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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

CITY OF TACOMA,

Appellant/Cross-Respondent

v.

ARTHUR C. BANKS, et al.,

Respondents/Cross-Appellants.

Respondents/Cross-Appellants' Reply

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TABLE OF CONTENTS

I. Introduction 1

II. Argument in Reply 2

A. Cell Site Simulator Technology 2

B. The Court Can and Should Order the City to Comply with the PRA by Conducting an Adequate Search 4

1. The Court is Fully Empowered to Enter Injunctive Relief. 4

2. TPD's Search for Data in the Cell Site Simulator Equipment Was Inadequate. 5

3. The City Failed to Adequately Search for Warrants and for Emails Regarding Cell Site Simulator Use. 8

4. South Sound 911 Is Not a Separate Agency for PRA Purposes and Likely Has Responsive Documents. 11

C. The City's Redactions and Withholding of Documents Are Contrary to the PRA 13

1. The City Has Not Shown That Make and Model Information Is Exempt. 13

2. The City Possesses Cell Site Simulator Manuals and Must Produce Them. 18

III. Conclusion 19

TABLE OF AUTHORITIES

Cases

Bldg. Indus. Ass'n of Wash. v. McCarthy, 152 Wn. App. 720, 218 P.3d 196, 203 (2009)..... 10
Brown v. Voss, 105 Wn.2d 366, 715 P.2d 514, 517 (1986)..... 5
Cedar Grove Composting Inc. v. City of Marysville, 188 Wn. App. 695, 354 P.3d 249, 258 (2015) 12
Fischer v. Dep't. of Corr., 160 Wn. App. 722, 254 P.3d 824, 825–26 (2011)..... 14, 15
Fisher Broad.-Seattle TV LLC v. City of Seattle, 180 Wn.2d 515, 326 P.3d 688, 693 (2014)..... 7
Gronquist v. State, 177 Wn. App. 389, 313 P.3d 416, 421–22 (2013)..... 14, 16
Haines-Marchel v. Dep't of Corr., 183 Wn. App. 655, 334 P.3d 99, 103 (2014)..... 13, 15
In re Request of Rosier, 105 Wn.2d 606, 717 P.2d 1353, 1360 (1986)..... 5
Kozol v. Dep't. of Corr., 192 Wn. App. 1, 366 P.3d 933, 936 (2015)..... 8
Neighborhood All. of Spokane Cty. v. Cty. of Spokane, 172 Wn.2d 702, 261 P.3d 119, 128 (2011) 8
Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 884 P.2d 592, 597 (1994) 17
Resident Action Council v. Seattle Hous. Auth., 177 Wn.2d 417, 327 P.3d 600, 612 (2013)..... 5
Sargent v. Seattle Police Dep't, 179 Wn.2d 376, 314 P.3d 1093, 1102 (2013)..... 16
See State v. Ward, 125 Wn. App. 138, 104 P.3d 61, 64 (2005)..... 19

Statutes

RCW 42.56.010 11
RCW 42.56.240 ..... 13, 14, 16, 17
RCW 9.73.260 2

I. INTRODUCTION

Plaintiffs/Cross-Appellants ("Plaintiffs") have demonstrated that the City of Tacoma ("City") failed to conduct an adequate search for documents and improperly withheld documents, relying primarily on testimony from Tacoma Police Department ("TPD") detectives and FBI affiants proffered by the City. The City's response is that the documents, which they concede they have not searched for, simply do not exist: there is no data on the cell site simulators; there are no warrants; emails about cell site simulators do not exist; and there is no operating manual. But the evidence indicates that the requested materials almost certainly do exist. And even if some have since been lost, there is no justification under the Public Records Act ("PRA") for the City's steadfast refusal to even *search* for them.

Plaintiffs have also demonstrated that the City improperly redacted cell site simulator make, model, and pricing information from invoices and shipping documents under an RCW exemption for specific intelligence information that is essential to effective law enforcement. The City did so without explaining why such information should be considered "specific intelligence information." Because basic model and pricing information is not "specific intelligence information," it is not properly exempt. The City

has also not shown that the information is "essential to effective law enforcement."

