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No. 87271-6

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 BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Fisher Broadcasting TV L.L.C. dba KOMO 4 (“KOMO”) hereby replies to the Brief of Respondent City of Seattle (“Response”), which is premised upon two fundamental flaws. First, it pretends that the public records requests at issue¹ asked the Seattle Police Department (“SPD”) to create something that did not exist. In fact, the requested database for the COBAN Digital Video Management System (“DVMS”) existed at the time of the requests.

Second, SPD assumes, that because a few dash-cam videos might involve future civil or criminal litigation it must withhold all dash-cam videos, which exceed 750,000 in number² from the public for three years under RCW 9.73.090(1)(c). Because this second flaw produces the greatest harm by foreclosing public access to critical records regarding police accountability KOMO dissects it first.

II. ARGUMENT

A. SPD’S DENIAL OF MS. VEDDER’S REQUESTS FOR DASH-CAM VIDEOS VIOLATED THE PRA.

¹ Tracy Vedder, a KOMO reporter requested the database for the DVMS on August 4 and 10, 2010 (CP 96, 98). Her third request sought the retained dash-cam videos (CP 107).

² Response, p.10.

1. **SPD's October 1 and December 10, 2010 Denials of the KOMO Dash-Cam Videos are Stand-Alone PRA Violations.**

The third PRA request at issue in this appeal asked for all SPD dash-cam videos tagged for retention (CP 107). It was denied on the basis that the retained videos did not exist because "SPD is unable to query the system to generate a retention report that would provide a list of retained videos." (CP 254). This denial violates the PRA because it was untruthful at the time it was provided, a fact ignored by the Response. The denial falsely represents that the retained videos did not exist at the time of the request because they could not be found. Yet, the Response clearly admits that the videos did exist at that time because they are retained in the DVMS system once they are uploaded to the system.³

The denial is also false, or at the very least misleading because SPD did have the means to locate the videos at the time of KOMO's request. The Response (pp. 11-12) admits that SPD has the ability to search for dash-cam videos: "SPD could query DVMS but not produce a searchable database." This sentence on its face contradicts itself. A query requires a searchable database. (CP 36, 403). Appendix A to the Response, entitled "Video Search" shows that SPD could search for

³ Response p. 9. Inexplicably, the Response (p. 38) perpetuates the illogic of the video request denial by claiming that an inability to access records means the records do not exist.

“Retained Video Only.” In addition, prior to its October 1, 2010 denial SPD provided Ms. Vedder with a sample of a video “log” retention report (CP 104) which also shows search capabilities. It defies credulity for SPD to claim its system could not generate a “retention report” when it provided one such report to Ms. Vedder on August 24, 2010. (CP 103-104). Therefore, SPD’s denial of KOMO’s request for retained videos on the basis of a lack of search capability is simply not true and SPD wrongfully withheld existing public records from KOMO. Finally, in addition to the user interface search capabilities (Response, Appendix A, CP 103-104) SPD had access to the searchable SQL database provided to Eric Rachner, who was able to quickly search for retained videos (CP 31-66). This database was not created but existed since the COBAN system was purchased. (CP 38, 403).

Given the existence of several search capabilities, the Response does not explain why SPD needed a complete list of all retained videos in order to produce any dash-cam videos to KOMO, when SPD clearly could locate some retained videos. The PRA does not exempt public records because they cannot be “listed,” if they can be found. Rather, the PRA imposes an obligation to produce the records, irrespective of retention “lists.” The PRA requires an agency to produce records an agency can locate even if it cannot locate all the records. RCW 42.56.070, .080.

