69129-5

69129-5

NO. 69129-5

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

JAMES C. EGAN, *Appellant,*

v.

CITY OF SEATTLE, *Respondent.*

BRIEF OF APPELLANT

JAMES C. EGAN
Pro Se Appellant

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

I. ASSIGNMENTS OF ERROR AND ISSUES OF APPEAL

A. ASSIGNMENTS OF ERROR

The Superior Court erred in denying Mr. Egan's ("Egan") Anti-SLAPP Motion to Strike the City of Seattle ("City") lawsuit for an injunction against him. [1] CP 626 et seq.

B. ISSUES ON APPEAL

1. Did the Trial Court err when it found as a matter of law that Egan has not carried his initial burden under RCW 4.24.5425(4)(b) by a preponderance of the evidence that the City's claim is based on an action involving public participation and petition, when the mere fact of requesting public documents and suing or threatening to sue to obtain the documents are examples of public participation and petition, and the numerous uses Egan has put to documents in which he has obtained in the past, including giving them to the press, publishing them on the internet, and using them as a basis for publicly asking Seattle's Mayor to fire the police chief, are overwhelming examples of public participation and petition? (Assignment A.)

2. Did the Trial Court err when it concluded that the injunction provisions of RCW 42.56.540 may be used any time a requestor threatens to sue for failure

[1] Specific Findings of Fact and Conclusions of Law have not been entered by King County Superior Court The Honorable Dean Lum.

to disclose documents when the circumstances of the present case did not satisfy the duel requirements of RCW 42.56.540 that the document request must not be in the public interest and would substantially and irreparably damage any person or would substantially and irreparably damage vital governmental functions. . ."? (Assignment A.)

3. Did the Trial Court err when it concluded, based on its interpretation of the injunction provisions RCW 42.56.540, that the phrase "based on an action involving public participation and petition" in the Anti-SLAPP statute does not include the public records request itself, when the circumstances of the present case did not satisfy the duel requirements of RCW 42.56.540 that the document request must not be in the public interest and would substantially and irreparably damage any person or would substantially and irreparably damage vital governmental functions. . ."? (Assignment A.)

4. Did the Trial Court err in concluding that the provisions of RCW 9.73.090(1)(c) govern the documents in question in this case when among other things, the statute does not apply to conversations between traffic stop detainees and arresting officers. (Assignment A.)

II. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

James C. Egan is an attorney emphasizing criminal defense in King, Pierce, and Snohomish Counties, with an

interest in civil rights plaintiff's work. CP 111. In July of 2011, Egan received three complete files of internal investigations conducted by the Seattle Police Department ("SPD") pursuant to a public disclosure request Egan had made in May 2011 (CP 112); one of those files referenced a 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 alleging 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 who he was through research, and after writing him, the subject and his passenger agreed to help Egan obtain the in-car video through Egan's representation of them. CP 112-113. Thus, in August 2011, Egan made a request for the in-car videos as Miguel Oregon's and Hugo Perez' lawyer and after "additional time" was needed to respond, Egan finally received the videos on September 9,

2011 (hereinafter called the "Oregon/Perez video(s)"). CP 154. The video is not in the record, but may be viewed at - http://www.youtube.com/watch?v=m9jhmXszDx0.

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 interviews with the Office of Professional Accountability ("OPA"), an SPD department tasked with investigating complaints of police misconduct. CP 113.

Egan identified 36 other videos that were reviewed by the OPA in connection with other investigations of the four officers in the Oregon/Perez video. CP 157-159. These four officers; Officer Corey Williams, Brett Schoenberg, Casey Steiger and Daniel Auderer, each had only about two years on the force at the time of the Oregon/Perez encounter, with an average of nine misconduct reviews for each officer by OPA. Egan made a

request for these specific 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 the production of 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 addressing what Egan saw as pretexts for denying disclosure. CP 170.

On December 16, 2011, a Department of Justice ("DOJ") investigation decision was published and made front page news. http://www.justice.gov/crt/about/spl/seattlepd.php. SPD Chief Diaz made statements that Egan interpreted as being dismissive

about the findings. CP 178-182, 184. After SPD Chief Diaz's refusal to acknowledge the internal problems at the SPD, Egan contacted the media with a redacted, transcribed version of the Oregon/Perez Video. CP 128-129. Egan gave interviews with television channels KIRO 7, KOMO 4, KING 5 and KCPQ 13, (CP 186-187) as well as interviews with the Stranger and the Seattle Weekly magazines. CP 128-129. Each media outlet covered the issue prominently, in some cases as its top story in that night's news. See, e.g., www.komonews.com/news/local/137061103.html. Egan also started posting all the in-car videos and documents from the Oregon/Perez matter on Egan's website. CP 186-187, 189-191.

On December 19, 2011, Egan was contacted by a national television news organization, "Right This Minute," ("RTM") which regularly features "viral videos." CP 126. Egan conducted an interview with RTM which was aired as a top story on December 20, 2011 in 48 major cities around the

country and the clip remains online for further viewing and dissemination at www.rightthisminute.com. CP 126.

On December 28, 2011, Seattle Assistant City Attorney Mary Perry wrote an email stating that Egan's December 7, 2011 appeal of the denial of the September 23, 2011 request for 36 videos had then been referred to her for "review and response," and that a response to the appeal would be provided "on or before January 6, 2012." CP 193.

On January 4, 2012, Egan was sued by the City of Seattle for making the September 23, 2011 public records request. CP 1-7.

On January 10, 2012, Egan made an additional, separate public disclosure request wherein Egan requested the same 36 videos in question but asked that the audio in the video be redacted. 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 the issue that Egan

made another Public Records Request for "silent videos." CP 198, 26-33.

