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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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EVAN SARGENT,

Petitioner

v.

SEATTLE POLICE DEPARTMENT,

Respondent

BRIEF OF AMICUS SUBMITTED ON BEHALF OF THE  
WASHINGTON ASSOCIATION OF SHERIFFS & POLICE CHIEFS

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## I. INTRODUCTION

The police can only do their job when the public has confidence that police officers will enforce the law in an even-handed and effective manner. This is particularly true when police officers are accused of misconduct or violating the law. To maintain this public confidence and assure that police officers are not given special access and allowed to “get away” with improper conduct, it is essential that the internal police investigations remain subject to the same categorical exemption that applies to external police investigations under RCW 42.56.240(1). The case at bar illustrates the importance of this conclusion.

The Seattle Police Department (SPD) conducted two investigations into the conduct of two individuals (the petitioner Sargent and an SPD Officer) involved in a “road rage” style confrontation. SPD considered the conduct of both men as potentially criminal and conducted a separate investigation of each. But because the Officer was an SPD officer, that investigation was an internal investigation.

The issue before this Court addressed in this brief is whether an officer being investigated by his own department should be allowed access to the ongoing internal investigative file, while the citizen is denied such access to the investigative file for his own conduct.

It is uncontested that RCW 42.56.240(1) blocked Sargent's access to the investigative file while SPD was actively investigating his actions. The temporary categorical exemption prevented interference with that investigation, making it more effective. The same benefit flows from blocking the SPD Officer's access to the active internal investigation. Moreover, the loss of accountability that would result if law enforcement officers could have access to active investigations of misconduct would undermine future law enforcement investigations by reducing public confidence and cooperation. Thus, applying the categorical exemption under RCW 42.56.240(1) to active internal investigations supports the goals of the PRA, and the Court must not interpret that exemption to defeat this public benefit.

## **II. IDENTITY AND INTEREST OF AMICUS**

### **A. Interest of Amicus**

The Washington Association of Sheriffs and Police Chiefs (WASPC) was founded in 1963 and consists of executive and top management personnel from law enforcement agencies statewide. WASPC's membership includes sheriffs, police chiefs, the Washington State Patrol, the Washington Department of Corrections, and representatives of a number of federal agencies. WASPC's function is to

provide specific materials and services to all law enforcement agencies in the state, members and non-members alike.

**B. Applicant's Familiarity with the Issues and the Scope of Argument to Be Presented by the Parties**

The applicant has reviewed the Court of Appeals opinion<sup>1</sup> along with the pleadings filed before that court and the Supreme Court.

**C. Specific Issue to Which Amicus Curiae Brief Will Be Directed**

Applying a categorical exemption to active law enforcement investigations files, including files for internal investigations of police misconduct, benefits the public by making those investigations more effective and by protecting public safety and privacy. Should the Court narrow its interpretation of RCW 42.56.240(1) and not apply the categorical exemption to internal law enforcement investigations?

**D. Why Additional Consideration Is Necessary**

Allowing participation from Amicus will provide the Court with a broader perspective regarding the related issues and ramifications faced by police departments and sheriffs' offices seeking to keep law enforcement officials accountable and to maintain public confidence.

**III. STATEMENT OF THE CASE**

The facts are adequately addressed by the Court of Appeals. Thus, only the facts relevant to this brief are provided below.

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<sup>1</sup> *Sargent v. City of Seattle*, 167 Wn. App. 1, 260 P.3d 1006 (2012).

After a confrontation between Sargent and off-duty SPD Officer on July 28, 2009, SPD conducted two investigations: an external criminal investigation of Sargent and an internal investigation by SPD's Office of Professional Accountability (OPA) of the SPD Officer. *Sargent*, 167 Wn. App. at 7.

