

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

rental housing association of puget sound,  
a Washington non-profit public benefit  
corporation,

Appellant,

v.

CITY OF DES MOINES, a Washington  
municipal corporation,

Respondent.

NO. 80532-6

EN BANC

Filed January 22, 2009

STEPHENS, J.—Washington’s Public Records Act (PRA), chapter 42.56 RCW, is a strongly-worded mandate for open government, requiring broad disclosure of public records unless the responding agency demonstrates that the record falls within a specific exemption. RCW 42.56.070(1). When a requesting party is dissatisfied with an agency’s response to a records request, it may bring an action under the PRA but must do so “within one year of the agency’s claim of exemption or the last production of a record on a partial or installment basis.” RCW 42.56.550(6). This case presents the question of when a response to a records request is sufficient to trigger the running of the limitation period. The Rental

Housing Association of Puget Sound (RHA) appeals an order granting a motion to dismiss its action against the city of Des Moines (City) as untimely under RCW 42.56.550(6). RHA argues that the limitations period did not begin to run until at least April 14, 2006, when the City first provided a privilege log identifying individual records it was withholding under a claim of exemption. We agree, and reverse and remand.

### FACTS

The RHA is the largest association of rental housing owners in the Pacific Northwest. On November 11, 2004, the City considered and adopted the crime free rental housing program (Program) in ordinance number 1351. Like programs established in cities across the country, Des Moines' Program includes training for landlords to help control crime in rental housing and provides guidance on crime prevention through environmental design. Rental property owners must pay an annual "crime-free housing endorsement fee" based upon the number of rental units each landlord owns, in addition to obtaining a business license. Clerk's Papers (CP) at 2082. When the Program was adopted, the fee was initially set at \$100.00 per unit, and the City later raised the yearly per-unit fee to \$105.73.

On July 20, 2005, the RHA in a letter made its first PRA request to the City, seeking 12 different categories of documents relating to the Program. The letter asked for a privilege log for each record claimed to be exempt from disclosure. On July 21, 2005, the City sent an initial response letter acknowledging receipt of the

public records request and estimating a response within two weeks.

On August 17, 2005, the City provided RHA with 593 pages of documents relating to the Program. In a cover letter, the City refused to provide hundreds of pages of other documents from the city attorney's file, claiming exemptions under former RCW 42.17.310(1)(i) (2003) (now codified at RCW 42.56.280), the deliberative process exemption, and former RCW 42.17.310(1)(j) (2003) (now codified at RCW 42.56.290), the documents not available through civil discovery exemption. The August 17, 2005 letter from the city attorney did not describe individual documents and did not provide a privilege exemption log; rather, it generally characterized the withheld documents as:

- Inter-office legal opinions and memoranda;
- Copies of reported cases decided by the Washington State Supreme Court and Court of Appeals dealing with rental housing ordinances;
- Copies of newspaper articles regarding the crime-free rental housing ordinance & possible litigation;
- Copies of treatises & articles dealing with the legality of crime-free rental housing ordinances;
- Copies of treatises & articles dealing with the Washington Landlord/Tenant Act (RCW 59.18);
- Attorney notes regarding preparation for teaching the "legal issues" portion of the Landlord Training Workshop;
- Copies of similar crime-free rental housing ordinances from other municipalities;
- Copies of "edits, drafts, re-drafts, & redlined versions" of the crime-free rental housing ordinance; and
- Copies of "edits, drafts, re-drafts, & redlined versions" of the Agenda Items prepared for presentation to the City Council.

CP at 61-62.

On October 7, 2005, the RHA sent a letter to the City complaining that some of the documents withheld by the City, such as treatises, articles, ordinances, and

appellate court opinions, did not fall under PRA exemptions and demanded disclosure under the PRA. The RHA again requested the City to provide a privilege log specifically describing each withheld individual document and the basis for withholding each document. The RHA also reminded the City that it had yet to produce numerous requested documents including: e-mails, e-mail attachments, records identifying which properties had been certified as crime-free, records showing which landlords had paid fees for the Program, and records regarding how to comply with the crime prevention through environmental design program.

On October 12, 2005, the City responded in a letter to RHA stating:

At this time, we believe that we have properly withheld exempt public records, stating the specific exemption in the terms required . . . . However, at your request, I will re-review the applicable statutes and caselaw (sic) concerning these exemptions; and the City Clerk will again request that City departments review their records, specifically searching for public records that you suspect we have failed to disclose. We will attempt to provide a complete response by November 18, 2005.

