

NO. 50338-7-II

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

DENNIS NEAL GASTON,
Appellant,

V.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,
Respondent.

APPELLANT'S BRIEF

Charles S. Hamilton, III, WSBA #5648
Attorney for Appellant
7016 35th Avenue NE
Seattle, WA 98115-5917
206-623-6619

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR ----- 1
 Assignments of Error
 Issues Pertaining to Assignments of Error

II. STATEMENT OF THE CASE ----- 1

III. ARGUMENT ----- 3
 No. 1 Principles applicable to Public Records Act review ----- 3
 No. 2 Did the trial court err in denying the motion to strike the
 opinion of Robert J. Herzog, who had not reviewed the
 individual Departmental recordings sought by the Plaintiff---- 6
 No. 3 In reviewing Plaintiff Gaston’s public records request for
 records of a crime committed against him, did the trial court err
 in failing to construe narrowly the statutory exemption of RCW
 42.56,240(1) regarding the withholding of material essential to
 effective law enforcement ----- 6
 No. 4 Did the Court err in failing to conduct an in camera review of
 the requested recordings ----- 9
 No. 5 Did the trial court err in failing to consider employment of a
 protective order or redaction to limit dissemination of all or
 part of the recording ----- 10
 No. 6 Did release of the recordings as part of an open and public
 criminal prosecution constitute a waiver of the statutory
 exemption ----- 1
 No. 7 Attorney’s fees may be awarded to the prevailing party ----- 1

IV. CONCLUSION ----- 12

TABLE OF AUTHORITIES
Table of Cases

Bainbridge Island Police Guild v City of Puyallup, 172 Wn.2d, 398, 259 P.3d 190 (2011) 11

Cowles Publishing Company v Spokane Police Department, 139 Wn.2d 472, 476 P.2d 712 (1997) 5

Does v. King County, 192 Wn. App.10, 366 P. 3d 936 (2015) 10, 11

Fischer v Washington State Department of Corrections, 160 Wn. App. 722, 254 P.3d 824 (2011)..... 2, 3, 8, 9

Gronquist v. State, 177 Wn. App. 389, 313 P.3d 416 (2013)..... 2, 3, 8, 9

Koenig v. Thurston County, 287 P.3d 523, 175 Wn. 2d 837 (2012)..... 7

Limstrom v Ladenburg, 136 Wn.2d 595, 614615, 963 P.2d 689 (1998)..... 10

Newman v. King County, 947 P.2d 712, 133 Wn. 2d 565 (1997)..... 9

Nissen v. Pierce County, 183 Wn. 2d 863, 357 P. 3rd 45 (2015) 5

Progressive Animal Welfare Soc. v. Univ. of Washington. 125 Wn.2d 243, 251, 884 P.2d 592 (1994) 3, 4, 5

Sargent v Seattle Police Department, 179 Wn.2d 376, 385, 314 P.3d 1093 (2013) 5, 7, 9

Wade’s Eastside Gun Shop, Inc. v. Dep’t of Labor & Indus., 372 P.3d 97, 185 Wn. 2d 270, 281 (Wn. 2016)..... 7, 9

White v. City of Lakewood, 194 Wn. App. 778, 374 P. 3rct 286 (2016) 4

Yousoufian v. Office of King County Executive, 152 Wn 2d 421, 98 P.3d 463 (2004)..... 6

Regulations, Rules, and Statutes

CR 26 (6).....	10
CR 56 (e).....	6
RAP 18.1.....	11, 13
RCW 42.56.010 (3).....	4
RCW 42.56.010 (4).....	4
RCW 42.56.030	4
RCW 42.56.240 (1).....	1, 6, 7, 8
RCW 42.56.550 (1).....	4
RCW 42.56.550 (3).....	5
RCW 42.56.550 (4).....	6, 11, 12, 13
RCW 42.56.565	8

I. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in denying plaintiff Gaston's public records request made pursuant to Chapter 42.56 RCW, entered on April 14, 2017.
2. The trial court erred in denying plaintiff Gaston's motion for in camera review of the video recording of an assault upon him in a correctional institution, the same entered on April 14, 2017.

