

No. 72159-3-I
(Consolidated with Nos. 72198-4-I, 72898-9-I, 72899-7-I)

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JANE DOES 1-15, *et al.*,

Plaintiffs/Appellants,
v.

KING COUNTY, *et al.*,

Defendants/Respondents

**APRIL 2015 BRIEF OF THE PLAINTIFF/APPELLANT
STUDENTS**

(JANE DOES 1-15 and JOHN DOES 1-15)

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3

TABLE OF CONTENTS

	<i>Page</i>
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR & CORRESPONDING ISSUES	2
A. Three Assignments Of Error.	2
1. The trial court erred by failing to grant a <i>preliminary</i> injunction under the PRA’s <u>victim & witness</u> exemption.	2
2. The trial court erred by failing to grant a <i>preliminary</i> injunction under the PRA’s <u>privacy</u> exemption.	2
3. The trial court erred by failing to grant a <i>preliminary</i> injunction under the PRA’s <u>law enforcement</u> exemption.	2
B. Five Issues Pertaining To Each Assignment of Error.	3
1. Do the students likely have a clear legal or equitable right under the specific PRA exemption to have more than just their faces blurred in the video footage?	3
2. Do the students have a well-grounded fear that their right under that exemption will be immediately invaded without a preliminary injunction?	3
3. Will the students likely be subject to substantial harm without a preliminary injunction under that exemption?	3
4. Do the relevant equities support or negate the preliminary injunction the students seek under that exemption?	3
5. Should this Court issue a preliminary injunction under that exemption and remand the students’ permanent injunction claims for trial on the merits?	3
III. STATEMENT OF THE CASE	3
A. SPU’s Security Camera Footage.	3
B. SPU Provides Its Security Camera Footage To Law Enforcement.	4
C. Law Enforcement’s Planned Distribution Of SPU’s Security Camera Footage Under The PRA.	4

	<u>Page</u>
1. First Set: a 3-minute segment of SPU’s footage.	4
2. Second Set: SPU’s remaining footage.	6
D. The Filmed SPU Students Seek A Preliminary Injunction Against The PRA Distribution Of SPU’s Security Camera Footage If Nothing More Than Their Faces Are Blurred.....	6
E. Distribution Of SPU’s Security Camera Footage Is Put On Hold Pending This Appeal’s Resolution Of The Student’s Preliminary Injunction Request.	7
IV. LEGAL DISCUSSION.....	7
A. Standard Of Review Is De Novo	7
B. Preliminary Injunction Standard: “Likelihood” Rather Than “Certainty” Of Success.....	7
C. The Students Have A Likelihood Of A Clear Legal Or Equitable Right To A Preliminary Injunction Under The PRA’s Victim & Witness Exemption.....	9
1. The PRA’s victim & witness exemption requires the disclosing agency to remove all information in the SPU video footage that identifies the plaintiff students.	9
2. Blurring a student’s face does not remove all information in the footage that identifies that student.	11
3. Legal right conclusion: plaintiffs established the requisite likelihood of a legal right to have more than just their face blurred under the PRA’s victim & witness exemption.	13
D. The Students Have A Likelihood Of A Clear Legal Or Equitable Right To A Preliminary Injunction To A Preliminary Injunction Under The PRA’s Privacy Exemption.....	14
1. The PRA exempts video footage in an investigative record if disclosure would invade a student’s privacy.	14
2. Releasing video footage with just the student’s <u>face</u> blurred invades the student’s privacy.	14
(a) Releasing this footage over the filmed student’s objection would be highly offensive to a reasonable person in that student’s position.....	14

	<u>Page</u>
(b) Releasing this footage over the filmed student’s objection does not serve a legitimate public concern.	17
3. Legal right conclusion: plaintiffs established the requisite likelihood of a legal right to have more than just their face blurred under the PRA’s privacy exemption.	18
E. The Students Have A Likelihood Of A Clear Legal Or Equitable Right To A Preliminary Injunction To A Preliminary Injunction Under The PRA’s Law Enforcement Exemption.	19
1. The PRA exempts video footage in an investigative record if nondisclosure is essential to promote effective law enforcement.	19
2. Releasing video footage with just the objecting citizen’s face blurred impairs effective law enforcement.	19
3. Legal right conclusion: plaintiffs established the requisite likelihood of a legal right to have more than just their face blurred under the PRA’s law enforcement exemption.	21
F. Likelihood Of Immediate Invasion.	22
G. Likelihood Of Substantial Harm.	22
H. Equities.	23
I. This Court Should Issue A Preliminary Injunction And Remand The Students’ Claims For Trial On The Merits.	24
V. CONCLUSION.	25

TABLE OF AUTHORITIES

Page(s)

CASES

Ameriquest Mortgage Co. v. State Atty. Gen.,
148 Wn.App. 145, 199 P.3d 468 (2009)8, 9, 25

Comaroto v. Pierce County Med. Examiner’s Office,
111 Wn.App. 69, 43 P.3d 539 (2002)15, 16, 17

Confederated Tribes of Chehalis Reservation v. Johnson,
135 Wn.2d 734, 958 P.2d 260 (1998)24

*Cowles Publishing Co. v. Pierce County Prosecutor’s
Office*,
111 Wn.App. 502, 45 P.3d 620 (2002) passim

Dawson v. Daly,
120 Wn.2d 782, 845 P.2d 995 (1993)7

Haines-Marchel v. State Dep’t of Corrections,
183 Wn.App. 655, 334 P.3d 99 (2014)20, 21

