, that it charges for providing photocopies of public records and a statement of the factors and manner used to determine the actual per page cost or other costs, if any.

(a) In determining the actual per page cost for providing photocopies of public records, an agency may include all costs directly incident to copying such public

records including the actual cost of the paper and the per page cost for use of agency copying equipment. In determining other actual costs for providing photocopies of public records, an agency may include all costs directly incident to shipping such public records, including the cost of postage or delivery charges and the cost of any container or envelope used.

(b) In determining the actual per page cost or other costs for providing copies of public records, an agency may not include staff salaries, benefits, or other general administrative or overhead charges, unless those costs are directly related to the actual cost of copying the public records. Staff time to copy and mail the requested public records may be included in an agency's costs.

(8) An agency need not calculate the actual per page cost or other costs it charges for providing photocopies of public records if to do so would be unduly burdensome, but in that event: The agency may not charge in excess of fifteen cents per page for photocopies of public records or for the use of agency equipment to photocopy public records and the actual postage or delivery charge and the cost of any container or envelope used to mail the public records to the requestor.

(9) This chapter shall not be construed as giving authority to any agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall not do so unless specifically authorized or directed by law: PROVIDED, HOWEVER, That lists of applicants for professional licenses and of professional licensees shall be made available to those professional associations or educational organizations recognized by their professional licensing or examination board, upon payment of a reasonable charge therefor: PROVIDED FURTHER, That such recognition may be refused only for a good cause pursuant to a hearing under the provisions of chapter 34.05 RCW, the Administrative Procedure Act.

[2005 c 274 § 284; 1997 c 409 § 601. Prior: 1995 c 397 § 11; 1995 c 341 § 1; 1992 c 139 § 3; 1989 c 175 § 36; 1987 c 403 § 3; 1975 1st ex.s. c 294 § 14; 1973 c 1 § 26 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.260.]

Notes:

***Reviser's note:** Subsection (6) of this section was renumbered as subsection (7) by 1992 c 139 § 3; and subsection (7) was subsequently renumbered as subsection (9) by 1995 c 341 § 1.

Part headings -- Severability -- 1997 c 409: See notes following RCW 43.22.051.

Effective date -- 1989 c 175: See note following RCW 34.05.010.

Intent -- Severability -- 1987 c 403: See notes following RCW 42.56.050.

Exemption for registered trade names: RCW 19.80.065.

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[42.56.155](#) << [42.56.210](#) >> [42.56.230](#)

RCW 42.56.210

Certain personal and other records exempt.

(1) Except for information described in *RCW [42.56.230](#)(3)(a) and confidential income data exempted from public inspection pursuant to RCW [84.40.020](#), the exemptions of this chapter are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought. No exemption may be construed to permit the nondisclosure of statistical information not descriptive of any readily identifiable person or persons.

(2) Inspection or copying of any specific records exempt under the provisions of this chapter may be permitted if the superior court in the county in which the record is maintained finds, after a hearing with notice thereof to every person in interest and the agency, that the exemption of such records is clearly unnecessary to protect any individual's right of privacy or any vital governmental function.

(3) 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.

[2005 c 274 § 402. Prior: (2006 c 302 § 11 expired July 1, 2006); (2006 c 75 § 2 expired July 1, 2006); (2006 c 8 § 111 expired July 1, 2006); (2003 1st sp.s. c 26 § 926 expired June 30, 2005); 2003 c 277 § 3; 2003 c 124 § 1; prior: 2002 c 335 § 1; 2002 c 224 § 2; 2002 c 205 § 4; 2002 c 172 § 1; prior: 2001 c 278 § 1; 2001 c 98 § 2; 2001 c 70 § 1; prior: 2000 c 134 § 3; 2000 c 56 § 1; 2000 c 6 § 5; prior: 1999 c 326 § 3; 1999 c 290 § 1; 1999 c 215 § 1; 1998 c 69 § 1; prior: 1997 c 310 § 2; 1997 c 274 § 8; 1997 c 250 § 7; 1997 c 239 § 4; 1997 c 220 § 120 (Referendum Bill No. 48, approved June 17, 1997); 1997 c 58 § 900; prior: 1996 c 305 § 2; 1996 c 253 § 302; 1996 c 191 § 88; 1996 c 80 § 1; 1995 c 267 § 6; prior: 1994 c 233 § 2; 1994 c 182 § 1; prior: 1993 c 360 § 2; 1993 c 320 § 9; 1993 c 280 § 35; prior: 1992 c 139 § 5; 1992 c 71 § 12; 1991 c 301 § 13; 1991 c 87 § 13; 1991 c 23 § 10; 1991 c 1 § 1; 1990 2nd ex.s. c 1 § 1103; 1990 c 256 § 1; prior: 1989 1st ex.s. c 9 § 407; 1989 c 352 § 7; 1989 c 279 § 23; 1989 c 238 § 1; 1989 c 205 § 20; 1989 c 189 § 3; 1989 c 11 § 12; prior: 1987 c 411 § 10; 1987 c 404 § 1; 1987 c 370 § 16; 1987 c 337 § 1; 1987 c 107 § 2; prior: 1986 c 299 § 25; 1986 c 276 § 7; 1985 c 414 § 8; 1984 c 143 § 21; 1983 c 133 § 10; 1982 c 64 § 1; 1977 ex.s. c 314 § 13; 1975-'76 2nd ex.s. c 82 § 5; 1975 1st ex.s. c 294 § 17; 1973 c 1 § 31 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW [42.17.310](#).]