Issues Pertaining to Assignments of Errors

1. Principles applicable to Public Records Act review
2. Did the trial court err in denying the motion to strike the opinion of Robert J. Herzog, who had not reviewed the individual Departmental recordings sought by the Plaintiff?
3. In reviewing Plaintiff Gaston's public records request for records of a crime committed against him, did the trial court err in failing to construe narrowly the statutory exemption of RCW 42.56.240(1) regarding the withholding of material essential to effective law enforcement?
4. Did the Court err in failing to conduct an in camera review of the requested video recordings of commission of crime upon Plaintiff Gaston?
5. Did the trial court err in failing to consider employment of a protective order or redaction to limit dissemination of all or part of the recording?
6. Did release of the recordings as part of an open and public criminal prosecution constitute a waiver of the statutory exemption of RCW 42.56.240 (1)?

7. Attorney's fees may be awarded to the prevailing party.

II. STATEMENT OF THE CASE

On April 14, 2015, Dennis Gaston, an inmate at Coyote Ridge Correction Center, Connell, Washington, was assaulted viciously by another inmate, Clayton Young, CP 23. Mr. Young was prosecuted for that assault and was convicted of commission of the felony of assault in the 2nd degree, CP 23. In the course of the criminal proceeding, Mr. Gaston learned that the assault was recorded by corrections staff. Some or all of those recordings were utilized in the course of the public prosecution of Mr. Young, CP 23.

After he was released from the institution, Mr. Gaston, in the process of considering the possibility of a lawsuit against his former jailors for failure to provide for his safety, sought those records and recordings for purposes of reviewing that potential evidence. The video recordings would be the best available evidence of the assault itself and what transpired shortly before and after the assault.

On April 14, 2017, the Honorable Christopher Lanese, Judge of the Thurston County Superior Court, entered an order denying Dennis Gaston's Public Records Act request for the Department's video recordings. CP 71, 72. That court denied also Mr. Gaston's motion for an in camera review of the requested recordings, a motion intended so that the trial court could make an independent determination of whether or not the recordings somehow revealed inordinately damaging information relating to Coyote Ridge Corrections Center's surveillance procedures. CP 71. The trial court ruled that the recordings were exempted from disclosure to the public because they constituted specific intelligence information and that nondisclosure of that information was essential to effective law enforcement. CP 72. The trial court's decision was

based on its reading of RCW 42. 56.240 (1) and two Washington cases: *Fischer v Washington State Department of Corrections*, 160 Wn. App. 722, 254 P.3d 824 (2011); and *Gronquist v. State*, 177 Wn. App. 389, 313 P.3d 416 (2013).

A critical distinction exists between those two referenced cases and Mr. Gaston's case: Messrs. Fischer and Gronquist made their requests for Corrections records *pro se* and while they were prison inmates. Although the video recordings depict a criminal assault on him while he was an inmate in the custody of the Department, Mr. Gaston was not an inmate when he made his request. CP 23.

The Department of Corrections, resisting the Public Records Act request, submitted the declaration of Robert Herzog, a declaration which tracks in large measure the same Department declaration provided in the two cases noted above: *Fischer, supra* and *Gronquist, supra*. The argument adopted by the courts in the two cases explicitly addressed the need to prevent inmates from using the video recordings to enable them develop strategies of avoiding camera surveillance. Inmate strategies of concealment seem to have had little to do with the assault on Mr. Gaston who was beaten up in the common room of a minimum security institution.

The denial of the motion for in camera review appears to have been based upon an expansion of the institutional concern to deter inmate misbehavior to the unwarranted inference that the public could misbehave after seeing the recordings. The ruling's effect has been to confer absolute and unfettered discretion upon the Department to determine when it shall release evidence of crimes committed on its premises, depriving the public of its right to monitor the behavior of the correctional staff.

