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No. 87271-6

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FISHER BROADCASTING-SEATTLE TV L.L.C. dba KOMO 4,

Appellant,

v.

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

Respondents.

**REPLY OF APPELLANT TO WASHINGTON ASSOCIATION OF
SHERIFFS AND POLICE CHIEFS' AMICUS BRIEF**

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I. INTRODUCTION

The Washington Association of Sheriffs and Police Chiefs (“WASPC”) does not explain how any decision in this case will impact “the use and acceptance of dash-cams by law enforcement.”¹ Rather, WASPC responds to arguments KOMO did not make, supporting the Seattle Police Department’s (“SPD”) interpretation of RCW 9.73.090(1)(c) in this case. This is not surprising because SPD’s interpretation delays release of dash-cam videos that record police activity, and public accountability for that activity, for three years after a recorded event that may reveal police misconduct. WASPC rests on the unsupported and unfounded contention that the Legislature intended to prevent any release of a dash-cam video to protect “information privacy interests” of individuals recorded in interactions with police. WASPC’s concern for the “privacy interests” of individuals recorded on police dash-cam video is surprising for a police organization that apparently sees no problem with police recording citizen activity as long as they do not have to disclose the recordings to the public. WASPC’s claims here have no basis in the legislative history of RCW 9.73.090(1)(c) or the law.

¹ CORRECTED Brief of Amicus Curiae Washington Association of Sheriffs and Police Chiefs (“WASPC Brief”), p. 1. WASPC merely threatens to not use dash-cam videos if the Court does not rule their way. WASPC Brief, p. 19.

II. ARGUMENT

A. KOMO'S INTERPRETATION OF RCW 9.73.090(1)(C) DOES NOT CONFLICT WITH THE PUBLIC RECORDS ACT WHEREAS WASPC'S DOES.

WASPC misreads KOMO's interpretation of RCW 9.73.090(1)(c).

KOMO contends that this statute does not qualify as an "other statute" exemption under RCW 42.56.070(1) according to the criteria in *Progressive Animal Welfare v. Soc'y of Univ. of Wash.* ("*PAWS II*"), 125 Wn.2d 243, 262, 884 P.2d 592 (1994) (en banc).²

According to *PAWS II* the "other statute" must not conflict with the PRA. *Id.* at 262. KOMO claims that RCW 9.73.090(1)(c) does not qualify as an "other statute" exemption under *PAWS II*. But WASPC does not address *PAWS II*. Instead, it contends that KOMO claims that all exemptions in other statutes would conflict with the PRA because they mandate nondisclosure.³ Not only would this sweeping interpretation of the "other statute" exemption practically eviscerate the PRA, but here, a three-year blanket ban on release of dash-cam videos in response to PRA requests certainly conflicts with the purpose of the PRA.

² Brief of Appellant, pp. 30-31.

³ KOMO has never asserted this claim but recognizes that the Legislature has decreed specific PRA exemptions for a myriad of reasons – RCW 9.73.090(1)(c) simply is not such an exception.

“The primary purpose of the Public Records Act is to provide broad access to public records to insure governmental accountability.” *Livingston v. Cedeno*, 164 Wn.2d 46, 52-53, 186 P.3d 1055 (2008) (en banc). A three-year delay in the release of a public record prevents the public from timely holding their government accountable. Thus, the WASPC/SPD interpretation creates a conflict with the PRA, which controls according to RCW 42.56.030. WASPC’s views would render that statute meaningless, as mere surplusage, an interpretation this Court must avoid. *See Veit, ex rel. Nelson v. Burlington Northern Santa Fe Corp.* 171 Wn.2d 88, 113, 249 P.2d 607 (2011).

This Court can interpret RCW 9.73.090(1)(c) to avoid conflict and to effectuate the purpose of both statutes, contrary to WASPC’s claim.⁴ If RCW 9.73.090(1)(c) is construed narrowly as required by law,⁵ it can be read to shield temporarily a dash-cam video for cases that are in litigation at the time of the PRA request, or it could be read as not applying to PRA requests which do not constitute disclosure to the public by police. The statutory text and legislative history supports both interpretations, which can fulfill the purpose of RCW 9.73.090(1)(c) and the PRA.