On February 5, 2010, before the completion of the OPA investigation, Sargent requested disciplinary investigative records. *Sargent*, 167 Wn. App. at 7-8. Because this was an ongoing investigation, SPD denied the request but suggested that Sargent renew the request in four to six weeks. *Sargent*, 167 Wn. App. at 8. Sargent instead sued, but the trial court ruled SPD properly withheld the file and the Court of Appeals affirmed, finding that a categorical exemption under RCW 42.56.240(1) applied to the active internal investigative file.<sup>2</sup> This Court should affirm the Court of Appeals.

#### IV. ARGUMENT

##### A. **When Narrowly Construing Exemptions, the Court Should Remain Mindful of the Public Benefits of Confidentiality**

Democracy requires open government. The importance of open government laws is captured in the first section of Initiative 276 (1972),

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<sup>2</sup> *Sargent*, 167 Wn. App. at 22 (quoting *Newman v. King County*, 133 Wn.2d 565, 572, 947 P.2d 712 (1997) and noting that an internal discipline investigation "could lead to criminal charges" and disclosure "could compromise both the investigation and any subsequent action").

(currently codified in part as Public Records Act, 42.56 RCW): “mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.” I-276(1)(11), codified at RCW 42.17A.001(11).

Despite the importance of openness and access, sometimes confidentiality, not disclosure, is in the public’s best interest. But to benefit the public, confidentiality must be transparent and limited only to those circumstances where nondisclosure actually serves the public interest. Washington’s PRA promotes this goal in several ways.

First, the PRA creates a default in favor of disclosure by mandating that public records must be produced “unless the record falls within the specific exemptions of [the PRA], or other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070(1). Second, when an exemption within the PRA applies, agencies cannot withhold complete documents if the confidential information protected by the act “can be deleted from the specific records sought[.]” RCW 42.56.210. Third, even if a record can be withheld in its entirety, it must be done transparently by informing the requester – silent withholding (or secret secrecy) is prohibited. RCW 42.56.210. Fourth,

PRA exemptions are not mandatory and agencies that release exempt records in good faith are immune from liability. RCW 42.56.060.<sup>3</sup> Thus, “when in doubt, disclose” is the best practice.

Finally, RCW 42.56.030 provides that the PRA “shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.”

This final direction of narrow construction is at the heart of this case. On its face, RCW 42.56.240(1) – the “investigative records exemption” – applies to internal investigation of alleged police misconduct. The only way Sargent could prevail would be if the Court were to construe this exemption too narrowly. But the narrow-construction requirement comes with an important caveat – the PRA also directs Courts to be “mindful” of the purposes of exemptions, the public benefits that are gained by confidentiality. This direction is both implicit and express.

First, implicit in the very fact that an exemption has been adopted is that there are some circumstances where the public is better served by confidentiality than by disclosure. If exemptions are construed so narrowly as to defeat the public benefit of the exemption, this would

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<sup>3</sup> When the public benefits of confidentiality are not clear, but a third party has an interest in non-disclosure, agencies can choose to disclose but also provide notice to the third party, who can then seek to establish that the record is exempt. *See* RCW 42.56.540.

undermine the PRA and run contrary to the maxim that legislation should not be construed to be meaningless.<sup>4</sup>

Second, very first section of Initiative 276 directs the Court to consider the public benefits of confidentiality, providing Courts to be “mindful of the right of individuals to privacy and of the desirability of the efficient administration of government.”

By analyzing all of the exemptions, these two public interests -- privacy and efficient government -- can be subdivided into five public benefits: (1) personal privacy; (2) private financial information; (3) general efficiency; (4) efficient use of taxpayer dollars and (5) efficient protection of public safety. Examples of each of these five categories are listed below.

<u>RCW Citation</u>	<u>Subject</u>	<u>Public Interests</u>
42.56.250(3)	• Employee personal contact info	• Privacy
42.56.250(2)	• Employment testing	• Efficient government
42.56.260	• Real estate appraisals	• Taxpayer dollars
42.56.270	• Various business records	• Private financial info
42.56.420(1)	• Terrorist response plans	• Public safety

Every exemption serves one or more of these five purposes.

