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COURT OF APPEALS  
DIVISION TWO  
OF THE STATE OF WASHINGTON

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DENNIS NEAL GASTON,  
Appellant,

V.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,  
Respondent.

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**PLAINTIFF'S REPLY MEMORANDUM RELATING TO  
REQUEST FOR DEFENDANT'S PUBLIC RECORDS**

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Dennis Gaston, Appellant, respectfully files herein his reply memorandum relating to his appeal of the trial court's denial of his request for public records from the Washington State Department of Corrections.

## **I. INTRODUCTION**

Dennis Gaston, while an inmate at Coyote Ridge Corrections Center, Connell, Washington, was brutally assaulted in the common room of a minimum-security correction center. CP 23. He was informed that the Department of Corrections possessed video recordings of the assault upon him. Those video recordings were apparently used in a criminal prosecution of the inmate who assaulted him, an individual named Clayton Young, and described as a "skinhead". CP 23. Mr. Gaston, no longer an inmate, made a public records request for copies of the recordings.

The Department of Corrections, refusing disclosure of all or some of the recordings, offered the declaration of Robert Herzog, a Department of Corrections administrative officer, who opined that the release of the records might lead to public misfeasance occasioned by disclosure to Mr. Gaston of the institutional recordings of the crime committed against him. CP 38-42. The Department claims that those video recordings are privileged from release as an exemption to disclosure under RCW 42.56.240 (1). The Department asserts that the recordings were made by a penological entity, that the recordings constituted specific investigative or surveillance records, and that the nondisclosure of those recordings was essential to effective law enforcement at the institutional site of the crime.

Mr. Gaston observes that no evidence exists that Mr. Herzog actually reviewed the recordings. The Department submits that it is not necessary that he should have seen the

recordings, because what it seeks to conceal is the general process and methodology by which the Department of Corrections, on the date of the assault, recorded activity in the common room of a medium security correctional institution. There is no evidence that the recording processes at the time of the assault were the same as at the time of the request.

Mr. Gaston submits that the Department's insistence upon court-ordered secrecy is based on surmise and speculation that the recordings would be converted by the public generally into some kind of nefarious use at the Corrections Center. Mr. Gaston asked for trial court review, in camera, to determine whether or not there was any substance to Mr. Herzog's broad assertions. The trial court, the Honorable Christopher Lanese, Thurston Superior Court Judge, declined to review the recordings. CP 71, 72. This position at least tangentially implicates the constitutional doctrine of separation of powers. That ruling accorded categorical judicial deference to the unempirical assumptions of the Department of Corrections.

Presently, no one, not even Mr. Herzog, knows how revelatory those recordings can be.

**A. The Concern for Maintenance of Safe and Secure Department Facilities is Not Jeopardized by Disclosure to Mr. Gaston, a Public Requestor, of Recorded Evidence of Criminal Activity at a Corrections Center.**

The legislative purpose Washington's Public Records Act elevates the public's interest over the sovereignty of the Department of Corrections: "The people of the state did not yield their sovereignty to the agencies that serve them. The people in delegating authority do not give their public servants the right to decide for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created." RCW 42.56.030.

What is requested in this case are video recordings of a specific event which occurred in the common room of a minimum-security correctional institution. What is sought with regard to the event is a visual record of commission of a felony perpetrated by one inmate upon another inmate. The Department resists disclosure by asserting that nondisclosure of unreviewed recordings is necessary "to protect the safety of the public and all persons within the correctional facilities, including volunteers, correctional facility staff, visitors, and offenders". Respondent's Brief, page 2; CP 39.

The Department's description of a generic electronic surveillance system does not provide clarity as what the actual recordings reveal or fail to reveal. The Respondent sets out the generic nature of its operations only:

"Not all surveillance cameras in DOC facilities are actively monitored by staff. CP 40. Some cameras are only monitored by staff and create no recordings. CP 40. Some cameras are only recording during specific times of day and not others. CP 40. Some camera stations (camera housing such as boxes and bubble housings) did not contain cameras at all. CP 40. Some cameras have poor resolution or can be out of service. CP 40. Some cameras have very narrow fields of view, while others have wide fields of view. CP 40. Some are PTZ (Pan, Tilt, and Zoom) and have powerful abilities to capture fine detail at long distances. CP 40. Some are controlled by the person monitoring the camera. CP 40. Some pan a wide field automatically. CP 40. Such cameras are so well hidden, they are not suspected by offenders to be present". CP 40.

*Respondent's Brief, pp. 3,4.*

This description concludes with a rhetorical flight:

"On the other hand, rumors abound among inmates that there are cameras where none exist". CP 40. *Respondent's Brief p. 4.*

Not only would it seem to be difficult to conclude anything useful about surveillance procedures from this wealth, or paucity, of information, but the description itself offers nothing but speculation about what the specific recordings of crime against Mr. Gaston actually disclose.

