

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

DAVID KOENIG, *Appellant*,

v.

CITY OF LAKEWOOD
Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The City's reply brief is a transparent attempt to avoid this Court's review of the erroneous analysis of CRPA¹ in *Hudgens v. City of Renton*, 49 Wn. App. 842, 746 P.2d 320 (1988), and to avoid paying attorney's fees for which the City is clearly liable. Well before the City denied Koenig's first request for records, the Lakewood City Attorney knew that the analysis of CRPA in *Hudgens* was questionable. CP 251. Yet the City expressly relied on *Hudgens* to withhold records from Koenig. CP 636 (FOF 8). The City did not abandon its reliance on *Hudgens* until after Koenig thoroughly researched and briefed the issue. CP 29-32. Having cited *Hudgens* to withhold records under CRPA, and having caused Koenig to incur attorney's fees to challenge *Hudgens*, the City cannot be allowed to hide behind a specious argument that this case is moot.

Nevertheless, the City attempts to convince this Court that there is no relief that this Court can afford to Koenig. *Resp. Br.* at 2. This argument is based on the frivolous assertion that Koenig waived the very same arguments that he presented in both the trial court and in his *Brief of Appellant*. The record shows that Koenig has never waived his arguments regarding CRPA or the City's liability under the PRA. Records remain improperly redacted, and Koenig is entitled to the attorney's fees he

¹ Criminal Records Privacy Act, Chapter 10.97 RCW.

incurred in establishing that the records are not exempt under CRPA.

The City's meritless arguments are sadly typical of its conduct throughout this case. It should come as no surprise that the trial court awarded Koenig virtually all of his attorney's fees (other than the CRPA fees) over the City's objections that such fees were excessive.

Although *Hudgens* is clearly wrong, that case has managed to evade further review for twenty years. Agencies like the City of Lakewood continue to rely on *Hudgens* to withhold large swaths of public records even though they know, or at least should know, that CRPA only applies to "criminal history record information" or "rap sheets." Unless and until another appellate court rejects *Hudgens*, agencies will continue to misapply CRPA in response to requests for records. The time has come for the Court to review the erroneous analysis of Division One in *Hudgens* and to restore full public access to public records under the PRA.

II. RESPONSE TO RESTATEMENT OF THE CASE

The City's brief presents a sanitized, misleading, and self-serving version of the facts. For example, the City discusses in detail how it responded to Koenig's initial request for records. *Resp. Br.* at 4.² But the City neglects to mention that (i) the City's November 24, 2004, response

² The City's *Brief of Respondent* is cited in this brief as "*Resp. Br.*" Koenig's opening brief is cited as "*App. Br.*"

stated that a “decision” had been made in the prostitution case and it was “not a guilty finding,” (ii) this statement was incorrect, (iii) the City knew it was incorrect, and (iv) the City attorney knew that CRPA was not applicable to pending cases. CP 635-36 (FOF 4-6); CP 43, 242-55.

For another example, the City continues to argue that it thought Koenig’s December 2005 request was a “reiteration of his earlier request.” *Resp. Br.* at 5. But the trial court found that Koenig’s request was unambiguous and the City knew what he wanted. CP 638 (FOF 18-19).

This Court should rely on the trial court’s findings of fact. Those unchallenged findings are verities on appeal. *Davis v. Dept. of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980).

A. Koenig did *not* waive his right to recover attorney’s fees on the CRPA issues.

The City asserts that “Koenig failed to make any claims of attorney fees” on the CRPA issues and “arguably waived any such claim.” *Resp. Br.* at 2. There is no factual basis for these assertions. The City’s “Restatement of the Case” contains no discussion of when or how Koenig’s alleged waiver was made. *See Resp. Br.* at 4-7. In fact, Koenig never waived his right to recover attorney’s fees for the CRPA issues.

