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SUPREME COURT  
OF THE STATE OF WASHINGTON

FISHER BROADCASTING-SEATTLE TV L.L.C. d/b/a KOMO 4,

*Appellant,*

v.

CITY OF SEATTLE, a local agency and the SEATTLE POLICE  
DEPARTMENT, a local agency,

*Respondent.*

BRIEF OF AMICUS CURIAE THE WASHINGTON ASSOCIATION  
OF CRIMINAL DEFENSE LAWYERS

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## **A. INTRODUCTION**

Public Records Act (“PRA”) cases are often seen as a clash between the advocates of governmental transparency and accountability, and the advocates of privacy. This case is no exception. Fisher Broadcasting, the records requester, is the champion of public accountability. It seeks disclosure of police dash-cam videos so that the citizenry can see how the police are doing their jobs. The City, on the other hand, argues that due to “privacy” concerns Fisher cannot have the police dash-cam videos now, but must instead wait three years before it can obtain them.

The Washington Association of Criminal Defense Lawyers (“WACDL”) urges the Court to reject the City’s argument that the release of video recordings of interactions between police and citizens trigger valid “privacy” concerns. In fact this Court rejected this same argument seven years ago when it succinctly noted that “this Court and the Court of Appeals have repeatedly held that conversations with police officers are not private.” *Lewis v. Department of Licensing*, 157 Wn.2d 446, 460, 139 P.3d 1078 (2006), citing *State v. Clark*, 129 Wn.2d 211, 226, 916 P.2d 384 (1996); *State v. Bonilla*, 23 Wn. App. 869, 873, 598 P.2d 783 (1979); *State v. Flora*, 68 Wn. App. 802, 808, 845 P.2d 1355 (1992); *Johnson v. Hawe*, 388 F.3d 676, 682-83 (9<sup>th</sup> Cir. 2004). The Court of Appeals recognized that such a privacy argument was “wholly without merit.” *State v. Flora*, 68 Wn. App. at 808. Incredibly, more than twenty years later the police are *still* arguing that what happens in front of police cars on the public streets and sidewalks is a “private” matter.

Moreover, there is a fundamental inconsistency between Seattle's argument that these videos contain "private" conversations which they *cannot* disclose without violating someone's right to privacy, and their contention that *after* three years have gone by, *then* they *can* disclose the videos. If the videos really did record "private" matters, they would not suddenly become less private just because three years had elapsed.

The real issue in this case is one of statutory construction. The question is how these words in one sentence contained in RCW 9.73.090(1)(c) should be read when considered together with the PRA:

No sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public *by a law enforcement agency* subject to this section *until final disposition of any* criminal or civil *litigation which arises* from the event or events which were recorded.

(Emphasis added).

The City persuaded the Superior Court that this sentence qualifies for the "other statute" exemption provided for by RCW 42.56.070(1). Although it never mentions the PRA and never mentions any three year period of time, the City argues that RCW 9.73.090(1)(c) temporarily prohibits police from releasing a dash-video in response to a PRA request *for a period of three years*, but that *after* three years has elapsed from the time of the event that was recorded on the video, then police can release the video in response to a PRA request. The City claims that its "three-year delay and then it's okay" policy is a "reasonable" way of harmonizing a conflict between the public accountability purpose of the Public Records Act and the privacy purpose of RCW 9.73.090(1)(c). *Brief*

of Respondent (“BOR”), at 43.

The City’s argument rests upon a false premise of conflict between the Privacy Act and the PRA. WACDL respectfully submits, however, that there is no conflict between the two statutes. Properly construed, RCW 9.73.090(1)(c) is a statute concerned with unnecessary pretrial publicity that may make selection of an impartial jury somewhat more difficult. It is *not* a privacy protection provision. In this case, as in *Livingston v. Cedeno*, 164 Wn.2d 46, 186 P.3d 1055 (2008), the two statutes, one inside the PRA and one outside it, serve different legislative purposes. *Both* purposes can be served without subordinating either one to the other. When properly construed, the key sentence in RCW 9.73.090(1)(c) has no application to police disclosures made in response to PRA requests. It is applicable *only* to (1) police initiated disclosures made in the absence of any PRA request, (2) when civil or criminal litigation related to the recorded event is actually pending in a court of law.

