

NO. 50338-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DENNIS NEAL GASTON,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

BRIEF OF RESPONDENT
WASHINGTON STATE DEPARTMENT OF CORRECTIONS

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I. INTRODUCTION

This appeal involves a public records request Gaston submitted to the Department of Corrections (DOC or Department) for prison surveillance video. Relying on two appellate decisions holding prison surveillance video is exempt under the Public Records Act, the Department withheld the video and claimed an exemption. Gaston filed this lawsuit alleging that the Department's failure to produce the video violated the Public Records Act (PRA). But this Court has already twice held that prison surveillance video is exempt from disclosure under the PRA as specific intelligence information, the nondisclosure of which is essential to effective law enforcement. Gaston has provided no persuasive reason to depart from this precedent. As such, the trial court correctly ruled that the Department did not violate the PRA. This Court should affirm.

II. COUNTER STATEMENT OF THE ISSUES

1. Did the Department comply with the PRA when it withheld surveillance video as exempt from disclosure under RCW 42.56.240(1) because the video necessarily contains specific intelligence information and the nondisclosure of information is essential to effective law enforcement?

2. Was it an abuse of discretion for the trial court to deny Gaston's motion for in camera review when the court could evaluate the

Department's claimed exemption based on information in the written record?

3. Was it an abuse of discretion for the court to fail to strike the declaration of Robert Herzog when Gaston did not move to strike the declaration and it is undisputed that the declaration is based on Herzog's personal knowledge about the Department's surveillance system?

III. STATEMENT OF THE CASE

A. The Maintenance of Safe and Secure Department Facilities

The primary goals in operating correctional facilities are carrying out the incarceration ordered by the court, protecting the public, providing rehabilitative programs as required or allowed by law, and maintaining order and security within the facilities. CP 39. The latter is particularly important in order to protect the safety of the public and all persons within the correctional facilities, including volunteers, correctional facility staff, visitors, and offenders. CP 39.

There are numerous methods for maintaining the secure and orderly operation of a correctional facility. CP 39. One of the most important tools for maintaining the security and orderly operation of prisons is remote electronic surveillance systems, which are in use in all of DOC's major facilities. CP 39. DOC's electronic surveillance systems consist of fixed cameras located in various locations in a prison that can be

monitored contemporaneously by staff and/or have recording capabilities. CP 39. Electronic surveillance is an essential element of effective 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. CP 39.

If it were financially feasible to do so, every area of a prison would be video-monitored and recorded 24 hours a day to ensure any act of victimization or malfeasance would be discovered and persons held accountable. CP 39. Since the resources are not available to accomplish 100% surveillance at all times, it is mission critical that offenders, their associates, and visitors not know the capabilities and the limitations of DOC's surveillance system. CP 40.

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 housings such as boxes and bubble housings) do 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, & 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. Some cameras are so well hidden, they are not suspected by offenders to be present. CP 40. On the other hand, rumors abound among inmates that there are cameras where none exist. CP 40.

It is a significant advantage to have offenders uncertain as to what is being monitored, what is recorded, and what is in the field of view. CP 40. Offenders will often use “blind spots” (locations that have infrequent staff presence and no electronic surveillance) to commit acts of violence and purvey contraband. CP 40. In reconstructing incidents and interviewing offenders, it has been found that incident location is often chosen due to a perceived lack of surveillance. CP 40. Surveillance, real or imagined, is a powerful deterrent to assaults and other problematic behaviors by offenders. CP 40.

Providing access to DOC surveillance videos would allow someone to accurately determine DOC’s ability—or inability—to capture identities, incidents, and crimes in specific prison locations. CP 40. The videos could also allow individuals to study staff movement habits and similarly identify areas or times of perceived security weaknesses. CP 40. Sexual predators could use this information to prey upon weaker offenders. CP 40. Offenders could also use this information to commit assaults on staff or other offenders. CP 40-41. Visitors could use this

information to uncover new methods to introduce contraband into facilities. CP 41. Surveillance video could also reveal the internal layout and design of a facility (such as whether it is a concrete or wood structure) or a specific security feature (such as whether a particular door uses an electronic or key-locking mechanism). CP 41. Disclosure of these recordings would leave Department facilities vulnerable to a breach of security, not only by the criminal population of offenders, but also by visitors and other members of the general public. CP 41.