Koenig’s motion for penalties and attorney’s fees was brought several months after the trial court made its substantive rulings on the

CRPA issues. In his motion, Koenig only requested the portion of his fees that related to issues on which he was the prevailing party. Koenig acknowledged that he was not entitled to fees on the CRPA issues because the court had ruled against Koenig on the CRPA issues:

Approximately sixty (60) of those hours were attributable to Koenig's arguments that the Criminal Records Privacy Act (CRPA) was not applicable to the records from the prostitution case. *Crittenden Attorney's Fees Dec.*, ¶ 11. Koenig was not successful on those CRPA arguments so those attorney hours would not be included in an award of reasonable attorney's fees. *Citizens for Fair Share v. Dept. of Corrections*, 117 Wn. App. 411, 437, 72 P.3d 206 (2003). Therefore, Koenig's attorneys spent 97.0 hours on PRA issues on which Koenig prevailed.

CP 491. However, Koenig's motion explicitly reserved Koenig's right to recover fees on the CRPA issue, and to seek those fees on appeal:

Koenig may appeal the Court's rulings on CRPA. If successful Koenig would seek an award of fees for the attorney time spent on the CRPA issues.

CR 491. Although the City's brief quotes this page of Koenig's motion for fees, the City omits the above portion of Koenig's motion which appears on the same page. *Resp. Br.* at 16.

The City cites the transcript of the penalty hearing (VRP (IV) at 112) in support of its claim that Koenig "withdrew" his right to recover fees on the CRPA issues. *Resp. Br.* at 16, 17. In that portion of the transcript Koenig's counsel clearly stated that fees for the CRPA issues

had been deducted because the trial court had ruled against Koenig on those issues:

MR. CRITTENDEN: ... Now if Your Honor will recall, you ruled against me on two legal questions; one being whether to follow the *Hudgens* case in its ruling that CRPA even applies to investigative records.

THE COURT: Right.

MR. CRITTENDEN: And you also ruled against me on the legal question of whether a stipulated order of continuance was an adverse disposition. Both of those are honestly debatable legal questions, we don't fault the City for taking its positions on those two issues and, in fact, we have removed the hours that we spent on those issues from our fee request --

THE COURT: I see that.

VRP (IV) at 112. In a later portion of the transcript, which the City ignores, the trial court acknowledged that Koenig's counsel acted appropriately in deducting his fees on the CRPA issue:

THE COURT:... So I am awarding all of the hours with the exception of the CRPA because I do think I have to carve that portion of the fees out and Mr. Crittenden did a good job of giving the Court direction on that, eliminating those hours from the total hours.

VRP (IV) at 137. Koenig never waived his right to recover fees on the CRPA issues if the trial court's ruling were reversed on appeal.

In sum, the City's assertion that Koenig somehow "waived" his right to recover fees is groundless. The City's legal argument regarding attorney's fees is addressed in section III(A), *infra*.

B. The prostitution case was pending in November of 2004 but not in December of 2005.

The City's brief recites the procedural history of the prostitution case. These facts are well documented and not disputed. *Resp. Br.* at 3.

The City argues, at the very end of its brief, that Koenig has invited an "academic discussion" of whether the prostitution case was actively pending for purposes of CRPA. *Resp. Br.* at 30-31. Those facts are also undisputed. The prostitution case was pending in 2004 when Koenig made his first request for records. Even though the City knew that the prostitution case was pending, the City erroneously withheld records under CRPA. CP 635-36 (FOF 3-8). This issue has become "academic" only because the City chose to abandon its cross appeal. The fact that the City knowingly violated the PRA in 2004 is clearly relevant to the penalties imposed on the City under RCW 42.56.550(4).

The fact that the prostitution case was not pending in December of 2005 is also undisputed. CP 637 (FOF 11-12). This fact is relevant to this appeal because records in criminal cases that are not pending may or may not be exempt under CRPA. *See* section III(D).

