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Not the Plainest Meaning: The Statute of Limitations in Washington State's Public Records Act

John Kreienkamp*

INTRODUCTION

The Public Records Act (PRA) gives Washington state citizens the right to request a copy of government documents.¹ Like similar laws in every other state,² the purpose of the law is to hold the government accountable by keeping the public informed.³ Once a request for documents is made, the PRA provides individuals the right to seek judicial review and a possible award of monetary damages if he or she feels the government has given an inadequate response.⁴ But the right to a judicial remedy carries with it an important question: how long can an individual wait to file suit?

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1. See WASH. REV. CODE § 42.56.030, § 42.56.070 (2007).

2. See RonNell Andersen Jones, *Litigation, Legislation, and Democracy in A Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 580–81 (2011) (discussing the creation of open records laws “in every state in the nation”).

3. See *id.* at 590 (noting that newspapers’ efforts to ensure “public access to government affairs” through the passage of open-records laws made them akin to “bulwarks of public accountability”). The idea that open government could be a check on corruption is probably best seen in Justice Brandeis’ famous remark that “sunlight is said to be the best of disinfectants.” LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY, AND HOW THE BANKERS USE IT* 92 (Norman Hapgood ed., BiblioLife, LLC 2009) (1914). The PRA was established on this premise, as its stated aim was for the public to “maintain control” over public officials. § 42.56.030.

4. WASH. REV. CODE § 42.56.550 (2011). Damages from PRA litigation often impose tremendous burdens on government agencies, which face already limited budgetary constraints. See William D. Richard, *Procedural Rules Under Washington’s Public Records Act: The Case for Agency Discretion*, 85 WASH. L. REV. 493, 515 (2010) (noting that the PRA has led to courts imposing “large monetary judgments which . . . burden already limited public resources and, ultimately, the taxpayers whose interests the PRA is meant to protect.”). This problem is especially acute for the Washington State Department of Corrections. In 2007 alone,

The PRA allows individuals to request documents and public records⁵ from all public agencies in the state,⁶ including even county-level government offices. The PRA specifies that its provisions must be strictly construed against the government⁷ in order to encourage maximum disclosure.⁸ In interpreting the PRA, the Washington Supreme Court has found that courts must “look at the Act in its entirety in order to enforce the law’s overall purpose.”⁹ The PRA is a strict liability statute, meaning that the government agency’s intent is irrelevant.¹⁰ Government agencies must publish their procedures for

Department staff responded to almost 5,000 public records requests from incarcerated felons, at a cost of more than \$250,000 and 12,000 hours of staff time. Rachel La Corte, *Felons don't have rights to public records, Attorney General says*, SEATTLE TIMES, June 10, 2008, http://seattletimes.com/html/localnews/2004468035_records10m.html. See also *H. B. Rep. SSB 5130, 1st Sess.* (Mar. 17, 2009) (testimony in support of the bill noting that “incarcerated felons have been flooding state and local governments with requests intended to overburden the public records staff, and harass law enforcement and other public employees”). For this reason, the interpretation of the PRA’s statute of limitations has a very real impact on government and public policy.

5. The PRA’s definition of “public record” is very expansive. It includes “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” WASH. REV. CODE § 42.56.010 (2012). However, agencies do not have the duty to create a document if it does not exist. See, e.g., *Sperr v. City of Spokane*, 123 Wash. App. 132, 136–37 (Wash. Ct. App. 2004) and *Bldg. Indus. Ass’n of Washington v. McCarthy*, 152 Wash. App. 720, 740 (Wash. Ct. App. 2009). Washington State also has an open meetings law, which is located in a separate chapter of the Annotated Code. See WASH. REV. CODE § 42.30 (2006) (Open Public Meetings Act).

6. The PRA defines “agency” as inclusive of “all state agencies and all local agencies.” WASH. REV. CODE § 42.56.010. Almost every conceivable state and local agency is included: “‘State agency’ includes every state office, department, division, bureau, board, commission, or other state agency. ‘Local agency’ includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.” *Id.*

7. “This chapter shall be liberally construed and its exemptions narrowly construed. . . .” WASH. REV. CODE § 42.56.030.

8. The unequivocal goal of the PRA is to encourage maximum disclosure. “The people insist on remaining informed so that they may maintain control over the instruments that they have created.” WASH. REV. CODE § 42.56.030. The PRA also specifies that in the event of a conflict between the PRA and any other chapter of the Washington Code, the PRA would prevail. *Id.*

9. *Rental Hous. Ass’n of Puget Sound v. City of Des Moines*, 199 P.3d 393, 398 (Wash. 2009).

10. Courts have noted the general rule that acting in good faith is no excuse for a violation of the PRA. See, e.g., *Yousoufian v. Office of Ron Sims*, 229 P.3d 735, 744 (Wash. 2010) (“an agency’s good faith reliance on an exemption does not insulate the agency from a penalty”). However, an agency’s bad faith is the principal consideration in the determination of the

making documents available for inspection and copying,¹¹ and upon receipt of any public records request the agency has exactly five business days to respond.¹² Although it is allowed to request both more time and further clarification from the requestor,¹³ in its response the agency must either release the documents¹⁴ or claim an exemption.¹⁵ The PRA specifies a limited number of exemptions,¹⁶ and the agency must provide a clearly stated explanation when rendering their decision.¹⁷ Agencies are permitted to provide the requested documents in multiple installments,¹⁸ if necessary. This gives rise to the ambiguity found in the PRA's statute of limitations.

If the requestor is unsatisfied with the agency's response and decides to take his grievance to court, he must do so within the PRA's statute of limitations.¹⁹ All actions "must be filed within one

amount of the penalty. *Id.* The exception to this rule is lawsuits brought by incarcerated felons—the PRA specifies that no penalties can be awarded in such cases unless the court finds that the agency acted in bad faith. WASH. REV. CODE § 42.56.565 (2011).