The concerns regarding dissemination of surveillance video are not limited to requests from offenders. The Department restricts access to surveillance videos in a number of other situations. CP 41. For example, not all Department staff is provided access to surveillance video. When staff needs to review surveillance video in relation to issues concerning bargaining units, they do not receive copies and are only allowed to *review* the tape. CP 41. The Department also limits disclosures to its law enforcement partners by providing copies of surveillance video on a case-by-case basis and only where criminal prosecution is likely. CP 41.

Disclosure of prison surveillance video in only narrow circumstances is essential. CP 41. Maintaining tight control on surveillance video prevents distribution of important intelligence regarding the Department's security practices (video surveillance

capabilities, staff movement habits, locking mechanisms, etc.) in addition to the internal layout and construction design of particular facilities. CP 41. These concerns are the same as applied to offenders and non-offenders because any individual may present a risk, and the initial release of surveillance video could result in further distribution. CP 41.

In light of these concerns, the Department has withheld surveillance video in response to public record requests for many years. CP 57. Specifically, the Department withholds surveillance video under RCW 42.56.240(1) and RCW 42.56.420. CP 57.

B. Gaston's Request

The Department received a public records request from Mr. Gaston on November 23, 2015, seeking the video of an offender's assault on Gaston. CP 49. This request was assigned tracking number PRU-39010. CP 49. The Department provided Gaston one video from a hand-held camera and notified him that it had withheld four surveillance videos. CP 46, 51-53. The Department provided an exemption log that indicated the surveillance videos were withheld under RCW 42.56.240(1) and RCW 42.56.420(2). CP 52. The Department continued to search for and provide other records responsive to Gaston's request. CP 46. After providing a total of 251 pages of records and one video in response to Gaston's request, the Department closed PRU-39010 on January 4, 2017. CP 46, 55.

Gaston filed this action on December 21, 2016, challenging the Department's decision to withhold the surveillance video. CP 3-5. Gaston filed an opening brief arguing that the surveillance video was not exempt under the PRA. CP 10-19; CP 20-21 and CP 23-24 (Declaration of Dennis Gaston). The Department responded, arguing that the surveillance video was exempt from disclosure under RCW 42.56.240(1) because the video by its nature contained specific intelligence information and that its nondisclosure was essential to effective law enforcement. CP 25-36; CP 38-42 (Declaration of Robert Herzog); CP 44-57 (Declaration of Denise Vaughan). Gaston also moved for in camera review of the surveillance video. CP 22. The Department responded that in camera review was unnecessary because the particularities of the video were not what made the videos exempt. CP 58-60. Gaston filed one joint reply to the Department's responses to his opening brief and motion for in camera review. CP 61-68; CP 69-70 (Second Declaration of Dennis Gaston).

On March 31, 2017, the trial court denied Gaston's motion for in camera review and determined that the Department did not violate the PRA in withholding the surveillance video pursuant to RCW 42.56.240(1). The court specifically relied on *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, 422 (2013) and noted "the

analysis set forth in those cases applies equally to the videos in this case.” CP 71-72. The Court dismissed Gaston’s claims with prejudice. CP 72. Gaston appealed.

IV. STANDARD OF REVIEW

The Court reviews challenges to agency actions under the PRA de novo. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009); *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009). Appellate courts stand in the same position as the trial courts when the record on a show cause motion consists only of affidavits, memoranda of law, and other documentary evidence. *Mitchell v. Washington State Dep’t of Corr.*, 164 Wn. App. 597, 602, 277 P.3d 670 (2011), *as amended on reconsideration in part*.

V. ARGUMENT

A. The Department Properly Withheld Surveillance Video as Exempt From Disclosure Under RCW 42.56.240(1) Because it Necessarily Contains Specific Intelligence Information and the Nondisclosure of Such is Essential to Effective Law Enforcement

The Public Records Act requires government agencies to disclose public records upon request unless the record falls within certain specific exemptions. *O’Connor v. Dep’t of Social & Health Services*, 143 Wn.2d 895, 905, 25 P.3d 426 (2001). Exemptions are construed narrowly and the

agency bears the burden of showing that a specific exemption applies. *Newman v. King Cty.*, 133 Wn.2d 565, 571, 947 P.2d 712 (1997).