Notes:

***Reviser's note:** RCW [42.56.230](#) was amended by 2011 c 173 § 1, changing subsection (3)(a) to subsection (4)(a).

Expiration date -- 2006 c 302 §§ 9 and 11: See note following RCW 66.28.180.

Expiration date -- 2006 c 75 § 2: "Section 2 of this act expires July 1, 2006." [2006 c 75 § 4.]

Expiration date -- 2006 c 8 § 111: "Section 111 of this act expires July 1, 2006." [2006 c 8 § 404.]

Expiration date -- Severability -- Effective dates -- 2003 1st sp.s. c 26: See notes following RCW 43.135.045.

Working group on veterans' records: "The protection from identity theft for veterans who choose to file their discharge papers with the county auditor is a matter of gravest concern. At the same time, the integrity of the public record of each county is a matter of utmost importance to the economic life of this state and to the right of each citizen to be secure in his or her ownership of real property and other rights and obligations of our citizens that rely upon the public record for their proof. Likewise the integrity of the public record is essential for the establishment of ancestral ties that may be of interest to this and future generations. While the public record as now kept by the county auditors is sufficient by itself for the accomplishment of these and many other public and private purposes, the proposed use of the public record for purposes that in their nature and intent are not public, so as to keep the veterans' discharge papers from disclosure to those of ill intent, causes concern among many segments of the population of this state.

In order to voice these concerns effectively and thoroughly, a working group may be convened by the joint committee on veterans' and military affairs to develop a means to preserve the integrity of the public record while protecting those veterans from identity theft." [2002 c 224 § 1.]

Effective date -- 2002 c 224 § 1: "Section 1 of this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 28, 2002]." [2002 c 224 § 4.]

Findings -- Severability -- Effective dates -- 2002 c 205 §§ 2, 3, and 4: See notes following RCW 28A.320.125.

Finding -- 2001 c 98: "The legislature finds that public health and safety is promoted when the public has knowledge that enables them to make informed choices about their health and safety. Therefore, the legislature declares, as a matter of public policy, that the public has a right to information necessary to protect members of the public from harm caused by alleged hazards or threats to the public.

The legislature also recognizes that the public disclosure of those portions of records containing specific and unique vulnerability assessments or specific and unique response plans, either of which is intended to prevent or mitigate criminal terrorist acts as defined in RCW 70.74.285, could have a substantial likelihood of threatening public safety. Therefore, the legislature declares, as a matter of public policy, that such specific and unique information should be protected from unnecessary disclosure." [2001 c 98 § 1.]

Findings -- Conflict with federal requirements -- Severability -- 2000 c 134: See notes following RCW 50.13.060.

Effective date -- 1998 c 69: See note following RCW 28B.95.025.

Effective date -- 1997 c 274: See note following RCW 41.05.021.

Referendum -- Other legislation limited -- Legislators' personal intent not indicated -- Reimbursements for election -- Voters' pamphlet, election requirements -- 1997 c 220: See RCW 36.102.800 through 36.102.803.

Short title -- Part headings, captions, table of contents not law -- Exemptions and waivers from federal law -- Conflict with federal requirements -- Severability -- 1997 c 58: See RCW 74.08A.900 through 74.08A.904.

Severability -- 1996 c 305: See note following RCW 28B.85.020.

Findings -- Purpose -- Severability -- Part headings not law -- 1996 c 253: See notes following RCW 28B.109.010.

Captions not law -- Severability -- Effective dates -- 1995 c 267: See notes following RCW 43.70.052.

Effective date -- 1994 c 233: See note following RCW 70.123.075.

Effective date -- 1994 c 182: "This act shall take effect July 1, 1994."
[1994 c 182 § 2.]

Effective date -- 1993 c 360: See note following RCW 18.130.085.

Effective date--Severability -- 1993 c 280: See RCW 43.330.902 and 43.330.903.

Finding -- 1991 c 301: See note following RCW 10.99.020.

