

NO. 94362-1

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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NICHOLAS CLAPHAM,

Appellant,

v.

WASHINGTON STATE PATROL,

Respondent.

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**RESPONDENT'S OPENING BRIEF**

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## I. INTRODUCTION

The material facts in this case are undisputed. The dispute involves pure questions of law. The Washington State Patrol (Patrol) provided Mr. Nicholas Clapham the fullest assistance by conducting a reasonable search for records involving him, and inviting clarification to conduct a more targeted search.

Within two days after the Patrol received Mr. Clapham's request, the agency provided the responsive records to him, described the databases searched, explained the agency's limitations on searching for records based on a person's name, and invited Mr. Clapham to provide additional information for another search. Mr. Clapham declined that invitation. Instead, he filed this lawsuit.

The Patrol went beyond its legal obligation in attempting to decipher Mr. Clapham's request for items that are not identifiable public records. The technology and surveillance techniques Mr. Chapman referred to are not owned or used by the Patrol, if they exist at all. In short, the trial court properly concluded, as a matter of law, that the Patrol conducted an adequate search, Mr. Clapham's request did not seek identifiable public records, and the Patrol complied with the Public Records Act (PRA), chapter 42.56 RCW. Accordingly, this Court should affirm.

## II. ISSUES PRESENTED

1. Did the trial court correctly conclude that the Patrol complied with the PRA by conducting a reasonable, adequate search, explaining the agency's search capabilities, and inviting Mr. Clapham to provide more information so that the agency could search for records?
2. Did Mr. Clapham's request seek identifiable public records, when he requested information regarding technology unrelated to the Patrol's operations and functions, and did not provide a reasonably detailed description of the records to enable the Patrol's public records manager to comprehend the request and locate responsive records?

## III. STATEMENT OF THE CASE

### A. Patrol's Law Enforcement Operations

The Patrol is a general authority Washington law enforcement agency. RCW 10.93.020(1); *see also* RCW 43.43.030. The Patrol's Field Operations Bureau and Investigative Services Bureau conduct criminal investigations. CP 24. The Field Operations Bureau primarily conducts investigations of traffic-related crimes. *Id.* The Investigative Services Bureau comprises several divisions that conduct other types of criminal investigations. *Id.*

Patrol officers may conduct surveillance in criminal investigations. *See* CP 42. When Patrol officers conduct surveillance of a subject, the officers commonly use cell phones, police radios, vehicles, handheld cameras and video recorders, binoculars, and disguises. *Id.*

When surveilling a subject, the Patrol does not use technology that would cause nausea, muscle cramping, or increased heart rate. CP 43. The Patrol does not use technology that would disrupt a subject's sleep cycle. *Id.* Patrol officers do not use sleep disruption as an investigative technique. *Id.* Patrol officers do not vandalize a subject's property when conducting surveillance. *Id.* The Patrol does not use emissions technology that affect a person's health. *Id.*

**B. Mr. Clapham's Public Records Request Seeking Broad Categories of Records Related to Surveillance Operations**

In his complaint, Mr. Clapham alleges that he submitted public records requests to several law enforcement agencies, such as the Bellevue Police Department, for records regarding his alleged exposure to emissions technology, which he believes has harmed his health. CP 248. Those law enforcement agencies allegedly denied his requests based on no responsive records. *Id.*

Mr. Clapham submitted a similar request to the Patrol on or about May 10, 2016. *Id.* Mr. Clapham has characterized this request as "twelve questions." CP 136. The request read, in relevant part:

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 interaction 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 parties, 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 as individual seeking information for my personal use.

CP 29-31.

Throughout this litigation, Mr. Clapham has made clear that he sought records related to a surveillance operation using emissions technology, which caused his health issues and resulted in property damage.

CP 249 ("The records plaintiff seeks concern sophisticated equipment with capabilities not fully known to the public and not detectable by the public

without expertise in the field together with sophisticated equipment at great expense.”); CP 133-34 (“Simply stated: the records sought relate to emissions that correlated human involvement with each event.”). On or about May 16, 2016, the Patrol received Mr. Clapham’s request that sought these records. CP 25.