Therefore, a more complete statement of the legislative direction for

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<sup>4</sup> *PAWS v. U.W.*, 125 Wn.2d 243, 260, 884 P.2d 592 (1994) (PRA should not be interpreted to make provisions superfluous).

interpreting exemptions is that *exemptions should be narrowly tailored taking into account the public benefits promoted by the exemption*. By taking these public benefits into account, the Court is following the mandate to remain “mindful” of privacy and government efficiency.<sup>5</sup> As demonstrated below, the public benefits of the investigative records exemption are furthered by applying that exemption to internal investigations of law enforcement.

**B. The Investigative Records Exemption Should Be Construed to Protect Privacy, Public Safety and Effective and Efficient Law Enforcement Investigations**

The investigative records exemption, RCW 42.56.240(1)<sup>6</sup>, serves three of these public benefits listed above: public safety, privacy and the efficient administration of law enforcement investigations.<sup>7</sup> The Court must avoid construing the exemption in a manner that undermines these public benefits.

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<sup>5</sup> This does not mean courts may go beyond the plain language of an exemption to protect one or more of these five public goods. See *Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006) (refusing to apply an exemption beyond its plain meaning to protect privacy of child sexual assault victim). But it does mean that when there is room for interpretation, an exemption should not be so narrowly construed as to defeat that public good. See *Vance v. Thurston County*, 117 Wn. App. 660, 668, 71 P.3d 680 (2003) (holding that PRA should not be interpreted in hypertechnical manner that defeats the public benefits embodied in the spirit of the PRA, and rejecting requester’s interpretation that would have resulted in agency waste).

<sup>6</sup> The exemption provides: “Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.” RCW 42.56.240(1).

<sup>7</sup> The exemption can also serve privacy interests, but those are not at issue here.

1. The Investigative Records Exemption Is Applied  
Categorically to Active Law Enforcement Investigations

To preserve the integrity of law enforcement investigations, the Court has recognized that this exemption must be applied as a categorical exemption for active law enforcement investigative files. *See Newman v. King County*, 133 Wn.2d 565, 572, 947 P.2d 712 (1997). In *Newman*, the Court accepted the county's argument that "disclosure of any open criminal file would inhibit effective police work" so the categorical application of the exemption was "essential for effective law enforcement." *Newman*, 133 Wn.2d at 572. "The determination of sensitive or nonsensitive documents often cannot be made until the case has been solved." *Newman*, 133 Wn.2d at 574. Courts should therefore defer to the professional judgment by law enforcement about what if anything should be released during an active investigation. Otherwise, the uncertainty that would be created if police knew that a judge was going to second guess these determinations "could result in the disclosure of sensitive information," which would interfere with effective law enforcement. *Newman*, 133 Wn.2d at 574.

While the exemption requires broad coverage to protect the public interest during an active investigation, its coverage narrows once the investigation is no longer active. This preserves the public's ability to

hold police accountable for how they conduct their investigations.<sup>8</sup> The temporary broad coverage followed by a more narrow coverage reflects the balancing of competing public interests that Courts sometimes needs to perform when interpreting exemptions.<sup>9</sup>

2. Premature Disclosure Can Undermine the Integrity of Active Investigations

The categorical exemption for active investigations serves government efficiency by protecting the integrity of the current and future law enforcement investigations. Disclosure of investigative files during an active investigation could make those investigations significantly less efficient. If a suspect were able to review an investigative file, the suspect could learn (1) whether he was in fact a suspect; (2) whether the police have uncovered any crucial facts; and (3) whether any witness has provided information. This would allow the suspect to alter his behavior and subsequent statements, destroy undiscovered evidence, affect witness testimony, and abscond if the suspect believes the police have or will gather sufficient evidence. Disclosure would also make it harder for police to use sources close to a suspect to gather information – even if the

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<sup>8</sup> *Cowles Publ'g Co. v. City of Spokane*, 139 Wn2d 472, 479, 987 P.2d 620(2000) (“Cowles 2000”) (noting that risks of public harm from premature disclosure greatly reduced once investigation is closed).