Since the lawsuit was filed, Egan determined that just in the years 2008 and 2009, there were at least 80 denials of Public Records Requests sent by the SPD to various citizens and lawyers who made such requests. CP 130, 207-222. Several involved denied requests for in-car videos. CP 207-222. Egan also requested and received a "first installment" of appeals of public disclosure requests (letters to the Chief after requests had been denied) through a separate public record request. CP 207-222. To Egan's knowledge, none of the 80 people who were denied requests, or the four whom Egan was aware had appealed, were sued by the City of Seattle for those requests. CP 207-222.

B. PROCEDURAL FACTS

On January 4, 2012, the City filed suit against Egan asking the Superior Court to issue a declaratory judgment that would prevent Egan from obtaining 36 specific in-car police

videos that he believed were relevant to his clients' cases. CP 1-7. The original argument date was set for June 17, 2013. The City then filed a Motion for Declaratory Judgment and Preliminary Injunction under RCW 42.56.540. This accelerated the argument date to February 28, 2012. CP 56-76.

The City had already been sued by Fisher Broadcasting ("KOMO") for the denial of KOMO's request of the release of in-car videos. *Fisher Broadcasting (KOMO) v. City of Seattle*, No. 12-2-00938-4 SEA, currently on petition for direct review to the Supreme Court. CP 608-621. In the KOMO case, the City claimed that disclosure was barred by RCW 9.73.090(1)(c). CP 355. This case was to be heard in front of Judge Rogers in April 2012. CP 86-90.

The issues in each of those cases, Egan and KOMO, were practically identical. CP 94-107. The distinction was that Egan requested 36 specific videos, some of which were related to his clients' cases, and KOMO had requested all of the SPD's in-car videos. CP 157-158.

The City advised KOMO that it had sued Egan, seeking declaratory and injunctive relief on its interpretation of RCW 9.73.090(1)(c) because the City knew that the same issue was pending in the KOMO case. CP 86-89. Because of this, KOMO moved to intervene, with the City's consent and the trial court granted the motion. CP 86-89.

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 law. CP 230-252.

On February 28, 2012, oral argument in the present case was continued until after Judge James Rogers issued his ruling in the KOMO case. CP 287. On April 6, 2012, Judge Rogers ruled that RCW 9.73.090(l)(c) and RCW 42.56.540 prevented the City from releasing in-car videos to KOMO. KOMO has sought direct review of this ruling to the Washington Supreme Court. CP 608-621.

On June 1, 2012, King County Superior Court, the Honorable Dean Lum, heard additional argument on the present

case. CP 525. During the hearing, the Court questioned the City about the lawsuit, particularly because the same underlying issue was already being litigated in the KOMO case. CP 525-533.

On June 26, 2012, the Trial Court issued an Order dismissing the City's request for an injunction, awarded Egan attorney fees and costs under CR 11, and dismissed Egan's Anti-SLAPP motion. CP 601-607.

III. STANDARD OF REVIEW

There are no disputed issues of material fact. Rather, the issue is the legal characterization of how the Anti-SLAPP law applies to the facts of this case, which is a question of law to be reviewed de novo. *See, e.g., Erwin v. Cotter Health Ctrs.* , 161 Wn.2d 676, 687, 167 P.3d 1112 (2007) (application of law to the facts of a case is a question of law reviewed de novo).

IV. ARGUMENT

The City's lawsuit against Egan amounts to a Strategic Lawsuit Against Public Participation (SLAPP), barred by Washington's 2010 Anti-SLAPP statute RCW 4.24.525.

RCW 4.24.525(4)(a) states that "[a] party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in subsection (2) of this section." RCW 4.24.525(4) states that, in relevant part:

> "(b) 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.

There are few cases interpreting Washington's Anti-SLAPP statute; but case law interpreting the California Anti-

SLAPP statute is persuasive precedent as to guidance for application of Anti-SLAPP law for public participation because the Washington statute was patterned after the California statute.

A. CALIFORNIA ANTI-SLAPP CASE LAW IS PERSUASIVE

The 2010 amendments to Washington's Anti-SLAPP law are "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" *Aronson*, at 1110.

> "RCW 4.24.525 is of such recent vintage that there have been few cases construing it in the months since it was enacted.... This court looks to California precedent as persuasive authority concerning the new Anti-SLAPP statute."

Castello v. City of Seattle, 2010 U.S. Dist. LEXIS 127648; 39 Media L. Rep. 1591; 2010 WL 4857022.

B. CALIFORNIA ANTI-SLAPP LAW PROTECTS PRE-LITIGATION COMMUNICATION

California has nearly 20 years of anti-SLAPP case law and over 300 published decisions, compared with a handful in Washington State. The California cases include a number of cases where the Anti-SLAPP statute applied to claims against defendants based upon statements made in anticipation of litigation, including statements of intent to sue.

In *Equilon Enterprises, LLC v. Consumer Cause*, 124 Cal.Rptr.2d 507, 29 Cal.4th 53 (2002) the Defendant, Consumer Cause, had served the Plaintiff, Shell and Texaco oil companies, a notice of its intent to sue for violations of a California health and safety statute alleging the Plaintiff had polluted ground waters in Southern California. Rather than request clarification, the oil companies served Common Cause a claim for declaratory and injunctive relief. *Id.* This prompted Consumer Cause to bring a motion to dismiss the suit under California's anti-SLAPP statute. *Id.*

The oil companies argued that to prevail on the Anti-SLAPP motion, Consumer Cause should have to show that the request for declaratory and injunctive relief was filed with the intent to chill Consumer Cause's exercise of constitutional speech or petition rights. *Id.* The California Supreme Court disagreed and stated "[w]hile it may well be [that the oil companies] had pure intentions when suing Consumer Cause, such intentions are ultimately beside the point." *Id.* at 67. Consumer Cause was not required to prove the oil companies' subjective intent. *Id.* Furthermore, the Court found that the oil companies' suit arose from Consumer Cause's activity in furtherance of its constitutional rights of speech or petition, *i.e.* the sending intent to sue notice that was served on the oil companies. *Id.* Since the oil companies failed to establish a probability of prevailing in their claim, the Anti-SLAPP motion was properly granted. *Id.*