Lindeman v. Kelso School Dist. No. 458,
127 Wn.App. 526, 111 P.3d 1235 (2005)12

*Northwest Gas Ass’n v. Washington Utilities & Transp.
Comm’n*,
141 Wn.App. 98, 168 P.3d 443 (2007)7, 9, 24

Rabon v. City of Seattle,
135 Wn.2d 278, 957 P.2d 621 (1998)8

Sargent v. Seattle Police Dep’t,
179 Wn.2d 376, 314 P.3d 1093 (2013)9, 10, 20

Soter v. Cowles Publishing Co.,
162 Wn.2d 716, 174 P.3d 60 (2007)3

Tiberino v. Spokane County,
103 Wn.App. 680, 13 P.3d 1104 (2000)16, 17

Page(s)

Tyler Pipe Indus., Inc. v. State, Dep't of Revenue,
96 Wn.2d 785, 638 P.2d 1213 (1982).....8

STATUTES

RCW 42.56.05014
RCW 42.56.240 passim
RCW 42.56.5503, 7

OTHER AUTHORITIES

Civil Rule 658, 9
Evidence Rule 201.....23

I. INTRODUCTION

The individual plaintiffs in this consolidated appeal are six students filmed by security cameras at a private university (Seattle Pacific University or “SPU”). The Seattle police and King County Prosecutor took possession of SPU’s security camera footage in their criminal investigation of the June 5, 2014 shootings on the SPU campus.

Once the SPU video footage was in law enforcement’s hands, commercial media outlets demanded a copy under the Public Records Act (“PRA”). The police and prosecutor notified the six students filmed in those videos that unless a court ordered otherwise, the police and prosecutor would distribute SPU’s security camera footage to all PRA requestors after blurring the students’ faces (and only their faces) with “pixilation”.

The plaintiff students asked the King County Superior Court to order otherwise. That’s because pixilating a person’s face alone does not obscure other recognizable attributes of a person’s body that reveal the person’s identity. As the trial court itself acknowledged:

Both the declarations of plaintiffs’ experts and common sense establish that persons who know an individual depicted in a pixilated video may be able to deduce that person’s identity from other cues, such as clothing, gait or body type. This is likely to be particularly true in a

small community such as Seattle Pacific University.¹

Since the police and prosecutor planned their PRA distribution of the SPU videos in two separate installments, the plaintiff students filed two separate preliminary injunction motions to enjoin that PRA distribution. Both motions were based on the same PRA exemptions – namely, the PRA’s (1) victim & witness exemption, (2) privacy exemption, and (3) law enforcement exemption.

The trial court denied the students’ preliminary injunction motions. Public distribution of the SPU videos, however, has been temporarily enjoined pending this consolidated appeal of the trial court’s two preliminary injunction denials.

This brief explains why it was reversible error for the trial court to deny the students’ request for a *preliminary* injunction before a trial on the merits.

II. ASSIGNMENTS OF ERROR & CORRESPONDING ISSUES

A. Three Assignments Of Error.

- 1.** The trial court erred by failing to grant a *preliminary* injunction under the PRA’s victim & witness exemption.
- 2.** The trial court erred by failing to grant a *preliminary* injunction under the PRA’s privacy exemption.
- 3.** The trial court erred by failing to grant a *preliminary* injunction under the PRA’s law enforcement exemption.

¹ CP 1045 (December 15, 2014 Second Memorandum Opinion at p. 5 of 9, lines 6-10).

B. Five Issues Pertaining To Each Assignment of Error.

1. Do the students likely have a clear legal or equitable right under the specific PRA exemption to have more than just their faces blurred in the video footage?
2. Do the students have a well-grounded fear that their right under that exemption will be immediately invaded without a preliminary injunction?
3. Will the students likely be subject to substantial harm without a preliminary injunction under that exemption?
4. Do the relevant equities support or negate the preliminary injunction the students seek under that exemption?
5. Should this Court issue a preliminary injunction under that exemption and remand the students' permanent injunction claims for trial on the merits?

III. STATEMENT OF THE CASE

A. SPU's Security Camera Footage.

Part of Mr. Ybarra's crime was filmed by SPU's campus security cameras.² As the trial court correctly noted, SPU's May 19 security camera footage shows the two plaintiff students who "were duped by Ybarra into showing him around campus" that day "for the purpose of planning his attack."³

SPU's June 5 security camera footage then shows the plaintiff

² CP at 109-10; see also video available for in camera review; RCW 42.56.550(3) ("Courts may examine any record in camera in any proceeding brought under this section."); *Soter v. Cowles Publishing Co.*, 162 Wn.2d 716, 744 n.14, 174 P.3d 60 (2007) (recognizing that appellate review of documents in camera is appropriate).

³ CP 1044 & 1042 (December 15, 2014 Second Memorandum Opinion at p.4 of 9, lines 19-21, & p.2 of 9, lines 10-17); see also, e.g., <https://www.documentcloud.org/documents/1185005-satterberg-statement.html>, at p.2.

students as Ybarra enters the SPU campus to kill a 19 year old SPU student,⁴ shoot two other SPU students,⁵ and threaten several other SPU students by aiming his shotgun at them.⁶ Ybarra was eventually disarmed and subdued by two of the SPU students.⁷

B. SPU Provides Its Security Camera Footage To Law Enforcement.

SPU provided its security camera footage to the Seattle Police Department to aid the criminal investigation of Mr. Ybarra's crime.⁸ SPU's security camera footage was then passed on to the King County Prosecutor prosecuting that crime.⁹

C. Law Enforcement's Planned Distribution Of SPU's Security Camera Footage Under The PRA.

1. First Set: a 3-minute segment of SPU's footage.

The Seattle Police Department received PRA requests from commercial media outlets for copies of SPU's security camera footage.¹⁰

The department planned to disseminate SPU's footage in two sets, with the first being a 3-minute video that "starts as defendant Aaron

⁴ CP at 86-88.

