

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

DAVID KOENIG, *Appellant/Cross Respondent*,

v.

CITY OF LAKEWOOD  
*Respondent/Cross-Appellant*,

BRIEF OF APPELLANT/CROSS-RESPONDENT

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## I. INTRODUCTION

This case arises out of appellant David Koenig’s request for records under the Public Records Act, Chapter 42.56 RCW (“PRA”). The main legal issue in this case is whether, and to what extent, certain records relating to a criminal case are exempt from disclosure pursuant to the Criminal Records Privacy Act, Chapter 10.97 RCW (“CRPA”). Koenig argued (i) that CRPA does not apply to investigative records or prosecution records, and (ii) that a case that is dismissed following a stipulated order of continuance (“SOC”) is an adverse disposition for purposes of CRPA.

The trial court disagreed with Koenig on both points, adhering to an erroneous interpretation of CRPA by Division One of the Court of Appeals. *See Hudgens v. City of Renton*, 49 Wn. App. 842, 746 P.2d 320 (1988). This Court should reject *Hudgens*, and hold that an SOC is an adverse disposition for purposes of CRPA.

Although the trial court disagreed with Koenig on the CRPA issues, the court also found that the City committed numerous other violations of the PRA. Despite abundant evidence of the City’s willful misconduct — including false statements about whether requested records existed and frivolous attempts to blame Koenig for a lack of communication — the court found only that “the City acted negligently

and failed to exercise ordinary care.” CP 645 (FOF 60).<sup>1</sup> Based on this unduly charitable characterization of the City’s conduct, the trial court awarded a penalty of \$25 per day out of an allowable range of \$5 to \$100 per day. RCW 42.56.550(4). In light of the discretion afforded to the trial court to determine the amount of a daily penalty under the PRA, Koenig has elected to not appeal that aspect of the trial court’s order.

## II. ASSIGNMENTS OF ERROR

**Assignment of Error.** The trial court erred in issuing its (i) *(Revised) Order on Motions* entered on August 15, 2007 (CP 334-36), (ii) *Order On Ruling Pursuant to the Public Records Act* entered on September 12, 2007 (CP 455-56), and (iii) *Findings of Fact, Conclusions of Law, and Order Awarding Penalties and Attorney’s Fees Pursuant to RCW 42.56.550(4)* entered on May 12, 2008 (CP 633-47).

### **Issues Pertaining To Assignments of Error**

A. Whether CRPA applies to investigative records and prosecution records.

B. Whether a stipulated order of continuance (“SOC”) is an adverse disposition for purposes of CRPA.

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<sup>1</sup> In this brief the numbered clerk’s papers are cited as “CP.” The trial court’s individual findings of fact (CP 633-47) are cited as “FOF.”

### **III. STATEMENT OF THE CASE**

#### **A. Background**

On or about October 14, 2004, an off-duty Seattle Police Officer was arrested in the City of Lakewood for patronizing a prostitute. Lakewood Police generated at least two police reports in the prostitution case. CP 635 (FOF 1).

On or about November 9, 2004, the Officer entered a “twelve month Stipulated Order of Continuance” (“SOC Order”) in the Lakewood Municipal Court. The SOC Order provided that the prostitution case would be continued for 12 months and then dismissed if the Officer complied with certain conditions. CP 635 (FOF 2).

On November 11, 2004, Koenig sent a public records request to the City. Koenig requested “the case number and all investigative records” connected with the prostitution case. CP 635 (FOF 3).

The City responded by letter dated November 24, 2004, indicating that redacted copies of the police report(s) were available. The City stated that certain information in the police reports was exempt due to a “not guilty” finding in the case. The City’s letter stated:

Identifying information of the arrestee, victim and witnesses are exempt from public inspection and copying, according to Washington State law, due to the case decision, which is not a guilty finding. In accordance with

this law, we have redacted (blacked out) that information off of the police report.

CP 635 (FOF 4); CP 43.<sup>2</sup> This response was incorrect. No determination of guilt had been made in the prostitution case at that time. In fact, the case was still pending pursuant to the SOC Order. CP 636 (FOF 6). Records eventually provided by the City show that the City knew that the prostitution case was pending when Koenig made his request. CP 636 (FOF 5). Furthermore, the City Attorney had actual personal knowledge that CRPA does not apply to pending criminal cases. CP 242-55.

