

72159-3

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Court of Appeals
Division I
State of Washington

72159-3

No. 72159-3-I

IN THE COURT OF APPEALS
FOR 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.

SUPPLEMENTAL OPENING BRIEF OF APPELLANT

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INTRODUCTION

This supplemental brief addresses issues raised in SPU's second motion for preliminary injunction, which concerned the remaining roughly 20 hours of footage SPU turned over to authorities pursuant to a warrant. Roughly 84% of this footage depicts empty spaces on the SPU campus, innocent people milling about, parking lots, and the like. In short, no governmental conduct is shown.

The other 16% does show aspects of the police response to the June 5, 2014 terrorist attack. While this may well be governmental conduct, it is too early in the legal proceedings to tell whether this footage was used by governmental authorities. If no "use" occurred, this footage is not public record.

The PRA exemptions for security and privacy should bar any release in any event. SPU used this private surveillance footage to assess potential security vulnerabilities whose exposure would present a substantial risk to SPU students and staff. SPU also has a substantial privacy interest that the trial court failed to recognize or protect. As in *Nw. Gas, infra*, this Court should review the denial of a preliminary injunction *de novo*, reverse it, grant a preliminary injunction, and remand for proper discovery and trial on a permanent injunction. Current and future students deserve no less.

SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court erred in again consolidating the preliminary injunction hearing with a trial on the merits without giving the required notice to parties under CR 65(a)(1).¹
2. The trial court erred in finding and concluding that the 84% of the 20 hours of private security-video footage containing no information relating to the conduct of government or to the performance of any governmental or proprietary function nonetheless was a public record. CP 1038.
3. The trial court erred in implicitly finding and concluding that the 20 hours of private footage was “used” by any governmental agency. CP 1038-39.
4. The trial court erred in finding and concluding that SPU failed to establish the Security Exemption in RCW 42.56.420(1), and in failing to recognize or to protect SPU’s privacy interest under RCW 42.56.240(1). CP 1039.
5. The trial court erred in denying SPU’s second motion for a temporary restraining order regarding the remaining 20 hours of private security video. CP 1039.

¹ This issue was fully brief in the opening briefs, so is not readdressed here.

ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The surveillance footage is the private property of SPU. The vast majority of it (roughly 84%) includes solely depictions of private individuals and private property. Is the requested footage outside the scope of the PRA because it is not a “public record”?

2. Does this record demonstrate that this footage contains information relating to the conduct of government or to the performance of any governmental or proprietary function that was “used” by a governmental agency?

3. The surveillance footage reveals detailed information about SPU’s confidential security system — detailed information used to assess, prepare for, and respond to threats, including criminal terrorist acts. Does the PRA exempt such information from public disclosure?

4. Does SPU have a privacy interest under RCW 42.56.240 that the trial court failed to protect?

SUPPLEMENTAL STATEMENT OF THE CASE

- A. SPU necessarily protects the integrity and secrecy of its proprietary private-security-camera system that captured some aspects of the shooting attack, footage now used to assess SPU's vulnerability to future attacks.**

SPU's extensive network of surveillance cameras enables it to deter, detect, and quickly respond to campus attacks. CP 669. SPU keeps its security surveillance abilities confidential. *Id.* Surveillance footage is not available to the public, and the capacities and details of the system are not evident from just observing the cameras' physical locations. CP 109-10. But certain nonpublic security-system and campus-design details are readily discernable by viewing the images produced by the system. CP 662-63, 671.

This security system was in place on June 5, 2014, capturing portions of the attack on SPU. CP 669. The footage was critical to SPU's post-incident assessment of its security system, procedures, and response. CP 670. SPU used the footage to assess its potential vulnerabilities, redesign and strengthen portions of its surveillance system, and adjust its preparations for future attacks. CP 670, 671. This post-attack assessment enabled SPU to prepare for future criminal terrorist attacks, consistent with best practices in the security industry. CP 664.

