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No. 89648-8

SUPREME COURT OF THE STATE OF WASHINGTON

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CITY OF LAKEWOOD  
*Petitioner,*

v.

DAVID KOENIG,  
*Respondent.*

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ANSWER TO PETITION FOR REVIEW

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WILLIAM JOHN CRITTENDEN  
Attorney for Appellant

William John Crittenden, #22033  
Attorney at Law  
300 East Pine Street  
Seattle, Washington 98122  
(206) 361-5972  
wjcrittenden@comcast.net

 ORIGINAL

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Respondent David Koenig submits the following answer to the City of Lakewood's *Petition for Review* (hereafter "*Petition*").

## I. INTRODUCTION

Under the Public Records Act, Chap. 42.56 RCW (PRA), agencies have the duty to determine what specific exemptions are applicable to specific records, and to explain why such exemptions are applicable. RCW 42.56.210(3). In *Sanders v. State*, 169 Wn.2d 827, 848, 860, 240 P.3d 120 (2010), this Court held that an agency's failure to explain why records are exempt is a violation of the "right to receive a response," for which the agency is liable for attorney fees under RCW 42.56.550(4).

In a misguided effort to go on the offensive against a requester, Koenig, the City sued him for refusing to state that the City had properly redacted driver's license numbers. But the City had no idea why driver's license numbers would be exempt under the PRA. The City cited many inapplicable statutes, and its exemption theories repeatedly changed during the case. In violation of RCW 42.56.210(3) and *Sanders*, the City tried to shift the burden of proof to Koenig to show that driver's license numbers are not exempt. Koenig has simply defended this case and the basic principle that the burden of PRA compliance is on the agency.

The Court of Appeals correctly held that (i) the City violated RCW 42.56.210(3) by failing to explain its exemptions, and (ii) the City is liable

for attorney fees under RCW 42.56.550(4) and *Sanders*. *Opinion* at 2, 4-6. It was not necessary for the court to decide whether driver's license numbers are exempt under any specific PRA exemption. *Id.* at 7 n.3. Instead, the court noted, in dicta, that the lack of any express exemption for driver's license numbers was a matter for the legislature to address. *Id.*

Seeking to avoid its liability under *Sanders*, the City makes a number of procedural arguments that the Court of Appeals correctly rejected and which do not warrant review. The City also erroneously argues that an agency's PRA response is insufficient under *Sanders* only where the brief explanation required by RCW 42.56.210(3) is entirely "omitted" and not merely inconsistent or erroneous. *Petition* at 9, 16. Finally, the City erroneously asserts that the Opinion "forces local governments to violate" the Driver's Privacy Protection Act, 18 USC § 2721 et seq. (DPPA). *Petition* at 1. In fact, the City failed to brief the DPPA and the Court of Appeals did not address that statute at all.

## **II. RESPONSE TO STATEMENT OF THE CASE**

The PRA requests at issue were made while another case between the same parties was pending. In the earlier case the City repeatedly failed to explain its redactions as required by RCW 42.56.210(3), and was held liable for about \$40,000 in fees and penalties. CP 138-152.

In response to Koenig's PRA requests the City initially cited two

sections of the PRA (RCW 42.56.050; -.240) and two sections of Title 46 RCW (RCW 46.52.120; -.130) as the basis for redacting driver's license numbers and other information. CP 75-76. The City immediately threatened to take legal action against Koenig unless he notified the City in writing that the City's PRA responses were satisfactory. CP 77.

Even though a PRA requester has no duty to research exemptions or to convince an agency that records are not exempt, Koenig responded by questioning a number of the City's exemption claims. First, Koenig noted that in its earlier responses the City had asserted that driver's license numbers were exempt pursuant to the DPPA, which the City had not cited in its current response. CP 80. Second, Koenig objected that the City's citations to RCW 42.56.050 and RCW 42.56.240 were insufficient, that it was not clear which of five subsections of RCW 42.56.240 the City intended to rely upon, and that, assuming the City meant to rely on subsection (1) of RCW 42.56.240, the City had not established that driver's license numbers were private for purposes of the PRA. CP 82. Third, Koenig questioned the City's reliance on RCW 46.52.120 and RCW 46.52.130, noting that those statutes did not allow the City to redact any information from documents other than driver's license abstracts. CP 82. Finally, Koenig told the City that it had failed to explain its redaction

of driver's license numbers as required by RCW 42.56.210(3).<sup>1</sup> CP 82.