Effective date -- 1991 c 87: See note following RCW 18.64.350.

Effective dates -- 1990 2nd ex.s. c 1: See note following RCW 84.52.010.

Severability -- 1990 2nd ex.s. c 1: See note following RCW 82.14.300.

Effective date -- Severability -- 1989 1st ex.s. c 9: See RCW 43.70.910 and 43.70.920.

Severability -- 1989 c 279: See RCW 43.163.901.

Severability -- 1989 c 11: See note following RCW 9A.56.220.

Severability -- 1987 c 411: See RCW 69.45.900.

Severability -- Effective date -- 1986 c 299: See RCW 28C.10.900 and 28C.10.902.

Severability -- 1986 c 276: See RCW 53.31.901.

Exemptions from public inspection

basic health plan records: RCW 70.47.150.

bill drafting service of code reviser's office: RCW 1.08.027, 44.68.060.

certificate submitted by individual with physical or mental disability seeking a

driver's license: RCW 46.20.041.

commercial fertilizers, sales reports: RCW 15.54.362.

criminal records: Chapter 10.97 RCW.

employer information: RCW 50.13.060.

family and children's ombuds: RCW 43.06A.050.

legislative service center, information: RCW 44.68.060.

medical quality assurance commission, reports required to be filed with:
RCW 18.71.0195.

organized crime investigative information: RCW 43.43.856.

public transportation information: RCW 47.04.240.

salary and fringe benefit survey information: RCW 41.06.160.

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[42.56.240](#) << [42.56.250](#) >> [42.56.260](#)

RCW 42.56.250

Employment and licensing.

The following employment and licensing information is exempt from public inspection and copying under this chapter:

- (1) Test questions, scoring keys, and other examination data used to administer a license, employment, or academic examination;
- (2) All applications for public employment, including the names of applicants, resumes, and other related materials submitted with respect to an applicant;
- (3) The following information held by any public agency in personnel records, public employment related records, volunteer rosters, or included in any mailing list of employees or volunteers of any public agency: Residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, driver's license numbers, identicard numbers, and emergency contact information of employees or volunteers of a public agency, and the names, dates of birth, residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, and emergency contact information of dependents of employees or volunteers of a public agency. For purposes of this subsection, "employees" includes independent provider home care workers as defined in [RCW 74.39A.240](#);
- (4) Information that identifies a person who, while an agency employee: (a) Seeks advice, under an informal process established by the employing agency, in order to ascertain his or her rights in connection with a possible unfair practice under chapter [49.60](#) RCW against the person; and (b) requests his or her identity or any identifying information not be disclosed;
- (5) Investigative records compiled by an employing agency conducting an active and ongoing investigation of a possible unfair practice under chapter [49.60](#) RCW or of a possible violation of other federal, state, or local laws prohibiting discrimination in employment;
- (6) Criminal history records checks for board staff finalist candidates conducted pursuant to [RCW 43.33A.025](#);
- (7) Except as provided in [*RCW 47.64.220](#), salary and benefit information for maritime employees collected from private employers under [*RCW 47.64.220\(1\)](#) and described in [*RCW 47.64.220\(2\)](#); and
- (8) Photographs and month and year of birth in the personnel files of employees and workers of criminal justice agencies as defined in [RCW 10.97.030](#). The news media, as defined in [RCW 5.68.010\(5\)](#), shall have access to the photographs and full date of birth. For the purposes of this subsection,

news media does not include any person or organization of persons in the custody of a criminal justice agency as defined in RCW 10.97.030.

[2014 c 106 § 1. Prior: 2010 c 257 § 1; 2010 c 128 § 9; 2006 c 209 § 6; 2005 c 274 § 405.]

Notes:

***Reviser's note:** RCW 47.64.220 was repealed by 2010 c 283 § 20.

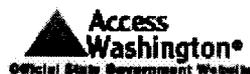
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[42.56.540](#) << [42.56.550](#) >> [42.56.560](#)

RCW 42.56.550

Judicial review of agency actions.

(1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

(2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

(3) Judicial review of all agency actions taken or challenged under RCW [42.56.030](#) through [42.56.520](#) shall be de novo. 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. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

(4) 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. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

(5) For actions under this section against counties, the venue provisions of RCW [36.01.050](#) apply.

(6) 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.

[2011 c 273 § 1. Prior: 2005 c 483 § 5; 2005 c 274 § 288; 1992 c 139 § 8; 1987 c 403 § 5; 1975 1st ex.s. c 294 § 20; 1973 c 1 § 34 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW [42.17.340](#).]

Notes:

Intent -- Severability -- 1987 c 403: See notes following RCW 42.56.050.

Application of chapter 300, Laws of 2011: See note following RCW 42.56.565.