CP at 68.

The City did not respond to RHA by November 18, 2005. CP at 70. On November 23, 2005, the Des Moines city attorney sent a letter to RHA indicating: “Due to the demands that come with the end of the year, I will not be able to provide you with a complete response to your October 7, 2005 public disclosure request until December 9, 2005.” CP at 70. The City did not respond to RHA by December 9, 2005.

On January 25, 2006, RHA wrote to the City demanding results of the

“re-review” of its July 20, 2005 first PRA request:

It is now January 25, 2006 – more than two months past the City’s original estimation of November 18, and nearly five months from when the documents should have been produced in the first instance. Unless we receive immediate assurance from the City that the responsive documents will be promptly produced, we will file suit under the PDA to compel production of the documents. Further, we will seek an award of monetary sanctions and attorneys’ fees and costs for bringing such an action

.....  
To avoid such dispute, the City must promptly and fully respond to our PDA requests, copies of which are attached for your convenience.

CP at 72-73. In this letter, RHA once again requested a privilege log detailing individual records claimed exempt by the City. RHA also made a second PRA request for documents containing additional cost and revenue information generated after RHA made its July 20, 2005 first PRA request and for copies of the 2006 City budget.

On January 26, 2006, the city attorney responded to RHA in a letter stating that all responsive records had been provided and the City had properly withheld exempt public records using the same specific exemptions language as stated in the City’s August 17, 2005 letter. Also, on January 26, 2006, the city attorney sent a letter to RHA stating that the City had received RHA’s second PRA request and would provide an appropriate response as soon as possible.

On February 2, 2006, RHA sent a letter to the City stating that the City was in continuing violation of the PRA because: (1) the City must specifically use a privilege log to identify withheld documents and explain the grounds for withholding each specific document, and it had not yet done so; (2) the City may not withhold

protected documents in their entirety where protected content can be redacted, and the City had made no effort to provide any redacted documents; (3) exemptions claimed under the deliberative process exemption and the documents not available through civil discovery exemption based upon the attorney/client privilege or work product doctrines must provide sufficient detail to justify the claims, which the City had not done; (4) the City may not withhold the entire city attorney file based on a work product claim.

On February 8, 2006, in response to RHA's February 2, 2006 letter, the city attorney called RHA's attorneys and through a teleconference the parties agreed that they would work cooperatively to avoid litigation. Shortly after the teleconference, RHA sent an e-mail to the city attorney requesting that the City e-mail any documents in electronic format directly to RHA's attorney. The city attorney replied via e-mail: "Will do. I appreciate your willingness to take a cooperative approach to resolving these issues." CP at 2170.

On February 10, 2006, in response to RHA's second PRA request of January 25, 2006, the City sent a letter to RHA containing the city of Des Moines 2006 budget appendix, adopted version, which it asserted had just been completed.

On March 1, 2006, the City provided RHA with 386 pages of documents responsive to the January 25, 2006 second PRA request. Many of the documents appeared identical to those provided on August 17, 2005. In a cover letter, the City stated that it expected to provide by March 7, 2006 other documents responsive to

the January 25, 2006 second PRA request by RHA, all of which concerned revenues and expenditures of the Program; however, the City added the following:

On February 10, 2006, we provided a copy of the City's public budget document as the first installment of the City's response to your January 25, 2006 request for public disclosure. By March 7, 2006, we expect to be able to provide you with the final installment of requested documents: the three categories of records you have requested concerning the revenues and costs of services provided in connection with the Crime Free Housing Ordinance. The documents we expect to be able to provide at that time are 2005 and 2006 financial reports for revenues and expenditures charged directly to the crime free rental housing program. Indirect costs supporting the program are charged to other departments and divisions within the City's budget and will be reported in the final overall cost of the program each year by the Finance Director; this report has not yet been prepared.

CP at 1493-94.

On March 8, 2006, the City provided an installment of documents to RHA's January 25, 2006 second PRA request. This installment included cost and revenue information for the period before RHA's July 20, 2005 first records request was made. The city attorney in the March 8 letter explained the lack of revenue information regarding the Program:

All general revenues of the City of Des Moines are deposited into the general fund, regardless of which department generates the revenues. Expenditures by City departments are made from the general fund. This budgeting process does not track each dollar of revenue or cost by the "program" to which it is related.