In addition to containing falsehoods, SPD's October 1, 2010 dash-cam video denial (CP 254) violates the PRA in other important ways. Just as with the other two denials at issue here, SPD denied KOMO's request for the dash-cam videos with no evidence that it conducted any search for them. Ms. Friend-Gray's response to Ms. Vedder (CP 109) denies the existence of the dash-cam videos but says nothing about SPD's search efforts to locate any video. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 261 P.3d 119 (2011) requires public records officers to conduct a documented, reasonable search and to search for the requested records where they most likely can be found. Ms. Friend-Gray's October 1, 2010 letter is simply a blow-off and fails to explain any search for the videos. It demonstrates a complete lack of "assistance" to the requestor, contrary to RCW 42.56.100. She never communicated with Ms. Vedder to clarify her request or to inform her of the capabilities of the COBAN system. See WAC 44-14-04003(2). She never informed Ms. Vedder that COBAN had offered to write a SQL script to locate the retained videos for free. (CP 239).⁴ Even though SPD really did not need any customized access to identify retained videos because of the underlying SQL database provided to Mr. Rachner, it was

⁴ The Response (p. 20) claims this SQL script did not differentiate between retained and unretained videos. The COBAN SQL script provided by COBAN (CP 409) was written to locate retained video.

particularly disingenuous for Ms. Friend-Gray to claim an inability to query the system in light of COBAN's offer, which she knew about prior to writing her October 1, 2010 blanket denial. (CP 109, 238-39). This denial violated the PRA because SPD wrongfully withheld existing dash-cam videos.

Further, Chief Diaz' denial of the appeal of the October 10, 2010 denial (CP 250) re-commits this violation. SPD produced no evidence of any "thorough inquiry and search" in conjunction with this appeal as claimed by Chief Diaz. The appeal denial continues to misrepresent that SPD would not locate "retained video" when it could. It misrepresents the COBAN response, and the agency's duties under the PRA, because the PRA does allow for customized access to electronic records and production of a searchable database in the format kept by the agency. See WAC 44-14-05004; WAC 44-14-05002(1).

SPD continued to violate its duty to search and to provide the "fullest assistance" when it purported to provide a response to the dash-cam video request after being compelled to do so by the intervention of the Seattle City Council in March of 2011. Leaving aside the issue of SPD's newly-minted claim of exemption under RCW 9.73.090(1)(c) SPD led KOMO down a senseless bunny trail by insisting that it could not provide KOMO with data about the dash-cam videos without running the

COBAN's new free SQL script and without correlating this data with data from unrelated SPD systems. (CP 137, 382). Ms. Vedder's 2010 requests for COBAN's database never asked for any data or database from any system other than the COBAN system (CP 96-98). The Response erroneously claims that she sought information compiled from the COBAN system and Versaterm systems⁵ (CP 3, 33) to falsely distinguish her request from Mr. Rachner's request. This claim is disingenuous and highlights the efforts SPD went through to find any basis to hinder Ms. Vedder's understanding of the COBAN system and access to the dash-cam videos. SPD's IT officer, Toby Baden, was working on the request of Mr. Rachner at the same time he was working on SPD's response to KOMO in the spring of 2011. Mr. Baden clarified Mr. Rachner's request (CP 406), but no one from SPD ever clarified Ms. Vedder's database request. Mr. Baden understood Mr. Rachner's request for the underlying SQL database and its capabilities (CR 402-06) yet he never used this capability to locate retained videos for Ms. Vedder even though Mr. Rachner was able to do so. One could argue that a seasoned, well-trained IT professional like Mr. Baden could have, and should have, connected the dots between the database provided to Mr. Rachner and its usefulness in the KOMO search.

⁵ The Response's discussion of the Versaterm system is irrelevant because all of the dash-cam video data sought by Ms. Vedder was contained in the COBAN system database. (CP 94-95).

Of course, SPD did not inform KOMO of the Rachner request. In sum, nothing in SPD's denials to KOMO of access to dash-cam videos on the basis of inaccessibility holds up.⁶

These violations are stand-alone PRA violations. SPD's continued withholding of the requested dash-cam videos under a purported PRA exemption, raised for the first time by SPD after events subsequent to the dash-cam video denial exposed its falsity, is a separate PRA violation.

