90136-8

NO. 69129-5

IN THE COURT OF APPEALS
IN AND FOR THE STATE OF WASHINGTON
DIVISION ONE

JAMES C. EGAN, *Petitioner,*

v.

CITY OF SEATTLE, *Respondent.*

PETITION FOR REVIEW

JAMES C. EGAN
Petitioner

The Law Offices of James Egan
605 First Ave Suite 400
Seattle, WA 98104
(206) 749-0333
(206) 749-5888
james@eganattorney.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR REVIEW

Pursuant to RAP Rule 13.4, petitioner James Egan[1] respectfully petitions the Washington State Supreme Court to accept review of this matter and reverse the decision published by the Court of Appeals, Division One, on February 3, 2014, Case No. 69129-5.

Mr. Egan seeks review under RAP 13.4(b)(3), as this case presents a significant question of law under the Constitutions of both the United States and the State of Washington. This case asks the Court to determine the meaning and scope of the Anti-SLAPP statute RCW 4.24.525 and the scope of the constitutional rights of petition and free speech, and to make a determination as to whether Mr. Egan's acts for which he was sued were "in furtherance" of any of those rights.

Additionally and alternatively, Mr. Egan seeks review under RAP 13.4(b)(4), as this case presents an issue of substantial public interest that should be determined by the Supreme Court. Specifically, the rules governing public access to video evidence of possible police misconduct present an issue of substantial public interest.

IDENTITY OF PETITIONER

Petitioner James Egan is a criminal defense and civil rights attorney raised and now practicing in Seattle, Washington. Mr. Egan has a

[1] For ease of reading, Mr. Egan is referred to in the third person throughout this petition.

personal and professional interest in exposing police misconduct and has devoted hours to his efforts to shine a light on abuse of police power.

CITATION TO COURT OF APPEALS DECISION

This petition seeks review of the decision published by the Court of Appeals, Division One, on February 3, 2013, Case No. 69129-5, which affirmed the dismissal of Mr. Egan's Anti-SLAPP motion in King County Superior Court under Cause No. 12-2-00938-4 SEA (The Honorable Dean Lum presiding). A copy of the decision is in this petition's appendix.

Mr. Egan filed a Motion for Reconsideration with the Court of Appeals on February 24, 2014. On March 13, 2014, the Court of Appeals denied the motion. A copy of the order denying reconsideration is in this petition's appendix.

ISSUES PRESENTED FOR REVIEW

This petition for review raises a single issue: Did Mr. Egan satisfy the threshold requirement of the Anti-SLAPP statute, RCW 4.24.525(4)(b), by showing by a preponderance of the evidence that the claim (i.e., the City's suit) was based on an action (of Egan's) involving public participation or petition?

STATEMENT OF THE CASE

Petitioner James Egan is a Seattle attorney who practices in the area of criminal defense and civil rights (42 U.S.C. § 1983) litigation. CP

111. Due to his focus on these areas of the law, Mr. Egan is frequently exposed to apparent evidence of police misconduct.

In addition to his legal pursuits, Mr. Egan also serves the public as an unofficial watchdog of police misconduct. Mr. Egan's website, for example, contains a wealth of information regarding excessive force and other forms of police misconduct, locally and regionally. CP 186-87, 189-191. Much of this information has been gathered through public records requests similar to the public records requests at issue in this case.

In one July, 2011 installment, Egan received three complete files of internal investigations conducted by the Seattle Police Department ("SPD") in response to a public disclosure request Egan had made in May, 2011 (CP 112); one of those files referenced an SPD Officer being reprimanded for, among other things, saying to a detainee: "My badge is the only thing preventing me from skull-fucking you and dragging you down the street." CP 112.

Egan's first public disclosure request for this video was denied by the SPD on the grounds that it would violate the subject's "right to privacy under RCW 9.73.090(1)(c)." CP 149. The subject was not identified, but Egan determined their identities through research and contacted them. The subject and his passenger subsequently retained Egan, who renewed the

request for the incident videos. CP 112-113. Egan received this video from March 2009 on September 9, 2011 ("Oregon/Perez video(s)"). CP 154.

In comparing the video with the Internal Investigation findings and the police report in the Oregon/Perez matter, it was immediately apparent to Egan that the officers had not been truthful in their police report or their interviews with the Office of Professional Accountability ("OPA"), an SPD department which reviews complaints of police misconduct. CP 113.

Egan identified 36 other videos reviewed by OPA in connection with other investigations of the four officers in the Oregon/Perez video. CP 157-159, ("36 videos"). These four officers (Officers Corey Williams, Brett Schoenberg, Casey Steiger and Daniel Auderer) each had about two years experience at the time of the Oregon/Perez encounter, yet all had been reviewed for misconduct several times. Egan made requests for these 36 OPA-reviewed in-car videos on September 23, 2011. CP 157-159.