11. WASH. REV. CODE § 42.56.040 (2012).

12. WASH. REV. CODE § 42.56.520 (2010). However, the government agency does not have to provide its final response within those five days. Rather, the government is allowed to state a "reasonable estimate" of the time needed to identify and assemble the requested documents. *Id.* The government agency is also allowed to deny the public records request, but it must specify the reason (such as having no responsive records or claiming an exemption). *Id.*

13. *See id.* The agency is allowed to respond by asking for clarification as to which documents or information is being sought. *Id.*

14. In cases where records are produced, the government agency is allowed to charge copying fees for the requested documents. WASH. REV. CODE § 42.56.120 (2006).

15. WASH. REV. CODE § 42.56.080 (2006).

16. The PRA includes a number of very specific exemptions. For example, personal information, such as public school student records and credit card information, is exempt from disclosure, and agencies can withhold those portions of documents, even if requested. WASH. REV. CODE § 42.56.230 (2013). These exemptions have grown in number over time. *See* WASH. FINAL B. REP., H.B. 1133, LEG. 59, 1ST REG. SESS., 2005 REGULAR SESSION, HOUSE BILL 1133, LEG. 59, 1st Sess. (2005) (noting that "[a]t the time the initiative was passed, there were 10 exemptions from public records disclosure").

17. WASH. REV. CODE § 42.56.210(3) (2006). The Supreme Court of Washington interpreted this language as mandating government agencies to provide a "brief explanation" of the stated exemption. *Sanders v. State*, 240 P.3d 120, 131 (Wash. 2010). The explanation cannot be a generic, form response; instead it must apply to the particular request to which it responds. *Id.*

18. Agencies are allowed to provide the requested documents on "a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure." WASH. REV. CODE § 42.56.080. This language mirrors the statute of limitations, which similarly mentions "partial or installment basis." WASH. REV. CODE § 42.56.550(6).

19. *Id.*

year of the agency's claim of exemption or the last production of a record on a partial or installment basis."²⁰ Although Washington State's Annotated Code includes a two-year "catch-all" statute of limitations for actions not addressed elsewhere,²¹ the PRA's language leaves at least one question unanswered: what limitations period applies when an agency produces all requested documents in a single installment?

The Washington State Courts of Appeals have reached conflicting answers to this question. In *Tobin v. Worden*,²² Division 1 took a narrow, literalist approach, holding that the PRA's statute of limitations did not apply to cases where the agency had provided all documents in a single installment.²³ Division 2 later disagreed, finding that the statute did indeed apply to cases in which the government agency produced all of the records at one time.²⁴ As the Washington State Supreme Court has thus far failed to resolve the issue, the Courts of Appeals remain divided.²⁵

This Note argues that the PRA's statute of limitations should apply to cases in which a government agency provides all requested documents in a single installment.²⁶ Part II will discuss the history of the statute of limitations, including historical amendments and the varying judicial interpretations by both the Washington State Supreme Court and the Courts of Appeals. This history provides the background for the analysis in Part III, which examines the

20. *Id.* As the statutory language makes abundantly clear, the limitations period does not commence when the initial request is made, but instead when an exemption is stated or the "last production of a record." *See id.*

21. WASH. REV. CODE § 4.16.130 (2013) provides a two-year catch-all statute of limitations. "An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued." *Id.* This statute raises the possibility that single installment cases might be barred after the expiration of the two-year period, even if section 42.56.550(6) is inapplicable.

22. *Tobin v. Worden*, 233 P.3d 906, 909 (Wash. Ct. App. 2010).

23. *Id.* *Tobin* did not mention the possibility of § 4.16.130's two-year statute. *Id.*

24. *Bartz v. State Dep't of Corr. Pub. Disclosure Unit*, 297 P.3d 737, 744 (Wash. Ct. App. 2013), *cert. denied*, 309 P.3d 504 (Wash. 2013).

25. The Washington State Supreme Court denied the petition for review in *Bartz*. *Id.*

26. Although many of the arguments made in this Note could apply equally to cases in which no documents were provided, that is not the principal focus here. Similarly, this Note will mention, but not focus on, the possible applicability of the two-year catch-all statute of limitations. *Tobin* did not address this question, and its largest disagreement with *Bartz* is the issue of section 42.56.550(6).

weaknesses in the state of the law today. Part IV will argue that a broader interpretation is reasonable and moreover, consistent with the legislature's intent and the goals of the PRA.

THE HISTORY OF THE STATUTE OF LIMITATIONS

In the election of 1972, Washington State voters passed Initiative 276, which mandated public access to government records.²⁷ Once enacted, the law became known as the Public Disclosure Act.²⁸ It contained a relatively simple five-year²⁹ statute of limitations: “[a]ny action brought under the provisions of this chapter must be commenced within five years after the date when the violation occurred.”³⁰

The legislature made significant changes to the Public Disclosure Act through two amendments in 2005. These began with the Act's reorganization into the PRA.³¹ At the same time, the legislature debated, amended, and later passed House Bill 1758,³² which incorporated a number of substantive alterations.³³ These included a

27. WASHINGTON HOUSE BILL REPORT, 2005 REGULAR SESSION, HOUSE BILL 1133, H. 59, 1st Sess. (Feb. 11, 2005) [hereinafter *Report for House Bill 1133*].

28. *See id.*

29. The Public Disclosure Act originally included a six-year statute of limitations. WASH. REV. CODE § 42.17.410 (1974) (current version at WASH. REV. CODE § 42.56.550). This eventually was shortened to five years, the length of the limitations period that existed prior to recodification into the PRA. *See infra* note 34.