2. **RCW 9.73.090(1)(c) is not an "Other Statutes" Exemption.**

Once SPD received pressure from the Seattle City Council, at KOMO's insistence, SPD knew that it had to manufacture a different reason to keep its dash-cam videos from public scrutiny because the basis for withholding previously given to KOMO would no longer work. SPD admits that it first asserted the RCW 9.73.090(1)(c) exemption in March of 2011 after the Seattle City Council intervened.⁷ Contrary to the Response's claim, SPD's position on RCW 9.73.090(1)(c) was not a longstanding SPD policy.⁸ If it was, then why was it not asserted initially

⁶ SPD unbelievably challenges the trial court's conclusion that it violated the PRA by failing to provide the database to KOMO that it provided to Mr. Rachner (Response, p. 35). An agency has duty to provide later-discovered records that are responsive to a PRA request. WAC 44-14-04007.

⁷ Response, p. 38, n. 11.

⁸ Response, p. 40. If SPD lacked the ability to access dash-cam videos in response to PRA requests prior to March of 2011 then SPD would have had no reason to assert RCW 9.73.090(1)(c) as an exemption prior to that time.

as a PRA exemption in response to KOMO's dash-cam video request? If it was, why is this nondisclosure "policy" not contained in SPD's dash-cam video policy, which indicates that video officers are to inform inquiring citizens how they may view or obtain a copy of the subject recording? (CP 90). If it was, why has the SPD given dash-cam videos to many requestors, not just to the video's subjects? (CP 276-96). The obvious answer is that SPD had no such policy on dash-cam videos prior to March of 2011.

The inconsistencies in SPD's positions in this case further point to the absence of this "policy." On the one hand, SPD argues that it first claimed the RCW 9.73.090(1)(c) exemption only after it could "access" the dash-cam videos in March of 2011.⁹ This admits the dash-cam videos exist. Then, SPD claims it did not have to assert the RCW 9.73.090(1)(c) exemption in its denials because the videos did not exist.¹⁰ SPD makes this incongruous claim to circumvent the requirement to provide a "detailed privilege log" with a brief explanation of withholding for each record withheld pursuant to RCW 42.56.210(3). WAC 44-14-04004(4)(b)(ii); *See Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536-39, 199 P.3d 393 (2009). SPD cannot have

⁹ Response p. 20.

¹⁰ Response, p. 38, n. 11.

it both ways. It cannot first claim that no videos existed and now claim they exist but are exempt, without violating the exemption requirements stated above.

SPD's post March 2011 position violates the PRA because it claims a blanket exemption for three years of dash-cam videos with none of the specificity required by RCW 42.56.210(3); *Rental Hous.* and *Progressive Animal Welfare Soc'y v. Univ. of Wash. (PAWS II)*, 125 Wn.2d 243, 270, 884 P.2d 592 (1994). RCW 42.56.210(3) requires an identification of each record withheld and an explanation of why the record is exempt. SPD failed to identify any dash-cam video that it claims is exempt because of RCW 9.73.090(1)(c) or cite any criminal and civil litigation that supports the exemption.

While SPD produced no evidence that it could not identify videos involved in actual criminal or civil litigation, KOMO produced evidence to show that SPD could do so, and that few instances of litigation actually involve dash-cam videos. (CP 297). SPD purchased the COBAN system in 2007 subject to responsibilities under RCW 9.73.090 and the PRA and could have managed, and could still manage, to identify videos subject to actual, open litigation. SPD (Response p. 12) discusses changes that SPD is considering for the COBAN system, an admission that SPD is capable of modifying its information technology system to meet operational needs,

which could include adding a data field to note the presence of actual dash-cam video involvement in litigation.

More important, SPD's newly-minted interpretation of RCW 9.73.090(1)(c) *per se* violates the PRA. The PRA does not require courts to harmonize "other statutes" and the PRA, contrary to SPD's claims.¹¹ On the contrary, the PRA contemplates a lack of harmony by stating that the PRA trumps in the event of a conflict with another statute, which could not be more evident in this case. RCW 42.56.030.

