NO. 101769-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TERRY COUSINS, as personal representative of the ESTATE OF RENEE FIELD, deceased,
Petitioner,

v.

STATE OF WASHINGTON, and DEPARTMENT OF CORRECTIONS,
Respondent.

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, *ET AL*. IN SUPPORT OF PETITIONER TERRY COUSINS

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I. IDENTITY OF *AMICI* AND SUMMARY OF ARGUMENT

As further described in the accompanying Motion for Leave to File *Amicus Curiae* Brief, the **American Civil Liberties Union of Washington** ("ACLU") is a nonprofit organization dedicated to the preservation of civil liberties. **Columbia Legal Services** ("CLS") is a nonprofit civil legal aid firm that advocates for laws that advance social, economic, and racial equity. **Human Rights Defense Center** ("HRDC") is a nonprofit organization that advocates on behalf of the human rights of people held in prisons and jails. **Washington Coalition for Open Government** ("WCOG") is a nonprofit organization dedicated to promoting the public's right to know. **Washington Employment Lawyers Association** ("WELA") is a nonprofit association of lawyers that advocates in favor of employee rights.

Amici are interested because the decision below, along with another published Division Two decision (*Dotson v.*

Pierce Cnty., 13 Wn. App. 2d 455, 464 P.3d 563 (2020)), impose burdens on Public Records Act ("PRA") requestors that are not permitted by the statute and threaten the ability of citizens to hold the Department of Corrections ("DOC") and other agencies accountable and protect the safety of incarcerated people.

Here and in *Dotson*, Division Two has adopted an extratextual "bright line rule" under which the statute of limitations on a PRA claim begins to run as soon as the agency sends a letter asserting the request is "closed"—even where, as here, the statute sets a later trigger for the limitations period because DOC continued producing records *after* it sent its initial "closing" letter. *See* RCW 42.56.550(6) (PRA statute of limitations triggered by "the last production of a record").

The decision below allows an agency to start the short one-year clock on a PRA claim while it is still discussing the request with the requestor, and before the agency has completed its production. The *Dotson* rule encourages agencies to use

artificial "closing letters" to manipulate the PRA's limitations period, regardless of when the statutory trigger actually occurs. Such a claim is now time-barred unless the requestor can prove equitable tolling—a safety valve this Court endorsed in *Belenski v. Jefferson Cnty.*, 186 Wn.2d 452, 378 P.3d 176 (2016), but which imposes a bad faith standard that, in practice, has proven all but impossible to meet.

If the *Dotson* rule stands, agencies will shield themselves from liability for inadequate searches and improper withholdings by issuing premature "closing" letters, stripping the PRA of its ability to ensure "[t]he people … maintain control over the instruments that they have created." RCW 42.56.030. That control is needed most in cases like this one, where the records relate to people who depend wholly on DOC's care—like Terry Cousins' sister, who died in DOC custody. Washington's prisons are dangerous, and the public needs an effective PRA in order to monitor and protect the

safety of the individuals held by DOC. The Court should reverse the decision below.

II. STATEMENT OF THE CASE

Amicus adopts Ms. Cousins' Statement of the Case.

III. ARGUMENT

A. The *Dotson* Rule Conflicts with the PRA's Text and Goals.

1. Courts should not apply the *Dotson* rule when a statutory trigger is met.

In its decision below, Division Two, following *Dotson*, barred a requestor's PRA claim under its judge-made rule that "[a]n agency's definitive, final response that the request is closed" triggers the statute of limitations. *Cousins v. Dep't of Corr.*, 25 Wn. App. 2d 483, 493, 523 P.3d 884, 889 (2023); *see Dotson*, 13 Wn. App. 2d at 471-72. Even though Division Two acknowledged the statute provided a later trigger, it improperly decided that its interpretation of *Belenski* controlled over the statutory text. *Cousins*, 25 Wn. App. 2d at 493-94. Further, Division Two improperly limited its analysis of whether DOC's

initial closing letter was "final" to the face of the letter while ignoring the circumstances surrounding the request, like the fact that after DOC issued the first "closing" letter, it subsequently "reopen[ed] the … request" in response to Ms. Cousins' inquiries; produced nine new installments of records; and then issued a *second* "closing" letter (followed by *yet another* installment). *Id*. at 488.

