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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 STATE
ASSOCIATION OF MUNICIPAL ATTORNEYS' AMICUS BRIEF**

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 ORIGINAL

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I. INTRODUCTION

Fisher Broadcasting-Seattle TV L.L.C. dba KOMO 4 (“KOMO”) responds to the Amicus Curiae brief of Washington State Association of Municipal Attorneys (“WSAMA”) in support of Respondents, City of Seattle (“City”) and Seattle Police Department (“SPD”). The point of WSAMA’s brief is unclear at best and misdirected at worst. WSAMA claims an amicus interest in its members’ fear of potential Public Records Act¹ (“PRA”) violations from denials of “vague and nebulous” PRA requests. Because KOMO’s PRA requests were not “vague and nebulous” and they requested records that did exist WSAMA’s brief is meritless.

WSAMA’s brief epitomizes a pro-secrecy attitude that conflicts with the PRA, blaming the requester for submitting a “poorly worded” or “flawed” request that did not “accommodate” the ability of SPD to process.² WSAMA speculates that a “blossoming cottage industry” will arise founded by PRA requesters who “would intentionally formulate nebulous requests for the specific purposes of manufacturing a Public Records Act case.”³ Far from addressing any relevant factual issues in this case, WSAMA’s speculation merely reflects its distaste for PRA requests.

¹ Washington’s Public Records Act is codified in RCW ch. 42.56.

² WSAMA Brief, pp. 2, 4.

³ WSAMA Brief, p. 7.

More to the point, WSAMA's views ignore the obligations that the PRA imposes on agencies to facilitate public access to government records, thereby achieving the PRA's purpose of informing citizens about the conduct of their government.⁴ RCW 42.56.030.

“[A]n informed and active electorate is an essential ingredient, if not the *sine qua non* in regard to a socially effective and desirable continuation of our democratic form of representative government.”

Fritz v. Gorton, 83 Wn.2d 275, 283-84, 517 P.2d 911 (1974).

Thus, agencies must construe PRA requests liberally. *Knight v. F.D.A.*, 938 F. Supp. 710, 716 (D. Kan. 1996). An unclear request is not a license for an agency to issue a summary denial. Instead, the agency must seek clarification and provide the “fullest assistance to inquirers.” RCW 42.56.110; 42.56.520. Here, SPD offered no assistance at all, yet WSAMA condones SPD's actions without legal justification.

WSAMA ends its brief with *ipse dixit* conclusions about the meaning of RCW 9.73.090(1)(c) that provide no assistance to this Court.

⁴ “It has long been recognized that compliance with the PDA may impose an administrative burden on an agency entrusted with public records. Yet, administrative inconvenience or difficulty does not excuse strict compliance with the PDA.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 131-32, 580 P.2d 246 (1978).

II. ARGUMENT

A. KOMO'S AUGUST 2010 PRA REQUESTS FOR SPD DASH-CAM VIDEOS WERE NEITHER VAGUE NOR NEBULOUS.

WSAMA argues that SPD properly denied KOMO's requests for the databases for SPD's dash-cam video system (the "DICVS") because the requests were not for "identifiable records," and that SPD had no duty to update responses to provide documents created after the request was received.⁵ Both claims are wrong because SPD knew, or should have known, the identity of the records requested by KOMO and that these databases were not created after KOMO's request.

First, there is no evidence that SPD's public records officer, Sheila Friend-Gray, misunderstood Tracy Vedder's August 4 and 11, 2010 requests or could not identify the requested records.⁶

The standard for an "identifiable record" seems to be whether an agency could reasonably identify the records from the description the requestor gives It makes sense that a requester is not required to provide the exact name of the requested record.⁷

⁵ WSAMA Brief, p. 6.

⁶ Ms. Friend-Gray received these requests. As the PRA officer responsible for SPD's response only her interpretation of the requests is most relevant. SPD submitted no Declaration from Ms. Friend-Gray. Because she sent them to IT Technology Staffers (albeit not to COBAN database administrator, Toby Baden) (CP 214), she clearly interpreted them as requesting electronic records.

⁷ "Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws," WSBA (2006 Ed.) § 4.1(2).

Given the background and context of Ms. Vedder's two database requests, Ms. Friend-Gray must have known they identified the database for the COBAN DICVS. This was the only database Ms. Vedder knew about in August of 2010 after she confirmed with Ms. Friend-Gray that COBAN was the manufacturer of SPD's DICVS. (CP 94-95). Ms. Vedder told SPD on July 8, 2010 that she was interested in SPD's video database. (CP 84). Ms. Friend-Gray knew this. (CP 202-03).

The actual language of each August request can only be interpreted as requesting an electronic database for the DICVS. Both requests asked for "log sheets" or a "list" in "a searchable electronic form organized and searchable by date and other reasonable fields." (CP 96, 98). This language clearly excludes stand-alone paper "log sheets" that recorded different information (equipment failure and deactivation) (CP 89-90), for which Ms. Vedder had expressed no interest. Yet this is SPD's after-the-fact alleged "interpretation" of the August 4, 2010 request, which makes no sense in the context of facts known by SPD at the time.

