

NO. 43700-7-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

LIBBY HAINES-MARCHEL,

Plaintiff,

v.

DEPARTMENT OF CORRECTIONS,

Defendant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Ms. Haines-Marchel appeals the June 15, 2012 order granting the Department of Corrections' ("DOC" or the "Department") motion for summary judgment in a Public Records Act lawsuit. Ms. Haines-Marchel submitted a request for records relating to her inmate husbands' dry-cell search. In response, the Department produced 43 pages of documents. In that production, DOC Form 05-392, which relates to the gathering and evaluation of confidential information within the prison system, was mostly redacted. Ms. Haines-Marchel filed this action seeking penalties for the Department's redaction of DOC Form 05-392. When presented with facts demonstrating the non-disclosure of the form itself and information entered on it are essential to effective law enforcement and the protection of informants' safety, the superior court dismissed Ms. Haines-Marchel's complaints with prejudice, correctly finding no violation of the Public Records Act (PRA). The Department asks this Court to affirm the trial court's decision.

II. STATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion when the court did review the exhibits prior to making its decision?
2. Whether Ms. Haines-Marchel waived the claimed error as to the superior court's ruling that DOC Form 05-392 is exempt from

disclosure pursuant to RCW 42.56.240(2) because she has not presented argument in support of the assigned error?

3. Whether the trial court correctly concluded that both pages of DOC Form 05-392 are exempt from disclosure pursuant to RCW 42.56.240(1)?

4. Whether Ms. Haines-Marchel is entitled to attorney's fees or costs?

III. COUNTER STATEMENT OF THE CASE

A. Underlying History

On December 13, 2010, Ms. Haines-Marchel's husband, Brock Marchel, an inmate in the custody of the Department, was escorted from the visiting area at Clallam Bay Corrections Center (CBCC) and placed on a "dry-cell search" based on information received from confidential informants indicating he had been bringing narcotics into CBCC. CP 145. As a result of this use of confidential informant information, the front and back sides of DOC Form 05-392, the Confidential Information Report and the Guide to the Evaluation of Reliability of Informant Information, were completed. CP 162, ¶ 6. In the days after the search, in response to a prison grievance he filed, Brock Marchel was erroneously given a copy of DOC Form 05-392 with only the informant names redacted. *See* CP 42-43; CP 161-68. This form had not, previously or since, been released in

any form in “dry-cell” searches, grievance responses, or otherwise, and it should not have been released Marchel in this case.¹ *See* CP 161-68. At some point thereafter, Mr. Marchel transferred a copy of the erroneously released form 05-392 out of the prison to Ms. Haines-Marchel. *See* CP 42-43. There is nothing in the record to indicate that Ms. Haines-Marchel herself was ever investigated for, charged with, or accused of any crime by DOC.

B. History Of The Request

On December 28, 2010, the Department received a public disclosure request from Ms. Haines-Marchel asking for documents related to the “dry-cell search” of Brock Marchel. CP 167, ¶ 8. On December 30, 2010, the Department sent a letter acknowledging the request had been received, and it began collecting responsive records. *Id.*, ¶ 9. On January 14, 2011, the Department contacted Ms. Haines-Marchel to notify her that the documents she had requested were ready and requested payment for

¹ In her brief, Ms. Haines-Marchel first incorrectly summarizes DOC policy in an attempt to imply that DOC Form 05-392 is permitted to be released to offenders who are subject to a dry-cell search. *See* Opening Brief at 12. Later, Ms. Haines-Marchel provides a significant and material false quotation of DOC Policy 420.311(I)(B). *Id.* at 23. Luckily, the truth is available in this matter because the actual policy was placed in the record by Ms. Haines-Marchel’s counsel at the trial court. CP 106. Despite Ms. Haines-Marchel’s frequent assertions to the opposite of this fact, DOC Policy 420.311(I)(B), specifically states that an offender is entitled to only “A copy of DOC 21-408 Dry Cell Search Authorization...” and never references DOC Form 05-392, the form at issue in this case. Additionally, and again contrary to Ms. Haines-Marchel’s false statements to this Court, the policy does not make any suggestion that an offender would be permitted to view any confidential informant information or scoring criteria.