Division Two has misapplied *Belenski*. In *Belenski*, this Court addressed the statute of limitations for a PRA claim when neither of the two express statutory triggers were met. 186 Wn.2d at 457-58. The statute provides, "'Actions under [the PRA] must be filed within one year of **[1]** the agency's claim of exemption or **[2]** the last production of a record on a partial or installment basis.'" *Id*. (quoting RCW 42.56.550(6)). In *Belinski*, however, neither triggering event had occurred; instead, the agency told the requestor it had no responsive records. *Id*. at 461. This Court held the PRA's "reference to [those two events] indicates that the legislature intended to

impose a one year statute of limitations beginning on an agency's final, definitive response to a public records request," which was triggered in that case when the agency sent a letter to Belenski stating it had no responsive records. *Id*. at 460-61.

In adopting the *Dotson* rule, Division Two has turned *Belenski* on its head. *Belenski* makes clear that the two statutory triggers—a claim of exemption or a last production—each qualifies as a "final, definitive response"; indeed, this Court synthesized those two specific examples to fashion that holding. *Id*. at 460. By overriding the statute and imposing its own extratextual limitations trigger (a letter purporting to "close" the PRA request), Division Two has created a rule that "is not authorized by any provision of the PRA, undermines the PRA's purposes, and is contrary to the PRA model rules." *Kilduff v. San Juan Cnty.*, 194 Wn.2d 859, 874, 453 P.3d 719, 727 (2019). Division Two should not have looked outside the statute to determine when Ms. Cousins' PRA limitations period began to run because, unlike the claim in *Belenski*, her claim

met one of the express statutory triggers: a "last production of a record." RCW 42.56.550(6).

This result makes sense. "The PRA is a forceful reminder that agencies remain accountable to the people of the State of Washington." *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 466, 229 P.3d 735, 747 (2010). It serves the PRA's goals to allow requestors to litigate PRA claims based on productions they received after a "closing" letter.

PRA claims provide transparency into the agency's PRA procedures and test the adequacy of an agency's search. *See Neighborhood All. of Spokane Cnty. v. Spokane Cnty.*, 172 Wn.2d 702, 717-19, 261 P.3d 119, 126-28 (2011). When an agency produces additional documents after it purportedly believed the request was "closed," such production is a sign the agency's initial search was deficient—a point DOC concedes. *See* Supplemental Brief of the Department of Corrections ("DOC Suppl. Br.") at 25-26 (arguing against rule where "the limitations period effectively varies based on whether the

agency response was deficient"). Defending a PRA claim forces agencies to review their deficient searches and investigate "*why* documents were withheld, destroyed, or even lost." *Neighborhood All*., 172 Wn.2d at 718; *see, e.g.*, *Cousins*, 25 Wn. App. 2d at 501 (noting a multifactor approach "would help ensure agencies prioritize prompt investigation of allegations that they have wrongfully withheld records") (Glasgow, C.J. dissenting).

Given PRA penalties are based on "agency culpability," and the current statute imposes no daily minimum penalty, an agency need not accrue penalties where the investigation it conducts as part of its PRA defense simply exposes an innocent mistake. *Neighborhood All.*, 172 Wn.2d. at 717; RCW 42.56.550(4) (penalties "not to exceed one hundred dollars" per day). Conversely, the threat of penalties forces the agency to incorporate any lessons learned into its PRA search procedures to ensure the same mistakes don't happen twice, thereby increasing government transparency and strengthening the

PRA's effectiveness by improving the agency's processes so it can locate and produce records as part of its initial search.

Even ignoring the express statutory trigger, Division Two erred by refusing to look beyond DOC's first "closing" letter to determine whether the letter was a "definitive, final response." *Cousins*, 25 Wn. App. 2d at 493. This Court has made clear that when interpreting the PRA's statute of limitations, it is function that matters, not form. For instance, in *RHA*, this Court held a "claim of exemption" did not trigger the limitations period unless it was "effectively made." *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 537, 199 P.3d 393, 398 (2009). There, a letter purporting to claim exemptions did not trigger the PRA limitations period unless it was accompanied by a privilege log. *Id*. at 541.