On November 26, 2004, Koenig responded to the City. Koenig asked the City to clarify its response and state the specific statutory exemptions being relied upon. Koenig also explained that the only witnesses involved were police officers, and that there was no basis for redacting their names or positions. CP 636 (FOF 7).

The City responded by letter dated December 3, 2004. The City stated that the Incident “did not result in a guilty finding,” and that redacted information was exempt under CRPA. The letter stated:

The court case relating to the Lakewood Police Report Incident No. 042881396 did not result in a guilty finding.

As interpreted by *Hudgens v. Renton*, 49 Wn. App. 842,

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<sup>2</sup> The quotation to the City’s letter in the trial court’s finding of fact contains a typo. The text of the original document states “not a guilty finding,” while the finding of fact states “a not guilty finding.” CP 43; CP 635 (FOF 4).

844 (1987), rev. denied, 110 Wn.2d 1014 (1988), RCW 10.97 (the Washington State Criminal Records Privacy Act ...precludes the copying or returning of non-conviction information, and exempts such information from the disclosure requirements of RCW 42.17.

CP 636 (FOF 8). Along with this letter the City provided seven (7) pages of redacted police reports. CP 636 (FOF 9).

On January 13, 2005, Koenig responded to the City. Koenig questioned the City's interpretation of CRPA and its reliance on *Hudgens, supra*. Koenig also asked the City to determine if any additional documents had been added since his initial request. Koenig never received any additional documents. CP 637 (FOF 10).

The prostitution case against the officer was dismissed on November 10, 2005. CP 637 (FOF 11).

On December 5, 2005, Koenig renewed his request, and expanded that request to include "all records concerning the prosecution or contemplated prosecution related to the above noted police report..." CP 637 (FOF 12). This was a specific request for records, and responsive records should have been provided by the City in response to this request. CP 637 (FOF 13).

The City had responsive records at that time. The City's files contained a criminal complaint signed by an associate city attorney, as well as correspondence with the officer's attorney, the SOC order, the

dismissal order, and a notice of appearance and request for discovery from the defendant. CP 637 (FOF 14).

The City received this request on December 9, 2005. The City concedes that this is the first day of the period in which the City wrongfully withheld records from Koenig. CP 637 (FOF 15).

The City responded on December 16, 2005. The City informed Koenig that “This case was dismissed following a twelve month Stipulated Order of Continuance and is considered non-conviction data. Non-conviction data is not discloseable per RCW 10.97.” CP 637-38 (FOF 16). This response was inconsistent with the City’s previous representation on December 3, 2004, that a “not guilty” finding had been made. CP 638 (FOF 17).

The City asserts that it believed Koenig’s December 2005 request was duplicative of Koenig’s earlier request. Koenig’s more recent request unambiguously requested “prosecution” records for the first time. CP 638 (FOF 18). Records eventually provided by the City show that the City knew that Koenig wanted prosecution records. CP 638 (FOF 19).

The City’s failure to provide the City’s records in response to Koenig’s December 2005 request was a violation of the PRA. CP 638 (FOF 20). The City’s response also violated RCW 42.56.210(3), CP 638 (FOF 21), which requires an agency to cite a specific exemption

authorizing the withholding of records and to provide a brief explanation of how exemptions apply to withheld records.

This action was filed by Koenig *pro se* on December 15, 2006. Koenig, acting *pro se*, served the Summons and Complaint on the City on March 14, 2007. CP 638 (FOF 22-23).

The City filed a “dispositive motion” on or about May 14, 2007. CP 8-13. The City argued, *inter alia*, that the police reports were “nonconviction data” under CRPA, because the prostitution case had been dismissed, and that the City had properly withheld the police reports under CRPA and *Hudgens*. CP 10-13.

By letter dated May 16, 2007, Koenig asked the City to take a closer look at his request dated December 5, 2005. Koenig explained that this request was made after the investigation was concluded, and that it sought “all records concerning the prosecution or contemplated prosecution as related to the police report in question.” Koenig explained in detail the type of responsive records he expected the City to have in its files, including “communications with the officer’s attorney...; court filings such as motions; orders; discovery issues; conclusions of the prosecuting attorneys; plea proposals; as well as any documents with regards to a final disposition in the case.” CP 638-39 (FOF 26). Koenig also asked the City to provide an exemption log. CP 639 (FOF 27).