The Department's response itself rejects the notion of hermetic sanctity of the surveillance procedures: "Disclosure of prison surveillance videos in only narrow circumstances is essential". CP 41; *Brief, Ibid at 5*. Mr. Gaston submits that his is one of those "only narrow circumstances". He is not an inmate. He does not seek the videos for general distribution. He noted in his brief at the trial level that he encouraged use of court orders of protection which would limit disclosure and use of the recordings. It remains Mr. Gaston's position that until the recordings are actually subject to judicial review, in camera or otherwise, neither he nor the public can in any way be confident that nondisclosure is essential to effective law enforcement.

The Washington Supreme Court has imposed limitations on what it describes as "categorical application of the effective law enforcement exemption". *Sargent v. Seattle Police Department*, 179 Wn.2d 376, 314 P.3d 1093 (2013), limiting application of its earlier assent to categorical exemptions to disclosure resident in *Newman v. King County*, 133 Wn. 2d 565, 947 P. 2d 712 (1997). Until an objective authority has reviewed the actual recordings, no such broad-based conclusion is fully supportable.

In the *Sargent* case, involving inquiries regarding internal disciplinary investigation of a Seattle police officer, the court noted that the Seattle Police Department was not "institutionally better suited than the courts to determine which information was essential to law enforcement". *Sargent, supra at 388*. That court stated that the burden rests upon the agency claiming exemption to prove the propriety of nondisclosure to the trial court "on a document by document basis". *Sargent, supra at 388*, citing *Seattle Times Co. v. Serko*, 170 Wn. 2d 581, 594, 243 P.3d 919, (2010). The *Sargent* case offers support for Mr. Gaston's claim that the trial court should have reviewed the recordings, in camera, on a "document by document" basis before entry of its categorical order. Emphasis on individualized examination of the requested documents finds

support in a prior case: *Hearst Corp. v. Hoppe*, 90 Wn. 2d 123, 580 P.2d 246 (1978). In *Hearst*, the court acknowledged:

“The statutory scheme establishes a positive duty to disclose public records, unless they fall within the specific exemptions. Whether or not they do so is a function reserved for the judiciary by the act. The court is the proper body to determine the construction and interpretation of statutes”. *Hearst, supra at 130*. Further, “the authority of the judicial department over an agency decision does not constitute a violation of separation of powers theory.” (cases cited). Emphatically it is the province and duty of the judicial department to say what the law is, even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the Constitution taken by another branch”. *Hearst supra at 130*, citing *In Re Juvenile Director*, 87 Wn.2d 3 232, 291, 522 P.2d 163 (1976).

**B. Only Speculation Supports the Argument that the Recordings Sought Necessarily Contain Specific Intelligence Information the Nondisclosure of Which is Essential to Effective Law Enforcement.**

An appellate court reviews de novo challenges to an agency action under the Public Records Act. RCW 42.56.550 (3); *Resident Action Council v. Seattle Housing Authority*, 117 Wn. 2d 417, 428, 327 P3d 600 (2013).

The statutory directive to review of a public records request must be driven by the proposition that “free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550 (3).

The Act provides for employment of an injunction upon motion and affidavit by an agency or its representative, which may be granted when a court can "find such examination would clearly not be in the public interest and would substantially and irreparable damage to any person or would substantially and irreparably damage vital government functions." RCW

42.56.540. A similar standard should apply to the present case, in which the same result is intended.

Certain statutory exemptions from disclosure exist within the context of Washington's Public Records Act. RCW 42.56.240. One of those statutory exemptions is RCW 42.56.240(1), the law enforcement exemption. However, those statutory exemptions must be narrowly construed, and the governmental agency claiming application of an exemption bears the burden of showing that the exemption applies to the specific records request. *Newman v. King County*, 133 Wn. 2d 565, 571, 947 P. 2d 712 (1997). It is true that two appellate cases have acknowledged that records of correctional institutions fall generally within the law enforcement exemption at least as applied to inmate requesters. *Fischer v. Washington State Department of Corrections*, 160 Wn. App. 722, 254 P. 3d 824 (2011); *Gronquist v. State*, 177 Wn. App. 389, 313 P. 3d 416 (2013).

Both of those two cases related to requests for public records from existing prison inmates, Mr. Gronquist and Mr. Fischer. Mr. Fischer conceded that nondisclosure was necessary to effective law enforcement, *Fischer, supra at 725, 726*. That issue was not adversarily litigated in *Fischer*. Those appellate cases recognized that the purpose in applying the law enforcement exemption to the requests of those inmates was the concern 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*.

