

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

CITY OF LAKEWOOD
Respondent,

v.

DAVID KOENIG,
Appellant.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The Public Records Act, Chap. 42.56 RCW (“PRA”) requires agencies to explain the application of specific PRA exemptions to requested records, and to prove the applicability of such exemptions in court. RCW 42.56.210(3); -550(1). In this case, the City failed to explain why driver’s license numbers are exempt, and has failed to carry its burden of proof. In an effort to avoid paying the attorney fees that the City forced Koenig to incur in this lawsuit, the City seeks to dismantle the PRA by shifting the burden of PRA compliance to the requester.

II. REPLY TO STATEMENT OF THE CASE

A. **Koenig’s *Answer* specifically denied that the City had properly redacted driver’s license numbers.**

The City misleadingly asserts that Koenig “did not identify any documents which he believed were wrongfully withheld.” *Resp. Br.* at 3. Koenig has never asserted that any records have been withheld *in their entirety*, but Koenig has consistently stated that the City erroneously redacted driver’s license numbers (DLNs). The City intentionally omits that part of Koenig’s *Answer* (CP 17) which specifically denies that the City had properly redacted driver’s license numbers:

3.5 Denied. The City has redacted driver’s license numbers from requested records based on the erroneous assertion that such information is exempt pursuant to the Federal Driver’s Privacy Protection Act, 18

USC §2721 (FDPPA), *Reno v. Condon*, 528 U.S. 141, 120 S.Ct. 666, 145 L.Ed.2d 587 (2000), RCW 42.56.050, RCW 42.56.240, RCW 46.52.120, and or RCW 46.52.130.

B. Koenig repeatedly warned the City its erroneous exemption claims for driver's license numbers violated RCW 42.56.210(3).

The City takes bits of Koenig's interrogatory answers out of context to create the misleading impression that Koenig never objected to the City's chronic failure to comply with RCW 42.56.210(3). *See Resp. Br.* at 3. But the City ignores both the relevant part of Koenig's *Answer* (see above) as well as the record, which shows that Koenig has clearly, consistently, and repeatedly informed the City that its exemption claims with respect to driver's license numbers (DLNs) were erroneous and that the City had violated its duties under RCW 42.56.210(3). Furthermore, the City has already been found to have violated RCW 42.56.210(3) by failing to provide proper explanations of its exemptions. CP 147-149.

In the earlier *Koenig v. Lakewood* case, the City repeatedly failed to comply with RCW 42.56.210(3). In May 2007, Koenig asked the City to provide an exemption to explain how specific exemptions applied. CP 143-144. Koenig repeated his demand for an exemption log in June 2007. CP 145. In August 2007, the trial court (Judge Serko) found the City in violation of the PRA, and ordered the City "to comply with the requirements of RCW 42.56.210(3)." CP 147. On August 30, 2007, the City "was still out of compliance with the PRA, and was directed by the

Court to clarify its exemption claims for a second time.” CP 149. These chronic violations of the PRA contributed to the City being held liable for approximately \$40,000 in attorney fees and statutory penalties. CP 152.

Unfortunately, the City did not learn its lesson in the first lawsuit. By letter dated December 21, 2007—before the current case was filed—Koenig asked the City to “Please explain these redactions [of driver’s license numbers] as required by *PAWS II* and RCW 42.56.210(3).” CP 82. Koenig’s answer stated that the requester has no obligation to research PRA exemptions or to tell the City whether its exemptions were correct. CP 16. The City never asked Koenig to clarify his assertion that the City had violated RCW 42.56.210(3). Nor did the City attempt 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 absolutely nothing to do with the question of whether driver’s license numbers were exempt or why. In his response to the City’s motion to compel discovery, Koenig clearly stated that the City was required to explain its exemptions under RCW 42.56.210(3). CP 365. And in the prior appeal, Koenig repeatedly stated that the City was required to explain its exemptions under RCW 42.56.210(3). *E.g., Lakewood v. Koenig*, No. 38657-7-II, *Mot. for Stay* (12/12/08) at 3; *Reply on Mot. for Stay* (12/22/08) at 9; *Mot. for Discr. Review* (1/6/09) at 3.

