

NO. 94362-1

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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NICHOLAS CLAPHAM  
Plaintiff-Appellant

v.

WASHINGTON STATE PATROL  
Defendant-Respondent

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**APPELLANT NICHOLAS CLAPHAM'S OPENING BRIEF**

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NICHOLAS CLAPHAM, *pro se*  
WSBA #17646

P.O. Box 50542  
Bellevue, WA 98015  
(407)484-9625  
nicholasclapham@protonmail.com



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## INTRODUCTION

U.S. Department of Defense, Strategic Plan 2016-2025 Science and Technology Joint Non-Lethal Weapons Program, (Joint Non-Lethal Weapons Directorate 2016) states:

Twenty years since founding of the DOD Non-Lethal Weapons (NLW) Program, the United States military faces global responsibilities in an increasing interconnected yet uncertain world. In this environment of rapid technological change and challenges to the status-quo, the Joint Force will continue to be tasked to subdue emerging threats and respond to humanitarian crises alongside, if not among, civilian populations. To accomplish these tasks, warfighters require NLW capabilities to respond to potential threats between “shouting and shooting” and to control the escalation-of-force, while minimizing collateral damage – capabilities the Joint Non-Lethal Weapons Program(JNLWP) is investing in today.

...

The JNLWP Science and Technology (S&T) Program contributes to the DOD NLW Program vision by investing in the innovative technology and applied research to mitigate non-lethal effects capability gaps and reduce developmental risk. The JNLWP S&T Program's intent is to “Foster the ideation, maturation, and demonstration of innovative and compelling NLW technologies for the Joint Force through focused investment and collaboration internal and external to the DOD Research and Engineering (R&E) Enterprise.”

This JNLWP S&T Strategic Plan (JSTP) articulates a direction for future JNLWP S&T investment to spark innovation and cooperative research and development partnerships across industry, academia, and government.

Page 1.

Individuals and groups in conflict have used non-lethal capabilities and actions throughout recorded history. Relatively simple cognitive and physical incentives designed to affect a person's behavior without imposing permanent harm, as well as actions to preserve infrastructure....As the military and other instruments of national power have become more technologically advanced, so have the suite of non-

lethal capabilities between 'shouting and shooting.'

...

The current NLW inventory expands our forces options in supporting mission objectives; however, as the military looks ahead to the coming decade, the shift to new operating environments and the rapid pace of technological change will require new NLW technologies to address capability gaps and threats from technologically evolving adversaries. Advancements in NLWs through scientific research and technological development will enable these non-lethal effects to be realized in more effective and efficient ways.

...

The program's mission is to serve as the Department's proponent to effectively identify, develop, test and evaluate, transition, field, and sustain integrated, relatively reversible, and scalable effects technologies and capabilities.

Page 3.

Today, there are currently 34 megacities (cities with populations of ten million or more) in the world. A number expected to grow to nearly 40 during the next ten years...

...

Taken together, these megacity characteristics highlight the prospect of instability over stability – as they also hold a high propensity for unrest, disruption, and disorder on a large scale and will likely be the focus of urban operations as the Joint Force responds to future hotspots.

...

To be effective in this sort of environment, security forces will need to blend police, infantry and military Special Forces...The effective employment of NLWs will be critical in the measured responses to situations our forces encounter in these challenging operating environments.

Pages 7-8

U.S. Efforts to minimize civilian casualties and collateral damage have steered the Services to consider the value of Cyberspace Operations (Cyber), Directed Energy (DE), and Electronic Warfare (EW) capabilities. These strategic and operational 'non-kinetic' fires have proliferated as Joint Forces have evolved the ability to operate in an increasingly complex environment. These are characterized by the pervasiveness of information technology, the increasing importance of signature management, challenges to electromagnetic spectrum access, and the globalization of

Cyberspace capabilities.

...

In particular, the advantages of DE with its expansive collaboration opportunities have spurred the JNLWP S&T Program to focus more attention to and increase investment in DE NLW efforts as a potential solution to multiple capability gaps.

...

From the outset of future conflicts, both the Joint Force and any threat actors likely will be interspersed among the civilian population. Enemy forces understand this will disproportionately limit the freedom of action of the military and shadow the activities of non-state actors.

...

NLWs will be vital to address this ongoing trend. Among civilian populations, the need to avoid casualties and collateral damage takes on more importance to maintain an effective campaign. Additionally, NLW's will need to fit the form and function so that they easily complement the capabilities of the individual soldier. At the tactical edge, far from echelon support, the NLWs space, weight and power requirements will take on even more importance.

Pages 9-10.

Unique Aspects in Developing Non-Lethal Weapons.

To address the future operating scenarios envisioned in DOD and Service strategic guidance and better fill the capability gaps between 'shouting and shooting', the Military Services and other governmental agencies will require new material solutions as part of their comprehensive escalation-of-force capability set. NLWs, as part of the solution, will need to leverage innovative scientific advances and the DOD will need to invest in the technology development efforts to sustain the technological advantage of the future warfighter. The development of NLWs is similar to the development of traditional weapon systems in the defense acquisition system, but there are unique elements of non-lethal technology that add both complexity and opportunity to the development process.

What Defines Non-Lethal Weapons?

The definition of what constitutes a 'non-lethal weapon' is specified in DOD Directive 3000.03E. At its core, and for purposes of this document, NLWs are defined by three tenets:

- \*Deliver immediate target response
- \*Provide predictable and intended reversible effects
- \*Minimize undesired collateral damage

NLW capabilities are further categorized into counter-personnel (CP) or counter-material (CM) core capability areas...Non-Lethal capability development; however, is not limited to the target set or effects described in these documents.

#### Counter-Personnel Tasks

\*Deny access into/out of an area to individuals (open/confined) (single/few/many)

\*Disable individuals (open/confined)(single/few/many)

\*Move individuals through an area (open/confined)(single/few/many)

Though the definition of what constitutes a NLW is clearly defined, NLWs are sometimes grouped with other capabilities that also produce other-than-lethal effects, including Cyberspace Operations and Electronic Warfare. While these capabilities do not all necessarily adhere to the three tenets of NLWs, they may offer additional opportunities for synergistic non-lethal effects that improve mission outcomes by together exploiting target vulnerabilities.

Pages 11-12

Predictability, although highlighted in the second NLW tenet, is not a discriminator unique to NLW. For all DOD weapons systems, predictability of effects is critical to success.

...

The JNLWP S&T Program invests in physiological effects as well as behavior response research to enable effective DOD human effects characterization and inform DOD NLW system requirements, design, test and evaluation.

Below is an illustrative diagram reflecting the complexity that arises when developing NLWs. On the left is a typical lethal weapon effectiveness analysis. As one expects, an increase in 'dose' typically leads to a more lethal and effective weapon. That dose amount is then balanced against other factors when designing a weapon to meet the threshold or objective performance criteria for the required capability.

...NLWs developers must identify the necessary 'dose' to achieve desired effects (predictability), while remaining within the bounds of acceptable injury risk (reversibility). This area in-between is referred to as the 'operating envelope,' and it varies widely across the spectrum of NLW stimuli and systems. Though the diagram is intentionally simplistic to convey the concept, examination of the trade space between the bounding 'dose' response curves can be extremely complex. It is for these reasons that S&T research to define these trade spaces is critical to the success of

NLWs development.