<sup>9</sup> See generally, *Bellevue John Does v. Bellevue Sch. Dist.*, 164 Wn.2d 199, 189 P.3d 139 (2008) (expressly recognizing this balance in the context of privacy exemptions). Note, this is not a balance between the public’s interests and private interests, although sometimes private harms are also public harms.

actual identity of that source was withheld, the mere fact that a suspect knows law enforcement has a source will make the suspect more guarded with everyone, including the source.

Uncontrolled premature disclosure could also taint other witnesses and would prevent officers from selectively disclosing facts that would aid in the investigation. Officers would also be hesitant to document all relevant facts in fear of tipping off suspects, which would result in the loss of information. Other law enforcement agencies would also be hesitant to cooperate. Because premature disclosure would result in fewer convictions, it would reduce public confidence so that the public would be less willing to cooperate in future investigations.

All of these consequences would make it harder to solve and prosecute crimes – in other words it would make not just the current investigation less effective, it would also interfere with all future law enforcement investigations. The categorical exemption is essential to prevent these harms.

Premature disclosure would also endanger public safety. First, less efficient and effective investigations of crimes would mean fewer criminals would be apprehended and successfully prosecuted, making the public less safe. Witnesses would also be less willing to cooperate out of fear of reprisal by persons who may now never be punished. Premature

disclosure also exposes suspects to vigilantism, which is a problem for child sex crime suspects. While no suspect should be subject to vigilantism, premature disclosure increases the chances that wrongfully accused suspects could be targeted.<sup>10</sup>

Thus, it is essential to apply the investigative records exemption in a categorical fashion for active law enforcement investigations to protect the public benefits exemption was enacted to protect.

**C. The Public Benefits Inherent in the Investigative Records Exemption Are Furthered by Applying It to Internal Investigations of Law Enforcement Officers**

What hangs in the balance in this case is law enforcement accountability and the integrity of law enforcement investigations. Disclosing investigative files will not only allow interference with those particular investigations, less effective internal investigations of even non-criminal conduct (assuming it is clear at the outset whether criminal conduct is involved, which is not a given) would also interfere with law enforcement's ability to resolve any crimes by reducing accountability, undermining public confidence and discouraging public cooperation. The temporary confidentiality of the categorical exemption, on the other hand, makes internal investigations more effective, increasing accountability and

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<sup>10</sup> Privacy issues are not addressed here, as there is no claim that confidentiality is necessary to protect privacy. But see note 14 below.

protecting public safety without sacrificing the public's need to oversee police conduct.

The importance of applying the categorical exemption is particularly apparent in cases like the one at bar, where the alleged officer misconduct is potentially criminal and stems from an officer/citizen confrontation.<sup>11</sup> If the SPD Officer were allowed to review and interfere with the SPD internal investigation,<sup>12</sup> while Sargent was prevented such access to the SPD investigation into his own conduct, the perceived special treatment of the officer strikes an additional blow to public confidence.

This unequal access is not allowed, however, because under the plain language of the investigative records exemption, internal police investigations are covered by that exemption. Moreover applying the categorical exemption to internal investigations serves the public benefits of the investigative records exemption. Therefore, the Court should avoid narrowly interpreting the exemption in a manner that excludes internal

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<sup>11</sup> While this case involves an internal potentially criminal investigation, for the reasons identified in this brief, the Court's ruling should not be limited to allegations of potentially criminal misconduct.

<sup>12</sup> While this case addresses Sargent's request for both files, SPD cannot distinguish between requesters so all of the implications of Sargent's argument must be considered. See RCW 42.56.080.

police investigations like the one OPA carried out to investigate the SPD Officer's conduct.