The financial records that we have provided at this time are 2005 and 2006 financial reports for revenues and expenditures charged directly to the Crime Free Rental Housing Program . . . . Because the City of Des Moines budgets by department, not by program, these reports do not document indirect costs that support the program but are charged to other departments within the City.

CP at 2178. On March 21, 2006, the City sent a letter containing an installment of

26 documents to the RHA's January 25, 2006 second PRA request. These 26 documents included pleadings and other documents related to the City's prosecution of notices of infraction for failure to pay business license and/or Program charges. On March 22, 2006, RHA lawyers telephoned the city attorney and again asked for a detailed privilege log in accordance with the PRA.

On April 14, 2006, the City sent a letter to RHA that attempted to provide a privilege log regarding the withheld documents relating to RHA's first PRA request of July 20, 2005. On April 21, 2006, RHA responded, claiming that the City's privilege log was missing additional identification information regarding several documents such as authors, recipients, and other details, and that several documents were clearly not eligible for exemption under the PRA.

On June 16, 2006, the City sent a response letter to the RHA supplying some of the requested identification information but refused to produce any of the withheld records. Shortly after receiving that letter, RHA's attorney called Des Moines City Attorney Linda Marousek and left a voicemail indicating that unless a number of the withheld documents were produced, the RHA would file suit against the City under the PRA. On June 20, 2006, Ms. Marousek responded by e-mail to the RHA attorney, suggesting the City was preparing to defend against litigation under the PRA by RHA. On November 1, 2006, Ms. Marousek left her position.

On January 16, 2007, RHA filed suit in King County Superior Court, alleging that the City had improperly withheld public records under the PRA since at least

April 14, 2006, the date that the City first provided a privilege log purporting to identify individual records it was withholding.

In early February 2007, Acting Des Moines City Attorney Richard Brown called RHA's attorney and requested a meeting to discuss the PRA litigation and the City's Program. On February 12, 2007, at that meeting Mr. Brown provided two documents to RHA reflecting total fees collected through the Program for 2005 (\$284,600) and 2006 (\$332,200). These two documents did not exist at the time of the July 25, 2005 first PRA request by RHA but had been recently created by Mr. Brown for settlement purposes.

On February 26, 2007, RHA filed a third PRA request with the City regarding the Program. On February 27, 2007, the City sent a response letter to the RHA acknowledging receipt of the third PRA request and estimating a response within two weeks. To this date, the City has not responded to RHA's third PRA request because, according to Mr. Brown, "it is difficult to identify what specific records they want." CP at 2224.

In May 2007, RHA and the City commenced settlement negotiations. On May 22, 2007, Mr. Brown provided copies of the withheld records to RHA to facilitate settlement, on the condition that the City was not admitting that it improperly withheld the documents. The City and RHA were unable to reach a settlement. On May 29, 2007, though no settlement was reached, the City decided that the RHA could keep and review the withheld documents.

On June 11, 2007, the City filed a motion to dismiss, contending that RHA failed to file its PRA suit within the one-year statute of limitations under RCW 42.56.550(6). The trial court entered an order granting the City's motion to dismiss. RHA timely appealed and sought direct review by this court. CP at 2291-92. On March 5, 2008, we granted direct review under RAP 4.2(a)(4).

### ANALYSIS

The PRA is a strongly worded mandate for broad disclosure of public records. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). It requires that “[e]ach 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 . . . this chapter, or other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070(1). RCW 42.56.210(3) states, “Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.”

The PRA's disclosure provisions must be liberally construed and its exemptions narrowly construed. RCW 42.56.030. The burden of proof is on the agency to establish that any refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part. RCW 42.56.550(1). Administrative inconvenience or difficulty does not excuse

strict compliance with the PRA. *Zink v. City of Mesa*, 140 Wn. App. 328, 337, 166 P.3d 738 (2007).

This case presents our first opportunity to address RCW 42.56.550(6), which was enacted in 2005 and provides a one-year statute of limitations for PRA actions. Laws of 2005, ch. 483, § 5. RCW 42.56.550(6) states, “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.” This provision replaces prior longer limitations periods applicable to PRA claims. *See, e.g.*, Laws of 1982, ch. 147, § 18 (five-year statute of limitations), codified at RCW 42.17.410; Laws of 1973, ch. 1, § 41 (six-year statute of limitations).

