No. 42972-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CITY OF LAKEWOOD, A Municipal Corporation of the State of Washington,

Respondent,

Vs.

DAVID KOENIG, individually,

Appellant.

CITY OF LAKEWOOD'S RESPONSE TO AMICUS, ALLIED DAILY NEWSPAPERS OF WASHINGTON, et al,

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I. INTRODUCTION

Pursuant to this Court's *Order Granting Motion to File Amicus Curie Brief* (Apr. 2, 2013), the City of Lakewood responds to the brief of Amicus, Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association and the Washington Coalition for Open Government.

II. POINTS & AUTHORITIES

Amicus' understanding of this case rests on a flawed premise: before the trial court, Mr. Koenig explicitly identified the sole alleged violation of the Public Records Act (PRA), chapter 42.56 RCW on the part of the City of Lakewood to its citation of what he termed "inapplicable exemptions," when the City redacted driver's license numbers to various requested documents. In his Answer, Mr. Koenig explicitly disavowed pursuit of any other alleged PRA violations. (CP 17, ¶ 3.5). Most of amicus' claims take up these disavowed arguments.

Worth repeating at the outset is this Court's observation pertaining to the same amici the last time these parties came before the Court,

> Amici argue that we should remand because an agency may not seek declaratory relief, only an injunction under the PRA. But, as Koenig acknowledged at the trial court, an agency facing a PRA request may seek declaratory relief to determine if an exemption applies. The remedy is an injunction. Koenig did not assign error to any finding below or challenge the City's ability to bring a suit for

> declaratory relief. Where parties raise issues to the trial court but fail to continue to press those arguments on appeal, relying instead on amici to so argue, we consider the arguments abandoned and do not address them.
>
> In addition, amici raises many arguments that Koenig never raised, such as whether a justiciable controversy or harm exists that would permit an agency to bring a declaratory judgment action. The case must be made by the parties, and its course and issues involved cannot be changed or added to by friends of the court. We decline to address issues raised only by amici. Amici's issues are their own and do not appear in the parties' briefing. Accordingly we decline to address amici's arguments.

City of Lakewood v. Koenig, 160 Wn. App. 883, 887 fn. 2, 250 P.3d 113 (2011)(internal case citations and parentheticals omitted).

As with the prior appeal, most of the issues now raised by amici largely do not appear in the parties' briefing and are wholly their own. At its crux, amicus, like Mr. Koenig, confuses two similar but legally distinct inquiries: (1) the right to receive a response; and (2) the right to inspect.

The Washington Supreme Court's decision in *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010) confirms that these are two related, but distinct, inquiries related to the actual production or withholding of records.

> [T]the penalty section does not expressly authorize a freestanding penalty for the failure to provide a brief explanation. It is the "response" that is insufficient when the brief explanation is omitted. See RCW 42.56.210(3). <u>In contrast, the right to inspect or copy turns on whether the document is actually exempt from disclosure, not whether</u>

> the response contained a brief explanation of the claimed exemptions.

169 Wn.2d at 860 (footnote and parenthetical citation omitted)(Emphasis added).

Instead of operating under this established framework, Mr. Koeing and amicus are combining the "brief explanation," requirement with the determination of whether the record is actually exempt from disclosure on the ground asserted by the agency, which as *Sanders* and its progeny confirm, are distinct inquiries. Disentangling these inquiries and putting each in their proper place, each is addressed in turn.

A. Any "Brief Explanation," Violation is Without Factual Foundation.

The first inquiry is whether the City complied with the "brief explanation," requirement. In the case at bar, there should be no reasonable dispute that the City identified and redacted driver's license numbers (among other redactions to which no issues have been raised), and provided citations to legal authority supporting its claims of exemption. (CP 75-77). Even if the City's citations to legal authority could be somehow construed as legally incorrect, the brief withholding requirement under the PRA is satisfied.

Ultimately dispositive of this issue is Mr. Koenig's responses to Interrogatory No. 10 (CP 176, 180). The City specifically asked if

whether it "made redactions or claimed an exemption to production, are there any claims of exemption or redaction which you do not understand." (CP 176 (Interrogatory No. 10)) Instead of asserting that the right to receive a response was not adhered to, Mr. Koenig cross-referenced his Answer and assert that the City "cit[ed] inapplicable exemptions". (CP 180 (Answer to Interrogatory No. 10), 17 ¶ 3.5). Implicit in Mr. Koenig's response is that (1) he was aware that the City redacted driver's license numbers; and (2) he was also aware of the grounds for the redaction. Although one may be free to disagree with the City's citations, it cannot be credibly argued that a disagreement with the City's claims of exemptions somehow equates to a denial of the right to receive a response in this context.

B. Mr. Koenig Was Not Denied the Right to Inspect a Public Record.

The second inquiry relates to the "right to inspect," inquiry. Simply stated, this inquiry is whether the withheld documents are subject to disclosure. The superior court concluded that it was. Mr. Koenig has advanced no argument either before the trial court or on appeal to suggest otherwise. Indeed, Mr. Koenig should have identified it as a PRA violation in his discovery responses.

To this end, Mr. Koenig has had three distinct opportunities in advance of this appeal to identify if -- and how -- the City failed to comply with its PRA violations in a cognizable manner. Mr. Koenig failed to do before this appeal began and he has failed to do so in his appellate briefing.

To recap:

1. Pre-litigation, the City met with silence, which this Court previously observed:

> In a letter explaining the redactions, the City informed Koenig that it believed that its response was adequate, but it gave Koenig until the close of business on December 21 to notify the City whether the responses satisfied his requests. If Koenig did not respond, the City was prepared to take "appropriate legal action to determine that it has fully complied with each of these requests." Koenig did not respond.

City of Lakewood v. Koenig, 160 Wn. App. at 886 (citation to clerks papers omitted).