30. WASH. REV. CODE § 42.17.410 (2004) (current version at WASH. REV. CODE § 42.56.550).

31. *Report for House Bill 1133*. *See also* WASHINGTON BILL HISTORY, 2005 REGULAR SESSION, HOUSE BILL 1133, Leg. 59, 1st Sess. (May 4, 2005). The bill passed without a single nay vote in either the State House or Senate, and was signed into law by Governor Gregoire on May 4, 2005. *Id.* House Bill 1133 did not change the wording of the statute of limitations, but this was done through the legislature's simultaneous passage of House Bill 1758. WASHINGTON FINAL BILL REPORT, 2005 REGULAR SESSION, HOUSE BILL 1758, Leg. 59, 1st Sess. (2005) [hereinafter *Washington Final Report for House Bill 1758*].

32. WASHINGTON BILL HISTORY, 2005 REGULAR SESSION, HOUSE BILL 1758, Leg. 59, 1st Sess. (May 16, 2005) [hereinafter *Washington Bill History for House Bill 1758*]. This amendment was separate and distinct from House Bill 1133, which primarily recodified the old Public Disclosure Act. *Report for House Bill 1133*. House Bill 1758 enacted substantive changes, which passed with an overwhelming margin. However, the vote was not unanimous. *Id.*

33. House Bill 1758 made a number of changes to the PRA. *See Washington Final Report for House Bill 1758*, *supra* note 31. These included a new requirement that all government agencies appoint an individual responsible for handling all public records request, a new rule

new statute of limitations, which replaced the old five-year period found in the Public Disclosure Act.³⁴ Upon passage, the new language read: “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.”³⁵ The limitations period therefore had two triggering mechanisms: first, an agency’s claim that the requested documents were exempted from disclosure; or second, when the documents were last produced by the agency on a “partial or installment basis.”

The new language in the statute of limitations is much more complex than that originally found in the Public Disclosure Act. Fortunately, House Bill 1758’s legislative history offers some guidance as to what precisely the legislature meant by this alteration. Before being revised, the amendment originally stated, “[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 *rolling* basis” [emphasis added].³⁶ The Second Substitute Bill later amended this language to its final form: “partial or installment basis.”³⁷ According to the House Bill Report, this was changed in order to allow agencies more flexibility in responding to requests.³⁸ Additionally, testimony offered in support of the amendment stated that the bill would “reduce litigation, make it easier for people to get a record, and make it easier for agencies to follow the PDA.”³⁹

preventing government agencies from denying a request on the basis of its broad scope, and a new statute of limitations. See *Washington Final Report for House Bill 1758*, *supra* note 31.

34. See *Washington Final Report for House Bill 1758*, *supra* note 31. The new statute of limitations did not supplement, but instead replaced, the old language of the Public Disclosure Act. See *City of Des Moines*, 199 P.3d at 398 (noting that the “provision replaces prior longer limitations periods applicable to PRA claims”). This is significant because the new language applied to all cases brought under the PRA, and the old statute of limitations was no longer in effect.

35. WASH. REV. CODE § 42.56.550.

36. WASHINGTON BILL ANALYSIS, 2005 REGULAR SESSION, HOUSE BILL 1758, H. 59, 1st Sess. (Feb. 9, 2005).

37. WASHINGTON HOUSE BILL REPORT, 2005 REGULAR SESSION, HOUSE BILL 1758, H. 59, 1st Sess. (Mar. 5, 2005) [hereinafter HOUSE BILL REPORT, HOUSE BILL 1758].

38. See *id.* (“The substitute allows agencies to fulfill requests on a ‘partial or installment’ basis as the documents are ‘assembled or made ready,’ instead of on a ‘rolling’ basis as the documents ‘become available and ready’”).

39. HOUSE BILL REPORT, HOUSE BILL 1758. Although this was not stated by the legislature itself, it was a part of the testimony in favor of the bill’s passage. *Id.*

The House Bill Report contains other subtle clues as to the legislature's intent. The House Bill Report stated that the new language imposed "a one year statute of limitations for *certain* public records-related suits" [emphasis added], but this was only mentioned in its "brief summary" of the bill.⁴⁰ The same report stated in its fuller summary section that, "Any action involving a person who is denied a public record or believes an agency's time estimate is unreasonable must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis" [emphasis added].⁴¹ While this language is remarkably consistent with the actual wording of the statute, it is significant that the section specified that the statute would apply to "any action" involving a litigant "denied a public record."⁴² This conflicts with the idea that the statute would apply to only "certain" cases. Similar conflicting clues can be found in several other documents discussing House Bill 1758 prior to its passage.⁴³

The legislature again amended section 42.56.550 in 2011,⁴⁴ reducing the lower range of per-day penalties imposed on agencies for violating the provisions of the PRA.⁴⁵ Although the revision suggested the legislature desired to limit agency liability,⁴⁶ the 2011

40. HOUSE BILL REPORT, HOUSE BILL 1758. The Report was discussing the new substitute bill, and language indicating that only "certain" lawsuits were barred by the new statute of limitations appeared in its "Brief Summary of Second Substitute Bill" section. *Id.*

41. *Id.* This language appeared in the "Summary of Substitute Bill" section, under the "Judicial Remedies" subheading.

42. *Id.* This is also very similar to the language in the old five-year statute of limitations, which applied to "[a]ny action brought under the provisions of this chapter. . . ." WASH. REV. CODE § 42.17.410.

43. *See, e.g.*, WASHINGTON BILL ANALYSIS, 2005 REGULAR SESSION, HOUSE BILL 1758, H. 59, 1st Sess. (February 9, 2005). The wording in these other documents is identical that in the House Bill Report.