Pages 13-14

To realize the JNLWP S&T Intent to 'foster the ideation, maturation, and demonstration' of new NLW technologies for the Joint Force in the 2025 time frame, the program has established a series of Science and Technology Objectives or STOs.

...

STO – Capability (STO-Cs): S&T objectives that are tied to requirements within the Initial Capability Documents (ICDs) for Counter-Personnel and Counter-Material Joint Non-Lethal Effects (JNLE) and/or emerging requirement demand signals for the Military Services and CCMDs. The STO-Cs are not inclusive of all non-lethal requirements, but instead are a selected list developed to identify the most pressing NLW capabilities required in the expected future operating environment.

STO – Enabler (STO-Es): S&T objectives that will help advance the state-of-the-art or increase the knowledge based for the most promising NLW technologies. These objectives are organized by a particular technology or family of technologies that have proven non-lethal efficacy to the warfighter, but require further research and/or development to optimize their utility.

...

Both categories of STOs are designed to be strategic 'stepping stones' for achieving new non-lethal capabilities and knowledge products. Complex technological innovations and research questions often call for an iterative approach, learning from results and re-shaping the path forward as needed to meet the mission.

...

In general, and for purposes of this plan, near-term refers to one to three years (FY16-18), mid-term refers to three to six years (FY19-21), and far-term six years and beyond (FY 22+).

...

The attributes below have been shown to be successful transition discriminators...

\*Applicability: S&T efforts that can be broadly applied across multiple efforts or capability objectives as opposed to a single program or effect. These include applicability across the range of military operations, environmental conditions, and warfare domains, in addition to fulfilling the cross-Service nature of the JNLWP.

\*Scalability: Technologies that can be applied across the escalation-of-

force continuum, against targets of various sizes, requiring different applications of power. Optimally, this should be seamless integration of technological capabilities that spans the non-lethal/lethal continuum, which replaces multiple disparate weapon systems.

\*Modularity: Technologies developed around modular components...

\*Space, Weight, Power, and Cooling (SWAP-C) Requirements: Technologies that can reduce SWAP-C requirements for warfighters and minimize the logistics burden of deployment or employment. The reduction should enable the NLW capability to complement other weapon systems and reduce the need for dedicated NLW platforms.

Page 15-16.

The anticipated future operational environment will drive the development of smaller, more capable non-lethal counter-personnel capabilities. Forces operating in megacities and as dispersed small-units will need the capability to quickly control crowds with a large number of civilians and potential threat actors relative to their own formations. Such engagements will demand a wide spectrum of non-lethal counter-personnel capabilities (move, deny, suppress, and disable) at increasingly longer ranges, larger areas of coverage, and for longer durations, to include operations in uniquely limiting environments...

Counter-Personnel – Move and Deny

Currently fielded and near-term developmental NLW capabilities can reliably achieve 'move' and 'deny' effects, but are typically range limited and are often not as effective against non-compliant personnel. S&T investments will therefore focus on expanding the operationally effective range envelope and developing solutions that compel even the most motivated individuals to move or remain out of an area.

Counter-Personnel – Suppress

This STO supports technology developments into new methods or techniques for the suppression of multiple compliant and non-compliant individuals in those constrained environments.

Counter-Personnel – Disable

The current disable NLW portfolio can engage individuals at close range and for only a short duration of time/effect. Mid-term objectives, and eventually far-term objectives as they come into focus, will aim to increase the range, duration of effect, volume of fire, and number of individuals a NLW system will be able to engage.

Pages 19-21.

Directed Energy Technologies

Directed energy (DE) technologies seek to exploit the electromagnetic spectrum to non-kinetically target individuals, equipment, or facilities, with non-lethal effects...Today's directed energy weapons (DEW) are capable of delivering non-kinetic effects over long distances nearly instantaneously, reducing the ammunition logistics burden (never has to reload, just keep firing) to the warfighter, also, they are generally less costly on a per-shot basis compared to the threats they are engaging. DEW scalability also enables the potential for graduated effects between 'shouting and shooting' within one system.

...

The JNLWP's intends to continue its investment in non-lethal DE technology to mitigate various persistent limitations of fielded NLWs to include, range, scalability, duration of effect, and diversity of susceptible targets.

The JNLWP DE Portfolio focuses on two major capability areas. The first capability area is the means to stop vehicles, vessels, and other systems with High Power Radio Frequency (HPRF) electro-magnetic energy. The second capability area involves compelling individuals (to move, deny, suppress or disable) within millimeter waves (mmWave) electro-magnetic energy.(mmWave ranges from 30 GHz to 300 GHz)...The JNLWP is a technical leader in DOD DE developments, especially as relates to HPRF and mmWaves...The JNLWP will remain actively in the forefront of DE to better help Joint Warfighters gain and maintain a competitive advantage over potential adversaries with DEWs.

...

#### Human Effects Characterization Technologies

Human effects characterization is **vital** to **all** NLW development to determine the effectiveness of the technology in creating immediate predictable effects with minimal risk of significant injury. In the past, this characterization followed the S&T development of the weapon technology and required human effects understanding to '**catch-up**' to meet system development efforts. This approach resulted in delays to operational fielding and constricted the design trade space of NLWs. **Since the initial NLW efforts, human effects characterization projects have been, and will continue to be, closely synchronized with technology development. Investments in determining the physiological effects of generalized NLW stimuli on human biological systems, as well as the development of holistic modeling solutions and testing surrogates are crucial to the success of the JNLWP and the fielding of operationally relevant NLW**

technologies.

STO-E: Human Effects Characterization

Near- Mature predictive models and surrogates to support current projects and programs (e.g., sound and light, blunt impact and human electro-muscular incapacitation,) Development of a thermal interceptor model in support of mmWave trade space investigations.

Mid- Develop predictive behavioral models for non-lethal stimuli to include combined NLW effects.

Far – Develop models and surrogates for future NLW stimuli and technology investments to ensure synergistic system development with emerging NLW technologies.

Pages 22-25. (Emphasis added.)

Moving this technology from the military to the state and local level to be used domestically is the stated goal of the Department of Homeland Security. The Department of Homeland Security, Science and Technology Division, published High – Priority Technology Needs, Version 3.0, May 2009, wherein the department spells out its goals and requests third parties to submit technology to enable their published “needs” for use within the United States. “The First Responder Capstone IPT coordinates the identification and prioritization of technology requirements and capability gaps of the Federal, state, local, territorial and tribal first responders. Identified technology solutions will be designed, tested, and assessed for usability and commercialized for the first responder community.” Department of Homeland Security, Science and Technology Division, High – Priority Technology Needs, Version 3.0,

page 6, (May 2009). At page seven, DHS states in clear terms that they seek technology granting the: “Ability for law enforcement officers to assure compliance of lawful orders using non-lethal means – in particular, the ability to disable vehicles/vessels and **temporarily incapacitate persons** to prevent the infliction of damage or harm. Id. On page six the publication states that Homeland Security is seeking technology that can produce: “Non-lethal compliance measures for people, vehicles, vessels, or aircraft, allowing safe interdiction by law enforcement personnel.” It is clear that this technology is intended to be given to Federal, state, local, territorial and tribal first responders to be used domestically against citizens.