III. ARGUMENT

A. Koenig did *not* waive his right to recover attorney's fees on the CRPA issue.

The City variously argues that Koenig “waived” or “withdrew” his right to recover attorney’s fees on the CRPA issue or “voluntarily failed to request” his fees on that issue. *Resp. Br.* at 2, 10, 15-16. As set forth in section II(A) (above), there is no factual basis for the City’s “waiver” arguments. Koenig clearly reserved his right to fees on the CRPA issues if he is successful in this appeal. CP 491. The City’s legal arguments are equally devoid of merit.

Koenig deducted the attorney time attributable to the CRPA issue because the case law directs a court to award only that portion of a requester’s attorney fees involved in successfully compelling the disclosure of records. *Zink v. City of Mesa*, 140 Wn. App. 328, 166 P.3d 738, 747-48 (2007) (citing *ACLU v. Blaine School Dist.*, 95 Wn. App. 106, 111-120, 975 P.2d 536 (1999)); *Koenig v. City of Des Moines*, 123 Wn. App. 285, 302-03, 95 P.3d 777 (2004), *aff’d in part and rev’d in part on other grounds*, 158 Wn.2d 173, 142 P.3d 162 (2006); *Citizens for Fair Share v. Dept. Corrections*, 117 Wn. App. 411, 437, 72 P.3d 206 (2003). Koenig clearly explained this to the trial court. CP 491.

The City's response to Koenig's motion never objected to Koenig's reservation of his right to recover fees on the CRPA issue if Koenig were successful on appeal. CP 537-551. On the contrary, the City cited *ACLU* and "question[ed]" whether Koenig was actually a prevailing party at all. CP 545-46.

On appeal, the City does not suggest that the trial court would have awarded Koenig fees on the CRPA issue if Koenig had sought such fees. Indeed, the City cites the portion of *ACLU* that states that courts should "discount hours spent on unsuccessful claims." *ACLU*, 95 Wn. App. at 118 (quoting *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983)); *Resp. Br.* at 16.³

Nevertheless, the City argues that Koenig cannot recover fees on the CRPA issue because he did not ask the trial court to award fees on issues on which he had not prevailed in the trial court. In essence, the City argues that Koenig was required to (i) ignore the applicable law, (ii) ask for fees to which he was not entitled (thereby incurring more fees), (iii) have the trial court rule against him, and then (iv) appeal. The City seeks to punish Koenig for being honest with the trial court and only requesting

³ Similarly, *Mayer v. Sto Industries, Inc.*, 123 Wn. App. 443, 459, 98 P.3d 116 (2004), *reversed in part*, 156 Wn.2d 677, 132 P.3d 115 (2006), cited by the City, provides that a fee award under the Consumer Protection Act must segregate the time spent on CPA claims from time spent on other causes of action.

those fees to which Koenig was entitled under the applicable law. There is no legal authority or rationale to support this absurd argument.

Citing *Hume v. American Disposal Co.*, 124 Wn.2d 656, 880 P.2d 988 (1994), the City suggests that Koenig should have asked the trial court to “exercise its discretion” and include the time spent on CRPA in the fee award. *Resp. Br.* at 17. *Hume* does not support the City’s assumption that the trial court could have or would have done that. That case recites a rule for fee segregation that applies where a party has several different causes of action. *Hume*, 124 Wn.2d at 672-73. But *Hume* is **not** a PRA case, and it is not applicable where the party has only one cause of action: RCW 42.56.550. *Hume* does not modify the requirement under the PRA (described above) that a prevailing requester is only entitled to fees related to the successful release of information.

Nor does *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005), support the City’s suggestion that Koenig should have asked the trial court to award fees for the CRPA issue. *Resp. Br.* at 17. *Spokane Research* held that a records requester would be entitled to fees and penalties if he eventually prevailed on the question of whether records should have been produced, even where the records had already been produced. *Spokane Research*, 155 Wn.2d at 102. However, *Spokane Research* does **not** hold that a party that has not prevailed in the

trial court must request and be denied fees in order to preserve the issue for appeal.⁴