In fact, the City possessed responsive records of exactly the types described by Koenig in his letter dated May 16, 2007. The City's files included (i) "communications with the officer's attorney" ... (ii) "court filings,"... (iii) "orders,"... (iv) "discovery issues," ... and (v) "documents with regards to the final disposition of the case." CP 639 (FOF 28).

The City's failure to provide these records in response to Koenig's letter dated May 16, 2007, was a violation of the PRA. CP 639 (FOF 29).

By letter dated June 13, 2007, the City Attorney told Koenig that there were no records of the type described in his letter dated May 16, 2007. The City Attorney stated, "This is a misdemeanor case. It is uncommon for there to be any documents meeting the above description and this case is no exception." CP 639-40 (FOF 31). The City's Attorney's statement was incorrect, as the City possessed numerous records of the type described by Koenig. CP 640 (FOF 32).

By letter dated June 19, 2007, Koenig again responded to the City's alleged lack of understanding of his request. Koenig pointed out that there must be records other than the two investigative reports. Koenig repeated his requests for all records relating to the prosecution of the Incident, and also repeated his request for an "exemption log" of any exemptions claimed by the City. Koenig also stated that he wanted

communications with the City Attorney to be in writing “so that there is a lasting record for the courts.” CP 640 (FOF 33).

The City finally provided records to Koenig on July 9, 2007. The City sent a letter with 22 pages of records to “Daniel” Koenig at an old address for Koenig. The City knew the current address for Koenig. The City’s failure to send the records to Koenig with a correct name and address was negligence. CP 640-41 (FOF 35). Koenig did not receive the City’s letter and enclosed records until July 23, 2007 as an attachment to the *City’s Response (7/23/07)*. CP 641 (FOF 36).

The parties agreed to a briefing schedule, and Koenig retained counsel. CP 641 (FOF 37-38). On July 16, 2007, Koenig, through his counsel, filed a response and cross-motion asserting, *inter alia*, that (i) *Hudgens* was erroneous, (ii) CRPA was not applicable to the SOC order, (iii) the City had wrongfully withheld records, and (iv) that the City had not complied with RCW 42.56.210(3) and the requirements of *Progressive Animal Welfare Society v. UW (PAWS II)*, 125 Wn.2d 243, 271 n.18, 884 P.2d 592 (1995).<sup>3</sup> CP 641 (FOF 39); CP 21 et seq.

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<sup>3</sup> The PRA prohibits silent withholding of records. If an agency believes requested records are exempt in their entirety the agency must identify the records and explain why the records are being withheld. *Progressive Animal Welfare Society v. UW (PAWS II)*, 125 Wn.2d 243, 271 n.18, 884 P.2d 592 (1995).

On July 23, 2007, the City filed its response to Koenig's motion. The City included as an attachment the letter and 22 pages of records that the City had sent to an incorrect address on July 9, 2007. CP 641 (FOF 40). Although the City's motion had argued that the City had complied with CRPA as interpreted in *Hudgens*, the City's response to Koenig's motion conceded that *Hudgens* was erroneous. CP 11-12, 78.

**B. Trial Court's Rulings on CRPA and PRA Issues**

A motion hearing was held on August 3, 2008. The trial court found as a matter of fact that the City violated the PRA as of December 2005. The Court rejected the City's argument that Koenig had not made a specific request for records. The Court gave the City until August 17, 2008, to comply with the requirements of RCW 42.56.210(3). CP 641-42 (FOF 42). The Court's order stated, in relevant part:

1. The Court adheres to *Hudgens v. Renton*, 49 Wn. App. 842 (1988);

2. The Court rules that the final dismissal of the misdemeanor case pursuant to the SOC order is not an adverse disposition for purposes of Criminal Records Privacy Act (CRPA);

3. The City shall by August 17, 2007 provide to the plaintiff and the Court a detailed list of each responsive document withheld in its entirety, describing the document as required by PAWS II, 125 Wn.2d 243 (1994), including a specific explanation of the exemptions claimed with further elaboration of any claim of "work product";

4. The City shall by August 17, 2007 provide to the

plaintiff and the Court an explanation of how exemptions were applied to redact specific documents provided to plaintiff;

5. The Court finds that plaintiff made a specific request for records on December 5, 2005 and received by the City on December 9, 2005 and responsive records should have been provided in response to that request...