While the oil companies purported "to have sought declaratory relief solely in order to 'get clarification of what

they had to do' to avoid . . . liability" they neglected to mention "that they also sought injunctive relief that expressly would restrict Consumer Cause's exercise of petition rights." *Equilon*, at 519, fn 4.[2]

The *Equilon* case is directly on point to the present case. Just as in *Equilon*, the City filed an order for declaratory and injunctive relief against Egan that would permanently prevent Egan from obtaining the records he requested. The City claimed it did this to "avoid liability," get "judicial guidance," and "because he (Egan) threatened to sue us."

The public records request, and subsequent appeal letter, are no different than the intent-to-sue notices in *Equilon*. California case law makes it clear that pre-litigation letters and threats to sue are protected petition activity. "[The Anti-SLAPP] does not limit its application to certain types of

[2] "The right of access to the courts is indeed but one aspect of the right of petition." *California Motor Transport v. Trucking Unlimited* 404 U.S. 508, 510, 92 S. Ct. 609, 612, 30 L.Ed. 2d 642 (1972). Also, constitutional doctrine was further established: "Those who petition the government are generally immune from liability [for doing so]" *Real Estate Investors v. Columbia Pictures* 508 Us 49, 113 S. Ct. 1920, 1926, 123 L.Ed. 2d 611 (1993).

petition activity." *Beilenson v. Superior Court*, 44 Cal.App.4th 944, 949 (1996); *See also Navarette v. Holland*, 134 Cal.Rptr.2d 403 109 Cal. App.4th 13 (2003) (even a police report filed by plaintiff's ex-wife, alleged to have been false, was regarded as public participation and petition.) "The pleadings and the affidavits submitted by the parties establish that Equilon's action for declaratory and injunctive relief is one arising from Consumer Cause's activity in furtherance of its constitutional rights of speech or petition – viz., the filing of Proposition 65 intent-to-sue notices." *Equilon,* at 518.

In *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 54 Cal.Rptr.2d 830, 47 Cal.App.4th 777 (1996), Audrey Hepburn and 13 other celebrities had recorded an album where a portion of the royalties from the sale of the record were supposed to go to the celebrities' charity of choice. After Ms. Hepburn's death, her estate became aware that her designated charity had not received virtually any of the royalties that it was entitled to from Dove Audio. *Id.* Ms. Hepburn's estate retained a law firm,

and the law firm sent letters to the other celebrities and the other charities, informing them of the situation and stating it intended to file a legal complaint with the State Attorney General's Office. *Id.* Once the recording company became aware of these letters it filed a law suit against the law firm claiming libel and interference with an economic relationship. *Id.* The law firm countered by bringing an Anti-SLAPP motion. *Id.*

The court ruled that the law firm's letter announcing an intention to take legal action was covered by the Anti-SLAPP law because it was an act in furtherance of the law firm's constitutional right of petition. *Id.* The letter raised a question of public interest and was in connection with an official proceeding authorized by law; *i.e.* a proposed complaint to the Attorney General seeking an investigation. *Id.* "The constitutional right to petition . . . includes the basic act of filing litigation or otherwise seeking administrative action." *Id.* at 784. "Just as communications preparatory to or in

anticipation of the bringing of an action or other official proceeding are within the protection of [California's litigation privilege law] we hold that such statements are equally entitled to the benefits of [California's Anti-SLAPP law]." *Id.*

In both the *Equilon* and the *Dove Audio* cases, the Defendant had met its initial burden of establishing that the lawsuit was based on public participation (namely conduct in furtherance of petition rights), and the burden was shifted to the Plaintiff to establish the merits of its case. Neither plaintiff in *Equilon* nor *Dove Audio* was able to establish prima facie evidence that they would prevail on their claims. Hence, the plaintiffs' actions were dismissed under Anti-SLAPP law.

C. Egan's public records request are both actions involving public participation and petition under RCW 4.24.525

When determining if the Anti-SLAPP law applies to the present matter, the Court must first examine whether the Egan's actions constitute "public participation and petition under RCW 4.24.525." RCW 4.24.525(2) states that:

"This section applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this section, an "action involving public participation and petition" includes:

(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

> (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."

(emphasis added)

All these subsections apply to the present case. Egan's public records requests on September 23, 2011, and January 10, 2012, constitute lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, and/or in furtherance of the exercise of the constitutional right of petition. These records requests were lawful and are obviously a matter of utmost public concern.

The DOJ's examination of the SPD had received national mediaattention. www.nytimes.com Egan made the records requests with the intention of petitioning Chief Diaz to make sweeping changes, (CP 178-182) and when that proved not fruitful in the wake of the DOJ findings, the requests became

relevant to the public outcry for transparency and accountability of the SPD.

The officers in the requested in-car videos were the same officers who allegedly violated the civil rights of Egan's clients. Another reason Egan requested the videos was to determine whether these particular officers had engaged in a pattern and practice of violating citizens' civil rights, particularly when those citizens are persons of color. CP 115.

Prior to making the 36 in-car video requests, Egan had obtained the in-car videos for Oregon/Perez, and Mr. Amanuel Gebreselassie. Mr. Gebreselassie approached Egan for representation regarding an encounter with the same Oregon/Perez officers who told Gebreselassie to "roll the fucking window down" and with regard to that altercation, Officer Steiger admitted to saying "I'll break your fucking neck" and Officer Schoenberg admitted to saying "Don't suck my dick". CP 124. This video is not in the record but can be found at www.youtube.com/watch?v=m17G_vxMj8.