In her dissent below, Chief Judge Glasgow proposed a five-factor test that illustrates the nuances of determining whether an agency response is "final." *Cousins*, 25 Wn. App. 2d at 500 (Glasgow, C.J. dissenting). As the dissent argues, the

majority should at least have considered these factors and the circumstances surrounding Ms. Cousins' request, rather than simply treating DOC's conclusory—and ultimately false—"closing" label as dispositive. *Id*. Otherwise, one cannot determine whether a definitive, final response was "effectively made." *RHA*, 165 Wn.2d at 537. Indeed, given DOC sent at least *two* "closing" letters to Ms. Cousins, it is odd the majority concluded the first letter was somehow more "definitive" or "final" than the second letter. *Cousins*, 25 Wn. App. 2d at 488. The Court should reverse the decision below.

2. The *Dotson* rule encourages conflict and wastes agency and judicial resources.

By allowing agencies to trigger the statute of limitations through conclusory and unsupportable "closing" letters, the decision below punishes requestors like Ms. Cousins who seek to resolve their PRA disputes through communication rather than litigation. In order to preserve their PRA claims, requestors will be forced to file suit rather than explore other

options, even when an agency's initial inadequate response could have been resolved with a simple email or phone call. *See, e.g.*, *West v. City of Lakewood*, noted at 22 Wn. App. 2d 1048, 2022 WL 2679516, at *2-3 (example of litigation that could have been avoided if city had engaged with requestor rather than immediately closing request when it located no records due to spelling error).

"[T]he purpose of the PRA is best served by communication between agencies and requesters, not by playing 'gotcha' with litigation." *Hobbs v. State*, 183 Wn. App. 925, 941 n.12, 335 P.3d 1004, 1011 (2014). Both the statute and the courts require a cooperative process. Agencies must "ask[] the requestor to provide clarification for a request that is unclear." RCW 42.56.520(1)(d). Agencies are also "required to make more than a perfunctory search and to follow obvious leads as they are uncovered." *Neighborhood All.*, 172 Wn.2d at 720.

This is consistent with the Attorney General's Model Rules, ch. 44-14 WAC, which this Court has "repeatedly cited… when interpreting provisions of the PRA." *Kilduff*, 194 Wn.2d at 873. The Model Rules emphasize communication and encourage "parties… to resolve their disputes without litigation." WAC 44-14-08003; *see also*, *e.g.*, WAC 44-14-04003(4) ("Communication is usually the key to a smooth public records process for both requestors and agencies."). The Model Rules expressly suggest agencies send closing letters that "ask the requestor to promptly contact the agency if [they] believe[] additional responsive records have not been provided." WAC 44-14-04006(1). It subverts the PRA's purpose to allow agencies to trigger the statute of limitations by saying the request is "closed" at the same time that they invite the requestor to provide information that would assist the agency in completing the request—especially so when the requestor's follow-up leads to months of additional delay as the agency conducts additional searches, running out the clock.

Dotson and *Cousins* turn a cooperative PRA process into an adversarial one and will lead to the waste of agency, requestor, and judicial resources by encouraging unnecessary and avoidable lawsuits. Division Two's dismissive remark that the requestor can just "mak[e] a new records request for records that were not produced" also ignores the waste of agency and requestor resources that arise from encouraging requestors to submit duplicative requests that cause the agency to re-run the same deficient searches. *Cousins*, 25 Wn. App. 2d at 495. The Court should not allow these consequences to prevail.