the copies to be produced. *Id.*, ¶ 10. One week later, the Department sent Ms. Haines-Marchel 43 pages of documents, along with an exemption log listing and explaining redactions made to the released documents. *Id.*, ¶ 11. Among the released documents, pages 1 and 2 were redacted heavily, leaving only the document title and identifying information. CP 42-43. Pages 1 and 2 were the front and back of DOC Form 05-392. CP 167-68. The redaction of these documents is the basis under which Ms. Haines-Marchel has brought this action under the PRA seeking financial penalties.

C. Procedural History

At the trial court, Ms. Haines-Marchel was represented by counsel. CP 83. Ms. Haines-Marchel, through counsel, moved for partial summary judgment on March 30, 2012, and DOC filed a response and cross-motion for summary judgment on April 20, 2012. CP 87-143; CP 145-68. The parties subsequently filed their respective responses and replies.² CP 171-79; CP 192-97; CP 199-212. The parties appeared for argument regarding summary judgment on May 11, 2012. *See generally* RP. During the hearing, Judge Dixon noted that he had not yet been able to access either party's attached exhibits because of an issue with the court's electronic file. RP at 6-11. Counsel for both parties approached the bench and directed the court to the various exhibits. RP at 6-11. The parties also

² Ms. Haines-Marchel also filed various motions to strike Defendant's pleadings, but withdrew these motions on the morning of the summary judgment hearing. RP at 5.

clarified the issue in dispute in this matter. RP at 13-14. Ms. Haines-Marchel clarified that no additional documents were being sought and limited the case only to the application of PRA exemptions to the two pages of DOC Form 05-392. RP at 13-14. The parties then proceeded to argue the matter before Judge Dixon, who reserved his ruling on the matter so that he could “take the time to look at these exhibits with a keen eye.” RP at 44.

On May 23, 2012, Judge Dixon sent a letter to the parties noting the pre-hearing misunderstanding with regard to exhibits and issuing his opinion as to the pending motion. CP 229-31. Judge Dixon explained that he agreed with the Department’s position regarding the application of RCW 42.56.240 to DOC Form 05-392 and noted that he found CBCC Investigator William Paul’s declaration “particularly enlightening and helpful.” *Id.* at 230.

On June 14, 2012, Judge Dixon signed an order which explained that he had reviewed the pleadings, including all of the attached declarations and granted the Department’s cross-motion, dismissing Ms. Haines-Marchel’s case with prejudice. CP 232-34. Ms. Haines-Marchel now appeals this order.

IV. ARGUMENT

A. Where The Trial Court Did Review The Exhibits Offered By Both Parties, The Trial Court Did Not Abuse Its Discretion In Deciding In Favor Of The Department Of Corrections And Dismissing Ms. Haines-Marchel's Case

Ms. Haines-Marchel's primary argument for reversal in this appeal is that Judge Dixon abused his discretion. Opening Brief at 10-18. This argument can be quickly disposed of as it has no basis in fact.

Ms. Haines-Marchel claims that Judge Dixon's dismissal of her case must be overturned because he allegedly abused his discretion by reaching a decision without reviewing the exhibits offered by Ms. Haines-Marchel. *Id.* This contention is not supported in the record. Judge Dixon twice noted that, prior to the hearing, he could not access either party's attached exhibits because of an issue with the court's electronic file. RP at 6-11; CP 229-31. However, the record of the hearing clearly indicates that the correct exhibits were located, examined, and discussed. RP at 6-11. At the end of the hearing, Judge Dixon specifically reserved ruling to allow him to review all of the exhibits "with a keen eye." RP at 44. In the final order being challenged in this appeal, Judge Dixon clearly states that he reviewed all of the relevant pleadings and specifically refers to various declarations of Michael C. Kahrs, Brock Marchel, Libby Haines-Marchel, William Paul, Denise Larson, and Denise Vaughan. CP 232-34. This

review of the record terminates Ms. Haines-Marchel's allegations of failure on the trial court's part. The record shows that Judge Dixon did, in fact, review the various exhibits Ms. Haines-Marchel claims he ignored. Thus, any related abuse of discretion argument fails.