⁵ CP at 510-11.

⁶ CP at 510-11.

⁷ CP at 511.

⁸ CP at 110.

⁹ CP at 200, ¶2. CP 1042 (December 15, 2014 Second Memorandum Opinion at p.2 of 9, lines 10-18).

¹⁰ See CP 76-78 (notice letter from police department's counsel describing the video requests made by KOMO television, Q13 FOX television, and KIRO television); One individual, Aurthur West, also made a similar request to the King County CP at 45-47.

Ybarra enters the building and ends after defendant has been subdued by one male student with the assistance of a second male student. The two students are still awaiting police arrival when the video ends.”¹¹

The police department notified the four SPU students shown in this video of Mr. Ybarra’s crime that:

We . . . understand that those students have expressed a desire for nondisclosure of their identities. RCW 42.56.240(2) [of the Public Records Act] allows agencies to redact information “revealing the identity of persons who are witnesses to or victims of crime” and the students’ desire for nondisclosure “shall govern.” SPD [Seattle Police Department] intends to provide requestors the video with the faces of the four SPU students blurred or “pixilated” in order to redact their identities.¹²

The police department also notified those SPU students that it would distribute the video with no more than the students’ faces blurred unless the students secured a court order enjoining that distribution.¹³

Since SPU’s security camera footage had been passed on to the prosecutor, the King County Prosecuting Attorney received similar PRA requests from commercial media outlets.¹⁴ The County Prosecutor sent the four SPU students a letter taking the same PRA position as the Seattle

¹¹ CP 77 at ¶1 (notice letter from police department’s counsel).

¹² CP 77 at ¶1 (notice letter from police department’s counsel).

¹³ CP 77 at last paragraph (notice letter from police department’s counsel).

¹⁴ See CP 73-74 (notice letter from prosecutor’s counsel describing the video requests made by KING 5 television and KIRO 7 television)

Police Department.¹⁵

2. Second Set: SPU's remaining footage.

The police department and prosecutor subsequently sent letters stating that they were going to distribute the rest of SPU's security camera videos in response to the PRA requests, and that those videos pictured six of the plaintiff SPU students (the previous four students plus two more).

Those letters notified the six SPU students that the police and prosecutor would release this second set of videos with nothing more than the six students' faces blurred unless they secured a court order enjoining that distribution.¹⁶

D. The Filmed SPU Students Seek A Preliminary Injunction Against The PRA Distribution Of SPU's Security Camera Footage If Nothing More Than Their Faces Are Blurred.

The SPU students shown in SPU's security camera footage filed this suit alleging that the PRA does not allow law enforcement to publicly distribute SPU's security camera footage with nothing more than their faces blurred.¹⁷ They allege that since blurring only the face on a person's body does not conceal that person's identity, the proposed PRA

¹⁵ CP 73-74 (notice letter from from prosecutor's counsel, but setting July 8 deadline for the SPU students to secure a court order).

¹⁶ CP 706 at ¶¶5-6 and CP 745-750 (October 23, 2014 notice letter from prosecutor's counsel; October 23, 2014 notice letter from police department's counsel).

¹⁷ CP 1-10 (Complaint); CP 11-24 (Motion for Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not Issue); CP 689-702 (second preliminary injunction motion).

distribution is precluded by at least three PRA exemptions – i.e., those relating to (1) information identifying a crime victim or witness, (2) personal privacy, and (3) promoting effective law enforcement.¹⁸

E. Distribution Of SPU’s Security Camera Footage Is Put On Hold Pending This Appeal’s Resolution Of The Student’s Preliminary Injunction Request.

Although the trial court denied the students’ preliminary injunction motions regarding the first and second sets of SPU videos, other court orders in this case currently preclude law enforcement’s planned distribution of SPU’s security camera footage pending this consolidated appeal of the trial court’s preliminary injunction denials.¹⁹

IV. LEGAL DISCUSSION

A. Standard Of Review Is De Novo

The trial court denied injunctive relief in this PRA case based on the pleadings and documents submitted by the parties. That denial is therefore reviewed de novo.²⁰

B. Preliminary Injunction Standard: “Likelihood” Rather Than “Certainty” Of Success.

To secure a *permanent* injunction, the plaintiff must prove:

- (1) a clear legal or equitable right,

¹⁸ RCW 42.56.240(1)-(2).

¹⁹ CP 133-138, CP 509-23; CP 1049 at lines 12-14.

²⁰ RCW 42.56.550(3); see *Northwest Gas Ass’n v. Washington Utilities & Transp. Comm’n*, 141 Wn.App. 98, 112-13, 168 P.3d 443 (2007) (citing *Dawson v. Daly*, 120 Wn.2d 782, 788, 845 P.2d 995 (1993)).

(2) a well-grounded fear of immediate invasion of that right, and

(3) that the acts complained of will result in substantial harm.