The City also cites two cases for the proposition that where fees are “incorrectly requested or not requested ... appellate relief to recover these fees will not be available.” *Resp. Br.* at 16. In *Marquez v. Cascade Residential Design, Inc.*, 142 Wn. App. 187, 194-95, 174 P.3d 151 (2007), an arbitration party failed to request a specific fee award from the arbitrator, and her untimely request for fees in the trial court was directed to the wrong forum. In *Marriage of Williams*, 84 Wn. App. 263, 273, 927 P.2d 679 (1996), the husband in a dissolution proceeding failed to request attorney’s fees based on the wife’s intransigence in the trial court and was not permitted to raise that issue for the first time on appeal. None of these cases even remotely support the City’s argument that Koenig was required to request fees to which he was not entitled under the trial court’s substantive rulings.

⁴ The remaining cases cited by the City are irrelevant. In *State v. O’Connell*, 83 Wn.2d 797, 821-22, 523 P.2d 872 (1974), the court rejected the appellant’s new legal theories regarding a statute of limitations because the appellant did not present those theories in the trial court. In *Shelton v. Farkas*, 30 Wn. App. 549, 557, 635 P.2d 1109 (1981), the court also rejected the appellant’s new theory regarding the cost of repair which was raised for the first time on appeal. In *Bowman v. Webster*, 44 Wn.2d 667, 671, 269 P.2d 960 (1954), the court upheld the trial court’s determination which held that the purchaser of property had waived the right to purchase a disputed portion of the property by refinancing the mortgage, accepting the deed, and waiting nine months to commence an action relating to the disputed portion.

In sum, Koenig did not waive his right to fees for the CRPA issue. He simply did what the case law clearly required, segregating his fees on the unsuccessful CRPA arguments.

B. This appeal is *not* moot.

The City argues that this appeal is moot. This argument is based on a number of erroneous assertions:

- that Koenig waived any claim for additional attorney fees;
- that there are no more records that can be provided;
- that the City correctly applied CRPA; and
- that Koenig waived his challenges to the redactions under CRPA.

Resp. Br. at 8-15. In fact, Koenig has not waived any arguments or fee claims, and some records remain improperly redacted under CRPA.⁵

1. Koenig is entitled to additional fees if this Court reverses the trial court on the CRPA issue.

As explained in Section A, Koenig did not waive his right to recover his attorney's fees on the CRPA issue. Koenig did not prevail on his CRPA arguments in the trial court because that court adhered to *Hudgens, supra*, and further held that the SOC was not an adverse disposition under CRPA. Koenig will be entitled to an additional award of attorney's fees if this Court reverses the trial court's decision to follow

⁵ The City's assertion that Koenig eventually received other responsive records, *Resp. Br.* at 12-13, is not relevant to any issue in this appeal.

Hudgens.⁶ Consequently this appeal is not moot.

2. The City's application of CRPA is erroneous.

The City argues that there are no records that remain to be disclosed, and that its remaining redactions under CRPA are correct notwithstanding the City's earlier reliance on *Hudgens*. *Resp. Br.* at 2, 8. But even if an SOC order is not an adverse disposition for purposes of CRPA, the City has still misapplied CRPA to the remaining records.

First, the City erroneously assumes that it has only withheld or redacted "criminal history record information" (or "rap sheets"). *Resp. Br.* at 18, 20. In fact, some of the records redacted by the City are *court records*. CR 405-407. Such records are expressly excluded from the definition of "criminal history record information:"

(1) "Criminal history record information" means information contained in records collected by criminal justice agencies, *other than courts*...

The term includes information contained in records maintained by or obtained from criminal justice agencies, *other than courts*...

RCW 10.97.030(1) (emphasis added); *Resp. Br.* at 20. In the possession of the City Attorney, these may be investigative records (or prosecution records) subject to CRPA as interpreted in *Hudgens*. But these records are

⁶ Koenig has decided to withdraw his appeal on the issue of whether a stipulated order of continuance ("SOC") is an adverse disposition for purposes of CRPA. *See* section (E).

not “criminal history record information” if *Hudgens* is wrong.