B. Ms. Haines-Marchel Has Failed To Argue Her Assignment Of Error As To The Trial Court's Holding That DOC Form 05-392 Is Exempt From Disclosure Pursuant To RCW 42.56.240(2)

Ms. Haines-Marchel broadly assigns error to the superior court's holding that DOC Form 05-392 is exempt from disclosure pursuant to RCW 42.56.240(1) and (2). Opening Brief at 2. Ms. Haines-Marchel, however, fails to present any specific argument, citation to the record, and citation to legal authority to support the assignment of error as to the RCW 42.56.240(2) exemption for records containing information revealing the identity of complainant witnesses or victims. *See generally* Opening Brief. The appellate court's "generally will not decide an issue if the appellant does not support her argument with citation to authority." *Draszt v. Naccarato*, 146 Wn. App. 536, 544, 192 P.3d 921 (2008). Ms. Haines-Marchel's failure to present an adequate argument waives the issue on appeal. *Ang v. Martin*, 154 Wn.2d 477, 487, 114 P.3d 637 (2005). An issue is deemed abandoned if it is not supported by argument or authority. *State v. Motherwell*, 114 Wn.2d 353, 358 n.3, 788 P.2d 1066 (1990);

Schmidt v. Cornerstone Investments, Inc., 115 Wn.2d 148, 160, 795 P.2d 1143 (1990).

The trial court ruled that DOC Form 05-392 is exempt under both RCW 42.56.240(1) and (2). CP 232-34. As noted above, Ms. Haines-Marchel has waived any argument against the application exemption under RCW 42.56.240(2) by failing to argue it. Without considering the exemption under RCW 42.56.240(2), this Court cannot reverse the trial court's decision. As a result, this Court's analysis may terminate here.

C. Public Records Act Cases May Be Decided On Affidavits, And Appellate Review Is *De Novo*

In the remainder of her brief, Ms. Haines-Marchel makes various arguments for the proposition that this Court should reverse the trial court's holding with regard to RCW 42.56.240(1) and enter judgment on her behalf. Opening Brief at 19-29. Prior to proceeding to the merits of the RCW 42.56.240(1) exemption, the Department will begin by proposing an appropriate replacement for Ms. Haines-Marchel's various proposed standards of review.

1. PRA Standard Of Review

Pursuant to RCW 42.56.550(3) "[t]he court may conduct a hearing based solely on affidavits" in a PRA case. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 151, 240 P.3d 1149 (2010). The Supreme Court has

stated that the PRA contemplates judicial review upon motion and affidavit, for to do otherwise ““would make public disclosure act cases so expensive that citizens could not use the act for its intended purpose.”” *Id.* (quoting *Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 801, 791 P.2d 526 (1990)).

This Court reviews summary judgment *de novo*. *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981 (2008). Summary judgment is apposite if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). Facts and reasonable inferences are interpreted in the light most favorable to the nonmoving party. *McNabb v. Department of Corrections*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008).

This Court stands in the shoes of the trial court where, as here, the record consists only of declarations, memoranda, and other documentary evidence. *Koenig v. Thurston County*, 175 Wn.2d 837, 842, 287 P.3d 523 (2012), citing *Progressive Animal Welfare Society (PAWS II) v. University of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). Declarations submitted in support of summary judgment must “set forth such facts as would be admissible in evidence.” CR 56(e). Allegations, arguments,

conclusions, and speculations do not raise issues of material fact that would preclude summary judgment. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 360, 753 P.2d 517 (1988); *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

The Department's affidavits establishing its public records processes, concerns of prison security, confidential informant management, and reasonableness of its conduct are not controverted by any admissible evidence. They are in stark contrast to Ms. Haines-Marchel's and her husband's speculative, conclusory, and unsupported assertions. Based upon the law and the facts, which this Court may review *de novo*, judgment was properly entered in favor of the Department and should be affirmed.