Significant to Mr. Gaston's public records claim is the incontrovertible fact that he is not presently or recently an inmate at the Coyote Ridge Center. For these purposes he has the same status as any other member of the public.

III. ARGUMENT

1. Principles applicable to Public Records Act review

Washington's Public Records Act, (referenced hereafter as "PRA"), is "a strongly worded mandate for broad disclosure of public records." *Progressive Animal Welfare Soc. v. Univ. of Washington*. 125 Wn.2d 243, 251, 884 P.2d 592 (1994). Washington courts are required to construe the PRA's disclosure provisions liberally and its exemptions narrowly. *Progressive Animal Welfare, supra at 251*; RCW 42.56.030, The Act's philosophy is stated: "The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know". RCW 42.56.030

The burden of proof lies with the relevant public agency to establish that refusal to permit public inspection and copying of public records complies with a statute that exempts or prohibits disclosure, in whole or in part, of specific information or records. RCW 42.56.240 (1). The definition of "public record" is sweeping. RCW 42.56.010 (3). It extends to any "writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010 (3).

The term "writing" means: "handwriting, typewriting, printing, photo stating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound

recordings, and other documents including existing data compilations from which information may be obtained or translated."

RCW 42.56.010 (4).

There should be agreement that video recordings of inmate movement at a jail or prison falls within the term "writing" and "public record."

A distinction exists in the PRA between the terms "produce" and "disclose". *White v. City of Lakewood*, 194 Wn. App. 778, 374 P. 3d 286 (2016). The term "produce" contemplates production of the requested material to the governmental entity from which the records are sought. The term "disclose" is used for purposes of establishing those documents which will be made available to the requestor. A public record is subject to disclosure if it is "a record that an agency employee prepares, owns, uses, or retains in the scope of employment." *Nissen v. Pierce County*, 183 Wn. 2d 863, 357 P. 3d 45 (2015).

Judicial review of agency denial of a Public Records Act request is de novo. *Sargent v Seattle Police Department*, 179 Wn.2d 376, 385, 314 P.3d 1093 (2013); RCW 42.56.550 (3). That review is analogous to a review of a summary judgment hearing, *Progressive Animal Welfare Soc. v University of Washington*, 125 W.2d 243, 884 P.2d 592 (1994).

The Department asserts a categorical application to public disclosure of its video recordings. Categorical exemption of broad categories of information conflicts with the policy of narrow construction of exemptions. *Sargent supra at 389*. The *Sargent* case involved application of exemption principles relating to a request for police reports which had not been fully referred to the office of the prosecuting attorney for purposes of determining whether or not to charge a given individual. Of significance in *Sargent* was its holding: "SPD had the burden to parse the individual documents and prove to the trial court why nondisclosure was essential to

law enforcement." *Sargent supra at 390*. In this case, no parsing was attempted or performed. The *Sargent* court noted also endorsement of in camera review of documents for purposes of determining whether an exemption applies to requested material. *Sargent supra at 390*; *Cowles Publishing Company v Spokane Police Department*, 139 Wn. 2d 472, 479, 476 P.2d 712 (1997), citing *Limstrom v Ladenburg*, 136 Wn.2d 595, 614, 615, 963 P.2d 689 (1998).

The PRA permits judicial assessment of penalties for improper withholding of public records in a daily amount not exceeding \$100.00 per day. RCW 42.56.550 (4); *Yousoufian v. Office of King County Executive*, 152 Wn 2d 421, 98 P.3d 463 (2004).

2. The Court erred in denying the motion to strike the opinion of Robert J. Herzog, who had not reviewed the individual Departmental recordings sought by the Plaintiff.