**C. Patrol’s Public Records Manager Responds to Mr. Clapham’s May 16, 2016 Request**

Gretchen Dolan is the Patrol’s Public Records Manager. CP 23. In this capacity, she is the custodian of records for the Patrol. *Id.* Ms. Dolan has been employed by the Patrol for over twenty-five years, and has served as the Public Records Manager for over fifteen years. *Id.* As the Patrol’s Public Records Manager, she has reviewed records from every Patrol bureau or division. CP 24. Based on her experience in reviewing these records, she has developed a familiarity with the types of investigations conducted by the Patrol’s officers. *Id.*

Ms. Dolan reviewed Mr. Clapham’s May 16, 2016 request. CP 25. While she did not consider his request as one for identifiable public records because it did not relate to the conduct of Patrol officers, Ms. Dolan proceeded to search for investigative records involving Mr. Clapham. *See* CP 25-26.

**1. Search to locate investigative records concerning Mr. Clapham.**

**a. Databases maintained or accessible by the Patrol.**

The Patrol maintains its records in several databases. CP 24. The Statewide Electronic Collision & Ticket Online Records (SECTOR) is a database that contains information regarding traffic-related citations and collisions. *See id.* The Crime Investigation and Tracking of Evidence (CITE) is a database that tracks, in part, certain criminal investigations conducted by Patrol personnel. *Id.* Computer Aided Dispatch (CAD) is a database that contains information about Patrol officers responding to calls, being dispatched to calls, and reporting their status. CP 24-25. Patrol personnel may also have access to other databases that are not maintained by the Patrol. CP 24. For example, the Judicial Information System (JIS) is a database provided by the Administrative Office of the Courts and contains information about civil and criminal cases filed in Washington state courts. CP 24-25.

To be sure, the Patrol has other records repositories. CP 24. For example, WSP Requests for Electronic Collision Records (WRECR) is a Patrol database and website for requestors to obtain collision reports. *See* CP 24; WRECR website, <https://fortress.wa.gov/wsp/wrecr/WSPCRS/> (last visited Oct. 1, 2017). The Washington Access to Criminal History

(WATCH) is a Patrol database and website for requestors to obtain criminal history conviction records. *See* CP 24; WATCH website, <https://fortress.wa.gov/wsp/watch/> (last visited Oct. 1, 2017). The Patrol also has access to third party databases such the Federal Bureau of Investigation's National Crime Information Center (NCIC), which includes information about criminal history records, fugitives, stolen property, and missing persons. *See* CP 24; NCIC website, <https://fas.org/irp/agency/doj/fbi/is/ncic.htm> (last visited Oct. 1, 2017).

**b. Search of CITE, SECTOR, JIS, and CAD databases.**

In general, when a public records requestor asks for an investigation by a person's name, CITE is the first database to query because certain criminal investigations are tracked in that database. CP 25.<sup>1</sup> Additionally, it is also prudent to query SECTOR, JIS, and CAD by a subject's name. *Id.* These databases may provide additional leads to locate investigative records regarding the subject. *Id.*

In an effort to provide Mr. Clapham the fullest assistance, Ms. Dolan queried CITE, CAD, SECTOR, and JIS with the search term "Clapham."

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<sup>1</sup> To the best of Ms. Dolan's knowledge, the Criminal Investigation Division, Homeland Security Division, and Investigative Assistance Division (with the exception of investigations conducted by the Patrol personnel assigned to the High-Density Drug Trafficking Areas (HIDTA)) use CITE to track their criminal investigations. *Id.*

CP 26. Ms. Dolan searched these databases because they are searchable by a subject's name, and are the most likely databases to have information about a criminal investigation or criminal charges filed in Washington state courts. *Id.* The JIS query indicated that on or about June 14, 2015, a Patrol officer issued a traffic infraction to Mr. Clapham. *Id.*

**2. Patrol's May 18, 2016 response to the May 16, 2016 request.**

Two days after receiving Mr. Clapham's request, Ms. Dolan responded by email. *Id.*; CP 37. Ms. Dolan detailed the databases that she searched, and she attached the responsive records that she was able to locate, which was an unredacted copy of the traffic citation and an unredacted copy of the incident's details in CAD. CP 26.