D. The Trial Court Correctly Concluded That Both Pages Of DOC Form 05-392 Are Exempt From Disclosure Pursuant To RCW 42.56.240(1)

The PRA is a strongly worded mandate for broad disclosure of public records. *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389 (1997). Washington's PRA requires every governmental agency to disclose any public record upon request, unless the record falls within certain specific exemptions. *O'Connor v. Dep't of Social and Health Services*, 143 Wn.2d 895, 905, 25 P.3d 426 (2001). Any information about government conduct is a public record regardless of its physical

form or characteristics. *Smith v. Okanogan County*, 100 Wn. App. 7, 12, 994 P.2d 857 (2000). A person seeking documents under the PRA must “identify the documents with reasonable clarity to allow the agency to locate them.” *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004). Requested public records must be disclosed unless they fall within a specific statutory exemption. *Prison Legal News, Inc. v. Dep’t of Corrections*, 154 Wn.2d 628, 635, 115 P.3d 316 (2005). As shown *infra*, the documents in question are protected from release by statutory exemptions.

1. The Erroneous Release Of Documents To Brock Marchel Does Not Affect The Applicability Of Public Records Act Exemptions

While the trial court found this argument non-persuasive, Ms. Haines-Marchel continues to refer to the Department’s erroneous release of a less redacted copy of the documents in question to Brock Marchel through the grievance process as if it had bearing on the decision of this matter. This erroneous release does not affect the applicability of exemptions under the PRA for a number of reasons. First, this erroneous release was not made pursuant to the PRA. The release of this document through the PRA is prohibited state wide and its release has not been allowed before or since at CBCC. CP 166-68; CP 161-64; CP 209-10.

The form itself would be considered contraband if found in the possession of an offender within DOC. *Id.*

Even if it had been released under the PRA, the Department's application of exemptions is permissive and a release of the documents does not affect the applicability of exemptions. *See Sanders v. State*, 169 Wn.2d 827, 849-50, 240 P.3d 120 (2010). If the incorrect release of this document to Marchel through the grievance process were to revoke the Department's ability to exercise exemptions under the PRA, it would only force the Department to repeat this mistake in perpetuity. In *Sanders* the Court noted that such an approach would be "antithetical" and that "the appropriate inquiry is whether the records are exempt from disclosure. If they are exempt, the agency's withholding of them was lawful and its subsequent production of them irrelevant." *Id.* The exemptions claimed by the Department are not affected by the Department's erroneous release of the documents to inmate Marchel and the exemptions were properly applied in this case.

2. RCW 42.56.240(1) Exempts DOC Form 05-392 From Production Under The Public Records Act

RCW 42.56.240(1) states in full:

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, and nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy;

DOC Form 05-392 fits squarely within this exemption. Based on the plain language of the exemption itself, whether a document is exempt is based on two factors: 1) who compiled the record; and, 2) whether the nondisclosure of the record essential to effective law enforcement or for the protection of a person's right to privacy.

Here, the form is both an intelligence and investigative document which records the information provided by confidential informants and the criteria the Department uses to evaluate the reliability of the informants and the information provided. This record was compiled by the Department, a penology agency. Thus, the first prong of RCW 42.56.240(1) is met and further analysis will focus on whether the withholding of the challenged records "is essential to effective law enforcement or for the protection of any person's right to privacy."³

³ Because Ms. Haines-Marchel's brief seems to primarily challenge the "essential to effective law enforcement" prong of this exemption, the Department's response also focuses there. Nonetheless, the Department maintains that the non-disclosure of DOC Form 05-392 is also necessary for "the protection of any person's right to privacy." RCW 42.56.240(1). Even with the informants' names redacted from the form, the remaining information could allow an offender to deduce the identities of the informants. *See* CP 161-64. Because the information on the form could help identify the confidential informants, and because of the resulting danger to those

a. The Non-Disclosure Of The Contents Of DOC Form 05-392 Is Essential To Effective Law Enforcement