1. On Its Face, the Investigative Records Exemption Applies to All Internal Law Enforcement Investigations

To determine whether the investigative records exemption applies to the internal SPD investigation in the same manner that it applied to SPD's investigation of Sargent, the Court should analyze the three prongs of RCW 42.56.240(1): (1) are the records "specific investigative records"; (2) is the investigation carried out by a "law enforcement ... agenc[y]"; and (3) is nondisclosure "essential for effective law enforcement"?<sup>13</sup> If these three elements are met and the investigation is active, then under *Newman*, the Court should uphold the application of the categorical exemption while the internal investigation was active.

This Court has recently ruled in *Bainbridge Island Police Guild v. City of Puyallup*, that the first two elements<sup>14</sup> are satisfied for criminal and

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<sup>13</sup> The first prong could also be satisfied by showing the record is specific intelligence information. The second prong could also be satisfied if the agency was a penal agency or other state agency vested with the responsibility of disciplining professionals. The third prong could also be established by showing disclosure violated someone's right to privacy. None of these are at issue in this case, however.

<sup>14</sup> There was no active investigation in *Bainbridge*, however, so the Court did not consider whether the categorical exemption was essential for effective law enforcement. The Court did, however, find that disclosing the identity of an officer would violate privacy under .240(1) if the claim was unsubstantiated. Premature disclosure, before such a determination is made, could therefore also violate privacy.

non-criminal investigations into allegations of police misconduct.<sup>15</sup> Here, just as in *Bainbridge*, the investigation at issue was an investigation of a specific officer based on a specific incident conducted by commissioned police officers (in this case internally by OPA – see CP 148-49). Therefore, the records were specific investigative records compiled by law enforcement, satisfying the first two elements.

The third element is also met because applying the categorical exemption to the active internal investigations like the OPA investigation here is essential for preventing interference with effective law enforcement. This is true whether the internal investigation is criminal or non-criminal.

For internal criminal investigations,<sup>16</sup> the categorical exemption prevents interference with that particular law enforcement investigation, just as it prevents such interference in any other criminal investigation. The only relevant difference is that premature disclosure of an internal criminal investigation would lead to the additional harm of a loss of accountability and public confidence by providing special advantage to

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<sup>15</sup> *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 259 P.3d 190 (2011) (records from criminal and non-criminal investigations were both specific investigative records compiled by a law enforcement agency); *see also Cowles Publ'g v. State Patrol*, 109 Wn.2d 712, 732, 748 P.2d 597 (1988) (lead opinion) (holding exemption applies to “specific” internal investigations of individual officers, but not general investigation of an agency).

<sup>16</sup> Here, as Sargent himself notes in the very first sentence of his Supplemental Brief, the SPD Officer was being investigated for threatening Sargent’s life at gunpoint, which could be criminal conduct if true.

law enforcement. Moreover, if there are parallel investigations, like in *Bainbridge*, premature disclosure of the non-criminal investigation would result in the same consequences as premature disclosure of the criminal investigation.

Second, even if the internal investigation is not potentially criminal (something is not always apparent at the outset of an investigation), but instead is an investigation of an alleged policy violation, or claim of excessive force or harassing conduct by a citizen, the categorical exemption still essential for preventing interference with effective law enforcement investigations in the future. As recognized by this Court in a series of opinions analyzing investigations into allegations of public employee misconduct, if premature disclosure were allowed, it would result in less police accountability. That in turn would undermine public confidence and discourage public cooperation, interfering with future law enforcement investigations and creating a spiraling effect from the loss of public confidence.