On November 30, 2011, Egan finally received a response to the September 23, 2011 request, which denied the request, stating that no videos will be produced "until final disposition of any litigation which arises from the incident." CP 166-168. The City also stated (without citation) that producing these videos containing possible misconduct of officers "would violate the subject's right to privacy." CP 166-168.

The November 30, 2011 response gave Egan ten days to "appeal" to the police chief if Egan disagreed with the denial. CP 166-168. On December 7, 2011, Egan wrote a two-page appeal letter explaining why the City's interpretation of the law was incorrect. CP 170. In this letter, Egan also offered the City notice that he intended to sue and seek damages under the Public Records Act if it were determined the records were "wrongfully withheld." ("PRA"), citing RCW 42.56 *et seq.*

On December 16, 2011, the U.S. Department of Justice found that 20% of SPD's uses of force were unconstitutionally excessive and that a question of SPD's biased policing was significant. Believing SPD to be overly defensive, Egan produced in-car videos consistent with DOJ findings to widespread local and national media on December 16, 2011 (Oregon/Perez videos) and December 27, 2011 (Gebreselassie video), asking SPD's chief to be fired for not recognizing DOJ conclusions.

On December 28, 2011, Seattle Assistant City Attorney Mary Perry wrote an email to Mr. Egan stating that his December 7, 2011 appeal had been referred to her for "review and response," and that a response would be provided "on or before January 6, 2012." CP 193.

On January 4, 2012, Egan was served with this lawsuit by the City of Seattle for making the September 23, 2011 public records request and appealing the denial of the request on December 7, 2011. CP 1-7. In the

suit, the City sought a declaratory judgment that RCW 9.73.090(1)(c) controlled (and prohibited) the disclosure of the in-car videos sought by Mr. Egan. CP 7. The City also sought an injunction that would prohibit the City from duplicating any in-car videos and making them available to the public any earlier than three years after the date of the incident captured on video (when tort liability typically expires). CP 7.[2]

On January 10, 2012, Egan made an additional public disclosure request requesting the same 36 videos with their audio tracks redacted as a compromise. CP 195-196. On January 11, 2012, this second request was denied and Assistant City Attorney Perry amended the City's complaint against Egan to include an allegation that Egan had made another Public Records Request for "silent videos." CP 198, 26-33.

On February 22, 2012, Egan filed a motion to strike and dismiss the City's Amended Complaint, pursuant to RCW 4.24.525, Washington's Anti-SLAPP statute. CP 230-252.

On June 1, 2012, the King County Superior Court, the Honorable Dean Lum presiding, heard oral argument on the City's motion for an injunction and Egan's motion to strike under RCW 4.24.525. CP 525.

---

[2] The question of whether RCW 9.73.090(1)(c) prohibits disclosure of in-car video recordings for three years in the absence of actual litigation is currently before the Washington State Supreme Court in the matter of *Fisher Broadcasting v. City of Seattle,* Case No. 87271-6.

On June 26, 2012, the trial court issued an Order dismissing the City's action, awarding Egan attorney fees and costs under CR 11, and also dismissing Egan's Anti-SLAPP motion. CP 601-607.

Egan appealed the dismissal of the Anti-SLAPP motion and the City separately appealed the award of fees under CR11.[3] Oral argument was heard at the Court of Appeals, Division I, on November 12, 2014, with a panel consisting of judges Dwyer, Grosse and Lau.

On February 3, 2014, the Court of Appeals, Division I, issued a published decision affirming the Trial Court's dismissal of Egan's Anti-SLAPP motion.

Mr. Egan filed a timely Motion for Reconsideration on February 24, 2014. Reconsideration was denied on March 13, 2014 without comment by the court.

ARGUMENT

A. THIS CASE PRESENTS A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTIONS OF BOTH THE UNITED STATES AND THE STATE OF WASHINGTON.

The Court should accept review because this case presents a significant question of constitutional law.

The First Amendment to the Constitution of the United States provides: "Congress shall make no law respecting an establishment of

[3] The CR 11 appeal was litigated under Case No. 69520-1. Mr. Egan is not seeking review on this issue.

religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance." Article 1, Section 4 of the Washington State Constitution provides "The right of petition and of the people peaceably to assemble for the common good shall never be abridged;" Article 1, Section 5 holds that "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

The questions raised by this case concern the scope of the right of speech and to petition the government for redress of grievances guaranteed by the federal constitution, and also the right of speech and general right of petition in the State Constitution. This case raises the broader question of what activities are "in furtherance of" these core constitutional rights.

The constitutional dimension of this case is found in the language of RCW 4.24.525(2), which states that "This section applies to any claim, however characterized, that is based on an action involving public participation and petition."

The phrase "action involving public participation and petition" is further defined by statute as including, "Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in

connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition." RCW 4.24.525(2)(e).