The nondisclosure of DOC Form 05-392 is essential to effective law enforcement. The Department's law enforcement "obligations include carrying out the terms of court-ordered sentences and detecting and punishing violations of the law." *Fischer v. Washington State Dept. of Corr.*, 160 Wn.App. 722, 727, 254 P.3d 824, 826-27, review denied, 172 Wn.2d 1001, 257 P.3d 666 (2011). In working to accomplish these goals, DOC is tasked with being in "control of a population that is 100% criminal in its composition and is accustomed to evading detection and exploiting the absence of authority, monitoring, and accountability." *Id.* at 726 (quoting Richard Morgan, then director of DOC's prisons division). This population is especially vindictive and dangerous towards informants who provide information to prison staff. CP 162-64; CP 166-67. Additionally, prisoners often attempt to manipulate staff into taking action against their enemies by providing false information. CP 162-63. It is in this law enforcement context that DOC Form 05-392 is used to document and evaluate confidential informant tips. *Id.*

The front of the form, entitled "Confidential Information Report" contains the substance of the confidential information provided to the

prison informants the release of this form would threaten the informants' right to privacy and is therefore exempt.

Department investigators as well as check boxes completed by the investigators relating to some of the factors used to evaluate reliability and validity. CP 42. The back of the form, entitled “Guide to the Evaluation of Reliability of Informant Information” is an evaluative scoring tool used by the Department to assess the reliability and validity of information obtained from confidential sources. CP 43. It contains a numerical scoring rubric used by investigators to establish the reliability of sources and the validity of information. *Id.*

This form reveals not only the criteria used to evaluate confidential information but, in conjunction with the other records from the investigation, would reveal how specific sources and types of information were weighed and scored in this particular investigation. Should this document be produced to the public, the Department’s intelligence evaluation methods would be compromised. *See* CP 161-64. Potential informants would be able to tailor their statements to investigators in such a way as to manufacture a higher (or lower) score which would negatively impact the penology agency’s ability to objectively evaluate confidential information in investigating prison misconduct and criminal activity. *Id.* As many of the Department’s investigations are initiated because of confidential information received from offenders, the continued flow of confidential information and Investigator’s ability to evaluate and score

it are essential to the Department's safe operation of prison facilities. *See id.* As described above, public disclosure of DOC Form 05-392 would imperil the flow of that information and the Department's ability to effectively make decisions about its reliability. Ms. Haines-Marchel has offered nothing to refute this critical fact.

The factual situation here is similar to that in the *Fischer* case cited above. *See Fischer*, 160 Wn. App. 722. Frederick Fisher's attorney requested DOC surveillance video related to an inmate assault. *Id.*, at 724. His request was denied under RCW 42.56.240(1), because the Department considered the non-disclosure of video surveillance to be essential to its law enforcement role because its release would "allow inmates to determine weaknesses [in prison security] and exploit those weaknesses by assaulting other inmates or committing crimes and prison infractions." *Id.*, at 725-27. The Department's claim of exemption was upheld, citing the critical nature of intelligence gathering to DOC's law enforcement role. *Id.* at 728. Just like the public release of surveillance video, the public release of DOC's tools for confidential informant collection and evaluation would imperil the operation of DOC facilities.

Ms. Haines-Marchel incorrectly argues that DOC's claim of exemption is foreclosed by Division I's statement that "[a]voiding an opportunity for an accused to tailor his statement to his advantage is not a

secret law enforcement technique.” Opening Brief at 26, citing *Sargent v. Seattle Police Dept.*, 167 Wn.App. 1, 19, 260 P.3d 1006 (2011), *appeal granted*, 175 Wn.2d 1001, 285 P.3d 884 (2012). This *dicta* is inapplicable to the situation at bar. The *Sargent* court did not reject the application of an exemption to specific facts or methods that would have made it easier for a suspect to tailor his statement, but rather they rejected the proposition that an investigators’ note stating that a suspect “can tailor his statement to match the known facts” is somehow secret. *Sargent*, 167 Wn. App. at 19. This is a wholly different proposition and the redaction of that quoted statement is plainly not protected. Here, the Department is not attempting to redact the idea that tailoring a statement is a secret, or even redacting the underlying facts to prevent tailoring in a specific case. Rather, the Department made redactions to protect its confidential information gathering and evaluation tools and infrastructure as well as the individual informants in this case. While in *Sargent* the Seattle Police Department, failed to explain why their single statement was protected, here DOC has thoroughly explained why public disclosure of the “Confidential Information Report” and “Guide to the Evaluation of Reliability of Informant Information” contained in DOC Form 05-392 would imperil its ability to accomplish its primarily law enforcement mission, the safe operation of our state’s prisons.