Second, the City admits that only “nonconviction data” is restricted under CRPA. RCW 10.97.050. CRPA defines “nonconviction data” as:

[A]ll 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); *Resp. Br.* at 19. The City redacted various personal identifiers — CHRI#, TPD#, and FBI No. — from the records it eventually produced. CP 403, 413. The City’s *Disclosure Chart* (9/7/07) asserted, without explanation, that this information was “nonconviction data.” CP 393, 396. On appeal, the City asserts that these identifiers are “criminal history record information” but does not explain why they are “nonconviction data” under RCW 10.97.030(2). *Resp Br.* at 21.

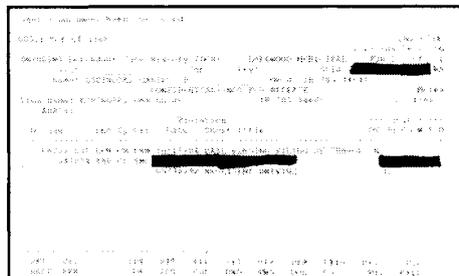
Beltran v. DSHS, 98 Wn. App. 245, 259-60, 989 P.2d 604, *review granted*, 140 Wn.2d 1021 (2000),⁷ does not support the City’s assertion that personal identifiers are “non-disclosable CHRI.” *Resp Br.* at 21. *Beltran* was a negligence action against the state by the mother of children who were abused in a foster home. The mother sought to admit evidence

⁷ “Although the Washington State Supreme Court granted review of *Beltran*, the parties settled, and the higher court never heard the case.” 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, 714 (2004).

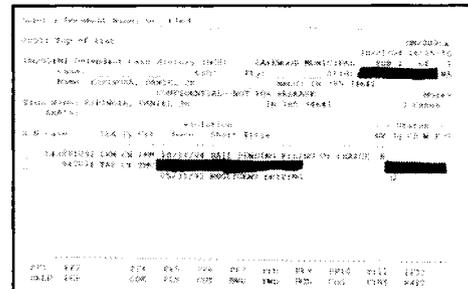
This record is clearly “criminal history record information” as defined by RCW 10.97.030(1). But the City has redacted both the “CHRI# and TPD# on the unexplained assumption that these identifiers are somehow “nonconviction data.” *Resp. Br.* at 11; CP 393.

ii. Defendant Case History:

August 10, 2007 (CP 377)



September 7, 2007 (CP 405)

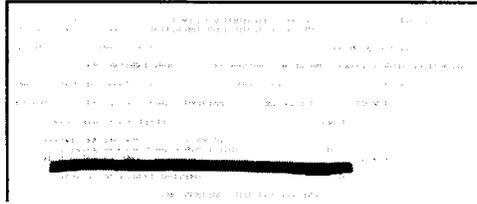


This record is a copy of a report from the Administrative Office of the Courts (AOC). *Resp. Br.* at 11. An entire line of information is redacted on the assumption that this information is “nonconviction data.” CP 394. But the City has not explained why the AOC would be a law enforcement agency and not a court for purposes of CRPA.⁸ As explained above, court records are expressly excluded from the definition of “criminal history record information. RCW 10.97.030(1).

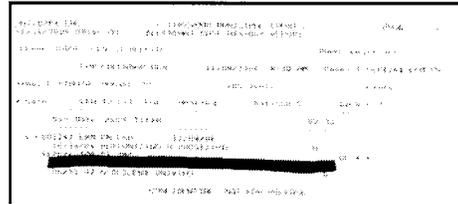
⁸ The AOC operates under the direction and supervision of the Chief Justice of the Supreme Court. www.courts.wa.gov/appellate_trial_courts/aocwho/.

iii. Defendant Case History Report:

August 10, 2007 (CP 378)



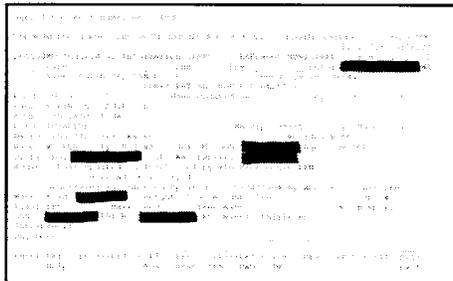
September 7, 2007 (CP 407)