44. WASHINGTON BILL HISTORY, 2012 REGULAR SESSION, HOUSE BILL 1899, Leg. 62, 2nd Sess. (Oct. 10, 2012). The bill was signed by Governor Gregoire on May 5, 2011, becoming effective on July 22, 2011. *Id.*

45. *See* WASHINGTON FINAL BILL REPORT, 2011 REGULAR SESSION, HOUSE BILL 1899, Leg. 62, 1st Sess. (Aug. 22, 2012) (noting that "the lower range of the daily monetary penalty that may be assessed by a superior court against an agency for violation of the PRA is revised"). The new language reduced the lowest possible daily penalty from \$5 to \$0, in effect giving judges the discretion to award no daily penalty to the government agency in violation of the PRA. *Id.*

46. Because the 2011 amendment reduced the lower limit on daily penalties, it provides possible evidence of a legislative motive to limit agency liability.

amendment made no changes to the wording of the statute of limitations.

In 2009, the Supreme Court of Washington interpreted the new statute of limitations for the first time. In *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, the Court focused on the statute's "claim of exemption" triggering mechanism, ultimately concluding that the limitations period began to run only when the government provided the requester an exemption log.⁴⁷ The Court reasoned that statutes of limitation were intended to provide "certainty and finality," which was accomplished through interpreting the "claim of exemption" requirement consistently throughout the PRA.⁴⁸ As the exemption issue determined the outcome of the case,⁴⁹ the majority in *Des Moines* did not address the meaning of "the last production of a record on a partial or installment basis."⁵⁰

In *Tobin v. Worden*,⁵¹ Division 1 of the Washington State Court of Appeals became the first appellate court to consider the meaning of the statute of limitations' second triggering mechanism—production of records on a partial or installment basis.⁵² In *Tobin*, the plaintiff had made two public records requests via email to the director of King County's Department of Development and Environment Services (DDES), requesting copies of an anonymous complaint made against her property.⁵³ Ms. Tobin and DDES exchanged a number of emails

47. *City of Des Moines*, 199 P.3d at 400. The Court held that merely claiming an exemption was insufficient, and that the statute "requires identification of a specific exemption and an explanation of how it applies to the individual agency record." *Id.* at 399–400. The requirement that the agency must provide a detailed explanation of the exemption in order to trigger the statute of limitations is consistent with the interpretation of other sections of the PRA. *See supra* note 18 and accompanying text.

48. "Statutes of limitation serve a valuable purpose by promoting certainty and finality, and protecting against stale claims." *City of Des Moines*, 199 P.3d at 400.

49. *Id.* at n.3, 401.

50. The dissent, however, did address the issue, and stated that a single production of a record would in fact trigger the statute of limitations. *Id.* at 409 (Madsen, J., dissenting). "If the agency makes a diligent search for records and produces those that it locates without reference to further installments to come, then the agency has fulfilled its duty. If there is no reference to installments or forthcoming documents, then the one-year limitation period starts at that point." *Id.*

51. *Tobin*, 233 P.3d at 906.

52. *Id.* at 908–09.

53. *Id.* at 907. The DDES had begun investigating the Tobins' property for possible code violations in response to the anonymous complaint. *Id.*

and letters in the months afterwards, in which DDES failed to turn over the requested document.⁵⁴ Ultimately, the Tobins filed suit against the County on August 27, 2007.⁵⁵

Division 1 embraced a strictly literal interpretation of the PRA's statute of limitations. Although it recognized the fact that the legislature had shortened the limitations period in 2005 to one year,⁵⁶ the court looked to what it considered the "plain language of the statute."⁵⁷ According to Division 1, "a single document that is the entirety of the requested record, as was provided here, is not a record provided on 'a partial or installment basis' within the meaning of the PRA because it is not part of a larger set of requested records."⁵⁸ The Court reasoned that the PRA's statute of limitations meant precisely what it said, and that the legislature would have written the statute differently had it intended anything other than the language's "plain meaning."⁵⁹ Since the one-year statute of limitations did not apply, the plaintiff's action was not time-barred.⁶⁰

Division 2 confronted the issue for the first time in *Johnson v. State Department of Corrections*.⁶¹ Robert Johnson, the plaintiff, was

54. *Id.*

55. *Id.* at 908. In its opinion, Division 1 did not note which date had kick-started the statute of limitations, but the opinion relied on the fact that it was well beyond one year. *See Tobin*, 233 P.3d at 908. This fact is of particular significance because of the unexplored possibility that RCW 4.16.130's two-year catch-all statute of limitations could have applied. *See Bartz*, 297 P.3d at 744 n.18 (noting that "it is unclear from the opinion when Tobin received the requested documents; so we cannot know whether she filed her complaint within two years of receiving the document").

56. *Tobin*, 233 P.3d at 908.

57. *Id.* Division 1's interpretation depended heavily upon what they saw as the apparent plain meaning of the statute. "When the meaning of statutory language is plain on its face, courts must give effect to that plain meaning as an expression of legislative intent." *Id.*

58. *Id.* at 908–09. The Court looked elsewhere in the PRA to determine whether "partial or installment basis" was an ambiguous phrase. *Id.* at 908. The Court contended that since the same phrase was used elsewhere in the PRA, it had a clear and unambiguous meaning. *Id.* at 908–09. In order to trigger the statute of limitations, the agency had to either declare an exemption or release the requested documents as "part of a larger set of requested records." *Id.* at 908–09.