SPD's reliance on *Deer v. Dep't of Soc. & Health Servs.*, 122 Wn. App. 84, 93 P.3d 195 (2004) and *In re the Dependency of KB*, 150 Wn. App. 912, 210 P.3d 330 (2009) is misplaced. In *Deer* the Court of Appeals held that the provisions protecting the privacy of juvenile dependency records in RCW ch. 13.50 qualified as a permissible exemption to the PRA.

However, under the court's analysis in *Deer*, RCW 9.73.090(1)(c) would not qualify as an "other statute" exemption in this case. First, the court accounted for the general purpose of exemptions "to the Act's broad mandate from disclosure" ... [which] is to exempt from public inspection those categories of public records most capable of causing substantial damage to the privacy rights of citizens" (*Deer*, 122 Wn. App. at 91,

quoting *Limstrom v. Ladenburg*, 136 Wn.2d 595, 607, 963 P.2d 869 (1998). The Legislature enacted ch. 13.50 to prevent disclosure of juvenile records to protect the privacy rights of juveniles. *Id.* In contrast, RCW 9.73.090(1)(c) was not adopted to protect any citizen privacy rights because the sound and video recordings made by police do not record private conversations. *Lewis v. State Dep't of Licensing*, 157 Wn.2d 446, 465, 139 P.3d 1078 (2006). In *Lewis* this Court noted that the legislative purpose of RCW 9.73.090(1)(c) was not to protect privacy, but to allow police to make sound recordings that might have been prohibited under RCW ch. 9.73. The Legislature stated:

“Allowing sound recordings in this context will help ensure officer safety, provide an important evidentiary tool, and create a checks and balances systems for officer conduct.”

157 Wn.2d at 463.

Thus, the *Deer* court would have found that RCW 9.73.090(1)(c)'s purpose is not consistent with the privacy-protecting purposes of PRA exemptions and would have not considered RCW 9.73.090(1)(c) to be a PRA “other statute” exemption.

RCW 9.73.090(1)(c) would also not qualify as an “other statute” according to the second part of the court's analysis in *Deer*, which tested RCW ch. 13.50 for a “conflict with the PDA's purpose of holding public

¹¹ Response, p. 41.

officials and institutions accountable and providing access to public records.” *Deer*, 122 Wn. App. at 92. The court found no conflict “[b]ecause chapter 13.50 RCW contains an alternative means of requesting and seeking juvenile dependency records that balances and protects the privacy needs of the juvenile and his or her family ...” *Id.* However, RCW 9.73.090(1)(c) provides no procedure, or means, for accessing public records and no privacy protections – it simply delays disclosure of a limited sub-set of dash-cam videos for a period of time. The only means to obtain them is through the PRA.

Further, SPD’s interpretation of RCW 9.73.090(1)(c) poses a clear, direct conflict with the PRA because it prevents access to public records. More important, it defeats the PRA’s purpose of holding SPD accountable to the public. As discussed in KOMO’s Opening Brief¹² access to dash-cam videos that record actual police conduct, or misconduct is critical to police accountability and to informing the public about newsworthy

¹² Police across the country voluntarily release dash-cam videos to inform the public. *See, e.g.*, Jeremy Ross and Myra Sanchick, “Police release dashcam videos from Sikh Temple shooting Fox 6 Now.com (Sept. 10, 2012) <http://Fox6now.com/2012/09/10/sikh-temple-dash-cam-videos-released-latest/>. Laura Byrne, “Gulfport police release dashcam video of pursuit, WSTP.com (July 11, 2012) <http://www.wtsp.com/news/local/story.aspx?storyid=263360>.

events. This direct conflict means that RCW 9.73.090(1)(c) cannot be a PRA “other statute” exemption.¹³

Refusing to find that RCW 9.73.090(1)(c) is a PRA exemption does not invalidate or abrogate that statute. It is possible to interpret RCW 9.73.090(1)(c), consistent with well-settled principles for statutory construction and the purpose of the PRA, which is to promote broad access to records important to public accountability, to give the full statute effect.