Although the purpose for making a PRA request is not an issue in review of the request itself, it is relevant if there is a determination that there was a failure on the agency's part to comply with the PRA. It is also relevant in the determination of whether this court accepts direct review. This is difficult to discuss due to the subjective nature of an area which historically has been associated with science fiction. The infinitesimal speed of technology has rendered what used to be fantasy to reality in some instances. The ability to charge a phone without a cord or ride in a car without a driver was not “reality” at some recent point. There are

several challenges that the subject matter of this PRA presents and the largest is the immediate assumption that the author is of diminished capacity. This in turn is the most effective way to avoid scrutiny. I can not comment on others but I was volunteering my time at a Neighborhood Legal Clinic one night when a client presented herself and declared that the Bellevue Police were after her. Two things struck me at that juncture. The first was coming up with a plan to find an agency to review her claims of police misconduct and the second to discuss seeking care and a safe place to sleep. Her body language, extremely fatigued demeanor and facial canvas showed someone who had authentically endured a lot of pain for a long period of time. The nature of her report made me immediately gravitate to the thought that there was a chance that she was suffering from some mental impairment. We have little time in those interactions but I questioned her at length. She detailed some form of irritant that started, without prior experience, to wake her every night followed by one or more loud vehicles outsider her residence at early morning hours and they would leave the area making a lot of noise in the process. She said she would see Bellevue P.D. vehicles.

Several months after the encounter, the exact same thing began to happen to me. To give background but not belabor the point, there are

several facts that may aid in understanding:

1. There is some form of emission/irritant that, in my case, was placed in my living space and my vehicles. (If I slept outside away from the residence there would be absolutely no irritation, no wake-ups and no nausea.) The nature and effect of the emission has evolved during the time period that I have been exposed to it. The exposure occurs in several ways with the first being “switched” on while I was asleep (obviously my experience was limited to after I would wake up) with the exposure causing me to wake up with my heart racing with reddened face in a heightened state. Falling back to sleep was very difficult. As days turned into weeks and weeks into months, this profoundly diminishes health and well being with minimal sleep per night. The second type occurs when the irritant is left on at a very low emission rate in an area of the home. This results in irritation, tinnitus (ringing in the ears) and elevated heart rate. I was hospitalized in Florida after three days of this type of exposure in my parent's house. A house where I grew up and never experienced such events. The vehicles and human activity occurred in Florida as well. The hospital took my physical symptoms at the emergency room and would not let me go home due to the objective symptoms including continued elevated heart rate. It is all transient in nature. When the irritant is

removed, the symptoms stop. Some, such as tinnitus and elevated heart rate do not stop immediately. After twelve hours in the Florida hospital, the symptoms subsided. Sleep that night in the hospital was uninterrupted.

The third and most recent type of irritant, is episodic, occurs at night and is the inverse. It causes a type of “sleep” that is forced almost like being knocked out. There are no dreams and absolutely no sleep realization. Upon waking there are concussive symptoms that are profound that include ringing in the ear (not the same as tinnitus), strong headache, lack of spacial recognition, red eyes and occasionally pronounced blurred vision in one or both eyes. Repetitive exposure causes hair to turn very coarse and brittle. More profoundly is a marked loss of memory. Recollection about the prior days events, the names of friends and relatives as well as very elementary things are temporarily wiped out. Physical exercise and research work brings recollection back as well as spacial awareness. Additionally, one or both eyes would, on occasion, completely loose vision temporarily. This also would reset. All of these symptoms occurred only when sleeping in the residence. The constant irritation emissions also occurred in the vehicle and would be intermittent.

2. There was a complete lack of any historical issues related to any of the irritation and/or resulting symptoms. The episodes are temporarily in

nature. This entire experience would be addressed solely as a medical issue if the human involvement did not occur.

3. There has always been a human element. When I was woken up at night, there would always be a vehicle outside my residence and/or people on foot at 2-4am when all was quiet. The vehicles had loud exhaust. Upon waking they would accelerate quickly and take off. This occurred every night. It could occur one to three times every night. I would look out the window and see the vehicles. They would almost always contain a driver and passenger and the passenger was always operating a cell phone which dimly lit the interior of the car and the occupants.

4. Sophomoric destruction of property occurred in conjunction with the nightly visits. My vehicle tires were punctured in the same manner five times, the brand new high end Baldwin lock on the front door was destroyed within days of installation by forced entry (with the brass key hole having scratches at top and bottom), "game cameras" set out to catch a photo of the persons in front of my residence were destroyed by pouring some form of corrosive liquid inside the cameras (which had been locked in the inside of my parked vehicle), boundary shrubs were destroyed by defoliant that would turn the entire plant completely black (not brown) overnight and die leaving gaps in boundary hedges, Christmas light strings

were cut, as well as a host of other events of the similar nature. My vehicles were getting broken into so much (nothing was ever taken) that I began removing the fuse that allowed electronic entry. I returned from a hike and found that the vehicle had been broken into and the metal fuse contacts had been punched out and the fuse box rewired. The fuse would no longer stay in its numbered location were it was secured a few hours before.

5. On the roadway traffic harassment with vehicles constantly (every time I drove) tailgating then swinging around and cutting directly in front of my vehicle on uncrowded two lane highways with an open left lane. This would occur six to eight times every time I left Olympia heading to Aberdeen. Vehicles would repetitively follow within feet of my rear end at highway speeds and would stay there when I slowed to 40 mph (even though there was a completely free and open left lane to pass. I would pull over and they would leave.

6. I left Washington temporarily to live in Kansas City and San Diego but the treatment followed. In San Diego I sought help from the US Attorney's office and they referred me to the Federal Bureau of Investigation. I went to the FBI and the agent instructed me that they did not handle cases like this and that they only handled "fraud" and some other forms of cases.

During the entire brief interview he smirked as if it was a joke.

7. The worst treatment (considering severity of the emissions, frequency of the irritation, time allowed to sleep, and resulting symptoms) occurred in Washington State.

8. One night I was at my storage unit in Elma, Washington when three helicopters, with no navigation lights flew to an approximate elevation of 400 feet above me while I was retrieving items out of storage. I took all of my belongings and spread them on top of the car so they could view them. The three helicopters immediately left. I learned to pilot an airplane at an early age and have extensive knowledge about aviation.