In response, the City clarified that it intended to rely on DPPA to redact driver's license numbers. CP 87. Other than that, the City refused to explain its exemptions, claiming they were "self-evident." CP 88.

The City filed this action, alleging, *inter alia*, that Koenig, as the defendant requester, had failed to acknowledge "that the City's responses are wholly satisfactory." CP 7. Koenig's *Answer* explained that a PRA requester has no duty to research an agency's exemptions or to determine whether such exemptions are correct. CP 16. Koenig's *Answer* denied that the City had properly redacted driver's license numbers. CP 17.

The City claims to have brought this case in order to prevent the accrual of daily penalties under RCW 42.56.550(4). *Petition* at 5.<sup>2</sup> But the City made no attempt to obtain a ruling on whether the driver's license numbers were exempt. Instead, the City insisted on conducting useless discovery that had absolutely nothing to do with whether the City had properly redacted driver's license numbers. The Court of Appeals

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<sup>1</sup> Koenig's letters and initial pleadings do not cite *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010), because that opinion was not issued until September 2010, while the earlier discovery appeal was pending in the Court of Appeals.

<sup>2</sup> The City alleges that Koenig intentionally delayed filing prior PRA cases to increase potential penalties under RCW 42.56.550(4), and asserts that such delay underpinned the "necessity" for this case. *Petition* at 5. The City made the same meritless, *ad hominem* allegations in the earlier discovery appeal, and the Court of Appeals correctly held that the City's allegations of delay are irrelevant in this case. *Lakewood v. Koenig*, 160 Wn. App. 883, 894, 250 P.3d 113 (2011).



quashed the City's effort to bludgeon Koenig with irrelevant discovery requests. *Lakewood v. Koenig*, 160 Wn. App. 883, 250 P.3d 113 (2011).

On remand the City finally moved for summary judgment. But the City's motion revealed that the City had no idea whether driver's license numbers were exempt or why. The City cited numerous inapplicable statutes, and made varied and inconsistent arguments about why it had redacted driver's license numbers. CP 59-71.

The City abandoned its erroneous reliance on RCW 42.56.050 (which defines "privacy" under the PRA) and the two sections of Title 46 RCW (RCW 46.52.120; -.130), and presented new exemption theories. *Id.* **The City's motion included a patently false quotation to its initial response, deleting the statutes that the City had actually cited and adding a citation to RCW 42.56.070.** The following shows the actual text of the City's initial response along with the City's creative revisions:

The City has redacted the dates of birth, and driver's license numbers ~~and social security numbers~~ of (1) the involved officer; (2) the alleged victim; and (3) the listed eyewitnesses. These redactions are made pursuant to ~~RCW 42.56.050, RCW 42.56.240, RCW 46.52.120, and RCW 46.52.130~~ RCW 42.56.070.

*Compare* CP 75-76; *with* CP 60.<sup>3</sup> The City also cited, **for the first time,**

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<sup>3</sup> To date the City has never denied, explained, or apologized for its outrageous misconduct in falsifying the quotation on page 2 of its trial court motion (CP 60). *See Reply. Br.* at 14-15; *Answer to Mot. for Recon.* at 9 n.4.

RCW 42.56.590, RCW 19.215.005, RCW 9A.56.330; RCW 9.41.070(4); GR 15; and GR 22, and also argued, for the first time and without any supporting authority, that a driver's license number is not a "public record" under the PRA. CP 63-67. Finally, the City asserted that driver's license numbers were protected by DPPA, but failed to explain how that statute actually applied to the requested records. CP 67-69.

Koenig filed a cross motion, explaining that none of the City's myriad exemption theories were correct or adequately explained, that the City had violated RCW 42.56.210(3), and that the City was liable for Koenig's attorney fees under *Sanders, supra*. CP 107-134. Koenig addressed DPPA in detail, noting that (i) the City had not established that the source of the redacted driver's license numbers was covered by DPPA in the first place, (ii) the City had not explained why disclosing records to Koenig as required by the PRA is not a "permissible use" under 18 USC § 2721(b), and (iii) the definition of "personal information" in 18 USC § 2725(3) includes a person's name, address and telephone number, but the City disclosed such information in the very same records from which the City redacted driver's license numbers. CP 119-121.