See *Tyler Pipe Indus., Inc. v. State, Dep't of Revenue*, 96 Wn.2d 785, 793, 638 P.2d 1213 (1982).

To secure a *preliminary* injunction, however, the plaintiff need only show a likelihood of establishing those three requirements at trial. That is because “[a]t a preliminary injunction hearing, the plaintiff need not prove, and the trial court does not reach or resolve, the merits of the issues underlying the three requirements for permanent injunctive relief.” *Ameriquest Mortgage Co. v. State Atty. Gen.*, 148 Wn.App. 145, 157, 199 P.3d 468, 473 (2009).

Each of those three requirements is “examined in light of equity, including the balancing of the relative interests of the parties and the interests of the public, if appropriate.” *Rabon v. City of Seattle*, 135 Wn.2d 278, 284, 957 P.2d 621 (1998); *Tyler Pipe*, 96 Wn.2d at 792.

As the following pages explain, the plaintiff SPU students satisfied the above “likelihood” of success standard for the preliminary injunction relief they request.²¹

²¹ *The trial court's Memorandum Opinion seems to ignore the governing likelihood of success standard by assessing plaintiffs' pre-trial preliminary injunction request as a permanent injunction on the merits. (For example, the word "likelihood" does not appear in the trial court's memorandum opinion, and it relies on permanent rather than preliminary injunction case law. CP at 509-519.) But Civil Rule 65 does not allow a*

C. **The Students Have A Likelihood Of A Clear Legal Or Equitable Right To A Preliminary Injunction Under The PRA's Victim & Witness Exemption.**

1. **The PRA's victim & witness exemption requires the disclosing agency to remove all information in the SPU video footage that identifies the plaintiff students.**

The PRA's victim & witness exemption prohibits government agencies from disclosing a record that contains information revealing the identity of a crime victim or witness if the victim or witness objects to that record's disclosure. RCW 42.56.240(2); accord *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 394, 314 P.3d 1093 (2013).

Once a victim or witness indicates a desire for non-disclosure, the PRA does not allow the disclosing agency any discretion to do otherwise. The PRA expressly and unequivocally mandates that if a victim or witness "indicates a desire for disclosure or non-disclosure, such desire shall govern." RCW 42.56.240(2) (underline added).

trial court to consolidate a preliminary injunction hearing with a trial on the merits for a permanent injunction unless it expressly notifies the parties that it is doing so. CR 65(a)(2). And the trial court did not do that here. (Washington law recognizes that that advance notice requirement is critical because parties are generally "unable to develop their evidence fully for the preliminary injunction hearing because of the expedited timeframe." Northwest. Gas Ass'n, 141 Wn.App. at 114. The purpose of Rule 65's notice requirement "is to give the parties notice and time to prepare so that they will have a full opportunity to present their cases at the permanent injunction hearing." Northwest. Gas Ass'n, 141 Wn.App. at 114.) Washington law accordingly holds that a trial court commits reversible error if it attempts at a preliminary injunction hearing to resolve plaintiff's legal claims on the merits instead of analyzing the likelihood of plaintiff's success in the future. Northwest. Gas Ass'n, 141 Wn.App. at 114-5; Ameriquest, 148 Wn.App. at 157. The trial court's denial of the students' preliminary injunction motion accordingly cannot be defended by suggesting the trial court rendered the governing "likelihood of success" standard irrelevant by treating the students' preliminary injunction request as a permanent injunction request instead.

Our Supreme Court has accordingly emphasized with respect to crime victims and witnesses that the PRA takes the public disclosure decision out of the hands of the disclosing agency, and puts that disclosure decision instead in the hands of the victims and witnesses themselves. *See Sargent*, 179 Wn.2d at 394; accord, Seattle Police Department’s notice letter in this case (“We . . . understand that those students have expressed a desire for nondisclosure of their identities. RCW 42.56.240(2) [of the Public Records Act] allows agencies to redact information ‘revealing the identity of persons who are witnesses to or victims of crime’ and the students’ desire for nondisclosure ‘shall govern.’”)²²

The plaintiff students are witnesses and victims shown in the video footage who’ve objected to the public disclosure of that footage.²³ The police and prosecutor acknowledge the PRA’s victim & witness exemption requires information that identifies those students to be redacted before its PRA distribution.²⁴ The police and prosecutor took one step towards that redaction by blurring plaintiffs’ faces with pixilation – a

²² CP 77 at ¶1 (*notice letter from police department’s counsel*) (*underline added*).

²³ CP 27 at ¶5, CP 59-71, CP 511. *The trial court (which reviewed the video in camera) verified this fact, stating that “[a]ll of the victims and witnesses portrayed in the videotape have requested that their identities not be disclosed.” CP at 511.*

²⁴ CP 183 at lines 19-20 (*response brief of King County Prosecuting Attorney’s Office [“PAO”], stating “The PAO has determined the facial images of certain victims and witnesses on the videos are exempt from disclosure under RCW 42.56.240(1) and RCW 42.56.240(2).”*); accord CP 347-48 at lines 20-4 (*response brief of Seattle Police Department*).

redaction permitted only if a PRA exemption applies.²⁵

In short: no dispute exists that the PRA's victim & witness exemption grants the students the right to have information in the video that identifies them removed before the footage's PRA distribution.

2. Blurring a student's face does not remove all information in the footage that identifies that student.

Blurring out a student's face does not remove all information in the video footage identifying that student.