CP 642 (FOF 42); CP 335.

**C. Subsequent Rulings on Disclosure Issues**

On August 10, 2007, the City provided Koenig with a letter that listed the City's exemption claims along with 34 pages of responsive records and a two-page "Withholding Index." Because the City stated that it had provided every document in the City's file, the question of the City's compliance with *PAWS II* became moot. CP 642 (FOF 44).

The records provided on August 10, 2007, contained a number of erroneous redactions. CP 643 (FOF 45-49). On August 15, 2007, the City moved the Court to determine whether the City had complied with the PRA. CP 643 (FOF 50); CP 331-333. In response, Koenig pointed out the City's various erroneous exemption claims. CP 642 (FOF 51); CP 342-49. In its reply, the City conceded that dates of birth were not exempt and that there was no financial information (RCW 42.56.230(4)) or victim/witness information (RCW 42.56.240(2)) in the records provided to Koenig. CP 643 (FOF 52); CP 338.

The parties appeared before the court at a second hearing on August 30, 2007. The City was still out of compliance with the PRA, and the Court directed the City to clarify its exemption claims for a second time. CP 644 (FOF 53). On September 7, 2007, the City filed a “Disclosure Chart,” which revised the City’s exemption claims, asserted new exemption claims, and provided new copies of documents without redactions. CP 644 (FOF 54); CP 392 *et seq.* On September 12, 2007, the Court determined that the City had complied with the PRA as of September 7, 2007. CP 644 (FOF 57); CP 456.

**D. Rulings on Penalties and Attorney’s Fees**

A hearing on the issues of penalties and attorney’s fees was held on April 11, 2008. CP 633. The trial court issued an order awarding penalties and fees, supported by detailed findings of fact. CP 633-47. These findings documented the City’s numerous violations of the PRA, including misstatements to Koenig, failures to provide proper explanations, and inapplicable exemption claims. CP 636-44 (FOF 6, 13, 17, 20, 21, 29, 32, 35, 42, 45-47, 49, 53). The trial court rejected the City’s frivolous argument that Koenig had failed to communicate with the City, finding that Koenig had made specific requests for records and that the City knew what records Koenig wanted. CP 637-38, 641-42 (FOF 13, 18-19, 42).

Koenig argued that the maximum allowable penalty was warranted by the City's repeated false statements, frivolous arguments, and chronic failures to comply with the PRA. CP 485-86. Even though the trial court had already ruled that Koenig's requests were clear, the City continued to blame Koenig for failing to communicate with the City. CP 462-64.

Despite the abundant evidence of willful violations by the City, the trial court characterized the City's conduct as negligence and a failure to exercise ordinary care. CP 645 (FOF 60). The Court awarded Koenig a daily penalty of \$25 per day for a period of 477 days. CP 647.<sup>4</sup>

The trial court also awarded Koenig his attorney's fees as required by RCW 42.56.550. The court deducted 60 hours of attorney time attributable to the CRPA issues on which the court ruled in favor of the City, as well as a few hours in September 2007. CP 645-46 (FOF 63-64). The court found the remaining 113.9 hours of attorney time were reasonable and necessary, and not duplicative or inefficient. CP 646 (FOF 65).

This appeal followed.

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<sup>4</sup> The court awarded an additional minimum penalty \$5 per day for a period of 159 days during which the case had not been served and/or Koenig had requested a continuance. CP 645 (FOF 60).

#### IV. STANDARD OF REVIEW

The PRA “is a strongly worded mandate for broad disclosure of public records.” *Progressive Animal Welfare Society v. UW (PAWS II)*, 125 Wn.2d 243, 251, 884 P.2d 592 (1995) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). The PRA’s disclosure provisions must be liberally construed, and its exemptions narrowly construed. *PAWS II*, 125 Wn.2d at 251. Courts are to take into account the PRA’s policy “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 42.56.550(3).

Judicial review of all agency actions under the PRA is *de novo*. RCW 42.56.550(3). This Court’s review of the trial court’s application of CRPA is also *de novo*. See *Yousoufian v. Sims*, 152 Wn.2d 421, 430, 98 P.3d 463 (2004). The trial court’s interpretation of CRPA raises questions of law which this Court reviews *de novo*. *Bank of America, N.A. v. Prestance Corp.*, 160 Wn.2d 560, 564, 160 P.3d 17 (2007).

