

No. 64818-7-1  
 IN THE COURT OF APPEALS  
 FOR THE STATE OF WASHINGTON  
 DIVISION I

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FREDERICK J. FISCHER III,  
 Appellant,  
 DEPARTMENT OF CORRECTIONS,  
 Respondent.

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ON APPEAL FROM THE  
 SUPERIOR COURT OF SNOHOMISH COUNTY  
 Before the Honorable Linda Krese  
 APPELLANT'S REPLY BRIEF

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Frederick J. Fischer III #249868  
 Washington State Reformatory  
 P.O. Box 777  
 Monroe, WA 98272

For Pro-se Appellant

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 STATE OF WASHINGTON  
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A. ASSIGNMENT OF ERROR

1. The Trial Court Erred In Finding That DOC Met It's Burden Of Proof Under The PRA.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether Or Not DOC Can Claim An Exemption Under RCW 42.56.240(1) When It Provides To Inmates The Specific Intelligence Information DOC Professes Is Essential To Prison Security, And Whether Or Not The Trial Court Erred In Failing To Consider The Unique Circumstances Of The Prison.

C. STATEMENT OF THE CASE

1. The Appellees agree to the Statement of the case as set forth in Appellant's Opening Brief. Appellees Brief, at p. 2, §II(A).

D. ARGUMENT

In Newman v. King County, 133 Wn.2d 565, 572, 947 P.2d 712 (1997) the Washington State Supreme Court determined for

the first time whether documents within an "open criminal investigation file" were "essential to effective law enforcement". The Newman court agreed with King County that under the "First Step of the Statute", RCW 42.56.240(1), that King County had established that the documents were compiled by a law enforcement agency. Newman, 133 Wn.2d at 572-73. Under the "Second Step of the Statute", RCW 42.56.240(1), requires appellee's in this case, as was required of King County in Newman, to establish that the documents were "essential to effective law enforcement". Newman, 133 Wn.2d at 573. Appellee's have not met their burden of proof under the second step of the statute as demonstrated by the foregoing.

Appellee's have not asserted or established in the trial court, nor in their brief in this court, the three part inquiry in the second step of the statute that the Newman Court adopted and addressed. See Newman, 133 Wn.2d at 573-574; Brief of Appellee, at pp. 7-14; CP 19, at pp. 7-11. This failure to establish or assert the three part inquiry in the second step of the statute is analogous to the finding in Peggie v. Cotten, 344 F.3d 674, 679 (7th Cir. 2003), that appellee cites in their brief at p. 9, where the Peggie Court found that Indiana had not yet asserted their defense. Rather appellees in their brief, the same as Indiana, simply state that "having the

offender excluded from viewing the videotape is consistent with the Department of Corrections (DOC) keeping security tapes confidential. Newman, 133 Wn.2d at 573-574; Peggie, 344 F.3d at 679. So absent appellee's asserting or establishing the three inquiries in the second step of the statute as required by Newman, supra, at 573-574, appellee's have demonstrated themselves that they have not met the burden of establishing that the videotapes are exempt under the PRA under RCW 42.56.240(1).

Therefore, appellate respectfully submits, Newman does not support appellee's "broad reliance" on RCW 42.56.240(1) to exempt that videotapes from disclosure under Newman. To the extent that appellees have asserted an exemption, appellant respectfully submits, is tested "in other contexts" the Newman court mentioned at pp. 574-75, and appellant's case is determined as if no "open criminal investigation" exists, which unlike Newman, leaves this court to decide what is sensitive or non-sensitive to prison security under the PRA as to amount to an exemption.

Appellee's citation to Linderman v. Kelso Sch. Dist. No. 458, 162 Wn.2d 196, 203, 172 P.3d 329 (2007), does not support appellee's broad reliance on RCW 42.56.240(1), because by analogy, under Linderman appellee's would still have to establish

the three Newman factors in the second step in order to meet their burden of proof under the PRA. Linderman, 162 Wn.2d at 203 ¶12 ("Even if the district ultimately used the videotape as the basis for disciplining the student who committed the assault, the videotape itself would not thereby be converted into personal information in files maintained for students, since the videotape does not reveal whether discipline was or was not imposed.").

In fact appellees and the Kelso School District would have the same interest with regards to discipline for violating rules. The Court in Linderman held that the District cannot change the inherent character of the record by simply placing the videotape in a student's file or by using the videotape as an evidentiary basis for disciplining the student. Likewise, appellant respectfully submits, appellees cannot change the inherent character of the videotape by refusing to establish the three criteria in the second step of Newman, and arguing "security concerns" which is what they're trying to do by citing Linderman to support their position and use of Richard Morgan's declaration.