- B. Pursuant to a warrant, SPU turned over roughly 20 hours of private security footage, but the media claimed it as a public record, even though the vast majority of the footage contains nothing pertaining to government, and releasing it creates a substantial public-safety risk.**

As part of the criminal investigation into the attack, the King County Prosecuting Attorney and the Seattle Police Department obtained extensive portions of the private surveillance footage under a search warrant. CP 669. Subsequently, media organizations made broad requests for copies of SPU's video under the PRA, Chapter 42.56 RCW. CP 734-35, 740. On October 23, 2014, both King County and Seattle notified SPU that they intended to release the footage on November 14, 2014. CP 676-80. That release date was extended to November 19, 2014. CP 682-88.

The surveillance footage at issue is approximately 20 hours in length and contains clear views of the University campus from 36 camera locations and angles. CP 671, 673-74. While images of government response are captured on portions of the footage, the vast majority shows only private citizens and private property. CP 674. Government presence amounts to less than 16% of the total footage requested. *Id.*

By contrast, the entire footage contains details of the unique vulnerabilities and capabilities of SPU's security system: fields of

view, blind spots, coverage saturation, and technical capabilities, and the design of Otto Miller Hall and the rest of the campus. CP 663-64, 671. Disclosure of these details, and of the civilian and public-safety response shown, will harm SPU and has a substantial likelihood of threatening public safety. CP 663-64.

C. The trial court again skipped over the trial, but failed to make any findings regarding the content or use of the lengthy SPU footage.

As in its rulings in the consolidated first motion pertaining to three minutes of violent footage, the trial court skipped over the trial on the merits and ruled that the videos could be released under the PRA, but nonetheless stayed their release in light of this Court's ongoing stay. CP 1039. The trial court made no findings regarding the content or governmental use of the videos, simply concluding that because an agency obtained the videos with a warrant, they *ipso facto* must be public records. CP 1033-39.

This Court granted review, enjoined release of any footage, consolidated the appeals, and adopted the parties' stipulated briefing schedule. The trial court has stayed further proceedings.

SUPPLEMENTAL ARGUMENT

- A. This Court should review *de novo*, reverse, grant a preliminary injunction, and remand for trial on a permanent injunction.**

In *Nw. Gas Ass'n v. Wash. Utilities & Transp. Comm'n*, 141 Wn. App. 98, 168 P.3d 443 (2007), Division Two reviewed the trial court's denial of a preliminary injunction *de novo*, reversed, granted a continuing preliminary injunction, and remanded for proper discovery and a trial on the merits (*id.* at 115):

We could end our analysis here and remand to the trial court to reconsider the Pipelines' request for a preliminary injunction in accordance with CR 65. But 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 WUTC release the requested information immediately, and remand for a trial on the merits of the Pipelines' request for a permanent injunction.

This Court should do the same here.

- B. The trial court erred in concluding that the entire 20 hours of private security video is a public record, even though 84% of it has absolutely nothing to do with government, and no findings say any of it was used by government.**

The PRA has a limited, if important, purpose: enabling citizens to retain sovereignty over their government by demanding full access to information relating to governmental activities. *DeLong v. Parmelee*, 157 Wn. App. 119, 154-55, 236 P.3d 936 (2010). That full

access thus encompasses only “public records.” *Nissen v. Pierce Cnty.*, 183 Wn. App. 581, 590, 333 P.3d 577 (2014), *rev. granted*, 182 Wn.2d 1008 (2015). “The determination of whether a document is a ‘public record’ is critical” to any PRA analysis. *Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 565 n.1, 618 P.2d 76 (1980).

The PRA requires public access only to public records. *Dragonslayer, Inc. v. Wash. State Gambling Comm’n*, 139 Wn. App. 433, 445, 161 P.3d 428 (2007). A ruling that something is a “public record” must be based upon findings regarding the record’s content and use, rather than general assertions or mere assumptions. 139 Wn. App. at 445-46 (“Additional factual findings as to how the Commission uses these statements are necessary to determine whether they are related to a public function.”). But at this early stage of the proceedings, the trial court had no opportunity for fact-finding regarding the required elements.

