



Washington Association of
Public Records Officers

Fall Conference Legal Update

October 17, 2024

This case law review includes decisions issued from May 8, 2024, through October 11, 2024. Several unpublished appellate decisions are summarized for this presentation. While they may not be cited as precedent, they are nonetheless instructive.

DISCLAIMER

This presentation is educational only and is not legal advice or a legal opinion. The PRA changes over time. Later court decisions or changes in statutes can impact these decisions and an agency's obligations.

TALK WITH YOUR AGENCY'S LEGAL ADVISOR

Cousins v. State, Dept. of Corrections

3 Wn.3d 19, 546 P.3d 415 (2024)

Washington State Supreme Court

A closing letter must be objectively “sufficient to put [a non-attorney requester] on notice” that the one-year limitations period had started running because the agency does “not intend to disclose records or further address [the] request.” Use of the word “closed” is not determinative. To assess the sufficiency of a closing letter, courts and agencies should consult the Model Rules and the guidance provided in this opinion. After issuing a sufficient closing letter, an agency may choose to answer follow-up questions by simply reiterating that the statute of limitations has started running because the agency does not intend to further address the request.

Cousins v. State, Dept. of Corrections

3 Wn.3d 19, 546 P.3d 415 (2024)

Sufficiency of a closing letter – required content

A closing letter is sufficient if it provides at least the following information to the requester, in plain language targeted to a lay audience:

- (1) how the PRA request was fulfilled and why the agency is now closing the request,
- (2) that the PRA's one-year statute of limitations to seek judicial review has started to run because the agency does not intend to further address the request, and
- (3) that the requester may ask follow-up questions within a reasonable time frame, which may be specified by the agency.

The final, definitive response test is an objective inquiry, so the agency's subjective intent and the requester's subjective understanding are not relevant.

Cousins v. State, Dept. of Corrections

3 Wn.3d 19, 546 P.3d 415 (2024)

The follow up questions

If the requester asks timely follow-up questions, the agency is not required to search for additional records, although it may choose to do so.

If the agency does not intend to further address the request, it must explicitly say so and reiterate that the statute of limitations has started to run.

Cousins v. State, Dept. of Corrections

3 Wn.3d 19, 546 P.3d 415 (2024)

Other Issues

The subsequent production of records may be relevant to liability or penalties but ordinarily will not restart the limitations period. Affirms *Belenski*. Clarifies *Dotson* did not adopt a bright-line rule that a closing letter will always trigger the statute of limitations. Providing later-discovered records does not restart the PRA's statute of limitations, unless equitable tolling applies.

June 2021 letter was final, definitive response to Cousins' request – lawsuit not barred by SOL. Court does “not claim to impose a retroactive standard of strict compliance.”

Hobbs does not apply here—lawsuit is not premature.

Soule v. State

Unpublished (July 2, 2024)

Trial Court

Between July 2019 and January 2020 Soule filed three PRA requests with the AGO. The first request was closed after Soule failed to submit a payment for the 10th installment. The second was closed after the 8th instalment for the same reason. Each installment letter indicated “the request will be administratively closed for nonpayment” if the payment was not received by the date indicated on each letter; May 29, 2021, for the first request and November 12, 2021, for the second. For the third request, Soule paid for 17 installments and the request was closed as fulfilled on May 13, 2022. Soule filed suit on May 12, 2023. The trial court dismisses the claims for requests one and two as outside of the statute of limitations.

Soule v. State

Unpublished (July 2, 2024)

Court of Appeals

The COA reverses the trial court. The one-year statute of limitations begins to run when an agency gives final and definitive response to a request. Applying the Cousins explanation of this requirement, the COA finds the notice from the AGO was insufficient to put a non-attorney requester on notice that administrative closure of the request due to non-payment means that the agency would no longer take action on the request or provide further records. Nothing explained the practical or legal consequences of administrative closure.

Collins v. Smith

Unpublished (August 20, 2024)

Trial Court

Collins filed approximately 150 requests with the City of Port Angeles beginning in February 2019. In November 2019, the city filtered all e-mails from Collins redirecting them to the PRO and the legal department. Due to regular inappropriate behavior towards staff the City initially directed Collins to a single point of contact for all his requests including the submission of future requests. This was later revised to a suggestion in order to provide the most efficient customer service to Collins. At no time did the City indicate it would not fulfill requests submitted outside of the requested points of contact. The email filter remained in place.