B. The Public Needs an Effective PRA to Ensure DOC Does Not Abuse Its Immense Power Over Incarcerated People's Lives.

1. The PRA provides much-needed transparency into DOC operations.

A strong PRA helps to protect the lives of incarcerated people.[1] Washington's prisons are dangerous, even deadly

[1] *Amici* bring the stories and statistics in this section to the Court's attention in order to emphasize the stakes at issue in this appeal. Should the Court deem it necessary, *Amici* request the Court take judicial notice under ER 201.

places, for the friends, family, and neighbors we incarcerate. Just this past summer, at least three people died at Walla Walla state prison. All were tragically young. Timothy Hemphill was 35 years old when he died (just months before he was due to be released); Everette Alonge was 23, and Michael Giordano was 29.[2] By July 2023, DOC owned up to the tragedy unfolding behind its walls, but failed to articulate a policy change or announce a robust response to what it described as a "rare" increase in suicides and suicide attempts that "warrants a close review."[3]

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[2] Jeremy Burnham, *State releases names of suicide victims at Washington State Penitentiary; full reports pending*, WALLA WALLA UNION-BULLETIN (Sept. 30, 2023), *available at* https://www.union-bulletin.com/news/local/courts_and_crime/state-releases-names-of-suicide-victims-at-washington-state-penitentiary-full-reports-pending/article_9763f23e-572d-11ee-b602-f78ab13e9560.html (last visited Nov. 30, 2023).

[3] Wash. Dep't of Corr, *News Spotlight: Humanity in Corrections—Suicide Prevention in Prisons*, July 14, 2023, *available at* https://www.doc.wa.gov/news/2023/spotlight/suicide-prevention-in-prisons.htm (last visited Nov. 30, 2023).

Unfortunately, there is nothing *rare* about death in Washington prisons. In fact, death is such a regular part of our incarceration system that DOC has determined there is a need to annually tabulate prison death *by cause*.[4] While this morbid chart outlines that most deaths in DOC custody are deemed "[n]atural," it also shows that accidents, homicides, and suicides regularly lead to death in our prisons. In addition, when someone unexpectedly dies in DOC custody, the agency must conduct a formal review. RCW 72.09.770(1)(a). In 2022,

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The Ombuds identified five prison suicides during the fiscal year 2023. *See* Off. of the Corr. Ombuds, *Ann. Rep.: Fiscal Year 2023* ("FY2023 Report"), at 16 *available at* https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=Office_of_%20the_%20Corrections_%20Ombuds_FY2023_%20AnnualReport_bc4cd2ff-f9e5-4422-b8da-0dec042e7274.pdf (last visited Nov. 30, 2023).

[4] Wash. Dep't of Corr., *Incarcerated Individuals Deaths: Cause of Death*, *available at* https://doc.wa.gov/corrections/services/health.htm#deaths (last visited Nov. 30, 2023).

DOC reviewed 37 unexpected fatalities.[5] To date, DOC has published its reviews of nine unexpected fatalities in 2023.[6]

Nor are these deaths limited to DOC facilities. In one recent case, "Derek Batton, while incarcerated at the Grant County Jail, died after ingesting heroin that was smuggled in by his cellmate." *Anderson v. Grant Cnty.*, No. 38892-1-III, 2023 WL 8227548, slip. op. at ¶ 1 (Nov. 28, 2023). The Grant County Sheriff's Office was aware it had become "routine for dealers to deliver drugs to inmates by preplanning their arrests and then secreting the drugs orally, anally, or vaginally into the facility," and that "[d]rug toxicity caused several inmates to be hospitalized." *Id*. ¶ 3. But even though Mr. Batton's cellmate "had been booked into the Grant County Jail over 40 times" and "had attempted to smuggle contraband into the jail," the

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[5] Wash. Dep't of Corr., *Incarcerated Individuals Deaths: Unexpected Fatalities, available at* https://doc.wa.gov/corrections/services/health.htm (list of links to unexpected fatality reports) (last visited Nov. 30, 2023).

[6] *Id*.

booking officers did not follow the County's bodily search policy. *Id*. ¶¶ 5-6. "Mr. Batton, who struggled with drug addiction," died because of their negligence. *Id*. ¶ 8; *see id*. ¶ 32 (concluding "County owed a nondelegable affirmative duty to protect Mr. Batton from harm").

The people who are harmed or who perish behind prison walls are more than convicted defendants. They are more than inmate numbers or pending petitions. They are loved, and when they are harmed, or when they die in DOC custody, DOC must be made to provide families with direct, responsive, and timely answers. Transparency and accountability must be the top priority of an agency that manages facilities as dangerous and prone to abuse as prisons.