C. The City's allegations of intentional delay by Koenig are both irrelevant and false.

The City repeats its tiresome allegation that Koenig intentionally delayed filing other PRA cases in order to increase potential penalties under RCW 42.56.550(4). The City alleges this as its justification for seeking declaratory relief in this case. *Resp. Br.* at 1, 10. This Court has already held that the City's allegations of delay are irrelevant in this case. *Lakewood v. Koenig*, 160 Wn. App. 883, 886 n.1, 250 P.3d 113 (2011).

Nor is there any factual basis for the City's claims of intentional delay in other cases. The City has identified two other cases in which Koenig waited until the last day to file and serve the defendant agency. *Resp. Br.* 1, 10. So what? The City acknowledges that Koenig has been involved in at least a dozen cases. CP 244. The fact that Koenig waited to the last day to file two of those cases proves nothing.

III. ARGUMENT

A. The City seeks to dismantle the Public Records Act by shifting the burden of proof to the requester.

The PRA is designed to provide ordinary citizens the best possible access to public records. *See* RCW 42.56.030; -.100. To achieve that goal, the PRA explicitly places the burden of PRA compliance exclusively on the agencies. Requesters have no obligation to explain why records have been requested, and agencies may not distinguish among requesters.

RCW 42.56.080. A requester has only the obligation to make a specific request for identifiable public records. *Beal v. Seattle*, 150 Wn. App. 865, 872, 209 P.3d 872 (2009). Once such a request is made, the agency must fulfill a number of specific duties under the PRA.

First, the PRA unambiguously places the burden of compliance on the agency, not the requester.

Each agency ... shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of ... this chapter, or other statute which exempts or prohibits disclosure of specific information or records.

RCW 42.56.070. Second, if any records or information are exempt, the agency has a duty to explain why such records or information are exempt.

Agency 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.

RCW 42.56.210(3); *see also* RCW 42.56.520. Third, the agency has the burden of proof to show that any exemptions or redactions are proper.

The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

RCW 42.56.550(1). Having repeatedly violated its duties under the PRA, and having failed to carry its burden of proof in the trial court, the City

attempts to shift the burden of proof to Koenig. Not surprisingly, the City ignores its burden of proof under RCW 42.56.550(1), and avoids any discussion of its duties under RCW 42.56.210(3).

The City attempts to shirk its burden of proof by blithely asserting that the *do novo* standard of review is “simple and succinct.” *Resp. Br.* at 5. The standard of review and the burden of proof are *not* the same thing. The issue to be determined *de novo* is whether the City has carried its burden of proof to show that its redaction of driver’s license numbers “is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.” RCW 42.56.550(1).¹

The City variously argues that Koenig “fails to articulate” why driver’s license numbers should be disclosed, that Koenig has not articulated “whether he believes that he should be granted access to these driver’s license numbers,” and that Koenig has been given “multiple opportunities” to assert that records have been wrongfully withheld. *Resp. Br.* at 2, 4-5, 610, 11-12. The most notable feature of these arguments is the total lack of supporting legal authority. The City’s arguments are

¹ The City also suggests that Koenig, as the “losing party below,” is somehow obligated to explain why driver’s license numbers are not exempt under the PRA. *Resp. Br.* at 2. But the burden of proof remains on the City, even on appeal. RCW 42.56.550(1); see *Prison Legal News, Inc. v. Dep’t of Corrections*, 154 Wn.2d 628, 645, 648, 115 P.3d 316 (2005) (noting that agency had burden of proof on appeal, and requiring agency to prove applicability of exemption on remand).

directly contrary to the fundamental purpose and structure of the PRA.

Under the PRA, agencies are required to produce non-exempt records without asking the requester why he or she wants the records, and without requiring the requester to show that the requested records are disclosable. The City's arguments, if accepted, would dismantle the PRA by shifting the burden of compliance to the requester. The City's position would allow an agency to deny a PRA request, sue the requester, and then force the requester to explain, in response to interrogatories from the agency, why the agency should be required to produce the records. According to the City, any requester who fails to adequately respond does not get the records and may be sanctioned by the court. *Resp. Br.* at 2-12.