The treatment amounts to physical and psychological torture and is not an “investigation.” It is assault, bullying, and harassment. The recent events (reported by CNN, the Washington Post and Reuters) at the U.S. Embassy in Cuba describe a similar type of stimuli and the resulting symptoms with those citizens sustaining hearing loss and “concussion” type symptoms. Those officials had to leave the compound and return to the United States. *See*, Frances Martel, Reports: ‘Incident’ in Cuba Leaves U.S. Diplomats With ‘Severe Hearing Loss,’ Concussion Symptoms, Breitbart News Network (August 10, 2017), <http://www.breitbart.com/national-security/2017/08/10/reports-incident->

cuba-leaves-u-s-diplomats-severe-hearing-loss-concussion-symptoms/.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that appellant's May 16, 2016 public records request to the Patrol was not for identifiable public records.
2. The trial court erred in finding that the Washington State Patrol (WSP) conducted an adequate search for responsive records considering entire record based upon the evidence submitted.
3. The trial court erred in finding that the WSP provided the fullest assistance to the Appellant.
4. The trial court erred in finding that WSP had met its burden at summary judgment holding WSP's response to Plaintiff's May 16, 2016 public records request did not violate the Public Records Act (PRA), chapter 42.56 RCW.

## III. STATEMENT OF THE CASE

Appellant made the following request, received by the Washington State Patrol on the morning of May 16, 2016:

This is a request for public records pursuant to the Washington Public Records Act, RCW 42.56, made by Nicholas Clapham, Washington Drivers License # (number redacted). Associated addresses attached as Exhibit A.

This request is being made for identifiable public records as well as records of those records deleted under and pursuant to Chapter 42.56 RCW. The form of the records is requested in electronic format with meta-

data included. If the records are not in electronic format then requester is seeking paper copies of the records and will pay the costs required by statute. Requester seeks to have an estimate of those costs prior to copying.

Please provide, within the time frame set forth by statute and case law, an explanation for any basis used for withholding or redaction of each document as set forth in RCW42.56.210(3): "Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to record withheld."

Pursuant to the Public Records Act, please provide any copies of the following records, that were **prepared, received, transmitted, collected and/or maintained** by the Washington State Patrol ("WSP"). The term "records" includes all records or communications preserved in any form, including but not limited to correspondence, documents, data, emails (including attachments and history), text messages, web searches (including search histories), audio/visual (in all formats), faxes, files, guidance/guidelines, evaluations, instructions, analysis, notes, procedures, protocols, reports, rules, technical manuals, training manuals, memorandum, agreements, orders, and technical information and/or data, technical specifications, and/or studies. For each request, I seek records created or collected **from January 1, 2005 to the present**.

1. Any records that document any monitoring, surveillance, observation, questionings, interrogation, infiltration, and/or collection of information about the Requester;
2. Any orders, agreements and/or instructions to monitor, observe, question, interrogate, investigate, infiltrate and/or collect information about or conduct surveillance of the Requester. These are to include but not be limited to those records from association with other Federal and/or state entities including Fusion Centers in Washington and other states;
3. Any records relating or referring to how, why or when the Requester was selected to be a subject or monitoring, surveillance, observation, questioning, interrogation, investigation, infiltration, and/or collection of information;

4. Any records relating or referring to the names of any other federal, state, or local government agencies participating in any monitoring, surveillance, observation, questioning, interrogation, investigation, infiltration, and/or collection of information about the Requester;
5. Any policies or procedures in place to protect the privacy of records that refer or relate to the Requester and/or any dissemination of information and/or allegations about Requester to any third persons, including those fellow employees of Requester;
6. Any records relating to communication between any employee, contractor and/or agent of the WSP and the Washington Joint Analytical Center (WAJAC), the Washington State Fusion Center (WSFC), the Missouri Fusion Center, any Regional Intelligence Office or Group (RIG), or any Regional Intelligence Analysts, United States Military groups, United States Coast Guard and/or other Federal Agencies regarding and/or mentioning the Requester;
7. Any records relating or referring to destruction, disabling, modification of any of Requester's property and/or property in possession of the Requester, including but not limited to descriptions of each such actions, the property that it affected and the outcome. Requester has suffered successive, continuous and consistent damage to electronics, automobiles, cameras, residents including break-ins and extensive damage to exterior locking systems wherein nothing was taken but the contents of the vehicles and the residents have been substantially disturbed and items therein damaged; Requester seeks information on involvement of the WSP or any person or entity the WSP uses and/or associates with, including but not limited to State Agencies, other Federal Governmental Agencies, contractors and/or other entities interacting with the Requester and/or his property.
8. Any records relating or referring to broadcasts, emissions and/or transmissions of any nature and of any frequency on the frequency spectrum, in and around the permanent and/or temporary locations, houses, hotel rooms and/or any other structures and vehicles where Requester was occupying at the time of the broadcast, emission and/or transmission, including but not limited to those locations listed in attached Exhibit A. This is to include, but not be limited to, any such broadcasts,

emissions and/or transmissions that interfere with, modify, interrupt and/or prevent nightly sleep, cause Requester to have various symptoms including but not limited to accelerated heart rate and caused hospitalization of the Requester.

9. Any records relating or referring to the creation, generation, emission, and/or release of electromagnetic and/or magnetic fields, stray currents and voltages, electrical harmonics (creation of “dirty electricity”), or any other electrical anomalies of any nature, used, implemented, set off, engaged, turned on, switched on and/ or off in and around the permanent and/ or temporary locations, houses, hotel rooms and/ or any other structures and vehicles where Requester was occupying at the time of the creation, including but not limited to those locations listed in attached Exhibit A. This is to include, but not be limited to, any events of this nature that interfere with, modify, interrupt and/ or prevent nightly sleep, cause Requester to have various symptoms including but not limited to accelerated heart rate, and caused hospitalization of the Requester. Because of the effect on the health of Requester, it is important to know the specific nature and magnitude of each such event;

10. Any records relating or referring to any other technology used by the WSP to disable, physically harm, cause reduction in health, temporarily or permanently reduced the mental or physical capacity of the Requester, including but not limited to any form of interaction, manipulation, stimulation, any portion of the brain or nervous system of Requester;

11. Any records relating or referring to dissemination of allegations, actions, information of any nature about Requester to any third party/parties, including but not limited to co-workers of Requester that are not employed by WSP and/or any other law enforcement agency;

12. Any records relating or referring to the use of volunteers, private contractor(s), third party, or private individual(s) (including federal or military agents acting in their individual capacity) to engage in surveillance, investigation or collection of information about Requester

I am an individual seeking information for my personal use. Please note that RCW42.56.520 requires agencies to respond to requests for public records within five (5) days. Please contact me at [seaseanc@gmail.com](mailto:seaseanc@gmail.com) if

you have any questions about the scope of this request.  
CP at 31-32.

Attached to this request was a list of eight specific residences commonly described by street address (with the exception of the Grays Harbor address which contained a tax identification number due to lack of an accurate house number) and marked as exhibit A to the request. Id.

The request was not nebulous. It had a very specific date range. The records requested were limited to one person and several specific locations. The request sought information about very specific activities which it enumerated clearly. The request was broken down into numbered paragraphs with each paragraph having a specific subject matter clearly described. The request specifically stated that it was a PRA request and was framed by the statute as to subject matter and procedure. The sections requested "any record" to be complete but then very narrowly described each individual issue that 'any record' pertained to. The request in total was very narrowly tailored and does not seek voluminous records such as a request for all dash cam records.

Gretchen Dolan, WSP Public Records Officer responded by e-mail at 11:06 on the morning of May 18, 2016:

The Washington State Patrol(WSP)has received your public disclosure request for "any and all" records concerning you (attached).