**B. ARGUMENT**

**1. VIDEO AND AUDIO RECORDINGS OF EVENTS WHICH HAPPEN IN PUBLIC PLACES DO NOT RECORD “PRIVATE” MATTERS BECAUSE ANYONE CAN SEE AND HEAR AND SEE THESE THINGS.**

Although the issue of how to treat police car dash-cam videos has been posed as a question about how to resolve a clash between the values of transparency and privacy, this is really a false dichotomy because there is no “privacy interest” in keeping secret what happens when police encounter people on the public streets. Washington courts have

repeatedly reached this very sensible conclusion.

One of the earliest cases was *State v. Flora*, 68 Wn. App. 802, 808, 845 P.2d 1355 (1992). In that case, while Flora was being arrested he tape recorded his conversation with the arresting officer. He was subsequently charged and convicted of violating RCW 9.73.030 for recording “private conversation.” The Court of Appeals reversed his conviction, holding that his conversation with the arresting officer was not “private” because it occurred in public where anyone could hear it:

The State urges us to adopt the view that public officers performing an official function on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby enjoy a privacy interest which they may assert under the statute. *We reject that view as wholly without merit.*

Determining whether a given matter is private requires a fact specific inquiry. . . .

Although the term “private” is not explicitly defined in the statute, Washington courts have on several occasions construed the term to mean:

“secret ... intended only for the persons involved (a conversation) ... holding a confidential relationship to something ... a secret message; a private communication ... secretly; not open or in public.”

[Citations omitted]. . . .

*The State advances no persuasive basis for its contention that the conversation between the officers and Flora should be considered private.* We note in particular that in none of the cases it cites as controlling were public officers asserting a privacy interest in statements uttered in the course of performing their official and public duties. Rather, the question in those cases was whether the *personal* privacy of an individual was improperly invaded. [Citations omitted] The State now urges us to distort the rationale of those cases to support the proposition that police officers possess a personal privacy interest in statements they make as public officers effectuating an arrest.

Our research into other legal sources, in which a literature on the notion of privacy may be said to exist, has produced no cases which support the State's position. In Fourth Amendment analysis, and tort theory, for example, *the question whether a matter is private occasions a threshold inquiry into whether the matter at issue ought properly be entitled to protection at all.*

“It is clear, however, that there must be something in the nature of prying or intrusion, ... *It is clear also that the thing into which there is intrusion or prying must be, and be entitled to be, private.*”

[Citations omitted].

*The conversation at issue fails this threshold inquiry; the arrest was not entitled to be private. Moreover, the police officers in this case could not reasonably have considered their words private.* Because the exchange was not private, its recording could not violate RCW 9.73.030 which applies to private conversations only.

*Flora*, 68 Wn. App. at 806-08 (footnote omitted) (bold emphasis added).

Seven years ago this Court reached the same conclusion and explicitly held that RCW 9.73.030 simply doesn't apply to roadside conversations between police and motorists they have stopped and detained. *Lewis v. Department of Licensing, supra*. *Lewis* was a consolidation of four DUI cases. Citing *inter alia* to *Flora*, this Court held “that conversations with police officers are not private.” 164 Wn.2d at 460. The Court reaffirmed *Flora* and explicitly stated, “[W]e hold that traffic stop conversations are not private for purposes of the privacy act.” *Id.* Moreover, this Court specifically held that “[t]he language of the proviso in RCW 9.73.090(1)(c) does not make these conversations private by implication.” *Id.* at 465.

In sum, since conversations occurring on the public streets and sidewalks of the city between police and citizens are not private, when

considering a PRA request for disclosure of dash cam videos there are no privacy interests to be balanced against the interest of transparency in government. Seattle's contention that privacy concerns justify the nondisclosure of dash-cam videos is simply at odds with well established Washington case law.