That's because you don't need to see a person's face to know who that person is. Especially a person you've seen before in your school, workplace, neighborhood, church, etc. Two examples illustrate this fact:

- In high school you often recognized the person walking in front of you down the hall without seeing that person's face. Instead, from the back you could identify classmates by seeing things other than their face – e.g., their height, weight, body shape, manner of dress or specific clothing, gait, posture, skin color, tattoos or scars, mannerisms, etc.
- At work you often recognize the person in front of you down the hall without seeing that person's face. Instead, from the back you can identify co-workers by seeing things other than their face – e.g., their height, weight, body shape, manner of dress or specific clothing, gait, posture, skin color, tattoos or scars, mannerisms, etc.

The same is true here. Even if the plaintiff students' faces are completely blacked out, the SPU video footage would still show viewers

²⁵ *CP at 183-84 & 347-48; see, e.g., RCW 42.56.240(1).*

the students' height, weight, body shape, manner of dress, specific clothing, gait, posture, skin color, tattoos or scars, mannerisms, etc. To remove such non-facial identifying information from a video, the student's entire body must be blacked out. Simply blurring the student's face leaves other information in the video identifying that student.

Washington case law recognizes this need to redact more than just a person's face. In *Lindeman v. Kelso School District*, the Court of Appeals recognized that redacting all identifying information from a videotape requires redaction of more than just a student's face. It held that removing all identifying information could even require the entire videotape to be withheld since, in that case, there would not be much left of the tape once all information identifying the students was redacted:

If it were possible to redact the tape, such redaction would obliterate audio and visual personal information such as students' faces, bodies, voices, clothing, and so forth, which would otherwise tend to reveal protected student identities. After such redaction, there would be no meaningful information remaining on the tape.

Lindeman v. Kelso School Dist. No. 458, 127 Wn.App. 526, 541, 111 P.3d 1235 (2005), rev'd on other grounds, 162 Wn.2d 196, 172 P.3d 329 (2007).

The need to redact more than just a student's face was confirmed in this case by law enforcement testimony which explained that

individuals are regularly identified by attributes other than their faces – such as height, weight, body shape, manner of dress, specific clothing, gait, posture, skin color, tattoos/scars or lack thereof, mannerisms, etc.²⁶

Such non-facial attributes of the plaintiff students are on full display in the SPU video footage. The testimony of these two veteran law enforcement professionals confirm that people who live, work, or go to school in the plaintiff students’ communities will therefore still be able to recognize the plaintiff students in the video footage if only their faces are blurred.²⁷ These two veteran law enforcement professionals also confirm that the only way to fully redact a student’s identifying information from a security camera video is to completely obscure the student’s entire body.²⁸

3. Legal right conclusion: plaintiffs established the requisite likelihood of a legal right to have more than just their face blurred under the PRA’s victim & witness exemption.

The above discussion explains why blurring just a person’s face in video footage does not remove all information in the footage identifying that person. The plaintiff students have accordingly demonstrated the required likelihood of a legal right under the PRA’s victim & witness exemption to have more than just their face blurred in the SPU videos.

²⁶ *CP 779 at ¶11; CP 785 at ¶9.*

²⁷ *CP 779 at ¶¶14-15, CP 785-786 at ¶¶9-13.*

²⁸ *CP 779 at ¶15, CP 786 at ¶14.*

D. The Students Have A Likelihood Of A Clear Legal Or Equitable Right To A Preliminary Injunction To A Preliminary Injunction Under The PRA's Privacy Exemption.

1. The PRA exempts video footage in an investigative record if disclosure would invade a student's privacy.

The PRA exempts information in an investigative record compiled by law enforcement when nondisclosure of that information is essential to protect a person's right to privacy. RCW 42.56.240(1) & (1)(a). The existence of this PRA exemption is not disputed.

2. Releasing video footage with just the student's face blurred invades the student's privacy.

As explained earlier, blurring just the face on a student's body does not remove all information in the video identifying that student. Publicly releasing that footage violates a student's right to privacy under the PRA if that public release of the video (i) would be highly offensive to a reasonable person and (ii) is not of legitimate concern to the public. RCW 42.56.050.

(a) Releasing this footage over the filmed student's objection would be highly offensive to a reasonable person in that student's position.

Washington courts have explained circumstances where disclosure of information would be highly offensive to a reasonable person in the objecting party's position:

Every individual has some phases of his life and his activities and some facts about himself that he does not

expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget.

Comaroto v. Pierce County Med. Examiner's Office, 111 Wn.App. 69, 77, 43 P.3d 539, 541 (2002) (quoting Restatement (Second) of Torts § 652D, at 386 (1977)).

Those circumstances exist here. These SPU videos of the plaintiff students being subjected to, and responding to, Mr. Ybarra's criminal actions display an aspect of their lives that they've never intended to expose to the public eye. The traumatic experience Mr. Ybarra put them through is a part of their past history that they would rather forget. They want to keep these video images to themselves, rather than have the commercial media irretrievably inject them into the World Wide Web, YouTube, and social media.

In short, the variety of circumstances noted by the Washington court in *Comaroto* confirm that publicly releasing the SPU video footage of these young adults over their objection would be highly offensive to a reasonable person in their position. *(At the very least, the array of circumstances noted in Comaroto show at this preliminary injunction stage that there's a sufficient "likelihood" that that public release would*

be highly offensive to a reasonable person in these students' position.)