#### V. ARGUMENT

When records are requested pursuant to the PRA, an agency bears the burden of proving that refusing to disclose “is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific

information or records.” RCW 42.56.550(1). When an agency asserts that a requested record is exempt, in whole or in part, the agency must state how a particular exemption applies to a particular record. RCW 42.56.210(3).

In addition to various exemptions set forth in the PRA itself, the statute includes an exemption for any “other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070(1). One such statute is CRPA. Koenig does not dispute the basic proposition that the restrictions in CRPA may apply to requests for certain records under the PRA. *See* RCW 10.97.080 (nonconviction data may not be copied under the PRA).

CRPA was enacted in 1977 “to provide for the completeness, accuracy, confidentiality, and security of criminal history record information...” RCW 10.97.010. CRPA limits the disclosure of a narrow class of records defined as “criminal history record information.” RCW 10.97.030(1). Such records may be disclosed if they qualify as a “conviction record,” which is defined as “criminal history record information relating to an incident which has led to a conviction *or other disposition adverse to the subject.*” RCW 10.97.030(3) (emphasis added); RCW 10.97.050(1).

On the other hand, such records may not be disclosed if they constitute “nonconviction data.” CRPA defines “nonconviction data” as:

all criminal history record information relating to an incident which has not led to a conviction or other disposition adverse to the subject, *and* for which proceedings are no longer actively pending.

RCW 10.97.030(2) (emphasis added). Two conditions must be met before information qualifies as “nonconviction data” under this provision. First, the information must relate to an incident that did not lead to a disposition adverse to the subject of the information. Second, the information must relate to an incident “for which proceedings are no longer actively pending.” *Id.* The test is conjunctive; *both* conditions must be met for information to be protected as nonconviction data.

Setting aside the legal questions of (i) whether CRPA applies to investigative records and prosecution records, and (ii) whether a stipulated order of continuance (“SOC”) is an adverse disposition for purposes of CRPA, it is undisputed that the records at issue in this case were not exempt under CRPA when Koenig initially requested those records. To be protected as “nonconviction data,” a record must relate to an incident “for which proceedings are no longer actively pending.” RCW 10.97.030(2). Koenig made his initial request on November 11, 2004, less than a month after the Incident on October 14, 2004. CP 635 (FOF 1, 3). At that time,

the prostitution case was still actively pending. That case was not dismissed until November 10, 2005, after a 12-month continuance under the SOC Order. CP 635, 637 (FOF 2, 11). The records were not nonconviction data, and Koenig was therefore entitled to the un-redacted police reports.

The City illegally failed to provide such records. The City responded to Koenig's initial request by informing Koenig that "the case decision" was "not a guilty finding." CP 43.<sup>5</sup> In its subsequent response, the City stated that the case "did not result in a guilty finding." CP 636 (FOF 8). These responses were incorrect at best.<sup>6</sup>

The question before both the trial court and this Court is whether CRPA prohibits the disclosure of police reports and other records relating to the prostitution case *after the case was dismissed* pursuant to the SOC. The City's application of CRPA to these records is erroneous for two reasons:

- First CRPA does not apply to investigative records.

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<sup>5</sup> See note 2.

<sup>6</sup> Koenig submitted proposed findings that the City's responses were false and/or misleading. CP 616-17. The City knew that the prostitution case was pending when Koenig made his request for records, CP 636 (FOF 5). It is undisputed that the City Attorney actually knew that CRPA does not apply to pending criminal cases. CP 242-55. For unknown reasons, the trial court chose to characterize the City's response as merely "incorrect." CP 636 (FOF 6). The trial court's findings also omitted the undisputed fact that the City's responses violated RCW 42.56.210(3) and *PAWS II, supra*.

- Second, even if CRPA applies, the records are not “nonconviction data” under CRPA.

Either way, the requested records are not exempt under CRPA.

**A. CRPA does not apply to investigative records or prosecution records; *Hudgens v. City of Renton* is erroneous.**

CRPA does not apply to investigative records such as police reports created by the Lakewood police department or prosecution records created or held by the Lakewood City Attorney. Rather, CRPA *only* restricts the dissemination of “criminal history record information,” which is specifically defined as follows:

(1) “Criminal history *record* information” means information contained in records collected by criminal justice agencies, other than courts, on individuals, consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, including acquittals by reason of insanity, dismissals based on lack of competency, sentences, correctional supervision, and release.