Collins v. Smith

Unpublished (August 20, 2024)

Trial Court

The COA affirms the Trial Court's grant of Summary Judgment to the City. An agency may violate the PRA if it uses the requester identity as a basis to deny access to records. Collins identity was not used as a basis by the City to deny access to records. RCW 42.56.080(2) "does not appear to regulate how an agency must internally process PRA requests-so the e-mail filtering decision is not implicated by the prohibition."

Washington Election Integrity Coalition v. Wise

Unpublished (June 3, 2024)

Trial Court

WEICU, sued asserting that misconduct by Director Wise tainted the 2020 election results. Included in these claims were alleged PRA violations. The County asserted records were exempt and sought injunctive relief. The trial court granted summary judgment and dismissed all of WEICU's claims. The court also granted King County's motion to strike the PRA cause of action pursuant to CR 11 and declared that King County cannot as a matter of law disclose the requested voting records.

Washington Election Integrity Coalition v. Wise

Unpublished (June 3, 2024)

Court of Appeals

The COA affirms the trial court. Washington follows the common law rule that corporations appearing in court proceedings must be represented by an attorney. WEICU is a corporation. The Complaint was not signed by an attorney. After the initial Complaint was filed, an attorney began representing WEICU in the proceedings. The attorney was aware of the omission but took no steps to correct the deficiency prior to the award of summary judgment.

Washington State Tree Fruit Association v. Employment Security Department

1 of 2

Unpublished (August 20, 2024)

Trial Court

Association requests records related to lawsuit and prevailing wage methodology. Multiple delays in records production. Records produced heavily redacted pursuant to attorney client privilege. Association files lawsuit while records are being produced alleging unreasonable estimate of time and improper withholding/redaction. Trial court dismissed improper withholding/redaction without prejudice because it was premature and finds estimates of time were reasonable when Department's electronic search software was malfunctioning, Department began working with a software vendor to repair the search functionality, and Department revised its production estimates several times with Association. Improper withholding/redaction claim dismissed without prejudice on summary judgment because claim is premature.

Washington State Tree Fruit Association v. Employment Security Department

2 of 2

Unpublished (August 20, 2024)

Court of Appeals

On appeal Association's claims fail for procedural issues. Association states there was no error in summary judgment ruling, thus nothing to review. Association also fails to develop reasonable estimate of time argument and thus appellate court declines to review the issue.

Valdez v. Wahkiakum County

Unpublished (September 10, 2024)

Trial Court

Valdez was convicted of attempting to hire someone to murder his ex-wife, burning down his neighbor's home because their testimony was damaging to his position in his divorce, and committing crimes related to his illegal marijuana business. He submitted a PRA request for the criminal investigative file from his case. After an in camera review the trial court ruled the records were exempt as either the mental impressions of the attorney (*Pappas v. Holloway*, 114 Wn.2d 198, 787 P.2d 30 (1990)); or; (2) notes or memoranda prepared by the attorney from oral communications (*Id.*, and/or *Dever v. Fowler*, 63 Wn. App. 35, 816 P.2d 1237 (1991)).

Valdez v. Wahkiakum County

Unpublished (September 10, 2024)

Court of Appeals

The party seeking review has the burden to perfect the record so that the reviewing court has all relevant evidence. An insufficient appellate record precludes review of the alleged errors. The record contained seven pages of clerk's papers. While Valdez designated a significant portion of other materials, those records were not part of the COA file. Notably absent was the county's response to Valdez's request thus it was not able to conduct a de novo review of that response and therefor affirms the trial court.

Moot - Mootness

A case is moot when the issues presented are no longer alive or the parties lack a legally cognizable interest in the outcome of the lawsuit. Moot cases are generally dismissed but the court may exercise its discretion to rule on the case when there is a substantial and continuing public interest assessed by:

- (1) the public or private nature of the question presented,
- (2) the desirability of an authoritative determination to provide future guidance to public officers, and
- (3) the likelihood that the question will recur.

Love Overwhelming v. City of Longview

___ Wn. App.2d ___, ___ P.3d ___ 2024

Trial Court

The City hired Loving Overwhelming (LO) to help process applications from homeless persons apply to stay in the City's proposed pallet shelter encampment. LO prepared the application forms with LO's logo, its staff help many of the applicants resulting in the names of LO staff members appearing in those applications. The applications sought sensitive information, including information related to drug use and mental health.