In the email, Ms. Dolan also informed Mr. Clapham that his request was otherwise not for clearly identifiable public records. CP 37. She explained the Patrol does not generally maintain records by name, but rather, it maintains them by date, nature of, and location of a specific incident. *Id.* She invited Mr. Clapham to resubmit his request with clarification. *Id.*

In terms of locating records by using a person's name as a search term, while CITE allows a name query for investigative records, CITE does not have the capacity to search all Patrol records, from every Patrol division

or employee, for any record regarding Mr. Clapham. CP 26. Additionally, a CITE search by a subject's name depends on the officer entering the subject's name into CITE. *Id.* In many circumstances, such as low-level crimes or confidential crimes, the officer may not enter the subject's name. *Id.* For that reason, Ms. Dolan invited Mr. Clapham to clarify his request if he was aware of a specific incident including the date, location, type of investigation, nature of the Patrol's involvement, and other information. *Id.* If Mr. Clapham had provided this additional information, she may have been able to identify other Patrol personnel or divisions that may have had responsive records not identified in CITE, CAD, or SECTOR. *Id.* The record does not indicate that Mr. Clapham responded to her invitation for clarification. *See* CP 248-49.

**3. Subsequent searches performed the week of January 2, 2017.**

Out of an abundance of caution, after Mr. Clapham filed this lawsuit, Ms. Dolan asked several Investigative Services Bureau divisions to search CITE with Mr. Clapham's name, the driver's license number listed on his May 16, 2016 request, and addresses attached to his request. CP 27. These searches occurred during the week of January 2, 2017. *Id.* The searches did not locate responsive records. *Id.*

**D. Procedural History**

Rather than provide clarification, Mr. Clapham filed this lawsuit in Thurston County Superior Court alleging PRA violations. CP 241-57. On February 10, 2017, the trial court heard the Patrol's motion for summary judgment. CP 4. At the summary judgment hearing, the trial court considered, *inter alia*, the Patrol's motion for summary judgment, the Declaration of Gretchen Dolan, and the Declaration of Captain Edward Swainson (the division commander for the Patrol's Homeland Security Division). CP 237; CP 42. The trial court also considered Mr. Clapham's declaration detailing his alleged exposure to the emissions technology described in his request, complaint, and other pleadings. CP 238.

Based on these submissions and oral argument, the trial court concluded: (1) Mr. Clapham's May 16, 2016 public records request to the Patrol was not for identifiable public records; (2) the Patrol conducted an adequate search for responsive records considering the entire record; (3) the Patrol provided Mr. Clapham the fullest assistance; and (4) the Patrol's response to Mr. Clapham's request did not violate the PRA. CP 238. The trial court granted the Patrol's motion for summary judgment and dismissed Mr. Clapham's lawsuit with prejudice. *Id.* This appeal followed. CP 240.

## IV. ARGUMENT

### A. Standard of Review

Agency action under the PRA is subject to de novo review. RCW 42.56.550(3). A summary judgment decision is subject to de novo review and the appellate court reviews “all facts in the light most favorable to the nonmoving party.” *Herring v. Texaco, Inc.*, 161 Wn.2d 189, 194, 165 P.3d 4 (2007) (citation omitted). Summary judgment is appropriate when the pleadings and supporting declarations before the court “show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

“The object and function of the summary judgment procedure is to avoid a useless trial[.]” *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963) (citation omitted). The moving party bears the initial burden to show “an absence of evidence to support the nonmoving party’s case.” *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)) (internal quotation marks omitted). The moving party can prove an absence of material fact by pointing to “those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.” *White v. Kent Med. Ctr., Inc.*,

61 Wn. App. 163, 170, 810 P.2d 4 (1991) (citations omitted and internal quotation marks omitted).

“Once the moving party meets its burden to show that there is no genuine issue as to any material fact, the nonmoving party must set forth specific facts rebutting the moving party’s contentions and disclosing that a genuine issue as to a material fact exists.” *Greenhalgh v. Dep’t of Corr.*, 160 Wn. App. 706, 714, 248 P.3d 150 (2011) (citation omitted). “Mere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact that preclude a grant of summary judgment.” *Id.* (citations omitted).

The material facts are undisputed. There is no dispute that Mr. Clapham submitted a request seeking broad categories of records involving him. There is no dispute that the Patrol responded to Mr. Clapham in two business days. There is no dispute that Ms. Dolan searched four databases to locate investigative records involving Mr. Clapham. There is no dispute that Ms. Dolan’s email informed Mr. Clapham that his request did not seek identifiable public records, explained the Patrol’s search limitations, described the locations searched for responsive records, and invited Mr. Clapham to clarify his request. There is no dispute that Mr. Clapham did not clarify his request.