In *Lewis* this court first interpreted RCW 9.73.090(1)(c) based upon its plain and unambiguous language. *Lewis* did not deal with the issue of public release of dash-cam videos but with that part of RCW 9.73.090(1)(c) that mandated that police officers “shall” advise “any” persons that they are being recorded during traffic stops. The court reasoned that use of the word “shall” requires strict compliance with the procedure police must follow when advising detainees of recording. *Lewis*, 157 Wn.2d at 466-68. The sentence in RCW 9.73.090(1)(c) relied upon by SPD in its Response (p. 38) does not contain mandatory language and *Lewis*’ “strict compliance” admonishment simply does not apply to it.

¹³ The *Deer’s* analysis comports with the “other statute” test set forth in *Progressive Animal Welfare Soc’y v. Univ. of Wash. (PAWS II)*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994). The Response does not analyze this test and does not address the glaring conflict that SPD’s interpretation poses with the PRA’s purpose.

The plain language of that sentence requires the non-release of a dash-cam video “until final disposition of any criminal or civil litigation which arises from the event or events which were recorded.” (emphasis supplied). If there is no pending litigation at the time of a request and hence, no “final disposition” can be possible, this condition does not apply and the video can be released. The statutory language does not state that an agency can delay release if it determines that litigation “might” arise, and certainly does not impose a three-year waiting period. Under its plain and unambiguous terms RCW 9.73.090(1)(c) states the fact that actual pending litigation controls nondisclosure.

The Response (p. 43) claims that KOMO’s plain reading of RCW 9.73.090(1)(c) is “nonsensical.” But SPD’s interpretation is nonsensical because it would make approximately 750,000 dash-cam videos non-releasable based upon the speculation that some litigation “might” result within three years.¹⁴ In reality, little litigation ensues. SPD documents produced in discovery shows that only seven videos may be related to open claims (CP 297). Further, any criminal litigation would usually be concluded long before the expiration of the SPD’s three-year waiting

¹⁴ Response, p. 10.

period due to speedy trial requirements.¹⁵ Yet, SPD believes it should refuse to release all dash-cam videos for three years.

If this Court finds RCW 9.73.010(1)(c) to be ambiguous then it can attempt to ascertain legislative intent and interpreting it accordingly. As discussed above, the legislative intent supports maximizing the public release of dash-cam videos to promote public accountability.

The Response insinuates, without any support, that the Legislature intended to delay release out of some unarticulated due process or privacy concerns. The Response advances a jumbled argument that equates release of dash-cam videos with internet shaming, video doctoring, witness tampering and unconstitutional punishment.¹⁶ These argue that dash-cam videos should not be released at all, but the Washington Legislature has determined already that they are releasable and are not confidential. *Lewis* held that privacy interests are not implicated by RCW

¹⁵ WA. Const. art. I, § 22; CrR 3.3.

¹⁶ *Demery v. Arpaio*, 378 F.3d 1020 (2004), *cert.denied*, 545 U.S. 1139 (2005) has no relevance to this case. It did not involve dash-cam videos that record police conduct. It involved jailhouse filming of arrestees by the Maricopa County, Arizona Sheriff's Office. The Sheriff then streamed that video over the internet to the public. The Ninth Circuit found this to be unconstitutional pre-conviction punishment. The other articles cited in the Response relate to issues raised by living in the internet age or video doctoring, which also have no relevance.

9.73.090(1)(c). Thus, SPD's claims regarding hypothetical public detriment from dash-cam video release again, make no sense.¹⁷

This Court can, and should interpret RCW 9.73.090(1)(c) in a way that advances public accountability, consistent with the statute's purposes and a key PRA purpose. This interpretation would narrowly restrict public access to dash-cam videos only for those involved in actual litigation at the time of a request and only until final disposition, which may be much less than three years.

