

No. 72256-5-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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WASHINGTON DEPARTMENT OF CORRECTIONS,

Appellant,

v.

ROBERT NORTHUP,

Respondent/Appellee.

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SUPPLEMENTAL BRIEF OF  
APPELLEE/RESPONDENT NORTHUP

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ORIGINAL

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## I. INTRODUCTION

On January 5, 2015, Northup asked this Court for supplemental briefing on the recent case issued by the Supreme Court on December 11, 2014. *See City of Lakewood v. Koenig*, 2014 WL 7003790 (December 11, 2014). After considering the motion, on January 9, 2015, the Commissioner ordered supplemental briefing addressing this case.

## II. STATEMENT OF FACTS

Northup made a Public Records Act (“PRA”) request to the Department of Corrections (“Department”) on February 14, 2013. CP 437. In this request he asked for various documents including the debriefing email from FBI Agent Rollins to STG specialist William Rielly (Riley) and emails sent to the Department by Agent Rollins. *Id.*

Northup was provided a heavily redacted copy of the debriefing email attached to a letter dated October 24, 2013. CP 504-519. The exemption log accompanying the redacted email cited one exemption category, identified as number 26. CP 503-504. This is because the Department of Corrections uses a numbered system to list exemptions on its logs with an accompanying list which provides the statutes which within each labeled category. There are often more than one statutory exemption cited for each category like number 26. Number 26 lists two statutes, the source bill for RCW 42.56.240(1) and RCW 42.56.240(12). CP 233.

Under number 26, the following descriptions were provided.

SECURITY THREAT GROUP (STG) INFORMATION – These records concern security threat groups and contain information the disclosure of which may compromise the safety and/or security of people and/or a facility, and have been redacted or withheld in their entirety per the following citations:

Senate Bill 5810, effective July 28, 2013, “The following security threat group information collected and maintained by the department of corrections pursuant to section 1 of this act: (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.”

RCW 42.56.240(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

CP 503.

In category number 26, the first referenced exemption was Senate Bill 5810, effective July 28, 2013. It quoted the language that would become RCW 42.56.240(12). The Department then cited and quoted to RCW 42.56.240(1).

The Department also provided three disclosures to Northup on March 5, 2014. The exemption log again listed some records as also being redacted pursuant to number 26. CP 230. Northup again was provided the key to interpreting what exemption number 26 meant.

### III. ARGUMENT

- A. THE DEPARTMENT OF CORRECTIONS PROVIDED TWO POSSIBLE REASONS FOR REDACTING THE DOCUMENTS PROVIDED NORTHUP, VIOLATING THE SUPREME COURT'S RULING IN *CITY OF LAKEWOOD v. KOENIG* BY FAILING TO CLARIFY WHICH EXEMPTION CLAIM APPLIED TO THE WITHHELD DOCUMENTS.

On December 11, 2014, the Supreme Court ruled that if there is any confusion over which statute an agency is citing for an exemption, the agency has failed to meet the PRA requirement it provide a brief explanation on how the exemption applied to the redacted or withheld information. *City of Lakewood v. Koenig*, No. 89648-8, 2014 WL 7003790 (Dec. 11, 2014).

In *Lakewood*, the records requester Koenig asked for documents about a Tacoma police officer. In responding, Lakewood made available documents but also redacted the officer's driver's license numbers citing to RCW 46.52.100 and RCW 46.52.130. *Id.* at \*1. Koenig asked Lakewood to specify which exemption it claimed under RCW 42.56.240(1) and whether or not it was also exempt under federal law. *Id.* Lakewood again claimed its prior exemptions and this time included the federal justifications mentioned by Koenig in his letter. *Id.* at \*2. The trial court granted Lakewood's summary judgment motion. The Court of Appeals reversed, holding that the city violated the brief explanation requirement. *Id.* The Supreme Court granted review and agreed with the Court of Appeals.