The invasion of personal privacy in this case is also illustrated by the wide array of information in investigative records that Washington courts have held would, if disclosed, unlawfully violate an individual's right to personal privacy under this PRA exemption. Such privacy-invading information includes:

- mitigation statements from family members about how they would feel if a relative were sentenced to death;²⁹
- personal emails;³⁰ and
- suicide notes.³¹

If the release of mitigation statements, personal emails, and suicide notes highly offensive to a reasonable person in the objecting party's position, then releasing video footage of an objecting student's being subjected to, and responding to, Mr. Ybarra's criminal actions would similarly be highly offensive to a reasonable person in that student's position. *(At the very least, the above array of privacy-invading information acknowledged by courts show at this preliminary injunction stage that there's a sufficient "likelihood" that that public release would be highly offensive to a reasonable person in these students' position.)*

²⁹ *Cowles Publishing Co. v. Pierce County Prosecutor's Office*, 111 Wn.App. 502, 510, 45 P.3d 620 (2002).

³⁰ *Tiberino v. Spokane County*, 103 Wn.App. 680, 689-90, 13 P.3d 1104 (2000)

³¹ *Comaroto*, 111 Wn.App. at 78.

(b) *Releasing this footage over the filmed student's objection does not serve a legitimate public concern.*

Washington courts emphasize that “the basic purpose and policy of [the Public Records Act] is to allow public scrutiny of government, rather than to promote scrutiny of particular individuals who are unrelated to any governmental operation.” *Cowles Publishing*, 111 Wn.App. at 510 (quoting *In re Request of Rosier*, 105 Wn.2d 606, 611, 717 P.2d 1353 (1986)).³²

To determine whether a record relates to a legitimate public concern under the Public Records Act, courts therefore focus on whether the contents of that record relate to governmental conduct or functionality instead of simply whether the “matter” that record relates to is of public concern. See *Tiberino*, 103 Wn.App. at 690.

Cowles Publishing illustrates the importance of this distinction between personal conduct and government conduct. That decision rejected the commercial media’s claim that family information in a death penalty case’s mitigation statement is subject to public disclosure: “We hold that while a prosecutor’s death penalty decision is a matter of

³² See also, *Tiberino*, 103 Wn.App. at 690 (the PRA’s basic goal is to “keep the public informed so it can control and monitor governmental conduct”) (underline added); *Comaroto*, 111 Wn.App. at 72) (the PRA’s “purpose is to preserve the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions”) (internal quotation marks omitted).

legitimate public concern, personal information about the defendant's family is not." 111 Wn.App. at 510.

The same applies here. While the decision to prosecute Mr. Ybarra might be a legitimate public concern, video footage of the plaintiff students' personal conduct relating to Mr. Ybarra's actions is not. Just as some people like to hear gossip or like to watch intimate YouTube videos on the internet, some people might similarly want to watch a video of one of the plaintiffs being shot. Or one of the plaintiffs having a shotgun pointed in their face. Or one of the plaintiffs struggling with Mr. Ybarra.

But that watching does not serve a legitimate public concern under the PRA. To paraphrase the previously-quoted *Cowles Publishing* decision, watching a private surveillance camera video of the plaintiffs does not allow public scrutiny of government – rather, it promotes scrutiny of particular individuals who are unrelated to any governmental operation. Releasing the SPU video footage over the filmed students' objection simply does not serve a legitimate public concern under the PRA.

3. Legal right conclusion: plaintiffs established the requisite likelihood of a legal right to have more than just their face blurred under the PRA's privacy exemption.

The above discussion explains the reasons why blurring more than just a plaintiff student's face in video footage is essential to protect that

student's privacy rights. Plaintiffs have accordingly shown the requisite likelihood of a legal right under the PRA's privacy exemption to have more than just their face blurred in the challenged videos.

E. The Students Have A Likelihood Of A Clear Legal Or Equitable Right To A Preliminary Injunction To A Preliminary Injunction Under The PRA's Law Enforcement Exemption.

1. The PRA exempts video footage in an investigative record if nondisclosure is essential to promote effective law enforcement.

The PRA exempts information in an investigative record compiled by law enforcement when nondisclosure of that information is essential to promote effective law enforcement. RCW 42.56.240(1) & (1)(b). The existence of this exemption is not disputed.

2. Releasing video footage with just the objecting citizen's face blurred impairs effective law enforcement.

As previously explained, blurring just the student's face in a video does not remove all information in that video identifying the student. Releasing such footage of victims and witnesses to irretrievable circulation forever on the World Wide Web – over the strong objection of those victims and witnesses – does not promote effective law enforcement.

To the contrary, such releases impair effective law enforcement by making victims and witnesses less willing to come forward or cooperate with law enforcement officers.

To determine whether releasing a record will hinder law enforcement efforts, courts often consider the “chilling effect” of disclosing that record. See *Cowles Publishing*, 111 Wn.App. at 509. This “chilling effect” doctrine recognizes that effective law enforcement requires the active cooperation of crime victims and witnesses. *Id.*

This doctrine has been applied in a wide array of cases. For example, *Cowles Publishing* held the PRA’s law enforcement exemption precluded the public disclosure of sentencing mitigation packages because such disclosure would create a chilling effect discouraging family members in the future from providing information necessary to make charging decisions. 111 Wn.App. at 510.³³

As another example, *Haines-Marchel* held the PRA’s law enforcement exemption precluded the public disclosure of information concerning confidential informants because such disclosure would have a chilling effect on informant cooperation in the future. *Haines-Marchel v. State Dep’t of Corrections*, 183 Wn.App. 655, 334 P.3d 99, 106-107 (2014).³⁴

The same rationale holds true for victims and witnesses filmed on

³³ The court further noted that prosecutors in law enforcement would then end up being left with “press releases from the defense, not meaningful input.” 111 Wn.App. at 510.