There are three required elements under RCW 42.56.010(3): 1) there must be a writing; 2) it must contain information relating to the conduct of government or to the performance of any governmental or proprietary function; and 3) it must be prepared, owned, used, or retained by an agency. SPU here challenges only the second and third elements: roughly 84% of the private security

footage that the trial court called “public record” contains no information relating to the conduct of government or to any governmental or proprietary function that was “used” by a governmental actor (as explained *infra*, retention is not sufficient).

1. The vast majority of the footage shows only private matters, but the trial court failed to make findings.

The vast majority of the surveillance footage is not a public record because it does not “contain[] information relating to the conduct of government or the performance of any governmental or proprietary function.” RCW 42.56.010(3); *O’Neill v. City of Shoreline*, 170 Wn.2d 138, 146-47, 240 P.3d 1149 (2010). Many hours of security footage showing neither the attacker nor any government actors belong to a private entity with a private purpose and relate only to private property. There is simply no connection with governmental conduct or performance.

The importance of the contents of the record was noted by Justice Fairhurst and Chief Justice Madsen in *Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wn.2d 196, 208 n.7, 172 P.3d 329 (2007) (Fairhurst, J., concurring in part and dissenting in part). *Lindeman* involved a PRA request for surveillance video showing a fight on a school bus. “[U]nder the [PRA], *the videotape’s inherent character as*

a record is defined by the information it contains and to what that information relates" 162 Wn.2d at 208 (emphasis added). But those parties did "not dispute that the videotape is a '[p]ublic record,' thereby leaving open for future consideration the question of whether a school district's surveillance videotape showing children on a public school bus does, in fact, contain 'information relating to the conduct of government[.]'" *Id.* at 208 n.7.

Dragonslayer too emphasized that the alleged public record must contain information related to government. There, the audited financial statements of a private gambling institution – legally subject to disclosure to the State Gambling Commission – were requested under the PRA. ***Dragonslayer***, 139 Wn. App. at 439. Like the surveillance footage at issue here, those financial statements were prepared by a private entity, contained private information, and were in the hands of a public agency only by operation of law. Overruling the trial court's failure to enjoin the records' release, ***Dragonslayer*** rejected the assertion that these were public records merely because they related to a governmental function (*i.e.*, the agency's regulatory function). *Id.* at 445. Instead, the court held that findings about whether a record contains information related to the conduct of

government “should be based on specific determinations” based on evidence. *Id.*

Here, the footage cannot be a “public record” because there are no findings that the images on the videos even relate to the conduct of government. And the images of police in a small portion of the videos cannot taint the entire 20 hours of footage, as *Nissen* makes clear. 183 Wn. App. at 592. There, the court rejected an assertion that all personal cell phone records of Pierce County Prosecutor Mark Lindquist were public records merely because they contained information about governmental communications. *Id.* at 591-92. The court emphasized that “a government employee’s use of a single device for both work and personal communications [does not] transform *all* records relating to that device into ‘public records.’” *Id.* at 592. The court remanded with instructions to determine which portions of the records were personal and which contained information relating to the conduct of government. *Id.* at 594.

So here, prior to the videos’ release, a determination had to be made as to which portions of the footage – if any – contain information related to the conduct of government. The evidence shows that 84% of the footage shows purely private matters. Yet the

trial court made no findings that the contents of the videos relate to government conduct or performance. This alone requires reversal.

2. Nor are there evidence and findings that the government used the footage.

Assuming *arguendo* portions of the surveillance footage could be found to contain information related to the conduct of government, those portions must still meet the third element – that they were used by a government agency. This element requires more than just governmental possession. ***Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1***, 138 Wn.2d 950, 959, 983 P.2d 635 (1999) (“possession of information is not determinative of the issue.”).