As SPD admits in its Response (p. 42) RCW 9.73.090(1)(c) is not a PRA exemption but a narrow, temporal restriction on release of dash-cam videos, which are not confidential documents. Even if SPD made a good-faith release of a dash-cam video in response to a public records request it could not be punished under RCW 9.73.080(2) because the release would not be wrongful. Further, RCW 42.56.060, which provides good-faith immunity for the release of a public record, would prevent any punishment. RCW 42.56.030. *Ameriquest Mortg. Co. v. Wash. State Gen.*, 170 Wn.2d 418, 241 P.3d 1245 (2010) cited by SPD, simply stands

¹⁷ SPD speculates that the Legislature intended the nondisclosure requirement to protect the legal system and insure impartiality in the litigation process. (Response, pp. 44-45). SPD cites no legislative history of intent to enact the statute to promote impartiality, as one of its purposes. This Court has repeatedly found that claims like SPD regarding publicity and its impact on trials can be dealt with by means other than preventing the publicity. *See Seattle Times Co. v. Serko*, 170 Wn.2d 581, 243 P.3d 919 (2010).

for the non-controversial proposition that federal laws that explicitly prevent the release of financial information may qualify as “other statutes” exemptions.

B. THE SPD VIOLATED THE PRA WITH ITS DENIALS OF THE AUGUST 4 AND AUGUST 11, 2010 REQUESTS FROM KOMO FOR A DASH-CAM VIDEO DATABASE.

The Response needlessly and deliberately confuses the facts regarding SPD’s denials of Ms. Vedder’s August 4 and 11, 2010 requests for COBAN databases. SPD has not (and cannot) disputed the fact that SPD had access to a comprehensive database for the COBAN system that had the capacity to search for “retained” videos since it purchased the system because it provided it to Eric Rachner (CP 38).¹⁸ In addition to the SQL database provided to Mr. Rachner SPD also had user interface search capabilities to search for retained video as demonstrated by the Response, Appendix A (“COBAN DVMS Query Screen) and the retention report provided to Ms. Vedder entitled “View Video Logs” (CP 104). Finally, SPD had the capacity to conduct a query specific to “retained videos” due

¹⁸ SPD does not deny that a database for COBAN’s Digital Video Management System (DVMS) existed as of the date of Ms. Vedder’s first request for such a database on August 4, 2010 (CP 38). SPD does not refute any of the factual evidence presented by Eric Rachner for KOMO (CP 31-72). Mr. Rachner’s declaration explains that the DVMS database runs on a Microsoft SQL Server which is designed to manage data uploaded from the COBAN system. (CP 33). He explained in detail how easily the DVMS database could be uploaded to a DVD (CP 35-36), which is how SPD provided the database to Mr. Rachner. Most importantly, Mr. Rachner testified that a comprehensive database of activity logs did exist for the COBAN DVMS as of August 2010 (CP 38).

to the offer from COBAN to write such a query for free, made in September of 2010 (CP 239).

The SPD's tactic all along has been to blame the requestor, Ms. Vedder for not formulating her PRA request properly like Mr. Rachner. This position is a smokescreen and not well taken for the following reasons.

First, SPD's response to the August 4 and 10, 2010 requests violate its statutory duty to provide "fullest assistance to inquirers." *Mechling v. City of Monroe*, 152 Wn. App. 830, 849, 222 P.3d 808 (2009); see RCW 42.56.100. When it is "reasonable and feasible" to disclose records electronically, an agency may be required to do so. *Mitchell v. State Dep't. of Corrections*, 164 Wn. App. 597, 607, 277 P.3d 670 (2011) (citing *Mechling*, 152 Wn. App. at 849-50. In general, an agency should provide electronic records in an electronic format if requested in that format. WAC 44-14-05001. It was more than reasonable and feasible for SPD to disclose the records Ms. Vedder sought because she asked for searchable "electronic" records. (CP 96, 98). SPD clearly had the capabilities to satisfy her requests because the records were reasonably locatable, which means they could "be located with typical search features and organizing methods contained in the agency's current software."

WAC 44-14-05002(1). As explained above, SPD could locate the records by its existing user interface and the Microsoft SQL server.

SPD for the first time on appeal presents a series of irrelevant arguments based upon The Sedona Conference Database Principles (March 2011). SPD never raised these arguments before the trial court and should be precluded from doing so on appeal. *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011). SPD produced no evidence that it follows, or has followed these principles. Finally, and most important they prove nothing as to the reasonableness and lawfulness of SPD's response to Ms. Vedder's August 4 and 10, 2010 PRA requests. The Sedona Principles should be disregarded.