Ms. Vedder's expressed prior interest—known to Ms. Friend-Gray—was for records that identified COBAN dash-cam videos "tagged for retention." Thus, it would be unreasonable for Ms. Friend-Gray to interpret the requests as seeking paper records recording other information about equipment failure and deactivation, and there is no record evidence

that she did so. In fact, SPD submitted no evidence whatsoever regarding Ms. Friend-Gray's interpretation, any confusion on her part or inability to "identify" the requested records. If Ms. Friend-Gray was confused, or thought the requests were unclear, the law required her to seek clarification from Ms. Vedder before denying them. RCW 42.56.520; WAC 44-14-04003(3). She did not do so. Instead, she and SPD consistently maintained that the COBAN database was unsearchable. (CP 76).

The record—which WSAMA's brief ignores—shows that Ms. Friend-Gray did not purport to deny the requests because she could not "identify" the records or because the requests were "poorly worded."⁸ (CP 97, 99). In fact, SPD is ill-positioned to make such a claim, because Ms. Friend-Gray identified and denied Ms. Vedder's PRA request for a COBAN user manual, erroneously claiming that copyright law forbade examination of the user manual. (CP 95, 204). Eric Rachner obtained a COBAN user manual independently, which allowed him to frame his database with the specificity SPD claims is lacking in Ms. Vedder's request. (CP 32). SPD and WSAMA cannot complain about an imprecise request and, at the same time, withhold the tools necessary to frame a more specific query. Agencies alone are the gatekeepers for these tools.

Further, contrary to WSAMA's claims⁹ that the Rachner and Vedder requests "are quite different," their language, interpreted broadly, seeks the same thing: the COBAN DICVS database. They both sought "logs" about the COBAN DICVS¹⁰ in searchable electronic form with "fields" of information.¹¹

The only conclusion that the Court can draw from the record is that Ms. Friend-Gray did not want to disclose the DICVS database to Ms. Vedder and manufactured a reason to withhold it. The record shows that she understood Ms. Vedder's requests and that she did no real, competent search to determine if the DICVS database existed, which it did, in August of 2010 (CP 38). SPD did not refute Mr. Rachner's testimony that the COBAN DICVS database existed in August, 2010. (CP 38). Therefore, it is disingenuous for WSAMA to claim that SPD had no obligation to "supplement" its response¹² once records came into existence because those records existed at the time of the denials to KOMO. It is that time

⁸ WSAMA Brief, p. 4.

⁹ *Id.*

¹⁰ In August of 2010, this was the only system for dash-cam videos that SPD told Ms. Vedder about. She never requested databases for other SPD computer systems.

¹¹ At least one court equates the term "database" with "searchable electronic format" in a Freedom of Information Act, 5 U.S.C. § 552, *et seq.* case. *See, e.g., People for the Ethical Treatment of Animals ("PETA") v. Bureau of Indian Affairs*, 800 F. Supp. 2d 173, 176 (D.D.C. 2011) (involving the adequacy of an agency search).

period that determines a PRA violation—when SPD first wrongfully denied Ms. Vedder’s requests. See *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 725, 261 P.3d 119 (2011) (citing *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103-04, 117 P.3d 1117 (2005)).

The SPD’s denial of Ms. Vedder’s database requests in August, 2010 violated the PRA because a searchable COBAN database existed. SPD and WSAMA’s position, if accepted, would mean that agencies would not have to look for responsive records to a PRA request. This Court rejected that position in *Neighborhood Alliance*, which adopted the same standard for determining the reasonableness of a search that federal courts apply to the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* “[T]he focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate ... The search must be reasonably calculated to uncover all relevant documents ... Agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered.” 172 Wn.2d at 720-21 (emphasis added). And under FOIA:

Detailed descriptions of “what records were searched, by whom, and through what process” satisfy this standard of reasonableness ... To meet its burden the agency may

¹² WSAMA Brief, pp, 5, 6.

submit affidavits or declarations that explain in reasonable detail the scope and method of the agency's search.

PETA, 800 F. Supp. 2d at 177.

SPD never documented its search for records responsive to Ms. Vedder's PRA requests. This absence of evidence shows that Ms. Friend-Gray's search was perfunctory and deliberately not targeted to uncover the requested COBAN databases. She did not craft her search in a way to find records responsive to Ms. Vedder's requests. She never sent the requests to the person most likely to know how to respond to such records: Toby Baden, the DICVS database administrator. (CP 214, 401.06). She based her first denial on Mr. Alcayaga's statement that officer log sheets are kept at the precinct level (CP 231). He is responsible for applications, not the database (CP 214).