The dispute is whether the Patrol conducted an adequate search, and whether Mr. Clapham submitted a request for identifiable public records. These are questions of law not fact. The trial court properly concluded, as a matter of law, that the Patrol conducted an adequate search and Mr. Clapham did not submit a request for identifiable public records.

**B. The Patrol Complied with the PRA by Conducting a Reasonable Search**

**1. The Patrol searched the databases that were reasonably likely to uncover the documents sought.**

Based on the information provided by Mr. Clapham, Ms. Dolan conducted an adequate search for identifiable investigative records involving his interactions with the Patrol. “The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents.” *Neighborhood All. of Spokane Cty. v. Cty. of Spokane*, 172 Wn.2d 702, 720, 261 P.3d 119 (2011) (citation omitted). “What will be considered reasonable will depend on the facts of each case.” *Id.* (citation omitted). An “agency bears the burden, beyond material doubt, of showing its search was adequate.” *Id.* at 721 (citation omitted).

While an agency may not perform “perfunctory searches,” an agency is not required to “search *every* possible place a record may conceivably be stored, but only those places where it is *reasonably likely* to

be found.” *Id.* at 720 (emphasis in original). An agency may show it conducted a reasonable search by presenting “reasonably detailed, nonconclusory affidavits submitted in good faith.” *Id.* at 721. “These should include the search terms and the type of search performed, and they should establish that all places likely to contain responsive materials were searched.” *Id.* “An adequate response to the initial PRA request where records are not disclosed should explain, at least in general terms, the places searched.” *Id.* at 722. That is the case here.

Ms. Dolan searched the places reasonably likely to locate investigative records regarding Mr. Clapham. Ms. Dolan queried CITE, CAD, SECTOR, and JIS with the search term “Clapham.” CP 26. These databases are the most likely databases to have information about a criminal investigation or criminal charges filed in Washington state courts. *Id.* Specifically, CITE tracks, in part, certain criminal investigations conducted by Patrol personnel. CP 24. When a requestor asks for an investigation by a person’s name, CITE is the first database to check. CP 25. While this database does not necessarily track every criminal investigation, CP 25-26, Ms. Dolan supplemented her search by querying SECTOR, CAD, and JIS. CP 26. Ms. Dolan’s search was more than adequate.

A particular challenge with Mr. Clapham’s request is its lack of clarity. The request had a broad date range (spanning over 11 years) and no

specific context of the investigation. CP 29-32. As such, the nature of the described surveillance investigation is unclear (e.g., drug trafficking, human trafficking, or traffic violations). As a result, Mr. Clapham's "twelve questions" gave the Patrol very little concrete information to query. The broadest, concrete term was Mr. Clapham's name.

Additionally, out of an abundance of caution, Patrol personnel conducted a second search of CITE with Mr. Clapham's name, driver's license number, and addresses attached to his request during the week of January 2, 2017. CP 27. Again, this search did not yield responsive records. *Id.* Accordingly, the Patrol conducted a reasonable, adequate search.

Mr. Clapham claims the Patrol did not conduct an adequate search because: (1) within five business days, Ms. Dolan promptly responded to his request by searching for responsive records and sending an email with records yielded from that search; and (2) the Patrol should have searched other databases, including "remote databases," to locate records of law enforcement agencies surveilling Mr. Clapham with the described emissions technology. Opening Br. at 26-36. Both of these claims fail.

The test for a reasonable, adequate search does not require the agency to spend a specific amount of time. It requires a search of all locations where the records are reasonably likely to be found. Depending on the requested records and the agency's search capabilities, a public

records officer may be able to quickly conduct a search and promptly produce records. To be sure, an agency's perfunctory search, which does not include the locations reasonably likely to have responsive records, is unreasonable. *See Francis v. Wash. State Dep't of Corr.*, 178 Wn. App. 42, 64, 313 P.3d 457 (2013), *review denied*, 180 Wn.2d 1016, 327 P.3d 55 (2014) (the agency acted in bad faith, in part, because agency personnel "spent no more than 15 minutes considering [the plaintiff's] request and did not check any of the usual record storage systems"). But, an agency search of the relevant databases (though it may not take a lot of time) does not render a search inadequate as a matter of law.