Thus, the main question presented is whether Mr. Egan's actions were "in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition." *Id.* This satisfies the "significant question of law" standard under RAP 13.4(b)(3).

The constitutional dimension of this case is also apparent from the Court of Appeals decision, which announced "[b]ecause James Egan does not have a constitutional right to the records requested, his request under the PRA does not fall within the ambit of the anti-SLAPP statute as protected public participation or petition activity." *See Appendix.* While we strongly disagree with the Court of Appeals' statement of the law, it cements the fact that this case presents a significant question of constitutional law justifying acceptance of review under RAP 13.4(b)(3).

B. THIS CASE PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DECIDED BY THE SUPREME COURT.

James Egan requested the 36 videos because the SPD officers featured in the videos (Officers Williams, Schoenberg, Steiger and Auderer) had established records of misconduct reviews by OPA. The SPD responded to the request by seeking an injunction that would have

prevented not only the release of these 36 in-car videos to Mr. Egan, but also the release of any in-car videos to any other public requestors.

Evidence of police misconduct presents an issue of substantial public interest. Axiomatically, the denial of access to this evidence also presents an issue of substantial public interest.

C. PETITIONER EGAN SATISIFIED THE THRESHOLD REQUIREMENTS OF RCW 4.24.525(4)(b) AS HIS PRA REQUESTS WERE LAWFUL ACTS IN FURTHERANCE OF THE RIGHT OF PUBLIC PARTICIPATION AND PETITION.

1. Standard of review is *de novo*.

The question of whether Mr. Egan satisfied the threshold requirement of RCW 4.24.525(4)(b) is a question of law reviewed *de novo*. *Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 687, 167 P.3d 1112 (2007) (application of law to undisputed facts of case reviewed de novo).

2. A motion to strike under RCW 4.24.525 is available in response to any cause of action, no matter how characterized.

RCW 4.25.525(2) states: "This section applies to ***any claim, however characterized***, that is based on an action involving public participation or petition." (Emphasis added) For purposes of this section, the "claim" is the City's complaint for declaratory and injunctive relief.

Because the section applies to "any claim, however characterized," there is no need to read the Anti-SLAPP statute in conjunction with any

other statute because the nature of the other statute is irrelevant. There is no need to read the Anti-SLAPP statute in conjunction with RCW 42.56.540; Anti-SLAPP is a procedural overlay applying to "any claim."[4] Whether the City's claim is otherwise authorized by the PRA is simply not before the Court, as the Legislature has already decided that an action under RCW 42.56.540 can be met with an Anti-SLAPP motion.

3. Mr. Egan's attempts to obtain the 36 videos were lawful acts in furtherance of the right of petition and speech on matters of public concern, thereby satisfying the threshold requirement of RCW 4.24.525(4)(b).

There is little case law in Washington regarding the threshold burden on the moving party in an Anti-SLAPP motion and the decision in this case, if left intact, would set very bad precedents.

Because Anti-SLAPP litigation in Washington State is a recent development, Washington courts frequently look to California courts for guidance. Washington's Anti-SLAPP law is "patterned after California's Anti-SLAPP Act." *Aronson v. Dog Eat Dog Films*, 738 F. Supp.2d 1104, at 1109 (2010). "[P]arties cite to California law as persuasive authority for interpreting the Washington amendments" *Id.* at 1110. Since it is of "recent vintage, ...[t]his court looks to California precedent as persuasive authority concerning the new Anti-SLAPP statute." *Castello v. City of*

[4] Nor is there any reason for the Court to analyze cases construing RCW 42.56.540, e.g., *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007).

Seattle, No. C10-14 57 MJP, 2010 U.S. Dist. LEXIS 127648; 39 Media L. Rep. 1591; 2010 WL 4857022 (USDC. W. Wash. 2010).

Three reported California cases are illustrative or on point with respect to the petition: *Dove Audio v. Rosenfeld, Meyer & Susman,* 47 Cal.App.4th 777, 54 Cal.Rptr.2d 830 (1996), *Equilon Enterprises v. Consumer Cause, Inc.,* 29 Cal.4th 53, 124 Cal.Rpter.2d 507, 52 P.3d 685 (2002) and *City of Cotati v. Gene Cashman, et al.,* 29 Cal.4th 69, 124 Cal.Rptr.2d 519, 52 P.3d 695 (2002).

Dove Audio is especially instructive because it establishes that Mr. Egan's pre-litigation activities (communications contemplating legal action) were "in furtherance of the constitutional right of petition," and thus satisfy the threshold requirement of RCW 4.24.525(4).