Death is not the only danger facing individuals incarcerated in Washington prisons. Concerns over abuse and mistreatment animate the fears of incarcerated persons and their families. RCW 43.06C.040(2) tasks the Office of Corrections Ombuds with investigating such complaints made against DOC.

Per 43.06C.040(1)(j)(ii) and (iii), the Ombuds annually publishes "[t]he number of complaints received and resolved," alongside "[a] description of significant systemic or individual investigations or outcomes …." For fiscal year 2023, the Ombuds reported "[t]he most frequently received complaints concerned healthcare, disciplinary cases, and DOC staff conduct."[7] Buttressing the Ombuds' concerns, this year's report includes images showing the cruel conditions people must endure when housed in mental health residential treatment units.[8]

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[7] FY2023 Report, at 1.

[8] *See id*. at 15-17. The Ombuds inspected the Special Offender Unit ("SOU") at the Monroe state prison after receiving an anonymous complaint regarding cell conditions and alleged mistreatment. *Id*. at 15. Presumably, the report's photographs were taken when the Ombuds office made an "unannounced visit" to Monroe. *Id*. As the Ombuds explains, these photos depict "hazardous living conditions in two different cells and suggest[] a failure of custody, healthcare, and physical plant coordination and leadership." *Id*. The conditions shown in these photos include corroded cell walls and uncollected garbage and debris. *See id*. 15-17.

In short, it is undeniable that prison living conditions are cruel in certain facilities and that unexpected death is a regular part of DOC operations.

The PRA, when properly applied, is the most immediate and effective way for incarcerated people and their communities to hold DOC accountable for what goes on inside their facilities. Allowing the *Dotson* rule to stand will enable DOC to maintain dangerous and deadly prisons. The decision below allows DOC to perform shoddy searches in response to PRA requests seeking information about potential DOC misconduct, then avoid accountability for both the inadequate search and the misconduct when it issues a letter that claims the PRA request is "closed" without having produced all responsive documents. Such lack of transparency and potential gamesmanship prevent the public from holding DOC accountable for keeping prisons safe. Without accountability, abuse and misconduct can occur with impunity.

A sobering observation illuminates the stakes of this case. "Legal interpretation takes place in a field of pain and death." Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986). This assessment is not hyperbolic. "A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life." *Id*. Here too, legal interpretation stems from pain and death. Ms. Cousins lost her sister, Renee Fields, when she died in DOC custody. As such, while the issue on appeal ostensibly concerns statutory interpretation implicating the public's access to inspect records regarding DOC operations, this Court's decision will ultimately shape how transparent, accountable, and thus—safe—our state's prisons will be in coming years.

2. A "bad faith" standard will eviscerate the PRA and allow DOC to escape public scrutiny.

DOC argues equitable tolling "provides meaningful protection" when the *Dotson* rule artificially triggers an early limitations period. DOC Suppl. Br. at 19. But making

equitable tolling the default would elevate the standard for a PRA violation to "bad faith." *Id.* at 18-19; *see Price v. Gonzalez*, 4 Wn. App. 2d 67, 75, 419 P.3d 858, 863 (2018) (equitable tolling requires "bad faith, deception, or false assurances") (internal quotation marks and citation omitted). Not only is this contrary to the law, but DOC's own litigation history shows that a bad faith standard will render the PRA toothless and encourage agencies to shirk their PRA obligations, rather than deter them from doing so.

Under normal circumstances, a requestor need only show an inadequate search, regardless of culpability, to trigger penalties under the PRA. *See, e.g.*, *Neighborhood All.*, 172 Wn.2d at 717-18 (explaining agency that "timely complied but mistakenly overlooked a responsive document should be sanctioned," albeit "less severely" than agency that "withheld records in bad faith"). "State agencies may not resist disclosure of public records until a suit is filed and then avoid paying fees and penalties by disclosing them voluntarily thereafter." *Kitsap*

Cnty. Prosecuting Att'y's Guild v. Kitsap Cnty., 156 Wn. App. 110, 118, 231 P.3d 219, 222-23 (2010) (citing *Spokane Rsch. & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005)).