59. 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. *Id.* at 909. "Had the legislature determined that the agency's last response would suffice, it would have expressly so stated." *Id.*

60. *Id.*

61. *Johnson v. State Dep't of Corr.*, 265 P.3d 216 (Wash. Ct. App. 2011), *cert. denied*, 277 P.3d 668 (Wash. 2012).

an incarcerated felon.⁶² The Department of Corrections had amended its Extended Family Visiting policies in June 2006,⁶³ and Mr. Johnson made two PRA requests to obtain documentation on these changes.⁶⁴ His first request was dated August 21, 2006.⁶⁵ Department staff mailed Mr. Johnson a single document in response to this request on August 24, 2006.⁶⁶ Mr. Johnson was unsatisfied by this response and filed a duplicate PRA request (asking for exactly the same documents) less than one month later on September 10, 2006.⁶⁷ This request was finally resolved almost a year later, on August 27, 2007, when the Department contacted Mr. Johnson to inform him that no additional documents existed.⁶⁸ Thus, the “last production of a record” was on August 24, 2006, and only one document was produced.⁶⁹ More than two years later, on December 16, 2009, Mr. Johnson filed his complaint based on alleged violations of the PRA.⁷⁰

In *Johnson*, Division 2 did not reach the decision of whether the PRA’s statute of limitations applied to cases involving the production of a single record.⁷¹ The facts of the case, in which Mr. Johnson had filed his action more than two years after the agency had produced its single installment of records, meant that the court had three options: the one-year statute of limitations applied, the two-year “catch-all” statute of limitations controlled, or no statute of limitations applied at all.⁷² The court declined to choose between the first two options, because they held that the action was barred by at least the longer of the two (the two-year “catch-all” statute of limitations in section

62. *Id.* at 217.

63. *Id.* at 216–17.

64. *Id.* at 217.

65. *Id.*

66. *Id.* DOC staff wrote Mr. Johnson, explaining that “(1) ‘the only information [the DOC] ha[s] is an email documenting approval of the change’; and (2) ‘[the DOC] [is] not required to maintain working files.’” *Id.* A printed copy of the email was sent to Mr. Johnson upon receipt of payment. *Id.*

67. *Id.*

68. *Id.* at 218.

69. *See id.* at 217, 219–20. These facts are pivotal to the outcome of the case because they determine when the statute of limitations would begin to run.

70. *Id.* at 218. In a motion to show cause dated February 3, 2010, Mr. Johnson claimed that the Department had withheld responsive records in contravention of the PRA. *Id.*

71. *Id.* at 220.

72. *Id.* at 219.

4.16.130).⁷³ However, the court took pains to distance itself from Division 1's conclusion in *Tobin*, stating, "in our view, 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 involving single-document production."⁷⁴

Division 2 grappled again with the statute of limitations two years later in *Bartz*,⁷⁵ in which another incarcerated felon filed multiple PRA requests with the Department of Corrections.⁷⁶ Mr. Bartz later filed two complaints based on allegedly inadequate responses by the Department in response to his three separate PRA requests.⁷⁷ Although Division 2 considered issues on appeal relating to both complaints, only one involved issues related to the statute of limitations.⁷⁸ In response to his second request, Mr. Bartz received all of the requested documents from the Department in a single installment.⁷⁹ This occurred on January 4, 2010.⁸⁰ He filed his complaint in court on March 24, 2011⁸¹—more than one year after the "last production of a record," but not two (as in the "catch-all" provision).⁸²

73. The court opined that "[n]evertheless, we need not choose whether section 42.56.550(6)'s one-year statute of limitations or section 4.16.130's two-year 'catch-all' statute of limitations applies here because Johnson did not file his action before expiration of even the latter, longer period." *Id.* at 220.

74. *Id.*

75. *Bartz v. State Dep't of Corr.*, 297 P.3d 737 (Wash. Ct. App. 2013), *cert. denied*, 309 P.3d 504 (Wash. 2013).

76. *Id.* at 738. Mr. Bartz first requested documents related to inmate personal clothing. *Id.* Next, he requested documents detailing the availability of a variety of medicinal supplements he desired to be provided by the Department. *Id.* at 739. The final request demanded four large groups of documents, all related to tort claims filed against the Department. *Id.* at 739–40.

77. *Id.* at 738. Mr. Bartz claimed that the Department had failed to disclose all responsive documents with regard to his three PRA requests. *Id.* at 741.

78. *Id.* at 741–42. With regard to the first PRA request, the Superior Court had found the Department had not violated the PRA. *Id.* at 742. In *Bartz*, Division 2 affirmed this finding and the dismissal of the plaintiff's complaint. *Id.* at 738.

79. *Id.* at 739. The Department sent Mr. Bartz "notice that it had located 66 pages of responsive records," later provided all of the documents in a single installment upon receipt of payment. *Id.*

80. *Id.*

81. *Id.* Mr. Bartz had filed his first complaint earlier, on January 19, 2011, but waited until March 24 to file his complaint related to his second PRA request. *Id.*

82. *Id.* at 743. Thus, unlike in *Johnson*, Division 2 was compelled to reach the issue of section 42.56.550(6)'s interpretation. *Id.*

Bartz represented a major deviation from Division 1's interpretation of section 42.56.550(6) in *Tobin*.⁸³ In light of the fact that the PRA had shortened the statute of limitations from five years to one year under the old Public Disclosure Act,⁸⁴ Division 2 held that the strict, literalist approach used in *Tobin* was "absurd."⁸⁵ Citing its previous decision in *Johnson*, the court also strongly rejected the notion that no statute of limitations whatsoever would attach to an agency's production of a single installment of documents.⁸⁶ Instead, "[t]he legislature intended that the PRA's one-year statute of limitations would apply to PRA requests completed by an agency's single production of records."⁸⁷ Because Mr. Bartz had filed his second lawsuit more than a year after the Department had produced the lone installment of responsive documents,⁸⁸ the court held that his case had to be dismissed.⁸⁹

The Washington State Supreme Court has yet to weigh in on the split between *Tobin* and *Bartz*.⁹⁰ Similarly, Division 3 has remained silent, and the legislature has enacted no changes to the language of the statute of limitations since the 2011 amendment. All of this means

83. Division 2 explicitly recognized that Division 1 had already reached the same question and arrived at a different result. *Id.* at 744. However, the Court felt that its own ruling in *Johnson* was controlling precedent: "Rather than following Division One's holding in *Tobin*, we adhere to our reasoning in *Johnson*." *Id.*

84. "It would also be absurd to conclude that the legislature intended to create a more lenient statute of limitations for one category of PRA requests in light of its 2005 deliberate and significant shortening of the time for filing a claim from five years, under the old Public Disclosure Act, to one year, under the PRA." *Id.* at 743.