The City notes that its interrogatories asked Koenig whether records had been improperly redacted. *Resp. Br.* at 10. But the City had no right to ask that question, and no right to rely on the requester's answer. RCW 42.56.210(3) requires the City to determine whether records are exempt, and to explain those exemptions to the requester. Nevertheless, Koenig told the City that its DLN exemptions were erroneous and, that the City had violated RCW 42.56.210(3). CP 17, 180.

The City also quotes a portion of the trial court hearing, and asserts that Koenig's counsel "evaded" the question of whether driver's license numbers should be disclosed. *Resp. Br.* at 12. Koenig's counsel correctly

informed the court that the City had the burden of proof, and that the City had no legal right to shift the burden of proof to Koenig. RP 5-6. That response was entirely correct. The City cites no authority requiring Koenig to take a position on whether driver's license numbers are exempt because no such authority exists. The PRA requires agencies—not requesters—to determine whether or not records are exempt. RCW 42.56.210(3); RCW 42.56.550(1). If the City's position were correct, agencies could shift that burden to requesters, forcing them to hire attorneys to explain in court why requested records should be disclosed.

The City failed to prove that its redaction of driver's license numbers was "in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." RCW 42.56.550(1). Even though the trial court granted the City's motion, neither the trial court's oral decision nor its written order actually states why driver's license numbers were redacted. CP 229, 9. That order was erroneous and must be reversed.

B. The City fails to explain how the exemptions it cited apply to driver's license numbers as required by RCW 42.56.210(3).

1. The City concedes that several of its original exemption theories are erroneous.

In response to Koenig's original request, the City asserted that driver's license numbers are exempt under the Driver's Privacy Protection

Act of 1994, 18 USC § 2721 (DPPA), *Reno v. Condon*, 528 U.S. 141 (2000), RCW 46.52.120 and RCW 46.52.130. CP 75-76, 87. Koenig’s brief explained that none of these exemption theories are correct. *App. Br.* at 16-20. The City fails to defend any of these exemption theories in its brief, conceding, *sub silentio*, that these theories are erroneous. By citing these erroneous exemption theories as the basis for redacting driver’s license numbers the City violated RCW 42.56.210(3).

2. The definition of “privacy” in RCW 42.56.050 is not a PRA exemption.

Koenig has repeatedly explained that RCW 42.56.050 is not a PRA exemption. CP 82; *App. Br.* at 21. That section merely provides the definition of “privacy” used in other sections that exempt private information from certain types of records. For example, *PAWS II* suggested that social security numbers might be exempt as personal information in employee files under former RCW 42.17.310(1)(b) (RCW 42.56.230(3)). *PAWS II*, 125 Wn.2d at 254. The City has failed to respond to Koenig’s point, conceding that the definition of “privacy” in RCW 42.56.050 is not a PRA exemption.

3. The City has not explained why driver’s license numbers are “private” for purposes of RCW 42.56.050.

Even if the City had cited a proper PRA exemption allowing the redaction of “private” information, the City has failed to explain why

driver's license numbers are private for purposes of RCW 42.56.050. After Koenig told the City that its citation to "RCW 42.56.050" was insufficient, the City flatly refused to clarify its reliance on that section. CP 82, 88. When the City finally moved for summary judgment on remand, the City failed to explain why DLNs are private. The City's motion and response never even mentioned the two-prong privacy test in RCW 42.56.050. CP 59-71; 183-190. Nor did the trial court explain why DLNs would be private under that test. CP 228-230.

Nor has the City ever explained why driver's license numbers were redacted as private while other personal identifiers were not redacted to protect privacy. Before this case was filed Koenig noted that the City had redacted dates of birth and driver's license numbers, but not the home addresses or telephone numbers of various witnesses, and asked the City to explain these inconsistent redactions. CP 81-82. The City flatly refused to clarify its redaction of driver's license numbers. CP 88.