But that is exactly what DOC does. DOC often has little incentive to conduct an adequate initial search because under the PRA, a requestor who is incarcerated is only entitled to penalties if the agency acted in "bad faith," and DOC receives a high volume of requests from prisoners. RCW 42.56.565(1). Numerous cases show DOC regularly shirks its obligations and "closes" PRA requests until the requestor challenges its response—whether through a follow-up email, an internal agency appeal, or litigation—because its negligence is rarely penalized. Both Ms. Cousins' experience, as well as *Amici*'s own experiences, *see infra* § II.B.3, show that not only incarcerated requestors, but also those who are not incarcerated, are subject to this poor treatment. *See also* RCW 42.56.080(2)

("Agencies shall not distinguish among persons requesting records ….").

For example, in *Faulkner v. Wash. Dep't of Corr.*, 183 Wn. App. 93, 332 P.3d 1136 (2014), a prisoner requested DOC produce a completed mail log, but DOC produced a blank log. *Id*. at 97-98. DOC did not produce the requested document until *after* the requestor filed a formal agency appeal. *Id*. Division Three held there was no bad faith because "[t]he error … was the result of an inadvertent mistake in summarizing the request." *Id*. at 108.

In *Thurura v. Wash. Dep't of Corr.*, noted at 15 Wn. App. 2d 1047, 2020 WL 7231100, a prisoner requested metadata about an incident report, and DOC responded that it had no records without making any attempt to contact the author of the report. *Id*. at *2. *After* the requestor filed a lawsuit, "DOC staff performed a further search" by contacting the report's author, then "threatened to seek costs for a frivolous action if [the prisoner] went forward with his suit."

Id. Division Three concluded "the agency conducted an inadequate search" but did not award penalties. *Id*. at *5-6.

In *Padgett v. Dep't of Corr.*, noted at 9 Wn. App. 2d 1040, 2019 WL 2599159, DOC again conducted an additional search and produced certain records only *after* an incarcerated requestor filed suit. *Id*. at *3-4. The trial court concluded DOC "violated the PRA by not providing the fullest assistance … by failing to seek clarification … and simply clos[ing] the request," but found no bad faith, and Division Two affirmed. *Id*. at *5-6, *12.

In *Curtis v. Wash. Dep't of Corr.*, No. 54758-9-II, 2022 WL 1315654 (May 3, 2022) (unpublished), DOC again failed to produce documents until the incarcerated requestor sued. *Id*. at *3. The trial court concluded DOC "violated the PRA by failing to disclose the records" but found no bad faith because DOC "merely made a mistake," and Division Two again affirmed. *Id*. at *3, *6.

In *Haney v. Wash. Dep't of Corr.*, noted at 22 Wn. App. 2d 1008, 2022 WL 1579881, DOC responded to a prisoner's PRA request by producing 42 pages along with a letter stating the request was closed. *Id*. at *1-2. Ten months after the requestor filed suit, DOC produced an additional 187 pages along with a letter stating the request "remains closed." *Id*. As Division Three aptly observed, that second letter "prompts many unanswered questions." *Id*. at *2. DOC sought to dismiss the PRA claim based on statute of limitations grounds, but the court rejected its arguments. *Id*. at *5.

Here, DOC withheld over 1,000 pages until it finally recognized, through Ms. Cousins' persistence, that it had closed her request in error. *Cousins*, 25 Wn. App. 2d at 488. After it re-opened her PRA request and produced theb withheld documents, DOC sent a *second* closing letter, then produced *yet another installment*, prompting "unanswered questions" about what DOC thinks it means to "close" a request. *Id*. (describing

production of "17th installment" after second closing letter); *Haney*, 2022 WL 1579881, at *2.

Because Division Two held the statute of limitations ran from DOC's first "closing" letter, Ms. Cousins was required to prove equitable tolling—raising her burden to simply *bring* a PRA claim to the same high bar that incarcerated requestors must prove in order to receive penalties. But Ms. Cousins should not be required to show bad faith in order to bring a claim that tests the adequacy of DOC's search—especially because DOC records require particular scrutiny due to the immense control DOC holds over the lives of incarcerated people and the dangerous conditions in DOC's prisons. *See supra* § III.B.1.