³⁴ That court also explained that the Supreme Court’s *Sargent* decision did not reject this “chilling effect” doctrine – but rather held that merely asserting “[a] general contention of chilling future witnesses is not enough to exempt disclosure.” *Haines-Marchel*, 183 Wn.App. 655, 334 P.3d at 106-107 (citing *Sargent*, 179 Wn.2d at 395).

surveillance videos. Common sense dictates that such victims and witnesses will be more reluctant to report crimes or provide important information to police or prosecutors for fear that their cooperation can lead to the video footage of them being released over their objection to heighten public scrutiny and intrigue about them and their relationship to the crime. That chilling effect would impair law enforcement since police and prosecutors ordinarily rely on victim and witness cooperation to investigate and prosecute crimes.

The previously-noted testimony of veteran law enforcement officers reiterates this chilling effect and resulting impairment of effective law enforcement – for their testimony confirm that victims and witnesses filmed on a private surveillance tape will be more reluctant to report crimes or provide important information to law enforcement officers if their cooperation can lead to the video footage of them being publicly released over their objection.³⁵

3. Legal right conclusion: plaintiffs established the requisite likelihood of a legal right to have more than just their face blurred under the PRA's law enforcement exemption.

The above discussion shows why blurring more than just the

³⁵ CP 780-781 at ¶¶16-23; CP 786-787 at ¶¶15-18; see also, *Haines-Marchel*, 183 Wn.App. 655, 334 P.3d at 106-107 (“Paul’s declaration establishes that disclosure of information about prison informants would threaten their safety and inhibit future informants from coming forward.”) (underline added).

victim's or witness's face in footage is essential to promote effective law enforcement. The plaintiff students have accordingly shown the requisite likelihood of a legal right under the PRA's law enforcement exemption to have more than just their face blurred in the challenged SPU videos.

F. Likelihood Of Immediate Invasion.

The police and prosecutor state they will release the footage with no more than the students' faces blurred unless a court orders otherwise. Invasion absent an injunction is more than just "likely". It's certain.

G. Likelihood Of Substantial Harm.

If the police or prosecutor distribute the SPU video footage to PRA requestors with no more than the students' faces blurred, that video footage will be irretrievably released into the stream of internet communications and social media. Once released, it can never be taken back. Even if a subsequent trial on the merits rules that release is unlawful under the PRA. Defendants cannot dispute that an unlawful release's nullification of plaintiffs' rights under the various exemptions would be irreversible and irreparable.

Nor can defendants dispute the substantial nature of the harm caused to young adults when photographic images of them are released against their will on the internet or in social media. Indeed, this Court can take judicial notice of the severe consequences that unwanted postings

cause to the person whose image is posted on the web or in social media against their will.³⁶

H. Equities.

The equities support the students' request for that temporary, pre-trial injunctive relief:

- Denying the students' request for preliminary injunctive relief irreparably prejudices them – it renders their non-disclosure right under the PRA irrelevant by allowing the challenged video footage to be released regardless of whether trial on the merits proves that release violates the PRA's exemptions.³⁷

³⁶ Pursuant to ER 201, this Court should take judicial notice of the fact that once a video is published on the Internet it is instantaneously distributed throughout the globe, profoundly impacting the lives of the persons involved. Examples of mass publication of private videos and images are all too common. For example, in 2010, a student at Rutgers University committed suicide because his roommate filmed him having a sexual encounter with another man and then broadcast it on the Internet. See <http://www.nbcphiladelphia.com/news/Student-Suicide-Possibly-Linked-to-Sex-Tape-Scandal--104030073.html>. As another example, this past month hackers obtained private photos of various celebrities and posted them on a small web platform – and within hours, the images could be found on every corner of the Internet. Despite the best efforts of some of the most sophisticated Internet companies, those images simply could not be removed faster than they could be reposted on any number of alternative hosting sites. See <http://deadline.com/2014/10/hacked-celebrity-photos-google-lawsuit-jennifer-lawrence-844715/>. The victims of such internet postings have been profoundly impacted by the immediate, unfettered distribution the Internet offers to anyone desiring to publicly disseminate images distressing to the person shown in those images. See, e.g., <http://www.thedailybeast.com/articles/2014/10/07/jennifer-lawrence-s-furious-perfect-response-to-nude-photo-leak-it-is-a-sex-crime.html>. This Court should also take judicial notice of the impact of re-traumatization on victims of crime or disasters. See, e.g., http://gainscenter.samhsa.gov/atc/text/papers/trauma_paper.htm (“Social scientific studies have learned what those who have lived through disasters already know: there are two dimensions of experiencing a disaster, both of which can be traumatic. The first is the disaster itself, which, as with Katrina, includes danger, destruction, and death. Anyone who survives the disaster event is then left in a changed world, one in which destruction of the physical environment, disruption and even rupture of the social environment of family and neighborhood, and often displacement destabilize or even destroy one’s sense of self, safety, and normalcy.”)