II. ARGUMENT IN REPLY

A. Cell Site Simulator Technology

The City begins its response to the Cross Appeal by endeavoring to adjust the Court's understanding of TPD's use of cell site simulator technology. Resp. to Pls.' Cross Appeal and Reply on Pls.' Resp. 1–4 ("App. Resp."). However, Plaintiffs stand by their descriptions of the technology and its potential misuse.

The City claims that TPD's use of cell site simulator technology is in strict conformity with RCW 9.73.260, the statute requiring a warrant for cell site simulator use, and that this "prevents the use from being indiscriminate." App. Resp. at 1. The City confuses Plaintiffs' argument. Plaintiffs did not allege that the City is using the cell site simulator without a warrant. Rather, Plaintiffs explain—and the City's affiants agree—that cell site simulators are by their very nature indiscriminate because they force *all* cellular devices within range to connect and transmit data as if to a normal cell tower. Br. of Resp't 4 ("Brief"); CP 127; CP 143. It is the device itself that is indiscriminate and intrusive, and it is for precisely this reason that Plaintiffs seek greater transparency about its use by TPD.

Furthermore, while the question of whether TPD's practice conforms to the warrant-requirement statute is not directly at issue, it is far from clear that the court orders TPD obtains are in compliance. The City concedes that *every* warrant for phone identification that TPD obtains authorizes the use of cell site simulator technology—TPD personnel decide when it will actually be used. *See* CP 787; CP 1498 at 31:2–21. But this does not conform to a fair reading of the statute, which has strict additional requirements for authorization of cell site simulator technology beyond standard "pen, trap, and trace" orders.[1] Brief at 6–7. In other words, the statute requires a judge to decide that cell site simulator technology is authorized for specific cases, not that the use of cell site simulator technology can simply be included as part of boilerplate language in every phone-related warrant. Thus, the potential for TPD's use of cell site simulator technology outside of the statutory constraints remains.

Finally, the City's reiteration that TPD's cell site simulator equipment collects no data misunderstands Plaintiffs' argument. App.

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[1] As Plaintiffs explained in their Brief, the cell site simulator is fundamentally different from the older "pen, trap, and trace" technology. Brief at 5. Contrary to the City's allegation that Plaintiffs believe the cell site simulator locates a person, Plaintiffs have been very clear that "a cell site simulator precisely locates a phone and therefore a person"—the person in possession of the phone. *Id*.

Resp. at 4–5. Plaintiffs do not allege that the City is using the cell site simulator to collect data—such as text messages or call logs—from cell phones it connects with. Rather, Plaintiffs seek the data created by the cell site simulator itself during the course of operation, data entered into the cell site simulator by TPD during operation, and any metadata collected from phones during the cell site simulator's use. The City's sweeping claim that no data exists is both unsupported by evidence and disputed by experts familiar with the technology and the FBI agent whom the City itself cites. *See infra*, Section II.b.

B. The Court Can and Should Order the City to Comply with the PRA by Conducting an Adequate Search

1. The Court is Fully Empowered to Enter Injunctive Relief.

The City's statement that the courts did not specifically order a new search in the cases cited by Plaintiffs (App. Resp. at 11) is true but beside the point. As detailed in Brief at 22–24, the Washington Supreme Court has clearly stated that injunctive orders are appropriate in PRA cases:

> [A PRA court has] "broad discretionary power to shape and fashion injunctive relief to fit the particular facts, circumstances, and equities of the case before it."
>
> . . .
>
> On numerous occasions [the Supreme Court of Washington has] allowed detailed "disclosure orders" in PRA cases to remedy an agency's failure to comply with the PRA.

Resident Action Council v. Seattle Hous. Auth., 177 Wn.2d 417, 445–446, 327 P.3d 600, 612 (2013) (first quoting *Brown v. Voss,* 105 Wn.2d 366, 372, 715 P.2d 514, 517 (1986), and then quoting *In re Request of Rosier*, 105 Wn.2d 606, 618, 717 P.2d 1353, 1360 (1986)). The City simply ignores this clear authority for this Court to order a new search.

Plaintiffs' request for a new search is a request for an injunctive order just like the orders specifically contemplated by the Supreme Court. TPD's search was inadequate and the record conveys the scope of the needed injunction requiring TPD to search further.

