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SUPREME COURT  
STATE OF WASHINGTON  
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BY SUSAN L. CARLSON  
CLERK

NO. 96544-7

SUPREME COURT  
OF THE STATE OF WASHINGTON

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THE CHURCH OF THE DIVINE EARTH,

Appellant,

v.

CITY OF TACOMA,

Respondent.

---

ON APPEAL FROM THE SUPERIOR COURT OF PIERCE COUNTY  
HONORABLE GRANT BLINN

---

AMENDED OPENING BRIEF OF APPELLANT THE  
CHURCH OF THE DIVINE EARTH

---

Richard B. Sanders, WSBA No. 2813  
Attorney for Appellant  
Goodstein Law Group PLLC  
501 South G Street  
Tacoma, WA 98405  
(253) 779-4000

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## I. INTRODUCTION

The Church of the Divine Earth (Church) made a Public Record Act (PRA) request to the City of Tacoma (City) for employee evaluations of two powerful city department heads. The City responded by redacting all relevant information under claim of privacy privilege, absent any “brief explanation” why the redactions factually fit within the claimed privilege. On summary judgment the trial court agreed, dismissing the Church’s complaint on the merits as well as its claim the “brief explanation” requirement of RCW 42.56.210(3) had been violated. Essentially the trial court bought the City argument *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993), overruled in part, *Soter v. Cowles Publ. Co.*, 162 Wn.2d 716, 755, 174 P.3d 60 (2007) created a categorical exemption for employee evaluations regardless of content—even if the evaluation contained no “personal information” whatsoever.

## II. ASSIGNMENT OF ERROR

The trial court erred when it granted the City’s motion for summary judgment to dismiss the Church’s complaint.

### *Issues Presented for Review*

- A. Does *Dawson* create a categorical exemption in the PRA for employee evaluations regardless of content?
- B. If so, should *Dawson* be overruled?

- C. **Are requests for employee evaluations under the PRA exempt from the brief explanation requirement of RCW 42.56.210(3)?**
- D. **Is the City collaterally estopped to deny its method to claim exemptions violates RCW 42.56.210(3)?**

### III. STATEMENT OF THE CASE (BUT FACTS DON'T MATTER)

The Public Records Act (PRA) request to the City of Tacoma sought “job performance evaluations, comments on job performance, document showing salary from City for each of the past 5 years for Peter Huffman and Curtis Kingsolver.”<sup>1</sup> CP 297 Eventually the City responded with the salary information requested however redacted all responsive information from job performance evaluation forms for both department heads. An accompanying privilege log justified all redactions simply with a code (without factual explanation) stating:

**EMPLOYEE PERFORMANCE EVALUATIONS (NO SPECIFIC MISCONDUCT)—**

These records, consisting of performance evaluations which do not discuss specific instances of misconduct, are protected from disclosure and have been withheld in their entirety based on the following authority:

#### **RCW 42.56.230 Personal Information**

(3) Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy.

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<sup>1</sup> Each are powerful department heads with considerable discretionary authority over private applicants for land use permits. Peter Huffman is Director of Planning and Development Services whereas Curtis Kingsolver is Director of Public Works. CP 341-49

**RCW 42.56.050 Invasion of privacy, when.**

A person's "right to privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public's right to inspect, examine or copy public records.

-AND-

***Dawson v. Daly*, 120 Wn.2d 782, 797 (1993)**

The Church filed suit to compel disclosure of the redacted material and to contest failure of the privilege log to comply with the brief explanation requirement of RCW 42.56.210(3). CP 245

The trial court granted the Church's request for in camera review of unredacted documents CP 388; however, after that review the case was reassigned to a different judge, Hon. Grant Blinn, who heard the City's motion for summary judgment of dismissal but declined the Church's request to also review the unredacted documents. RP 10 Judge Blinn granted the City's motion dismissing both the claim on the merits and the separate claim alleging violation of RCW 42.56.210(3)'s brief explanation requirement. CP 701 The verbatim report (RP) consists of that hearing.

As can be seen from the RP, the whole proceeding turned on construction and application of the *Dawson* case. Judge Blinn struggled with confusing and seemingly self-contradictory language in the opinion ultimately concluding the opinion created a categorical exemption for performance evaluations regardless of content, even if they contained no “personal information” as required by RCW 42.56.230(3) and defined by *Dawson*, 120 Wn.2d at 796 as “the intimate details of one’s personal and private life.” Further Judge Blinn concluded no “brief explanation” of how the redacted material fit within the claimed exemption was required because it didn’t matter since “performance evaluations” were categorically exempt regardless of content. Facts just didn’t matter.