2. Once suit was commenced, the City posed discovery to Mr. Koenig requesting whether he identified with particularity the ways in which the City violated the PRA. Through his responses to discovery, the City narrowed the probable violations of the PRA to one:

> Interrogatory No. 13:
> Do you maintain that the City of Lakewood otherwise violated the provisions of the Public Records Act, chapter 42.56 RCW in the processing of the public records request

> forming the basis of this litigation? If so, please state with specificity all facts upon which you base such contention.
>
> Answer:
> See paragraph 3.5 in Koenig's *Answer* regarding the redaction of driver's license numbers. By citing inapplicable exemptions the City further violated RCW 42.56.210(3).

(CP 177 (Interrogatory No. 13); CP 180 (Answer to Interrogatory No. 13)).

Of note, Paragraph 3.5 in the answer disavowed any other PRA violations, stating in relevant part: "[i]t is possible, if not likely in light of the City's prior behavior, that the City has violated the PRA in other respects. However, Koenig does not care to litigate other possible violations so the matter is moot and/or nonjusticiable." (CP 17, ¶ 3.5; Emphasis added).

3. Following remand by this Court in *City of Lakewood v. Koenig, supra*, both parties brought summary judgment motions before the Superior Court. Given that the scope of any alleged violations of the PRA had been further narrowed by the intervening decisions of *Sanders, Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 246 P.3d 768 (2011) and *Mitchell v. Dep't of Corr.*, 164 Wn. App. 597, 260 P.3d 249 (2011), holding that exemption log related issues do not serve as a "freestanding," violations of the PRA unless the record itself has been unlawfully withheld, the following discussion took place:

> [Counsel for the City]: … And I submit if you are to put the question bluntly to Mr. Koenig and counsel, you won't get a yes or no answer because if he answers that driver's license numbers should have been redacted, under *Mitchell*, City wins; if the answer is no, the City should have not redacted driver's license numbers, you are now in the position of arguably being the first judge I am aware of in the state having to make a decision should driver's license numbers be released into the wild under the Public Records Act[.]
>
> The Court: Well, let's jump into the fray and ask [Mr. Koeing's counsel]: Should driver's license ID numbers be redacted or not?
>
> [Counsel for Mr. Koenig]: Your Honor, that's not the question. The question in this case ---
>
> The Court: Well, it is my question.
>
> [Counsel for Mr. Koeing]: Well, it may be your question, Your Honor, but the point is, the City of Lakewood sued my client while we were smack in the middle of another public records case pending in front of Judge Serko. They sent my client a letter saying, "If you don't tell us we have complied with the PRA, we are going to sue you." We said, "You don't have the right to do that. And we don't want you doing it to us, and we don't want you to do it to anybody else."
>
> So no, we are not going to answer your request because you don't have the right to give out a sloppy response, and then tell the requester that if they are not satisfied, they are going to get hauled into court. …

(VRP 5-6).

This Division of the Court of Appeals observed a few weeks ago, "[a]s *Neighborhood Alliance*[1] makes clear, it is an agency's failure to produce records properly that violates the PRA, regardless of what documents the requester possesses." *Bartz v. Dep't of Corr. Pub. Disclosure Unit*, --- Wn.App. ---, ¶ 33, Wash. Ct. App. 42478-9-II & 42485-1-II (Feb. 12, 2013)(Emphasis by the Court), *pet. for review filed*, Wash. Supreme Ct. No. 88597-4 (March 12, 2013). Indeed, in some circumstances it may be incumbent upon the requestor to identify specific records and dates for the records the requestor was seeking, to guide both the agency in the processing of the request and the trial court in the analysis of the agency's alleged wrongdoing. *See id.* at ¶ 36 & fn. 20. Given the opportunity to do so, Mr. Koenig simply failed to identify any unlawful withholding.

C. The City is Not Making up an Exemption. Application of the PRA Compels the Conclusion that Drivers License Numbers are Exempt.

One final point raised by Amicus merits brief attention: amicus suggests that a ruling in the City's favor is tantamount to "creat[ing] and exemption that does not currently exist." (*Amicus Brief* at p. 14). This is nonsense. Simply because the PRA does not explicitly set forth an

[1] *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011).

exemption does not mean that the record is not exempt from disclosure. *See e.g., Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004)(recognizing that attorney-client protected materials exempt under PRA although the PRA is silent on the privilege). The test is whether the exemption is somehow rooted in the PRA. As we set forth in the *Respondent's Brief*, numerous provisions both within and outside of the PRA amply demonstrate that driver's license numbers are the type of information which ought to be protected by those governmental agencies which hold them.

CONCLUSION

Nothing raised by Amicus alters the fact that this Court should affirm the Pierce County Superior Court and award the City its reasonable attorney fees for defending against a frivolous appeal.

DATED: April 8, 2013.

By: _____
MATTHEW S. KASER, WSBA # 32239
Acting City Attorney, City of Lakewood

CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed the foregoing by using the Electronic Filing - Court of Appeals (COA) Login system available at *http://www.courts.wa.gov/secure/index.cfm?fa=secure.login&app=coaFiling2*.
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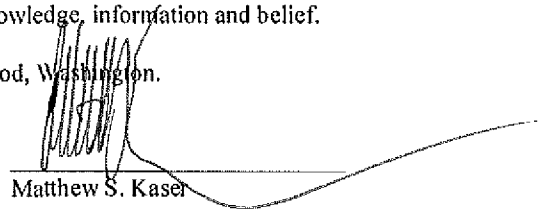
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge, information and belief.

EXECUTED this 8th April, 2013 at Lakewood, Washington.



Matthew S. Kaser

LAKEWOOD CITY ATTORNEY

April 08, 2013 - 2:41 PM

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