Dolan included with the e-mail response a copy of the request, an unresponsive traffic citation and an unresponsive printout of incident details from the citation. CP at 149. The attached documents were left out of Ms. Dolan's attachments and appellant will seek to amend the record to include them. The time stamps on those documents were within minutes of Ms. Dolan's response to the PRA sent by email at 11:06 am on May 18, 2016. They demonstrate how short time wise the search was.

**Assignment of Error No. 1 Identifiable Public Records/Fullest Assistance**

In justification of the limited response given, WSP asserted that the request made was not for identifiable public records. The basis for this claim changed from their inability to search their own records to a denial that such actions were conducted by WSP. Initially, Ms. Dolan made the following assertion in her official e-mail PRA response dated May 18, 2016:

“Because we do not generally maintain records by name...your request was otherwise not for clearly identifiable public records, as required by RCW 42.56.080.” CP at 35.

At summary judgment, Ms. Dolan asserted by declaration:

I reviewed Mr. Clapham's public records request. Based on paragraphs 7,

The WSP has limited search capabilities by only a person's name. We are not able to conduct an agency wide search for every public record involving a specific individual. Please also note that "Public record includes any writing containing information relating to the conduct of government of the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency"(RCW 42.56.010 emphasis added). We were able to conduct searches in the following locations: WSP's public disclosure system, our case tracking system, the Computer Aided dispatch system, and our citation tracking system. Enclosed please find the responsive records we were able to locate. No information on the located records has been redacted or withheld from this response.

Because we do not generally maintain records by name, but rather by the date, nature of, and location of a specific incident, your request was otherwise not for clearly identifiable public records, as required by RCW 42.56.080. A request must provide "a reasonable description enabling the government employee to locate the requested records" (O'Neill v. City of Shoreline, 145 Wn. App. 913, 926(2008), Bonamy v. City of Seattle. Neighborhood Alliance of Spokane County v. County of Spokane. No.84108-0(Wash. Sept 29, 2011), and Hangartner v. City of Seattle).

If you are aware of a specific incident, please feel free to resubmit your request with clarification, including the date, location, type of investigation, nature of WSP involvement (ie: Crime Lab, State Fire Marshal, Homeland Security, Traffic Enforcement, etc.), nature of the party's involvement, names of other parties involved, or any other specific identifiers, etc.

You may obtain a-conviction criminal history-report, which is maintained by name, on any individual (Chapter 10.97 RCW). To obtain a conviction criminal history record for Washington State, complete the online form at <https://fortress.wa.gov/wsp/watch/>. Non-conviction criminal history record information is for law enforcement use only, and restricted from dissemination under provisions of RCW 10.97.050 and 28 USC § 534 and 28 CFR Part 20. For specific public disclosure documents regarding each conviction, please contact the arresting agency.

CP at 35. (Emphasis removed.) The mail manifest showed that the PRA was received into WSP's system at 10:17:14 am on May 16, 2016. Id. Ms.

8,9, and 10 of the request, I interpreted the request as asking for records of Patrol officers intentionally destroying Mr. Clapham's property, and using technology (such as "emissions") to disturb his sleep or cause health issues. Since the Patrol does not engage in such investigative techniques, I did not consider his request as one for identifiable public records because it does not relate to the conduct of Patrol personnel.  
CP at 25-26.

This subsequent assertion is irrelevant for several reasons: 1) it is not based upon personal knowledge but what Ms. Dolan heard or read in records, 2) the Public Records Act does not provide for different classes of searches based upon the records officer's estimation of viability of the search, 3) the public records officer Ms. Dolan failed to notify the requestor of the new basis that the request was for unidentifiable records, and 4) the fact that "[t]he merits of a PRA claim are determined...on the circumstances existing at the time of the request." *Zink v. City of Mesa*, 162 Wn. App. 688, 728, 256 P.3d 384(2011). The subsequent assertions at summary judgment were made long after WSP had finalized its May 18, 2016 response.

The subject matter of the records sought could easily discerned from its wording in the request. Ms. Dolan's admits specifically: "...I interpreted the request as asking for records of Patrol officers intentionally destroying Mr. Clapham's property, and using technology (such as "emissions") to disturb his sleep or cause health issues." *Id.* Sending

copies of traffic citations did not constitute a response. Id.

The PRA sought records in **possession** of the WSP created by **any** person (federal, state, or local agency, volunteer or any other actor) participating in these and the other enumerated actions that were occurring multiple times per night every night at the requestor's home. The WSP admittedly participates in joint operations with federal, state, municipal and other policing organizations. The records officer's search should have included those shared databases. The search should also focus upon the investigative divisions and those divisions responsible for adopting and testing new technology. The scope of the search should reasonably look at all records "...prepared, owned, used, or retained..." by WSP.

#### Clarification

Ms. Dolan did not seek clarification, she sought limitation. Ms.

Dolan's e-mail of May 18, 2016, stated in part:

If you are aware of a **specific incident**, please feel free to **resubmit** your request with clarification, including date, location, type of investigation, nature of WSP involvement (ie: Crime Lab, State Fire Marshal, Homeland Security, Traffic Enforcement, etc.), nature of the party's involvement, names of other parties involved, or any other specific identifiers.  
CP at 35. (Emphasis added.)

The PRA does not require such limitation. Conforming the request to such format would be futile because it would limit its scope and negate some of

the terms.

WSP did essentially the same thing in *Gendler v. Batiste*, 174 Wn.2d 244, 248-49, 274 P.3d 346, (2012): "...WSP responded that **it could not provide** accident reports **by location** and that it would provide records to Gendler only if he were able to specifically identify the person involved in the collision and the precise collision date." Id. (Emphasis added.) The Gendler court found this inaccurate and determined that WSP did in fact possess the records requested. Id.

"Clarification" was addressed in part seven of the comments to WAC 44-14-040:

An agency may seek a clarification of an "unclear" request. RCW 42.17.320 /42.56.520. An agency can only seek a clarification when the request is objectively "unclear." Seeking a "clarification" of an objectively clear request delays access to public records. If the requestor fails to clarify an unclear request, the agency need not respond to it further. RCW 42.17.320 /42.56.520. If the requestor does not respond to the agency's request for a clarification within thirty days of the agency's request, the agency may consider the request abandoned. If the agency considers the request abandoned, it should send a closing letter to the requestor.

Wash. State Bar Ass'n, Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws §.6.4(3) at 6-17(2d 2014) explains that identifiable public records are ones that could potentially be recovered if the agency staff perform a search that is

reasonably calculated to uncover all relevant documents:

The PRA is liberally construed, so to be adequate, a 'search must be reasonably calculated to uncover all relevant documents. But agencies are only required to produce 'identifiable public records.' 'An identifiable record' is [a record] agency staff can reasonably locate. This 'require[s] agencies] to make more than a perfunctory search' and takes into account how the agency organizes its records and what tools it has to locate those records....**Consider all sources of records, including other records systems used by the agency, all locations where records are stored, and all custodians that might have responsive records.** 'The search should not be limited to one or more places if there are additional sources for the information requested....The agency's information technology staff may need to be consulted to make sure that all relevant servers and databases have been included in the search.