In its reply the City made no attempt to explain, defend, or retract any of its defective exemption claims, including DPPA. CP 183-190. Instead, the City attempted to shift the burden of proof to Koenig, and also

erroneously argued that the City could not be liable under *Sanders, supra*, unless Koenig demonstrated that he was entitled to driver's license numbers. CP 185-188. The trial court granted the City's motion without explaining why driver's license numbers were exempt. CP 229; RP 9.

Koenig appealed, arguing that the City had failed to explain why driver's license numbers were exempt, as required by RCW 42.56.210(3), and that the City was liable for attorney fees under *Sanders, supra*. *App. Br.* at 4. Koenig's brief explained that none of the City's exemption theories were correct or adequately explained. *App. Br.* at 11-29.

On appeal, the City changed its exemption theories again. The City's brief completely failed to address DPPA and the sections of Title 46 upon which the City originally relied. The City relied on a pastiche of statutes and court rules. *Resp. Br.* at 12-17. The City also argued that RCW 42.56.230(7) (applications for driver's licenses)—**which the City had never cited before**—"comes the closest to an express exemption" for driver's license numbers, *Resp. Br.* at 14, thereby conceding that the PRA provides no specific exemption for driver's license numbers.

The City never explained what statute, if any, provided a specific exemption for driver's license numbers. Instead, the City erroneously argued that it could not be liable under *Sanders* unless Koenig proved that the City had wrongfully withheld records. *Resp. Br.* at 5-9.

The Court of Appeals reversed, correctly holding that (i) the City violated RCW 42.56.210(3) by failing to explain its exemptions, and (ii) the City was liable for attorney fees under RCW 42.56.550(4) and *Sanders*. *Opinion* at 2, 4-6. The court found it unnecessary to decide the question of whether driver’s license numbers are exempt. However, the court correctly noted in a dicta footnote that there is no express exemption for driver’s license numbers in the PRA, and that the legislature, not the courts, should address the need for such an exemption. *Opinion* at 7 n.3.

### III. ARGUMENT

- A. **The City’s procedural arguments—that Koenig did not raise the *Sanders* issue in the trial court and that the Court of Appeals should not have reached that issue—are frivolous and do not warrant further review.**

The City devotes almost half of its *Petition* to procedural arguments about whether the Court of Appeals should have reached the issue of whether the City was liable, under *Sanders* for failing to properly explain its exemptions. *Petition* at 1-4, 7-14, 17. The City’s procedural arguments are meritless and do not warrant review.

Taking bits of Koenig’s pleadings out of context, the City argues that Koenig represented to the trial court that the “sole issue” in this case was whether driver’s license numbers are exempt. *Petition* at 1, 2. The portion of the trial court transcript quoted by the City shows that the trial

court erroneously concluded that whether driver's licenses were exempt was the "sole issue" in the case. RP 9; *see Petition* at 9-10. But the same portion of the transcript shows that Koenig objected to the trial court's characterization of the issue, and that Koenig specifically asked the trial court to state "*why*" driver's license numbers are exempt. *Id.* The court declined to answer Koenig's question. *Id.*

The City's argument about the "sole issue" in the case is a rehash of the City's false assertion that Koenig never asserted a violation of RCW 42.56.210(3) in the trial court. Koenig has exhaustively addressed the City's misleading characterization of the record. CP 194-197; *Reply Br.* at 1-3; *Answer to Mot. Recon.* at 4-9. As set forth in section II, Koenig repeatedly warned the City that its exemption claims were erroneous, and that the City had failed to explain its redactions under RCW 42.56.210(3).<sup>4</sup>