Here, the prison surveillance video Gaston requested is exempt under RCW 42.56.240(1), as established in *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). This Court in *Fischer* held that “[i]ntelligence information provided by [prison] video surveillance systems therefore falls squarely within the core definitions of ‘law enforcement.’ Concealment of the full recording capabilities of those systems is critical to its effectiveness in the specific setting of a prison.” *Fischer*, 160 Wn. App. at 727-28. *Gronquist* reaffirmed *Fischer*’s reasoning: in holding that the trial court did not err in concluding that prison surveillance video was exempt under RCW 42.56.240(1), the Court recognized that “providing inmates with access to recordings of DOC’s surveillance videos would exploit weaknesses in DOC’s surveillance system.” *Gronquist*, 177 Wn. App. at 400-01.

This Court can affirm the trial court on the holdings in *Fischer* and *Gronquist* alone. But even if the precedent does not squarely resolve this issue, the Department has made an independent showing that prison surveillance video is exempt under RCW 42.56.240(1). This statute exempts specific intelligence information and investigation records, the

nondisclosure of which is essential to effective law enforcement or the protection of a person's right to privacy. RCW 42.56.240(1). This exemption is designed to protect the integrity of law enforcement investigations and intelligence. *See Cowles Pub. Co. v. Spokane Police Dep't*, 139 Wn.2d 472, 478, 987 P.2d 620 (1999).

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.

To be exempt under this provision: (1) the record must be investigative in nature or contain specific intelligence information; (2) the record must be 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. *See Cowles Pub. Co.*, 109 Wn.2d at 728. Courts have interpreted specific intelligence information as “the gathering or distribution of information, especially secret information, or . . . the evaluated conclusions drawn from such information” to include information compiled in an effort to prevent and monitor possible criminal

activity. *King County v. Sheehan*, 114 Wn. App 325, 337-38, 57 P.3d 307 (2002).

The Department video surveillance system provides a “steady and valuable stream of intelligence information.” CP 41. Beyond information about a specific incident which is recorded, surveillance video reveals much about the Department’s surveillance capabilities. The Department does not have the resources to monitor and record every area of a prison 24 hours a day. CP 39-40. Since resources are not available to accomplish 100% surveillance at all times, it is mission critical that offenders, their cohorts, and visitors not know the capabilities and limits of DOC’s surveillance capabilities, including which cameras are actively monitored by staff, which cameras are monitored by staff but create no recordings, and which camera stations do not contain cameras at all. CP 40. Providing access to recordings of DOC surveillance videos would allow someone to accurately determine which areas of DOC’s surveillance system are weak or devoid. CP 40. Surveillance video could also reveal the internal layout and design of a facility (such as whether it is a concrete or wood structure) or specific security features (such as whether a particular door uses electronic or key locking mechanism). CP 41.

Accordingly, as held by both *Fischer* and *Gronquist*, the information revealed about DOC’s surveillance capabilities and other

specific security features qualifies surveillance video as specific intelligence information under RCW 42.56.240(1); *see Fischer*, 160 Wn. App. at 727-28, *Gronquist*, 177 Wn. App. at 400-01.

On appeal, Gaston claims that the specific activities which would be shown on the requested video do not, in his opinion, reveal any damaging specific intelligence information, and so the Department's proffered security concerns do not apply. Appellant's Brief, at 8 (the requested video shows "a minimum security common area where monitoring cameras are visible and obvious," and such video "would seem to be of little functional use to plotting inmates."). But even when cameras are "visible and obvious," not all camera stations contain cameras, and the exact capabilities of each camera vary depending on location. CP 40.

More importantly, as this Court pointed out in *Haines-Marchel*, "[n]either *Fischer* nor *Gronquist* rested its conclusion on the nature of the activities shown on the tapes." *Haines-Marchel v. State, Dep't of Corr.*, 183 Wn. App. 655, 667, 334 P.3d 99 (2014). Instead, those decisions "relied on the information about investigative methods that would be disclosed, such as which cameras were recording, which were dummies, when cameras were off or on, their resolution and field of view, and the extent to which they were controlled by the staff, knowledge that could help in their evasion." *Haines-Marchel*, 183 Wn. App. at 667-68; *see*

Fischer, 160 Wn. App. at 726, 254 P.3d 824; *Gronquist*, 177 Wn. App. at 399–400, 313 P.3d 416. Thus, “the term ‘specific’ in the exemption for specific intelligence information must be read to require not that the information concern particular individuals, but that it disclose particular methods or procedures for gathering or evaluating intelligence information.” *Haines-Marchel*, 183 Wn. App. at 669. Because the surveillance video requested in this case would necessarily reveal particular methods or procedures which the Department uses in surveilling its facilities, the video qualifies as “specific intelligence information.”