In ***Nissen***, for example, the requestor asserted that Lindquist’s personal cellphone logs, created by a private company and mailed to a private address, were public records. ***Nissen***, 183 Wn. App. at 594. Those phone logs were in a government agency’s possession solely for purposes of review for redaction and disclosure. *Id.* at 595 n.16. The ***Nissen*** court emphasized that “[u]nder the plain language of [the PRA, the phone logs] do not qualify as ‘public records’ if [Lindquist] (or a prosecutor’s office employee) did not review, refer to, or otherwise use them in [a governmental] capacity.” *Id.* at 584. Instead, to transform a private

record into a public record, governmental possession must be combined with demonstrated governmental use. *Id.*

The critical inquiry is practical impact on decision making:

[T]he critical inquiry is whether the requested information bears a nexus with the agency's decision-making process. . . . [M]ere reference to a document that has no relevance to an agency's conduct or performance may not constitute "use," but information that is reviewed, evaluated, or referred to and has an impact on an agency's decision-making process would be within the parameters of the [PRA].

Concerned Ratepayers, 138 Wn.2d at 960–61. Footage obtained by search warrant, even if reviewed in its entirety, is not "used" for purposes of the PRA.

There is simply no evidence here – much less any finding – that the hours of empty corridors and parking lots, milling students, classrooms, or even the police response, had any impact on either agency's decision-making process. There is not even evidence or a finding that this footage had any impact on whether and to what extent the attacker was charged with various crimes. At this early stage of the proceedings, "use" by the government was not established. This Court should reverse.

- C. **Assuming *arguendo* that any of the surveillance video is a public record, the trial court erred in failing to apply the Security Exemption in RCW 42.56.420(1), where the video is a record assembled, prepared, and maintained to prevent, mitigate, or respond to terrorist acts, whose disclosure would create a substantial likelihood of threatening public safety.**

Assuming *arguendo* that any of the surveillance video is a public record, the trial court erred in failing to apply the Security Exemption, RCW 42.56.420(1). The surveillance footage is a record assembled, prepared, and maintained to prevent, mitigate, or respond to terrorist acts. Its disclosure would create a substantial likelihood of threatening public safety. This Court should reverse, maintain its preliminary injunction, and remand for trial.

The Security Exemption protects underlying data “assembled, prepared, or maintained to prevent, mitigate, or respond to criminal terrorist acts,” “data collected in preparation of or essential to the assessments or to the response or deployment plans.” RCW 42.56.420(1)(a). The SPU attacker perpetrated a criminal terrorist attack that “significantly disrupt[ed] . . . the general civilian population” and “manifest[ed] an extreme indifference to human life.” *Id.* at (1). In response to his attack, SPU used its private surveillance footage to assess its security vulnerabilities and to revise (and where appropriate, redesign) its response plans – and security systems –

to guard against future attacks. CP 664. The Security Exemption expressly protects this information.

In *Nw. Gas*, like here, in the wake of a deadly event (a pipeline explosion) the media made PRA requests for a private entity's confidential data. There too, the data was held by a governmental agency under the authority of law. 141 Wn. App. at 101, 104-05. Also similarly to this case, two levels of data were at issue: first was basic pipeline routing that was freely available to the general public (analogous to the public knowledge of the general location of SPU's security cameras, *id.* at 103); and second was confidential details of the pipeline system (analogous to specific details of the security system revealed by viewing the requested footage, *id.* at 105-06). As should happen here, the appellate court protected this second-level data due to its sensitive nature. *Id.* at 124.

The main concern the Security Exemption addresses is detrimental effects on public safety arising from releasing threat-assessment data. Releasing such data – including data used to prepare the assessment – renders the assessment useless because vulnerabilities become known to the very terrorists the security professionals are trying to guard against. *Id.* at 120 (noting the importance of “keeping [the data] out of the hands of . . . terrorists.”).

SPU has used the surveillance footage to analyze its security vulnerabilities and to assess its response and deployment plans. Its confidentiality is why it is valuable and why it receives special PRA protections. *Id.* (“‘maintaining’ records to mitigate or to respond to terrorist acts is sufficient to qualify that information for the security exemption”). Releasing *any* of this footage would share the security system's vulnerabilities, expose nonpublic information about campus design, and undermine SPU's current security system.² Preventing this result is the precise reason that this exemption exists.