The Department concedes that it must bear the burden of establishing the following:

(1) "The record must be investigative in nature or contain specific intelligence information;

(2) “The record must be combined compiled by an investigative, law enforcement, or penology agency; and

(3) “It must be essential to law enforcement or essential to the protection of privacy.” *Cowles Pub. Co. v. Spokane Police Dept.*, 139 Wn. 2d 472, 987 P.2d 620, (1999).

A distinction in this case seems to lie, at least in part, between the concept of nondisclosure of a pattern of those recording activities designed to oversee inmate behavior and Mr. Gaston’s request for recordings which seeks a single recorded episode which may or may not establish a pattern of recording. At issue is the question of whether revelation of the specific, time-limited recordings will circumstantially “disclose particular methods or procedures for gathering or evaluating intelligence information”. *Haines-Marchel v. State, Dept. of Corr.*, 183 Wn. App. 655, 334 P.3d 99, (2014).

The Department insists that the cases cited by Mr. Gaston, *Wade’s Eastside Gun Shop v. Dep’t of Labor & Indus.*, 185 Wn. 2d 270, 281, 372 P.3d 97 (2016); *Sargent v. Seattle Police Department*, 179 Wn.2d 376, 314 P.3d 1093 (2013), expand unnecessarily and improperly the specificity requirement inhering in the intelligence or investigative records exception. If the records sought were part of a now closed investigation, those cases, which counsel subsequent disclosure, would have some weight.

The Department opposes disclosure of the recordings to Mr. Gaston, who is a member of the public, because of the somewhat cynical and unscientific surmise that exempting surveillance video from disclosure to anyone “may be the only way to keep surveillance details out of the inmates’ hands”. *Respondents’ Brief*, p. 17 citing *Haines-Marchel v. State Dept. of Corr.*, *supra* at 671. *Haines-Marchel*, like *Fischer* and *Gronquist*, involved requests relating to current

inmates, in that case, the wife of an inmate who sought the names of confidential inmate informants who informed on her husband.

The Department cites RCW 42.56.080 (2), for purposes of ignoring the difference between an inmate and a non-inmate requestor: “agencies shall not distinguish among persons requesting records. *Respondents’ Brief*, p.17. That quotation is somewhat misleading. The relevant statutory provision states:

"Agencies shall not distinguish among persons requesting records, and such person shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.07 (8) or 42.56.240 (14), or other statute which exempts or prohibits disclosure of specific information or records to certain persons". RCW 42.56.080 (2).

The Washington legislature has recognized the status of an inmate requestor as significantly bearing upon the issues relating to disclosure of a public record. A statute, RCW 42.56.565 was enacted to address abusive requests for public records by inmates. *Department of Corrections v. McKee*, 199 Wn. App. 635, 643, 399 P.3d 1187 (2007). One of the criteria designated by that provision to authorize nondisclosure of records to inmates is that “fulfilling the request would likely threaten the security of correctional facilities”. RCW 42.56.565. The effect of that statute is to single out the status of inmate as a basis for limiting disclosure of public records. The statute specifically lists the purpose of the requester-inmate as one of the factors of the court may consider in determining whether to enjoin records requested by inmates. RCW 42.56.565 (3). In these circumstances, the exemption provisions resident generally in RCW 42.56.420 should be read in conjunction with the more special statute RCW 42.56.565. The statutory limitations on disclosure to inmates should not be read to extend to members of the public. Both *Gronquist* and *Fischer*, and later, *Haines-Marchel*, highlighted the status and

suspected purpose of the inmate requestors as the driving factor in their decisions to withhold public records.

The Department asserts that principles of waiver, statutory or by common law, do not apply to Public Records Act requests. That position has limited strength: "the fact that an agency releases documents, whether through a records request or some other process, does not by itself establish the absence of an exemption". *Sanders v. State*, 169 Wn. 2d 827, 240 P.3d 120 (2010). That observation simply indicates that release does not establish a per se waiver of the exemption. In this case, the Department's surrender of the recordings to a public prosecution against Mr. Gaston's assailant placed those records within the scope of the public right of access to proceedings in a public trial. *State v. Whitlock* 188 Wn.2d 511, 396 P.3d 310 (2017).

**C. The Trial Court Abused Its Discretion in Denying Mr. Gaston's Request for in camera Review or a Protective Order.**

The citations utilized by the Department in its response do not dispose of the argument that in camera review was an appropriate response to the motion of Mr. Gaston. In camera review pursuant to RCW 42.56.550 was sought because Mr. Gaston's questioned whether the exemption applied to specifics of the recordings themselves. There was limited articulation by the trial court in declining an in camera review. The response concluded that recognition of a categorical exemption, relying upon *Fischer* and *Gronquist* was a sufficient exercise of discretion.