**2. THE CITY REWRITES THE STATUTE, CHANGING THE PHRASE "WHICH ARISES" INTO "WHICH MAY ARISE," AND THEN PLUCKS A THREE YEAR STATUTE OF LIMITATIONS OUT OF THIN AIR AND APPLIES IT SO AS TO DELAY THE PRODUCTION OF POLICE VIDEOS WHICH DEPICT INCIDENTS FROM WHICH LITIGATION "MAY ARISE."**

The City's position rests upon its interpretation of the clause that refers to final disposition of criminal or civil litigation. The subject of this clause, which amicus will refer to here as the "Until Clause," is the "final disposition of any criminal or civil litigation." That subject is further modified. The Until Clause only applies to litigation "*which arises* from the event or events which were recorded." (Emphasis added). The City reads the words "which arises" as encompassing *more* than simply litigation which has actually arisen and therefore exists – in an unresolved state -- at the time a public records act request for the video is received. The City reads the Until Clause as *also applicable* to litigation *which may arise* at some point in the future. Thus, the City contends that as long as it is possible that a lawsuit or a criminal prosecution *might* be filed, the police cannot release the video in response to a Public Records Act request unless three years has elapsed since the date of the filmed event.

RCW 9.73.090(1)(c) makes no mention of any specific time period.

Nevertheless, the City offers this explanation as to how it came up with this construction of the statute:

The statute of limitations for a personal injury lawsuit is three years. RCW 4.16.080. Other statutes of limitations are even longer. Consequently, civil litigation which arises from an event that has been recorded may not even be filed for three or more years or more. Despite this uncertainty, SPD adopted three years as the narrowest interpretation that complies with both the PRA and the Privacy Act. Based on evidence provided by the City and the Court's own experience that tort cases are routinely not filed until just before the three year period is up, the trial Court held this was a reasonable and narrow interpretation of the statute; thus, a case by case review of videos prior to three years would not effectuate the Legislature's intent.

*BOR*, at 43.

**3. FISHER CORRECTLY POINTS OUT THAT THE CITY'S CONSTRUCTION OF RCW 9.73.090(1)(c) VIOLATES SEVERAL CANONS OF STATUTORY CONSTRUCTION.**

Fisher Broadcasting correctly notes that Seattle is misreading the "which arises" phrase. The City reads the phrase as if it said "which may arise." The word "may" is not in the statute; the word used is "arises" with an "s," not the word "arise." The City's interpretation violates basic canons of statutory construction such as the rule that a court cannot add words to a statute that are not there. *Restaurant Development, Inc. v. Cananwill*, 150 Wn.2d 674, 682, 598 (2003). Second, it conflicts with the Legislature's command that courts must construe the PRA liberally so as to effectuate open government. *Rental House v. City of Des Moines*, 165 Wn.2d 525, 540, 199 P.3d 393 (2009). Third, the City's construction ignores the language of RCW 42.17A.904<sup>1</sup> that states: "In the event of

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<sup>1</sup> RCW 42.17A.904 is a re-codification of former RCW 42.17.920.

conflict between the provisions of this act and any other act, the provisions of this act shall govern.” And fourth, the City’s construction is at odds with *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994). There this Court held that a statute falls within the “other statute” exemption provided by RCW 42.56.070(1) unless the “other statute” exempts or prohibits the disclosure of specific public records “in their entirety.” *Brief of Appellant* (“BOA”), at 30. Since Seattle’s construction of RCW 9.73.090(1)(c) only provides for a “temporary” exemption for a period of three years, it cannot qualify for the “other statute” exemption because it flunks the “entirety” requirement of *PAWS II*.

**4. THE CITY’S CONSTRUCTION OF THE STATUTE FORCES IT TO ARGUE THAT THERE IS A “TEMPORARY” EXEMPTION FOR DASH CAM VIDEOS THAT EVENTUALLY DISAPPEARS. MOREOVER THE CITY’S SELECTION OF THE THREE YEAR STATUTE IS WHOLLY ARBITRARY, SINCE SOME LITIGATION IS GOVERNED BY A TEN YEAR STATUTE, SOME BY A TWO YEAR STATUTE, AND SOME HAS NO STATUTE OF LIMITATIONS AT ALL.**

Finally, since the Seattle Police Department (“SPD”) also follows a record retention policy of destroying all dash cam-videos after a period of three years, Fisher points out the absurd consequences of SPD’s statutory construction policy when combined with this retention policy. First, SPD refuses to release the videos for a period of three years. Then, after three years, having complied with RCW 9.73.090(1)(c)’s supposed requirement of waiting until it is no longer possible for a personal injury lawsuit to be filed, SPD destroys all its dash-cam videos. So the bottom line is, “You

can't have them now, but if you wait three years you can get them then although by that time we will have destroyed them." This is just as good a "Catch-22" as the famous one employed by the character in Joseph Heller's famous novel of the same name.