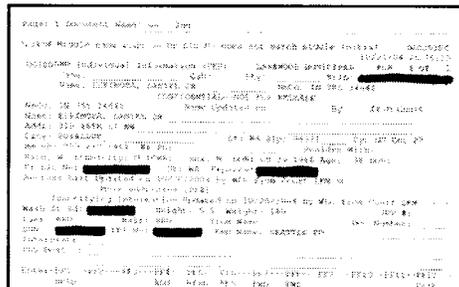
This record is a printout from the Lakewood Municipal Court, which is clearly a “court” for purposes of RCW 10.97.030(1). This record is *not* “criminal history record information” (unless *Hudgens* is upheld).

iv. Individual Information (PER) Query:

August 10, 2007 (CP 381)



September 7, 2007 (CP 413)



This record may or may not be “criminal history record information.” Assuming that it is, the “FBI No.” is still redacted on the assumption that this identifier is “nonconviction data.” CP 396.

3. Koenig did not waive his challenges to the City’s redactions under CRPA.

The City argues that Koenig “waived” and “expressly disavowed” any challenge to the trial court’s CRPA redactions, and that Koenig has no claim on appeal that these redactions were incorrect. *Resp. Br.* at 8, 10,

13. This argument is based on a misleading characterization of the record. The pleading quoted on pages 13-14 of the *Brief of Respondent* was filed *after* the trial court had already ruled against Koenig on the CRPA issues. CP 342-49. In that same pleading, Koenig clearly stated that the issue before the court at the August 30, 2007, compliance hearing was whether the City had complied with the court's prior order, and that Koenig reserved his right to appeal that order:

In its *Order* [August 3, 2007], this Court disagreed with Koenig's arguments regarding the Criminal Records Privacy Act ("CRPA"), Chapter 10.97 RCW, and the City's obligations under *Progressive Animal Welfare Society v. UW (PAWS II)*, 125 Wn.2d 243, 884 P.2d 592 (1995). **Koenig reserves the right to appeal those rulings.**

The precise issue before the Court on the present motion is not whether the City has fully responded to Koenig's request for records but whether the City has complied with the Public Records Act, RCW Chapter 42.56 ("PRA") **as interpreted in this Court's *Order***. (Emphasis added).

CP 343. The City's assertion that Koenig "waived" his arguments under CRPA is frivolous. Nor is there any factual basis for the City's argument that Koenig is "estopped" from challenging the City's redactions under CRPA. *Mueller v. Garske*, 1 Wn. App. 406, 409, 461 P.2d 886 (1969), cited by the City, is inapplicable because Koenig has not taken inconsistent positions on the CRPA issues.

Furthermore, the City's exemption theories in the trial court were garbled and inconsistent, making it difficult for both Koenig and the trial court to understand what the City was redacting and why. When Koenig filed the memorandum quoted on page 14 of the *Brief of Respondent* the City had only applied CPRA to the LESA Criminal History Report (above). CP 387. At the compliance hearing on August 30, 2007, neither Koenig nor the Court could determine why the City had redacted the personal identifiers (CHRI#, TPD#, FBI No.) from various records. VRP (III) at 94-96. When the trial court asked the City Attorney the basis for these redactions she did not know the answer. VRP (III) at 97. The City did not explain that the identifiers had been redacted under CRPA until September 7, 2007. CP 393, 396.

The City also asserts that Koenig does not assign error to the trial court's determination that the City was in full compliance with the PRA as of September 7, 2007. *Resp. Br.* at 9-10. That is simply false. Koenig explicitly assigned error to the trial court's "*Order On Ruling Pursuant to the Public Records Act* entered on September 12, 2007 (CP 455-56)." *App. Br.* at 2. Furthermore, Koenig had no opportunity to respond to the City's "Disclosure Chart" dated September 7, 2007, CP 392 et seq., because his attorney was out of the Country on a previously scheduled vacation. CP 330; VRP (IV) at 116. Nor was there any requirement that

Koenig attempt to file an untimely motion for reconsideration. *See* VRP (IV) at 116.