Equilon Enterprises and *City of Cotati* are also instructive for free speech reasons as well by reducing the burden of proof on an Anti-SLAPP plaintiff, by establishing no need to show either an intent to chill or an actual chilling effect caused by the other party's claim. We believe the Court of Appeals wrongly placed these burdens on Mr. Egan.

a. *Dove Audio*

In *Dove Audio,* a representative of Audrey Hepburn's estate learned that royalties from a recording entitled "Carnival of the Animals" were not being paid to the American Society for the Prevention of Cruelty

to Animals as required by Hepburn's contract with defendant Dove Audio. *Dove Audio,* 47 Cal.App.4th at 780. Attorneys for the estate then contacted other celebrities who had provided voices for "Carnival of the Animals." *Id.* These celebrities had designated charities other than the ASPCA to receive royalties from the "Carnival of the Animals" and the law firm representing Hepburn's estate learned that the other charities had also been deprived of their assigned royalties. *Id.* The contact letter from the law firm asked each of the celebrities to endorse the law firm's efforts to file a joint complaint with the California State Attorney General's office. *Id.*

Dove Audio then filed suit in state court against the law firm and other defendants based on the firm's letter, claiming libel and interference with economic relationships. *Dove Audio,* 47 Cal.App.4th at 780.

The law firm moved to dismiss the complaint under California's Anti-Slapp statute, California Code of Civil Procedure § 425.16. *Dove Audio,* 47 Cal.App.4th at 780-1. The trial court dismissed the suit on litigation privilege grounds, granted the Anti-SLAPP motion, and awarded the law firm fees and costs over $28,000. *Id.* at 781. Dove Audio appealed.

The California Court of Appeal, Second District, Fourth Division, analyzed the case under § 425.16(b), which states in relevant part that, "A cause of action against a person arising from any act of that person in

furtherance of the person's right of petition...shall be subject to a special motion to strike." *Dove Audio,* 47 Cal.App.4th at 783.

This language tracks closely with RCW 4.24.525(2)(e), holding that "an action involving public participation and petition" includes "[A]ny other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition." Notably, the scope of protected activity is clearly broader in Washington than in California, as the Anti-SLAPP plaintiff in California must show that he or she was acting in furtherance of his or her own right of petition, where an Anti-SLAPP plaintiff in Washington need only show that the acts were in furtherance of the right of petition in general.

In affirming the trial court's granting of the Anti-SLAPP motion, the Court of Appeals observed that, "[t]he constitutional right to petition...includes the basic act of filing litigation or otherwise seeking administrative action." *Dove Audio,* 47 Cal.App.4th at 784, citing *Ludwig v. Superior Court*, 37 Cal.App.4th 8, 19 (1995). The court then held: "RM&S's letter seeking support for its petition to the Attorney General for an investigation of appellant's royalty payments to designated charities is similarly entitled to the protection of section 425.16 for its act in furtherance of its constitutional right of petition." *Id.*

Under the *Dove Audio* analysis it should be readily apparent that Mr. Egan's written requests to obtain the 36 videos were basic and completely lawful acts towards the right of petition for those records.

The *Dove Audio* opinion is also insightful for establishing that the underlying dispute in an Anti-SLAPP case does not itself have to revolve around a constitutional right, because the lawful conduct of speech about future petition activity is itself constitutional.[5]

b. *Equilon Enterprises*

Equilon Enterprises is especially useful because it stands for the proposition that an Anti-SLAPP plaintiff does not have to allege or prove that the other party acted with an "intent to chill" the plaintiff's exercise of protected constitutional rights. We feel the Court of Appeals improperly placed this burden on Egan when rendering its decision in this case.[6]

In *Equilon Enterprises* a consumer advocacy group, Consumer Cause, Inc., served intent to sue notices on Shell Pipe Line Corporation and Texaco, Inc., both of which were predecessors in interest to Equilon Enterprises. *Equilon Enterprises,* 29 Cal.4th at 57. The notices were

---

[5] This negates the reasoning of the Court of Appeals, which premised its ruling on the incorrect belief that Egan was required to establish a constitutional right to obtain the videos in order to employ anti-SLAPP. The Court of Appeals overlooked *that Speech which contemplates exercising Petition rights* – most certainly on matters of public concern – *is inherently constitutional* and therefore subject to anti-SLAPP protections.

[6] The published opinion contains several references to the City's rationale and subjective reasons for filing suit against Egan. Under *Equilon Enterprises,* the City's subjective intent is irrelevant to the Anti-SLAPP analysis, so the opinion's language is misleading.

authorized by Proposition 65, which is codified at California Health & Safety Code § 25249.7(d). *Id.*

Equilon responded to the Proposition 65 notices by filing a lawsuit seeking declaratory and injunctive relief, just as the City of Seattle responded to Egan's efforts with a suit for declaratory and injunctive relief. *Equilon Enterprises,* 29 Cal.4th at 57. Consumer Cause responded by moving to strike the complaint under the Anti-SLAPP statute, § 425.16. *Id.* The trial court granted to motion to strike and Equilon appealed. *Id.*

California's Anti-SLAPP statute contains the following preamble: "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Cal. Code of Civ. Procedure § 425.16(a).