Second, the Department is a penology agency and therefore meets the second requirement under RCW 42.56.240(1). This Court has routinely found the Department to be a penology agency for purposes of RCW 42.56.240(1). *See, e.g., Haines-Marchel*, 183 Wn. App. 655 (applying RCW 42.56.240(1) to Department of Corrections records); *Fischer*, 160 Wn. App. 722; *Gronquist* 177 Wn. App. 389. Gaston cannot reasonably contest that the Department is a penology agency. *See* RCW 72.09, et. seq. As such, the Department has met the second prong of RCW 42.56.240(1).

The Department has also shown that the nondisclosure of the surveillance videos is essential to effective law enforcement and the maintenance of secure Department facilities. In *Prison Legal News, Inc. v.*

Department of Corrections, the state Supreme Court rejected the proposition that all Department operations are law enforcement activities. *Prison Legal News*, 154 Wn.2d at 643. However, in doing so, the court looked to the ordinary meaning of the term “law enforcement” and noted that such a meaning encompassed “[t]he act of putting . . . law into effect,’ ‘the imposition of sanctions for illegal conduct,’ and ‘[t]he detection and punishment of violations of the law.’” *Id.* at 640 (internal citations omitted).

As recognized in *Fischer* and reaffirmed in *Gronquist*, “[i]ntelligence information provided by video surveillance systems . . . falls squarely within the core definitions of ‘law enforcement.’” *Gronquist*, 177 Wn. App at 400-01 (citing *Fischer*). Here, like in *Fischer* and *Gronquist*, the Department has established that protecting the Department’s surveillance capabilities, internal layout and design, and specific security features is necessary to ensure safe facilities and prevent malfeasance in Department facilities. *See* CP 38-42. Specifically, the release of surveillance videos “would leave Department facilities vulnerable to a breach of security by not only offenders but also visitors or other members of the general public,” in addition to undercutting the Department’s ability to enforce its disciplinary regulations. CP 41. Moreover, the release of surveillance video would enable offenders and

visitors to evade detection for crimes and other malfeasance by permitting the detection of “blind spots” or other surveillance and security shortcomings. CP 40.

In attempting to distinguish *Gronquist* and *Fischer*, Gaston misunderstands the operation of RCW 42.56.240(1). Gaston disagrees that *Fischer* and *Gronquist* control here, arguing that those holdings were eroded by *Wade’s Eastside Gun Shop, Inc. v. Department of Labor & Industries*, 185 Wn.2d 270, 372 P.3d 97 (2016) and *Sargent v. Seattle Police Department*, 179 Wn.2d 376, 314 P.3d 1093 (2013). Appellant’s Brief at 5, 9. In doing so, he conflates the requirements under RCW 42.56.240(1) as related to specific intelligence or investigative records with the categorical exemption for open investigations.

The Supreme Court in *Newman* created a categorical exemption for records that are part of an open and active investigation, and the scope of that categorical exemption was subsequently modified by *Wade’s Eastside Gun Shop* and *Sargent*. See *Newman v. King County*, 133 Wn.2d 565, 754-75, 947 P.2d 712 (1997); *Wade’s Eastside Gun Shop*, 185 Wn.2d at 280-83; *Sargent*, 179 Wn.2d at 387-90. This categorical exemption *presumes* that the nondisclosure of records related to an open and active investigation is essential to effective law enforcement. *Newman*, 133 Wn.2d at 574-75. Under this theory, agencies are not required to make a

record by record showing that the nondisclosure is essential to effective law enforcement. *Id.* But RCW 42.56.240(1) is broader than just the categorical exemption for open and active investigations. *See, e.g., Haines-Marchel*, 183 Wash. App. at 667 (noting that material which did not qualify for the categorical exemption as a specific investigation record under *Sargent* would still be exempt under RCW 42.56.240(1) if it qualified as specific intelligence information).

Here, the Department is not asserting that Gaston's requested video is exempt because it is a record that is part of an open and active investigation; rather, the Department asserts that Gaston's requested video is exempt as specific intelligence information under RCW 42.56.240(1). Gaston's arguments related to *Wade's Eastside Gun Shop* and *Sargent* are therefore inapplicable to the Court's analysis in this case.