The Supreme Court first stated that PRA exemptions must be narrowly construed and records which can be redacted must be redacted. *Id.* at \*3; quoting *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 433, 327 P.3d 600 (2014) (citing *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 261, 884 P.2d 592 (1994); RCW 42.56.210(1); RCW 42.56.070). The Supreme Court reemphasized that exemptions must be specific.

The plain language of RCW 42.56.210(3) and our cases interpreting it are clear that an agency must identify “with particularity” the specific record or information being withheld and the specific exemption authorizing the withholding.

*Id.* at \*3 (citations omitted). This requirement includes requiring the agency to “provide sufficient explanatory information for requesters to determine whether the exemptions are properly invoked. *Id.* Shifting the burden of determining which exemption claim applies to the requester violates the PRA. *Id.* This happens when the agency fails to provide sufficient information how a claimed exemption applies to a particular record when the connection is not obvious on its face. *Id.* This is what happened here.

There is no question that RCW 42.56.240(12) applies to most documents about security threat groups.<sup>1</sup> However, RCW 42.56.240(1) is a

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<sup>1</sup>Northup has argued it does not apply to records based on his statements.

general exemption claim. It requires a specific explanation on how it may apply to an STG record including what specific investigation the document was collected for.

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.

RCW 42.56.240(1). Contrast this to RCW 42.56.240(12) which does not require a specific investigation.

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.

RCW 42.56.240(12). The requester must be provided, at a minimum, information on how a generalized exemption applies when a specific exemption is also claimed. The Department failed to do this when it provided Northup the two exemption logs and violated the PRA.

**B. FAILURE TO PROVIDE AN EXPLANATION OF HOW A GENERALIZED EXEMPTION APPLIES AFFECTS A TRIAL COURT'S PENALTY ANALYSIS.**

It is well established that when evaluating bad faith and penalties

courts examine the non-exclusive mitigating and aggravating factors set forth by the Supreme Court. *See Yousoufian v. King County*, 168 Wn.2d 444, 229 P.3d 735 (2010). The *Yousoufian* mitigating factors are as follows:

(1) a lack of clarity in the PRA request, (2) the agency's prompt response or legitimate follow-up inquiry for clarification, (3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions, (4) proper training and supervision of the agency's personnel, (5) the reasonableness of any explanation for noncompliance by the agency, (6) the helpfulness of the agency to the requestor, and (7) the existence of agency systems to track and retrieve public records.

The *Yousoufian* aggravating factors are as follows:

(1) a delayed response by the agency, especially in circumstances making time of the essence, (2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions, (3) lack of proper training and supervision of the agency's personnel, (4) unreasonableness of any explanation for noncompliance by the agency, (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency, (6) agency dishonesty, (7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency, (8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency, and (9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.

*Id.* at 467-68.

Lack of strict compliance with the PRA is an aggravating factor. So is an unreasonable explanation provided by the agency. The failure to provide sufficient information for a requester to understand how a claimed

exemption applies must be taken into account when evaluating the strict compliance or reasonable explanation exemptions. This must affect any bad faith calculus for penalties including whether the Department has asked in bad faith as required by RCW 42.56.565.

#### IV. CONCLUSION

In conclusion, this Court must take into account the Department's violation of the Public Records Act when it failed to provide specific information on how the general exemption statute RCW 42.56.240(1) applies to the records request which the Department claimed the particular statute RCW 42.56.240(12) applies. For this reason, Northup asks this Court to find that the Department violated the PRA based on the holding of *City of Lakewood v. Koenig* and take into account this violation during the bad faith and penalty calculations.

Respectfully submitted this 2<sup>nd</sup> day of February, 2015.

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**CERTIFICATE OF SERVICE**

I certify under the penalty of perjury under the laws of the State of Washington that on February 2, 2015 in Seattle, County of King, State of Washington, I deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

1. SUPPLEMENTAL BRIEF OF APPELLEE/RESPONDENT

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