³⁷ Indeed, one reason courts use the “likelihood of success on the merits” standard for issuing a preliminary injunction is to give parties “time to prepare so that they will have

- Denying the students’ preliminary injunction request chills victim and witness cooperation with (and trust in) law enforcement officers also harms society as a whole.
- Granting the students’ temporary injunction request does not prejudice the defendant police or prosecutor. They will not be subject to PRA penalties or fee awards in this third-party suit. *See Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 757, 958 P.2d 260 (1998).
- Granting the students’ temporary injunction request does not prejudice the defendant PRA requestors either – it merely delays their receipt of the partially redacted video proposed by the police and prosecutor until trial on the merits.

I. This Court Should Issue A Preliminary Injunction And Remand The Students’ Claims For Trial On The Merits.

This Court of Appeals may stand in the place of the trial court and, in the interests of judicial economy, apply the governing “likelihood of success” standard to determine if preliminary injunctive relief is appropriate. See, e.g., *Northwest Gas Ass’n*, 141 Wn.App. at 115 (“mindful that this is an accelerated appeal and to conserve the parties’ and the courts’ resources, we review the record de novo, address the requirements for injunctive relief, hold that the trial court erred in refusing to issue a preliminary injunction, reverse the trial court’s order that the [defendant] release the requested information immediately, and remand

a full opportunity to present their cases at the permanent injunction hearing.” Northwest Gas Ass’n, 141 Wn.App. at 113-14. Washington law recognizes that the emergency nature of preliminary injunction proceedings often leaves parties “unable to develop their evidence fully”. Id. at 114. Thus, the purpose of a preliminary injunction is “to preserve the status quo while the plaintiff compiles the evidence necessary to establish the need for a permanent injunction, to be proven at a future trial on the merits.” Id.

for a trial on the merits of the [plaintiff's] request for a permanent injunction.”); and *Ameriquest*, 148 Wn.App. at 156.

This Court should issue a *preliminary* injunction to preserve the status quo, and remand the students’ *permanent* injunction request for a trial on the merits.

V. CONCLUSION

If the trial court’s preliminary injunction denial is allowed to stand, the challenged video footage of these students will be irretrievably released into the pervasive internet and social media world these students will live in for the rest of their lives.

If the trial court’s *preliminary* injunction denial is allowed to stand, the upcoming trial on the merits of the students’ *permanent* injunction claims will be meaningless and irrelevant. At trial, it will be too late to shut the barn door. The horse will already be long gone.

If the trial court’s preliminary injunction denial is allowed to stand, the PRA’s disclosure exemptions will be meaningless and irrelevant as well. The rights and protections they establish for citizens such as the SPU students in this case will be of no import whatsoever.

The SPU students respectfully request that this Court enter a preliminary injunction enjoining release of the challenged video footage pending trial on the merits of the students’ permanent injunction claims.

DATED this 20th day of April, 2015.



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COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

JANE DOES 1 through 15 and
JOHN DOES 1 through 15, victims
of and witnesses to the June 5, 2014
Seattle Pacific University shooting,
and SEATTLE PACIFIC
UNIVERSITY, a Washington
nonprofit corporation,

Appellants,

v.

KING COUNTY, a legal subdivision
of the state of Washington, CITY OF
SEATTLE, a Washington municipal
corporation, TRIBUNE
BROADCASTING SEATTLE, LLC
and its affiliates, d/b/a KCPQ-TV
and Q13 FOX, a Delaware
corporation, KIRO-TV, INC. and its
affiliates, d/b/a KIRO NEWS and
KIRO TV, a Delaware corporation,
SINCLAIR SEATTLE LICENSEE,
LLC, and its affiliates, d/b/a KOMO
TV and KOMO 4, a Nevada
corporation, KING
BROADCASTING COMPANY and
its affiliates, d/b/a KING 5
TELEVISION, a Washington
corporation, ARTHUR WEST, a
Washington resident, JOHN DOE
MEDIA ORGANIZATIONS 1
through 100,

Respondents.

Court of Appeals – Div. I No.
72159-3-I

(Consolidated with Nos. 72198-
4-I, 72898-9-I, 72899-7-I)

King County Superior Court
No. 14-2-18514-6 SEA

CERTIFICATE OF SERVICE

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CERTIFICATE OF SERVICE - 1

I certify that I am a citizen of the United States of America and a resident of the State of Washington. I am over the age of twenty-one years, and I am competent to be a witness herein.

On April 20, 2015, I caused the following document to be served on counsel as follows:

1. April 2015 Brief Of The Plaintiff/Appellant Students (Jane Does 1-15 and John Does 1-15) ;
2. Notice of Withdrawal and Substitution of Counsel for Appellants Jane Does 1 through 15 and John Does 1 through 15; and
3. Certificate of Service.

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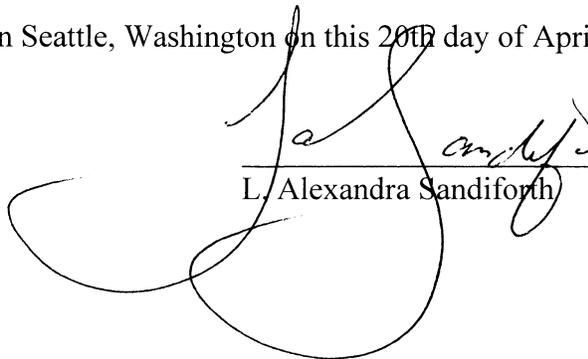
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Executed in Seattle, Washington on this 20th day of April, 2015.



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