If anything, the concerns raised in the opening brief are hugely magnified when disclosing effectively all of SPU's proprietary private-security-camera-system footage. It would be difficult to overstate the crippling effect such a release would have on SPU's ongoing efforts to protect its staff and students. The very idea that the public has some “right” to see endless hours of uneventful private footage is preposterous. “Enforcing” such a nonexistent “right” at the cost of our students' safety is unwise, at best.

² While it is difficult to parse at this juncture, it appears likely that releasing only the 16% of the footage that shows police activity would expose all 36 cameras' tactical positioning; what seems certain is that releasing only that 16% would explain the police team's attack response to future terrorists.

D. SPU also has a privacy interest under RCW 42.56.240(1) that the trial court failed to protect.

The PRA also exempts “intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies . . . the nondisclosure of which is essential . . . for the protection of any person’s right to privacy.” RCW 42.56.240(1). A “right to privacy,” is violated if disclosure (1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. RCW 42.56.050. The PRA was “not intended to make it easier for the public to obtain personal information about individuals who have become subject to government action.” *DeLong*, 157 Wn. App. at 154-55 (quoting *Lindeman v. Kelso Sch. Dist. No. 458*, 127 Wn. App. 526, 535–36, 111 P.3d 1235 (2005), *rev’d on other grounds*, *Lindeman*, 162 Wn.2d 192); *see also* WAC 44-14-01003 (PRA is tempered by the need to be “mindful of the right of individuals to privacy” and must “not be used to obtain records containing purely personal information that [have] absolutely no bearing on the conduct of government”).

In this case, SPU’s security system is confidential private property that it uses to protect students, faculty, and members of the public. Disclosure would be highly offensive because of the breadth

of information the footage reveals as well as the impact disclosure would have on SPU – requiring additional redesign and redeployment of the security system. Further, it is highly offensive that proprietary information, created in the interest of safety for students, staff, and the general public, could be suddenly rendered worthless through a sweeping search warrant and the public release of that information. The public has absolutely no legitimate concern in reducing the safety of SPU's campus, examining empty corridors, or reviewing footage of parking lots. Again, this Court should reverse.

E. The trial court erred in failing to grant SPU's request for a preliminary injunction.

For all of the reasons stated above, the trial court erred in failing to grant SPU's request for a preliminary injunction. The PRA gives courts authority to enjoin the disclosure of any requested public record where the disclosure “would clearly not be in the public interest and would substantially and irreparably damage any person[.]” RCW 42.56.540. To obtain a preliminary injunction, SPU needed to show: (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of will result in actual and substantial injury. *Tyler Pipe Indus., Inc. v. Dept. of Revenue*, 96 Wn.2d 785, 792, 638 P.2d

1213 (1982). A clear legal and equitable right is established by showing a likelihood of success on the merits. *Id.* at 793.

Here, disclosure is adverse to the public interest because it would provide no-risk, no-exposure reconnaissance of the University campus, endangering students, faculty, and the general public. The attacker admitted he drew inspiration from the Columbine and Virginia Tech school shooters, considered other Washington Universities for his attack before settling on SPU, and conducted reconnaissance of the campus. Broadcasting his misdeeds, and providing to him and others essentially an all-access pass to our security system and the Otto Miller Hall design can only harm the public. Further, disclosure of the footage will bring about the real and immediate harm of compromising SPU's security system. This harm would be substantial. Release should have been enjoined.

In light of the City's and County's notifications of impending release, SPU plainly had a well-grounded fear of an immediate invasion of its rights. And once the confidential security information is in the public domain, the University, its students, faculty, and the general public, all will be vulnerable to those who wish to exploit the system's limitations or conduct reconnaissance. A later determination suppressing the footage will be meaningless. See *Nw.*

Gas, 141 Wn. App. at 121 (“once released, the [data] cannot be retrieved and returned to...confidential status”). SPU is left with wholly unsatisfactory options: living with the public exposure, or adding or physically repositioning cameras, if possible. And even if cameras are repositioned, the existing footage reveals the layout of Otto Miller Hall to those wishing to harm the University community. Therefore, release prior to a resolution on the merits will result in actual and substantial injury. The Court should reverse, maintain an ongoing preliminary injunction, and remand for proper discovery and a trial on a permanent injunction.

CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse, grant a preliminary injunction, and remand for proper discovery, and a trial on a permanent injunction. The requested surveillance footage is not a “public record,” and is not, therefore, subject to disclosure. Even if some of the footage were a public record, it qualifies for two exemptions: it is information used to prevent or respond to criminal terrorist attacks, and it is information in which SPU has a right to privacy. Significant public safety concerns are plainly at issue, and SPU has demonstrated a likelihood of success on the merits. An order enjoining release until

all sides can be fully heard is necessary and appropriate. Public safety and privacy should not be put at risk, particularly where the purpose of the PRA is already met by the publicly available information about the attack.

RESPECTFULLY SUBMITTED this 20th day of April, 2015.

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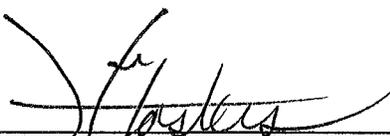
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RCW 42.56.010

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Agency" includes all state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

(2) "Person in interest" means the person who is the subject of a record or any representative designated by that person, except that if that person is under a legal disability, "person in interest" means and includes the parent or duly appointed legal representative.

(3) "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.

(4) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

RCW 42.56.050

Invasion of privacy, when.

A person's "right to privacy," "right of privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or violated 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. The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public's right to inspect, examine, or copy public records.

[1987 c 403 § 2. Formerly RCW 42.17.255.]

RCW 42.56.240

Investigative, law enforcement, and crime victims.

The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:

- (1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy;
- (2) Information revealing the identity of persons who are witnesses to or victims of crime or who file complaints with investigative, law enforcement, or penology agencies, other than the commission, if disclosure would endanger any person's life, physical safety, or property. If at the time a complaint is filed the complainant, victim, or witness indicates a desire for disclosure or nondisclosure, such desire shall govern. However, all complaints filed with the commission about any elected official or candidate for public office must be made in writing and signed by the complainant under oath;
- (3) Any records of investigative reports prepared by any state, county, municipal, or other law enforcement agency pertaining to sex offenses contained in chapter 9A.44 RCW or sexually violent offenses as defined in RCW 71.09.020, which have been transferred to the Washington association of sheriffs and police chiefs for permanent electronic retention and retrieval pursuant to RCW 40.14.070(2)(b);
- (4) License applications under RCW 9.41.070; copies of license applications or information on the applications may be released to law enforcement or corrections agencies;
- (5) Information revealing the identity of child victims of sexual assault who are under age eighteen. Identifying information means the child victim's name, address, location, photograph, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator;
- (6) The statewide gang database referenced in RCW 43.43.762;
- (7) Data from the electronic sales tracking system established in RCW 69.43.165;
- (8) Information submitted to the statewide unified sex offender notification and registration program under RCW 36.28A.040(6) by a person for the purpose of receiving notification regarding a registered sex offender, including the person's

name, residential address, and e-mail address;

(9) Personally identifying information collected by law enforcement agencies pursuant to local security alarm system programs and vacation crime watch programs. Nothing in this subsection shall be interpreted so as to prohibit the legal owner of a residence or business from accessing information regarding his or her residence or business; and

(10) The felony firearm offense conviction database of felony firearm offenders established in RCW 43.43.822; and

(11) The identity of a state employee or officer who has in good faith filed a complaint with an ethics board, as provided in RCW 42.52.410, or who has in good faith reported improper governmental action, as defined in RCW 42.40.020, to the auditor or other public official, as defined in RCW 42.40.020; and

(12) The following security threat group information collected and maintained by the department of corrections pursuant to RCW 72.09.745: (a) Information that could lead to the identification of a person's security threat group status, affiliation, or activities; (b) information that reveals specific security threats associated with the operation and activities of security threat groups; and (c) information that identifies the number of security threat group members, affiliates, or associates.