With the permission of his clients, Egan made these videos available to the public by posting the videos on youtube.com, his web site, as well as providing them to the media. Egan did this so that the public could view actual instances where SPD officers acted improperly, rather than just learn generally about the pattern of excessive force or possible biased policing, as noted in the DOJ report.

By the time Egan was sued, the public records appeal for 36 videos had been provided to the media and for nearly three weeks and was available on the "police misconduct" section of Egan's website. CP 189-191. The fact that Egan had previously made in-car videos available to the public demonstrates his intent to do the same for the 36 videos in question here. In addition to the public records requests, in furtherance of the exercise of the constitutional right of free speech, what Egan would have done with them would have been consistent with the other in-car videos he had received. Egan clearly intended to place them on Egan's own "police misconduct" site and

make them available to the print, internet and broadcast media, as well as demand for more and better investigation of the SPD's conduct. These are all classical examples of "public participation and petition."

Accordingly, Egan's public records request on September 23, 2011 and January 10, 2012 are both actions involving public participation and petition under RCW 4.24.525.

RCW 4.24.525(1)(a) states that a "claim" as used in the section "includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief." The City's Motion for Declaratory Judgment and Preliminary Injunction is a "claim" under RCW 4.24.525(1)(a).

Besides RCW 4.24.525(2) (c), (d) and (e) basis for finding the lawsuit was based on Egan's "public participation," sections (a) and (b) also applies. Egan herein argues that the claim is based upon a "written statement, or other document

submitted, in a... judicial proceeding or other governmental proceeding authorized by law," and also based upon a "written statement or other document submitted, in connection with an issue under consideration of review by a ... judicial proceeding or governmental proceeding authorized by law."

Once the initial records request is denied, there is an option to appeal. That appeal consists of writing a letter to Chief Diaz. CP 149. That letter of appeal is certainly a "governmental proceeding authorized by law." Therefore, the written documents of public disclosure requests filed by Egan are plainly written statements submitted in a governmental proceeding, and when provided to the media, are also submitted in connection with an issue under consideration of review by a governmental proceeding. This especially applies to the January 10, 2012 request for "silent videos," as this issue is in connection with an issue already under consideration by the KOMO 4 lawsuit against the SPD, and yet nonetheless resulted

in an amendment to the lawsuit against Egan for bringing in those requests.

"This section applies to any claim, however characterized, that is based on an action involving public participation and petition." (*see* RCW 4.24.525(2), (emphasis added)). The language, however characterized, establishes the legislature understood that SLAPP suits may be characterized as not just about statements made, but may include claims about "documents submitted" or "other lawful conduct… in furtherance of the exercise of the right of free speech in connection with an issue of public concern, or in furtherance of the constitutional right of petition." RCW 4.24.525(2)(d) and (e).

The legislature's mandate against SLAPP suits is deliberately broad. Whether characterized as not a claim involving First Amendment rights exercised by Egan, but characterized as merely resolving an issue of documents submitted, the City cannot be seen to have filed the claim

against Egan in a vacuum, and Egan has plainly established more likely than not that the City's claim is based on Egan's public participation, "however characterized."

The lawsuit was filed to pre-empt Egan's ability to seek relief from a court (or petition) at a time of his own choosing. Rather than be free to contemplate whether or not to pursue legal action over SPD's denial of the request, Egan was forced to immediately defend against the suit, or simply not respond to the lawsuit, lose by default, and forgo a lawfully issued public records request for his clients. This creates an undue burden on Egan that he did not anticipate when making the initial citizen request. Furthermore, the fact that the City filed a suit against Egan for making a public records request creates a chilling effect on all citizens who are contemplating making a public records request to the SPD.

D. The City Chose to Sue Egan on Impermissible Grounds.

Egan had previously obtained in-car videos from the SPD and made these videos available to the public. However,

Egan is certainly not the only citizen to request in-car videos from the SPD. Between 2008 and 2009, at least eighty public records requests were denied by the SPD. CP 207-222. As with any public records denial by the SPD, the person whose request is denied then has the option to follow up with a written appeal to SPD Chief Diaz. This appeal is a governmental proceeding that is recognized as such by the SPD, the City Attorney and the Court. Unlike claims for damages, it is not a pre-requisite to file a claim under the PRA. A small number of citizens denied a public records request by the SPD chose to file this appeal, which is simply a letter addressed directly to the Chief.

1. The City chose to sue Egan based on his comments to the media and the disclosure of previous videos to the public.

RCW 4.24.525 (2)(d) defines public participation as "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."

As noted above, Egan made a series of oral statements to the media. Egan posted the in-car videos of his clients on his own website, which included written analyses of the videos.

The City chose to file this law suit against Egan several days after Egan disclosed these in-car videos to the media.

Egan gave multiple interviews to not only local news outlets but to also national news outlets. Spurred by the DOJ findings released in December 2011 and the dismissive remarks made by Chief Diaz (CP 184), Egan called for the firing of Chief Diaz during a second interview with Right this Minute, a national news outlet. The interview was run on December 29, 2011. On January 4, 2012 the City filed suit against Egan. The appearance is that the City filed suit due to the media attention Egan brought to the issues SPD were facing.

2. The City sued Egan because "he threatened to sue the City."

In e-mails produced by the City through a Public Records Request, Assistant City Attorney Perry confirms that the City

sued Egan because of his threat (contained in his Public Records Request) to sue the City should the City not provide the requested records. CP 310.

City Attorney Pete Holmes wrote an article that was published in the Stranger, entitled "Why I'm Suing Attorney James Egan." CP 317-318. In this article, the City again reiterates that it sued Egan because Egan threatened to sue the City in the public records requests. Additionally, Mr. Holmes indicates in the article that the City sued Egan to seek "judicial guidance." CP 317-318.