2. TPD's Search for Data in the Cell Site Simulator Equipment Was Inadequate.

Plaintiffs' experts have explained in detail how the cell site simulator has data entered into it, generates data, and collects data over the course of its use. *See* Brief at 14–19. Much of this data is easily exportable. *Id*. at 16. The City does not dispute that data is entered into the cell site simulator, or that the cell site simulator generates data during operation. *See* App. Resp. at 4–5. The information input into and generated by the cell site simulator is responsive to Plaintiffs' records request and the Court should require the City to search for and provide that data.

The City continues to state that the cell site simulator collects no data. App. Resp. at 4–6. Not only do Plaintiffs seek more than just "collected" data, but this statement by the City is incorrect. The City cites to the U.S. Statement of Interest, which cites to an Affidavit from FBI Agent Russell Hansen, for the proposition that the cell site simulator "does not 'collect information'" (App. Resp. at 2 (citing CP 127; CP 143–44))—but on the very page the City cites, the U.S. Statement of Interest declares that the cell site simulator operates "by *collecting limited signaling information* from devices in the simulator operator's vicinity." CP 127 (citing CP 143–44) (emphasis added). The same page also explains that "[b]y transmitting as a cell tower, cell site simulators *acquire the identifying information* from cellular devices." *Id.* (emphasis added). The City's own source admits the cell site simulator collects data.[2]

The City's only other support for the argument that the device does not collect data is from Det. Terry Krause. App. Resp. at 2 (citing CP 1502 at 44). But Det. Krause's statement is inconsistent with the United States' submissions in this case, Plaintiffs' experts, the RCW requiring deletion of data, and DOJ policies regarding deletion of data, and should not be

[2] Plaintiffs do not allege that the cell site simulator is being used to intercept communications from cellular devices or data contained on the phone itself, such as emails or contacts, and this is consistent with the United States' explanation of the device. CP 127–28.

credited. Brief at 17. In this context, a sweeping statement by a single detective, who does not claim to have a technology background, that the cell site simulator does not "collect data" is not a sufficient reason for the City to refuse even to *look* for the data.

The City attempts to shroud the cell site simulator in mystery, making it appear that any data contained within it is secreted away, accessible only by forensic experts, and therefore beyond the reach of the PRA. App. Resp. at 5. This is simply not so. As Plaintiffs' experts have explained, Harris Corporation cell site simulators (including the models that the City almost certainly possesses and has not denied possessing), have databases of information that are easily exportable using the software already on the cell site simulator laptop. Brief at 16. The responsive data in the cell site simulator includes information entered into the cell site simulator by TPD during operation, as well as information collected during operation. *Id*. The PRA defines "public records" broadly and includes information in databases and other electronic information. *Fisher Broad.-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 524, 326 P.3d 688, 693 (2014).

As stated in a case only partially quoted by the City, although a search does not have to be perfect, "[t]he agency must look in the place where the record 'is reasonably likely to be found.'" *Kozol v. Dep't. of*

Corr., 192 Wn. App. 1, 8, 366 P.3d 933, 936 (2015) (quoting *Neighborhood All. of Spokane Cty. v. Cty. of Spokane*, 172 Wn.2d 702, 719–20, 261 P.3d 119, 128 (2011)), *rev. denied*, 185 Wn.2d 1034 (2016). The cell site simulator is the core focus of Plaintiffs' public records request. It is a clear violation of the PRA for the City to fail to search the cell site simulator itself for data that multiple sources—the Plaintiffs' experts, the City's FBI affiant, the State Legislature, the federal government's guidance—all strongly suggest is stored in the cell site simulator equipment. This Court should require a further search for this data.

3. The City Failed to Adequately Search for Warrants and for Emails Regarding Cell Site Simulator Use.

Plaintiffs' cross-appeal highlights the City's failure to search both for relevant emails regarding cell site simulator use and for warrants and warrant-related documents. Brief at 19–20. The City's response focuses only on emails containing warrants, and fails to address Plaintiffs' argument that the City failed to search all relevant custodians for emails disclosing cell site simulator use or related to cell site simulator use. App. Resp. at 6-7. While Tech Unit officers were the only ones to operate the cell site simulator, the cell site simulator was utilized in cases on behalf of officers outside of the Tech Unit. In his 30(b)(6) deposition, Det. Chris

Shipp testified that the case officers would also email about cell site simulator use, CP 808–09, and therefore they are appropriate custodians to be searched. Therefore, the City should be ordered to search for these documents.