Under the PRA proper application of the “privacy” exemption involves a three part test: (1) is the information “personal,” RCW 42.56.230(3), i.e. “only the intimate details of one’s personal and private life” *Dawson*, 120 Wn.2d at 796; *and* (2) would release of the information be “highly offensive to a reasonable person” RCW 42.56.050; *and* (3) would release of the information be “not of legitimate concern to the public” RCW 42.56.050? The trial court however did not apply the statutory test. There is simply no statutory categorical exemption for personnel evaluations of public employees in the PRA; although the trial court read *Dawson* to create one.

As the RP demonstrates, the trial court was conflicted (see e.g. RP 8, 25, 26) by the decision's statement "information about public, on duty job performances should be disclosed" *Dawson*, 120 Wn.2d at 795 quoting *Ollie v. Highland School District 203*, 50 Wn. App. 639,645, 749 P.2d 747, rev. den'd, 110 Wn.2d 1040 (1988); "personal information" is *only* the intimate details of one's personal and private life, *Dawson* at 797; but "employee evaluations qualify as personal informative that bears on the competence of the subject employee." *Dawson* at 797.

Moreover, the trial court was troubled the *Dawson* opinion also seems premised on an evaluation "which does not discuss any specific instances of misconduct **or** *of the performance of public duties...*" *Dawson* at 796 (italics added) The trial court commented this "has to mean something" RP 8; however, accepted the City's argument it meant nothing.

Also troubling, the *Dawson* opinion seemed to analogize performance evaluations to "employment records" which contain information about family problems, health problems, military records, scores from IQ tests, etc. But it did not address a job performance evaluation which has no "personal information," but merely recounts and evaluates what the public employee does on the job. *Dawson* did not say the public is not entitled to this information under the PRA. Nor did it

explain if the public is entitled to see information about “specific instances of misconduct” why the public is not entitled to information demonstrating the individual is a highly qualified employee who the public is lucky to have on the payroll.

Without reading the unredacted documents RP 10 the trial court seemed to assume (correctly) a performance evaluation must contain *only* information regarding “the performance of public duties,” but that it was none the less categorically exempt. RP 26

Under the trial court and City’s reading of *Dawson* information that an employee was late to work, or didn’t show up at all, or had perfect attendance, or was competent, or incompetent, or honest, or dishonest would be exempt from public disclosure. Facts don’t matter!

*Dawson* also asserts a “presumption” that release of a performance evaluation would be “highly offensive.” *Dawson* at 796 But why? Shouldn’t public employees who work for the taxpayers anticipate they are to be held accountable for on the job performance? However the “highly offensive” prong only applies to “personal information.” Under the statute if there is none, the record must be disclosed--“highly offensive” or not.

If *Dawson* is read to abandon the “personal information” requirement at the very threshold of any privacy analysis it judicially repeals RCW 42.56.230(3).

So too, if *Dawson* is read to exempt personnel evaluations from the brief explanation requirement of RCW 42.56.210(3) it contradicts the statute by making up a categorical exemption for everything and anything which might be contained in the evaluation. Rather than simply quoting the privacy exemption statutes does not the agency have a duty under sec. 210 to offer facts to show how the claimed redaction (1) contains “personal information,” i.e. the personal and intimate details of one’s persona life (e.g. medical conditions, family problems, etc.), (2) the facts about how or why the release of the information would be “highly offensive” to a reasonable person, and (3) facts about how or why the requested informative is *not* of “legitimate concern to the public?”

Regarding the last prong of the test, legitimate concern to the public, (if we ever get to it—which we shouldn’t unless the first two prongs are met) the court should recall the record shows we are not talking about janitors but powerful department heads. CP 341-49 As in *Spokane Research v. Spokane*, 99 Wn. App. 452, 457, 994 P.2d 267 (2000) if facts about a city manager are of legitimate concern to the public, why not a department head? And is it not of legitimate public concern how the City

evaluates its top employees, and what criteria it applies to judge their job performance? If they violate the constitutional rights of private citizens under color of law does that matter to the City?