In this case, Mr. Clapham requested broad categories of records concerning an alleged investigation of him. In this context, it was reasonable for Ms. Dolan to search the standard databases likely to have investigative records and any civil or criminal cases involving Mr. Clapham. *See contra id.* (agency did not search the usual locations for responsive records). Ms. Dolan searched CITE, which tracks certain Patrol investigations, and is the first place to search for investigative records by name. CP 25. Additionally, it is reasonable to conclude that a traffic investigation is a likely Patrol investigation involving a person. A primary function of the Patrol is traffic enforcement. The Patrol has devoted the Field Operations Bureau to traffic enforcement. *See* CP 24. As such, a

search of SECTOR and CAD, which contain information about traffic investigations, was reasonable. CP 24-25. This search was not perfunctory because it covered the locations reasonably likely to have responsive records. In addition, Ms. Dolan provided Mr. Clapham additional information about the Patrol's divisions and operations, and invited him to submit additional information for a further search. CP 37. This is not a PRA violation. It is quite the opposite; it is the fullest assistance.

**2. The Patrol is not required to search in databases and locations where it would be unreasonable to expect to find responsive documents.**

Mr. Clapham contends that the Patrol should have queried dozens of databases based on his broad description of the requested records. Opening Br. at 29-31, 34-36. That is not so. Courts “inquire into the scope of the agency’s search as a whole and whether that search was reasonable, not whether the requester has presented alternatives that he believes would have more accurately produced the records he requested.” *Hobbs v. State*, 183 Wn. App. 925, 944, 335 P.3d 1004 (2014). “The onus is instead on the agency—necessarily through its employees—to perform an adequate search for the records requested.” *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 885, 357 P.3d 45 (2015) (citation and internal quotation marks omitted). The Patrol’s actions here satisfy this requirement.

The person with a comprehensive knowledge of the Patrol's records and records management systems reviewed Mr. Clapham's request. Based on her years of experience as the Patrol's records custodian, Ms. Dolan conducted a standard search for investigative records based on a person's name by querying CITE, SECTOR, CAD, and JIS. CP 23; CP 25-26. Mr. Clapham's "alleged failings" of Ms. Dolan's search "do not render [her] records search unreasonable." *See Hobbs*, 183 Wn. App. at 945 (internal quotation marks omitted) (State Auditor conducted a comprehensive and reasonable search notwithstanding the requestor's contentions that the search was unreasonable).

Mr. Clapham cites to *Nissen*, 183 Wn.2d at 877, for the proposition that the Patrol had a duty to search every database (which agency personnel could access) for the responsive records. Opening Br. at 34. But, there is a key distinction between that case and Mr. Clapham's request. In *Nissen*, it was evident that the elected prosecuting attorney had text messages on his personal cell phone relating to his official duties. 183 Wn.2d at 870. The issue in that case dealt with a specific record on a specific device—not whether an agency must search every records repository (including third party records repositories accessible to agency personnel) to respond to a public records request. Indeed, *Nissen's* reasoning is contrary to Mr. Clapham's argument. *Nissen* recognized "[w]hether stored in a file

cabinet or a cell phone, the PRA has never authorized unbridled searches of every piece of information held by an agency or its employees to find records the citizen believes are responsive to a request.” *Id.* at 885 (citation and internal quotation marks omitted).

An agency need not disrupt its operations to search databases that would not have responsive records. The PRA directs agencies to “adopt and enforce reasonable rules . . . to prevent excessive interference with other essential functions of the agency.” RCW 42.56.100. A search of every records repository—in response to every public records request—unreasonably interferes with essential agency functions. Such a search would include locations that are not reasonably likely to have responsive records.

For example, WRECR, a Patrol database and website, contains collision reports. *See* CP 24; WRECR website, <https://fortress.wa.gov/wsp/wrecr/WSPCRS/> (last visited Oct. 1, 2017). Mr. Clapham’s request did not describe a vehicular collision, or seek collision records. WATCH is a Patrol database and website for requestors to obtain criminal history conviction records. *See* CP 24; WATCH website, <https://fortress.wa.gov/wsp/watch/> (last visited Oct. 1, 2017). In the interests of providing Mr. Clapham the fullest assistance, Ms. Dolan’s email informed him about this website. CP 35. But, Mr. Clapham’s request did

not specifically seek conviction records. As such, querying those databases are unlikely to yield responsive records.

