

No. 87271-6

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

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

Appellant,

vs.

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

Respondents.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This case arose after Fisher Broadcasting-Seattle TV L.L.C. dba KOMO 4 (“KOMO”) sued the City of Seattle (“City”) after KOMO TV Reporter Tracy Vedder submitted three records requests under the Washington Public Records Act (“PRA”), RCW ch. 42.56, to the Seattle Police Department (“SPD”) on August 4, August 11, and September 1, 2010. In the first, she requested a copy of any and all Seattle Police officer’s log sheets that correspond to any and all in-car video/audio recordings which have been tagged for retention by SPD officers for the past five years. Vedder’s second request was for a list of all SPD in-car videos that had been tagged for retention during a five-year period along with the officer’s name, badge, number, date, time and location and other unidentified information for each video. KOMO’s third request was for “copies of any and all digital, in-car video/audio recordings from the Seattle Police Department that have been tagged for retention by anyone from January 2007 to [September 1, 2010].”

On Cross-Motions for Summary Judgment, the Trial Court found that the City did not violate the PRA in responding to the August 4, 2010, request for “log sheets” because it “interpreted [the request] literally, i.e., ‘log sheets’ a technical term, records which had been located at the precinct level but were no longer in existence at the time requested. This

was defined in the SPD manuals that Ms. Vedder had just received.” (CP 535).

The trial court found that when SPD responded to the August 11, 2010 request, “the City gave specifics to Ms. Vedder about the limits of its ability to query the COBAN system. It also contacted COBAN. Finally, the City gave KOMO information about how to contact COBAN, create documents and download in-car videos, at KOMO's expense, in December 2010. All of this was in compliance with, or beyond the City's responsibility under, the Public Records Act.” (CP 537) The trial court then found the City liable for violating the PRA because almost a year later the City was able to produce a database in response to a request limited only to information from the COBAN system from another requester Eric Rachner. The trial court found that “later, when the City gained an understanding that it possessed a record [that] was partially responsive during this period, even if employees did not grasp that fact initially, it had a duty to respond.” (CP 538) Based on this finding, the trial court awarded KOMO attorney's fees and costs and daily penalties of \$25 for a period of 404 days computed from the August 11, 2010 request.

The trial court also found that the City had no legal responsibility to turn over in-car videos before three years had elapsed and that RCW9.73.090(1)(c) is an "other statute" within the meaning of RCW

42.56.070(1), which exempts or prohibits disclosure of specific information or records because “the Legislature deliberately decided to delay the release of in-car videos to citizens making such requests ‘until final disposition of any criminal or civil litigation which arises from the event or events which were recorded.’” (CP 544) It further found that SPD’s policy of delaying disclosure of tagged video for a period of three years was a narrow and reasonable interpretation of the Privacy Act and a case by case review of videos prior to three years would not effectuate the Legislature’s intent with respect to that act. (CP 543)

Vedder repeatedly asked for more than just the information from the COBAN system and that is what SPD tried to provide her. Where an agency repeatedly tries to give a requester what it insists it wants, it is patently unfair to impose penalties and attorneys fees because it did not give the requester something less.

KOMO seeks Direct Review and asks this Court to hold agencies to standards that are not just unworkable but impossible. KOMO would have the Court force agencies to read between the lines of requests for clearly identified, specific records and intuit that those are not really the records that the requester seeks. It would have the Court compel agencies to follow up on requests for records that do not exist at the time of the request and provide the requester later-created records that are “partially

responsive” to the earlier request even if the later-created records are not what the requester originally asked for. KOMO would have the Court rule that a requester need only include a statement that he or she prefers records in searchable electronic format to convert it into a request for a database of different information. Finally, KOMO asks the Court to ignore the clear language and plain meaning of the Washington Privacy Act and obligate agencies to make in-car videos available to the public prior to final disposition of any criminal or civil litigation which arises from the event or events which were recorded.

KOMO’s theories would create uncertainty and unpredictability for agencies and unnecessarily complicate and dramatically slow the process of responding to Public Records Act responses. Last year, the City of Seattle alone received more than 9,000 requests. This is a fraction of the requests agencies receive state-wide. If the Court accepts KOMO’s reasoning, agencies would have to second guess even the clearest of the hundreds of thousands of requests they receive or risk liability because a requester later claims it was a request for something else. Agencies would have to follow up on thousands of earlier requests and provide “partially responsive” records as they are created. They would have to create databases of records that had previously never existed. And they would be

compelled to violate the Privacy Act and routinely jeopardize the outcome of criminal prosecutions and civil litigation.

II. RESTATEMENT OF ISSUES FOR REVIEW

1. Where KOMO requested “Seattle Police officer’s log sheets” a record specifically referred to in its Policy and Procedures Manual, and KOMO requested log sheets generated during a period in which they were not in use, did the Trial Court correctly determine that SPD did not violate the PRA in responding that it had no responsive records.

2. Where KOMO requested “Seattle Police officer’s log sheets” a record specifically referred to in its Policy and Procedures Manual, and KOMO requested log sheets generated during a period in which they were not even generated, must SPD conduct a search for records that could not exist.

3. Where on August 11, 2010, KOMO requested records that did not exist at the time of its requests that would require SPD to compile and create a previously non-existent record by performing custom programming and by extracting, compiling and correlating information from two non-communicating computer systems, did SPD violate the PRA by denying KOMO’s August 11, 2010, request.

4. Where on September 1, 2010, KOMO requested the same non-existent list also requested on August 11, 2010 along with videos correlated to that list, and SPD would need to create that non-existent list in order to identify and retrieve those videos, did SPD violate the PRA by denying KOMO's September 1, 2010 request.

5. Where the Trial Court found that at the time it responded to KOMO's August 11, and September 1, 2010 requests, responsive records did not exist and SPD complied with and even exceeded the requirements of the PRA, should SPD be held liable for not providing KOMO with a record that did not contain all of the information requested by KOMO and was not even created until almost a year after KOMO made its requests.

6. Did the Trial Court correctly determine that the Washington Privacy Act, RCW 9.73.090(1)(c) is "an other statute" within the meaning of RCW 42.56.070 and law enforcement agencies may not disclose in-car videos to the public until at least three years after the date of the event recorded.

7. Did the Trial Court err in awarding penalties and attorney fees to KOMO and should KOMO be entitled to attorney fees and costs of this appeal.

III. RESTATEMENT OF THE FACTS

SPD's Three Primary Computer Records Systems (CAD, RMS, and ICV)

SPD has three primary computer systems, each of which serves a different purpose and contains different data. The first two systems are the Computer Aided Dispatch (CAD) and the Records Management System (RMS).

The CAD provides automated emergency vehicle dispatching related to 911 calls from citizens to police dispatchers, and calls from officers to dispatchers to announce the activities in which they are engaged. The RMS is used by officers throughout the department to enter incident or General Offense ("GO") reports directly into the system from laptops, vehicle-mounted computers and desktops.¹ Many CAD "events" are entered into the CAD system that do not lead to arrests or other incidents requiring the generation of a GO report. For example, in 2010 SPD had 448,648 CAD events, but only 98,216 GO reports were written.

¹ The SPD website defines a General Offense Report as "the standard format for initial crime reports that are written up by a police officer responding to an incident. Many of these will be responses to 9-1-1 calls. Others will be on-view incidents, which is an incident an officer sees and responds to, without being called to the scene." *SPD website, available at, <http://www.seattle.gov/spd/records/PoliceReportsFAQ.htm>, (last visited August 9, 2012).*

(CP 354). SPD purchased both the CAD and RMS from the same vendor Versaterm. (CP 454).