Declarations should be based on personal knowledge because the proceeding utilized in Public Records Act reviews is the same as would apply in a summary judgment proceeding. To that end, declarations must be based on personal knowledge, CR 56 (e). Mr. Herzog's Declaration indicates that he lacks personal knowledge of the actual recordings requested by Mr. Gaston. CP 38-42. Although he may be familiar with general surveillance cameras and systems throughout the Department of Corrections institutions, he did not establish that he had seen the particular recordings at issue in this case, and he does not state that his review of those recordings confirms his speculation about the possible transgressive use of the recordings by inmates, or the public generally. Without that personal knowledge, he was not in a position to state how those particular recordings could be interpreted by a viewer. CR 56 (e). Nor has he stated that his personal review of the actual recordings indicates that non-disclosure is probably essential to effective law enforcement. His opinions state rather a general conclusion about departmental oversight of inmates.

3. In reviewing Plaintiff Gaston’s public records request for records of a crime committed against him, the trial court erred in failing to construe narrowly the statutory exemption of RCW 42.56.240(1) regarding the withholding of material essential to effective law enforcement.

The investigative records and intelligence information exemption must be reviewed on a case-by-case basis, *Sargent v. Seattle Police Department*, 179 Wn. 2d 376, 386-87, 314 P.3d 1093 (2013).

The ruling in the present case involves judicial construction of the statutory exemption within the Washington's Public Records Act, which states as follows:

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

a) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the non-disclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.”
RCW 42.56.240 (1).

The Department of Corrections must bear the burden of proving that the requested documents fall within the scope of the relevant exemption. In this case, the Department must prove that the requested records must, “(1) be investigative in nature, (2) be compiled by the law enforcement, penology, or investigative agency, and (3) be essential to effective law enforcement or the protection of privacy.”

Wade’s Eastside v. Dep’t of Labor & Indus., 185 Wn. 2d 270, 281, 372 P.3d 97 (2016); *Koenig v. Thurston County*, 175 Wn. 2d 837, 287 P.3d 523 (2012).

The Department’s reliance on the statutory exemption of RCW 42.56.240 (1) resides almost exclusively in two Court of Appeals cases: *Fischer v. Washington State Department of*

Corrections, 160 Wn. App. 722, 254 P. 3d 254, (2011) and *Gronquist v. State*, 177 Wn. App. 389, 313 P. 3d 416 (2013). Both of those cases were initiated and pursued by individuals who were then inmates at correctional institutions. Mr. Gaston is not an inmate. The PRA singles out inmates as disfavored requestors under the Act. RCW 42.56.565.

The stated focus and concern of the two appellate court cases denying inmates access to surveillance records was to circumvent the possibility that “providing inmates with access to recordings of DOC’s surveillance videos would exploit weaknesses in DOC’s surveillance system.” *Gronquist supra* at 400-401, citing *Fischer supra*. That concern is not implicated by Mr. Gaston’s request, made by one who is not an inmate, nor a technician capable of interpreting the hermeneutics of camera angles, or placement, or use, suggested by Mr. Herzog.

The Department insists that there is a categorical imperative that the exemption should be applied without exception, apparently even to a reviewing court, in order to preserve the integrity of a prison surveillance system. The declaration of Mr. Herzog expresses an opinion that the undisclosed and un-reviewed recordings sought by Mr. Gaston would reveal, detrimentally, “surveillance capabilities,” “internal layout and design,” or “specific security features”, necessary to ensure safe facilities and prevent malfeasance in Department facilities. (CP 41). Moreover, Mr. Herzog hypothesizes that the revelation of the undisclosed recordings would leave Department facilities vulnerable to a breach of security not only by offenders but also visitors or other members of the general public. (CP 41). As Mr. Gaston’s second declaration indicates, the assault occurred inside the facility in a minimum security common area where monitoring cameras are visible and obvious. CP 69. Disclosure of the familiar would seem to be of little functional use to plotting inmates, and less to Mr. Gaston.