Gaston also contends that his status as a non-inmate renders the Department's proffered safety and security concerns inapplicable to this case. Appellant's Brief, at 3, 4, 8. But Gaston's status as a non-inmate and victim of the alleged crime does not affect the applicability of the exemption. First, the dissemination of the Department's security and surveillance systems to *anyone* could result in undermining the security of the facility. This Court recognized as much in *Haines-Marchel*, noting that "[e]xempting [certain information] from disclosure under the PRA may

well be the only way to keep its contents out of inmates' hands." 183 Wn. App. at 671. In that case, this Court held that two forms which contained various criteria prison officials used to evaluate the reliability and credibility of confidential informants were exempt as specific intelligence information. *Id.* at 660-61, 671. This was true even though the requestor was a non-inmate because "[s]omeone could simply read the form to the prisoner over the phone or memorize the criteria and relay them during a visit." *Id.* at 671.

The situation is the same here. Once surveillance video records are released, they could be posted on the internet or widely distributed, or the surveillance details revealed by the video could make their way in some form into the prison population. Moreover, the Department's concerns regarding exploiting weaknesses in facility surveillance or security equally apply to visitors or other members of the general public. *See* CP 40-41. As in *Haines-Marchel*, exempting surveillance video from disclosure to anyone "may well be the only way to keep [surveillance details] out of inmates' hands." 183 Wn. App. at 671.

Furthermore, agencies cannot distinguish among requesters. RCW 42.56.080(2) ("Agencies *shall not* distinguish among persons requesting records") (emphasis added). Therefore, Gaston's identity as a non-inmate cannot factor into the Department's decision to release records to

him, and does not factor into whether the Department's claim of exemption is proper. RCW 42.56.080. Gaston disagrees, citing to RCW 42.56.565 and claiming that "[t]he PRA singles out inmates as disfavored requestors under the Act." Appellant's Brief, at 8. But that statute speaks only to whether the Court can award penalties to inmate requestors and does not alter how the Department responds to public records requests. *See* RCW 42.56.565. Regardless of whether an inmate requestor may be awarded penalties in some future PRA action, the Department "must respond to all public disclosure requests without regard to the status or motivation of the requestor." *Livingston v. Cedeno*, 164 Wn.2d 46, 53, 186 P.3d 1055 (2008). For similar reasons, Gaston's argument that he had only good intentions when requesting the video (*see* Appellant's Brief at 2, 8) has no bearing on whether the Department's response to Gaston's request was proper. *See Livingston*, 164 Wn.2d at 53; *see also* RCW 42.56.080(2) (requestors "shall not be required to provide information as to the purpose for the request").

Finally, the interplay between Gaston's request and any criminal proceeding has no bearing on whether the Department properly withheld the requested surveillance video in response to a public records request. Gaston claims the Department waived any right to claim an exemption for the surveillance video because the video was used in a criminal proceeding

Appellant’s Brief, at 10-11. Gaston cites to *Bainbridge Island Police Guild v. City of Puyallup* for the idea that a PRA exemption can be waived if the requested record is released in a different context. Appellant’s Brief, at 10-11 (citing *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 409, 259 P.3d 190 (2011)). But the Court in *Bainbridge* found no support in the PRA for the proposition that a PRA exemption can be waived. *Bainbridge Island Police Guild*, 172 Wn.2d at 409 (“The PRA itself does not provide for waiver of a claimed exemption. Instead, the PRA mandates that state and local agencies produce all public records upon request, unless the record falls within a specific PRA exemption or other statutory exemption.”); see *Haines-Marchel*, 183 Wn. App. at 672 (citing *Sanders v. State*, 169 Wn.2d 827, 849–50, 240 P.3d 120 (2010)) (“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”).

Gaston then briefly asserts that the Department may have waived its ability to claim a PRA exemption under the theory of common law waiver discussed in *Bainbridge*. Opening Brief, at 11. While *Bainbridge* did discuss the issue of common law waiver, it tied the concept of common law waiver to the common law right to privacy. See *Bainbridge Island Police Guild*, 172 Wn.2d at 409-10. Gaston has made no attempt to

tie his waiver argument to any common law right. *See* Opening Brief, at 11. Because there is no statutory support for the waiver of a PRA exemption, *see Bainbridge Island Police Guild*, 172 Wn.2d at 409, and no common law right is implicated in this case, Gaston’s arguments regarding waiver are unpersuasive and should not be considered.