Judicial review has long been considered essential to a balance of the separate powers, administrative and judicial. See generally, *Brown v. Owen*, 165 Wn.2d 706, 206 P.3d 310 (2009). The effect of the trial court's ruling was to endorse unquestioning acquiescence to the position of

the executive branch, a position which does little to advance principles of separation of powers. It is not accurate to suggest, as does the Department, that in camera review is the same as public disclosure. The argument that the position adopted by the trial court cannot be considered an abuse of discretion is as speculative, or imaginative, as the arguments supporting sequestering of the recordings from any review at all.

**D. The Trial Court Abused Its Discretion in Declining to Strike the Declaration of Robert Herzog.**

The Department is dismissive of Mr. Gaston's request below to strike the declaration of Robert Herzog, suggesting that this argument was only mentioned in Mr. Gaston's reply to the Department's responding brief. The responding brief was the first and only platform on which a motion to strike could be advanced. It seems clear, in the Department's argument, that Mr. Herzog did not need to view the recordings. There is no evidence that Mr. Herzog had reviewed the particular recordings for which Mr. Gaston requested disclosure. The failure to review the recordings produced an opinion which was not based on personal knowledge, in violation of CR 56.

**II. CONCLUSION**

Although there is case law indicating that surveillance videos at a Department of Corrections site may be closed to public access for various reasons, depending on the facts of an individual case, it is Mr. Gaston's submission that some objective judicial authority must actually scrutinize the corpus, the recordings, which are the subject of the Department's resistance to disclosure. The evidence in this case provides only to the Court the opinion of an administrator of the Department who appears not to have reviewed the actual recordings of crime committed at

the institutional site. Case law supporting advocacy of nondisclosure seems to be in support of the general proposition that release to inmates of patterns of surveillance may, and only may, support the hypothesis that the inmates would use such knowledge to circumvent the surveillance procedures which may be evidenced by the recordings. However, in this case, Mr. Gaston is not an inmate. In this proceeding, no one has taken advantage of the opportunity to review the recordings to determine whether or not there may be a hint of utility to inmates desiring to circumvent what camera coverage actually covered the assault upon Mr. Gaston. The trial court's ruling expands the holdings in *Fischer* and *Gronquist* transgressing the statutory caution that exemptions should be construed narrowly.

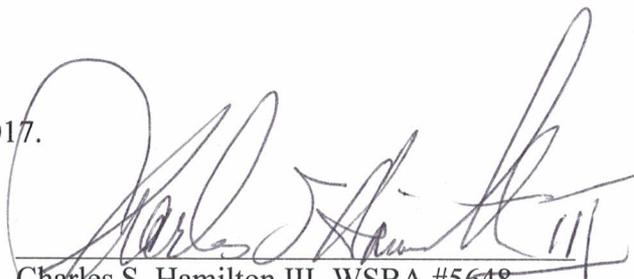
Whether or not the recordings sought actually support rational and circumstantial inferences about the surveillance methodology at Coyote Ridge Corrections Center, is wholly speculative. What is evident is that despite the fact that "rumors abound" among inmates with regard to camera placement, camera placement was of no efficacy at all in preventing the commission of a felony by one inmate against another inmate, Mr. Gaston.

It seems clear also that courts have the power, through in camera review and orders of protection, to limit distribution and use of the recordings sought by Mr. Gaston, regardless of whether or not in there is a judicial finding that total nondisclosure of the recordings best serves the public's interest.

The proposition that recorded evidence of crime must be concealed from members of the public in order to serve the members of the public, has not been fully addressed by the Department in this case. It is respectfully submitted that the Court should either remand the case for transmission of the video recordings to Mr. Gaston, or the Court should remand the case to the trial court for in camera review and the addressing of appropriate limitations upon use of all

or some of the recordings, thus striking the balance between the public interest in open and candid governmental activities and the Department's interest in overseeing the behavior of its inmates.

Dated this 20<sup>th</sup> day of November, 2017.

A handwritten signature in black ink, appearing to read "Charles S. Hamilton III", written over a horizontal line.

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7 COURT OF APPEALS,  
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10 DENNIS NEAL GASTON

NO. 50338-7

11 Appellant

CERTIFICATE OF SERVICE

12 vs.

13 WASHINGTON STATE DEPARTMENT OF  
14 CORRECTONS

15 Defendants.

16 I hereby certify under penalty of perjury under the laws of the State of Washington  
17 that I have filed a copy of the Plaintiff's Reply Memorandum Relating to Request for  
18 Defendant's Public Records by means of:

- 19  U.S. Postal Service (First Class, postage pre-paid)  
20  Facsimile to  
21  Hand Delivery  
22  E-Filing

23 DATED this 20<sup>th</sup> day of November, 2017.

24 

25 Annie Layer

26 Assistant to Charles S. Hamilton, III

**LAW OFFICE OF CHARLES HAMILTON III**

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