3. The City claims to have sued Egan to get "judicial guidance."

The City claimed it needed to file the suit to get judicial clarification of RCW 9.73.090(1)(c). CP 254. However, if this really was its intention, why not wait until the outcome of the KOMO case? The KOMO case addresses the same legal issue and was set for summary judgment motion before King County Superior Court Judge Rogers in March of 2012.

Under the injunction subsection of the PRA, there is no provision for which the City is allowed to use a lawsuit to "gain judicial guidance" on this particular issue. RCW 42.56.540 allows a court to issue an injunction prohibiting the release of public records only if the court finds

> "that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital government functions."

The statute is not drafted to permit agencies to seek "judicial guidance" as to whether or not to disclose records requested. RCW 42.56.540 has provisions that would allow the City get the "guidance" it needed without filing a lawsuit. Namely, "[a]n agency has the option of notifying persons named in the record...that the release of the record has been requested..." *Id.* Further, the PRA contemplates the Attorney General's opinion may be sought in the event of denial of a record without resort to litigation. RCW 42.56.530.

The City did not, to Egan's knowledge, contact any of the 36 subjects in the specific requests Egan made in December 2011 or January 2012. In the January 2012 public records request for "silent videos," Egan also asked that SPD contact the 36 persons recorded to see if they would object to the release of their videos to Egan. CP 200-201. This request was completely ignored. The City certainly did not put such requests, or answers to such requests, into the record.

4. The City sued Egan because the City perceived potential liability under the PRA and wrongly chose to proceed under the injunction statute.

The City seemed to think that Egan's language in his own appeal to Chief Diaz justifies the need for this legal action. However, other citizens have used similar language in their appeal and yet the City has not filed a law suit against them.

For instance, in a December 16, 2011 appeal from Attorney Joann Francis to SPD Chief Diaz, Francis demanded the "requested information be provided immediately" and that the "delay is unreasonable." CP 219-222.

On January 12, 2012, Laurie Morris, an Investigation Supervisor for the (Public) Defender Association, submitted an appeal arguing that even if RCW 9.73.090(1)(c) prevents SPD from duplicating the video, she should at least be allowed to come in and view the video in person. CP 107. Ms. Morris argued (correctly) that under any interpretation of RCW 9.73.090(1)(c), viewing the video in person at SPD's headquarters would not be duplication and should be permitted. *Id.* Even though Ms. Morris's request contains an identical legal issue presented in the present matter, to Egan's knowledge, the City has not chosen to file a law suit against Ms. Morris. *Id.*

The primary difference between Egan and these other requesters is that Egan had previously disclosed lawfully obtained in-car videos very broadly to the public. However, Egan's past actions and statements should not be a basis to seek a protective order preventing future disclosure of public records.

The City claimed that Egan's statement that he would seek maximum penalties for failure to provide the records justifies this law suit. If Egan had failed to include the statement in his appeal letter, he still would be free to seek damages for the non-disclosure under the PRA, as anyone could. Egan had explained that he included that particular statement to insure that his request was addressed completely and timely, due to past experiences of delay and undelivered correspondence from SPD. CP 111-131.

E. The City failed to produce any evidence much less show by clear and convincing evidence, a probability of prevailing on the claim.

Egan has fulfilled his burden by demonstrating by a preponderance of evidence how his requests for the in-car videos constitute public participation under the statute. Under RCW 4.24.525(4)(b), after Egan has met this burden, "the burden shifts to the [Plaintiff] to establish by clear and convincing evidence a probability of prevailing on the claim."

1. The City's use of RCW 42.56.540 is inapplicable to the present matter.

RCW 42.56.540 allows a court to issue an injunction prohibiting the release of public records if the court finds "that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions." Releasing the in-car videos in question is clearly in the public interest because it highlights the need for greater transparency and accountability of the SPD. The City failed to put forth any facts to dispute the public interest in examining potential police officer misconduct. Furthermore, the City offered no evidence to show how releasing the in-car videos would substantially and irreparably damage any person. The mere possibility of substantial and irreparable damage is not enough.

The statute uses the word "and" between "public interest" and "would substantially and irreparably damage any person," meaning the court must find both factors to intervene.

The statute contains an "and", not an "or". Thus it should be read "and" as simply being an "and". The Legislature would have used the word "or" if it had intended to convey a disjunctive meaning. *See State v. Carr*, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982) (where the lower court erred in reading an "and" in former JCrR 4.10 as conveying a disjunctive meaning); *Childers v. Childers*, 89 Wn.2d 592, 596, 575 P.2d 201 (1978) (the word "and" does not mean "or"). *Ski Acres v. Kittitas County*, 118 Wn.2d 852, 856, 827 P.2d 1000 (1992).

Where the plain language of a statute is unambiguous and legislative intent is apparent, the Court will not construe the statute otherwise. *Id.*

The City put on no evidence that non-disclosure of the videos would be in the public interest. Accordingly, even if the court found that releasing the in-car videos would substantially

and irreparably damage any person, this alone, would not be enough for the court to issue an injunction because a court would have to find that releasing the in-car videos would also not in the public interest. The court could not do so because it is obviously is in the public interest to see how its police department is interacting with its citizens.

Under RCW 42.56.540, the only other way the court would have the authority to issue the injunction would be if the City could show that the release of the in-car videos would "substantially and irreparably damage vital governmental functions." Again, the City failed to put forth any facts that would demonstrate how this would occur. Therefore, the City cannot claim that the release of the in-car videos would in some way hamper its ability to investigate a case. There is no vital governmental function that prevents the exposure of police excessive force to the public. Again, if the police officers in question acted improperly on these in-car videos, the taxpaying public has an absolute right to know about it.