Washington's Anti-SLAPP statute contains similar language in the form of legislative findings: "The legislature finds and declares that: (a) It is concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." RCW 4.24.525, Note 1, Findings—Purpose.

Relying on the language in the California preamble, Equilon argued on appeal that the law contained an "intent to chill" requirement and that Consumer Cause had to prove that Equilon intended to chill its

exercise of the constitutional right of petition. The California Supreme Court rejected this argument. *Equilon Enterprises,* 29 Cal.4th at 57.

The *Equilon* court began by analyzing the plain language of the statute, finding "[S]ection 425.16 nowhere states that, in order to prevail on an anti-SLAPP motion, the defendant must demonstrate that the plaintiff brought the cause of action complained of with the intent of chilling the defendant's exercise of speech or petition rights. There simply is 'nothing in the statute requiring the court to engage in an inquiry as to the plaintiff's motives before it may determine [whether] the anti-SLAPP statute is applicable'" *Equilon Enterprises,* 29 Cal.4th at 58. Likewise, it would be improper for this Court to require Egan to establish that the City intended to chill Egan's constitutional right of petition or speech.

c. *City of Cotati*

City of Cotati was decided as a companion case to *Equilon Enterprises* and provides further guidance on the proper scope of inquiry in Anti-SLAPP cases. *Cotati* goes beyond *Equilon Enterprises* by establishing an Anti-SLAPP plaintiff does not have to show that the other party's acts had an actual chilling effect on the moving party's constitutional rights.

In this case, the Court of Appeals explicitly based its decision in part on the fact that Mr. Egan could not show an actual chilling effect on

his constitutional right to petition. "The City's declaratory action did not interfere with Egan's right to petition." Opinion, p.4.

In *City of Cotati,* the owners of mobile home parks sued the city in federal court to invalidate the City's rent stabilization ordinance. *City of Cotati,* 29 Cal.4th at 71. The City then sued the owners in state court seeking a declaration that the rent control ordinance was valid and enforceable. *Id.* at 72. The owners then moved in the state court action to strike the city's complaint under § 425.16. *Id.* The trial court granted the owners' motion to strike. *Id.* at 73. The Court of Appeal reversed that decision and reinstated the City's suit. *Id.* The California Supreme Court then accepted review. *Id.* Among the issues considered on review was whether an Anti-SLAPP plaintiff must show that his or her exercise of constitutional rights was actually chilled by the other party's action. *Id.* at 74. In reasoning that paralleled the *Equilon Enterprises* analysis, the court observed that "section 425.16 nowhere states that, in order to prevail on an anti-SLAPP motion, a defendant must demonstrate that the cause of action complained of has had, or will have, an actual effect of chilling the defendant's exercise of speech or petition rights." *Id.* at 75. "The fact that the Legislature expressed a concern in the statute's preamble with lawsuits brought 'primarily' to chill First Amendment rights does not mean that a court may add this concept as a separate requirement in the operative

sections of the statute." *Id.,* citing *Damon v. Ocean Hills Journalism Club,* 85 Cal.App.4th 468, 480 (2000). Accordingly, it would be improper for this Court to require Egan to show that the City's suit actually interfered with his rights of petition or speech.

REQUEST FOR ATTORNEY'S FEES

RAP 18.1 authorizes an award of attorney's fees on appeal where the underlying statute authorizes an award of fees. Egan should be awarded fees under RCW 4.24.525(6)(a)(i), which provides that the court shall award attorney's fees plus $10,000 to an Anti-SLAPP plaintiff who prevails in whole or in part.[7]

CONCLUSION

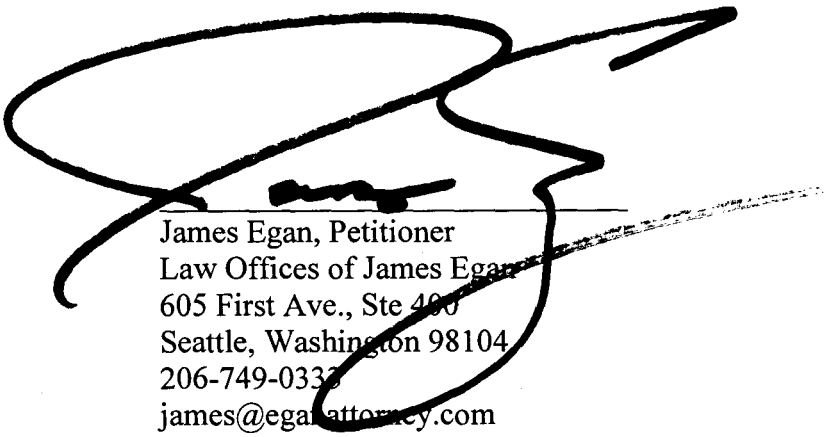
Review should be granted in this matter because Mr. Egan's communications giving rise to the City's suit were lawful acts of free speech concerning the exercise of future petition rights, which also happened to be public and on an issue of public concern (i.e., police misconduct within SPD immediately after DOJ findings). As is clear from *Dove Audio*, the "constitutional right of petition" is broad, and the scope of "acts taken in furtherance of" is even broader. Naturally, speech about