Linderman, supra, rather supports appellant's argument that providing inmates access to the monitors and capabilities of the cameras undermine the credibility of appellees that

the videotapes in question are "essential to effective law enforcement", or "essential to prison security." Linderman, 162 Wn.2d at 203 ¶13 ("Further undermining the credibility of any later claim that the videotape was a document maintained in the student's file is the fact that the district permitted the Lindermans to view the videotape on the evening of the incident. Were the videotape actually a record in the student's file, the District would have immediately recognized it as such and would not have shared it absent a court order or subpoena or consent of the student's parent or guardian.").

Likewise, appellant respectfully submits if appellees believed the PAB video system to be "essential to effective law enforcement" or "essential to prison security" they certainly would not give inmates and their cohorts access to the video monitors and provide them information concerning the capabilities of the PAB video system.

Thus, under Newman and Linderman, the PAB videotapes in appellant's case would be exempt under the second step in Newman for "essential to effective law enforcement" if appellees established that the videotape is being used for an "open criminal investigation" or "open disciplinary proceeding." Newman, 133 Wn.2d at 573-574 ("These three inquiries require the agency to explain why documents fall within the exemption

and provide a basis to define the scope of the exemption." ). Appellees have made no showing in this respect except to assert that the videotapes are exempt because of security issues, which the credibility of appellee's assertions are undermined by the fact that they provide inmates and their cohorts access to the PAB monitor and give them information regarding the capabilities of the PAB video system.

Additionally, Gaither v. Anderson, 236 F.3d 818, 819-820 (7th Cir. 2000), cited by appellees, does not support appellee's position. Gaither recognized that Chavis recognized that its rule requiring disclosure of exculpatory evidence to an inmate is limited to situations in which such disclosure would not create security issues. Gaither, 236 F.3d at 820. In Gaither, the prison officials articulated a legitimate security concern for refusing to disclose the videotape, namely, because they "did not want the offenders to know the capabilities of the cameras for security reasons." Gaither, 236 F.3d at 820.

Although appellees submitted the declaration of Richard Morgan to make this same argument, as pointed out above, appellees have made no showing that there is an "open criminal investigation" or "open disciplinary proceeding" under Newman, supra, and appellee's assertion of a security issue is undermined by

the fact that appellees provide inmates and their cohorts access to the PAB monitor and, as established below, give them information regarding the recording capabilities of the PAB video system. Thus, appellant respectfully submits, Gaither, supra, does not support appellee's position.

Likewise, Livingston v. Ceden, 164 Wn.2d 46, pp. 51-57, ¶¶7-21, 186 P.3d 1055 (2008), moots appellee's security issues because, although appellees could not deny a public disclosure request for a security issue in that case, when the PRA requested items are received at the prison, DOC could deny an inmate and his cohorts possession of the videotapes under RCW 72.09.530 and DOC Policy 450.100. See Livingston, 164 Wn.2d at pp. 51, ¶7, 55-56, ¶¶6-17, and not violate the PRA.

Appellees admit that inmates and their cohorts have access to the monitors and can see the camera angles, blind spots, and clarity of the video picture. Brief of Appellee, at pp. 12-14. Appellees argue "waiver", but they admit that issue was not timely asserted by them in the trial court and the trial court denied their motion to supplement the record as moot because the court had already ruled in their favor. Brief of Appellee, at p. 12 and n. 1.

Even assuming that the trial court did consider appellee's supplement to the record, appellees already concede that they

give inmates and their cohorts access to the PAB monitor, which provides direct evidence that inmates and their cohorts are able to figure out what the various cameras could see and not see in real time, see Brief of Appellee, at p. 13, and appellee's argument that there is no evidence to tell inmates anything about the recording capabilities of the surveillance system and the quality of the images that are captured and retained, see Brief of Appellee, at p. 13, does not have merit.

Appellees ignore "Exhibit #9" attached to appellant's "Affidavit of Fischer", CP 12 in Court of Appeals record, attached as Attachment A hereto, which provides:

"I spoke with Chris Fadden, MCC's Electronic Technician, regarding down-loading this incident. According to Chris -- he recalls being called to the PAB on December 11th or so by Sgt. Lamm in an attempt to download this incident, what was found was that the PAB recording works off of movement, in that when there is no movement in the PAB the recorder works at a very low frame rate, when movement occurs the recording then works at a higher frame rate to catch a clear picture of the recording -- in this case by December 11th the date we they were looking for had been recorded over and was unable to be retrieved. Chris said with the volume of activity in the PAB we may have a 14 to 15 day window period in which to record a past incident."