After close examination RCW 42.56.540, it becomes apparent the City has attempted to use this statute as a way to prevent Egan from ever filing his own suit against the City. A failure to timely or fully respond to City's voluminous motions would mean a loss by default, and potential precedent against other requesters, to include the news media.

This is not a proper use of the statute. The statute was intended to provide a very limited avenue for the courts to prevent very sensitive, damaging, and personal information from being made available to public, where the information is of no public interest whatsoever.

The City cited *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007), CP 35, to argue that the government facing a public records request can seek a declaratory judgment from the court.

However, the facts of that case are starkly different from the present matter. In *Soter,* a nine year old student, who was allergic to peanuts, died after eating a peanut butter cookie the

Spokane school had given him. *Id.* In connection with a wrongful death claim against the school district, the student's estate and the school district entered into an agreement where they would agree to not make any statements to the public, apparently in large part for the sake of the grieving parents. *Id.* The local newspaper made a public records request for documents concerning the student's death and the agreement that was reached with the school district. *Id.* The school district provided most of the documents. However, the school district *and* the student's estate together joined in a declaratory judgment request from the court under RCW 42.56.540. *Id.* The school was in a precarious position because while the newspaper was arguing it was entitled to the documents under the PRA, the student's estate was arguing that the information was protected under the Federal Family Educational Rights and Privacy Act ("FERPA"). *Id.* A violation of this act would affect the school district's $26 million it receives in Federal funding. *Id.* The court ultimately held that in this particular situation,

RCW 42.56.540 did allow the school district and the student's estate to seek a declaratory judgment against the release of documents. *Id.*

The *Soter* case is an excellent example of what must be at stake in order for RCW 42.56.540 to apply. The Court found that irreparable harm would be caused to a person or vital government functions (the grieving parents, and $26 million in FERPA school funding) and the release of the few remaining undisclosed documents served no public interest. Those similar facts were not brought out in the case against Egan, where the City, despite an oral request to do so, never provided the 36 specific records to the court for *in camera* review nor described their specific contents.

In *Soter*, the issue of whether RCW 42.56.540 permitted an agency to seek a declaratory judgment was actually moot because the newspaper had filed its own motion to compel against the school district. *Id.* Nonetheless, the Supreme Court felt the need to address the issue since it was likely to reoccur.

Id. at 749. The Court of Appeals had previously ruled that if an exemption to the Public Records Act applies, the remaining portion of RCW 42.56.540 was superfluous and need not be addressed. *Id.* at 748, *citing Soter v. Cowles Pub.Co.* 131 Wn.App 882, 907, 130 P.3d 840 (2006).

The Washington Supreme Court directly overruled this notion and stated "[w]e therefore clarify that to impose the injunction contemplated by RCW 42.56.540, the trial court *must* find that a specific exemption applies and that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital government interest." *Id.* at 757, emphasis added.

In the present case, the City cited RCW 42.56.540 with the notion that the court has the power to enter a preliminary injunction in this matter. But following the holding in *Soter*, the courts must make very specific findings to enter that injunction, to include substantial harm to persons or government functions *and* no public interest in the documents requested.

2. The City's claim that RCW 9.73.090(1)(c) prevents the release of the videos is incorrect.

The City may argue that RCW 9.73.090(1)(c) justifies its injunction claim and would negate Egan's Anti-SLAPP motion. This is incorrect. As shown above, for the City to prevail on the Anti-SLAPP claim, it must first show by clear and convincing evidence that RCW 42.56.540 applies. The City has failed to meet this burden, by not showing both actual irreparable harm to agencies or persons and an absence of public interest in the requested documents. However, even if the Court feels the City has met this burden, the City still has failed to show by clear and convincing evidence that RCW 9.73.090(1)(c) prevents it from releasing the videos, as an underlying issue in its claim.

a. RCW 9.73.090(1)(c) only prevents the videos release if there is active, ongoing, litigation.

RCW 9.73.090(1)(c) states that "[n]o 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." (emphasis added).

The City interprets this statute broadly to mean that the videos shall not be released to the public until after at least three years has passed and there is no longer a risk that the SPD may be sued for wrongdoing that may occurred, which the video evidence may show. However, the statute states "until final disposition of any criminal or civil litigation which arises." (emphasis added).

If the legislature wanted to prevent the release of the video until the risk of all criminal and civil claims have extinguished, it would have phrased the statute to read: "which arises or which may arise." The fact that the legislature chose to use the active term, "which arises" shows that it intended the videos not be released if there is active, pending criminal or civil litigation. But under the plain language of the statue, and coupled with the PRA's broad mandate for disclosure, the mere

possibility of litigation somewhere, someday is not enough to prevent the release of the video. The City pointed to no such pending litigation.

b. Conversations recorded during routine traffic stops are not private and therefore the exemption contained in RCW 9.73.090(1)(c) does not apply.

In *Lewis v. State Department of Licensing*, 157 Wn. 2d 446, 461, 139 P. 3d 1078 (2006), the Washington Supreme Court held that "conversations between traffic stop detainees and police officers are not private conversations."

c. The SPD records custodians would not be prosecuted for a gross misdemeanor if they were to release the videos.

The City claims that SPD records custodians are at risk of being charged with a crime if they were to release the videos before three years has passed under RCW 9.73.080. CP 5.

RCW 9.73.080(2) states that "[a]ny person who knowingly alters, erases, or wrongfully discloses any recording in violation of 9.73.090(1)(c) is guilty of a gross misdemeanor."

Accordingly, only "wrongfully" releasing the videos would be a crime.

Moreover, RCW 42.56.060 states that:

"no public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee or custodian acted in good faith in attempting to comply with the provisions of this chapter."