85. "Although a literal reading of section 42.56.550(6) does not encompass documents disclosed in a single production, we need not follow a literal reading of a statute if it would yield an absurd result." *Id.* at 744. In *Bartz*, Division 2 cited to *State, Dep't of Licensing v. Cannon*, 50 P.3d 627 (Wash. 2002), in which the Supreme Court of Washington had held that a strictly literal approach to statutory interpretation was sometimes inappropriate. *Id.* In order to best serve the purpose and intent of the statute, courts must "avoid a literal reading of a provision if it would result in unlikely, absurd, or strained consequences." *Cannon*, 50 P.3d at 636.

86. *Bartz*, 297 P.3d at 743. "[I]t would be an absurd result to conclude that the legislature intended no statute of limitations for PRA actions involving the production of a single volume of documents." *Id.*

87. *Id.* at 744.

88. See *supra* note 81 and 82 and accompanying text.

89. *Bartz*, 297 P.3d at 744.

90. See *supra* note 25 and accompanying text.

that the proper interpretation of the PRA's statute of limitations remains an open question.

ANALYSIS

As Division 2 articulated in *Johnson* and *Bartz*, three possible answers exist to the question of what limitations period applies in cases for which the government agency produces all requested documents in a single installment.⁹¹ The first interpretation would be that no limitations period exists and plaintiffs remain free to bring PRA claims against government agencies in perpetuity.⁹² The second alternative is that only the "catch-all" statute of limitations period applies, and lawsuits are barred after two years. Finally, the remaining option is that the approach taken by Division 2 in *Bartz* was correct, and section 42.56.550(6) extinguishes PRA cases after one year.

In *Tobin*, Division 1 selected the first option, primarily on the basis of its conclusion that the PRA's statute of limitations had an obvious and evident "plain meaning."⁹³ According to the court in *Tobin*, since the statute's literal language did not include agency provisions of a single installment, the legislature obviously desired to exclude such cases.⁹⁴

However, the legislative history of section 42.56.550(6) does not reveal any plain meaning⁹⁵ on the part of the legislature, nor does it

91. See *supra* note 72 and accompanying text.

92. See *supra* note 59 and accompanying text.

93. See *supra* note 59. *Tobin* is additionally remarkable because Division 1 failed to address the possible applicability of section 4.16.130's two-year catch-all statute of limitations. See *supra* text accompanying note 55. Even if the PRA's statute does not apply, Division 1 provided no reason to reject section 4.16.130. This raises the very real possibility that no limitations period whatsoever would apply to single-installment cases, leaving government agencies liable for alleged violations years (or even decades) old. As Division 2 articulated in *Johnson*, at the very least it would seem that the two-year period should apply. See *supra* note 73 and accompanying text.

94. See *supra* note 59.

95. "A statute is ambiguous if it can be *reasonably* interpreted in more than one way." *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wash. 2d 599, 608, 998 P.2d 884, 890 (2000) (emphasis in original). See also *State v. Keller*, 143 Wash. 2d 267, 276, 19 P.3d 1030, 1035 (2001) (noting that "[a] statute is ambiguous if it can reasonably be interpreted in two or more ways"). Additionally, courts must avoid "strained, unlikely, or absurd consequences

support a strictly literal interpretation. Firstly, section 42.56.550(6) replaced a relatively unambiguous five-year statute of limitations in the Public Disclosure Act.⁹⁶ The PRA's new limitations period is a full four years shorter than the old statute, which strongly suggests a legislative desire to reduce agency liability.⁹⁷ This move by the legislature is inconsistent with dramatically increasing agency liability in cases where agencies provided documents in multiple installments. Although it could be argued that the more complex language in the new statute proves the legislature desired to exclude certain cases, it seems highly improbable that the legislature would do so without adding another limitations period. If cases involving a single production of records really were intended to be outside the purview of § 42.56.550(6), it would seem likely that the legislature would have provided an alternative limitations period elsewhere.⁹⁸ At the very least, this would seem to be a strong argument in favor of applying the two-year catch-all provision.

Moreover, the legislative record provides little evidence suggesting a legislative desire to exclude single installment cases. Testimony in support of the 2005 amendment (mentioned in the House Bill Report) suggested that the new and improved PRA, and presumably the statute of limitations, was designed in part to "reduce litigation."⁹⁹ This goal is clearly at odds with the decision from Division 1 that suggested legislative desire to increase agency liability in single installment cases.¹⁰⁰ Moreover, the precise language of the statute was altered from "rolling basis" to "partial or

resulting from a literal reading" of statutory language. *State v. Neher*, 112 Wash. 2d 347, 351, 771 P.2d 330, 331 (1989).

96. See *supra* note 30 and accompanying text.

97. The Supreme Court of Washington strongly hinted at this in *City of Des Moines*, in which it noted that the new provision "replaces prior limitations period." See *City of Des Moines*, 199 P.3d at 398. Division 2 made this argument in *Bartz*. See *Bartz*, 297 P.3d at 743.

98. See *Johnson*, 265 P.3d at 220 n.14 ("[T]here is no other statute of limitations that similarly expressly applies to non-partial and non-installment PRA document productions; in fact, the legislature has provided no other PRA-specific statutes of limitations at all").