The City's motion for summary judgment failed to explain why DLNs would be private while other personal identifiers were not private. CP 59-71. In his cross-motion, Koenig specifically questioned the City's inconsistent redaction of allegedly private information. CP 126. Again, the City completely failed to respond. CP 183-190.

On appeal, the City finally mentions the two-prong test for privacy under RCW 42.56.050. *Resp. Br.* at 14. But the City never explains why driver's license numbers would be exempt under that test, except to assert that there is no difference between social security numbers and DLNs. Nor does it explain why DLNs are private while other personal identifiers, such as home addresses and telephone numbers, are not private.

The City cites *PAWS II*, 125 Wn.2d at 254, for the proposition that the Supreme Court has “recognized that the release of social security numbers are highly offensive to a reasonable person and not of legitimate concern to the public.” *Resp. Br.* 13; *see Resp. Br.* at 1, 14, 20. The City also notes that this Court held that certain “employee identification numbers” were private in *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 221-223, 951 P.2d 357 (1998). Based on *PAWS II* and *Tacoma Public Library*, the City asserts that “[t]here is no functional difference between the social security numbers and employee identifiers in these cases, and at bar, the drivers license numbers.” *Resp. Br.* at 13.

There are important differences between social security numbers, the employee identification numbers at issue in *Tacoma Public Library*, and driver's license numbers. Social security numbers are often used to confirm identity. That fact may explain why the PRA includes at least three specific exemptions for social security numbers. *See RCW*

42.56.230(2); RCW 42.56.250(3); RCW 42.56.350. In *Tacoma Public Library*, this Court held that employee identification numbers were private because disclosure of such numbers would allow public access to “private information such as employee non-public job evaluations, charitable contributions, private addresses and phone numbers.” 90 Wn. App. at 218. The City has not explained why driver’s license numbers are functionally identical to social security numbers or the employee identification numbers in *Tacoma Public Library*.

The City still has not explained why it redacted driver’s license numbers but not other personal identifiers. The City asks this Court to infer a categorical exemption for driver’s license numbers based on oblique references to such information in RCW 42.56.230(7) and/or RCW 42.56.590. *Resp. Br.* at 14-15. If the PRA permitted agencies to redact information based on implied, rather than express, exemptions (it does not), then the City should have also redacted names, addresses, phone numbers, and dates of birth based on the express exemptions for such information in RCW 42.56.230(2) and/or RCW 42.56.250(3). **But the City did not redact that information.** CP 160-169. The City fails to explain why DLNs are “private” under the PRA while home addresses, phone numbers, and dates of birth in the same records are not “private.”

The City's sloppy, inadequately explained reliance on RCW 42.56.050 to redact driver's license numbers violated RCW 42.56.210(3).

4. The City has not explained why driver's license numbers are exempt under RCW 42.56.240.

The City argues that DLNs are exempt under the privacy prong of the investigative records exemption in RCW 42.56.240(1). The City has failed to properly explain its reliance on this exemption theory for several reasons. First, the City's response to Koenig's request cited only "RCW 42.56.240" as one of several statutes justifying the redaction of dates of birth, driver's license numbers, and/or social security numbers. CP 75-76. But the City never explained whether it had redacted driver's license numbers under "RCW 42.56.240" or one of the other cited statutes. *Id.*

Second, the City never explained which of RCW 42.56.240's eight subsections was the basis for redacting driver's license numbers. *Id.*

Third, RCW 42.56.240(1) has separate prongs for redactions based on "effective law enforcement" and "privacy," and these prongs must be analyzed separately. *King County v. Sheehan*, 114 Wn. App. 325, 335-349, 57 P.3d 307 (2002). The City never explained which prong it relied upon to redact DLNs. Assuming, *arguendo*, that the City meant to rely on the privacy prong, the City never explained why driver's license numbers would be private under the two-prong test in RCW 42.56.050. CP 75-76.

Nevertheless, the City flatly refused to clarify its reliance on “RCW 42.56.240” as an exemption, even after Koenig explicitly requested such clarification. CP 87. Koenig raised the same objections in the trial court, but the City simply ignored him. CP 123-125; 183-190.