Opponents of the pallet shelter project requested the completed application forms. The City provided third-party notice to LO which filed for an injunction. The case was dismissed by the trial court ruling LO did not have standing under RCW 42.56.540 to seek the injunction because LO was not one of the applicants and it was not LO's confidential information at issue. The trial court authorized immediate release of the records and refused to stay its ruling pending appeal. LO appealed.

Love Overwhelming v. City of Longview

___ Wn. App.2d ___, ___ P.3d ___ 2024

Court of Appeals

The City argued the case was moot because the records had been released. The appeal was not “moot” based in the public-interest exception to mootness: (1) the dispute was public in nature, (2) there was a public interest in resolving the standing question, and (3) the issue was likely to arise in future disputes.

The Appellate Court reversed the trial court ruling, holding that that LO had standing to seek the injunction under RCW 42.56.540. That statute allows “a person who is named in the record or to whom the record specifically pertains” to seek an injunction. LO is named in the applications because the applications bore LO’s logo and its employees were named in many of the completed applications. This is a bright-line standard that does not turn on whether LO was seeking to protect its own interests or the interests of the applicants.

Citizens Action Defense Fund v. State

___ Wn. App.2d ___, 552 P.3d 341 (2024) (July 16, 2024)

Trial Court

Negotiations for the “terms and conditions” for the 2023-25 CBA’s commenced prior to June 2022. Agreements were reached and prior to October 1, 2022, they were provided to the OFM Director; found to be financially feasible for the state; and included in the Governor’s proposed state budget for the 2023 legislative session. On April 23, 2023, the legislature passed a budget which the Governor signed on May 16, 2023, with certain vetoes not impacting the CBA’s. After this the State negotiators and unions signed the 2023-25 CBA’s. At issues was a request submitted December 15, 2022. CADF requested the parties original offer letters in negotiations. The Trial Court held the deliberative process exemption inapplicable as the records were no longer pre-decisional.

Citizens Action Defense Fund v. State

___ Wn. App.2d ___, 552 P.3d 341 (2024) (July 16, 2024)

Court of Appeals

The COA reverses the trial court. At the time OFM denied the request, the tentative agreements had not been sent to the governor or legislature for approval, nor had the funding been approved for their implementation. The agreements were not approved and funded by the legislature until April 23, 2023, and governor did not sign the bill until May 16, 2023, but in doing so exercised veto authority over other aspects of the bill.

Abuse of Discretion

An error of judgment by a trial court in making a ruling that is clearly unreasonable, erroneous, or arbitrary and not justified by the facts or the law applicable in the case.

Merriam-Webster online

A standard of review used by appellate courts to review the decision of a lower court. While many appellate courts review PRA cases “de-novo,” meaning the findings of the lower court are not given deference, for certain PRA issues this is not the case.

Horvath v. DBIA Services

___ Wn. App.2d ___, 551 P.3d 1053 (2024) (July 8, 2024)

Trial Court

Horvath sought records from DBIA, a nonprofit corporation providing services within a business improvement district. DBIA responded it was not a public agency subject to the PRA. Horvath sued. The trial court agreed DBIA was not subject to the PRA.

Court of Appeals

DBIA Services is not a state or local “agency” as defined in the PRA. The functional equivalent test requires the trial court exercises its discretion. The trial court did not abuse its discretion in its application of all four *Telford* factors in holding that DBIA is not the functional equivalent of a public agency.

Herrick v. Special Commitment Center

Unpublished (May 29, 2024)

Trial Court

A prior appeal remanded the issue of whether the SCC conducted an adequate search. *Herrick v. Special Commitment Center*, Unpublished, decided June 4, 2019. On remand Herrick sought in camera review of certain records asserting it was related to the adequacy of the search. The trial court did not address the adequacy of the search in its oral opinion or written order. It engaged in a *Yousoufian* mitigating/aggravating analysis and calculated penalties finding denial of access for 2,917 days awarding \$1 for each day.

Herrick v. Special Commitment Center

Unpublished (May 29, 2024)

Court of Appeals

Not conducting an in camera review was not an abuse of discretion. None of the documents attached to the motion for an in camera review contain, or potentially require, redactions and all of the documents were reviewable as part of the show cause process. Penalties review in a PRA case is whether there was an abuse of discretion. The Trial court thoroughly addressed the aggravating and mitigating *Yousoufian* factors clearly finding the failure to disclose was a potentially neglectful mistake but not a systemic PRA compliance failure or the result of intentional misconduct or bad faith. On review no single *Yousoufian* factor should control. The superior court's failure to make necessary findings concerning the adequacy of the search was an abuse of discretion. The case was remanded on this issue including whether additional penalties are warranted.