SPD purchased its third primary computer system, the Digital In-Car Video System (ICV) from a different vendor, COBAN. (CP 454). The COBAN ICV system operates independently of the RMS and CAD systems, and the COBAN ICV and Versaterm RMS and CAD systems do not “communicate” with one another. As a result, information in CAD or RMS, such as CAD event number, or GO number or location, is not contained or cross-referenced in the COBAN system. (CP 428, 454, 461). At the time SPD selected the COBAN system, no vendor offered a single system that integrated ICV with other reporting technology systems. (CP 454).²

The COBAN ICV System

SPD purchased the COBAN ICV System in 2007 at a cost of approximately \$2.5 million. (CP 453-54). COBAN digital video recording equipment is installed in 276 SPD first-response vehicles. (CP 454). Video recording may be started in several ways: when the vehicle light bar is turned on, when the officer presses a button on the in-car computer screen, or when the officer presses a button on the system’s wireless

² This appears to still be true. (CP 454).

microphone. (CP 455). An officer may record something for a number of reasons. An officer may turn on the ICV when responding to a CAD dispatch, but a recording may also result when he or she simply turns on the light bar and pulls over after seeing activity that warrants a closer look while driving down the street. Officers often do not and cannot know whether an event they choose to record will result in a GO being generated. Even when a GO is generated, it may not be generated until days or even longer after the recording is made. (CP 455).

Video Storage and Retention

After they are recorded, videos are uploaded onto the COBAN Digital Video Management System (“DVMS”). (CP 456). Videos fall into two categories, “tagged” and “untagged,” based on the retention value of their content. Videos are “tagged” for retention by officers when they are needed for criminal, civil or administrative case investigation/prosecution, while “untagged” videos contain imagery with minimal or no retention value beyond the initial ninety days. (CP 88, 456).

While, SPD’s Policy and Procedures Manual indicates that archived (i.e., tagged) videos are automatically deleted from the COBAN DVMS system after three years, this does not reflect SPD’s actual practice of retaining videos longer than that as reflected in the evidence submitted to the trial court. (CP 88, 217-18, 312, 429, 453). SPD experienced two

COBAN system crashes caused by hardware failure in 2008. (CP 428-29). As a result of these crashes, SPD began using a tape backup system in April 2009 in addition to the COBAN DVMS to backup all video files in case of disaster. (CP 456). **All tagged video that has been generated since the system was implemented (unless otherwise lost during the two outages of 2008) is currently maintained on the COBAN DVMS system.** “Untagged” video stays on the COBAN DVMS server for at least ninety days; it is then retained on the backup tapes. **All tagged and untagged video that was on the COBAN DVMS system as of April 2009 when disaster recovery backups began is on the backup tape.** (CP 217-18, 312, 429, 453). In addition, videos are transferred onto DVD’s and retained in case files where they are retained for the retention period appropriate to that file. (CP 670).

As of March, 2012, the number of video clips stored on COBAN DVMS and the tape backup system exceeded 750,000 recordings equating to approximately 135,000 hours of video or 170 Terabytes of digital content. (CP 457).

The COBAN DVMS Search Criteria Is Limited to Three Fields

SPD purchased the COBAN ICV system as an “off-the-shelf” system with specific capabilities provided by the vendor at the time of purchase. (CP 403). COBAN provided SPD with a template of fields of

information that can be entered into the system by officers in the field as they operate the system. COBAN advertised that its system provided “more than 20 search criteria.” (CP 266). Nonetheless, all COBAN DVMS users do not enter data into all search criteria fields for a number of reasons, including system configuration, cost, operational needs, and efficiency. (CP 455). **Appendix A** is a screenshot of the DVMS Query Screen that SPD uses to search for video.³ Although it contains other blocks for entries regarding location, driver’s and vehicle license information, Case ID, etc., the SPD COBAN DVMS cannot search and retrieve videos using those fields even if information is entered in them because it only searches and retrieves videos by three fields: officer’s name, serial number, and date and time. (CP 440, 483).

Because the Versaterm CAD and RMS systems do not communicate with the COBAN DVMS, neither CAD event numbers nor GO numbers are communicated to or cross-referenced in the COBAN DVMS. (CP 428, 454). Similarly, the location where the recording was made is not contained in the COBAN DVMS. (CP 461) Nevertheless,

³ For this Court’s convenience, screenshots of the SPD COBAN DVMS illustrating what the DVMS operator sees when playing back and querying the DVMS are attached as Appendices to this Brief. Appendix A is a screenshot of the “COBAN Video Search” screen used to query the DVMS; this is a copy of the screenshot that appears in the record at CP 270. Appendix B is a screenshot of the “Video Playback/Data Entry” screen; this is a copy of the screenshot that appears in the record at CP 451.

even with its limited search criteria, the COBAN system was the best system available to meet SPD's operational needs at the time it was purchased. (CP 454, 455).

SPD's COBAN system is approaching the end of its lifespan, and the department is taking steps to replace existing technology. SPD has specified that the new technology must be capable of automatically tagging each video segment with the latitude and longitude of the location where it was recorded and must be searchable by latitude, longitude, date and time to allow correlation with CAD events and RMS reports. SPD prefers that the new system integrate with SPD's current CAD/RMS. However, this is contingent on the, as yet undetermined, ability and willingness of SPD's current CAD/RMS vendor and the future video system vendor to design and implement a user interface. (CP 429, 457-58).

SPD could query DVMS but not produce a searchable database

As purchased, and at the time of the Vedder requests, SPD's COBAN DVMS was configured to compile and produce limited amounts of information. It provided a maximum of 500 results to a particular query with no more than 16 results displayed on the system computer screen at a time.⁴ The operator could scroll down from display page to display page

⁴ See Appendix A, the left side of the Video Playback/Data Entry screenshot shows the results of a particular search. Mid-page on the left side, it indicates that there are

of 16 results until he or she reached the 500th result, and then had to enter another query of prompts in order to get more results. There was no way to see or print out more than 16 results at a time. The most one could do was to print a screen shot of 16 results, then scroll down and print a screen shot of the next 16 results, and so forth. (CP 440, 483-84). **Appendix B** is a screenshot of the results of such a query (search) illustrating the 16-line display that resulted.

KOMO's Requests

On July 8, 2010 Tracy Vedder sent an email to SPD Public Affairs Unit Sgt. Sean Whitcomb saying that she ultimately hoped to have “a digital database that would in effect be like an index system or table of contents to the video libraries of public agencies.” Nevertheless, her email also says she needed to understand more about agency systems “before I start sending out requests.” (CP 84). She did not direct this email to the SPD Public Request Unit, and her email clearly indicates that this is not a public records request. This is the only communication with SPD prior to September 20, 2011, in which Ms. Vedder mentions the word “database.” (CP 184).

“500/3410 videos displayed”. This means that while there are 3410 results to the particular query, a maximum of only 500 results will be displayed at the rate of 16 results per page. (CP 440).

Two weeks later, Vedder asked for “a copy of the Seattle Police Department’s Policies and Procedures regarding all use of video recording.” (CP 86). SPD Public Disclosure Officer Sheila Friend Gray provided a copy of SPD Policies and Procedures Manual, Chapt. 17.260, regarding SPD’s ICV on August 2, 2010.

On August 4, 2010, Vedder submitted the first of the three requests at issue in this lawsuit. She requested:

[A] copy of any and all Seattle Police officer’s **log sheets** that correspond to any and all in-car video/audio recordings which have been tagged for retention by officers. This request is for such records dating from January 1, 2005 to the present.

KOMO-TV will pay reasonable copy fees but we prefer that this data be released to us in a searchable electronic format organized and searchable by date and other reasonable fields. (CP 96).

SPD Public Request Unit Researcher Jason Hardi referred Vedder’s request to Isabelo (Bill) Alcayaga in the SPD Video Unit. Alcayaga, who is a retired SPD officer and has been in the Video Unit for six years, responded “We do not keep Officer log sheets here in the Video Unit. Those types of records would have been kept by the Individual Precincts where the Officers worked and turned them in each day.” (CP 231).