On appeal, the City finally clarifies that its redaction of driver’s license numbers is based on the privacy prong of RCW 42.56.540(1). *Resp. Br.* at 14. But the City has not addressed any of the glaring problems with the City’s inadequate citation to “RCW 42.56.240” in its original response to Koenig’s request for records. Furthermore, the City has not explained why driver’s license numbers are “private” under the PRA. The City’s unexplained, inconsistent reliance on RCW 42.56.240 violated RCW 42.56.210(3).

5. The City has not explained why driver’s license numbers are exempt under RCW 42.56.070, which the City cited for the first time on remand.

The City asserts that it “also argued” that RCW 42.56.070 exempts driver’s license numbers. *Resp. Br.* at 14. This assertion glosses over the undisputed facts that (i) the City never cited RCW 42.56.070 until the City filed its motion for summary judgment on remand, and (ii) the alleged quotation in that motion to the City’s initial response was an outright fabrication. *Compare* CP 75-76; *with* CP 60. 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.

RCW 42.56.070(1) allows agencies to redact unspecified “identifying details” to the extent required to protect privacy. Even assuming, *arguendo*, that driver’s license numbers are subject to redaction under this section, the City violated RCW 42.56.210(3) by failing to cite this section in its response to Koenig’s request for records. Furthermore, the City has not explained why it redacted driver’s license numbers but not other personal identifiers. *See* subsection (3) (above) The City’s belated reliance on RCW 42.56.070(1) does not comply with RCW 42.56.210(3).

6. RCW 42.56.230(7), cited by the City for the first time on appeal, does *not* provide an exemption for driver’s license numbers.

The City argues that “RCW 42.56.230(7) comes the closest to an express exemption.” *Resp. Br.* at 14. This argument fails for several reasons. **First and foremost, the City has never cited this section before.** Even if this new statute were a proper basis for redacting driver’s license numbers, the City would still be liable for its violation of RCW 42.56.210(3) under *Sanders, supra*. Second, the City concedes that RCW 42.56.230(7) does not actually state that driver’s license **numbers** are exempt. Contrary to the City’s argument, it does not “stand[] to reason”

that a driver's license number is exempt any more than it "stands to reason" that a person's name is exempt. *Resp. Br.* at 14.

Third, as Koenig has repeatedly explained, the City must establish that driver's license numbers are exempt pursuant to specific statutory exemptions, and those exemptions must be narrowly construed. RCW 42.56.030; RCW 42.56.070; *Seattle Times v. Serko*, 170 Wn.2d 581, 591, 243 P.3d 919 (2010); *PAWS II*, 125 Wn.2d at 260. Narrowly construed, RCW 42.56.230(7) exempts only certain documents used to apply for a driver's license. By citing this inapplicable statute for the first time on appeal the City has compounded its violations of RCW 42.56.210(3).

7. RCW 42.56.590, cited by the City for the first time on remand, does not provide an exemption for driver's license numbers.

RCW 42.56.590(6) expressly excludes information obtained from public records from the definition of "personal information." In addition, the City concedes that the records requested by Koenig are not computerized data maintained by the City. CP 65; *Resp. Br.* at 15. Therefore, RCW 42.56.590 does not allow the City to redact driver's license numbers from the requested records.

Nonetheless, the City argues that statutes should be interpreted "in the context of the whole statute and larger statutory scheme," and to avoid absurd results. *Resp. Br.* at 15. The City asserts that it would be "absurd"

to require notification of a security breach involving driver's license numbers where the same information may be obtained by requesting public records. The City's argument ignores the plain language of the statute, which clearly distinguishes between unauthorized access to computerized information and requests for public records. RCW 42.56.590(1)(a), (4), (6). This distinction is not "absurd" as the City suggests; it is required by the plain language of the statute.

As Koenig has explained, some PRA exemptions apply to only specific types of records. *See App. Br.* 26. Even if driver's license numbers in computerized records were exempt under RCW 42.56.590, the same information might not be exempt in other types of records. The City completely ignores Koenig's point and the PRA cases he cited.