Our purpose when interpreting a statute is to determine and enforce the intent of the legislature. *City of Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006). Where the meaning of statutory language is plain on its face, we must give effect to that plain meaning as an expression of legislative intent. *Id.* In construing the PRA, we look at the Act in its entirety in order to enforce the law’s overall purpose. *See Ockerman v. King County Dep’t of Developmental & Env’tl. Servs.*, 102 Wn. App. 212, 217, 6 P.3d 1214 (2000). Our review is de novo. RCW 42.56.550(3).

The trial court held that the one-year statute of limitations under RCW 42.56.550(6) commenced with the City’s August 17, 2005 letter claiming exemptions in response to RHA’s first (July 20, 2005) PRA request. CP at 2288.

RHA contends that the August 17, 2005 letter was insufficient because a claim of exemption requires a detailed privilege log under RCW 42.56.210(3) and our decision in *PAWS II*<sup>1</sup>. RHA's view is supported by amici Allied Daily Newspapers of Washington and Washington Coalition for Open Government. Because the City did not provide a privilege log until April 14, 2006, RHA contends the one-year statute of limitations did not begin to run until that date, with the result that its suit was timely filed on January 16, 2007.

The City responds that *PAWS II* is irrelevant, as it did not address the statute of limitations and was decided 11 years before enactment of the 1-year limitations period at issue here. *Id.* at 243. The City urges us to read RCW 42.56.550(6) in isolation from other parts of the PRA and in light of the public policy favoring statutes of limitation. The City also argues that RHA's privilege log theory is at odds with prior case law establishing that an agency may argue new grounds for exemption at a PRA show cause hearing even if previously-stated reasons for refusing disclosure are invalid. *Id.* at 253; *Cowles Publ'g Co. v. City of Spokane*, 69 Wn. App. 678, 683, 849 P.2d 1271, *review denied*, 122 Wn.2d 1013 (1993). Because RCW 42.56.550(6) requires only a "claim of exemption" and does not reference a "privilege log," the City maintains that the trial court under the plain meaning doctrine correctly interpreted the intent of the legislature in holding that the one-year statute of limitations was triggered by the City's August 17, 2005 letter

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<sup>1</sup> *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1994).

claiming exemptions.

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. This court in *PAWS II* addressed the issue of whether information in a university researcher’s unfunded grant proposal involving use of animals in scientific research was subject to disclosure under the PRA. *PAWS II*, 125 Wn.2d at 247. Of particular significance here, the Court in *PAWS II* denounced the “silent withholding” of information in response to a PRA request:

Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld. The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. 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 (citation omitted). We emphasized the need for particularity in the identification of records withheld and exemptions claimed:

The plain terms of the Public Records Act, as well as proper review and enforcement of the statute, make it imperative that all relevant records or portions be identified with particularity. Therefore, in order to ensure compliance with the statute and to create an adequate record for a reviewing court, an agency’s response to a requester must include specific means of identifying any individual records which are being withheld in their entirety. Not only does this requirement ensure compliance with the statute and provide an adequate record on review, it also dovetails with the recently enacted ethics act.

*Id.* at 271 (footnote omitted). In a footnote, the court described the sort of

identifying information that would be deemed adequate for review purposes under the PRA:

The identifying information need not be elaborate, but should include the type of record, its date and number of pages, and, unless otherwise protected, the author and recipient, or if protected, other means of sufficiently identifying particular records without disclosing protected content. Where use of any identifying features whatever would reveal protected content, the agency may designate the records by a numbered sequence.

*Id.* at 271 n.18.<sup>2</sup>

Consistent with this reasoning, a valid claim of exemption under the PRA should include the sort of “identifying information” a privilege log provides. *Id.* Indeed, RCW 42.56.210(3) requires identification of a specific exemption and an explanation of how it applies to the individual agency record. We must read “claim of exemption” in RCW 42.56.550(6) in light of this requirement, as we construe the PRA as a whole. *Ockerman*, 102 Wn. App. at 217.