Case law after *Fischer* and *Gronquist* appears to have modified the rigidity of those cases with regard to disclosure of exempted investigative records or intelligence records. The erosion of the concept of a categorical sweep of the investigative records exemption is described in what may be the most recent Washington Supreme Court case relating to that exemption. *Wade's Eastside Gun Shop, Inc. v. Department of Labor and Industries*, 185 Wn. 2d 270, 372 P. 3d 97 (2016). That case addresses what had been previously a judicial endorsement of a categorical approach to the investigative records exception: *Newman v. King County*, 133 Wn. 2d 565, 947 P. 2d 712 (1997). The *Wade* court held that once a case has been referred to the office of the relevant prosecutor, such as in Mr. Gaston's case, there must be a "case by case determination of whether nondisclosure is essential to effective law enforcement." *Id at 282*. A Supreme Court case, post-*Fischer* and post- *Gronquist* advises that where public records exemptions are implicated, each case must be judged independently against the purpose of the exemption. *Sargent v. Seattle Police Department*, 179 Wn. 2d 376, 386-87, 314 P.3d 1093 (2013). In this regard, the Department has the burden of proving by a preponderance of the evidence, its justification for application of the exemption. *Sargent supra at 385*. As the Court indicated, "The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know," *Id at 385*.

4. The trial court erred in failing to conduct an in camera review of the requested recordings.

The Department opposed Mr. Gaston's motion for an in camera review of the video recordings in its possession. CP 56, 57. It suggests what amounts to an absolute privilege to exclude scrutiny of the recordings because of an apprehension that revelation to a trial court, in camera, could encourage inmate conspiracies to commit criminal acts implicating both inmates

and the public. CP 56, 57. This kind of speculation is precisely the kind of speculation that Washington courts caution against. *Does v. King County*, 192 Wn. App.10, 29, 366 P.3d 936 (2015). Mr. Gaston submits that the trial court should have reviewed, in camera, the recordings in order to correlate what can actually be seen in the recordings with Mr. Herzog's empirically unsupported hypotheses. "In camera review is the only way a court can determine what portion of a document, if any, is exempt from disclosure". *Limstrom v Ladenburg*, 136 Wn.2d 595, 614, 615, 963 P.2d 689 (1998).

5. The trial court erred in failing to consider employment of a protective order or redaction to limit dissemination of all or part of the recording.

Civil procedures allow a trial court to enter protective orders limiting distribution or utilization of evidence in a civil or criminal case. CR 26 (6). A protective order in this case could strike an accommodating balance between the Department's insistence upon the sacrosanct nature of the recordings and Mr. Gaston's right as a member of the public to review those recordings. The trial court's rationale for denying this tack appears to align with the opinions expressed in *Fischer* and *Gronquist*. The request was not onerous, and would have provided independent judicial oversight over a unilateral administrative decision.

6. Release of the recordings as part of an open and public criminal prosecution constituted a waiver of the statutory exemption of RCW 42.56.240 (1).

Mr. Gaston indicates that the recordings he requested were utilized in the prosecution of Mr. Young CP 69, 70. He indicated that he saw the recordings. He indicates that his wife saw the recordings, CP 69, 70. He doesn't know how many other people saw the recordings, but it is

clear that the recordings were released for viewing, without incident, by an unknown number of individuals outside the institution.

The Department presented no evidence of its efforts to limit public access to the recordings in the criminal proceeding. It is submitted that failure to sequester the recordings from public view in the course of the public prosecution, as well as release of the recordings to the third party prosecutor constituted a waiver of application of the claimed exemption to release of the recordings. *Bainbridge Island Police Guild v City of Puyallup*, 172 Wn.2d, 398, 259 P.3d 190 (2011), (Discussing common law elements of waiver in a PRA context). The recordings, having been transformed into public records for purposes of a public prosecution, evidenced a termination of any rigorous need for non-disclosure.