With its Cross-Motion for Summary Judgment, the City provided the declaration of another long-time SPD employee, David Strom, SPD

Senior Warehouse of Archival Records for more than fifteen years. Strom's testimony showed that "log sheets" referred to stand-alone paper forms (i.e., they were not contained in a database) that SPD phased out and quit using entirely in December 2002. Strom testified that all of SPD's log sheets were destroyed by the end of 2004. (CP 398-400). Vedder had requested log sheets that would have been generated after they were phased out.⁵ As a result, SPD responded on August 10, 2010 by email stating "A search of the files of the Seattle Police Department resulted in no records being responsive to your request." (CP 97).

The Trial Court found that the City did not violate the PRA in responding to the August 4, 2010, request for "log sheets" because it "interpreted [the request] literally, i.e., 'log sheets' a technical term, records which had been located at the precinct level but were no longer in existence at the time requested. This was defined in the SPD manuals that Ms. Vedder had just received." (CP 535).

Ms. Vedder submitted the second of the three requests at issue in this lawsuit on August 11, 2010:

[A] list of any and all digital in-car video/audio recordings that have been tagged for retention by Seattle Police Officers from January 1, 2005 to the present. The list should include, but not be limited to, the officer's name, badge, number, date, time and location when the video

⁵ Ms. Vedder requested log sheets dating "from January 1, 2005 to the present." (CP 96).

was tagged for retention and any other notation that accompanied the retention log.

KOMO TV will pay reasonable copy fees but we prefer that this data be released to us in a searchable electronic format organized and searchable by date and other reasonable fields. (CP 98).

On August 12, 2010, Sheila Friend Gray asked Bill Alcayaga and SPD IT Technology Support Manager Bruce Hills to take a look at Ms. Vedder's August 11th request, and inquired whether it was possible to provide the records. (CP 236) Alcayaga's and Hills' responses to her inquiry reflect the DVMS limitations described above and that the DVMS did not contain all of the requested information. (CP 235-36). Friend-Gray also communicated with SPD IT Manager Mark Knutson, who reiterated that the requested list didn't exist and would require vendor involvement. (CP 234-35). On August 18, 2010, Friend-Gray responded to Vedder saying "I have consulted content experts within SPD and have learned the following: SPD is unable to query the system the way you have requested. We can search by individual officer name, date and time only. We cannot generate mass retention reports due to system limitations. Thus we do not have any responsive records." (CP 99).

Later the same day, Vedder requested a copy of a single retention report for a digital in-car video/audio recording that has been tagged for retention any time since January 1, 2009. (CP 100). Friend-Gray provided

two screen shots labeled "Video Playback/Data Entry" and "View Video Logs." (CP 103-06).

Vedder submitted the third request at issue in this lawsuit on September 1, 2010:

[C]opies of any and all digital, in-car video/audio recordings from the Seattle Police department that have been tagged for retention by anyone from January 2007 to the present. The recordings should also include, but not be limited to, corresponding identifying information such as the date, time, location and officer(s) connected to each unique recording. KOMO TV recognizes that this may be a large project and therefore we additionally request that the recordings be released to us in installments with the most recent recordings released first: i.e. January 2010 to the present first, 2009 recordings second, etc.... Depending on the size of the digital files, KOMO TV would prefer to provide our own hard drive onto which the files may be downloaded. (CP 115-16).

Bruce Hills contacted COBAN to see whether it could provide programming to reconfigure the SPD DVMS capabilities and, if so, how much it would cost. (CP 459). On September 14, 2010, COBAN President Allan Chen responded that COBAN would provide a SQL Server script to SPD at no cost but also said that it would "**take some real programming**" costing approximately \$1500 and COBAN did not know whether it was even "feasible to integrate our recording software with [SPD's Versaterm system] for data exchange." (CP 479). In SPD's experience, the RMS vendor has been unwilling to provide custom working due to support concerns, so this was not a realistic proposal. (CP 459-60).

KOMO misinterprets COBAN's offer to write the query for free as meaning that SPD could have produced a COBAN database. In fact after receiving the SQL script from COBAN in March 2011, SPD first had to modify it in order to create a list of approximately 16,000 videos. It then had to perform additional programming, including working over the weekend with COBAN representatives, in order to create a revised list of 41,193 videos. (CP 405). The City provided the lists created as a result of the "free" query to Vedder but she was not satisfied that this was responsive to her request. In fact, in its Motion for Summary Judgment, KOMO complains that because the lists contain only partial information they are **"useless without the other data fields requested by Ms. Vedder in her previous requests."** (CP 326).

Friend Gray responded to Vedder on October 1, 2010, again informing her that "SPD is unable to query the system to generate a retention report that would provide a list of the retained videos. Without this capability we are unable to respond to your request. Therefore we have no documents responsive to your request." (CP 247)

KOMO's attorney appealed the denial of Vedder's September 1, 2010 request and SPD Legal Advisor Shawna Skjonsberg-Fotopolous responded to the appeal, stating that "SPD does not have the capabilities to search for 'tagged records' only, which is consistent with the Public

Request Unit's initial responses.” She explained SPD could not create a list of retained videos without this internal capability to know what videos should be downloaded. Skjonsberg-Fotopolous offered alternative access to records using “specific date, time and officer” because SPD was “able to query the system for that level of detail, as opposed to the current query of retained video only.” She also explained that, “the vendor is able to create a list and download such videos for a fee.” (CP 250).

KOMO’s attorney sent a letter to the Seattle City Council President on March 4, 2011, questioning SPD's justification for its responses as “dubious.” (CP 251). Subsequently, SPD asked COBAN to provide the SQL query that would list all existing videos flagged for retention since January 2007. SPD modified the script and used it to provide Vedder the list that she asserts was “useless” without the other data fields she had requested. (CP 326, 405).⁶

This was because the list was just a “starting point” in the process of identifying videos tagged for retention. The list reflected “limited data

⁶ The list created using the SQL Server script provided by COBAN contains just three pieces of information: Filename (which reflects officer’s serial number and a date and time identifier), Starting Time and Upload Date. The list does not distinguish between tagged and untagged video nor does it contain the name of the officer, location, or other specific information regarding the event recorded, such as a CAD number or General Offense Number. A copy of a representative page of the list created using the SQL Server script provided by COBAN is attached to this brief as Appendix C. It is copy of the list page that appears in the record at (CP 133).

regarding all videos, not just videos tagged for retention.” (CP 405). SPD had to invest substantial IT time to get to the point where it could isolate tagged from untagged video. (CP 406).

Representatives of the City Attorney’s Office met with KOMO’s attorney and Vedder on March 23, 2011. SPD was undertaking the customized programming at no fee to identify videos tagged for retention.⁷ This was the first time that the City asserted that videos were exempt under RCW 9.73.090(1)(c) because it was the first time that records (i.e., the videos) responsive to KOMO’s request were accessible. (CP 354).

KOMO continued to seek information from the systems correlated. On March 23, 2011, Vedder asked when she’d get the first installment of videos along with their corresponding incident reports, and on April 5, 2011, she wanted “copies of all GO reports associated with the 70 hours of video” to sift through. (CP 139, 379). SPD’s IT Manager met with members of KOMO’s IT staff on April 19, 2011, to explain SPD’s systems and to answer their questions. Even after this meeting, KOMO did not submit a request reformulated in a way that reflected the actual structure of SPD’s records systems. (CP 432).

⁷ SPD still did not have the technical capability to produce a database that contains all of the fields Vedder requested. It does not have that capability even now.

After viewing the video for barely a week, Vedder sent an email to the City saying that viewing so many videos wasn't "particularly efficient." Having "learned a lot about how the system works" and having "found that there are lots of videos that were retained that we have no interest in whatsoever," she proposed limiting her viewing to videos related to particular officers' badge numbers. (CP 147).