Regarding the search for warrants and warrant-related documents, the City claims that TPD has never possessed copies of warrants or related materials and so there is nothing to look for. App. Resp. at 6–9. Even conceding that the originals of warrants go back to the court and are sealed, and that the scanner/copier in TPD's Tech Unit that was frequently used to send warrants to cell phone companies did not keep copies, the record demonstrates at least three sets of responsive warrant-related records that did likely exist at the time of the PRA request, and which may well still exist.

First, in a 30(b)(6) deposition, Det. Chris Shipp testified that warrants were sometimes sent from the email accounts of Tech Unit officers. CP 837–39.

Second, Det. Krause also testified that the requesting detectives in other jurisdictions were the ones to prepare and apply for the warrants, CP 1496 at 21, and that he would email the warrant template to other jurisdictions, CP 1497 at 26. These documents, which are responsive to the PRA request, were also not provided. *See* CP 16–17 (Request 1 for all

records regarding "use" of the cell site simulator and Request 10 for warrants and applications for warrants).

Third, for a period of time before the PRA request, TPD deployed the cell site simulator equipment in multiple jurisdictions outside the City of Tacoma. Det. Krause, whom the City puts forward as the main person handling warrants related to the cell site simulator equipment, testified that while he would not usually receive the warrants via email, he may have received copies of warrants from these other jurisdictions through email. CP 1499 at 33–34.

Mere assertions that these documents do not exist, even if they are made "over and over again" (App. Resp. at 6), do not relieve the City of its PRA obligations in light of the cited testimony *from TPD witnesses*. The City's reliance on *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 736, 218 P.3d 196, 203 (2009) (stating that "facts . . . not just mere speculation . . ." are required to overcome a claim that no records exist) is unavailing: Plaintiffs have brought forth just such facts and the Court should order a proper search for warrants and related documents, and emails regarding cell site simulator use.

4. South Sound 911 Is Not a Separate Agency for PRA Purposes and Likely Has Responsive Documents.

The City does not deny that there are TPD records at South Sound 911, but rather claims that if TPD believes there could be TPD records there, TPD will refer the requester to South Sound 911. App. Resp. at 10. The City states, without citation, that "South Sound 9-1-1 is an independent agency contracted to provided [sic] records management for [TPD]." App. Resp. at 9. However, whatever else South Sound 911 might be, it is not an independent agency for PRA purposes. Under the PRA:

> "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function *prepared, owned, used, or retained* by any state or local agency regardless of physical form or characteristics.

RCW 42.56.010(3) (emphasis added). The City's 30(b)(6) testimony demonstrates beyond doubt that TPD officers use South Sound 911 in real time to enter and save records directly related to ongoing investigations. CP 828–32. Even Michael Smith, TPD's main responder on public records, conceded that TPD investigative files are kept at South Sound 911. CP 873. The investigation files stored by South Sound 911 for TPD are created by TPD and accessible by all TPD officers from their computers and patrol cars. They are public records within TPD's possession and subject to Plaintiffs' PRA request.

Because the records at South Sound 911 are "public records" used by and of the City, the City has an obligation to produce them in response to a PRA request. In *Cedar Grove Composting Inc. v. City of Marysville*, the Washington Court of Appeals held that certain records possessed by a public relations firm hired by the City of Marysville were public records for purposes of the PRA because the City of Marysville "used" the records. 188 Wn. App. 695, 716, 354 P.3d 249, 258 (2015) ("Marysville used the 173 records because [the public relations firm] created these documents for and applied them to a governmental purpose identified by Marysville."). Not only does TPD use the records stored at South Sound 911, it also prepared them and owns them. That South Sound 911 also has its own public records request process is of no moment; it does not relieve TPD of its duties to search for responsive documents that it prepares, owns, and uses. It surely cannot be that a public agency can evade its responsibilities merely by setting up a separate storage facility—to which it has the keys—in which to keep documents it creates and owns.