Because Ms. Haines-Marchel did not, and cannot, refute that public release of DOC Form 05-392 would impede DOC's law enforcement function, Judge Dixon was correct in granting Defendant's cross-motion and his ruling should be upheld.

b. Ms. Haines-Marchel Does Not Have A "Legitimate Public Interest" In Access To DOC Form 05-392 And Even If She Did, This Interest Does Not Trump Non-Disclosure Which Is Essential To Effective Law Enforcement

Ms. Haines-Marchel now claims that she has a "legitimate public interest" in receiving an un-redacted copy of DOC Form 05-392 and that that "interest" trumps the exemption contained within RCW 42.56.240(1). Opening Brief at 17-18. This position is unsupported in fact and law.

First, Ms. Haines-Marchel has no particularly strong interest in this form. This is a form kept and used by DOC investigators evaluating confidential informants who provide information on what takes place in DOC facilities. There is nothing in the record to indicate that Ms. Haines-Marchel herself was ever investigated for, charged with, or directly accused of anything. At most, Ms. Haines-Marchel missed a single visiting event because her inmate husband was placed on dry cell search. Additionally, Ms. Haines-Marchel admits that DOC released 43 pages related to the investigation and search to her. Opening Brief at 8.

The only redactions at issue are those related to information on the collection and evaluation of confidential informant information. The other 41 pages of information gave Ms. Haines-Marchel the opportunity to examine how DOC responded to and investigated the allegation against her inmate husband.

More importantly, the “legitimate public concern” doctrine that Ms. Haines-Marchel refers to in her argument is inapplicable to DOC’s claimed exemption under RCW 42.56.240(1). Ms. Haines-Marchel bases her argument on the Supreme Court’s holding in *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 259 P.3d 190 (2011). However, the discussion of “legitimate public concern” in that case is not applicable to the exemption which is at issue here. In *Bainbridge Island Police Guild*, the court evaluated the application of a privacy exemption to an unsubstantiated sexual misconduct report against a police officer. *Id.* Privacy exemptions under the PRA only apply when the information to be released “(1) [w]ould be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.” RCW 42.56.050 (emphasis added); *Bainbridge Island Police Guild*, 172 Wn.2d, at 415-18. The legislature did not include the same two part test for the application of the non-disclosure of documents essential to effective law enforcement under RCW 42.56.240(1). In fact, when choosing the method of analysis to

apply, the Supreme Court specifically noted that the “essential to effective law enforcement” exemption was not at issue in *Bainbridge Island Police Guild*, implying that if it had been, the analysis would have been different. *See* 172 Wn.2d at 419. There is no “legitimate public interest” analysis applicable to a claim of the “essential to effective law enforcement” exemption under RCW 42.56.240(1). The only analysis applicable is the one applied above and it supports the lower court’s ruling and the nondisclosure of DOC Form 05-392.

c. Ms. Haines-Marchel’s argument regarding *Livingston v. Cedeno* is also misplaced

Acknowledging the Department’s security concerns with regard to the release of the form in question, Ms. Haines-Marchel attempts to argue that the Supreme Court’s holding in *Livingston v. Cedeno*, 164 Wn.2d 46, 49, 186 P.3d 1055 (2008), undermines the Department’s ability to claim any security related PRA exemptions. Opening Brief at 18-19. Here again, Ms. Haines-Marchel is incorrect.