[7] If the Anti-SLAPP motion were frivolous or for unnecessary delay, Mr. Egan could equally be charged with $10,000 plus attorney fees; the City has never suggested such in this logical case of first impression, nor has City sought fees under 4.24.525(6)(b).

and in furtherance of petition rights is lawful conduct falling within the realm of "public participation and petition."

Upon accepting review, this Court should take care to ensure that the scope of inquiry exactly matches that required by the issue presented. Specifically, this Court should analyze the language of RCW 4.24.525 ***and no other statute.*** The Court should not consider the *nature* of the City's action because the Anti-SLAPP statute applies to "any claim, however characterized;" that issue has already been legislated. Likewise, the Court should not consider either the City's subjective intent or the actual effect of the City's suit. Under guiding case law, the inquiry limits to Mr. Egan's lawful conduct in furtherance of the related constitutional rights of petition or free speech on matters of public concerns, on which the City's lawsuit was admittedly based.

Respectfully submitted this the 14 day of April, 2014.



James Egan, Petitioner
Law Offices of James Egan
605 First Ave., Ste 400
Seattle, Washington 98104
206-749-0333
james@eganattorney.com

Daniel Nelson states and declares as follows:

1. I am over the age of 18, am competent to testify in this matter, am a Legal Assistant at the Law Offices of James C. Egan, and make this declaration based on my personal knowledge and belief.

2. On April 14, 2014, I delivered a copy of Petition for Review to:

Mary F. Perry
Assistant City Attorney
Seattle City Attorney's Office
600 Fourth Avenue, 4th Floor,
Seattle, WA 98124-4769

Washington State Court of Appeals Division 1
600 University St
One Union Square
Seattle, WA 98101-1176

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED in Seattle, Washington, this 14th day of April, 2014.

Daniel Nelson
Legal Assistant

Lee Rousso states and declares as follows:

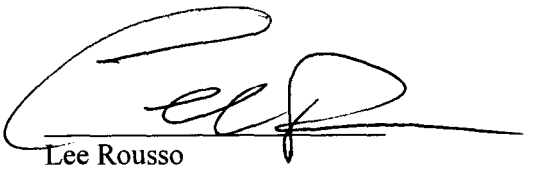
1. I am over the age of 18, am competent to testify in this matter, am an Attorney at the Law Offices of James C. Egan, and make this declaration based on my personal knowledge and belief.

2. On April 14, 2014, I delivered a copy of Petition for Review to:

Phil Talmadge
18010 Southcenter Pkwy
Tukwila, WA 98188-4630

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED in Seattle, Washington, this 14th day of April, 2014.



Lee Rousso
WSBA #33340

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CITY OF SEATTLE, a Washington municipal corporation, Respondent, v. JAMES EGAN, an individual, Appellant.	)	No. 69129-5-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, James Egan, has filed a motion for reconsideration herein. The court has taken the matter under consideration and has determined that the motion for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Done this 12th day of March, 2014.

FOR THE COURT:

Grosse, J

Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF SEATTLE, a Washington municipal corporation,	)	No. 69129-5-I
Respondent,	)	DIVISION ONE
v.	)	PUBLISHED OPINION
JAMES EGAN, an individual,	)	
Appellant.	)	FILED: February 3, 2014

GROSSE, J. — The Public Records Act (PRA), chapter 42.56 RCW, is a legislatively created right of access to public records. The legislature is free to restrict or even eliminate access without offending any constitutional protection. The city of Seattle (City) brought a declaratory action for the limited purpose of determining the applicability of the privacy act's[1] prohibitions against the release of the records requested here. Such an action is specifically provided for in the PRA. Because James Egan does not have a constitutional right to the records requested, his request under the PRA does not fall within the ambit of the anti-SLAPP[2] statute as protected public participation or petition activity. We affirm the trial court's dismissal.