99. See *supra* note 39 and accompanying text.

100. In the old Public Records Act, the legislature made no distinction between single and multiple installment cases. See *supra* note 30 and accompanying text. Since one of the goals of the 2005 amendment was to reduce agency liability, this does not suggest that the "plain meaning" of the statute of limitations was to exclude single installment cases and subject agencies to more liability.

installment basis”¹⁰¹ in order to provide agencies with more flexibility, not less.¹⁰²

The House Bill Report for House Bill 1758 does note that the 2005 amendment imposed “a one year statute of limitations for *certain* public records-related suits” [emphasis added].¹⁰³ Although this possibly supports Division 1’s interpretation, the statute includes two triggering mechanisms (the other being a claim of an exemption), so it is unclear whether the Bill Report’s language is actually referring to the “partial or installment basis” phrase.¹⁰⁴ More importantly, the Report notes later that the new statute of limitations would apply to “*Any* action involving a person who is denied a public record” [emphasis added].¹⁰⁵ This is contradictory language, because the phrase “certain public-records related suits” in the 2005 amendment is easily juxtaposed with the words “any action” in RCW § 42.17.410. In fact, the word “any” suggests that the legislature intended to include single installment cases.¹⁰⁶ Taken as a whole, however, the House Bill Report provides little in the way of hard evidence, and it certainly fails to establish a plain meaning on the part of the legislature to exclude single installment cases.

101. See *supra* note 38. This language was changed specifically in order to provide agencies with more flexibility in responding to requests. It does not logically follow that this language was imposed in order to subject agencies to more liability if providing documents in a single installment, as *Tobin* suggested.

102. In other words, the language cited by Division 1 as demonstrating a “plain meaning” to exclude single installment cases was introduced to give agencies more leeway in responding to requests, not to punish agencies for providing all of the requested documents as soon as possible in a single installment.

103. See *supra* note 40. It also bears repeating that this was only stated in the “Brief Summary” section of the House Bill Report.

104. Even if the legislature did intend a restrictive interpretation of the statute of limitations, the word “certain” does not necessarily mean that single installment cases are meant to be excluded. Section 42.56.550(6) has two triggering mechanisms- the other being the agency’s last claim of an exemption. Since the limitations period does not begin to run beginning with the agency’s first claim (or if the agency fails to properly claim an exemption), these cases are not encompassed within the statute and the word “certain” could be read as exclusive of those cases. Single installment cases could still be included. Regardless, this language is contradicted elsewhere in the House Bill Report. See *supra* note 42 and accompanying text.

105. See *supra* note 42 and accompanying text.

106. It is therefore also inconsistent with Division 1’s literal conclusion in *Tobin* that the statute would apply only to cases in which the requested records had been provided in a number of installments. Had the legislature intended the statute to cover only some cases, the House Bill Report might have used the word “some” in lieu of “any.”

The lack of a statewide approach to this issue has obvious consequences for the PRA. The current split in the Court of Appeals leads to unequal treatment of government agencies across the state under the PRA, depending on the jurisdiction in which they reside. Agencies located in King County (Division 1), for example, potentially face a shorter statute of limitations than similar agencies located in Mason County (Division 2). This Court of Appeals split leads to an unavoidable amount of ambiguity on the part of prospective litigants, as agencies might not be able to adequately budget for PRA litigation¹⁰⁷ when unable to ascertain the length of the statute of limitations. As the Washington State Supreme Court has not yet settled the issue,¹⁰⁸ a case brought in the Court of Appeals may be overturned on appeal regardless of the division in which suit is brought. Furthermore, Division 3's silence on the issue adds to the uncertainty.¹⁰⁹

PROPOSAL

Washington state courts should embrace Division 2's broad interpretation of the PRA's statute of limitations and apply the two-year limitations period to cases in which the government agency provides the responsive records in a single installment.¹¹⁰ When an agency produces all of the requested documents in one installment, all at one time, the limitations period should commence then. This interpretation is consistent with the broad aims of the PRA, is beneficial to government agencies, and is in line with the purpose of statutes of limitations. Accordingly, Division 2's holding in *Bartz* is a

107. PRA litigation can impose significant costs on government agencies. *See supra* note 4.

108. *See supra* notes 25 and 90 and accompanying text.

109. As the Court of Appeals for Division 3 has not yet adopted either of the *Tobin* or *Bartz* interpretations, no prospective litigant in Division 3 can confidently predict whether section 42.56.550(6) applies to single installment cases.

110. Although the proposal in this Note is limited to single installment cases, an additional issue exists with regard to the applicability of section 42.56.550(6) to cases in which no documents were provided ("no installment" cases). There are valid reasons to argue the statute of limitations should apply in those cases. The PRA's goal is to promote government accountability, not to punish government agencies for failing to have the documents requested by the public.

more reasonable approach to the issue and should be adopted by courts statewide.

There are reasons to adopt a more limited interpretation of the statute of limitations. As a whole, the PRA's goal is to promote government accountability through providing individuals access to government documents.¹¹¹ This is important to ensure an informed electorate. As the PRA mandates that all of its provisions be interpreted in order to accomplish this goal,¹¹² a limited interpretation of section 42.56.550(6) is arguably appropriate, because it benefits requestors. Individuals would be able to hold agencies accountable for violations of the PRA for an extended (or unlimited) amount of time, and this might further the goal of public disclosure. Furthermore, an individual would not be barred from bringing a claim by a limitations period of which he or she might not have been aware.

However, Division 2's approach in *Bartz* is more consistent with the aims of the PRA. A government agency's provision of all requested documents in a single installment is preferable to multiple installments over a longer period of time because it fulfills the request sooner rather than later. This type of expediency should not be punished by boundless liability. Agencies should be encouraged to provide all requested documents in single installments, but interpreting the statute of limitations to exclude such cases would actually discourage agencies from doing so. Agencies might provide requested documents more slowly, through multiple installments, as a means of limiting liability in lawsuits potentially years or decades away.¹¹³ As long as the government agency could defend the decision as reasonable, it might hold back documents in order to provide them in partial increments, and thereby fall under the protection of section 42.56.550(6). This would undermine the goal of the PRA to provide

111. *See supra* note 3.