Finally, the City argues that Koenig has not made “specific” or “individualized” claims of how the trial court erred in applying CRPA to the records at issue. *Resp. Br.* at 12, 15. There is no requirement that Koenig make such “individualized” claims. If this Court agrees that *Hudgens* is erroneous then the City’s particular erroneous redactions can be corrected on remand. Koenig will also be entitled to an additional award of penalties and fees.

4. The City cannot avoid liability by abandoning *Hudgens* after being sued.

The City argues that the validity of *Hudgens* is now “academic” because the City abandoned its reliance on *Hudgens* prior to the hearing on August 3, 2007. *Resp. Br.* at 6, 18-19, 22-23. But the facts remain that (i) the City initially withheld records under *Hudgens*, and (ii) Koenig did not receive the withheld records until July 23, 2007, more than a week after Koenig had filed his motion to compel disclosure, which included all of Koenig’s legal arguments under CRPA. CP 28-34; CP 636, 640-41 (FOF 8, 35-36). The City cannot avoid its liability under the PRA by attempting to disavow *Hudgens* only after being sued.⁹

⁹ The City continues to claim that it did not understand Koenig’s initial request. *Resp. Br.* at 13, 22, 28. The trial court rejected this claim, making explicit findings of fact that

The City's argument is directly contrary to *Spokane Research, supra*. The agency in that case argued that the requester's claims were moot because he had received the documents prior to judgment. Like the City in this case, the agency argued that the issues were "moot" and "academic." *Spokane Research*, 155 Wn.2d at 99. The Supreme Court emphatically rejected these arguments, holding that "Prejudgment disclosure of records does not moot judicial review." *Id.* at 100. The court also rejected the suggestion that the requester could not be a prevailing party if he had not caused the disclosure of records.

This is the mootness argument in another garb. It allows government agencies to resist disclosure of records until a suit is filed and then to disclose them voluntarily to avoid paying fees and penalties. This rule flouts the purpose of the PDA...

Spokane Research, 155 Wn.2d at 103. Under *Spokane Research*, the City is clearly liable for withholding records under CRPA even though it subsequently released some of the records.

In sum, the CRPA issue and Koenig's request for attorney's fees are **not** moot.¹⁰ The Court must reach the merits of those issues.

Koenig's request was unambiguous and that the City knew what Koenig wanted. CP 638 (FOF 18-19).

¹⁰ The various cases cited by the City do not support its argument that this case is moot. *Kuehn v. Renton School Dist.*, 103 Wn.2d 594, 597, 694 P.2d 1078 (1985), held that a declaratory challenge to the search of a student's luggage on a band trip was not moot where the plaintiff might be entitled to nominal damages and attorney's fees. In *State v. Turner*, 98 Wn.2d 731, 658 P.2d 658 (1983), school truants challenged judgments

C. The Court should review this case even if it were moot.

Even if this case were moot, this Court should still review the question of whether *Hudgens* is erroneous. ““A moot case will be reviewed if its issue is a matter of continuing and substantial interest, it presents a question of a public nature which is likely to recur, and it is desirable to provide an authoritative determination for the future guidance of public officials.”” *Soter v. Cowles Publ’g Co.*, 162 Wn.2d 716, 749-50, 174 P.3d 60 (2007) (quoting *Cathcart-Maltby-Clearview Cmty. Council v. Snohomish County*, 96 Wn.2d 201, 208, 634 P.2d 853 (1981)). All of these factors are present. The scope of CRPA under the PRA is an issue of continuing public interest. Agencies, like the City, continue to cite *Hudgens* to withhold investigative records. The City Attorney admitted to the trial court that *Hudgens* continues to create problems for agency attorneys, and that there is a growing recognition that *Hudgens* should be

holding them in contempt for failing to attend school. Even though the appellants had already served their sentences the appeal was not moot because the court was still able to vacate fines and cleanse the students’ records. *Turner*, 98 Wn.2d at 733.