Id. at sec. (a)(i) at 6-31. (Emphasis added.)(Citations omitted.)

The appellant's PRA spelled out clearly and concisely the records being sought. The request can not be objectively "unclear" if its provides a sufficient description of the documents it sought. *Levy v. Snohomish Co.*, 167 Wn. App. 94, 98, 272 P.3d 87(2012).

### **Assignment of Error No. 2 & 3 Searching Databases and Disclosure**

**WSP claimed no exemptions in this matter.** Appellant requested factual information, through interrogatories, on the following issues related to the public records requests use of the technology, nature and extent of data and databases, nature of records keeping in centralized investigations such as Fusion Centers, etc., activities of volunteers in

investigations, what facts WSP was aware of that would form the basis for a claim that requestor failed to follow proper PRA procedures, what facts WSP was aware of that would form the basis for a claim that requestor failed to properly prosecute this action, the names and addresses of the witnesses supplying answers to the interrogatories and for each person what portion of the interrogatories they supplied answers for. That was the extent of discovery. The Sanders court touched on the issue of what is relevant in PRA actions and discovery therein:

...the use of the term " relevant" evokes the concept of relevance applicable to pretrial discovery: " evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." ER 401 Clearly, this broad definition includes evidence that does not facially relate to a given controversy, but whose relevance arises indirectly from context.

Sanders v. State, 169 Wn.2d 827, 240 P.3d 120(Wash. 2010).

Interrogatory number two sought information about the nature and extent of the records maintained by WSP to allow comparison and analysis of the search performed by Ms. Dolan. CP at 98-100. This request was directly relevant to a central issue in the lawsuit, namely WSP's claim that Appellant's PRA request was not for identifiable public records because WSP alleged "...has limited search capabilities by only a person's name." CP at 40. The question and response were:

INTERROGATORY NO, 2: List all databases, whether in digital and/or other form, that WSP uses and/or has access (including those it has access to through its Memorandums of Understanding and/or other agreements) to that can be queried and/or searched by an individual's name.

ANSWER: Objection, This interrogatory requests information that is beyond the scope of permissible discovery and is not reasonably calculated to lead to the discovery of relevant and admissible evidence. See CR 26. The Patrol and its officers may have "access to databases that are completely unrelated to the public records request at issue in this litigation. The public records request at issue in this dispute was limited to records related to the surveillance of Plaintiff with technology that caused health issues. As stated in the Declaration of Edward J. Swainson and Declaration of Gretchen Dolan, the Patrol does not use such technology. As such, the requested records do not exist. Accordingly, listing every database that the Patrol or its officers use is beyond the scope of discovery in this litigation. See CR 26. Requesting the names of every database accessed by the Patrol or its officers is also unduly burdensome given the limited issues in this litigation. It is unduly burdensome, oppressive, and unreasonable to expect the Defendant to ask every Patrol employee to identify the databases that he or she may access. The Patrol does not have the technological capability to search, every employee's computer for that information. It would be exceptionally difficult to attempt to obtain a reasonably accurate list of every database accessed by a Patrol employee. This overly-broad request is not reasonably calculated to lead to the discovery of admissible evidence as the overwhelming majority of the response would have nothing to do with, the underlying claims in this lawsuit. Additionally, the Patrol's officers may have access to federal databases that are confidential under federal law, and the Patrol objects to identification of any federal database where such identification violates federal law.

Without waiving the objection: The Patrol's Information' Technology Division conducted a reasonable review of institutional records in light of limited issues in this litigation, and created a spreadsheet to answer this interrogatory. Please see the Excel spreadsheet included with the Defendant's Objections" and Answers to Plaintiff's Interrogatories. The spreadsheet does not include any databases with employee name information if that was the only name field in the database. The spreadsheet does not include any individual sources (e.g., Excel spreadsheets) that may exist on an individual computer. The spreadsheet

does not include any information sources outside the Patrol that one or more of the agency's officers may have access to.  
CP at 98-100.

On the spreadsheet, the following additional limitations were asserted: “This does not include items where Microsoft Excel may be used.” and “There may be other small databases which were not discovered due to the time factor.” CP at 181-83. The spreadsheet contained twenty three (23) databases that were not listed before. Ms. Dolan’s declaration for summary judgment included several more. By her own declaration, they were not included in her May 18, 2016 search or response. *Id.* The allegations, tone and stance of WSP’s response to discovery was indicative of the entire PRA process.

Even after the PRA *and* the discovery request, their remained databases which the WSP failed to identify. LinX was not listed as a database, yet the WSP is a party to the following MOU:

This Memorandum of Understanding (MOU) is entered into by the Naval Criminal Investigative Service and the Federal, State, and local law enforcement agencies participating in an information sharing initiative for operation of a regional warehouse of databases, known as the Puget Sound Law Enforcement Information Exchange (LinX)...The parties to this MOU are...the Washington State Patrol....The LinX is a cooperative partnership of Federal, State, county, and local law enforcement agencies, in which each agency is participating under its own legal status...The LinX will become a central, electronic repository of derivative Federal, State, county, and local law enforcement and investigative data, with each party

providing for use copies of information from its own records which may be pertinent to LinX's mission...Each party retains sole ownership of, exclusive control over content and sole responsibility for the information it contributes...To the extent that any newly discovered links, matches, relationships, interpretations, etc., located in "mining" of LInX information may be relevant and appropriate for preservation as independent records, it will be the responsibility of the accessing party to incorporate such information as records of the accessing party in the party's own official records system(s)...

Memorandum of Understanding Among the Naval Criminal Investigative Service and Participating Federal, State, County and Municipal Agencies for an Information Sharing Initiative Known as the Puget Sound Law Enforcement Information Exchange (LinX). Bellevue City Council Resolution No. 7083 (October 4, 2004)

WSP also failed to identify WACIC and failed to search ACCESS.

The MOU describing these databases, states in part:

The purpose of this Memorandum of Understanding (MOU) between the Washington State Patrol (WSP) and the Police Department of the City of Bellevue (Department), hereinafter referred to as the "parties", is to memorialize the parties understanding regarding transmitting, receiving, and storage of information contained in the National Crime Information Center (NCIC) and Washington Crime Information Center (WACIC) systems of records made available through a data transfer program. The data provided by WSP will be used by Bellevue Police Department as input to a law enforcement application.

WSP provides NCIC data to the Bellevue Police Department through WSP's Central Computerized Enforcement System (ACCESS). The Department has a separate agreement with WSP regarding access to, use of, and subsequent dissemination of information obtained through ACCESS, including NCIC data...The Federal Bureau of Investigation (FBI) maintains the NCIC system of records containing multiple files. WSP maintains the WACIC system of records containing multiple files. Information included may be stolen vehicles, vehicles wanted in conjunction with felonies, wanted persons...