⁴ KOMO never argued that a “conflict” arises because there is alternative means to acquire the records. KOMO’s discussion of *Deer v. DSHS*, 122 Wn. App. 84, 93 P.3d 195 (2005) examined how the Court reconciled RCW ch. 13.50 and the PRA and one basis was the means to acquire public records under both statutes.

No legislative history exists to explain the insertion of the language at issue in RCW 9.73.090(1)(c):⁶

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 supplied).

The legislative purpose of the overall amendment to RCW 9.73.090 was explained:

This bill will allow a sound recording also to be made in this situation. The intent of this bill is not to invade privacy – it doesn't authorize recordings in homes, in businesses, or of phone conversations. People pulled over for a traffic stop have a lower expectation of privacy than situations involving wiretaps. *Allowing sound recordings in this context will help ensure officer safety, provide an important evidentiary tool, and create a checks and balances system for officer conduct.*

H.B.Rep. on Substitute H.B. 2903 56th Leg., Reg. Sess. (Wash. 2000).

Nothing in its legislative history indicates that the Legislature intended to create a new three-year exemption for dash-cam videos with the language at issue or that it had privacy concerns about the bill.

But WASPC argues that there is no need to resort to legislative history because the language of RCW 9.73.090(1)(c) is so clear and

⁵ RCW 42.56.030.

⁶ All versions of the House and Senate Bill Reports for H.B. 2903 are silent about this sentence that was added to RCW 9.73.090 by the Legislature in 2000.

unambiguous, focusing on the words “no” and “any.” WASPC claims, without authority, that “any” is “all inclusive” including “pending,” “threatened,” “likely,” and “possible” litigation.⁷ But in statutory construction, the term “any” is a word of limitation that specifies an item in existence as stated in a statute. *Barnecut v. Seattle School Dist. No. 1*, 63 Wn.2d 905, 907, 389 P.2d 904 (1964) citing *Stovall v. Toppenish School Dist. No. 49*, 110 Wn. 97, 188 P. 12 (1920) (interpreting the words any park, playground or field house as a word of limitation describing the actual places.) Therefore, WASPC’s interpretation of the statutory text is unsupportable.

Further, WASPC’s analysis ignores other words in the text such as a dash-cam video “to the public by a law enforcement agency.” A release to an individual in response to a public records request is not a release to the general public. Further, the term “by a law enforcement agency” can mean that the disclosure the statute prevents is one initiated at the behest of the police when litigation is underway. Logically, this makes sense because this limit on police disclosure ties to the obligation of prosecutors and police to avoid potentially biasing the jury pool by making extrajudicial statements such as by the release of a dash-cam video before or during trial. *See* RPC 2.8(f). If that is the purpose of the sentence at

⁷ WASPC Brief, p. 7.

issue, then it can be achieved with no violation of the PRA. Police can fulfill their legal obligation to respond to a dash-cam video PRA request and, at the same time, avoid initiating potentially prejudicial extrajudicial statements, which is the harm to be avoided.

WASPC speculates⁸ that PRA requestees will slip into the crack between the video event and commencement of litigation to obtain dash-cam videos. This alarmist concern is baseless. WASPC identifies no harm to any articulated state interest by providing dash-cam videos in response to a PRA request except generalized, speculative harm to privacy interests that is unfounded as explained in the next section. This result would not be “absurd” or frustrate the “intent of the statute,”⁹ and in any event, the legislative history indicates that WASPC has no standing to vindicate the privacy interest it invokes here.

In sum, WASPC’s statutory construction argument is as baseless as SPD’s. If the Legislature intended RCW 9.73.090(1)(c) to be an “other statute” PRA exemption it could have said so as it has done with other non-PRA statutes. (*See, e.g.*, RCW 2.61.111; 7.68.080; 15.19.080; 15.44.185; 18.71.045).¹⁰ WASPC’s interpretation blatantly conflicts with

⁸ WASPC Brief, p. 8.