The term includes information contained in records maintained by or obtained from criminal justice agencies, other than courts, which records provide individual identification of a person together with any portion of the individual’s *record* of involvement in the criminal justice system as an alleged or convicted offender...

RCW 10.97.030(1) (emphases added). It is important to note that the word ‘*record*,’ as highlighted above, is singular. This term refers to a compiled ‘record’ of a particular person’s involvement in the criminal

justice system. This narrow class of records is traditionally known as “rap sheets.”

The CRPA contains regulations for disseminating criminal history record information. The statute defines criminal history record information as the combination of three necessary elements: (1) identifiable descriptions of a person, (2) notations of arrests or formal criminal charges, and (3) the dispositions of such charges. Law enforcement agencies across the country compile this information about individual suspects and exchange the compilations with other agencies in response to criminal background checks. Agencies typically refer to these compilations as “rap sheets.”

Lynette Meachum, *Private Rap Sheet or Public Record? Reconciling the Disclosure of Nonconviction Information under Washington’s Public Disclosure and Criminal Records Privacy Acts*, 79 Wash. L. Rev. 693, 700 (2004).

The Attorney General’s Office confirms that investigative information does *not* fall within that definition. Instead, such records are only governed by the PRA.

Investigative information does *not* fall within the definition of “criminal history record information.” Release of police investigative information is covered by the PRA. See RCW 42.56.240(1).

Washington Attorney General’s Office, *Open Government Internet Manual*, §2.3(A) (emphasis added).<sup>7</sup>

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<sup>7</sup> Available at: <http://www.atg.wa.gov/OpenGovernment/InternetManual/Chapter2.aspx> (last visited September 5, 2008).

The correct, narrow definition of “criminal history record information” is confirmed by companion legislation enacted at the same time as CRPA:

“Criminal history record information” includes, **and shall be restricted to** identifying data and information recorded as the result of an arrest or other initiation of criminal proceedings and the consequent proceedings related thereto. **“Criminal history record information” shall not include intelligence, analytical, or investigative reports and files.**

RCW 43.43.705 (emphases added).<sup>8</sup> Because investigative records are not “criminal history record information,” such records are not covered by CRPA at all.

In *Hudgens, supra*, a reporter requested access to police reports relating to a DWI arrest four years earlier. The suspect had been found not guilty. The agency refused access and the trial court upheld the agency’s assertion that access was precluded by CRPA. *Hudgens*, 49 Wn. App. at 843-44. On appeal, Division One of the Court of Appeals concluded that CRPA allowed a requester to view but not copy the police reports. *Hudgens*, 49 Wn. App. at 844-45. The *Hudgens* court erroneously assumed, without any citation or any argument, that police

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<sup>8</sup> RCW 43.43.705 *et seq.* is the companion legislation to the CRPA. That statute establishes the Washington State Patrol as the central clearinghouse for ‘criminal history record information’ in Washington. The statutory language quoted above was included in the original legislation enacting the CRPA. Law of 1977, 1st Ex. Sess., Ch. 314, § 14.

reports fall within the scope of CRPA. *Hudgens*, 49 Wn. App. at 844. *Hudgens* never even cites, much less analyzes, CRPA's definition of "criminal history record information," which determines whether given records fall within the protections of CRPA.

In light of RCW 43.43.705 and the clear statement by the Attorney General, the analysis of CRPA in *Hudgens* is clearly wrong. Although *Hudgens* has not been reversed or rejected by other divisions of the Court of Appeals, its analysis of CRPA has not been accepted by the Supreme Court. In *Limstrom v. Ladenburg*, 136 Wn.2d 595, 616 n.10, 963 P.2d 869 (1998), the Supreme Court expressly declined to decide whether the court agreed with *Hudgens*.

If *Hudgens* were correct, CRPA would require agencies to withhold huge amounts of investigative information from the public. Under *Newman v. King County*, 133 Wn.2d 565, 573-74, 947 P.2d 712 (1997), investigative records in open investigations are categorically exempt from public disclosure. Such records only become available after a suspect is arrested or a case is referred to the prosecuting attorney. *Cowles Publishing v. Spokane Police Department*, 139 Wn.2d 472, 987 P.2d 620 (2000). If CRPA applied to investigative records, such records would only be available under the PRA while a case was pending unless the defendant is found guilty. RCW 10.97.030(2). *Hudgens* leaves only a

small window in which investigative records are available if a defendant is acquitted or charges are dropped.