The City also argues that the only issue decided by the trial court

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<sup>4</sup> Koenig's *Answer* and responses to the City's discovery requests warned that the City had violated RCW 42.56.210(3). CP 17, 180. The City never asked Koenig to clarify his assertion that the City had violated RCW 42.56.210(3), and never attempted to explain or revise its exemption claims to comply with RCW 42.56.210(3). Instead, the City insisted on moving forward with its discovery requests that had nothing to do with the question of whether driver's license numbers are exempt or why. *Lakewood*, 160 Wn. App. at 893-894. The City also argues that the Court of Appeals' prior opinion in this case (the discovery appeal) noted that the only issue in the case was "whether the City properly redacted driver's license numbers," and that the appellate court "took a different approach" on the current appeal. *Petition* at 2, 10. The Court of Appeals understood the issues and did not accept the City's erroneous interpretation of its own prior opinion.

was whether driver's license numbers are exempt, and that the Court of Appeals "violated a basic tenant [sic] of appellate review" by ruling on an issue that the trial court did not address. *Petition* at 2, 7, 8. The City's argument is directly contrary to RAP 2.5(a), which provides that an appellate court "may refuse to review any claim of error which was not *raised* in the trial court." *Id.* (emphasis added). Koenig moved for summary judgment on the issue of liability under *Sanders* in the trial court, and the trial court denied Koenig's motion. CP 107, 132-133, 201-207, 229. Koenig appealed the denial of his motion, and the Court of Appeals correctly reached and decided the *Sanders* issue. *Opinion* at 3-4.<sup>5</sup>

Finally, the City argues that Koenig's allegedly inconsistent statements trigger judicial estoppel under *Rushlight v. McLain*, 28 Wn.2d 189, 182 P.2d 62 (1947). *Petition* at 13-14. But the City never raised this issue, or cited *Rushlight*, in the lower courts. **In fact, the City has raised the issue of judicial estoppel for the first time in its *Petition* to this Court.** The assertion that the Court of Appeals *Opinion* conflicts with *Rushlight* for purposes of RAP 13.4(b)(1) is nonsense, and the City cannot present a new legal theory in its *Petition* anyway.

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<sup>5</sup> The City also argues that Koenig failed to assign error to the trial court's ruling that driver's license numbers are exempt. *Petition* at 2, 6, 8, 20. The City made this argument for the first time in its *Mot. Recon.* at 1, 5, 7, and the Court of Appeals correctly rejected it. *Order Den. Mot. Recon.* (10/28/13) at 2.

**B. The Court of Appeals correctly followed this Court’s opinion in *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010).**

RCW 42.56.210(3) provides that “[a]gency 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 Court of Appeals correctly held that the City violated the plain language of RCW 42.56.210(3) by failing to provide the required brief explanation of its redaction of driver’s license numbers. *Opinion 4-5*. While the *Opinion* mentions only the City’s initial erroneous citations to “RCW 42.56.050,” “RCW 42.56.240,” and two sections of Title 46, the City cited numerous other statutes and court rules, and repeatedly changed its exemption theories during the litigation.

In *Sanders*, this Court unanimously held that an agency’s failure to properly explain exemptions, as required by RCW 42.56.210(3), is a violation of the “right to receive a response,” for which the agency is liable for attorney fees under RCW 42.56.550(4). *Sanders*, 169 Wn.2d at 848, 860. The Court rejected the state’s argument that there is no separate remedy for a violation of RCW 42.56.210(3), noting that agencies must have an incentive to explain exemptions at the outset. *Sanders*, 169 Wn.2d at 847. The Court also clarified its earlier opinion in *Progressive*

*Animal Welfare Society v. UW (PAWS II)*, 125 Wn.2d 243, 884 P.2d 592 (1994), holding that although an agency may change its exemption claims during an action for judicial review, such an agency is still liable for violating RCW 42.56.210(3). *Sanders*, 169 Wn.2d at 847-848.

In the lower courts the City erroneously argued that the City could not be liable for attorney fees under *Sanders* unless Koenig demonstrated that he was entitled to driver's license numbers. *Resp. Br.* at 5-9; CP 185-188. The Court of Appeals correctly rejected this argument, holding that, under *Sanders*, the City's violation of RCW 42.56.210(3) was a violation of the "right to receive a response" under RCW 42.56.550. *Opinion* at 6. The City abandons its erroneous interpretation of *Sanders* in its *Petition*.