Hood v. City of Langley

Unpublished (July 1, 2024)

Trial Court

In 2016 Hood e-mailed the City requesting numerous records associated with its former Mayor. Prior appeal found there to be a question on whether the City conducted an adequate search and whether the Hood intended to narrow his request. *Hood v City of Langly*, Unpublished, decided January 28, 2019. Three years later Hood filed a motion for partial summary judgment. The City was found to have denied access to certain records from March 2016 to February 2019 imposing a penalty of \$5,315 (\$5 for 1,063 days) finding that four mitigating factors justified a lower penalty.

Hood v. City of Langley

Unpublished (July 1, 2024)

Court of Appeals

The COA affirms the penalty award. Trial courts have considerable discretion on application of the *Yousefian* factors with a holistic review for overall reasonableness; no one penalty factor should control appellate review. The COA will not review a single *Yousoufian* factor as urged by Hood. Review of a single factor risks distorting the statutorily conferred discretion granted to the trial court and is inconsistent with the standard of review set forth by the Supreme Court. Notably, no party challenged the overall penalty assessment or the factual finding supporting it which the COA then assessed (4 mitigating and no aggravating) finding no abuse of discretion.

Kittitas County v. Sky Allphin

Unpublished (July 23, 2024)

Trial Court

In 2012 Allphin made requests for records to Kittitas County resulting in litigation spanning over a decade. In a prior appeal Allphin was found to have been denied access to 6 e-mails with the case remanded for penalties. After 90 days the County filed a motion to determine penalties arguing an appropriate penalty was \$490 arguing it was one records withheld for 98 days. Allphin then filed his own motion asserting that in addition to the six emails, three additional emails were silently withheld for 6173 days asking for a total penalty of \$617,000; plus attorney fees. The trial court determined that the issue on remand was the 6 e-mails. It grouped the emails awarding a penalty of \$490 (1 group of emails * 98 days @ \$5.00 per day) plus attorney fees of \$8,750 which it supported in its written decision applying the *Yousoufian* factors.

Kittitas County v. Sky Allphin

Unpublished (July 23, 2024)

Court of Appeals

The 2016 COA opinion limited the issue on remand to the 6 e-mails which the COA previously found to have been improperly withheld for 98 days. The trial court's refusal to consider an additional penalty for 3 additional e-mails was not in error. Nor were the 3 e-mails sufficient to merit heightened penalties. There was no evidence of bad faith by the County. The County's conduct throughout the request, including correcting mistakes showed the opposite. The County's conduct in litigation was not excessive or improper. Their motions had been largely successful. There was no abuse of discretion.

Requesters serving criminal sentence

(1) A court shall not award penalties under RCW 42.56.550(4) to a person who was serving a criminal sentence in a state, local, or privately operated correctional facility on the date the request for public records was made, *unless the court finds that the agency acted in bad faith* in denying the person the opportunity to inspect or copy a public record.

RCW 42.56.565 (emphasis added)

Haney v. Wash. St. Dept. of Corr.

Unpublished (July 11, 2024)

The trial court found negligence on the DOC's part when it failed to provide records which the trial court equated to bad faith. Bad faith is more culpable than negligence.

Reversed and remanded with instructions to focus on the reasons behind the agency's failure to provide responsive records. If it finds bad faith, it should then apply the *Yousoufian* factors to determine an appropriate penalty.

Flook v. Wash. St. Dept. of Corr.

Unpublished (July 2, 2024)

The burden is on the requester to prove the agency acted in bad faith.

The DOC did not act unreasonably, maliciously or with utter indifference to the consequences when it originally failed to produce the record. While there may have been incorrect assumptions regarding the request, nothing suggested conduct to constitute bad faith. Once DOC was alerted to the mistake it located and provided the records. No abuse of its discretion.

A background image of a sunset over a mountain range. The sun is low on the horizon, casting a warm orange glow across the sky and the silhouettes of the mountains. The text '~ FINIS ~' is centered in the upper half of the image.

~ FINIS ~

WAPRO Fall 2024 Legal Update