The Model Rules from the Attorney General provide guidance to agencies responding to requests for electronic records. If they can be "reasonably locatable" they must be provided. WAC 44-14-05002. If they cannot be located without specialized programming agencies can create "customized access" and charge the requestor fees for this purpose. WAC 44-14-05004; WAC 44-14-050(3). If an agency cannot produce all of the requested record at once, it can do so in installments. RCW 42.56.080; WAC 44-14-04004(3). "When an agency receives a large or unclear request, **the agency should communicate with the requestor to clarify the request.**" WAC 44-14-04003(3).

“If an agency initially believes it cannot provide electronic records in an electronic format, it **should confer with the requestor** and the two parties should attempt to cooperatively resolve any technical difficulties.” See WAC 44-14-05001. It is usually a purely technical question whether an agency can provide electronic records in a particular format in a specific case.” WAC 44-14-05001.

WAC 44-14-05003: Parties should confer on technical issues.

When a request for electronic records involves technical issues, the best approach is for both parties to confer and cooperatively resolve them. Often a telephone conference will be sufficient. This approach is consistent with the requirement that agencies provide the ‘fullest assistance’ to a requestor.

WAC 44-14-05003 allows an agency to produce a database containing the information requested and allow the requestor to extract the responsive data, if the agency does not maintain its database in the format requested.

WAC 44-14-05002(1) explains:

Another indicator of what is “reasonably locatable” is whether the agency keeps the information in a particular way for its business purposes. For example, an agency might keep a data base of permit holders including the name of the businesses. The agency does not separate the businesses by whether they are publicly traded corporations or not because it has no reason to do so. A request for the names of the business which are publicly traded is not “reasonably locatable” because the agency has no business purpose for keeping the information that way. In such a case, the agency should provide the names of the businesses (assuming they are not exempt from disclosure) and the requestor can analyze the

data base to determine which businesses are publicly traded corporations.

An agency must conduct an objectively reasonable search for responsive records. WAC 44-14-04003(9). If records are later discovered that respond to a request they should be provided. WAC 44-14-04003(12).

SPD's response to the August 4 and 11, 2010 requests disregards all of the guidance in the Model Rules, proving both the lack of "fullest assistance" and the absence of any meaningful search prior to the cursory denials from Ms. Friend-Gray. She was charged with responding to Ms. Vedder's request. The failure of SPD to submit any evidence from Ms. Friend-Gray in this case is an admission that the SPD did virtually nothing to search for the COBAN electronic database requested by Ms. Vedder.

There is no evidence that SPD "interpreted" the August 4, 2010 request for "log sheets" mentioned in another context in the video policies. In the proper context -- meaning Ms. Friend-Gray's interpretation and action between the August 4, 2010 request and her August 10, 2010 denial -- SPD's "after-the-fact" interpretation makes no sense because it is based solely upon the testimony of an employee who had no involvement with the August 10, 2010 response/denial and there is no evidence that Ms. Friend-Gray knew that "log sheets" were destroyed. The evidence shows

that Ms. Friend-Gray had to have known that Ms. Vedder's requests sought the COBAN video bases. She was copied on the "database" email from Ms. Vedder on July 12, 2010 (CP 202-03). She provided Ms. Vedder with the video policy (CP 87-93), reaffirmed that COBAN was the manufacturer of the in-car video system (CP 94, 95) and denied Ms. Vedder access to the COBAN manuals and user guides (CP 204-05). She provided Ms. Vedder with a retention report listing a screenshot labeled "view video logs" (Emphasis supplied). (CP 103-04). SPD cannot now claim a different interpretation of what Ms. Vedder sought other than for a video log database, particularly when SPD sought no clarification of the request.