The City chooses to select three years because RCW 4.16.080(2) provides a catch-all three year statute of limitations for actions for "injuring personal property . . . or for any other injury to the person or rights of another not hereafter enumerated." But there are other statutes of limitations that could easily apply to actions arising out of encounters between police and citizens. A two year statute of limitations applies to civil actions for assault, assault and battery, and false imprisonment. RCW 4.16.100(1). A ten year statute of limitations applies to criminal prosecutions brought against a public officer for a felony committed in connection with the duties or his or her office. RCW 9A.04.080(1)(b)(i). And there is no statute of limitations at all for criminal actions for murder, vehicular homicide, vehicular assault or hit-and-run injury-accident. RCW 9A.04.080(1)(a). The City offers no explanation as to why its choice to import the general three year statute of limitations into RCW 9.73.090(1)(c) is the correct choice.<sup>2</sup>

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<sup>2</sup> Consider, then, the absurd consequences of making a public records act request dependent upon the length of the applicable civil and criminal statutes of limitation. If a police officer kills a citizen in an encounter on a public street, and the police are forbidden to release a dash-cam video until after final disposition of any criminal litigation which "may arise," then the police would *never* have to release the video. But if the only possible litigation which "may arise" is a civil action for a simple battery, since the applicable statute of limitations is two years, using the City's logic a PRA request for a dash- cam video would only be forbidden for two years.

**5. THE CITY INCORRECTLY EQUATES RECORDS MADE AVAILABLE TO THE PUBLIC BY PUBLIC RECORDS REQUESTERS WITH THOSE MADE AVAILABLE BY POLICE IN THE ABSENCE OF ANY PRA REQUEST.**

The parties have assumed that the phrase “made available to the public” covers the action of complying with the Public Records Act by giving a copy of a dash-cam video to a records requester. Particularly when one considers the preposition “by” in the phrase “by a law enforcement agency,” this assumption does not prove warranted.

When a person makes a PRA request for a record, and that record is provided by a government agency, the agency has made the record available to *the PRA requester*. But by making the record available to the requester the government agency has *not* made the record “available to the public.” It takes a second act “by” someone else – “by” the records requester – before the record is “available to the public.” Of course the records requester, once he obtains the record, may take action to make the record “available to the public.” The requester may post the video on the internet, thus making it available to the whole world. He may copy it and send a copy of it to *The New York Times* or to Fisher Broadcasting. If he does that, then *The New York Times* or Fisher Broadcasting may post it on the internet, thus making it “available to the public.” But suppose that second step is actually taken by the records requester, and the third step is actually taken by the media organization. Can it be said that the record was made available to the public “by the law enforcement agency”? Only in the most indirect sense can it be said that it was made available “by” the police agency. In was only truly made available to the public “by” the

media organization. And the media organization was only able to make it “available to the public” because it was made available to it “by” the records requester. Therefore, if one interprets the “made available to the public *by*” clause narrowly, the act of disclosing a dash-cam video in response to a PRA request is not covered at all by RCW 9.73.090(1)(c).

The City would label such an argument sheer sophistry. But is it? Why interpret the “made available . . . by” clause narrowly? Because the case law and the Public Records Act itself both state that all exemptions are to be construed narrowly. The Legislature could not have been clearer about this: “This chapter shall be liberally construed *and its exemptions narrowly construed.*” RCW 42.56.030 (emphasis added). *Livingston v. Cedeno*, 164 Wn.2d at 50; *Hangartner v. Seattle*, 151 Wn.2d 439, 450, 90 P.3d 26 (2004); *Confederated Tribes v. Johnson*, 135 Wn.2d 734, 745-46, 958 P.2d 260 (1998).

**6. PROSECUTORS AND POLICE ARE FORBIDDEN FROM MAKING EXTRAJUDICIAL STATEMENTS THAT HAVE A SUBSTANTIAL LIKELIHOOD OF MAKING IT DIFFICULT TO SELECT AN IMPARTIAL JURY.**

More importantly, construing the “made available” clause in this manner makes good sense because it promotes the purpose of statute in a manner which does *not* bring it into conflict with the Public Records Act, but instead allows both statutes to achieve their purpose. Demonstrating this point requires us first to answer the question: What is the legislative purpose that underlies the key sentence in RCW 9.73.090(1), and why would the Legislature want to single out the *police* and prohibit them from

making dash-cam videos publicly available, while allowing everyone else in society to make them publicly available?