City of Tacoma v. Taxpayers, 108 Wn.2d 679, 685, 743 P.2d 793 (1987), held that a party that merely objects to a trial court’s reasoning does not have standing to appeal. Koenig does not merely object to the trial court’s reasoning. Koenig seeks additional records and attorney’s fees.

The City’s discussion of *Progressive Animal Welfare Society v. UW (PAWS II)*, 125 Wn.2d 243, 884 P.2d 592 (1995); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978); *Soter v. Cowles Publ’g Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007); and *Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998) is boilerplate. *Resp. Br.* at 11-12.

overturned. CP 78; VRP (II) at 43-44. The City must concede that the *Hudgens* should be reviewed and rejected as soon as possible.

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

The City makes no attempt to defend the erroneous analysis of CRPA in *Hudgens*. Instead, the City suggests that this Court should adhere to *Hudgens* even if that case is wrong. *Resp. Br.* at 24. This Court should reject the City's self-serving attempt to avoid liability and to retain the ability to withhold records from other requesters under *Hudgens*.

City of Walla Walla v. Ashby, 90 Wn. App. 560, 952 P.2d 201 (1998), *overruled on other grounds*, *State v. Enstone*, 137 Wn.2d 675, 974 P.2d 828 (1999), indicates that this Court might adhere to the "reasoning" of another division of the Court of Appeals. But there is no "reasoning" in *Hudgens* for this Court to follow. *Hudgens* merely assumed, without analysis or authority, that police reports fall within the scope of CRPA. *Hudgens*, 49 Wn. App. at 844. Even the City notes that "this portion of *Hudgens* very well may be dicta." *Resp. Br.* at 23. This Court is not required to agree with another division even where it explains the basis for its decision. *See State v. Nonog*, 145 Wn. App. 802, 187 P.3d 335 (2008). There is no reason for this Court to follow clearly erroneous dicta. *Hudgens* is obviously wrong and must be expressly rejected by this Court.

E. Koenig withdraws his appeal on the issue of whether a stipulated order of continuance (“SOC”) is an “adverse” disposition for purposes of CRPA.

Koenig has decided to withdraw his appeal on the issue of whether a stipulated order of continuance (“SOC”) is an adverse disposition for purposes of CRPA. *See App. Br.* at 22-26.

The dispositive issue before this Court is whether the analysis of CRPA in *Hudgens* is erroneous. *See* section (D) (above).

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

If this Court agrees with Koenig and rejects *Hudgens* then this matter must be remanded to the trial court to order the City to produce records without improper CRPA redactions.

G. Koenig is entitled to attorney’s fees on appeal pursuant to RCW 42.56.550(4).

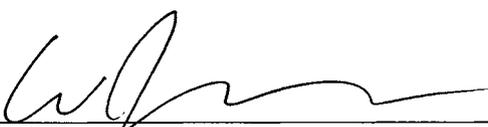
See App. Br. at 27.

IV. CONCLUSION

This case is not moot. This Court must reject the interpretation of CRPA in *Hudgens* and hold that CRPA does not apply to investigative records or prosecution records. This case must be remanded to the trial court for the production of unredacted documents and to award additional penalties and fees.

Koenig is also entitled to attorney fees on appeal under RAP 18.1.

RESPECTFULLY SUBMITTED this 20th day of November,
2008.

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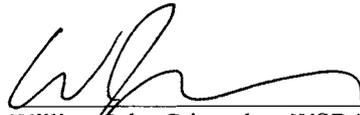
Certificate of Service

I, the undersigned, certify that on the 20th day of November, 2008, I caused a true and correct copy of this *Reply Brief of Appellant* to be served, by the method(s) indicated below, to the following person(s):

By email (PDF) to:
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