Vedder claims she later discovered that months after she had made her requests, SPD had received a significantly different request from another requester, Eric Rachner. (CP 81). In February 2011, Rachner had requested "a copy of the full and complete database of all Coban DVMS activity logs in electronic form." Mr. Rachner's request contained the following detailed description of the records he was seeking as follows, "The Coban DVMS system's database runs on Microsoft SQL Server, therefore it should be convenient to provide the logs in electronic form, in their original Microsoft SQL Server format. The responsive records will include all rows of all columns of all tables related to the logging of video-related activity within the Coban DVMS. Note that I am not requesting the actual content of any audio or video recordings." (CP 40). Even though Rachner made it clear that he was requesting a database, SPD still had to request clarification to determine the precise database he was requesting, and SPD Information Applications Manager Toby Baden spent more than 16 hours providing the

first installment to Rachner in June 2011. (406). SPD provided Eric Rachner the final installment of his request on August 22, 2011. (CP 55).

In September 2011, Vedder told SPD that she believed that she had “made a request for the SPD in-car video log database like Mr. Rachner had previously made a request for.” Friend Gray sent Vedder an email on September 20, 2011 saying that SPD had researched her requests and had been unable to locate a request for a video log database; she provided Vedder a copy of the database that had been provided to Rachner with the email. (CP 184). KOMO filed this lawsuit the same day.

The Trial Court found that the evidence was clear that no single record or database responsive to KOMO’s request existed because it would have to be created by correlating data from two non-communicating computer systems. The Court found that the City complied with and went beyond its responsibility under the PRA in 2010 when it: (1) gave specifics to Vedder about its limited ability to query the COBAN system, (2) contacted COBAN, and (3) gave KOMO information about how to contact COBAN, create documents and download in-car videos, at KOMO's expense. The Trial Court also found that between March and June, 2011 the City made efforts in making documents and videos available and creating documents which the City was not legally required to create. (CP 536-37). Despite these findings, the Trial Court determined that

because the City later “gained an understanding that it had a record that was partially responsive” it violated the PRA by denying Vedder’s August 11, 2010 request. (CP 538).

IV. ARGUMENT

A. STANDARD OF REVIEW

In reviewing a PRA request, "the appellate court stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence." *PAWS v. UW*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). Judicial review of the agency's decision to withhold the records is de novo. RCW 42.56.550(3).

1. The Trial Court correctly determined that SPD did not violate the PRA in interpreting a request for “Seattle Police officer’s log sheets” as a record specifically referred to in its Policy and Procedures Manual.

Officer’s log sheets are specifically referred to in the *SPD Policies & Procedures Manual*, chapt. 17.260 . (CP 89) The City provided the uncontroverted testimony of Bill Alcayaga, the individual in the SPD Video Unit to whom the request was referred. As a long-time SPD employee, Mr. Alcayaga was familiar with the officer’s log sheets and interpreted KOMO’s request as being for those specific records. (CP 439). The City also submitted the uncontroverted testimony of David Strom,

SPD Senior Warehouser of Archival Records, that officer's log sheets were stand alone paper documents. (CP 399-400).

KOMO claims that SPD should have interpreted a request for "log sheets" as a request for database information. The fact that Vedder said she preferred the "data" in electronically searchable form did not turn the request into one for a database because stand alone documents, such as officer's log sheets, differ substantially from a database. The Sedona Conference Database Principles explain the difference between databases and unstructured data contained in stand alone documents:

Information stored in databases differs fundamentally from discrete unstructured data, because unstructured data files tend to be static and self-contained. For instance, although an unstructured file (e.g., a memorandum) may reference other files (e.g., other memoranda or reports), the individual file is nonetheless a stand-alone document or piece of evidence. In addition, both the information on the page and the way it is formatted are left to the discretion of the user. Database analysis typically starts at the most granular or atomic level possible—individual data elements or fields—each of which need be accessed separately for relevance, but must be assembled and viewed in context to be understood. Databases also impose strict rules that define how information can be entered, stored, and retrieved.⁸

⁸ Working Group on Elec. Doc. Retention & Prod., The Sedona Conference, The Sedona Conference Database Principles, (March 2011), p.1, *available at* <https://thesedonaconference.org/download-pub/426> (last accessed, August 20, 2012). The Sedona Conference is a nonprofit research and educational institute that brings together jurists, lawyers, experts and academics in order to discuss how the law should go forward on cutting edge issues in the areas of antitrust law, complex litigation, and intellectual property rights. Working groups are created and produce principles, best practices and guidelines for these specific areas of law. This Court has previously cited the Sedona Conference Working Group on Elec. Doc. Retention & Prod. as an authority regarding

A stand-alone document may be produced in an electronically searchable form, such as a document in PDF format, but that does not transform the information into a database. In order to convert information from a stand alone document into a database, that information must be first extracted and then entered into individual data fields. The evidence demonstrates that officer's log sheets were stand alone documents. Simply requesting officer's log sheets or other records that are stand alone documents in electronically searchable form does not convert the request into one for a database or alert an agency that it is a request for a database.

2. SPD did not even generate officer's log sheets for the time period that KOMO requested, and as a result SPD did not have to conduct a search for records that could not exist.

KOMO argues that even if SPD correctly interpreted the August 4, 2010 request, it violated the PRA because it failed to conduct an adequate search for those log sheets. In responding to a PRA request, an agency must conduct an adequate search. *Neighborhood Alliance of Spokane*

electronically stored data and information in *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 146, 240 P.3d 1149 (2010)

County v. County of Spokane, 172 Wn.2d 702, 724, 261 P.3d 119 (2011). When the agency fails to provide records, it must submit “reasonably detailed, nonconclusory affidavits” establishing “that all places likely to contain responsive materials were searched.” *Id.*, 172 Wn.2d at 721. The City submitted the uncontroverted testimony of David Strom, SPD Senior Warehouser of Archival Records, that SPD phased out the use of log sheets in 2002 and all log sheets would have been destroyed by 2004. (CP 399-400). KOMO requested officer’s log sheets from January 1, 2005 to August 4, 2010. The evidence showed that SPD would not have generated officer’s log sheets during this period. *Neighborhood Alliance* does not require agencies to conduct useless searches for records that cannot exist because no place is likely to contain responsive materials.

It is axiomatic that an agency has no duty to create a record in response to a request; only existing records must be provided. Accordingly, there is “no agency action to review” under the PRA where the agency did not deny the requester an opportunity to inspect or copy a public record, because the public record he sought “did not exist.” *Sperr v. City of Spokane*, 123 Wn.App. 132, 137, 136-37, 96 P.3d 1012 (2004); see also, *Kleven v. City of Des Moines*, 11 Wn.App, 284, 294, 44 P.3d 887 (2002) (no violation of the public disclosure act because the agency had “made available all that it could find”); *Smith v. Okanagon County*, 110

Wn. App. 7, 22, 994 P.2d 857 (2000). Where no records could have existed for the period that KOMO requested, there was no agency action to review with regard to the August 4, 2010 request.

3. SPD did not violate the PRA by denying KOMO's August 11, 2010, request because KOMO requested records that did not exist at the time, would have required SPD to compile and create records by performing custom programming and by extracting, compiling and correlating information from two non-communicating computer systems.

While access to agency electronic databases under the PRA is a matter of first impression before this Court, it has addressed PRA access to metadata embedded in electronic records in *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 146, 240 P.3d 1149 (2010). In *O'Neill*, this Court held that an electronic version of a record, including its embedded metadata, is a public record subject to disclosure under the PRA. *Id.*, 170 Wn.2d at 147-48. The Court looked to the Act's definition of "public record." As defined by the PRA, "public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. (RCW 42.56.010(3)). The Court concluded that the metadata associated with a public record was itself a public record because

the Act defines public record “very broadly, encompassing virtually any record related to the conduct of government.” *Id.* 170 Wn.2d at 147. But, the Court also held that even though metadata is a public record, an agency does not have to provide metadata in response to every PRA request for an electronic record: The requester must first submit a specific and clear request for that metadata to the agency before the agency is required to provide the metadata. *Id.*, 170 Wn.2d at 151-52.