Amici Attorney General’s Office, Washington Association of Prosecuting Attorneys, and Washington State Association of Municipal Attorneys contend that, had the Legislature intended to require a privilege log, it would have said so. Yet, the attorney general’s own rule under the Washington Administrative Code (WAC)

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<sup>2</sup> The concurrence and dissent downplay this language, concluding that in *PAWS II* we were concerned only with the silent withholding of records and not the statute of limitations. Concurrence at 7-8; Dissent at 3 n.1. Our analysis in *PAWS II*, however, underscores we were concerned with the need for sufficient identifying information about withheld documents in order to effectuate the goals of the PRA. To sever this important concern from the statute of limitations would undermine the PRA by creating an incentive for agencies to provide as little information as possible in claiming an exemption and encouraging requesters to seek litigation first and cooperation later.

states:

**Brief explanation of withholding.** When an agency claims an exemption for an entire record or portion of one, it must inform the requestor of the statutory exemption and provide a brief explanation of how the exemption applies to the record or portion withheld. RCW 42.17.310(4)/42.56.210(4). The brief explanation should cite the statute the agency claims grants an exemption from disclosure. The brief explanation should provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper. Nonspecific claims of exemption such as “proprietary” or “privacy” are insufficient.

WAC 44-14-04004(4)(b)(ii). Furthermore, the WAC provides an illustration of compliance with RCW 42.56.210(3) using **a detailed privilege log**:

One way to properly provide a brief explanation of the withheld record or redaction is for the agency to provide a withholding index. It identifies the type of record, its date and number of pages, and the author or recipient of the record (unless their identity is exempt). The withholding index need not be elaborate but should allow a requestor to make a threshold determination of whether the agency has properly invoked the exemption.

*Id.* (footnote omitted).

The City’s reply letter to the RHA on August 17, 2005, 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 August 17, 2005 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 rather than generally asserting the controversy and deliberative process exemptions as to all withheld documents. CP at 61-62.

The concurrence accepts the argument of the City and amicus Attorney

General's Office that the requirement of a privilege log to trigger the statute of limitations would generate uncertainty because a proper claim of exemption would depend on the PRA requester's satisfaction with the detail provided in a claim of exemption, rather than providing a clear line such as can be drawn upon the mere assertion of exemption. Concurrence at 9-10. This argument fails because the PRA's mandate, not the requester's preference, controls when a claim of exemption is validly made. 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. In this regard, requiring a privilege log does not *add to* the statutory requirements, but rather effectuates them. *See* RCW 42.56.210(3), .550(6).

Finally, the City argues that requiring a privilege log to state a claim of exemption undermines the public policy favoring statutes of limitation. Undeniably, statutes of limitation serve a valuable purpose by promoting certainty and finality, and protecting against stale claims. *Kittinger v. Boeing Co.*, 21 Wn. App. 484, 486-87, 585 P.2d 812 (1978). However, liberally construing the PRA to effectuate open government—as we must—does not defeat these goals. Certainty and finality are

promoted by a construction of RCW 42.56.550(6) that reads “claim of exemption” consistent with other provisions of the PRA, particularly RCW 42.56.210(3), as well as our prior holdings and administrative regulations implementing the Act. *See PAWS II*, 125 Wn.2d at 271 & n.18; WAC 44-14-04004(4)(b)(ii). Moreover, the opportunity for meaningful judicial review of a claim of exemption requires specific identifying information to support a claim.

### CONCLUSION

We conclude that the City did not state a proper claim of exemption to trigger RCW 42.56.550(6), the one-year statute of limitations on PRA suits, until April 14, 2006, when it provided RHA with a privilege log. The City’s August 17, 2005 letter was insufficient to state a claim of exemption under RCW 42.56.210(3), *PAWS II* and WAC 44-14-04004(4)(b)(ii). *See PAWS II*, 125 Wn.2d at 271 & n.18. Accordingly, RHA timely filed suit against the City on January 16, 2007. We reverse the trial court’s order granting the City’s motion to dismiss and remand for further proceedings consistent with this opinion.<sup>3</sup>

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<sup>3</sup> RHA presents additional arguments to reverse the trial court’s order, including that: (1) RHA’s January 25, 2006 records request restarted the statute of limitations; (2) the City provided records on a partial or installment basis throughout 2006-2007 to toll the statute of limitations; and (3) the City waived the statute of limitations with inconsistent behavior. Because we hold that the City never effectively claimed an exemption to trigger the statute of limitations under RCW 42.56.550(6) until April 14, 2006, we do not reach these additional issues.

AUTHOR:

Justice Debra L. Stephens

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WE CONCUR:

Chief Justice Gerry L. Alexander

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Justice Charles W. Johnson

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Justice James M. Johnson

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Justice Richard B. Sanders

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Justice Tom Chambers

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