Mr. Clapham appears to argue that the Patrol should have queried the databases listed in the answer to his interrogatory. Opening Br. at 29. But, many of these databases may have nothing to do with the records he sought. For example, the Combined DNA Index System (CODIS) is a database of DNA profiles. CP 181; *State v. McConnell*, 178 Wn. App. 592, 598, 315 P.3d 586 (2013) (Patrol crime laboratory employee matched a DNA profile from evidence with a DNA profile in CODIS); Frequently Asked Questions About CODIS and NDIS, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited Oct. 1, 2017). Mr. Clapham's request did not describe DNA analyses, and CODIS is unlikely to have responsive records. In short, searching every database or records repository diverts an agency's attention from other pending public records requests, and slows the response time for other requestors to receive records.

**3. The PRA does not require an agency to search databases for records that are not "prepared, owned, used, or retained" by the agency.**

If a record is not "used" by an agency employee, an agency has no obligation to search for the record. *See* RCW 42.56.010(3); *Nissen*, 183 Wn.2d at 882 ("A record that is prepared and held by a third party,

without more, is not a public record.”). The Patrol has no obligation to search databases maintained by third parties unless Patrol personnel “evaluat[ed], review[ed], or refer[ed] to a record [in a database] in the course of [agency] business[.]” *Nissen*, 183 Wn.2d at 882. “On its face the [PRA] does not require, and [courts] do not interpret it to require, an agency to go outside its own records and resources to try to identify or locate the record requested.” *Limstrom v. Ladenburg*, 136 Wn.2d 595, 603 n.3, 963 P.2d 869 (1998).

For example, a government attorney may have access to Westlaw. The attorney’s employing agency may receive a public records request for a copy of the *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968), opinion. The government attorney need not search Westlaw to retrieve the opinion for the requestor, if the government attorney had never “used” the opinion. Rather, the PRA requires the government attorney to disclose the *Terry* opinion if the attorney had “used” the opinion in the course of researching an issue or litigating a case. *See* RCW 42.56.010(3); *see also Concerned Ratepayers Ass’n v. Pub. Util. Dist. No. 1 of Clark Cty.*, 138 Wn.2d 950, 962, 983 P.2d 635 (1999) (“evaluating, reviewing and referring to [a] document constitutes ‘use’ within the meaning of the” PRA).

By that same token, even if the LinX database had a record created by another law enforcement agency regarding Mr. Clapham,

Opening Br. at 29-30, the Patrol is not obligated to search that database unless agency personnel has “prepared, owned, used, or retained” that record. The description of LinX in Mr. Clapham’s brief states, in part:

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 [from LinX] as records of the accessing party in the party’s own official records system(s).

*Id.* at 30. The Patrol searched the agency’s relevant official records systems plus JIS and located responsive records related to a traffic infraction. CP 25. The Patrol was not required to query LinX or other third party databases to locate records that were not “prepared, owned, used, or retained” by agency personnel. Accordingly, as a matter of law, the Patrol conducted an adequate search.

**C. The Request Did Not Seek Identifiable Public Records Because It Did Not Provide a Reasonable Description of the Requested Records**

A request with limited concrete information, and describing unusual circumstances and technology, does not provide a reasonable description of the requested records to enable agency personnel to locate the responsive records. The PRA does not come into play until a person requests identifiable public records. “[P]ublic disclosure is not necessary until and unless there has been a specific request for records.”

*Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998), review denied, 137 Wn.2d 1012, 978 P.2d 1099 (1999); see also *Gendler v. Batiste*, 174 Wn.2d 244, 252, 274 P.3d 346 (2012) (“The record sought must be identifiable.”) (citation omitted). “The standard for an ‘identifiable record’ is whether an agency employee could reasonably identify the records from the description the requestor gives.” Wash. State Bar Ass’n, *Public Records Act Deskbook: Washington’s Public Disclosure and Open Public Meetings Laws* § 5.1(2) (2014) (citing *Beal v. City of Seattle*, 150 Wn. App. 865, 873, 209 P.3d 872 (2009)); see also *Limstrom*, 136 Wn.2d at 604 n.3 (request for all of the Prosecuting Attorney’s driving under the influence case files involving a specific officer did not clearly identify the requested records).