The Church prevailed against the City in a prior litigation involving the same “brief explanation” issue in April 2015.<sup>2</sup> There, as here, the City merely identified by code letter which exemption was claimed without any factual explanation why the redacted or withheld materials fit within the claimed exemption. Therefore the City is collaterally estopped to deny it violated RCW 42.56.210(3) a second time using the same system in flagrant disregard of the prior ruling of the court. *Rains v. State*, 100 Wn.2d 660, 665-66, 674 P.2d 165 (1983)

The City admitted during its CR 30(b)(6) deposition that the adverse judgment in the prior litigation did not cause the City to change its procedure whatsoever to fulfill the brief explanation requirement. See e.g. CP 287-288 (Lantz dep. 34, 36, 39)

This is plainly inconsistent with *Lakewood v. Koenig*, 182 Wn.2d 87, 343 P.3d 335 (2014) and *Sanders v. State*, 169 Wn.2d 827, 846, 240 P.3d 120 (2010). The trial court simply read the brief explanation

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<sup>2</sup> Pierce County Cause Number 14-2-13006-1, Order Denying in part and Granting in part Petitioner’s Motion for Summary Judgment on Public Records Act Claim (May 8, 2015) CP 327, 332-333, **335-337**, 338-340

requirement out of the statute. The summary judgment of dismissal in this regard violates clear precedent of this court and the statute.

#### **IV. ARGUMENT**

##### **A. Agency bears the burden to show compliance with the PRA**

In general, the legislature commands the PRA be “liberally” construed to promote the goals of open government. RCW 42.56.030 The PRA is a “strongly worded mandate for open government.” *Federal Way v. Koenig*, 167 Wn.2d 341, 344, 217 P.3d 1172 (2009), quoting *Rental Housing Ass’n of Puget Sound v. Des Moines*, 165 Wn.2d 525, 527, 199 P.3d 393 (2009) The burden is on the agency to demonstrate timely compliance. RCW 42.56.550(2)

##### **B. Agency bears the burden to justify exemption, strictly and narrowly construed**

The agency bears the burden to prove an exemption to production applies. RCW 42.56.550(1), *West v. Port of Olympia*, 183 Wn. App. 306, 311, 333 P.3d 488 (2014) The Act must be liberally construed in favor of disclosure and its exemptions must be narrowly construed. RCW 42.56.030, *West*, 183 Wn. App. at 311 Review of agency action is de novo. RCW 42.56.550(3), *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 428, 300 P.3d 376, 327 P.3d 600 (2013), *West*, Id.

Any exemption must be enumerated by the legislature. There is no statutory exemption for employee evaluations.

**C. The City failed to provide a brief explanation of how the claimed exemption applies to the record redacted**

Agency responses refusing, in whole or 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 the record withheld.*

RCW 42.56.210 (italics added).

*Lakewood v. Koenig*, 182 Wn. 2d 87, 343 P.3d 335 (2014) is directly on point. There the Supreme Court held:

An agency violates a requestor's right to receive a response when it withholds or redacts public records without articulating a specific applicable exemption and providing a 'brief explanation of how the exemption applies to the record withheld.' RCW 42.56.210(3)

Id. at 90 There Lakewood, as Tacoma here, simply redacted documents with a citation to the claimed exemption without explanation as to why the document fits within the claimed exemption. This, the court found, violated the Act.

The purpose of the requirement is to inform the requestor why the documents are being withheld and provide for meaningful judicial review of the agency action. See *PAWS II*, 125 Wash.2d at 270, 884 P.2d 592; *Sanders v. State*, 169 Wash. 2d 827, 240 P.3d 120 (2010) (noting that "claimed exemptions cannot be vetted for validity if they are unexplained").

Id. at 94 Further, the agency must identify “with particularity” the specific record withheld and the specific exemption authorizing the withholding.

Id. at 94 “...the agency must provide sufficient explanatory information for requestors to determine whether the exemptions are properly invoked,” citing *Rental Housing*, 165 Wash. 2d at 539, 199 P.3d 393 (quoting WAC 44-14-04004(4)(b)(ii)); and *Sanders*, 169 Wash. 2d at 846, 240 P.3d 120.”

Id. at 95

When the exemption is categorical to exempt a particular type of information or record such as debit card numbers further explanation may not be required however when other exemptions are claimed “additional explanation is necessary to determine whether the exemption is properly invoked. See e.g. *Sanders*, 169 Wash. 2d at 846, 240 P.3d 120 (finding agency’s response insufficient when it claimed the controversy exemption for numerous records without specifying details such as the controversy to which each record was relevant).” Id. at 95-96 For example the attorney client privilege is an “other” statute which requires further explanation why the privilege applies. *Sanders*, 169 Wn. 2d at 840 n. 4

In *Sanders* the Court held a log which identifies the author, recipient, date, and broad subject matter with a specification of the exemption is legally insufficient because the explanation is absent. *Id.* at 845-46 “Allowing the mere identification of a document and the claimed

exemption to count as a ‘brief explanation’ would render the brief explanation clause superfluous.” Id. at 846 According to *Sanders*, the agency’s failure to fulfill its brief explanation requirement is an aggravating factor to be considered at the penalty phase. In *Koenig*, the court held failure to provide an adequate brief explanation entitles the requestor to an award of reasonable attorney fees without consideration of penalties and regardless of whether documents are improperly withheld. *Koenig*, 182 Wn.2d at 98.