The City's *Petition* argues that *Sanders* established a "bright line" rule under which an agency's response is insufficient only when the brief explanation is "omitted." *Petition* at 9, 16. The City takes portions of *Sanders* out of context to argue that the City complied with the PRA by providing inconsistent and erroneous explanations of why driver's license numbers were exempt. The City made this argument for the first time on appeal, *see Resp. Br.* at 5, and the Court of Appeals did not address it.

The City's new argument defeats the purpose of the explanation required by RCW 42.56.210(3), which is to allow exemptions to be "vetted for validity." 169 Wn.2d at 846. The City blithely suggests that



its erroneous exemption claims complied with RCW 42.56.210(3) because Koenig and the trial court were able to ascertain what was missing from the records. *Petition* at 15. Nothing in *Sanders, Rental Housing Ass'n v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009), or *PAWS II* supports the City's argument that an erroneous and/or incoherent explanation of redactions complies with RCW 42.56.210(3). The City's argument is contrary to *Sanders*, which holds that an agency may change its initial exemption claims in an action for judicial review, but the agency is still liable for violating RCW 42.56.210(3). *Sanders*, 169 Wn.2d at 847-848. If an erroneous explanation complied with RCW 42.56.210(3), there would be no reason for an agency to change its exemption claims.<sup>6</sup>

Finally, the City trivializes its chronic violations of RCW 42.56.210(3), erroneously suggesting that the City had "cited the law" supporting its redaction of driver's license numbers, and that its explanation of such redactions were merely "not precise enough" to satisfy Koenig. *Petition* at 16. But the City's failures to comply with RCW 42.56.210(3) in this case were much worse than the state's violations in *Sanders*, which merely failed to explain why certain records were

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<sup>6</sup> The City's arguments are also self-contradictory. In the Court of Appeals, the City argued that there was no difference between failing to provide an exemption log and providing an erroneous exemption log. *Resp. Br.* at 7. That argument directly contradicts the City's new argument that an agency's response is insufficient only where the explanation required by RCW 42.56.210(3) is "omitted." *Petition* at 16.

privileged or work product. 169 Wn.2d at 837-839. The Court of Appeals correctly followed this Court's opinion in *Sanders* in holding the City liable for its violations of RCW 42.56.210(3).

In sum, the Court of Appeals *Opinion* does *not* “missappl[y],” “confus[e],” “disregard[]” or “conflict[] with” this Court's decision in *Sanders* or any other case. *Petition* at 3, 8, 14. The City seeks to dismantle RCW 42.56.210(3) and *Sanders* in an effort to avoid its liability for attorney's fees in a case that the City should never have filed.

**C. The moot question of whether driver's license numbers *should be exempt under the PRA is a policy matter for the legislature. The City's arguments regarding federal law were not properly preserved in the Court of Appeals and are meritless.***

The City disputes the Court of Appeals' dicta observation that the lack of an express PRA exemption for driver's license numbers may be an “unfortunate oversight.” *Opinion* at n. 3; *Petition* at 1, 4, 16. But the City's *Petition* fails to explain what section of the PRA, if any, authorized or required the City to redact driver's license numbers. The City also asserts that the Court of Appeals *Opinion* “forces local governments to violate federal law,” specifically the DPPA (18 USC § 2721 et seq.). *Petition* at 1. These arguments do not warrant review by this Court.

As a threshold matter, the issue of whether driver's license numbers are exempt was not decided by the Court of Appeals, and that

issue has become moot. In response to the City's *Mot. Recon.*, Koenig explained that even if the court held that driver's license numbers were exempt under one of the many statutes cited by the City, the City would still be liable for its violation of RCW 42.56.210(3). The Court of Appeals agreed with Koenig, correctly noting that "the issue is whether the City violated the right to receive a response by failing to include a brief explanation, a violation recognized by *Sanders*, not whether the driver's license numbers were actually exempt." *Order* (10/28/13) at 2.

Even if the issue were not moot, the City's *Petition* totally fails to explain why driver's license numbers would be exempt under the PRA. In the lower courts the City inconsistently relied on numerous inapplicable statutes. *See* section II. But the *Petition* cites only DPPA (see below) and two inapplicable court rules.<sup>7</sup> *Petition* at 17-18.