Here, there is no genuine issue of material fact that Mr. Clapham’s request described technology and techniques that “are far from common in nature.” CP 134. The request sought investigative records specific to Mr. Clapham from January 1, 2005 to May 16, 2016. CP 29. The request provided some of Mr. Clapham’s identifying information and a list of addresses. CP 29, 32. But, the specific requests at issue in this litigation describe emissions technology harming his health and disrupting his sleep. CP 133-137; CP 244-247; CP 249. Mr. Clapham acknowledges that the purpose of his request “is difficult to discuss due to the subjective nature of

an area which historically has been associated with science fiction.”

Opening Br. at 9.

A request describing unusual technology, which the Patrol does not possess or use, is not a reasonable description of the records. In surveillance operations, Patrol officers generally use conventional technology such as cell phones, aircraft, radios, cameras, and binoculars. CP 42.<sup>2</sup> The Patrol does not use the technology or techniques described in Mr. Clapham’s request. *See* CP 43. In this context, agency personnel have a limited framework in which to search for responsive records. As such, Mr. Clapham’s description of the Patrol using extraordinary technology to harm his health “lacks any meaningful description helpful for the person charged with finding the record.” *Wood v. Lowe*, 102 Wn. App. 872, 879, 10 P.3d 494 (2000) (citation omitted).

Given the limited information in Mr. Clapham’s request as to dates and the nature of the investigation, and the description of unusual circumstances, Ms. Dolan had no information on which specific Patrol divisions should search for responsive records, or whether specific agency

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<sup>2</sup> Mr. Clapham argues that Captain Swainson’s declaration lacks foundation to testify about whether the Patrol uses the technology, described in the request, in surveillance operations. Opening Br. at 37. That is not so. Captain Swainson’s declaration provides sufficient foundation that he has substantial knowledge in the Patrol’s surveillance technology and techniques based on his extensive experience in conducting surveillance operations and training officers in surveillance. CP 41-42.

databases should be queried for responsive records. A request describing agency action, which is far from commonplace, does not provide a reasonably detailed description on where to search for records.

Additionally, Mr. Clapham's request is more akin to a request for information about agency operations rather than a request for identifiable public records. "An important distinction must be drawn between a request for information about public records and a request for the records themselves." *Smith v. Okanogan Cty.*, 100 Wn. App. 7, 12, 994 P.2d 857 (2000). "A request for information about public records or for the information contained in a public record is not a PRA request." *Beal*, 150 Wn. App. at 876 (requestor asking agency to "prove" the basis of its decisions did not request identifiable public records). Simply put, a request for information does not provide agency personnel with a reasonable description to locate the requested records. *See Wood*, 102 Wn. App. at 879.

Mr. Clapham requested, in part, "information on the involvement of the WSP or an entity the WSP uses and/or associates with . . . interacting with the Requester and/or his property", and "information of any nature about Requester to any third party/parties." CP 30-31. The request informed the Patrol that Mr. Clapham is "an individual seeking information for my personal use." CP 31. Mr. Clapham has characterized his request as "twelve questions." CP 136. These requests are akin to asking for information about

agency operations rather than asking for a record itself. As such, at least part of the request sought information about the described surveillance rather than identifiable public records. Accordingly, the trial court properly concluded the request did not seek identifiable public records.

**D. The Patrol Invited Mr. Clapham to Clarify his Request but He Failed to Do So**

Mr. Clapham argues that the Patrol improperly asked him to limit his request by requesting clarification. Opening Br. at 24. That is not so. Mr. Clapham's request sought broad categories of information concerning him. As such, Ms. Dolan properly asked for clarification that would enable her to enter usable search terms in the Patrol's databases, or focus on other records systems.

When a public records request "is unclear, an agency . . . may ask the requestor to clarify what information the requestor is seeking." Former RCW 42.56.520 (2010), *amended by* Laws of 2017, ch. 303, § 3.<sup>3</sup> "If a request does not specify identifiable public records, the responding agency is perfectly justified in asking for clarification." *Kleven v. City of Des Moines*, 111 Wn. App. 284, 294, 44 P.3d 887 (2002) (citation and internal quotation marks omitted). "When an agency receives a 'relating to'

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<sup>3</sup> At the time that Mr. Clapham submitted his request and filed this lawsuit former RCW 42.56.520 was in effect.

or similar request, it should seek clarification of the request from the requestor.” WAC 44-14-04002(2). If the requestor does not clarify the request, the agency is not required to respond further to the request. Former RCW 42.56.520 (2010), *amended by* Laws of 2017, ch. 303, § 3.<sup>4</sup> That is situation here.