Ultimately, the Department met its burden to show that nondisclosure of prison surveillance video is essential to effective law enforcement and therefore prison surveillance video is exempt from disclosure under RCW 42.56.240(1) as specific intelligence information. Gaston has presented no persuasive argument to the contrary. As such, the trial court correctly concluded that the Department did not violate the PRA in withholding Gaston’s requested surveillance video, and the Court should affirm the trial court’s dismissal of Gaston’s claims.

B. The Trial Court Did Not Abuse its Discretion in Denying Gaston’s Motion For In Camera Review or Failing to Enter A Protective Order

The particularities of the individual surveillance videos do not change the nature and validity of the claimed exemption so the trial court’s in camera review was unnecessary. However, Gaston claims that the trial court erred in denying Gaston’s motion for in camera review of the requested video recordings. Appellant’s Brief, at 9-10. 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.” Appellant’s Brief, at 10.

A trial court’s decision on whether to conduct an in camera review of records is reviewed for abuse of discretion. *Harris v. Pierce County*, 84 Wn. App. 222, 235, 928 P.2d 1111 (1996). Under RCW 42.56.550, “Courts *may* examine any record in camera in any proceeding brought under [the PRA].” RCW 42.56.550(3) (emphasis added). In camera review will be necessary where the court “cannot evaluate the asserted exemption without more information than that contained in the government’s affidavits.” *King Cty. Dep’t of Adult & Juvenile Det. v. Parmelee*, 162 Wn. App. 337, 360, 254 P.3d 927, 939 (2011) (quoting *Overlake Fund v. City of Bellevue*, 60 Wn. App. 787, 796–97, 810 P.2d 507 (1991)).

Here, the Court did not abuse its discretion in denying Gaston’s motion for in camera review. The exemption claimed by the Department—that the requested video was exempt from disclosure as specific intelligence information under RCW 42.56.240(1)—did not depend on the particularities of the video in question. CP 38-42, CP 59. Rather, the surveillance information which the video would necessarily reveal was what made the video exempt, regardless of the exact content of the video. CP 38-42, CP 59. This aligns with the Court’s conclusion in both *Fischer* and *Gronquist* that surveillance video is exempt from

disclosure not because of “the nature of the activities shown on the tapes” but instead because of “the information about investigative methods that would be disclosed” if released. *Haines-Marchel*, 183 Wn. App. at 667. Thus, the trial court could evaluate the Department’s asserted exemptions based entirely upon the information contained in the written record, and it was not an abuse of discretion for the court to deny Gaston’s motion for in camera review.

Gaston makes a related argument that it was error for the court to “[fail] to consider employment of a protective order or redaction to limit dissemination of all or part of the recording.” Appellant’s Brief, at 10. Gaston did not move for a protective order below but rather mentioned in passing in his reply to the Department’s responding brief that a protective order from the Court “could strike an accommodating balance” between competing interests in the case and would “[limit] distribution or utilization of evidence” CP 63.

It was not an abuse of discretion for the trial court here to decline to *sua sponte* issue an ill-defined protective order when ruling on Gaston’s motion for in camera review. A court’s decision on whether to grant a protective order is reviewed for abuse of discretion, and “[a] trial court abuses its discretion only if its ruling is manifestly unreasonable or is based upon untenable grounds or reasons.” *King v. Olympic Pipeline Co.*,

104 Wn. App. 338, 348, 16 P.3d 45, 50 (2000), *as amended on reconsideration* (Feb. 14, 2001).

Here, although Gaston cites to CR 26 in support of his argument (*see* Opening Brief, at 11; CP 63), his request for a protective order does not appear to be related to any of the types of discovery orders outlined in CR 26. *See* CR 26(c)(1)-(8). Instead, Gaston seems to have requested that the court supersede the statutory authority found in RCW 42.56.240(1) and order the Department to release the exempted records, but on some sort of limited basis. *See* CP 63 (“Civil procedures allow the trial court to enter protective orders limiting distribution or utilization of evidence in a civil or criminal case.”). It was not an abuse of discretion for the trial court to decline to issue an order circumventing the law, nor was it an abuse of discretion for the trial court to decline Gaston’s invitation to enter some version of a protective order in the case when Gaston’s request for a protective order was unclear and unsupported by any relevant legal argument. *See* CP 63. This Court therefore need not disrupt the trial court’s ruling in this regard.