And no agency should be allowed to start the clock on a PRA claim by conducting an inadequate search and then purporting to "close" the request, thereby enabling the agency to let the statute of limitations run while it works through concerns about its response with the requestor—a process that

can easily consume much of the one-year limitations period under the *Dotson* rule. Agencies do not have "the right to decide what is good for the people to know and what is not good for them to know," RCW 42.56.030, and requestors should be entitled to enforce this principle if their concerns are ultimately not addressed—not barred from doing so due to extratextual deadlines.

3. DOC's intransigence when responding to PRA requests is not limited to Cousins' request.

Amici use the PRA to protect incarcerated people and hold the DOC accountable. As PRA requestors themselves, *Amici* have insight into DOC's disregard for its PRA obligations, and the consequences of DOC's non-compliance.

For example, *Amicus* CLS recently filed suit against DOC based on DOC's extraordinary delay in producing records that may show it has been violating prisoners' constitutional rights with respect to its use of certain drug tests. *See Columbia Legal Servs. v. Wash. Dep't of Corr.*, No. 23-2-03060-34, Pet.

for Judicial Review (Sept. 21, 2023, Thurston Cnty. Super. Ct.). CLS submitted its PRA request on December 29, 2022. *Id*. ¶ 9. As CLS alleged in its petition,[9] DOC's initial response was a blank disc and a "closing" letter saying it could not locate records for most of the requests. *Id*. ¶¶ 16, 19. After CLS objected, DOC then provided a small production followed by a second "closing" letter. *Id*. ¶¶ 22, 27-29. After CLS submitted an administrative appeal, DOC reopened the request and produced another handful of responsive records. *Id*. ¶¶ 33-35. DOC then stated it would make another installment by November 21—almost one year after CLS's original request. *Id*. ¶ 35. DOC's recalcitrance has impeded CLS's investigation into DOC's potential constitutional violations, delaying CLS's ability to challenge those violations and obtain relief for the

[9] Although this Court does not "take judicial notice of records of other independent and separate judicial proceedings," *Spokane Rsch. & Def. Fund*, 155 Wn.2d at 98, *Amici* provide these personal anecdotes to illustrate the consequences of weakening the PRA.

individuals in DOC custody whose rights continue to be violated.

Similarly, *Amicus* HRDC is the entity that publishes *Prison Legal News*, a publication created for and by incarcerated people that investigates and publishes stories about the experiences of people in prison. HRDC's investigations predominantly concern conditions of confinement, corruption, and staff malfeasance. HRDC routinely utilizes the PRA to attain records and documentation that can help *PLN* evaluate, explore, and—most importantly—substantiate or disprove allegations of abuse or misconduct by DOC. *PLN*'s publication of substantiated claims of abuse sheds light on DOC operations and leads to changes in policy by instigating public scrutiny and revealing the need for accountability. These effects inevitably help make prisons safer for those who are incarcerated.

But when DOC evades its responsibilities under the PRA, HRDC is hampered, and progress toward transparency and accountability is stunted. HRDC's experience is that DOC

systematically delays production of records, and often these delays are so extreme that HRDC's investigations are frequently hamstrung.

In addition to extreme delays in the production of documents, DOC has subjected HRDC to a pervasive "trickle and close" pattern when it responds to PRA requests. Often, DOC will slowly produce negligible installments of records over the period of months or years only to finally "close" a request, even after it never actually produced all responsive records. Because the PRA is HRDC's most direct and effective means to information about the prison environment, DOC's ability to close requests without meaningfully responding to them prevents HRDC from successfully investigating abuse and misconduct. In the absence of diligent compliance with the PRA, allegations raised by incarcerated people are left inadequately investigated, and thus unaddressed.

IV. CONCLUSION

The Court should abrogate the *Dotson* rule and reverse Division Two's decision.

This document contains 4,815 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 1st day of December, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby declares that on this 1st day of December, 2023, he electronically filed the foregoing document with the Washington State Supreme Court, which will send notification of such filing to the attorneys of record listed below.

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December 01, 2023 - 4:02 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,769-3
Appellate Court Case Title:	Terry Cousins v. State of WA and Department of Corrections
Superior Court Case Number:	21-2-00050-2

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