As interpreted in *Hudgens*, CRPA would prevent public scrutiny in situations where such scrutiny is most essential to open and accountable government — cases where law enforcement personnel or other public officials are investigated for criminal activity but not prosecuted or convicted. In such cases the public has both the need and the right to know whether investigations have been botched or whether public officials have received favorable treatment from law enforcement.

This Court should explicitly reject the erroneous interpretation of CRPA in *Hudgens*.<sup>9</sup> This Court should hold that CRPA does not apply to investigative records or prosecution records.

**B. In the alternative, a stipulated order of continuance (SOC) is an adverse disposition for purposes of CRPA.**

When Koenig made his renewed request in December 2005, the 12-month SOC period had elapsed and the case against the officer had

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<sup>9</sup> In the trial court, the City erroneously asserted that Koenig “agree[d]” that *Hudgens* “is the law,” and suggested the Koenig was asking the trial court to make “new law.” CP 78 In fact, Koenig argued that *Hudgens* was not proper authority on whether police reports are “criminal history record information” because the *Hudgens* court did not actually address that issue. CP 32; *See In re Burton*, 80 Wn. App. 573, 582, 910 P.2d 1295 (1996) (an appellate opinion is not authority on an issue that it does not actually address); *see also ETCO Inc. v. Dept. Labor & Industries*, 66 Wn. App. 302, 307, 831 P.2d 1133 (1992). At this point the question of whether *Hudgens* was binding on the trial court is moot. This Court is free to disagree with the analysis of Division One in *Hudgens*. *See State v. Nonog*, \_\_\_ Wn. App. \_\_\_, 187 P.3d 335 (July 14, 2008) (noting that Division I and III disagreed with this Court’s decision in *State v. Clowes*, 104 Wn. App. 935, 18 P.3d 596 (2001)).

been dismissed. CP 637 (FOF 11). Even assuming, *arguendo*, that CRPA applies to investigative records, the records were not exempt “nonconviction data” for purposes of CRPA because the SOC order was an adverse disposition for purposes of CRPA.

Under CRPA, a disposition that is “adverse” to the subject of the information is disclosable “criminal record information,” not protected “nonconviction data.” “‘Conviction record’ means criminal history record information relating to an incident which has led to a conviction *or other disposition adverse to the subject.*” RCW 10.97.030(4) (emphasis added). Conversely, “nonconviction data” is defined as “all criminal history record information relating to an incident which has *not* led to a conviction *or other disposition adverse to the subject...*” RCW 10.97.030(2) (emphasis added). The precise issue is whether the entry of the SOC order or the dismissal of the prostitution case after the 12-month continuance was a “disposition adverse to the subject.”

CRPA expressly defines a class of dispositions that are not convictions but which still count as “dispositions adverse to the subject.”

These adverse dispositions are:

An acquittal due to a finding of not guilty by reason of insanity and a dismissal by reason of incompetency, pursuant to chapter 10.77 RCW; and a dismissal entered after a period of probation, suspension, or deferral of sentence.

RCW 10.97.030(4). Under this definition, the dismissal of the prostitution case pursuant to the SOC order was a “disposition adverse to the subject” for three reasons.

First, the dismissal was entered after a period of “suspension” and is therefore “considered [a] disposition[] adverse to the subject.” RCW 10.97.030(4). The prosecution of the officer was suspended during the 12-month period of the continuance. The fact that the charge was ultimately dismissed is not legally relevant under RCW 10.97.030(4); it is still considered “an adverse disposition” along with the other dismissals which the statute treats as adverse dispositions.

Second, the SOC is an adverse disposition because it is, or is equivalent to, “a dismissal entered after a period of probation.” CRPA does not specify particular kinds of probation; any kind of “period of probation” qualifies as an adverse disposition.