FACTS

On September 23, 2011, James Egan requested records from the Seattle Police Department's Office of Professional Accountability's (OPA) internal investigation, regarding complaints against four officers. Included in the request were 36 "dash-cam" videos that OPA reviewed in the investigations of those

[1] Ch. 9.73 RCW.
[2] Strategic Lawsuits Against Public Participation, RCW 4.24.525.

complaints. The City provided Egan with some records but refused to release 35 of the 36 dash-cam videos, claiming those were exempt from disclosure under RCW 9.73.090(1)(c). RCW 9.73.090(1)(c) prohibits the City from providing videos to the public until final disposition of any criminal or civil litigation that arises from the event or events that were recorded.[3]

Egan disputed the application of that exemption and threatened to sue. The City filed a motion for declaratory judgment and a preliminary injunction against Egan. RCW 42.56.540 authorizes a court to enjoin production of a public record falling under an exemption. The City wanted to resolve any uncertainty and to avoid the accumulation of potential penalties should Egan delay suing. The City noted that it was involved in a pending lawsuit in which access to dash-cam videos was one of the issues.[4]

Egan filed a motion to strike and dismiss the City's suit under RCW 4.24.525, Washington's anti-SLAPP statute. Egan appeals the trial court's denial of that motion.

ANALYSIS

A strategic lawsuit against public participation—otherwise known as a "SLAPP" suit—is a meritless suit filed primarily to chill a defendant's exercise of

---

[3] RCW 9.73.090(1)(c) provides:

> No sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until final disposition of any criminal or civil litigation which arises from the event or events which were recorded. Such sound recordings shall not be divulged or used by any law enforcement agency for any commercial purpose.

[4] Fisher Broadcasting v. City of Seattle, No. 87271-6, argued before the Supreme Court on May 14, 2013.

First Amendment rights.[5] This court reviews the denial of an anti-SLAPP motion de novo.[6] To prevail on a motion to dismiss Egan was required to prove by a preponderance of the evidence that his claim was based on an action involving public participation and petition.[7] RCW 4.24.525(2) defines public participation and petition as

> (a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
>
> (b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
>
> (c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
>
> (d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

---

[5] LAWS OF 2010, ch. 118, §1. Under LAWS OF 2002, ch. 232, § 1, amending former RCW 4.24.510, "SLAPP suits are designed to intimidate the exercise of First Amendment rights and rights under [a]rticle I, section 5 of the Washington [S]tate Constitution."

[6] City of Longview v. Wallin, 174 Wn. App. 763, 776, 301 P.3d 45, rev. denied, 178 Wn.2d 1020 (2013); see Eugster v. City of Spokane, 139 Wn. App. 21, 33, 156 P.3d 912 (2007) (The interpretation and application of a statute are reviewed de novo.)

[7] RCW 4.24.525(4)(b) provides:

> A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

> (e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

Egan argues that all of the subsections apply to the present case. We disagree.

Here, the City's declaratory judgment action under RCW 42.56.540 asked the court to determine whether the City had properly applied RCW 9.73.090(1)(c) in denying Egan's PRA request for the dash-cam videos. Under that statute, Egan is a necessary party. Because the legislature's intent in adopting RCW 4.24.525 was to address "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances,"[8] this court looks to First Amendment cases to aid in its interpretation. Egan argues the anti-SLAPP statute applies because the City sought relief because of Egan's "threat" to sue. But the gravamen of the City's suit was whether a PRA exemption applied to Egan's original request, not to suppress Egan's right to bring an action. There was no question that Egan retained his right to bring an action under the PRA. But Egan was a necessary party under RCW 42.56.540.[9] The City's declaratory action did not interfere with Egan's right to petition. In John Doe No. 1 v. Reed, the United States Supreme Court distinguished disclosure requests under the Washington PRA from activity protected by the First Amendment, stating "the PRA is not a prohibition on

---

[8] LAWS OF 2010, ch. 118, §1(a).

[9] Burt v. Wash. State Dep't of Corr., 168 Wn.2d 828, 833, 231 P.3d 196 (2009) (holding that a person who requests public records is a necessary party and must be joined in any action brought under RCW 42.56.540).

speech, but a disclosure requirement."[10] "[D]isclosure requirements may burden the ability to speak, but they . . . do not prevent anyone from speaking."[11]

The policy of the PRA requires a court to recognize "that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment." RCW 42.56.550(3).[12] That mandate for disclosure is in the public interest and is circumscribed by the exemptions created by the legislature. Our Supreme Court noted that although the PRA ""is a strongly worded mandate for broad disclosure of public records,"" . . . "where an exemption applies, disclosure is not appropriate."[13] RCW 42.56.070.

The United States Supreme Court revealed that there is not a general constitutional right of access to government information.[14] Accordingly, Washington is not compelled by the First Amendment to provide information to Egan. Instead its obligation to provide the public records to him arises under state law.[15]

---

[10] 561 U.S. 186, 130 S. Ct. 2811, 2813-14, 177 L. Ed. 2d 493 (2010).
[11] Reed, 130 S. Ct. at 2818 (alterations in original).
[12] Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 261 P.3d 119 (2011).
[13] Yakima v. Yakima Herald-Republic, 170 Wn.2d 775, 791, 246 P.3d 768 (2011) (quoting Soter v. Cowles Publ'g Co., 162 Wn.2d 716, 731, 174 P.3d 60 (2007) (quoting Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)).
[14] See Houchins v. KQED, Inc., 438 U.S. 1, 98 S. Ct. 2588, 57 L. Ed. 2d 553 (1978) (holding that the right of access to government information or sources of information within the government's control is not mandated by the First or Fourteenth Amendments).
[15] Shero v. City of Grove, Okl., 510 F.3d 1196, 1201 (10th Cir. 2007).