Having no coherent legal theory about why driver's licenses would be exempt under the existing PRA, the City urges the Court to reverse the Court of Appeals as a matter of public policy. As the City notes, the Court of Appeals suggested that the lack of an express exemption for driver's license numbers is "worthy of legislative attention." *Petition* at 16-17.

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<sup>7</sup> This Court has adopted rules that restrict access to various personal identifiers. *See* GR 22, GR 31.1(1)(5). But this Court has clearly stated that access to court records is governed by court rules while access to other agency records is governed by the PRA. *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 792, 246 P.3d 768 (2011). This case does not involve access to court records.

But the City then leaps to the erroneous conclusion that this Court is equally capable of addressing the policy question of whether driver's license numbers should be exempt. *Id.* But the PRA does not work that way. This Court has repeatedly held that agencies must establish that a specific PRA exemption applies to particular records. *Franklin County Sheriff's Office v. Parmelee*, 175 Wn.2d 476, 480, 285 P.3d 67 (2012); *Seattle Times v. Serko*, 170 Wn.2d 581, 591, 243 P.3d 919 (2010); *Rental Housing Ass'n*, 165 Wn.2d at 535; *PAWS II*, 125 Wn.2d at 251 n.2.

Even if this Court were empowered to make up new PRA exemptions on public policy grounds there would be no reason to do so in this case. The Court of Appeals has already brought the issue of driver's license numbers to the attention of the legislature in its lengthy dicta footnote. *Opinion* at 7 n.3. A proposed PRA exemption for driver's license numbers has already been presented to the "Sunshine Committee" created by RCW 42.56.140.<sup>8</sup> Assuming, *arguendo*, that the need for such an exemption is as dire as the City suggests, the 2014 legislature will act on this issue long before the Court could even hear this case.

Finally, the City's assertion that the Court of Appeals *Opinion* "forces local governments to violate federal law [DPPA]" is nonsense.

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<sup>8</sup> See <http://www.atg.wa.gov/page.aspx?id=31534#.Urj2SLSFfqc> (last visited December 23, 2013).

*Petition* at 1. In fact, the City abandoned its DPPA theory in the trial court, failing to respond to any of Koenig's arguments about the DPPA. CP 119-121; *see* CP 183-190. Koenig's opening brief in the Court of Appeals addressed the DPPA in detail, explaining how the City's reliance on DPPA was erroneous and/or inadequately explained. *App. Br.* at 16-19. But the City did not even cite DPPA in its brief. Instead, the City chose to rely on various inapplicable state statutes, and on its erroneous argument that Koenig had the burden of proof. *Resp. Br.* at 9-17.

As a general rule, appellate courts will not address issues that have not been briefed. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 540 (1992). Not surprisingly, the Court of Appeals did not address (or even mention) the DPPA in its *Opinion*. As a result, the *Opinion* is *not* precedent on the question of whether or how DPPA applies to requests for records under the PRA. *In re Burton*, 80 Wn. App. 573, 582, 910 P.2d 1295 (1996). Contrary to the City's argument, local governments and state agencies remain free to explain how DPPA might apply to specific requests for records under the PRA.

Nor has the City ever explained why the DPPA required the redaction of driver's license numbers from the police reports requested by Koenig. The DPPA is a complex federal statute that regulates the disclosure of both "personal information" and "highly restricted personal

information” held by a state DMV. 18 USC § 2721(a). The DPPA does *not* specifically address driver’s license numbers except as part of a broader definition of “personal information,” which includes names, addresses, and other information. 18 USC § 2725(3). The DPPA restricts the use of “personal information” by a state DMV and by authorized recipients of such information. 18 USC § 2721(a),(c). The DPPA also provides a list of fourteen (14) permissible uses for which “personal information” may be disclosed. 18 USC § 2721(b).

**Koenig has repeatedly explained that DPPA is simply *not* a blanket federal exemption for driver’s license numbers.** Koenig’s cross-motion in the trial court addressed DPPA in detail, noting that (i) the City had not established the source of the redacted driver’s license numbers was covered by DPPA in the first place, (ii) the City had not explained why disclosing records to Koenig as required by the PRA is not a “permissible use” under any of the fourteen (14) exceptions in 18 USC § 2721(b), and (iii) the definition of “personal information” in 18 USC § 2725(3) includes a person’s name, address and telephone number, but the City disclosed such information in the very same records from which the City redacted driver’s license numbers. CP 119-121. But the City ignored DPPA and Koenig’s arguments in its reply. CP 183-190. The trial court did not cite DPPA in its oral or written order. RP 9; CP 229.