Memorandum of Understanding between the Washington State Patrol and the Bellevue Police Department, page 1 (June 17, 2009)

The Public Records Deskbook properly states at section 16.2(1)(c):

An agency is required to include its explanation of its claimed exemptions with its response to requestors when it refuses, in whole or in part, the inspection of a public record. Mitchell v. State Dep't of Corr. 164 Wn. App. 597, 606, 277 P.3d 670(2011). Even if it produces records in installments, an agency must provide an exemption log with each installment that includes a redacted record. If an agency withholds a record entirely but does not list the document on the exemption log or otherwise indicate to the requestor that it is withholding a record, the agency's action is called "silent withholding" because it gives the requestor the misleading impression that all documents responsive to the request were disclosed. Zink, 162 Wn. App. at 711. See also: Rental Housing Association of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 539-41, 199 P.3d 393(2009).

In the immediate action, silent withholding took place both in discovery as well as in the PRA response. WSP specifically stated: "...Patrol objects to **identification** of any federal database..." CP at 212.

#### Adequacy of the Search

The relevant time period for analysis of agency action under the PRA spans from the time the request is received through the time the agency responds, not thereafter. Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 103-04, 117 P.3d 1117 (2005) (agencies are prohibited from resisting compliance with the PRA until after a suit is filed without facing a penalty). As stated, the record clearly shows the time

allotted to the search herein was extremely short. The request was received by WSP on May 16, 2016 at 10:17 am. CP at 33. Gretchen Dolan's affidavit demonstrates lack of knowledge of its actual arrival "On or about May 16, 2016, the Patrol received a public records request" CP at 25. "In an effort to provide Mr. Clapham the fullest assistance, I queried CITE, CAD, SECTOR, and JIS with the search term "Clapham." CP at 26. It is clear that the search concluded with Ms. Dolan's e-mail response sent to the respondent within minutes after the search began and less than two days after receipt.

The following claims that clearly demonstrate that an adequate search was not performed:

Additionally, the Patrol's officers may have access to federal databases that are confidential under federal law, and the Patrol objects to identification of any federal database where such identification violates federal law.

CP at 98-99.

This does not include items where Microsoft Excel may be used. There may be other small databases which were not discovered due to the time factors.

Id.

Without waiving the objection: The Patrol's Information Technology Division conducted a reasonable review of institutional records in light of the limited issues in this litigation, and created a spreadsheet to answer this interrogatory.

Id.

The spreadsheet does not include any individual sources (e.g., Excel spreadsheets) that may exist on an individual computer.  
CP at 181-183.

The spreadsheet does not include any information sources outside the Patrol that one or more of the agency's officers may have access to.  
Id.

Since the Patrol does not engage in such investigative techniques, I did not consider his request as one for identifiable public records because it does not relate to the conduct of Patrol personnel.  
CP at 25-26.

Sanders v. State, 169 Wn.2d 827, 835-36, 240 P.3d 120(2010)

explained succinctly:

This case involves interpretation and application of the PRA. Because PRA analysis uses technical terms that are sometimes confusing, we begin by identifying the terminology used throughout this opinion:

1. Records are either "disclosed" or "not disclosed." A record is disclosed if its existence is revealed to the requester in response to a PRA request, regardless of whether it is produced.

2. Disclosed records are either "produced" (made available for inspection and copying) or "withheld" (not produced). A document may be lawfully withheld if it is "exempt" under one of the PRA's enumerated exemptions. A document not covered by one of the exemptions is, by contrast, "nonexempt." Withholding a nonexempt document is "wrongful withholding" and violates the PRA. Yousoufian v. Office of King County Executive, 152 Wash.2d 421, 429, 98 P.3d 463(2004)(Yousoufian I).

3. A document is never exempt from disclosure; it can be exempt only from production. An agency withholding a document must claim a "specific exemption," i.e., which exemption covers the document. RCW 42.56.210(3). The claimed exemption is "invalid" if it does not in fact cover the document.

Id at 835-36.

Neighborhood Alliance clearly states:

Moreover, records are never exempt from disclosure, only production, so an adequate search is required in order to properly disclose responsive documents. See *Sanders*, 169 Wash.2d at 836, 240 P.3d 120. The failure to perform an adequate search precludes an adequate response and production. The PRA " treats a failure to properly respond as a denial." *Soter v. Cowles Publ'g Co.*, 162 Wash.2d 716, 750, 174 P.3d 60 (2007) (citing RCW 42.56.550(2), (4) (formerly RCW 42.17.340)). Thus, an inadequate search is comparable to a denial because the result is the same, and should be treated similarly in penalty determinations, at least insofar as the requester may be entitled to costs and reasonable attorney fees under RCW 42.56.550(4) Id, at 721.

The method of maintaining records by an agency can not serve as a method to reduce or avoid an adequate search of the agency records under the PRA. The remote databases are included in the agencies documents that require searching. *Nissen v. Pierce County*, 183 Wn.2d 863, 877, 357 P.3d 45(2015) held:

With that understanding, it is clear that an agency's " public records" include the work product of its employees. And we find nothing in the text or purpose of the PRA supporting the County's suggestion that only work product made using agency property can be a public record. To the contrary, the PRA is explicit that information qualifies as a public record " regardless of [its] physical form or characteristics." RCW 42.56.010(3). In *O'Neill* we held that a city official stored a public record on a private computer in her home by using the computer for city business, 170 Wn.2d at 150, which is consistent with the idea that employees can use their own property and still be within the scope of their employment. *Dickinson v. Edwards*, 105 Wn.2d 457, 467-68, 716 P.2d 814 (1986). There is no reason to treat cell phones differently. We hold that records an agency employee prepares, owns, uses, or retains on a private cell phone within the scope of employment can be a public record if they also meet the other requirements of RCW 42.56.010(3).

When the agency is aware that records exist in different databases, a reasonable search would include those databases that reasonably could be expected to contain the type and nature of documents requested. Otherwise, the PRA would be akin to swiss cheese with holes throughout. The fact that the agency has, uses and maintains records on remote computers (including those that are personal) dictates that those must be searched to have a reasonable search or any search at all. Otherwise certain records could just be stored off site or on jointly used computers and not be amenable to search. "...if government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 150, 240 P.3d 1149(2010). *Nissen v. Pierce County*, 183 Wn.2d 863, 886, 357 P.3d 45(2015) addressed agency's that disseminated their data to employee devices.

Therefore, we hold agency employees are responsible for searching their files, devices, and accounts for records responsive to a relevant PRA request. Employees must produce any public records (e-mails, text messages, and any other type of data) to the employer agency. The agency then proceeds just as it would when responding to a request for public records in the agency's possession by reviewing each record, determining

if some or all of the record is exempted from production, and disclosing the record to the requester.

The PRA applies to records, “prepared, owned, used, or retained” and is not limited to records *generated* by the WSP. *Nissen v. Pierce County*, 183 Wn.2d 863, 876, 357 P.3d 45(2015). The search in this matter barely touched on the actual records.

WSP has a duty under the PRA and the rules of discovery of fully answering and disclosing the records in its possession. They can not ignore them. They can not casually mention databases which they use, control and contribute to and ignore them. *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120(Wash. 2010). Wash. State Bar Ass'n, Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws § 6.4(3) at 6-18 (2014 ed.) states:

If it is clear what the requestor is seeking, do not “hide the ball” by interpreting a request in a manner that will not provide the records sought. The PRA mandates that its provisions must be “liberally interpreted”; therefore, absent evidence to the contrary, agencies can expect a court to broadly interpret a request. Agencies that narrowly interpret a request to avoid producing unfavorable or unflattering records can expect harsh consequences.