C. The Trial Court Did Not Abuse its Discretion in Declining to Strike the Declaration of Robert Herzog

On appeal, Gaston asserts it was error for the trial court to deny Gaston’s motion to strike the Declaration of Robert Herzog. Appellant’s

Brief, at 6; *see* CP 38-42 (Declaration of Robert Herzog). The trial court need not consider the issue because Gaston did not properly bring it before the trial court. Gaston did not specifically move to strike Herzog's declaration and instead only mentioned in his reply to the Department's responding brief that Assistant Secretary Herzog's declaration should be stricken. CP 62. The trial court did not rule on any motion to strike. CP 71-72. Generally, a party cannot raise an issue on appeal that it did not properly raise before the trial court, unless the issue involves "manifest error affecting a constitutional right." RAP 2.5(a).

However, even if this Court were to consider the issue, the Court did not abuse its discretion by failing to strike Robert Herzog's declaration from the record. "The abuse of discretion standard applies to review of a trial court's decision on a motion to strike a declaration or affidavit allegedly containing inadmissible evidence." *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 247, 178 P.3d 981, 988 (2008). Declarations "shall be made on personal knowledge." CR 56(e).

Here, Gaston argues that the Court should have stricken Robert Herzog's declaration because Herzog did not watch the video in question. Appellant's Brief, at 6. But again, the particularities of the video in question were not what made the video exempt, nor the basis of Assistant Secretary Herzog's declaration. CP 38-42, CP 59. As explained above, it

is the general operation of the Department's surveillance system, and the intelligence information the surveillance video necessarily reveals about that, which forms the basis for the Department's claim that the video is specific intelligence information and exempt from disclosure under RCW 42.56.240(1). Gaston admits that Herzog was "familiar with general surveillance cameras and systems throughout the Department of Corrections institutions" Opening Brief, at 6.

It is undisputed, then, that Herzog's declaration was based on his personal knowledge. Gaston's argument that Herzog should have been required to acquire *more* personal knowledge before submitting a declaration is untenable. It was not an abuse of discretion for the Court to rely upon a declaration which was based on the declarant's personal knowledge about a Department system, and the Court should decline Gaston's invitation to hold otherwise.

D. Costs And Attorney's Fees Should Not Be Awarded Because Gaston is Not the Prevailing Party

Gaston raises the issue of attorney's fees in his opening brief. Appellant's Brief, at 11-12. The PRA provides for costs and attorney's fees to the prevailing party. RCW 42.56.550(4); *Sanders v. State*, 169 Wn.2d 827, 865, 240 P.3d 120 (2010). Attorney's fees are only awarded when the party secures the disclosure of additional documents. *See*

Concerned Ratepayers Ass'n v. Public Utility Dist. No. 1 of Clark Cnty., 138 Wn.2d 950, 964, 983 P.2d 635 (1999). When a requester has not secured the disclosure of additional records on appeal, courts are required to remand the issue of attorney's fees to the trial court because the determination of which party is the prevailing party has not been made. *Id.*

First, Gaston is not entitled to attorney's fees and costs because the trial court's decision should be affirmed. *See supra* Sections (V)(A)-(D). As such, Gaston is not the prevailing party for purposes of appeal or this case. Second, even if Gaston prevails on the reversal of one or all of his claims, Gaston is not the prevailing party at this time. A reversal in this circumstance will result in further proceedings below to determine whether the Department violated the PRA. It is premature to determine who the prevailing party in this case is until such a determination is made. If Gaston succeeds on issues on appeal and submits a cost bill under RAP 18.1, the Department will respond to such appellate costs at that time. Therefore, in the event that the Court reverses any portion of the trial court's decision, it should remand the issue of attorney's fees to the trial court for it to determine the issue after the case is resolved and to determine the prevailing party.

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VI. CONCLUSION

For the foregoing reasons, the Department respectfully requests that this court affirm the lower Court's dismissal of Gaston's action.

RESPECTFULLY SUBMITTED this 10th day of October, 2017.

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the BRIEF OF RESPONDENT WASHINGTON STATE DEPARTMENT OF CORRECTIONS with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participant:

CHARLES S. HAMILTON III
7016 35TH AVENUE NE
SEATTLE, WA 98115

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 10th day of October, 2017 at Olympia, Washington.

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