**D. The City is collaterally estopped to deny it violated RCW 42.56.210(3)**

Displaying contempt for the Court and the rule of law, the City willfully disregarded with full knowledge the prior ruling of Judge Martin on the brief explanation requirement. CP 289-90, (Lantz 44-5) More importantly, the City willfully and intentionally decided to violate the rights and entitlements of virtually every private person requesting disclosure of public documents by violating the brief explanation requirement of RCW 42.56.210(3). Thus, Pastor Kuehn was required to initiate a second suit to vindicate the same legal right established against the City in the first. This is bad faith and an outrage!

The City is collaterally estopped to deny its methodology of simply identifying the claimed exemption by a code letter and then quoting the

exemption statute absent specific factual explanation of why or how the claimed exemption applies to the specific document withheld or redacted violates the statute.

This precise issue was previously before the Court in a prior litigation brought by the Church against the City and determined in favor of the Church and against the City. CP 335-7, See Ex. 6 and 7(Summary Judgment of May 8, 2015) Although the City simply ignored Judge Martin’s judgment, it did so at its peril. In fact, the City specifically and intentionally decided to ignore the order as seen in the Lantz deposition.

*Rains v. State*, 100 Wn.2d 660, 665-66, 674 P.2d 165 (1983) is on point. Collateral estoppel “prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted. (citing cases)” Id. The doctrine requires (1) Identity of issue, (2) a final judgment, (3) identity of the party against whom the claim is asserted, and (4) application of the doctrine not work an injustice (in the sense that the party had a fair opportunity to litigate in the prior proceeding.) All of the elements are here present: (1) in the prior proceeding, as here, the issue decided was whether the City’s practice of simply identifying the claimed exemption by statutory citation without further explanation satisfied RCW 42.56.210(3); (2) there was a final judgment on the merits ; (3) the plea is asserted against the same party here as before; and (4) application of the

doctrine will not work an injustice (because the City was afforded a full and fair opportunity to litigate it in the prior proceeding). Under these circumstances, the City is “foreclosed under the doctrine of collateral estoppel from litigating the same issue...” *Id.* 666

**E. Documents Redacted do not fit within the claimed exemption**

Since the legislature has not created a categorical (or any other) exemption for employee evaluations, we must look to RCW 42.56.230 and .050 for the elements of proof. For something to fit within the “privacy” exemption it must first be “personal information” (.230) and *only if so* the agency must then establish its release would be “highly offensive” (.050) *and* even then *not* be of legitimate concern to the public. Unfortunately, the trial court did not even purport to perform the statutory analysis but hung its hat on a (mis)reading of *Dawson* entirely. The proper statutory analysis follows.

**1. Redacted material is not “personal information”**

“There’s no privacy interest in public records. Public records belong to the public.”

Judge Chris Lanese, Thurston County Superior Court, [News Tribune](#)

March 13, 2018 (fining Pierce County and Mark Lindquist \$349,000)

At the statutory privacy exemption threshold must be a determination whether (1) the withheld material is “personal information” and, if so, (2) the

disclosure would violate the employee's "right to privacy." RCW 42.56.230

(3) If not, the analysis ends.

The Supreme Court has held "the right to privacy applies 'only to the intimate details of one's personal and private life.'" *Dawson v. Daly*, 120 Wn.2d 782, 796, 845 P.2d 995 (1993), overruled in part, *Soter v. Cowles Publ. Co.*, 162 Wn.2d 716, 755, 174 P.3d 60 (2007). However here *nothing* redacted appears by context related to the intimate details of either Directors Huffman nor Kingsolver's personal life.

The City cited *Dawson* in its claimed exemption, CP 298; however, the issue in *Dawson* was whether a performance evaluation "which does not discuss any specific instances of misconduct or of the *performance of public duties*" was exempt. *Dawson*, 120 Wn.2d at 796, 800 (italics added) But here there is *nothing but* a discussion of public duties.

## **2. Redacted Material is not "highly offensive to a reasonable person"**

Even if we were dealing with "personal information," which we are not, its disclosure does not violate the employees right to privacy unless its disclosure would also be "highly offensive to a reasonable person." RCW 42.56.050 The City CR 30(b)(6) deposition failed to identify anything even in its own opinion "highly offensive" which was redacted. CP 285 (Lantz 25) The unredacted documents should confirm that.