Therefore, so long as the records custodian releases the videos in a good faith attempt to comply with RCW 9.73.090(1)(c), that person would be immune from all criminal and civil liability.

Further, RCW 9.73.090(1) states that:

"the provisions of RCW 9.73.030 through 9.73.080 [the statute that makes wrongful disclosure a crime] shall not apply to police, fire, emergency medical service, emergency communication center, and poison center personnel in the following instances:

a) Recording incoming telephone calls to police and fire stations . . .

b) Video and/or sound recordings ... made of arrested persons by police officers responsible for making arrests . . .

c) Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles . . ."

(emphasis added)

By extension, the public records officer who works for the police department is a member of "police personnel" exempt from criminal prosecution contemplated by RCW 9.73.080.

d. The strong language in favor of disclosure contained in the Public Records Act trumps any conflict with RCW 9.73.090(1)(c).

RCW 42.56.030, the preamble to the Public Records Act, states that:

> "The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern."

(emphasis added)

Therefore, even if the court agrees the City has correctly interpreted RCW 9.73.090(1)(c), that interpretation would directly conflict with the Public Records Act. RCW 42.56.030 makes it clear that should this occur, the provisions of the Public Records Act control. Further, "[a] person's 'right to privacy,' 'right of privacy,' 'privacy' or 'personal privacy' as these terms are used in [the Public Records Act], is invaded only if disclosure of information about the person: (1) would be highly offensive to a reasonable person and (2) is not of legitimate concern to the public." RCW 42.56.050.

When interpreting RCW 9.73.090(1)(c) this Court should look to the Public Records Act to define "privacy" and rule that there are no exemptions that prevent the release of the in-car videos requested in this case.

F. Egan is entitled to a monetary award of $10,000 plus reasonable attorney fees for the proceedings below.

RCW 4.24.525(6)(a) states that:

(a) The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and

(iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

Egan requests this Court to instruct the Trial Court to award him his reasonable attorney fees for the proceedings below, and to award him the statutory amount of $10,000 for violation of RCW 4.24.525. Not only would the award of fees and the $10,000 be reasonable under the applicable statute, the penalty is necessary to prevent the City from filing a similar

motions for declaratory and injunctive relief against other citizens who may be also brazen enough to request an in-car video from SPD.

G. Egan is entitled to Attorney's Fees and Costs on Appeal

RAP 18.1(a) provides that a party may recover its reasonable attorneys' fees on appeal if "applicable law" permits recovery of attorneys' fees. A party must devote a separate section of its brief to the request for reasonable attorneys' fees. RAP 18.1(b).

As shown in the previous section of this brief, RCW 4.24.525(6)(a) provides for the award of attorney fees and costs to the prevailing defendant (Egan). To the extent that Egan recovers attorneys' fees with respect to the proceedings below, applicable law also supports an award of attorneys' fees on appeal. See, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 825, 828 P.2d 549 (1992). The point of the present appeal is to rectify the error made by the trial court not finding

Egan to be the prevailing party under RCW 4.24.525 and thus not awarding him fees or sanctions. Therefore, in addition to this Court remanding the case for entry of an order awarding fees, fees should be awarded to Egan for his appeal.

Egan respectfully requests that the Court grant his request for costs and reasonable attorneys' fees on appeal. This Court should determine those fees. *Martinez v. City of Tacoma*, 81 Wn.App. 228 at 245-46, 914 P.2d 86 (1996). Egan will submit an affidavit to document his fees on appeal. RAP 18.1(d).

V. CONCLUSION

The trial court's rejection of Egan's Anti-SLAPP claim should be reversed. The case should be remanded with instructions to the Trial Court to enter an order recognizing that Egan has prevailed under RCW 4.24.525 and to award attorney fees, a $10,000 sanction and costs under that statute. This Court should make an award of fees for Egan's successful appeal.

DATED this 22nd day of October, 2012

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

APPENDIX A

TIMELINE OF EVENTS

May 26, 2011 Egan sent a public disclosure request to obtain "all sustained and founded complaints against Seattle Police Officer from January 1, 2010 through May 26, 2011. CP 133.

July 14, 2011 Egan received no response to the May 26, 2011 request. E-mail inquiry was sent to the SPD. In this inquiry, Egan wrote that "we should have the response or a reason explaining for the delay. The failure to do so would violate the Public Disclosure Act and the statutory fees would be up to $100/day for the delay." CP 135.

July 14, 2011 Egan received the first installment of the almost thirty total sustained complaints from January 1, 2010 through July 14, 2011. CP139-147.

July 15, 2011 Egan made an additional request for the in-car video of an incident which was referenced in the initial

installment of an officer using incredibly vulgar language toward a citizen. CP 149-150.

July 17, 2011the City responded by denying the request pursuant to RCW 9.73.090(1)(c) because disclosure would violate the subject's "right to privacy." CP 149.

August 19, 2011 Egan again requested the in-car video and through investigation has obtained the identity of the subjects in the in-car video. Egan advised in this request that "we are expecting strict adherence to the spirit of the public disclosure here. If the documents are not produced, are adulterated or otherwise affected, the Public Disclosure Act has statutory remedies we would pursue." CP 152.

August 25, 2011 SPD advised that it needed more time to respond to the request. The anticipated response would be on or about September 9, 2011. CP 154

September 9, 2011 Egan received the two in-car videos requested.

September 23, 2011 after reviewing the videos provided on September 9, 2011, Egan requested 36 specific videos of certain officers in which Egan had determined the Office of Professional Accountability ("OPA") had investigated. CP 157-158.

September 28, 2011 Egan received a scanned letter in response to the request which indicated that the response time would be at least two months, November 30, 2011. CP 161

November 30, 2011 Egan received an e-mail indicating that the City would not produce the 36 videos again pursuant to RCW 9.73.090(1)(c). This response did allow for an appeal to the Seattle Police Chief to be made in writing. CP 166-168.