The question of whether all agency databases are public records is not before this Court, and in fact, because of the complexity of the question is better left for another day. The Sedona Conference likens the question of analyzing electronic databases to a “jigsaw puzzle.” Working Group on Elec. Doc. Retention & Prod., The Sedona Conference, The Sedona Conference Database Principles, (March 2011), p.2, *available at* <https://thesedonaconference.org/download-pub/426> (last accessed, August 20, 2012) (“Sedona Conference Database Principles”). The Sedona Conference observes that “the diverse and complicated ways in which database information can be stored has made it difficult to develop universal ‘best-practice’ approaches to requesting and producing information stored in databases.” *Id.* at p. ii. In addressing access to databases, the Sedona Conference proposes essential considerations and principles. These include critical factors regarding the technical

challenges to accessing data in a database, such as the ability to search on database fields, the extent to which information may be stored outside fielded tables, and the capability of exporting data. *Id.* at pp. 26-9.

SPD's access to database information in the COBAN DVMS was particularly affected by two factors identified by the Sedona Conference: the reporting functionality of the database and the extent to which the user has custody and control of the database. *Id.* at p. 29. The reporting functionality of a database refers to the system's ability to search for data entered into particular fields and to format the results into a report. Accessing information from a database may be limited to standardized report "templates" from which the user can choose, and the user may not be able to craft "custom" reports. In order to obtain reports beyond the limitations built into the system requires custom programming costing the producing party time and money. Even with custom programming, it is possible that some database fields cannot be included in a report-writing function. *Id.* Limiting database access through report-generating templates is not a matter of trying to "hide" information; rather, reports generated through template queries, as opposed to custom reports, have been **pre-validated for accuracy**. *Id.* at p. 19 (emphasis added).

Another significant limitation to database accessibility occurs when it is purchased or licensed from a vendor, such as COBAN in this

case. The end-user may not have direct access to the “back end” of the database required to implement custom programming. *Id.*

Finally, an overriding consideration expressed by the Sedona Conference is that the “Parties Must Consider the Database as It is, Not as It Could Be.” *Id.* at p. 14.

Setting aside the question of whether all agency databases are public records, when SPD received Eric Rachner’s request for a copy of the full and complete database of all Coban DVMS activity logs in electronic form, it concluded that the database itself was a public record. It did so in the spirit of the *O’Neill* decision that SPD responded to Rachner’s request by providing him a copy of the COBAN database, but responded to KOMO’s requests as it did is not evidence that SPD discriminated against KOMO or Tracy Vedder. It is evidence that KOMO clearly and specifically asked for something significantly different from what Rachner requested.⁹

This is not a matter of “Magic Words” as KOMO puts it. This is a matter of substance. The City submitted the testimony of SPD Information Applications Manager Toby Baden comparing the two requests. He testified that Rachner’s request asked SPD to extract data that resided

⁹ A side by side comparison of KOMO’s requests and Rachner’s requests is attached to this brief as Appendix D. It is a copy of a table that appears at CP 360-61.

only in the COBAN system, while KOMO asked SPD to create lists correlating information that resided on two different systems that did not communicate. KOMO asked for the actual videos, while Rachner clearly stated that he was not asking for the videos. Rachner did not ask SPD to take additional steps to exclude certain information, while KOMO asked for only data related to tagged video. (CP 399-400)Mr. Baden's testimony highlights the complexity of responding to requests for databases: "Rachner made it clear that he was requesting a database, but we had to request clarification from Mr. Rachner to determine the precise database he was requesting." (CP 406).

The Trial Court erroneously concluded that the testimony of another of the City's IT professionals was evidence of an unhelpful mindset toward requesters: "[a]s an IT professional, I would say that Mr. Rachner was assuming full responsibility for whatever data he requested...Ms. Vedder's request...assumed that SPD had internal knowledge of the database and the meaning of the tables that had been vendor-created." (CP 537-38). This testimony does not evidence an unwillingness to help KOMO; it evidences the complexity of responding to KOMO's requests. As the Sedona Conference Database Principles illustrate, accessing database information is complicated when the end-user may not have direct access to the "back end" of the database required to

implement custom programming. The Sedona Conference Database Principles, p.19. At the time of KOMO's requests, SPD's access to the COBAN system was hindered by built-in limitations and because the COBAN and Versaterm systems did not communicate. To correlate and compile the information requested by KOMO would require not only custom programming, but also the unlikely cooperation of two vendors. The PRA does not obligate agencies to compile information into a new record. Citizens may not compel an agency to synthesize information into some sort of compilation. *Smith v. Okanogan County*, 100 Wn. App. 7, 13-4, 994 P.2d 857 (2000). ("an agency is not required to create a record which is otherwise non-existent.").

KOMO offered the Declaration of Eric Rachner, but it supports the City's argument because he addressed only the COBAN database to which his request was limited. (CP 32-8) Rachner offered no evidence regarding the lists containing all of the information requested by KOMO.

The PRA does not require agencies to be mind readers or to intuit a complex request from a completely different request. While the PRA places certain duties on agencies, it also imposes obligations on a requester, including stating a request in a form sufficiently clear so that an agency has reasonable notice that it has received a public records request, and that the request must be for an identifiable public record. *Hangartner*

v. *City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004); *Wood v. Lowe*, 102 Wn. App. 872, 878, 10 P.3d 494 (2000). An agency has no duty to respond until it has received a valid public records request. *Bonamy v. City of Seattle*, 92 Wn.App. 403, 412, 960 P.2d 447 (1998) review denied, 137 Wn.2d 1012, 978 P.2d 1099 (1999). “A public agency cannot be expected to disclose records that have not yet been requested.” *Beal v. City of Seattle*, 150 Wn. App. 865, 875, 209 P.3d 872 (2009) (citations omitted).

O’Neill is on point. Metadata is a public record, but an agency does not have to provide metadata in response to every PRA request for an electronic record. The requester must first submit a specific and clear request for that metadata to the agency before the agency is required to provide it. *O’Neill*, 170 Wn.2d at 151-52. KOMO never requested information limited to the COBAN system. KOMO persisted in seeking information compiled from the COBAN and Versaterm systems in its requests, in its later communications and meetings with SPD, and even after KOMO IT staff met with SPD’s IT Manager. KOMO asserted this position in its summary judgment motion that the lists created as a result of the SQL query provided by COBAN were “useless without the other data fields requested by Ms. Vedder in her previous requests. (CP 326).

It cannot now claim that it ever made a specific and clear request for anything less.

4. **SPD did not violate the PRA by denying KOMO's September 1, 2010 request because KOMO requested the same records that it had asked for on August 11, 2010, and SPD would need that list to identify and retrieve videos it also requested on August 11, 2010.**

KOMO's September 1, 2010 request was for copies of all in-car videos tagged for retention since January 2007 along with identifying information including, but not limited to the date, time, location and officer(s) connected to each unique recording. (CP 115-16). This request asks for the same list of information as the August 11, 2010 request with accompanying videos. SPD needed to create this list in order to know which videos should be downloaded and to provide the information requested on September 1. SPD did not violate the PRA when it appropriately denied the September 1 request for the same reasons that it denied the August 11 request.

5. **The Trial Court found that SPD complied with the PRA in responding to KOMO's August 11, and September 1, 2010 requests, SPD should not have been held liable for not providing KOMO with a record that did not contain all of the information requested by KOMO and was not even created until almost a year after KOMO made its requests.**

The Trial Court made the following findings: (1) In the fall of 2010, the City gave specifics to Ms. Vedder about the limits of its ability

to query the COBAN system. (2) The City contacted COBAN and gave KOMO information about how to contact COBAN, create documents and download in-car videos, at KOMO's expense, in December 2010. (3) All of this was in compliance with, or beyond the City's responsibility under, the Public Records Act. (4) During the March-June time period, the City made efforts, after Seattle Councilmember. Conlin intervened, in making documents and videos available and creating documents which the City was not legally required to create. Despite these findings, the Trial Court determined that SPD violated the PRA in responding to the August 11, 2010 request because "later the City knew that the database produced to Mr. Rachner was partially responsive to Ms. Vedder's request" and, as a result, it had a duty to provide the same record to Vedder. (CP 537) This ruling is contrary to the clear terms of the PRA, case law interpreting the PRA, and any common understanding of the PRA's requirements.