The answer, I believe, is related to well-recognized principles about the responsibility of lawyers and police to avoid potentially biasing the jury pool by making extrajudicial statements. These principles are set forth in RPC 3.6 and 3.8 which govern what lawyers may say while litigation is pending or when it is anticipated. Rule 3.6 says that a lawyer “shall not make an extrajudicial statement that the lawyer knows, or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” The Comment to the rule states:

Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, *the Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.*

Comment [3] (emphasis added).

RPC 3.8(f) provides that prosecutors have “special responsibilities.” One of those responsibilities is to prevent police from making similar extrajudicial statements:

The prosecutor in a criminal case shall: . . .

(f) refrain from making extrajudicial statements that have a substantial likelihood of heightening public condemnation of the accused and *exercise reasonable care to prevent* investigators, *law enforcement personnel*, employees or other persons assisting or associated with the prosecutor in a criminal case *from making an extrajudicial statement*

*that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.*

RPC 3.8(f) (emphasis added). *See also* Comment [6].<sup>3</sup>

Similarly, the courts have held that trial judges have the power to protect a criminal defendant from the effects of prejudicial pretrial publicity by “proscribing public statements by prosecutors, attorneys, witnesses, court staff, *police* and the defendant . . .” *State v. Coe*, 101 Wn.2d 364, 384, 679 P.2d 353 (1984)(emphasis added), citing *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966).<sup>4</sup>

**7. THE PURPOSE OF THE “UNTIL FINAL DISPOSITION” CLAUSE IS TO PREVENT THE POLICE FROM MAKING IT MORE DIFFICULT TO SELECT AN IMPARTIAL JURY WHEN CIVIL OR CRIMINAL LITIGATION HAS ACTUALLY ARISEN.**

There is no legislative history which sheds light on the reason why State Senator Hargrove moved to insert the sentence prohibiting law enforcement from making dash-cam videos available to the public.<sup>5</sup> But in light of the principles that lawyers and police should not make extrajudicial statements which can be expected to inflame the jury pool, it seems logical to conclude that these principles were what motivated Senator Hargrove to insert this sentence into the law.

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<sup>3</sup> “Ordinarily the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.”

<sup>4</sup> “[T]he court should have made some effort to control . . . gossip to the press *by police officers*, witness, and counsel for both sides.”

<sup>5</sup> The House and Senate Reports on the bill to amend RCW 9.73.090 do not say anything about why this sentence was added to the statute. *See* House Bill Report, HB 2903 (undated); House Bill Analysis, HB 2903 (undated); House Bill Report, SHB 2903 (As Passed Legislature); Senate Bill Report, SHB 2903 (February 25, 2000); Final Bill Report, SHB 2903. But it was Senator Hargrove who moved the amendment which inserted this sentence into Substitute House Bill 2903, and his motion to amend was passed on March 2, 2000.

The City seems inclined to *agree* that this was what motivated Senator Hargrove. The City notes that it is easy to edit videos, and such editing can distort the truth and cause the video to be an unfair and inaccurate record of the event.

These recordings play a significant evidentiary role in civil and criminal litigation and *the Legislature recognized the impact that disclosure of recordings to the public could have if they were released before the subject of the recordings had an opportunity to fully adjudicate any criminal charges or civil claims* related to the events that were recorded. (Clerks Papers 487-88). KOMO focuses only on disclosing videos to expose possible police misconduct, but fails to acknowledge or even mention *the potential impact disclosure could have on individual citizens and the legal system*. Video images are more powerful than a written description, and they can quickly “go viral” on-line. *Viewers feel that they have “witnessed” recorded events even if the recordings are incomplete, fail to provide essential contextual information, or have been heavily edited.*

*Brief of Respondent*, at 43-44 (footnotes omitted) (emphasis added). Recognizing the potential that dash-cam videos have to prejudice viewers who may end up being called for jury duty in cases involving the filmed incident, the City asserts that the Legislature recognized the importance of affording litigants “the right to defend criminal charges or pursue civil claims in an impartial atmosphere.” *Id.* at 45.