7. Attorney's fees may be awarded to the prevailing party

Mr. Gaston, should he be the prevailing party, may be awarded reasonable attorney fees and costs. RAP 18.1 and RCW 42.56.550 (4) allow recovery of the costs of appeal to the prevailing party in a Public Records Act case. Mr. Gaston submits, perhaps prematurely, that he, as the prevailing party, is entitled to that permitted recovery of the costs of his appeal.

Washington's Public Records Act allows recovery of reasonable attorney fees and costs to the prevailing party in a Public Records Act litigation. RCW 42.56.550 (4). An accounting of attorney fees generated and through the course of these proceeding, must await a final reconciliation.

The time period between the request and the granting, in whole or in part, of the public records request, may be assigned an award of a daily penalty, in an amount up to \$100.00 daily,

RCW 42.56.550 (4). Mr. Gaston urges that he is entitled to that penalty award dating from his initial request.

IV. CONCLUSION

Dennis Gaston respectfully submits that the trial court failed to review his Public Records Act request through the mandated lens of narrow interpretation of the statutory exemption relating to surveillance or investigation records. It is submitted that the Department of Corrections has not established, by a preponderance of the evidence, that a categorical withholding of specific video recordings of a criminal assault upon Mr. Gaston was “essential to effective law enforcement”. The recordings were disclosed for purposes of publicly prosecuting the inmate who assaulted Mr. Gaston, indicating a waiver, or rebuttal, of a claim that the recordings must retain the quality of invisibility. It is evident the Mr. Herzog’s strategies of concealment had no deterrent effect upon the assault upon Mr. Gaston.

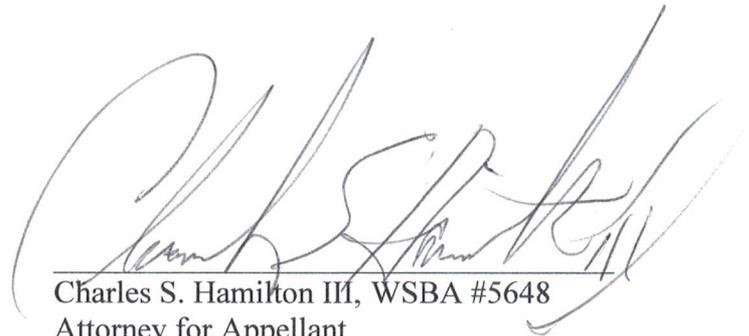
It is evident that the conclusory declaration of Robert Herzog, offered to support a hermetic interpretation of the limited exemption to disclosure of public records, which in this case depict commission of a crime in a correctional institution, was an abstraction because he had not actually seen the specific recordings that he, and the trial court, determined to sequester, sight unseen.

Neither the Department nor the trial court considered the use of an order of protection or the use of redaction as a way of limiting problematical disclosures. The effect of the ruling below was to sequester the four video recordings without actual review by any independent body. There is no explanation why some, if not all, of those recordings could not be disclosed with appropriate redactions or implementation of an order of protection. The Public Records Act’s

stated concern that the public should be the final arbiter of the probity of the actions of its public servants is not well-served by extending the scope of an exemption to non-disclosure beyond the purpose of the exemption, in this case a purpose to withhold disclosure to prison inmates.

For the reasons set forth above, it is respectfully submitted that the Court should reverse the trial court in this matter and remand the case for an order of full disclosure, or for an in camera review preparatory to some disclosure. Additionally, it is submitted that the Court should order an assessment of attorney's fees and costs of appeal pursuant to RAP 18.1. And it is asserted that if Mr. Gaston should be determined to be the prevailing party, that he should be awarded reasonable attorney's fees and costs attending his request pursuant to RCW 42.56.550 (4).

Dated this 10th day of August, 2017.



Charles S. Hamilton III, WSBA #5648
Attorney for Appellant
7016 35th Avenue NE
Seattle WA 98115-5917
(206) 623-6619

LAW OFFICE OF CHARLES HAMILTON III

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