See Attachment A, at p. 1, CP 12, at Exhibit #9, at p. 1.

Under Gaither and Chavis it is hard to discern how appellees can argue under the unique facts and circumstances of this case the disclosure of the videotapes create a security issue when they not only disclose the capabilities of the cameras

In the PAB to inmates and their cohorts, but also admit that inmates and their cohorts have unrestricted access to view the PAB monitor and determine the camera angles and blind-spots as well as see and not see the camera quality in real time, and even if appellees have to produce the videotapes under the PRA, under Livingston v. Ceden, supra, appellees could prevent inmates and their cohorts from viewing the videotapes or having them in their possession.

Appellee's claims that the videotapes are "essential to effective law enforcement", without establishing the Three Newman Factors in the second step of RCW 42.56.240(1), or that they are "essential to prison security" after they admit they let inmates and their cohorts have unrestricted access to the PAB monitor, and appellant's evidence in the trial court that appellees give inmates access to information regarding the recording capabilities, undermines their credibility and Richard Morgan's credibility, that in this specific case, that providing videotapes of the incident to which the PRA request was made creates a security issue and preventing disclosure is "essential to effective law enforcement" or "essential to prison security". If that were so appellees would have immediately recognized the PAB camera system as such and would not have shared the PAB camera system and recording capabilities

with inmates and their cohorts.

The declaration of Richard Morgan does not contradict the evidence submitted to the trial court by appellant. Appellees argue that appellant does not contradict the declaration of Richard Morgan. See Brief of Appellee, at p. 12 ¶1. However, under RCW 42.56.550(1) the burden of proof is on appellees not appellant, and the declaration of Richard Morgan does not contradict the evidence under the unique facts and circumstances of this case submitted in the trial court.

Appellant recognizes that if he is given a favorable ruling in this matter by this Court, this Court's ruling will be limited to the unique facts and circumstances of this case and not apply to DOC's entire surveillance system in every institution throughout the state as the declaration of Richard Morgan supports and would ask the Court to hold as much. However, under the unique facts and circumstances of this case and the clearly established statutory and decisional law of this state holding that the PRA shall be liberally construed and its exceptions narrowly construed, See RCW 42.56.030; Prison Legal News v. Dept. of Corr., 154 Wn.2d 628, 636, ¶17, 115 P.3d 316 (2005), appellant asks the Court to rule that appellees did not meet their burden in the trial court and remand this matter to the trial court.

CONCLUSION

Appellant respectfully requests that the Court reverse the trial court's ruling and remand this matter to the trial court for further proceedings consistent with this Honorable Court's decision.

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

Signed this 28th day of June, 2010.

Signed: Frederick J. Fischer III  
Frederick J. Fischer III

Pro-se for appellant.

# ATTACHMENT A

EXHIBIT

9

**Vaughan, Denise L. (DOC)**

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**From:** Kopoian, Catherine M. 'Cathy' (DOC)  
**Sent:** Friday, January 11, 2008 10:48 AM  
**To:** Vaughan, Denise L. (DOC)  
**Subject:** RE: Question

Thank You

-----Original Message-----

**From:** Vaughan, Denise L. (DOC)  
**Sent:** Friday, January 11, 2008 10:48 AM  
**To:** Kopoian, Catherine M. 'Cathy' (DOC)  
**Subject:** RE: Question

Cathy, I will follow up with you next week re: this issue.

Denise Vaughan, Public Disclosure Manager  
Washington State Department of Corrections  
✉ dlvbaugh@doc1.wa.gov  
☎ (360) 725-8854

"Ensuring effective communication and compliance with the Public Records Act."

-----Original Message-----

**From:** Kopoian, Catherine M. 'Cathy' (DOC)  
**Sent:** Friday, January 11, 2008 10:43 AM  
**To:** Vaughan, Denise L. (DOC)  
**Subject:** RE: Question

This is the response I rec'd today regarding the tape:

I spoke with Chris Fadden, MCC's Electronic Technician, regarding down loading this incident. According to Chris—he recalls being called to the PAB on December 11th or so by Sgt Lamm in an attempt to down load this incident, what was found was that the PAB recording works off of movement, in that when there is no movement in the PAB the recorder works at a very low frame rate, when movement occurs the recording then works at a higher frame rate to catch a clear picture of the recording—in this case by December 11th the date we they were looking for had been recorded over and was unable to be retrieved. Chris said with the volume of activity in the PAB we may have a 14 to 15 day window period in which to record a past incident.