WACDL agrees. The City is right about this: The legislative purpose to be served by prohibiting “law enforcement” from making the videos “available to the public” was to protect the impartiality of the jury pool from which jurors will be drawn to decide these cases.

**8. THERE IS NO CONFLICT BETWEEN THE PUBLIC RECORDS ACT AND RCW 9.73.090(1)(c). THE LEGISLATIVE PURPOSES OF BOTH CAN BE SERVED BY RECOGNIZING THAT THE BAN ON MAKING DASH CAM VIDEOS PUBLICLY AVAILABLE ONLY PROHIBITS POLICE INITIATED DISSEMINATION OF DASH-CAM VIDEOS WHERE (a) NO PRA REQUEST HAS BEEN MADE AND (b) WHERE THERE IS ACTUAL LITIGATION PENDING REGARDING THE RECORDED EVENT.**

There is no good reason to read RCW 9.73.090(1)(c) as if it provides an exemption to the PRA. Once it is recognized that the two statutes have entirely different purposes, RCW 9.73.090(1)(c) should be read as having no impact whatsoever on how police agencies respond to PRA requests for dash-cam videos.

The purpose of RCW 9.73.090(1)(c) is to make sure that law enforcement agencies that use dash-cam videos do not take the initiative to disseminate these videos to the media because that runs afoul of the general principle that government officials (which includes police) should not be making extrajudicial statements that make it substantially likely that the ability to conduct a fair judicial proceeding will be prejudiced. The purpose behind the PRA is clearly stated in the Act itself – to make it possible for citizens to be informed about what their government officials are doing, so that they can hold them accountable. *Both* purposes can be served by implementing *both* statutes.

In the absence of a PRA request, law enforcement is prohibited from making the dash-cam videos publicly available by voluntarily disseminating them. But if a PRA request is made for a dash-cam video, law enforcement must grant the request and provide a copy of the video to

the requester. If, thereafter, the records requester decides to further disseminate the video, that does not violate RCW 9.73.090(1)(c), because that statute *only* applies to police. On its face it only applies to the situation when a dash-cam video is “made available to the public *by a law enforcement agency . . .*” What law enforcement *cannot* do, other people can do. This is entirely consistent with the distinction drawn by RPC 3.6, which “*applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.*” Comment [c]. Similarly, RPC 3.8 states that the lawyer who works with the police – the prosecutor – must take steps to prevent the police from making the same type of statements which the RPC prohibits the prosecutor from making.

But everyone else is free to make such statements. Freedom of speech – the right to speak on the subject of how government employees (like police) are conducting themselves – does not get generally suspended simply because litigation is pending or anticipated. But freedom of speech for the lawyers and police involved in incidents which are being litigated *does* get restricted *if* it is the kind of speech that imperils the ability of the litigants to have a fair trial.

**9. HERE, AS IN *LIVINGSTON v. CEDENO*, THERE IS NO CONFLICT BETWEEN THE PRA AND THE STATUTE OUTSIDE THE PRA.**

While the two laws at issue in *Livingston v. Cedeno*, 164 Wn.2d 46, 186 P.3d 1055 (2008) were quite different, the Court properly resolved what at first blush appeared to be a conflict between them by pointing out

that there really was no conflict at all. In *Livingston* a prison inmate made a PRA request for some records of the Department of Correction. The Department copied the records and mailed them to the inmate at his current address – the prison where he was confined. Upon arrival there the records were treated as “contraband” under DOC Policy Directive 450.100 which authorizes the Department to inspect and read all incoming mail, and to prevent inmates from receiving material which threatens the security of a prison. Livingston argued that by seizing the records and refusing to deliver them to him, the Department had violated the PRA. He argued that RCW 72.09.530, the statute which authorized the Department to adopt its mail policy, did not create an “exemption” from the Public Records Act. On this point the Court *agreed* with him. 164 Wn.2d at 52 (“We agree with Livingston that RCW 72.09.530 . . . is not an exemption to disclosure under the public records act.”)

Livingston further argued that the Department’s enforcement of the mail contraband policy violated the PRA, but the Court disagreed with him on this point:

The public records act requires the department to release its records to the public. However, whether the department must allow them inside a correctional facility is a different issue, subject to different statutory obligations. Under RCW 72.09.530, the Department has broad discretion to deny entry of any materials it determines may threaten legitimate penological interests, without exception for public records.