Dispositional continuances—sometimes referred to as **stipulated orders of continuance** or continuances for dismissal—and deferred prosecutions are also creatures of municipal and district courts. Because they have some aspects that are more like pre-judgment cases and some that are more like post-judgment cases, they pose more difficult issues than deferred or suspended sentences, which are clearly post-judgment matters. From a purely technical standpoint, dispositional continuances and deferred prosecutions are pre-judgment matters: the court does not enter a finding of guilty, either by plea or following trial. **Procedurally and pragmatically, however, dispositional continuances and deferred prosecutions are more similar**

**to post-judgment probation cases** than to pre-judgment cases, **and it seems more logical to treat them as post-judgment cases.** The conditions imposed as part of the dispositional continuance, or deferred prosecution, **are similar to conditions of probation** that might be imposed as part of a suspended or deferred sentence, and are often monitored by a probation officer.”

Michael J. Finkle, *Washington’s Criminal Competency Laws: Getting from Where We Are To Where We Should Be*, 5 Seattle J. for Soc. Just. 201, 243 (2006) (emphasis added).

A district court proceeding which can bypass a criminal conviction is deferred prosecution, **which is in effect a pre-conviction probation.** A person charged with a misdemeanor or gross misdemeanor in district court may petition the court to be considered for a deferred prosecution program by alleging that the wrongful conduct is caused by alcohol, drug or mental problems.

Royce A. Ferguson, Jr., 12 Wash. Prac., Criminal Practice & Procedure § 703 (3d ed.).

Third, the stipulated order of continuance is an adverse disposition because the officer was required to pay \$300 as a “monitoring fee” and to take an HIV test. CP 194, 354. The imposition of these requirements in the SOC order constitutes an adverse disposition because these orders are not “(a) A decision not to prosecute; (b) a dismissal; or (c) acquittal.” RCW 10.97.030(4).

In the trial court the City argued that the periods of “probation, suspension, or deferral of sentence” in RCW 10.97.030(4) pertain only to

periods in which “the presumption of innocence is gone” or “findings have been entered.” CP 80. Nothing in the statute supports the City’s creative interpretation. CRPA is concerned with the completeness and accuracy of criminal history record information. RCW 10.97.010. The criminal record history information would be neither accurate nor complete if an SOC disposition, in which the defendant essentially concedes that a crime was committed, were treated as “nonconviction data.”

The City’s argument also conflicts with the determination in RCW 10.97.030(4) that a “finding of **not guilty** by reason of insanity” is an adverse disposition. In that instance there is not merely a presumption of innocence but a finding that the defendant is *not* guilty. In contrast, the final order in the prostitution case was only a dismissal with no finding of guilt or innocence. CP 187, 353. Nor is there any apparent reason why the presumption of innocence would remain relevant under an SOC order where the defendant has already given up other rights such as the right to present evidence, the right to a speedy trial, and the right to jury trial. CP 194, 354.

The Court should hold that an SOC order is an adverse disposition for purposes of CRPA. Therefore, none of the records in this case are exempt under CRPA.

**C. This case must be remanded to the trial court to order the production of unredacted documents and to award additional penalties and fees.**

This matter must be remanded to the trial court to order the City to produce records without improper CRPA redactions. On remand, the trial court will exercise its discretion to determine the amount of additional penalties to be awarded. *Yousoufian*, 152 Wn.2d at 431.

Koenig was not awarded the portion of his attorney's fees attributable to the CRPA issues on which the court ruled in favor of the City. CP 645 (FOF 63). Those fees must be awarded on remand.

**D. Koenig is entitled to attorney's fees on appeal pursuant to RCW 42.56.550(4).**

The PRA requires an award of attorney's fees to a successful requester on appeal. *Progressive Animal Welfare Soc'y v. UW (PAWS I)*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990); RCW 42.56.550(4). Koenig respectfully requests an award of attorney's fees pursuant to RAP 18.1.

## **VI. CONCLUSION**

For all these reasons, this Court should reject the interpretation of CRPA in *Hudgens, supra*, as well as the trial court's conclusion that an SOC is not an adverse disposition for purposes of CRPA.

This case must be remanded to the trial court with instructions to order the production of unredacted documents and to award additional penalties and fees.

Koenig is also entitled to an award of fees on appeal.

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RESPECTFULLY SUBMITTED this 8th day of September, 2008.

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Certificate of Service

I, the undersigned, certify that on the 8th day of September, 2008, I caused a true and correct copy of this *Brief of Appellant / Cross Respondent* to be served, by the method(s) indicated below, to the following person(s):

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