The PRA requires that upon receipt of a request for identifiable records, an agency must provide those records for inspection. The PRA does not include any obligation to produce records that do not exist at the time a request is received. *Smith v. Okanogan County*, 100 Wn. App. 7, 14, 994 P.2d 857 (2000). Thus, in response to a public disclosure request, the PRA requires the production of existing and identifiable records. There is no ongoing duty to provide updated responses to a request, or to provide

documents created after a request is received. *Sargent v. Seattle Police Department*, 167 Wn.App. 1, 10, 260 P.3d 1006 (2011). The PRA “does not require that agencies provide updates to previous responses, or monitor whether documents properly withheld as exempt may later become subject to disclosure.” *Id.*

This principle is well established in Washington, as recognized by the Washington Attorney General, Washington public agencies and Washington attorneys who specialize in public records law representing both requesters and public agencies. For example, the Washington Attorney General Model Rules state that an agency is only obligated to provide existing documents in response to a request and explicitly state that “[a]n agency is not obligated to supplement responses” to requests. WAC 44-14-04004(4)(a). Further, the Model Rules recognize that “if a public record is created or comes into the possession of the agency after the request is received by the agency, it is not responsive to the request and need not be provided.” *Id.*

The Washington State Bar Association has published the *Public Records Act Deskbook* as a resource on the topic of PRA compliance. The editors of that publication include prominent lawyers who represent both

requesters and public agencies.¹⁰ The *Deskbook* instructs agencies to treat a request for records existing as of the date of the request because the PRA does not provide for "continuing" or "standing" requests. *Public Records Act Deskbook* §5.3 at 5-31.

Neither is an agency obligated to supplement responses. *Sargent*, 167 Wn.App. at 11.(citing WAC 44-14-04004(4)(a)). A requester may make a "refresher" request for records created between the date of the first request and the refresher request. *Id.* Such a request should be treated as a new and separate request. *Id.*

In this case, the trial court found that SPD complied with the PRA at the time of the requests, but should have supplemented the original response when it created a database for Eric Rachner that had not existed at the time of the KOMO requests. This is not only contrary to the law, it imposes the impossible burden of never-ending requests in which agencies will have to constantly update earlier requests as potentially "responsive" records are created. The burden posed by the trial court is particularly egregious because it would require agencies to provide not just later-created records that are responsive to earlier requests, but later-created records that are **partially responsive** to an earlier request.

¹⁰ Judith Endejan, KOMO's Attorney in this case, is one of the authors of the *Public Records Act Deskbook*.

6. The Trial Court correctly determine that the Washington Privacy Act, RCW 9.73.090(1)(c) is “an other statute” within the meaning of RCW 42.56.070 and law enforcement agencies may not disclose in-car videos to the public until at least three years after the date of the event recorded.

The Trial Court held that RCW 9.73.090(1)(c) was “an other” statute that prohibits disclosure of in-car videos to public until final disposition of any criminal or civil litigation which arises from the event or events which were recorded.¹¹

In Washington State, the consent of all parties to a conversation is generally required to legally record it, but the Washington Privacy Act (RCW Chapt. 9.73) has carved out exceptions allowing one-party consent in limited instances, including in-car recordings. The portion of the Privacy Act that applies to these recordings, RCW 9.73.090(1)(c), contains specific directions and limitations regarding access to those recordings:

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. Such sound recordings shall not

¹¹ The City first asserted RCW 9.73.090(1)(c) in March, 2011. Before that it could not access responsive records. An agency does not need to assert an exemption when there are no records responsive to a request. There is no agency action to review when a record does not exist. *Sperr v. City of Spokane*, 123 Wn.App.132, 137, 96 P.3d 1012 (2004). By the same logic, there is no obligation to claim an exemption when the agency has no responsive records.

be divulged or used by any law enforcement agency for any commercial purpose.

The Privacy Act not only prohibits public disclosure of in-car recordings before final disposition of related criminal and civil litigation, it makes the wrongful disclosure of any recording in violation of the Act a crime. RCW 9.73.080 (2). In enacting RCW 9.73.090, the Legislature intended "to provide a very limited exception to the restrictions on disclosure of intercepted communications." Laws of 2000, ch. 195, sec. 1. This Court has held that, even though conversations recorded during routine traffic stops are not private, law enforcement agencies must strictly comply with RCW 9.73.090(1)(c). *Lewis v. State Dept. of Licensing*, 157 Wn.2d 446, 451-2 and 465-66, 139 P.3d 1078, 1080 and 1086-87 (2006).

The choice of the word "public" in the statute is not explained, but a reasonable inference is that the individual who is the subject of the recording is not the "public" and, therefore, may have a greater right to access the recording. The *Sargent* Court's interpretation of the jail records statute, RCW 70.48.100(2), is instructive. That statute says that "records of a person confined in jail shall be held in confidence and shall be made available only to criminal justice agencies ... or ... [u]pon the written permission of the person." The *Sargent* Court held that an individual may

have his own records, and where the subject's attorney makes the request, it amounts to a grant of permission. *Sargent*, 167 Wn.App. at 20. Similarly, SPD provides copies of in-car videos to the subjects of those videos upon request. SPD provides copies on in-car videos to the subjects' attorneys. *See*, RCW 9.73.100. It also provides them in response to criminal and civil discovery requests.

It has been SPD's policy to not provide copies of in-car videos prior to final disposition of related litigation in response to requests from the public since SPD began its in-car video pilot program in 2003. (CP 389, 391, 488-91).

Vedder requested videos that had been tagged for retention, which are defined as "Recordings created by mobile units which have captured a unique or unusual action from which litigation or criminal prosecution is expected or likely to result."¹² As a result, these were videos likely to lead to criminal or civil litigation.

¹² Washington State Archives Law Enforcement Records Retention Schedule for Law Enforcement Agencies, Version 6.0, July 2010 §8.1.22, available at <http://www.sos.wa.gov/archives/RecordsManagement/RecordsRetentionSchedulesforLawEnforcementAgencies.aspx> (last accessed August 21, 2012). This case does not involve "untagged" in-car videos or "Recordings from Mobile Units—Incident Not Identified" as defined by Washington State Archives Law Enforcement Records Retention Schedule for Law Enforcement Agencies, Version 6.0, July 2010 §8.1.23: "Recordings created by mobile units which have not captured a unique or unusual action from which litigation or criminal prosecution is expected or likely to result."

Courts try to read an “other statute” and the PRA so that they can be harmonized. See *Deer v. Dept. of Social & Health Svc.*, 122 Wn.App, 84, 91-93, 93 P.3d 195, 198 (2004). The *Deer* court analyzed the interaction between the PRA and RCW ch. 13.50, which provides procedures for obtaining access to juvenile records. The court found no conflict between the two statutes because RCW ch. 13.50 specifies an alternative means of obtaining juvenile records that “balances and protects the privacy needs of the juvenile and his or her family.” *Deer*, 122 Wn.App. at 92, 93 P.3d at 199. As a result, RCW ch. 13.50 provides the “exclusive process” for obtaining juvenile justice and care records. *Id.* A later case held that a requester was not entitled to PRA penalties and attorney’s fees when she should have sought the records using the procedure provided in RCW ch. 13.50. *In re the Dependency of KB*, 150 Wn.App.912, 923-24, 210 P.3d 330, 335 (2009).

The Privacy Act provides limitations on disclosure not reflected in the PRA, the two statutes can be read in harmony as the *Deer* and *In re the Dependency of KB* Courts read the PRA and Chapter 13.50 RCW. In order to read the statutes in harmony, one must apply the delay of disclosure contained in RCW 9.73.090(1)(c) to releases under the PRA. Just as in *Deer*, this additional requirement must be read as supplementing the PRA. To interpret it otherwise would require an assumption that the

PRA abrogates the Privacy Act, and a court will not read a statute or rule in a manner that renders it “superfluous, void or insignificant.” See *State v. Thomas*, 121 Wn. 2d 504, 512, 851 P.2d 673, 677 (1993)(internal citation omitted).