#### **Assignment of Error No. 4 Burden at Summary Judgment**

WSP based its motion for summary judgment on two declarations.

Gretchen Dolan was the records custodian and performed the search in this matter. CP at 23-27. Attached to her declaration was a copy of the request and a portion of the response. CP 29-40. The other declaration was from Captain Edward J. Swainson who was not involved in the PRA but supplied information about the practices of the WSP and a general denial that WSP participated in any of the enumerated types of activities in the general sense. CP at 41-44. Captain Swainson did not supply information about the PRA leaving Ms. Dolan's declaration as the sole proof on those issues. Id. Captain Swainson's declaration lists a distinguished career with WSP holding many offices and participating in many facets of the organization. Id. He then states in several paragraphs in essence "...based upon my experience in criminal investigation and conducting surveillance of subjects, the Patrol does not use technology that..." Id at 42-43. He does not say that he is the person that is responsible or most knowledgeable about the issues that were presented by the requestor or the technology. Id. WSP uses his distinguished service as an inference of this and his qualifications to testify about these issues but does not lay a specific foundation that supplies a direct nexus. Id. Solely from his declaration, the WSP bases their argument that they should not have to perform much of a search because these activities do not exist. Id. Ms. Dolan's declaration

shows that she has no personal knowledge about these issues and she testifies based upon what she has read in records and heard which lacks foundation and is hearsay as substantive evidence. CP at 41-44, ER 801.

Marks v. Benson, 62 Wn. App. 178, 813 P.2d 180 (1991), states:

CR 56(e) requires that affidavits submitted in summary judgment proceedings be made on personal knowledge and set forth such facts as would be admissible in evidence. The affiant must affirmatively show competence to testify to the matters stated. It is not enough that the affiant be "aware of" or be "familiar with" the matter; personal knowledge is required. Guntheroth v. Rodaway, 107 Wash.2d 170, 178, 727 P.2d 982 (1986). Unsupported conclusional statements and legal opinions cannot be considered in a summary judgment motion. Orion Corp. v. State, 103 Wash.2d 441, 461-62, 693 P.2d 1369 (1985).

The content of the affidavit itself must show the affiant's personal knowledge. Henry v. St. Regis Paper Co., 55 Wn.2d 148, 151-52, 346 P.2d 692 (1959). It is not sufficient to merely state that the affiant is competent or has knowledge; the substance of the affidavit must provide verification of that assertion. Antonio v. Barnes, 464 F.2d 584 (4th Cir. 1972). Considering the portions of both declarations that are admissible, there is insufficient evidence to support summary judgment.

**Fees, Costs and Penalties in the Trial Court and on Appeal.**

Requestor is pro se so no attorney's fees can be awarded under the

PRA even though he is a licensed attorney. Requestor has incurred substantial costs and unrecoverable time spent as well as continued to endure the treatment without the ability to obtain records that could guide future litigation to stop such treatment. Requestor asks this court to award any penalties, fees and costs allowed under court rules and the PRA. *See*, RAP 18.1(a). RCW 42.56.550(4). PRA actions serve as a precursor to other litigation and assist fact based claims and avoid CR 11 actions. This becomes magnified in actions such as this one wherein discovery can be difficult. WSP's failure to search and failure to provide both slowed that process and prevented requestor from moving forward. This subjected requestor to the continued abuse. The abuse was substantial.

In determination of the proper penalty *Yousoufian V. Office of Ron Sims*, 165 Wn.2d 439,453-62, 200 P.3d 232 (2009) (*Yousoufian III*) held:

Determining a PRA penalty involves two steps: (1) determine the amount of days the party was denied access and (2) determine the appropriate per day penalty between \$5 and \$100 depending on the agency's actions... Courts should bear in mind the following factors, which may overlap and are not meant to comprise an exclusive list of considerations. Factors that can serve to mitigate the penalty are (1) the lack of clarity of the PRA request; (2) an agency's prompt response or legitimate follow-up inquiry for clarification; (3) good faith, honest, timely, and strict compliance with all the PRA procedural requirements and exceptions; (4) proper training and supervision of personnel; (5) reasonableness of any explanation for noncompliance; (6) helpfulness of the agency to the requestor; and (6) the existence of systems to track and retrieve public records.

Conversely, aggravating factors that increase a penalty are (1) a

delayed response, especially in circumstances making time of the essence; (2) lack of strict compliance with all the PRA procedural requirements and exceptions; (3) lack of proper training and supervision of personnel and response; (4) unreasonableness of any explanation for noncompliance; (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA; (6) dishonesty; (7) potential for public harm, including economic loss or loss of governmental accountability; (8) personal economic loss; and (9) a penalty amount necessary to deter future misconduct considering the size of the agency and the facts of the case.

Yousoufian properly requests an award of attorney fees and costs incurred in connection with this appeal. See RAP 18.1(a). RCW 42.56.550(4) authorizes "all costs, including reasonable attorney fees" to be awarded to "[a]ny person who prevails" in a PRA case. Yousoufian is entitled to an award of all reasonable attorney fees and costs incurred in connection with this appeal plus a supplemental award to be calculated by the trial court for additional fees and expenses incurred on remand. RCW 42.56.550(4).

These factors should be applied in the immediate action to determine a penalty award. *O'Neill v. City of Shoreline*, 183 Wn. App. 15, 25-26, 332 P.3d 1099(2014) mandated liberal construction to favor public's right to access public records:

RCW 42.56.550(4) "shall be liberally construed to promote ... full access to public records." It provides for a more liberal recovery of costs than does RCW 4.84.010, the statute that governs recovery of costs generally. The liberal allowance for cost recovery furthers the policy of the public's right to access public records. Here, the O'Neill's prevail upon an argument that they did not advance. In recognition of the strong public policy underlying the Public Records Act, we award the O'Neill's

reasonable attorney fees and costs on appeal, subject to the foregoing limitations.

## CONCLUSION

The home is the place where the requestor lives, visits with his children, has guests over, eats, sleeps, watches television, reads, works, builds things, repairs things and lives his life in the fashion that the Constitutions of this state and this country profoundly protect. The requestor had done this for 40 years unabated and without ANY of the nighttime meddling of people or creative irritants that rob a person of the dignities of sleep and peace in their own home. The requestor should not be forced to leave his house to evade such treatment even when doing so is 100% effective.

This PRA is very important. WSP should be ordered perform a search inclusive of investigative databases which it both shared and in its sole possession, as well as those troopers devices working in the areas queried both solely and with other agencies. The search should be inclusive of records of other organizations that WSP uses, has access to and/or shares despite size. If WSP truly does not participate in such activities but has records of such actions by other organizations, that if

very valuable information. Due to WSP's position in this state and their work with other organizations, there is a high probability that these records do in fact exist. The PRA process will prove valuable as it will act as a filter to review such matters.

**LAW OFFICE OF NICHOLAS CLAPHAM**

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