Egan relies on Equilon Enterprises, LLC v. Consumer Cause, Inc.,[16] as support for his claim that the City's action for declaratory and injunctive relief arises from his protected speech. There, the consumer group defendant served the oil company with notices of intent to sue for alleged violation of Proposition 65 for groundwater pollution. Instead of requesting the consumer group to clarify its notice, the oil company filed a lawsuit for declaratory and injunctive relief, seeking a declaration that the notice did not comply with the California Code of Regulations.[17] The trial court granted the consumer group's motion to strike the complaint under the anti-SLAPP statute.[18] The Court of Appeals and Supreme Court agreed, ruling that the plaintiff's action for declaratory and injunctive relief arose from the consumer group's activity in furtherance of its constitutional rights of speech or petition. Those facts are markedly different than the facts of this case. Here, there was a dispute over whether the City correctly denied Egan's requests, and the City sought guidance in the manner prescribed by the PRA statute.

This case is more similar to a subsequent case dealing with Proposition 65. In American Meat Institute v. Leeman,[19] the California court held that a declaratory judgment action brought by two trade associations was not a SLAPP action, where the associations sought a determination that the Federal Meat Inspection Act preempted Proposition 65. In so holding the court noted:

---

[16] 29 Cal. 4th 53, 52 P.3d 685 (2002).
[17] Equilon, 29 Cal. 4th at 57-58.
[18] Equilon, 29 Cal. 4th at 57.
[19] 180 Cal. App. 4th 728, 739, 102 Cal. Rptr. 3d 759, 767 (2009).

> One purpose of declaratory relief is "to liquidate doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation." . . . "One test of the right to institute proceedings for declaratory judgment is the necessity of present adjudication as a guide for plaintiff's future conduct in order to preserve his legal rights."[20]

Likewise Egan's reliance on Dove Audio, Inc. v. Rosenfeld, Meyer & Susman[21] is misplaced. There, the California court held that a letter from a law firm soliciting celebrity support for efforts to file a complaint against a publishing firm for alleged failure to pay royalties on audio recordings of prominent celebrities fell within the scope of the anti-SLAPP statute. In Dove, the underlying activity was the lawyer's letter, not a controversy between the parties.

The fact that one party's protected activity may have triggered the other party's cause of action does not necessarily mean the cause of action arose from the protected activity. In City of Cotati v. Cashman,[22] the parties disputed the validity of a rent stabilization ordinance applicable to mobile home parks. Owners of the mobile home parks sued the city in federal court challenging the ordinance. In response to that suit, the city filed its own action in state court. The owners then claimed that the city's state court action arose out of their pursuit of the federal action which qualified as a protected petitioning activity and therefore fell within the penumbra of the anti-SLAPP statute. In determining that it was not a SLAPP action, the California Supreme Court explained that even if the filing of the federal action triggered the city's decision to file its own action in

---

[20] Leeman, 102 Cal. Rptr. 3rd at 768-69 (internal quotation marks omitted) (quoting Meyer v. Sprint Spectrum L.P., 45 Cal. 4th 634, 647, 200 P.3d 295, 303-04 (2009)).
[21] 47 Cal. App. 4th 777, 54 Cal. Rptr. 2d 830 (1996).
[22] 29 Cal. 4th 69, 52 P.3d 695 (2002).

state court, the state court claims were not based on the federal court action. Instead both actions arose from the parties' underlying controversy.[23] Here, as in Cashman, although the "threat" of a suit may have pushed the City to act it was not the "gravamen" of the underlying action.

Further, to hold that the anti-SLAPP statue would prohibit the City from seeking declaratory and injunctive relief would vitiate the section of the PRA expressly providing for such actions. We must read the PRA and the anti-SLAPP statute to be in harmony:

> The principle of reading statutes in pari materia applies where statutes relate to the same subject matter. . . . Such statutes must be construed together. . . . In ascertaining legislative purpose, statutes which stand in pari materia are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.[24]

Because we construe the PRA to allow the City to seek declaratory and injunctive relief and we determine that the City's action was not primarily concerned with limiting Egan's protected activity, we conclude the anti-SLAPP statute does not apply here.

We affirm the trial court's dismissal of Egan's anti-SLAPP motion.

WE CONCUR:

[23] Cashman, 52 P.3d at 703.
[24] Hallauer v. Spectrum Props., Inc., 143 Wn.2d 126, 146, 18 P.3d 540 (2001) (internal quotation marks and citations omitted).