Moreover our Supreme Court has opined “allegations—including angry outbursts, inappropriate gender-based and sexual comments, and demeaning of colleagues and employees--...do not raise to the level of ‘highly offensive.’” *Morgan v. Federal Way*, 166 Wn.2d 747, 756, 213 P.3d 596 (2009) The redacted material here, by comparison, is plain vanilla.

**3. The City cannot prove the redacted material is not “of legitimate concern to the public.” RCW 42.56.050**

We are here concerned with the on-the-job performance of two powerful department heads within the City of Tacoma. Each supervises hundreds of employees and has considerable discretionary authority over private citizens such as Pastor Kuehn. CP 341- 349 Even if the information sought was “personal” (which it isn’t), the release of which would be “highly offensive” (which it isn’t), their on-the-job performance is certainly of legitimate concern to the public.

Illustrative is *Spokane Research v. Spokane*, 99 Wn. App. 452, 457, 994 P.2d 267 (2000) wherein the performance evaluation of the Spokane City Manager was sought. The court held even if one presumed release of same would be “highly offensive,” there is a legitimate public interest in the information, which trumps all other considerations to the contrary.

So too performance of the directors of Planning and Development Services and Public Works is a legitimate public concern. These evaluations

are material to their continued employment (and City witnesses didn't testify to the contrary) and are of legitimate public concern. We are not here concerned with janitors or clerical staff, but powerful department heads. Also, of legitimate public concern is the method whereby the City evaluates the performance of its department heads—also hidden by these redactions.

**F. The Church should recover its expenses and reasonable attorney fees**

RCW 42.56.550(4) provides the court may assess the agency up to \$100 per day per document withheld or redacted plus all costs including reasonable attorney fees. Failure to comply with the “brief explanation” requirement in and of itself requires an award of reasonable attorney fees. *Koenig*, 182 Wn.2d at 98 Such an award is appropriate here.

**V. CONCLUSION**

As amply demonstrated by in camera review of the unredacted documents, there is not *any* “personal” information at issue. Withholding nearly 150 pages of documents on claim of privilege is nothing less than a scam on the public. Nor is the redacted material “highly offensive” to a reasonable person. Moreover the public has a legitimate need to know what city department heads are doing on the job and how their performance is evaluated by the agency.

Additionally, the City flouts the “brief explanation” requirement of the statute by providing no factual explanation whatsoever of why or how each and every sentence redacted falls within the scope (narrowly construed or otherwise) of RCW 42.56.230 and .050. And the City ignores a prior judgment of the court which invalidates the same exemption scheme it employs here.

The summary judgment of the trial court must be reversed, attorney fees and expenses on appeal must be awarded to the Church and the case remanded for the imposition of additional attorney fees and penalties.

DATED this 7<sup>th</sup> day of May 2019.

GOODSTEIN LAW GROUP PLLC

*s/Richard B. Sanders*

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Richard B. Sanders, WSBA #2813  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

|  |  |
|--|--|
| <p>Margaret Elofson, Deputy City Attorney<br/> City of Tacoma, Office of the City Attorney<br/> 747 Market Street, Room 1120<br/> Tacoma, WA 98402<br/> Email: <a href="mailto:margaret.elifson@ci.tacoma.wa.us">margaret.elifson@ci.tacoma.wa.us</a></p>  | <p><input type="checkbox"/> U.S. First Class Mail, postage prepaid<br/> <input type="checkbox"/> Via Legal Messenger<br/> <input type="checkbox"/> Overnight Courier<br/> <input checked="" type="checkbox"/> Electronically via email<br/> <input type="checkbox"/> Facsimile</p> |
| <p>Sydney Phillips<br/> Eric Stahlfeld<br/> Freedom Foundation<br/> PO Box 552<br/> Olympia, WA 98507<br/> Email: <a href="mailto:ESTahlfeld@freedomfoundation.com">ESTahlfeld@freedomfoundation.com</a><br/> <a href="mailto:sphillips@freedomfoundation.com">sphillips@freedomfoundation.com</a></p> | <p><input type="checkbox"/> U.S. First Class Mail, postage prepaid<br/> <input type="checkbox"/> Via Legal Messenger<br/> <input type="checkbox"/> Overnight Courier<br/> <input checked="" type="checkbox"/> Electronically via email<br/> <input type="checkbox"/> Facsimile</p> |

DATED this 7<sup>th</sup> day of May 2019, at Tacoma, Washington.

s/Deena Pinckney \_\_\_\_\_  
Deena Pinckney

# GOODSTEIN LAW GROUP PLLC

May 07, 2019 - 1:52 PM

## Transmittal Information

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