The City's argument fails to recognize that the PRA must be interpreted in favor of disclosure, and its exemptions must be narrowly construed. RCW 42.56.030. As a result, the PRA often provides incomplete or even illusory protection for personal information. In *Bainbridge Is. Police Guild v. Puyallup*, 172 Wn.2d 398, 418, 259 P.3d 190 (2011), the Court held that only the officer's name was exempt, even though the Court recognized that his name could be determined and paired with the non-exempt records. The *Bainbridge Island* Court noted that in an earlier PRA case the Court required the agency to produce redacted

records of a sexual assault on a child even though such redactions were “insufficient to protect the person’s identity.” 172 Wn.2d at 416. Unless a specific statutory exemption, narrowly construed, requires the City to redact driver’s license numbers, that information must be disclosed without regard for the City’s policy arguments against such disclosure. RCW 42.56.590 is not a PRA exemption for driver’s license numbers.

8. Other Laws Cited by the City.

The City continues to rely on various other statutes and court rules as support for redacting driver’s license numbers under some unspecified PRA exemption. *City’s Brief* at 15-17. These statutes and rules do not constitute exemptions under the PRA. *App. Br.* at 27-29. The City concedes this. *City’s Brief* at 15. Pointing out that the retention or dissemination of driver’s license numbers is regulated in certain non-PRA contexts does not satisfy the City’s burden to prove that driver’s license numbers are exempt under a specific PRA exemption or other statute which exempts or prohibits disclosure of specific information or records. RCW 42.56.070(1); RCW 42.56.550(1).

C. The City is liable for attorney fees under RCW 42.56.550(4) and *Sanders v. State* regardless of whether driver’s license numbers are exempt.

The City erroneously argues that an agency is only liable for attorney fees where the agency wrongfully withholds records. *Resp. Br.* at

5-9. The City's argument is contrary to the plain language of RCW 42.56.550(4), as well as all of the cases cited by the City. The first sentence of RCW 42.56.550(4) states that **attorney fees** shall be awarded for a violation of "the right to receive a response." The second sentence provides for **penalties** only when a requester was denied the right to inspect or copy records. *Id.* Under *Sanders*, an agency that fails to explain why records are exempt as required by RCW 42.56.210(3) is liable for attorney fees whether or not the records are actually exempt.

1. *Sanders* requires an award of attorney fees for a violation of RCW 42.56.210(3) whether or not records are actually exempt.

In *Sanders*, the Supreme Court clarified that RCW 42.56.550(4) creates two separate remedies, and that attorney fees are awarded for any violation of the right to receive a response to a PRA request. *Sanders*, 169 Wn.2d at 848. Under *Sanders*, there are two remedial consequences that flow from the City's violation of RCW 42.56.210(3). First, an agency that violates this section is liable for attorney fees and costs under RCW 42.56.550(4). *Id.* Second, if the agency is found to have wrongfully withheld (or redacted) records, then the agency's violation of RCW 42.56.210(3) is also a factor in determining daily penalties. *Id.*

The City relies on a passage in *Sanders*, 169 Wn.2d at 848, which states that the remedy for a violation of RCW 42.56.210(3) is

“consideration when awarding costs, fees, and penalties.” *Resp. Br.* at 7. However, in two other parts of the opinion, the court used the word “or,” indicating that attorney fees and penalties are separate remedies. “The remedy is consideration when awarding costs and fees *or* when imposing penalties for failure to produce nonexempt records.” 169 Wn.2d at 842 (emphasis added); *id.* at 870. Contrary to the City’s argument, attorney fees are awarded for a violation of the brief explanation requirement whether or not records are erroneously withheld.

The City argues that a requester should not recover attorney fees for litigating an incorrect exemption claim. *Resp. Br.* at 8. This argument was rejected in *Sanders* because it provided no real remedy or sanction for a violation of RCW 42.56.210(3).