There is no evidence that Ms. Friend-Gray searched for records at the precinct level or otherwise. There is no evidence that Ms. Friend-Gray knew when she denied Ms. Vedder's first request that the paper log sheets (which were non-responsive in any event) had been destroyed.

Her attempts to fulfill Ms. Vedder's second PRA request are equally inadequate. Again, she did not send it to the person most able to respond: Mr. Baden. She then directed SPD IT officers to not use COBAN to see if it could help respond to the request. (CP 234). Then she

told Ms. Vedder in the denial that while the system had some search capabilities (CP 99) she did not offer to use them—concluding that because SPD did not have records exactly as requested by Ms. Vedder that SPD had no records.

What is remarkable is that Ms. Friend-Gray then provided Ms. Vedder with screen shots from the COBAN system that on their face show extensive search capabilities. Ms. Friend-Gray did not follow up on this obvious lead. (CP 104, Appendix A Respondent’s Brief). Ms. Friend-Gray never questioned why these records contradicted her claim that the COBAN system had no search capabilities and therefore no responsive records existed.

In sum, Ms. Friend-Gay’s two denials immediately violated the PRA because a searchable COBAN database existed and her effort to search for responsive records was inadequate at law. Further, SPD provided a searchable COBAN database to Mr. Rachner in August of 2011 (CP 35) but only provided it to Ms. Vedder when she learned about it from Mr. Rachner (CP 81) further exacerbating the PRA violations because SPD should have provided it on its own. WAC 44-14-04003(12).

B. WSAMA’S INTERPRETATION OF RCW 9.73.090(1)(C) HAS NO BASIS.

Not surprisingly WSAMA endorses SPD’s skewed interpretation of RCW 9.73.090(1)(c) that inserts novel language into that statute;

namely, if any litigation is possible over an arbitrary three-year period, then police cannot disclose dash-cam videos in response to a PRA request.

WSAMA's conclusory interpretation of this allegedly unambiguous statute violates several principles of statutory construction. First, it ignores the PRA's requirement that courts construe exemptions narrowly. RCW 42.56.030. Second, it ignores that the PRA preempts conflicting statutes, here RCW 9.73.090(1)(c). RCW 42.56.030. Third, it inserts language to a statute (i.e., "which might arise"; "three-year period") which courts cannot do. *Restaurant Dev. Inc. v. Cananwill*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003) (en banc). Finally, WSAMA's interpretation sidesteps the issue of whether RCW 973.090(1)(c) even qualifies an "an other statute" exemption under RCW 42.56.070(1).¹³

WSAMA then claims that the legislative history of RCW 9.73.090(1)(c) supports its position that the Legislature intended the statute to delay disclosure to avoid unspecified effects upon any possible civil or criminal litigation. Yet, the history WSAMA cites evidences no such intent. Rather, it shows that the Legislature viewed dash-cam videos as necessary tools to achieve the purposes of insuring officer safety, providing an important evidentiary tool and creating a "checks and

¹³ WSAMA Brief, pp. 11-12.

balances system for officer conduct."¹⁴ This confirms the parallel purposes of RCW 9.73.090(1)(c) and the PRA: to allow the public to hold government actors accountable for their actions. WSAMA's interpretation would defeat that purpose by withholding dash-cam videos that reveal officer conduct.

It is more plausible that the Legislature intended the nondisclosure language in RCW 9.73.090(1)(c) to achieve an additional purpose—to prohibit police or prosecutors from releasing dash-cam videos on their own as a public statement prior to a trial for their benefit. Ethical rules proscribe such extrajudicial statements. RPC 3.8(f). What is certain is that there is no evidence that the Legislature intended the nondisclosure language to delay a response to a PRA request.

It is possible for this Court to fulfill both the purpose of RCW 9.73.090(1)(c) and the PRA by finding that providing dash-cam videos to a public records requester is not prohibited by the nondisclosure provisions of RCW 9.73.090(1)(c).

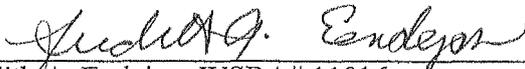
¹⁴ WSAMA Brief, citing H.B. Rep. on Substitute H.B. 2903 56th Leg., Reg. Sess. (Wash. 2000).

III. CONCLUSION

WSAMA's brief provides no legal or factual basis to support SPD's position in this case. This 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
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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.

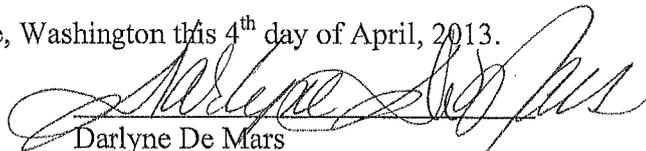
On the 4th day of April, 2013, I caused to be served a true and correct copy of Reply of Appellant to Washington State Association of Municipal Attorneys' Amicus Brief, addressed and delivered as follows:

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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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