112. *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 199 P.3d 393, 398 (Wash. 2009).

113. Although the PRA is to be strictly construed against the government agency, this is done in order to maximize disclosure. In this case, a strict construction against the government agency has the perverse consequence of discouraging disclosure, by incentivizing agencies to hold back documents into two installments. For this reason, the strict construction requirement does not mandate Division 1's interpretation.

the public with government records, and would represent the kind of “absurd result” that courts strive to avoid.¹¹⁴

Practical considerations also suggest that Washington courts should adopt the *Bartz* interpretation.¹¹⁵ Government runs on budgets, and no agency has an endless supply of money. Because all government agencies in Washington State are potentially liable for costly damages under the PRA,¹¹⁶ lawsuits can have a tremendous effect on their resources. By excluding single installment cases from the statute of limitations, agencies face potentially boundless liability without any ability to predict legal expenses. Damages from years-old violations of the PRA could cripple an agency’s ability to function,¹¹⁷ and agencies that receive a large number of requests for documents on a yearly basis would have no knowledge of how many lawsuits they might face in the future. Extending the statute of limitations to single installment cases would greatly aid agencies in anticipating lawsuits and their legal needs, while at the same time recognizing the goal of government accountability.

Finally, statutes of limitations are designed to provide certainty and finality to litigation,¹¹⁸ a goal that would be undermined by a strictly literal interpretation of § 42.56.550(6). An interpretation that excludes single installment cases from the statute would produce

114. As *Johnson* and *Bartz* noted, courts strive to avoid an absurd or illogical interpretation. See *supra* note 85. This result would be especially absurd given the PRA’s mandate that all of its provisions be interpreted in order to further the goal of public disclosure. See *supra* note 10 and accompanying text.

115. Although any practical considerations must be balanced against the need for government accountability, the legislature did so through its adoption of a one-year limitations period. In multiple installment cases, the legislature clearly felt that a one-year limitations period was adequate to hold agencies accountable for PRA violations.

116. Government agencies face the possibility of hefty penalties. Every prevailing litigant is entitled as a matter of law to all costs, including legal fees, and the judge has the discretion to award up to \$100 for each day the agency was in violation of the PRA. WASH. REV. CODE § 42.56.550. To put it into perspective, an agency that unlawfully denied a litigant the right to view just one document for 364 days (almost an entire year) could be fined \$36,400 even before legal fees are accounted for. These potential costs rise for cases extending over two (or even more) years.

117. The possibility of the PRA harming agencies was well known to the legislature prior to the passage of the 2005 amendment. Testimony against the amendment noted that “[t]he increased fines in the bill are too high and may give the public incentive to sue agencies. Some people currently use the PDA to blackmail agencies.” H.R. 59-1758, 1st Sess. (Wash. 2005).

118. *City of Des Moines*, 199 P.3d at 400. Statutes of limitations are designed in part to provide prospective litigants predictability and certainty by imposing a final date on liability. *Id.*

unavoidable uncertainty in government agencies, which could potentially be sued years later after providing the requested documents. Agencies would have no ability to predict how many lawsuits they might face or how substantial awards of damages might be. Since government agencies must budget for litigation costs, the resulting uncertainty could undermine their effectiveness and burden taxpayers. This would directly contravene the purpose of statutes of limitations, which suggests that the legislature did not intend a strictly literal meaning of section 42.56.550(6).

On balance, the *Bartz* interpretation is preferable as a public policy matter. The goals of the PRA are served by encouraging agencies to release the requested documents as soon as possible. A broader interpretation is far more favorable, and reasonable, to government agencies, which depend on budgets and anticipated costs over time. Finally, including single installment cases in section 42.56.550(6) provides additional certainty and finality to PRA cases, remaining consistent with the overall purpose of statutes of limitations. For these reasons, courts statewide should follow Division 2's approach.

CONCLUSION

The PRA's statute of limitations should be interpreted as inclusive of single installment cases. Division 2's approach has the advantage of providing greater certainty and predictability to government agencies as to their own liability, which is the general purpose of all statutes of limitations.¹¹⁹ Additionally, the legislative history of section 42.56.550(6) suggests that the legislature did not intend to punish agencies for providing documents in a single installment by imposing a longer limitations period.¹²⁰

Ultimately, the fundamental objective of the Public Records Act is to facilitate government accountability by empowering the public.¹²¹ This goal must be paramount when interpreting any other provision

119. *Id.* at 400

120. Similarly, the legislative history does not suggest the legislature intended to punish government agencies by imposing no limitations period at all (the outcome suggested by Division 1 in *Tobin*).

121. *See supra* note 3.

of the PRA, including the statute of limitations.¹²² This provides the single most compelling reason to include single installment cases in the PRA's statute of limitations. The approach chosen by Division 1 in *Tobin* encourages agencies to provide requested documents in multiple installments, because providing a single installment could potentially increase liability.¹²³ Instead, Division 2's interpretation in *Bartz* would not incentivize delayed or multiple installments, but rather reward agencies for providing requested documents as soon as possible.¹²⁴ Agencies would be motivated to provide documents in a single installment, if possible, because it would trigger the limitations period. At the same time, this would provide the requester with his or her documents in a speedier fashion, and thus fulfill the PRA's goal of maximum disclosure.

122. *See supra* note 9.

123. *See supra* note 113 and accompanying text.

124. A broader interpretation would incentivize finality in the agency's response to all requests, because as soon as the single installment is provided, the limitations period begins. This would allow agencies to better predict potential litigation and give the requester all of the documents.