If the only remedy for a failure to explain is to sue to compel explanation, the agency has no incentive to explain its exemptions at the outset. This forces requesters to resort to litigation, while allowing the agency to escape sanction of any kind.

Sanders, 169 Wn.2d at 847-48. In other words, an agency may explain or change its exemption claims in an action for judicial review, but such an agency is liable for the resulting violation of RCW 42.56.210(3).

The City cites *PAWS II*, 125 Wn.2d at 253, for the proposition that “if the record is exempt on any ground, an agency will not be liable.” *Resp. Br.* at 8. This part of *PAWS II* was clarified in *Sanders*, which held

that an agency may change its exemption claims in an action for judicial review, but such an agency is still liable for violating RCW 42.56.210(3):

[T]he agency's failure to provide a brief explanation should be considered when awarding costs, fees, and penalties, but the agency is not foreclosed from offering a satisfactory explanation. Such an interpretation serves the PRA's policy of disclosure by providing incentives for the agency to explain its claimed exemptions, while avoiding the negative consequences warned of in *PAWS II*.

Sanders, 169 Wn.2d at 847-48.

For the first time on appeal, the City argues that an agency's response is insufficient when the brief explanation is "omitted." *Resp. Br.* at 5. The City takes portions of *Sanders* out of context to argue that the City complied with the PRA by providing an erroneous explanation of why records are exempt. *Resp. Br.* 6, 9. This argument defeats the purpose of the required explanation, which is to allow exemptions to be "vetted for validity." 169 Wn.2d at 846.

The City's arguments are also self-contradictory. The City argues that there is no difference "between failing to provide an exemption log and providing one with 'inapplicable exemptions.'" *Resp. Br.* at 7. This argument directly contradicts the City's earlier erroneous argument (addressed above) that an agency's response is insufficient only where the explanation required by RCW 42.56.210(3) is omitted. *Resp. Br.* at 5. The City also argues that Koenig's position "creates a perverse

disincentive for agencies not to provide a brief explanation at all.” *Resp. Br.* at 8. But Koenig’s (correct) interpretation of *Sanders* creates the incentive for agencies to provide a **correct** explanation of exemptions. Neither an absent nor incorrect explanation complies with RCW 42.56.210(3) and so the City is liable for attorney fees under *Sanders*.

The City has repeatedly violated RCW 42.56.210(3) by failing to explain why driver’s license numbers are exempt. If its argument were correct, there would be no remedy for this violation as long as the court upholds the redaction of driver’s license numbers for one reason or another. That lack of remedy for an agency’s violation of RCW 42.56.210(3) is what *Sanders* sought to prevent. 169 Wn.2d at 847-48.

The correct interpretation of *Sanders* is shown in the court’s analysis of attorney fees. Upholding the trial court’s award of fees, the *Sanders* court noted that the trial court had apportioned the fee award based on four different issues, only one of which was the ultimate validity of the agency’s exemptions. 169 Wn.2d at 868. The court apportioned the award of attorney fees on appeal based on five different issues, only one of which was the validity of the exemptions. Even though *Sanders* had prevailed on only 5% of the challenged exemptions, the court awarded 25% of *Sanders*’ attorney fees on appeal, based on the fact that *Sanders* had prevailed on other issues, including the issue of whether the agency

violated the PRA by not explaining its exemptions. 169 Wn.2d at 870. These rulings on fees confirm that a PRA requester may be a prevailing party under RCW 42.56.550(4) even where an agency has not wrongfully withheld (or redacted) any records.

2 Cases following *Sanders* require an award of attorney fees for any violation of RCW 42.56.210(3).

Yakima County v. Yakima Herald-Republic, 170 Wn.2d 775, 809, 246 P.3d 768 (2011), confirms the distinction between attorney fees and penalties under RCW 42.56.550(4). The requester was awarded attorney fees because the county violated the right to receive a response.