December 7, 2011 Egan appealed the November 30, 2011 denial of the records to Seattle Police Chief Diaz. CP 170-171.

December 7, 2011 Egan also sent an e-mail to Seattle Police Chief Diaz's assistant requesting a meeting with the chief. CP 173.

December 8, 2011 the Director of the City's OPA, Kathryn Olson e-mailed Egan and indicated that she would be willing to meet with Egan to discuss his concerns about some of the Seattle Police Officers' behavior. CP 175. This meeting never occurred.

December 16, 2011 the United States Department of Justice issued its findings relating to its own investigation of the Seattle Police Department and the concern of biased policing, among other issues. CP 118 for the web address to the findings.

December 16, 2011 Egan released the videos he had received to KIRO, KOMO and published the videos to Youtube.com and put the videos on Egan's website. CP186-187, 189-191.

December 17, 2011 Egan gave interviews to KCPQ 13 and KING 5 news.

December 19, 2011 Egan gave a phone interview with KOMO news.

December 19, 2011 the Seattle Weekly ran an article which included segments of a previous interview with Egan.

December 20, 2011 Egan gave an interview to Right this Minute, a national news group.

After numerous interviews over the next week or so, on December 28, 2011 Assistant City Attorney Mary Perry wrote Egan an e-mail which indicated that the appeal he filed has been referred to her for review and response. Ms. Perry indicated that she would have a response by January 6, 2012. CP 193.

January 4, 2012 the City of Seattle filed suit against James Egan. CP 1-7.

January 10, 2012 Egan requested the 36 videos again, only this time requested the sound be deleted from the disclosure. In essence the request was for 36 silent videos. CP 195-196.

January 11, 2012 the City denied Egan's request for 36 silent videos pursuant to RCW 9.73.090(1)(c). CP 198.

January 11, 2012 Assistant City Attorney Perry filed an Amended Complaint seeking Declaratory and Injunctive Relief. CP 26-33.

January 18, 2012 Egan appealed the denial of the production of silent videos to Chief Diaz. CP 200-201.

Through subsequent public records requests, Egan was able to determine several other examples where other citizens have made a public records request to the Seattle Police Department, were denied that request, an chose to appeal the denials to Chief Diaz. To Egan's knowledge none of those record requesters have been sued by the City of Seattle. CP 207-222.

APPENDIX B

RELEVANT STATUTE PROVISIONS

RCW 9.73.090. Certain emergency response personnel exempted from RCW 9.73.030 through 9.73.080 - Standards - Court authorizations - Admissibility

(1) The provisions of RCW 9.73.030 through 9.73.080 shall not apply to police, fire, emergency medical service, emergency communication center, and poison center personnel in the following instances:.....

(c) Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles. All law enforcement officers wearing a sound recording device that makes recordings corresponding to videos recorded by video cameras mounted in law enforcement vehicles must be in uniform. A sound recording device that makes a recording pursuant to this subsection (1)(c) must be operated simultaneously with the video camera when the operating system has been activated for an event. No sound recording device may be intentionally turned off by the law enforcement officer during the recording of an event. Once the event has been captured, the officer may turn off the audio recording and place the system back into "pre-event" mode.

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.

A law enforcement officer shall inform any person being recorded by sound under this subsection (1)(c) that a sound recording is being made and the statement so informing the person shall be included in the sound recording, except that the law enforcement officer is not required to inform the person being recorded if the person is being recorded under exigent circumstances. A law enforcement officer is not required to inform a person being recorded by video under this subsection (1)(c) that the person is being recorded by video…..

RCW 42.56.540. Court protection of public records

The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions. An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested. However, this option does not exist where the agency is required by law to provide such notice.

RCW 4.24.525 Public participation lawsuits - Special motion to strike claim - Damages, costs, attorneys' fees, other relief - Definitions

(1) As used in this section:

(a) "Claim" includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;

(b) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

(c) "Moving party" means a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim;

(d) "Other governmental proceeding authorized by law" means a proceeding conducted by any board, commission, agency, or other entity created by state, county, or local statute or rule, including any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency.

(e) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity;

(f) "Responding party" means a person against whom the motion described in subsection (4) of this section is filed.

(2) This section applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this section, an "action involving public participation and petition" includes:

(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

(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.

(3) This section does not apply to any action brought by the attorney general, prosecuting attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

(4)(a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in subsection (2) of this section.

(b) 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.

(c) In making a determination under (b) of this subsection, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(d) If the court determines that the responding party has established a probability of prevailing on the claim:

(i) The fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and

(ii) The determination does not affect the burden of proof or standard of proof that is applied in the underlying proceeding.

(e) The attorney general's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

(5)(a) The special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not later than thirty days after the service of the motion unless the docket conditions of the court require a later hearing. Notwithstanding this subsection, the court is directed to hold a hearing with all due speed and such hearings should receive priority.

(b) The court shall render its decision as soon as possible but no later than seven days after the hearing is held.

(c) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

(d) Every party has a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

(6)(a) The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and

(iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award to a responding party who prevails, in part or in whole, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the responding party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorneys' fees; and

(iii) Such additional relief, including sanctions upon the moving party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(7) Nothing in this section limits or precludes any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

RCW 42.56.530

Review of agency denial.

Whenever a state agency concludes that a public record is exempt from disclosure and denies a person opportunity to inspect or copy a public record for that reason, the person may request the attorney general to review the matter. The attorney general shall provide the person with his or her written opinion on whether the record is exempt.

Nothing in this section shall be deemed to establish an attorney-client relationship between the attorney general and a person making a request under this section.

[1992 c 139 § 10. Formerly RCW 42.17.325.]