⁹ WASPC Brief, p. 8.

¹⁰ Approximately 90 statutes specify reports or information that are “exempt” under “ch. 42.56.”

the PRA's purpose by squelching release of dash-cam videos for three years based upon the specter of "possible" litigation. KOMO's interpretation avoids this conflict and fulfills the PRA's purpose of promoting government accountability intended by both RCW 9.73.090(1)(c) and the PRA.

B. NO PRIVACY INTEREST IS AT ISSUE IN RCW 9.73.090(1)(C).

WASPC erroneously claims that "protection of information privacy interests" was one of the Legislature's purpose in adopting the delayed-release provision in RCW 9.73.090(1)(c).¹¹ WASPC cites no legislative history or other support for this proposition and the reason is clear: None exists. The Legislature added the amendment to RCW 9.73.090 in 2000 to allow police to make sound recordings that would otherwise be deemed an invasion of privacy under other sections of RCW ch. 9.73. Because these recordings would be made in public as a result of police interaction they would not invade privacy. *See* H.B. Rep. on Substitute H.B. 2903 56th Leg. Reg. Sess. (Wash. 2000).¹²

WASPC's position, if taken to its logical conclusion, would prohibit use of police dash-cam videos because they might record images of persons who have a qualified privacy interest in not being filmed in

¹¹ WASPC Brief, p. 9.

public. But the Legislature impliedly disagrees with WASPC's position, since the Privacy Act, which criminalizes some privacy invasions, specifically exempts dash-cam videos. The Legislature crafted the Privacy Act this way because they did not view such videos as invading any protectable privacy interest.

WASPC seems to claim that the release of the dash-cam videos would violate privacy rights but the Legislature has found otherwise or it would not have allowed the release of dash-cam videos at all. However, any privacy violation occurs by the act of filming, for which police are responsible and no prohibition or release would cure the initial violation.

Washington case law refutes WASPC's position. These hold there is no "privacy interest" in police interactions with citizens on public streets. *State v. Flora*, 68 Wn. App. 802, 806-08, 845 P.2d 1355 (1992) involved a citizen taping his conversation with an arresting officer who claimed his privacy rights were invaded by the filming – not the distribution. The Court said:

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.*

¹² Quoted on p. 4, *supra*.

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."

Id. at 806 (citations omitted).

In *Fordyce v. Seattle*, 840 F. Supp. 784 (W.D. Wash. 1993), *aff'd in part, reversed in part, vacated in part*, 55 F.3d 436 (9th Cir. 1995) a police officer claimed Fordyce violated the Privacy Act by recording him during a protest rally. The court said:

While the exact question has not been decided, it is highly probable that the state **courts would interpret RCW 9.73.090 so as to not make criminal the recording of a conversation held in a public street**, in voices audible to passersby, by the use of a readily apparent recording device. In [one Washington case] the court stated:

"On the public street, or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there. Neither is it such an invasion to take his photographs in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which anyone would be free to see."

[That case] dealt with photography, not with sound recording, but its point that **reasonable privacy expectations do not extend to what can readily be seen**

in a public place could apply to what can readily be heard by passersby in such a place.

Even more clearly, **the state would not apply the statute to the recording of a conversation in the street, audible to others, between two police officers, or between officers and a citizen, held in the course of the officers' duties.** The Washington Court of Appeals so decided in 1992. (*Citing Fordyce*)

(*Id.*, at 792-93 (emphasis added)).

Finally, *Lewis v. Department of Licensing*, 157 Wn.2d 446, 460, 139 P.3d 1078 (2006), which interpreted other provisions of RCW 9.73.090(1)(c) noted “this Court and the Court of Appeals have repeatedly held that conversations with police officers are not private.” WASPC tries to distinguish *Lewis* by claiming that it did not hold that no privacy interests were implicated by the Privacy Act.¹³

WASPC’s ten-page “privacy” analysis invents a purported legislative concern to address modern perils to privacy through the nondisclosure language of RCW 9.73.090(1)(c). It does not work for several reasons, not the least of which is the absence of any supporting legislative authority.¹⁴

¹³ WASPC Brief, p. 10.