Mr. Clapham’s request described records “relating or referring to” several categories of investigative records involving surveillance of him. CP 29-31. The request sought records specific to him during a time period spanning over eleven years. CP 29. The request did not provide context for the type of investigation (e.g., narcotics, human trafficking, or traffic violations).

The Patrol acted well within PRA parameters by asking Mr. Clapham to clarify his request. Ms. Dolan’s email invited Mr. Clapham:

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.

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<sup>4</sup> The current statute provides: “If the requestor fails to respond to an agency request to clarify the request, and the entire request is unclear, the agency . . . need not respond to it.” RCW 42.56.520(3)(b).

CP 35. As such, the Patrol's response provided Mr. Clapham with guidance on how to clarify which records he sought.

Mr. Clapham analogizes the Patrol's request for clarification to *Gendler v. Batiste*, 174 Wn.2d at 248-49. Opening Br. at 24. The analogy fails. In *Gendler*, the Patrol claimed that it could not locate the requested collision reports by location without resorting to the Washington State Department of Transportation's (WSDOT) analysis. *Id.* at 262. *Gendler* is distinguishable for three reasons. First, it was undisputed that the Patrol had a statutory duty to collect the collision reports. *Id.* at 264. In this case, there is no evidence that the Patrol has a duty to collect surveillance records from other agencies. Second, the Patrol had previously produced collision reports by location without the benefit of WSDOT's analysis. *Id.* at 255, 262. Here, there is no evidence that Patrol has produced the records described in the request. Third, Mr. Gendler provided a reasonable description of the requested records—police reports of bicycle accidents on the Montlake Bridge. *Id.* at 248. Here, Mr. Clapham's request did not seek identifiable public records (such as a collision report) but broad categories of information. Accordingly, the Patrol properly invited Mr. Clapham to clarify his request, which he declined to do.

**E. In The Event This Court Finds The Trial Court Erred in Granting Summary Judgment, This Court Should Remand The Case To The Trial Court**

If this Court finds that the trial court erred in granting the Patrol's motion for summary judgment, and there are issues of material fact, the matter should be remanded to the trial court. *McKee v. Wash. Dep't of Corr.*, 160 Wn. App. 437, 448, 248 P.3d 115 (2011) (appellate court reversed the trial court's order granting motion for summary judgment in a PRA lawsuit and remanded to the trial court for further factual and legal findings). Mr. Clapham did not file a cross-motion for summary judgment, and it is premature to consider penalties, costs, or fees under RCW 42.56.550(4). Accordingly, if this Court finds that summary judgment was not warranted, the Patrol respectfully requests this Court to remand the matter to the trial court for further fact-finding and argument.

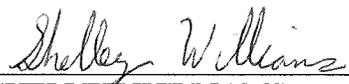
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**V. CONCLUSION**

For these reasons, the Patrol respectfully requests this Court to affirm the trial court's order granting summary judgment and dismissing this lawsuit with prejudice.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of October, 2017.

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NO. 94362-1

**SUPREME COURT OF THE STATE OF WASHINGTON**

NICHOLAS CLAPHAM

Appellant,

v.

WASHINGTON STATE PATROL,

Respondent.

DECLARATION OF  
SERVICE

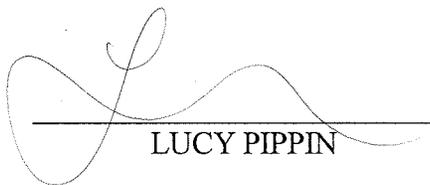
I, Lucy Pippin, declare as follows:

On October 2, 2017, I sent a true and correct copy of Respondent's Opening Brief and Declaration of Service, addressed as follows:

NICHOLAS CLAPHAM  
seaseanc@gmail.com

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

DATED this 2nd day of October, 2017, at Seattle, Washington.

  
LUCY PIPPIN

**WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION**

**October 02, 2017 - 10:47 AM**

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