An “other statute” may preclude disclosure of “specific information” or entire “records.” RCW 42.56.070(1). This Court recently said that an “other statute” can expressly prohibit disclosures of entire records. *Ameriquest Mortgage Co. v. Attorney General*, 170 Wn.2d 418, 440, 241 P. 3d 1245 (2010). RCW 9.73.090(1)(c) is not an exemption; it is a prohibition on disclosure until all civil and criminal litigation related to a video has been disposed of. There is a substantive difference between an exemption and a prohibition. Exemptions are permissive and an agency has the discretion to provide an exempt record. In contrast, an agency has no discretion to release a record or the confidential portion of a record if a statute classifies information as confidential or otherwise prohibits disclosure. WAC 44-14-06002(1).

The Privacy Act prohibits disclosure of in-car videos to the public until final disposition of any criminal or civil litigation which arises from the event or events which were recorded, but leaves it to an agency to determine whether final disposition of any criminal or civil litigation which arises from the event or events which were recorded has occurred.

KOMO argues that an agency may withhold video only if **actual litigation** has arisen from the events recorded. This is nonsensical because it would require agencies to release recordings when clearly anticipated criminal or civil litigation had not yet been filed. The result would be a race to request recordings before litigation could be filed, which does not comport with the strict standards imposed in the rest of the legislation. (CP 489).

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. (CP 543).

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. (CP 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.¹³ 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.¹⁴

The Ninth Circuit held that live streaming pretrial detainees in a county facility to internet constituted “punishment” prior to adjudication of guilt and violated the due process clause. *Demery v. Arpaio*, 378 F.3d 1020 (2004), *certiorari denied*, *Arpaio v. Demery*, 545 U.S. 1139 (2005).

¹³ One legal expert on privacy refers to “internet shaming” as the result of posting embarrassing or humiliating video online without affording the targets a chance to defend or explain themselves. Daniel J. Solove, *The Future of Reputation: Gossip, Rumor, and Privilege on the Internet*, 10, Yale University Press, 2007. Once posted online, videos become permanent and searchable. Once there, the resulting damage can’t be undone.

¹⁴ Researchers have been able to use doctored video to convince subjects to testify that they actually witnessed events that hadn’t happened or even to confess to committing misdeeds that never occurred. Nash, R.A. and Wade, K.A., (2008), Innocent but proven guilty: eliciting confessions using doctored-video evidence. *Appl. Cognit. Psychol.*, 23: 624–637. doi:10.1002/acp.1500, <http://www2.warwick.ac.uk/fac/sci/psych/people/academic/kwade/kimwade/publications/nash-wade-inpress.pdf>, (last accessed August 21, 2012).

There, the Court found that constituted “a level of humiliation that almost anyone would regard as profoundly undesirable and strive to avoid.” *Demery*, 378 F.3d at 1029-30. And the Court could not see how displaying images of the County's pretrial detainees to internet users from around the world was rationally connected to goals associated with educating the citizenry of Maricopa County. *Id.*, 378 F.3d at 1032.

The potential impact extends to individuals who are never prosecuted or even charged, to victims, witnesses, and mere passersby. The Ninth Circuit failed to see how turning pretrial detainees into the unwilling objects of the latest reality show served any legitimate goals. *Id.* The delay expressed in RCW 9.73.090(1)(c) reflects similar concerns regarding in-car videos. Ms. Vedder herself acknowledges the detriment that may result when a recording is released before the subject has an opportunity to present his side of the story. (CP 386-87).

Oversight of police must be balanced against other legitimate public interests. In RCW 9.73.090(1)(c), the Legislature recognized the public interest in due process and affording individuals the right to defend criminal charges or pursue civil claims in an impartial atmosphere.

7. **The Trial court should not have awarded penalties and attorney fees to KOMO and KOMO is not entitled to attorney fees and costs of this appeal.**

The PRA provides an award of fees and costs to any person who “prevails” against an agency in a PRA action seeking the right to inspect or copy a public record or to receive a response to a public record request within a reasonable amount of time. RCW 42.56.550(4). Whether a person “prevails” relates to the legal question of whether the records should have been disclosed *on request*. Subsequent events do not affect the wrongfulness of the agency's initial action to withhold the records if the records were wrongfully withheld at that time. *Neighborhood Alliance of Spokane v. Spokane Co.*, 172 Wash.2d 702, 727. The trial court found that SPD did not violate the PRA at the time of KOMO’s requests, and, therefore, KOMO has not and cannot prevail in this Court or below.

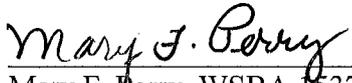
V. CONCLUSION

The City respectfully asks the Court to affirm in part and reverse in part the Trial Court’s decision and find that (1) SPD did not violate the PRA in this case; (2) that RCW 9.73.090(1)(c) is an “other statute” within the meaning of RCW 42.56.070(1), which delays disclosure of in-car video to the public until final disposition of any criminal or civil litigation which arises from the event or events which were recorded; (3) that SPD’s policy of delaying disclosure of tagged video to the public for a period of three years is a narrow and reasonable interpretation of the Privacy Act; (4) that a case by case review of videos prior to three years would not

effectuate the Legislature's intent with respect to the Privacy Act; and (5) that KOMO is not entitled to penalties, fees and costs below or in this Court.

DATED this 22nd day of August, 2012.

PETER S. HOLMES
Seattle City Attorney


Mary F. Perry, WSBA 15376
Attorneys for Respondent
City of Seattle

DECLARATION OF SERVICE

Marisa Johnson states and declares as follows:

I am competent to testify in this matter, am a Legal Assistant in the Law Department, Civil Division, Seattle City Attorney's Office, and make this declaration based on my personal knowledge.

2. On August 23rd, 2012, I caused to be delivered by US

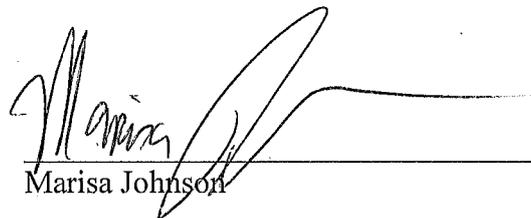
Mail addressed to:

Judith A. Endejan
Graham & Dunn PC
2801 Alaskan Way Pier 70
Suite 300
Seattle, WA 98121-1134

a copy of Brief of Respondent.

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

DATED this 22nd day of August, 2012, at Seattle, King County, Washington.


Marisa Johnson

APPENDIX A

COBAN DVMS Query Screen

Video Search

Officer
-- (ALL Officers)

Sort by: First Name Last Name Officer ID

Show Online Videos Only (Server Hard Drive) Retained Video Only

Search By

Date Range From To

Time of Day (00-23) From To

Patrol Unit ID Descending

Mobile Unit ID Descending

Beats

Page 1

Search Criteria with Exact Match

Location1:	<input type="text"/>	Location2:	<input type="text"/>
Driver's License, State:	<input type="text"/>	Number:	<input type="text"/>
Vehicle License, State:	<input type="text"/>	Number:	<input type="text"/>
First Name:	<input type="text"/>	Last Name:	<input type="text"/>
Ticket:	<input type="text"/>	Case ID:	<input type="text"/>