In that case, Michael Livingston, a DOC inmate, requested training records of a DOC officer which were not covered by any PRA exemption and were thus required to be disclosed. *Livingston v. Cedeno*, 164 Wn.2d at 49. When the documents were stopped as contraband in the prison’s mail room, Livingston sued. *Id.* at 50. The Supreme Court held that the

Department's application of prison mail room screening operates outside of and independently of the PRA and that there was no PRA violation. *Id.* at 57. The case contained no suggestion that the ability to stop contraband at the mail room somehow weakened the Department's ability to claim exemptions in the future. *See generally id.* The case allows the Department to intercept documents that are not otherwise subject to an exemption, but has no impact on the application of those exemptions which exist under the PRA. This fact is evidenced in more recent case law involving the Department. *See Fischer*, 160 Wn. App. 722. If *Livingston* abrogated the Department's ability to claim the "essential to effective law enforcement" exemption, then there would have been no basis for the Department to claim an exemption for surveillance video requested by an attorney in *Fischer*, as the video could just be stopped at the mail room. *Id.* at 728. Of course, three years after *Livingston*, the *Fischer* court did not face this question because, despite Ms. Haines-Marchel's claims to the contrary, *Livingston* has no effect on the Department's ability to claim an exemption under the PRA. Again, the only analysis applicable in this case, is the one applied above and it supports the lower court's ruling and the non-disclosure of DOC Form 05-392 as essential to effective law enforcement.

3. The Redactions Made Were Appropriate

Ms. Haines-Marchel incorrectly argues that the form could have been provided with fewer redactions and without impeding effective law enforcement. Redaction of the whole form is justified in this case. *Koenig v. Thurston Co.*, 155 Wn. App. 398 (2010), *review granted*, 245 P.3d 774 (2011) supports this conclusion. In *Koenig*, the court held that RCW 42.56.240(1) exempted victim impact statements in the possession of the prosecuting attorney's office because their disclosure would discourage victims from submitting such statements in the first place. *Id.* at 410-11. Importantly, the court noted that:

The redaction of any information identifying the victim from the victim impact statement will not appropriately address the chilling effect that disclosure would have on law enforcement The ease with which a victim could be identified negates the purpose of redaction. Even without the victim's name, victim impact statements contain highly personal information. The potential disclosure of even a redacted statement could cause victims to censor their statements or refuse to provide them altogether. Moreover, redaction is a highly subjective process. A victim may not trust that sensitive personal information would actually be redacted from the disclosed document. Because redaction will not cure the threat to effective law enforcement, we hold that the PRA does not require disclosure of a redacted victim impact statement.

Id. at 412. Thus, it is doubtful that production of even a redacted "Confidential Information Report" could adequately address the chilling effect of publicly disclosing such records. CP 161-64.

A partial redaction is similarly ineffective with regard to the back of the form, the “Guide to the Evaluation of Reliability of Informant Information.” As mentioned above, DOC Form 05-392 is an evaluative tool used by the Department and its release, even in blank, would compromise intelligence evaluation methods because potential informants would be able to tailor their statements to investigators and prevent investigators from being able to objectively evaluate confidential information in investigating prison misconduct and criminal activity.

Because lesser redaction would have negative impacts on the Department’s ability to effectively engage in its obligations, the heavy redaction of the record was proper under RCW 42.56.240.

E. Ms. Haines-Marchel Is Not Entitled To Attorney’s Fees Or Costs

Because the Department properly redacted the documents in question pursuant to the above cited sections of the PRA, Ms. Haines-Marchel cannot be a prevailing party. Ms. Haines-Marchel was not wrongfully denied access to any records. As such, Ms. Haines-Marchel is not entitled to any penalties, attorney’s fees or costs. Additionally, Ms. Haines-Marchel is not represented by counsel in this portion of the proceedings and therefore would not be entitled to attorney’s fees if she prevailed.

V. CONCLUSION

The Department's redaction of DOC Form 05-392 complied with RCW 42.56.240. The Court should affirm the superior court's dismissal of this matter.

RESPECTFULLY SUBMITTED this 12th day of April, 2013.

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CERTIFICATE OF SERVICE

I certify that on the date below I served a copy of the **BRIEF OF RESPONDENT** on all parties or their counsel of record as follows:

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EXECUTED this 12th day of April, 2013, at Olympia,
Washington.

s/ Judy Lonborg
JUDY LONBORG
Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

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