The City's 30(b)(6) testimony describes TPD's investigative files and how case officers document the acquisition of pen, trap, and trace warrants in the investigative files. CP 801–05. Portions of these investigative files are often copied and pasted directly into the warrant applications. CP 803–04. Det. Shipp also testified in his 30(b)(6) that all

of TPD's pen, trap, and trace warrants are also cell site simulator warrants. CP 786–87. Therefore, a reasonable PRA search would include the South Sound 911 files for cases in which the cell site simulator was used or in which a warrant authorizing the use of a cell site simulator was obtained.

C. The City's Redactions and Withholding of Documents Are Contrary to the PRA

As explained in Plaintiffs' brief, the City improperly redacted and withheld information under RCW 42.56.240 that should have been produced. For information to be exempt under RCW 42.56.240 (1), it must meet four requirements: (1) it must be "[s]pecific intelligence information" or "specific investigative records" (2) "compiled by" (3) investigative, law enforcement, and penology agencies, (4) "the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy." *See Haines-Marchel v. Dep't of Corr.*, 183 Wn. App. 655, 665–66, 334 P.3d 99, 103 (2014) (recognizing four elements to RCW 42.56.240 (1)). Because the City cannot meet its burden to show that all four prongs are met here, the PRA requires that the redacted information must be provided.

1. The City Has Not Shown That Make and Model Information Is Exempt.

The make, model, and pricing information Plaintiffs seek are not "specific investigative records," so in order to be exempt they must, under

the first prong of RCW 42.56.240 (1), be "specific intelligence information." As Plaintiffs have shown, make, model, and pricing information is not specific intelligence information. Brief at 26–30. All the City offers in response is the erroneous claim that the *Fischer* and *Gronquist* cases stand for the proposition that the specifics of surveillance equipment—here, make, model, and pricing information—qualify as "specific intelligence information" for purposes of RCW 42.56.240 (1). App. Resp. at 18.

But, as the City acknowledges, neither *Fischer* nor *Gronquist* addresses the "specific intelligence information" issue presented here. App. Resp. at 18. Both cases involved prisoner requests for in-prison video surveillance recordings that corrections officials possessed. Video surveillance recordings are not analogous to make, model, and pricing information. And both cases involved only judicial determination of whether the recordings were "essential to effective law enforcement" under the fourth prong. *Fischer v. Dep't. of Corr.,* 160 Wn. App. 722, 725–26, 254 P.3d 824, 825–26 (2011); *Gronquist v. State*, 177 Wn. App. 389, 399–401, 313 P.3d 416, 421–22 (2013). These cases are of no utility on the "specific intelligence information" issue.

The City offers no other argument for why make, model, and pricing information should be considered "specific intelligence

information." App. Resp. at 18. Nor could it. Make, model, and pricing information is not even "intelligence information," let alone "specific intelligence information." Neither is it "the gathering or distribution of information, especially secret information," "information about an enemy," or "the evaluated conclusions drawn from such information." *See Haines-Marchel*, 183 Wn. App. at 667, 334 P.3d at 104 (internal citation omitted).

Fischer and *Gronquist* are also not helpful to the City on the "essential to effective law enforcement" issue that those cases did address. *Fischer* and *Gronquist* do not stand for the proposition that any information that could somehow be used to circumvent law enforcement is exempt from disclosure. Rather, based on the evidence presented about the critical role surveillance systems play in prison operation and control, the courts determined that the information obtained from those systems was essential to effective law enforcement. The City has not met its burden to show that make, model and pricing information about cell site simulators are on a par with videotapes deemed essential to prison security.

And meeting that burden should be more difficult outside a prison setting. *Cf. Fischer*, 160 Wn. App. at 728, 254 P.3d at 827 (emphasis added) ("Concealment of the full recording capabilities of those systems is critical to its effectiveness *in the specific setting of a prison*."); *Gronquist*,

177 Wn. App. at 399, 313 P.3d at 421 (noting DOC argument that the surveillance system was "one of the most important tools for maintaining the security and orderly operation of prisons").