-----Original Message-----

**From:** Vaughan, Denise L. (DOC)  
**Sent:** Thursday, January 10, 2008 10:25 AM  
**To:** Kopoian, Catherine M. 'Cathy' (DOC)  
**Subject:** RE: Question

First we need to determine whether or not we have the records that were requested. This must always be done prior to denying a record. If the record does not exist, then we have nothing to deny. Let me know what you find out from main control and I will work with you to draft a response to Attorney Kahrs.

Denise Vaughan, Public Disclosure Manager  
Washington State Department of Corrections  
✉ dlvbaugh@doc1.wa.gov  
☎ (360) 725-8854

"Ensuring effective communication and compliance with the Public Records Act."

-----Original Message-----

**From:** Kopolan, Catherine M. 'Cathy' (DOC)  
**Sent:** Thursday, January 10, 2008 8:48 AM  
**To:** Vaughan, Denise L. (DOC)  
**Subject:** RE: Question

I requested it but haven't rec'd it. I will contact main control.

-----Original Message-----

**From:** Vaughan, Denise L. (DOC)  
**Sent:** Thursday, January 10, 2008 8:46 AM  
**To:** Kopolan, Catherine M. 'Cathy' (DOC)  
**Subject:** RE: Question

Do you have copy of the surveillance video that has been requested?

Denise Vaughan, Public Disclosure Manager  
Washington State Department of Corrections  
✉ dlvaughan@doc1.wa.gov  
☎ (360) 725-8854

"Ensuring effective communication and compliance with the Public Records Act."

-----Original Message-----

**From:** Kopolan, Catherine M. 'Cathy' (DOC)  
**Sent:** Thursday, January 10, 2008 6:49 AM  
**To:** Vaughan, Denise L. (DOC)  
**Subject:** FW: Question

I was wondering if you had a chance to review this matter?

-----Original Message-----

**From:** Schave, Gaylene R. (DOC)  
**Sent:** Monday, December 17, 2007 12:43 PM  
**To:** Vaughan, Denise L. (DOC)  
**Cc:** Kopolan, Catherine M. 'Cathy' (DOC)  
**Subject:** FW: Question

Let me forward to Denise and see what advice she has.

*Gaylene Schave  
Public Disclosure Specialist  
Public Disclosure Unit  
Department of Corrections  
MS: 41118  
(360) 725-8852  
(360) 664-4056 Fax  
[grschave@doc1.wa.gov](mailto:grschave@doc1.wa.gov)*

*"Ensuring effective communication and compliance with the Public Records Act."*

-----Original Message-----

**From:** Kopolan, Catherine M. 'Cathy' (DOC)  
**Sent:** Monday, December 17, 2007 11:52 AM  
**To:** Schave, Gaylene R. (DOC)  
**Subject:** Question

<< File: 7-431 Kahrs re Fischer 12-05-07.doc >>

I sent the attached letter with Denise Vaughan's OK. The attorney is challenging me to show how cameras which show areas in which offenders have daily access meet the requirements of either RCW 42.56 (1) or 420 (2). He states that if necessary, he will litigate the issue.

Any suggestion on how best to respond to his challenge?

Thank You,  
Cathy Kopoian  
Acting Administrative Assistant 4  
WSRU X2608

Fischer v. Dept. of Corr.  
Court of Appeals No. 64818-7-1

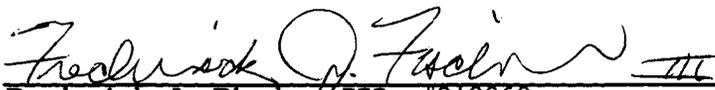
DECLARATION OF SERVICE BY MAILING

I Frederick J. Fischer III declare under the penalty of perjury under the laws of the State of Washington that on the 28th day of June, 2010, I mailed a copy of: (1) Declaration of Service by Mailing, and (2) Appellant's Reply Brief, to:

Douglas W. Carr, Assistant Attorney General  
Office of the Attorney General  
PO Box 40116  
Olympia, WA 98504

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

Signed this 28th day of July, 2010.

Signed:   
Frederick J. Fischer III, #249868  
Box 777 B235  
Monroe Correctional Complex  
Washington State Reformatory  
Monroe, WA 98272-0777

Declaration of Service  
By Mailing  
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