Display Order By

Officer ID
 Date & Time
 Most Recent

Search Main Server

APPENDIX B

APPENDIX C

Filename	Starting	UploadDate
5291@20070101001155	1/1/07 0:11	1/5/2007 11:49
5291@20070101001500	1/1/07 0:15	1/5/2007 11:49
5291@20070101005656	1/1/07 0:56	1/5/2007 11:50
5291@20070101013424	1/1/07 1:34	1/5/2007 11:52
5291@20070101015104	1/1/07 1:51	1/5/2007 11:54
5162@20070101020143	1/1/07 2:01	1/1/2007 4:04
5291@20070101020528	1/1/07 2:05	1/5/2007 11:54
5291@20070101021025	1/1/07 2:10	1/5/2007 11:55
5291@20070101021526	1/1/07 2:15	1/5/2007 11:56
5291@20070101022019	1/1/07 2:20	1/5/2007 11:56
5291@20070101022547	1/1/07 2:25	1/5/2007 11:57
5291@20070101023518	1/1/07 2:35	1/5/2007 11:58
5291@20070101025337	1/1/07 2:53	1/5/2007 11:59
5291@20070101030052	1/1/07 3:00	1/5/2007 11:59
6049@20070101031630	1/1/07 3:16	1/2/2007 22:29
5291@20070101032006	1/1/07 3:20	1/5/2007 12:01
6338@20070104021935	1/4/07 2:19	1/4/2007 20:55
6338@20070104023758	1/4/07 2:37	1/4/2007 20:56
6889@20070104051435	1/4/07 5:14	1/4/2007 8:12
6156@20070104175653	1/4/07 17:56	1/4/2007 20:49
6049@20070104214126	1/4/07 21:41	1/5/2007 19:11
6338@20070105021320	1/5/07 2:13	1/5/2007 19:55
4649@20070105074710	1/5/07 7:47	1/19/2007 6:48
4649@20070105080044	1/5/07 8:00	1/19/2007 6:51
4649@20070105083203	1/5/07 8:32	1/19/2007 6:54
4649@20070105091442	1/5/07 9:14	1/19/2007 7:01
6338@20070106003413	1/6/07 0:34	1/6/2007 14:14
5162@20070106024109	1/6/07 2:41	1/6/2007 6:19
5162@20070106193636	1/6/07 19:36	1/6/2007 21:55
6338@20070106203314	1/6/07 20:33	1/6/2007 23:32
6338@20070106204744	1/6/07 20:47	1/7/2007 1:49
5162@20070107011631	1/7/07 1:16	1/11/2007 19:37
5291@20070107011640	1/7/07 1:16	1/9/2007 10:41
4494@20070107013428	1/7/07 1:34	1/9/2007 9:48
6907@20070109131616	1/9/07 13:16	1/20/2007 14:32
6156@20070109142159	1/9/07 14:21	1/9/2007 19:11
5291@20070109160043	1/9/07 16:04	1/10/2007 13:50
6156@20070109173725	1/9/07 17:37	1/9/2007 19:30
5162@20070110014030	1/10/07 1:40	1/11/2007 19:59
6338@20070110200445	1/10/07 20:04	1/10/2007 22:26
4494@20070110202156	1/10/07 20:21	1/12/2007 20:08
6156@20070111122428	1/11/07 12:24	1/11/2007 16:13
5494@20070111133353	1/11/07 13:33	1/11/2007 18:07
5162@20070112015734	1/12/07 1:57	1/12/2007 19:41
6338@20070112235217	1/12/07 23:52	1/16/2007 20:18
6338@20070112235322	1/12/07 23:53	1/16/2007 20:23

6338@20070113012214	1/13/07 1:22	1/16/2007 20:28
4494@20070113012820	1/13/07 1:28	1/16/2007 19:32
5162@20070113021307	1/13/07 2:13	1/16/2007 19:36
6700@20070113221842	1/13/07 22:18	1/14/2007 3:24
5162@20070117221550	1/17/07 22:15	1/18/2007 1:54
4649@20070118103801	1/18/07 10:38	1/19/2007 9:09
6338@20070118200336	1/18/07 20:03	1/18/2007 22:42
6049@20070119003850	1/19/07 0:38	1/19/2007 19:55
5162@20070119005002	1/19/07 0:50	1/19/2007 2:34
6049@20070119025104	1/19/07 2:51	1/19/2007 20:02
5434@20070119085420	1/19/07 8:54	1/21/2007 20:34
6338@20070119232608	1/19/07 23:26	1/20/2007 19:35
5162@20070120003920	1/20/07 0:39	1/20/2007 2:14
6338@20070120022944	1/20/07 2:29	1/20/2007 19:40
6907@20070120130618	1/20/07 13:06	1/20/2007 14:56
6338@20070120204132	1/20/07 20:41	1/20/2007 22:33
5162@20070122202701	1/22/07 20:27	1/22/2007 23:51
5291@20070123121900	1/23/07 12:19	1/26/2007 13:39
6049@20070123201001	1/23/07 20:10	1/24/2007 19:47
5162@20070124002334	1/24/07 0:23	1/24/2007 20:25
6156@20070124173413	1/24/07 17:34	1/24/2007 18:57
4494@20070125012840	1/25/07 1:28	1/25/2007 21:45
5162@20070125234506	1/25/07 23:45	1/26/2007 1:59
6338@20070125234617	1/25/07 23:46	1/26/2007 19:49
5162@20070126205722	1/26/07 20:57	1/26/2007 23:51
6338@20070127002208	1/27/07 0:22	1/27/2007 18:34
6338@20070127015125	1/27/07 1:51	1/27/2007 18:48
6709@20070127230211	1/27/07 23:02	1/27/2007 23:20
6709@20070129023613	1/29/07 2:36	2/4/2007 22:56
6761@20070129112410	1/29/07 11:24	3/9/2007 11:19
6819@20070130005351	1/30/07 0:53	1/30/2007 1:50
6761@20070201072209	2/1/07 7:22	3/9/2007 11:19
6761@20070201080614	2/1/07 8:06	3/9/2007 11:19
6761@20070203043238	2/3/07 4:32	3/9/2007 11:23
6761@20070203050141	2/3/07 5:01	3/9/2007 11:25
6761@20070203054737	2/3/07 5:47	3/9/2007 11:28
6761@20070203082946	2/3/07 8:29	3/9/2007 11:33
6761@20070203084508	2/3/07 8:45	3/9/2007 11:35
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6761@20070203094311	2/3/07 9:43	3/9/2007 11:41
6761@20070204053906	2/4/07 5:39	3/9/2007 11:41
6761@20070204061854	2/4/07 6:18	3/9/2007 11:43
6761@20070204065144	2/4/07 6:51	3/9/2007 11:47
6761@20070204073058	2/4/07 7:30	3/9/2007 11:53
6761@20070204080711	2/4/07 8:07	3/9/2007 11:56
6761@20070207040241	2/7/07 4:02	3/9/2007 11:58
6761@20070207084016	2/7/07 8:40	3/9/2007 11:58

APPENDIX D

Comparison of KOMO and Rachner Requests

KOMO Requests	Eric Rachner's Request
<p>August 4, 2011: "a copy of any and all Seattle Police officer's log sheets that correspond to any and all in-car video/audio recordings which have been tagged for retention by officers... from January 1, 2005 to the present."</p> <p>August 11, 2010: "a list of any and all digital in-car video/audio recordings that have been tagged for retention by Seattle Police Officers from January 1, 2005 to the present. The list should include, but not be limited to, the officer's name, badge, number, date, time and location when the video was tagged for retention and any other notation that accompanied the retention log... we prefer that this data be released to us in a searchable electronic format organized and searchable by date and other reasonable fields"</p> <p>September 1, 2010: "copies of any and all digital, in-car video/audio recordings from the Seattle Police department that have been tagged for retention by anyone from January 2007 to the present. The recordings should also include, but not be limited to, corresponding identifying information such as the date, time, location and officer(s) connected to each unique recording. KOMO TV recognizes that this may be a large project and therefore we additionally request that the recordings be released to us in installments with the most recent recordings released first: i.e. January 2010 to the present first, 2009 recordings second, etc.... Depending on the size of the digital files, KOMO TV would prefer to provide our own hard drive onto which the files may be downloaded"</p>	<p>February 21, 2011: a copy of the full and complete database of all Coban DVMS activity logs in electronic form.</p> <p>The Coban DVMS system's database runs on Microsoft SQL Server, therefore it should be convenient to provide the logs in electronic form, in their original Microsoft SQL Server format. The responsive records will include all rows of all columns of all tables related to the logging of video-related activity within the Coban DVMS. Note that I am not requesting the actual content of any audio or video recordings</p>