The City's briefs, including the material from the federal government, do not make the showing required by the PRA that make, model, and pricing information rise to anywhere near this level of threat. The City admits that this information appears to be innocuous, but then claims, without explanation, that it can be "used by criminals and terrorists to defeat the technology and endanger citizens." App. Resp. at 19. But the City cannot avoid the requirements of the PRA with generalized incantations of "terrorism" and other unspecified harms. *See Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 395, 314 P.3d 1093, 1102 (2013) (agency required to provide "specific evidence of chilled witnesses or other evidence of impeded law enforcement" to show nondisclosure essential to effective law enforcement); *City of Fife v. Hicks*, 186 Wn. App. 122, 138, 345 P.3d 1, 9 (2015) ("[G]eneralized concerns . . . were insufficient to establish that nondisclosure was essential to effective law enforcement.").

There is a logic to the argument that disclosure of a technology's attributes, even the most innocuous, make the technology more susceptible to evasion. But that is not the standard under RCW 42.56.240 (1).

Otherwise, information about *all* technology could be withheld. The information must be "essential to effective law enforcement." The City has not met its burden of explaining why make, model, and pricing information is essential to effective law enforcement, beyond general claims that people may be able to evade the technology. App. Resp. at 19.

Having failed to make any showing that the make, model, and pricing information it withheld is "specific intelligence information," the City has failed to meet its burden of proving that its redactions were in accordance with the statute. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 251–52, 884 P.2d 592, 597 (1994) (en banc). It is not enough to meet some of the prongs of RCW 42.56.240 (1); the City must meet all four to justify its redactions, which is has not done. The City has also not shown that make, model, and pricing information are "essential to effective law enforcement." For these reasons, the City's redactions are improper and the information should be provided to Plaintiffs. Should the Court require more information to evaluate the propriety of the redactions, Plaintiffs request that the Court conduct an *in camera* review of the contested information. Brief at 33.

2. The City Possesses Cell Site Simulator Manuals and Must Produce Them.

In its privilege log, the City listed Operating Manuals for cell site simulators. CP 23. It now claims that this was an error and that it has no manuals, although it is perplexing how the City could accidentally identify something that it did not have. Tech Unit detectives testified that the original hard copy manuals for the first cell site simulator were destroyed when TPD received new cell site simulator equipment in 2010 or 2011. CP 326; CP 604. Plaintiffs do not dispute that the first manual was destroyed. However, Det. Jeffrey Shipp explained that when TPD received the new cell site simulator equipment, it received a new cell site simulator manual that was available via download. CP 1081. There were numerous downloads related to this manual over time. CP 1082. This manual is saved on the laptop associated with the cell site simulator equipment. CP 1085. There is no testimony that this subsequent electronic manual was ever destroyed, and the City has provided no explanation for why it believes this manual no longer exists. The City states that it has not had a manual since the hard copy was destroyed, but does so without citation (App. Resp. at 12), and in direct contradiction to its own detective's testimony. The electronic manual is the target of Plaintiffs' appeal, and the

City has failed to address its withholding of this manual. Brief at 33, n.11; App. Resp. at 11–12.

The City refuses to substantively respond to Plaintiffs' redaction claims about the manual, instead focusing only on the hard copy manual that all parties agree no longer exists. *See* Brief at 33, n.11; App. Resp. at 11–12. Indeed, the City explicitly states that its arguments regarding redactions apply only to the invoices and shipping documents, and that it "will not respond to Banks's arguments concerning a cell site simulator manual." App. Resp. at 12. Accordingly, the City has conceded Plaintiffs' claims about the manual. *See State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61, 64 (2005) (concluding that party's failure to respond to an argument conceded the argument). The City has not met its burden of establishing that the remaining manual is exempt from disclosure in its entirety. Accordingly, the City must produce it, redacting only that information which is exempt under the PRA.

III. CONCLUSION

For all of the foregoing reasons, this Court should hold that TPD conducted an inadequate search and wrongfully withheld and redacted information about cell site simulators as detailed above. The Court should order TPD to conduct an additional search for documents and remand the case for further proceedings.

RESPECTFULLY SUBMITTED this 17 day of May, 2019

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DIVISION II

No. 52072-9-II

Banks et al. v. City of Tacoma

I declare, under penalty of perjury, under the laws of the State of Washington, that on the date below, I caused to be served a copy of the *Respondents/Cross-Appellants' Reply* via the AOC Portal on the following:

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