This Court's decision in *DeLong v. Parmelee*, 164 Wn. App. 781, 267 P.3d 410 (2011), confirms that the City is liable for attorney fees whether or not driver's license numbers are actually exempt. The portion of *DeLong* that immediately precedes the City's quotation (Resp. Br. at 7-8) confirms the distinction between attorney fees and penalties:

Under the first sentence of [RCW 42.56.550(4)], costs and attorney fees may be awarded for vindicating “the right to inspect or copy” or “the right to receive a response.” By contrast, penalties are authorized only for improper denials of the “right to inspect or copy,” as specified in the second sentence of RCW 42.56.550(4). (Citations omitted).

DeLong, 164 Wn. App. at 787.²

² The City misleadingly cites a portion of this Court's opinion in *Mitchell v. Department of Corrections*, 164 Wn. App. 597, 606, 260 P.3d 249 (2011), in which this Court denied

In sum, the City has repeatedly violated RCW 42.56.210(3) and *Sanders, supra*, by failing to explain how the exemptions cited by the City apply to driver's license numbers. As a result, the City is liable for attorney fees under RCW 42.56.550(4).

D. Koenig is entitled to reasonable attorney fees for this appeal.

Koenig is also entitled to attorney fees on appeal. *App. Br.* at 30.

E. The City is not entitled to attorney fees.

The City argues that Koenig's appeal is frivolous, and requests an award of attorney fees under RAP 18.9. The City's request is entirely based on the City's efforts to shift the burden of proof to Koenig as well as the City's erroneous interpretation of *Sanders, supra*. *Resp. Br.* at 17-18.

An award of attorney fees to Koenig is not only required under *Sanders, supra*, an award of attorney fees is necessary to deter agencies from engaging in such ill-conceived attacks on requesters in future cases.

Finally, the City resorts to self-serving *ad hominem* attacks on Koenig, arguing that Koenig seeks to "profit" from this case. *Resp. Br.* at

an award of **penalties** to the requester. *Resp. Br.* at 7. In the original version of the *Mitchell* opinion, this Court awarded attorney fees to the requester under *Sanders, supra*. See *Mitchell v. Department of Corrections*, No. 39874-5-11 (September 7, 2011). Later, in response to a motion for reconsideration, the Court amended the opinion to deny attorney fees because the requester was a pro se litigant who had not actually incurred any attorney fees. 164 Wn. App. at 608. This Court's opinion in *West v. Thurston County*, __ Wn. App. __, 275 P.3d 1200 (2012), confirms that the requester in *Mitchell* was denied attorney fees because he was pro se, **not** because there is no remedy for a violation of RCW 42.56.210(3) as the City erroneously argues.


19-20. *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 830, 225 P.3d 280 (2009), has absolutely nothing to do with this case. In *Mitchell*, this Court upheld a trial court order vacating an award of costs to a PRA requester (an inmate) who had obtained an inflated award of costs through false statements. 153 Wn. App. 803. The only false statements in this case were made by the City. *Compare* CP 75-76; *with* CP 60.

There is no basis for the City's assertion that Koenig will ever profit from this case. Even if this Court eventually awards Koenig all of the attorney fees he has incurred in this case, Koenig would merely be made whole. The City brought this ill-advised lawsuit against Koenig to punish him for exposing the City's dishonesty and incompetence in the first PRA case. Koenig has merely defended this case in order to uphold the PRA. The Court must ignore the City's baseless attacks on Koenig.

IV. CONCLUSION

This Court should reverse the erroneous decision of the trial court, and hold that the City has violated the PRA by failing to explain why driver's license numbers are exempt from disclosure. This matter should be remanded to the trial court for an award of attorney fees. Koenig is also entitled to attorney fees and costs for this appeal.

RESPECTFULLY SUBMITTED this 20th day of July, 2012.

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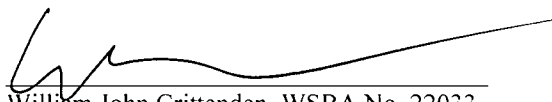
I, the undersigned, certify that on the 20th day of July, 2012, I caused a true and correct copy of this pleading to be served, by the method(s) indicated below, to the following person(s):

By email (PDF) to:

mkaser@ci.lakewood.wa.us

and First Class Mail to:

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