*Livingston*, 164 Wn.2d at 52.

Relying upon the axiom that “statutes must be read in harmony and each must be given effect” whenever that is possible, the Court held that

there was no conflict between the two statutes, and that both statutes had been properly implemented:

The public records act and RCW 72.09.530 are aimed at two different concerns. The primary purpose of the public records act is to provide broad access to public records to ensure governmental accountability. To that end, each agency “shall make available for public inspection and copying all nonexempt public records. RCW 42.56.070(1). Agencies must honor requests received by mail and may not distinguish among persons requesting records.

The primary objective of the correctional system, on the other hand, is “to provide the maximum feasible safety” for the public, staff, and inmates. RCW 72.09.010(1). Accordingly, RCW 72.09.530 directs the Department to screen all incoming and outgoing mail in order to protect legitimate security concerns within the state penal institutions. . . .

*Livingston*, 164 Wn.2d at 52-53.

Ultimately, the Court recognized that the primary objectives of *both* laws could be – and had been – accomplished.

***We find no conflict between RCW 72.09.530 and the public records act, chapter 42.17 RCW. Each statute serves a different legislative purpose.*** While the public records act is intended to provide broad access to public records to ensure governmental accountability, RCW 72.09.530 is intended to protect legitimate security concerns within the state penal institutions. Here, the Department complied with the public records act when it mailed the requested documents to the address provided by *Livingston*. The Department’s subsequent decision to bar *Livingston* from receiving the documents pursuant to its mail policy did not violate *Livingston*’s rights under the public records act.

*Livingston*, 164 Wn.2d at 57 (emphasis added).

WACDL submits these same principles apply to RCW 9.73.090(1)(c) and the PRA. There is no conflict between them. “Each statute serves a different purpose.” *Id.* To paraphrase *Livingston*,

While the public records act is intended to provide broad access to public records to ensure governmental accountability, RCW

9.73.090(1)(c) is intended to protect litigants from being unable to have their cases impartially adjudicated by prohibiting police from making extrajudicial statements that are likely to bias the potential jury pool.

Similarly, to borrow from *Livingston's* text and to apply it to the statutes at issue in *Fisher Broadcasting v. Seattle*,

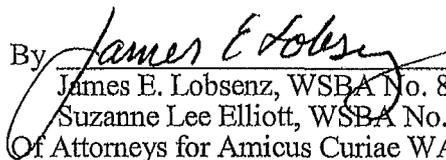
When no one makes a public records act request for dash-cam videos, police comply with RCW 9.73.090(1)(c) by not voluntarily disseminating them to the public. When police comply with a public records act request to furnish a copy of a dash-cam video to someone who has requested that record pursuant to that act, they comply with the public records act, and they do not violate RCW 9.73.090(1)(c).

### C. CONCLUSION

In sum, by reading RCW 9.73.090(1) literally and narrowly, the apparent conflict between it and the public records act simply disappears. There is no reason to read RCW 9.73.090(1)(c) as if it is an "other statute" which sets forth an exemption to the public records act. We can have *both* (1) public access to video records needed to insure that our police are accountable to the public they serve *and* (2) litigation free from the taint of police initiated disclosures of video records which can be expected to make it more difficult to find impartial jurors to sit and decide the cases which involve the events recorded on those videos.

DATED this 9th day of April, 2013.

CARNEY BADLEY SPELLMAN, P.S.

By   
James E. Lobsenz, WSBA No. 8787  
Suzanne Lee Elliott, WSBA No. 12634  
Of Attorneys for Amicus Curiae WACDL

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Attached for filing in *Fisher Broadcasting v. City of Seattle & the Seattle Police Department*, No. 87271-6, is the motion of WACDL to file an amicus brief, along with the amicus brief itself.

The motion for amicus brief is filed by Suzanne Lee Elliott, WSBA #12634, 206-623-0291, [Suzanne-elliott@msn.com](mailto:Suzanne-elliott@msn.com). The amicus brief is filed by Ms. Elliott and James E. Lobsenz, WSBA # 8787, (206) 622-8020, [lobsenz@carneylaw.com](mailto:lobsenz@carneylaw.com).

Thank you for your assistance.

William Hackney  
Legal Assistant