[2013 c 315 § 2; 2013 c 190 § 7; 2013 c 183 § 1; 2012 c 88 § 1. Prior: 2010 c 266 § 2; 2010 c 182 § 5; 2008 c 276 § 202; 2005 c 274 § 404.]

RCW 42.56.420

Security.

The following information relating to security is exempt from disclosure under this chapter:

(1) Those portions of records assembled, prepared, or maintained to prevent, mitigate, or respond to criminal terrorist acts, which are acts that significantly disrupt the conduct of government or of the general civilian population of the state or the United States and that manifest an extreme indifference to human life, the public disclosure of which would have a substantial likelihood of threatening public safety, consisting of:

(a) Specific and unique vulnerability assessments or specific and unique response or deployment plans, including compiled underlying data collected in preparation of or essential to the assessments, or to the response or deployment plans; and

(b) Records not subject to public disclosure under federal law that are shared by federal or international agencies, and information prepared from national security briefings provided to state or local government officials related to domestic preparedness for acts of terrorism;

(2) Those portions of records containing specific and unique vulnerability assessments or specific and unique emergency and escape response plans at a city, county, or state adult or juvenile correctional facility, or secure facility for persons civilly confined under chapter 71.09 RCW, the public disclosure of which would have a substantial likelihood of threatening the security of a city, county, or state adult or juvenile correctional facility, secure facility for persons civilly confined under chapter 71.09 RCW, or any individual's safety;

(3) Information compiled by school districts or schools in the development of their comprehensive safe school plans under RCW 28A.320.125, to the extent that they identify specific vulnerabilities of school districts and each individual school;

(4) Information regarding the infrastructure and security of computer and telecommunications networks, consisting of security passwords, security access codes and programs, access codes for secure software applications, security and service recovery plans, security risk assessments, and security test results to the extent that they identify specific system vulnerabilities, and other such information the release of which may increase risk to the confidentiality, integrity, or availability of agency security, information technology infrastructure, or assets; and

(5) The system security and emergency preparedness plan required under RCW 35.21.228, 35A.21.300, 36.01.210, 36.57.120, 36.57A.170, and 81.112.180.

[2013 2nd sp.s. c 33 § 9; 2009 c 67 § 1; 2005 c 274 § 422.]

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.

[1992 c 139 § 7; 1975 1st ex.s. c 294 § 19; 1973 c 1 § 33 (Initiative Measure No. 276, approved November 7, 1972).
Formerly RCW 42.17.330.]

WAC 44-14-01003

Construction and application of act.

The act declares: "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." RCW 42.17.251/42.56.030. The act further provides: "...mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." RCW 42.17.010(11). The act further provides: "Courts shall take into account the policy of (the act) that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.17.340(3)/42.56.550(3).

Because the purpose of the act is to allow people to be informed about governmental decisions (and therefore help keep government accountable) while at the same time being "mindful of the right of individuals to privacy," it should not be used to obtain records containing purely personal information that has absolutely no bearing on the conduct of government.

The act emphasizes three separate times that it must be liberally construed to effect its purpose, which is the disclosure of nonexempt public records. RCW 42.17.010, 42.17.251/42.56.030, 42.17.920.1 The act places the burden on the agency of proving a record is not subject to disclosure or that its estimate of time to provide a full response is "reasonable." RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2). The act also encourages disclosure by awarding a requestor reasonable attorneys fees, costs, and a daily penalty if the agency fails to meet its burden of proving the record is not subject to disclosure or its estimate is not "reasonable." RCW 42.17.340(4)/42.56.550(4).

An additional incentive for disclosure is RCW 42.17.258, which provides: "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 act.

Note: 1See *King County v. Sheehan*, 114 Wn. App. 325, 338, 57 P.3d 307 (2002) (referring to the three legislative intent provisions of the act as "the thrice-repeated legislative mandate that exemptions under the Public Records Act are to be narrowly construed.").

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. WSR 06-04-079, § 44-14-01003, filed 1/31/06, effective 3/3/06.]