The SPD also submitted no evidence of a search for the requested electronic information as required by WAC 44-14-04003(a) and *Rental Hous.*, 165 Wn.2d 525. Yet, the Response (p. 21) claims in circular fashion that it had no obligation to search for non-existing records because they did not exist, based, of course, upon SPD's after-the-fact interpretation of the requested records! This logic, or lack thereof, turns *Rental Housing* on its head and would relieve agencies of any obligation to look for records if they only have to claim they don't exist.

The PRA violations in the August 10, 2010 response were repeated in the second denial of Ms. Vedder's re-formulated request of August 11,

2010. Again, SPD sought no clarification from Ms. Vedder and made no attempts to work with her as required by the Model Rules, discussed above. Ms. Friend-Gray appears to have made a limited inquiry of IT and learned that SPD does not keep its COBAN database in the precise way Ms. Vedder requested (CP 234-37). Although it could do some searching, Ms. Friend-Gray did not offer this to Ms. Vedder but just denied the request (CP 99). SPD's position throughout this case is that it could not produce the one record with all of the data requested by Ms. Vedder and therefore it had no obligation to produce any record of its COBAN DVMS database. As the Model Rules explain, SPD did not have to reformat its database but could have given it to Ms. Vedder to search it. *See* WAC 44-14-05002(1).

Mr. Rachner received a searchable database from which retained video data could be extracted. (CP 35-38). SPD has provided no plausible explanation for the failure to produce the same to Ms. Vedder, which is why the trial court found a PRA violation. KOMO maintains that SPD violated the PRA on the basis that it failed to conduct any search prior to its denials. In any event, WAC 44-14-04003(12) requires SPD to produce records responsive to a request that existed at the time but was not "located" initially, so the trial court did not err.

Second, there is no factual basis that KOMO's requests differ from the Rachner request because they sought information compiled from two systems, not just the COBAN system (Response, p. 3, 33). Ms. Vedder's August 4 and 11, 2010 requests do not refer to any other database system because at that time all she knew, and had been told by SPD, was that the COBAN system maintained data on the dash-cam videos. (CP 86-95). For SPD to assert that it "tried to provide" the "requested" data is disingenuous and flat-out wrong because it did not try to provide anything to Ms. Vedder in August of 2010. SPD's efforts in the Spring of 2011, due to the intervention of the Seattle City Council do not erase the PRA violations created by the August 2010 denials from Ms. Friend-Gray.

SPD created the confusion over databases by claiming it could not give Ms. Vedder the data she sought without correlating the COBAN and Veraterm systems. (CP 135, 139). This is not true as demonstrated by the database provided to Mr. Rachner. Because the same IT personnel (Mr. Baden) worked on both the Rachner and Vedder renewal requests at the same time it is implausible for a seasoned IT professional like Mr. Baden to have ignored the connection between the requests.

In sum, the Response's histrionic claims that it could not "second guess" Ms. Vedder's requests, and that agencies will experience a parade of horrors are not well taken here. SPD never followed any of the

guidance in the Model Rules; withheld information from Ms. Vedder to help her formulate a request; never clarified her requests; summarily denied them without a meaningful search; misrepresented the COBAN search capabilities and wrongfully withheld the database Ms. Vedder requested in August of 2010.

III. CONCLUSION

The trial court's Order (CP 546-61) should be reversed. This court should rule that the SPD violated the PRA by its responses to the three 2010 PRA requests at issue and by its continuous withholding of the dash-cam videos on the basis of RCW 9.73.090(1)(c). New penalties and KOMO's attorney's fees requested pursuant to RAP 18.1(a) and (b) and RCW 42.56.550(4) should be determined and awarded upon remand to the court.

Respectfully submitted this 24th day of September, 2012.

GRAHAM & DUNN PC

By 
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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 24th day of September, 2012, I caused to be served a true and correct copy of Reply Brief of Appellant, addressed and delivered as follows:

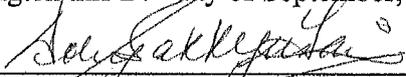
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Seattle, Washington this 24th day of September, 2012.



 Dory Satt-Yun Tai
 Legal Assistant to Judith A. Endejan

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