Koenig briefed the DPPA at the Court of Appeals, but the City completely ignored the issue again. The City seeks to revive its inconsistent reliance on DPPA in the *Petition*, but the City's arguments about DPPA are hopelessly conclusory and do not respond to any of Koenig's points (above). The City's assertion that DPPA "imposes civil liability" on anyone who discloses "personal information" under any circumstances is a ludicrous mischaracterization of DPPA. *Petition* at 19.

The City asserts that two federal cases support its reliance on DPPA. *Petition* at 18-19. It is important to note that the City never cited these cases to the Court of Appeals in either a statement of additional authority or in its *Mot. Recon.* More importantly, these cases actually highlight the City's failure to analyze the DPPA in any meaningful way. In both cases it was undisputed that the records were obtained directly from a DMV so there was no question about whether the DPPA applied to the disclosure in the first place. *Maracich v. Spears*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2191, 2196, 186 L.Ed.2d 275 (2013); *Senne v. Village of Palatine*, 695 F.3d 597, 599 (7th Cir. 2012). In this case, the City has not established that it obtained the redacted information from the Department of Licensing (DOL) in the first place. CP 120; *App. Br.* at 17-18. In many of the redacted records the driver's license number was written by hand, presumably from an investigating officer examining a person's driver's

license card. CP 162, 166, 168. Furthermore, both cases involved the improper disclosure of *names and addresses*. *Maracich*, 133 S.Ct. at 2196; *Senne*, 695 F.3d 601. **In this case the City has repeatedly failed to explain why it redacted driver's license numbers but not names and addresses in the same records.** CP 121, 160-169, *App. Br.* at 19.

In sum, the City has never presented a coherent legal theory about how or why driver's license numbers are exempt under either DPPA or the PRA. The Court of Appeals correctly held that the City is liable for its chronic violations of RCW 42.56.210(3)..

**D. Koenig is entitled to attorney fees pursuant to RAP 18.1(j) and RCW 42.56.550(4) for answering the *Petition*.**


RAP 18.1(j) provides for an award of attorney fees where such fees were awarded to a party who prevailed in the Court of Appeals and a petition for review to this Court is subsequently denied. Koenig prevailed in the Court of Appeals and was awarded attorney fees pursuant to RCW 42.56.550(4) and RAP 18.1. *Opinion* at 6. Koenig respectfully requests an award of fees for answering the *Petition* pursuant to RAP 18.1(j).

#### **IV. CONCLUSION**

The City's *Petition* does not present any issues that warrant review under RAP 13.4(b). The *Petition* should be denied, and Koenig should be awarded attorney fees pursuant to RAP 18.1(j).



RESPECTFULLY SUBMITTED this 27th day of December, 2013.

By:   
\_\_\_\_\_  
William John Crittenden, WSBA No. 22033

WILLIAM JOHN CRITTENDEN  
Attorney at Law  
300 East Pine Street  
Seattle, Washington 98122  
(206) 361-5972  
[wjcrittenden@comcast.net](mailto:wjcrittenden@comcast.net)

Attorney for Respondent David Koenig

**Certificate of Service**


I, the undersigned, certify that on the 27th day of December, 2013, I caused a true and correct copy of this pleading to be served, by the method(s) indicated below, to the following person(s):

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[mkaser@ci.lakewood.wa.us](mailto:mkaser@ci.lakewood.wa.us)

and First Class Mail to:

Matthew Kaser  
City of Lakewood  
6000 Main St SW  
Lakewood WA 98499-5027

  
\_\_\_\_\_  
William John Crittenden, WSBA No. 22033

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Dear Clerk-

Enclosed please find Koenig's Answer to Petition for Review.

William John Crittenden  
Attorney at Law  
300 East Pine Street  
Seattle, WA 98122-2029  
(206) 361-5972  
[wjcrittenden@comcast.net](mailto:wjcrittenden@comcast.net)

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