¹⁴ WASPC’s concerns over modern voyeurism and dissemination over YouTube could not have been considered by the Legislature in 2000 when it adopted RCW 9.73.090(1)(c) because YouTube first aired in 2005. See <http://en.wikipedia.org/wiki/YouTube> (last visited April 4, 2013).

WASPC's privacy arguments also miss the mark because they speculate about numerous possible embarrassing moments that "might" be caught on film (i.e., the wardrobe malfunction), without tying these to what could or would actually be recorded by a dash-cam video. More importantly, they ignore the fact that the dash-cam video is also capturing police conduct, which is one of the purposes expressed in legislative history.

C. KOMO'S INTERPRETATION OF RCW 9.73.090(1)(C) HAS NO IMPACT ON FAIR TRIAL RIGHTS.

As discussed above, if the Legislature had any intent for RCW 9.73.090(1)(c) to impact of pretrial release of a dash-cam video, it was to preclude police from disseminating the video to the public as a form of extrajudicial statement. Nothing supports an interpretation that equates responding to a PRA request as an act of "dissemination" forbidden by RCW 9.73.090(1)(c) or as interfering with "fair trial" rights.

Courts have ample tools to protect litigants' "fair trial interests" without impeding the dissemination of information and prohibition on speech. *See State v. Coe*, 101 Wn.2d 364, 689 P.2d 353 (1984) (prior restraint of speech is not a tool to protect fair trial rights); *Seattle Times v. Serko*, 170 Wn.2d 581, 243 P.3d 919 (2010) (denial of PRA request not a tool to protect fair trial rights). A three-year ban on the release of dash-

cam videos certainly is not necessary to protect fair trial rights, especially where criminal trials are typically resolved in far less time. Cr.R. 3.3(b) (providing defendants' speedy trial right).

Finally, WASPC again posits speculative harm to the integrity of law enforcement investigations by release of dash-cam videos. If a video is essential to effective law enforcement, then the Public Records Act would exempt it from disclosure, under RCW 42.56.230 explicitly rather than rely on a strained interpretation of RCW 9.73.090(1)(c) as an "other statute exemption."

III. CONCLUSION

WASPC's brief provides no assistance to this Court in resolving this appeal, and the Court should disregard it.

Respectfully submitted this 4th day of April, 2013.

GRAHAM & DUNN PC

By 
Judith A. Endejan, WSBA# 11016
Attorneys for Fisher Broadcasting-Seattle
TV L.L.C. dba KOMO 4

DECLARATION OF SERVICE

Darlyne De Mars declares and states as follows:

I am a citizen of the United States and a resident of the state of Washington; I am over the age of eighteen (18) years; am competent to be a witness in a court of law; and am not a party to the this action.

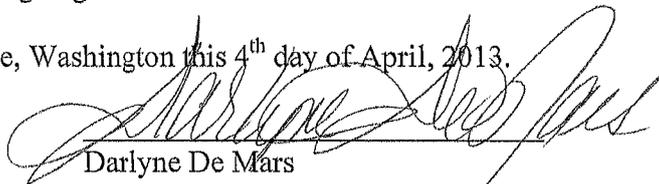
On the 4th day of April, 2013, I caused to be served a true and correct copy of Reply of Appellant to Washington Association of Sheriffs and Police Chiefs' Amicus Brief, addressed and delivered as follows:

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

Signed at Seattle, Washington this 4th day of April, 2013.



Darlyne De Mars
 Legal Assistant to Judith A. Endejan

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Subject: Fisher Broadcasting-Seattle TV L.L.C. dba KOMO 4 v. City of Seattle - No. 87271-6 [Reply to Amicus Briefs]

Dear Clerk:

Attached for filing with the Court, please find (1) Reply of KOMO to Washington State Association of Municipal Attorneys' Amicus Brief; and (2) Reply of KOMO to Washington Association of Sheriffs and Police Chiefs' Amicus Brief in Cause No. 87271-6. Please acknowledge receipt by reply email. Thank you.

Darlyne T. De Mars

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