In *Cowles Publ'g v. State Patrol*, 109 Wn.2d 712, 732, 748 P.2d 597 (1988) ("*Cowles 1988*"), the Court addressed this exact issue, but no opinion commanded a majority so there is no controlling opinion. Nevertheless, the lead opinion's analysis correctly identifies how premature disclosure of any internal investigations would undermine

police accountability and therefore interfere with effective law enforcement. *See Cowles 1988*, 109 Wn.2d at 728-29. “Effective law enforcement requires a workable reliable procedure for accepting and investigating complaints against law enforcement officers.” *Cowles 1988*, 109 Wn.2d at 728-29. Efficient and effective investigations of these complaints are “necessary to ensure that law enforcement officers do not abuse their authority or engage in unlawful activities.” *Cowles 1988*, 109 Wn.2d at 728-29. Efficient and effective investigations also “uphold the integrity of the law enforcement agency in the minds of the public[.]” *Cowles 1988*, 109 Wn.2d at 728-29. Premature disclosure would make these investigations less efficient and effective, interfering with effective law enforcement.

In two decisions decided by this Court after *Cowles 1988*, the Court emphasized the reasoning in *Cowles 1988* to distinguish investigations of law enforcement employees from investigations of other public employees. In those cases, RCW 42.56.240(1) did not apply because the investigation itself was not a law enforcement investigation and because a less effective investigation would not reduce public confidence and therefore would not interfere with future law enforcement investigations. *See Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 795-96, 791 P.2d 526 (1990) (holding OSPI investigations into teachers are not

law enforcement investigations); *Prison Legal News v. D.O.C.*, 154 Wn.2d 628, 640-41, 115 P.3d 316 (2005) (holding DOC investigations into medical malpractice claims are not law enforcement investigations).

Thus, under the plain language of the investigative records exemption as interpreted by the Court, disclosure can interfere with effective law enforcement in two ways when the investigative agency is a law enforcement agency. First, if the employee misconduct being investigated could lead to criminal charges, premature disclosure could interfere with that criminal investigation. Second, if the employee being investigated conducts law enforcement investigations, then premature disclosure in even non-criminal investigations would still lead to less police accountability and thus interfere with the agency's future law enforcement investigations by undermining public trust and cooperation.

Here, the internal investigation of the SPD Officer qualified under either of these prongs, and therefore the trial court and Court of Appeals properly found that the categorical investigative records exemption applied during the active investigation.

2. Public Policy Supports Applying the Categorical Exemption to All Internal Investigations of Law Enforcement Employees

Given the plain language of the investigative records exemption, the only way this Court could rule that the exemption did not apply to

internal investigations would be for the Court to narrowly interpret that exemption to find either it does not apply at all or that the categorical exemption does not apply. Either narrow interpretation, however, would interfere with effective law enforcement by allowing premature disclosure to disrupt the internal investigations leading to the spiraling effect of less effective investigations, less accountability, lowered public confidence and reduced public cooperation.

This harm is avoided, however, if the Court remains “mindful ... of the desirability of the efficient administration of government” and takes into account how the investigative records exemption promotes effective law enforcement and public safety. When the Court interprets the scope of the exemption to further those goals, it becomes apparent that it is essential to apply the categorical exemption investigative records exemption to all active criminal and non-criminal internal investigations of law enforcement officers.

The public, of course, has a strong interest in the transparency of internal investigations to ensure law enforcement officers are held accountable and the exemption should be interpreted to enhance accountability. But the interest in accountability served better by full disclosure only after any internal investigation is complete – premature

disclosure would in fact undermine accountability, not enhance it.<sup>17</sup> Premature disclosure might be in Sargent's best interest, but only at the cost of less accountability, contrary to the public's best interest.

## V. CONCLUSION

"The basic purpose of the [PRA] is to provide a mechanism by which the public can be assured that its public officials are honest and impartial in the conduct of their public offices." *Cowles 1988*, 109 Wn.2d at 719. Here, temporary confidentiality in the form of the categorical exemption during an active internal investigation is essential for achieving this most basic function of the PRA and for preventing interference with effective law enforcement investigations. Premature disclosure, on the other hand, would lessen police accountability and give law enforcement officers special advantages when accused of crimes or other misconduct.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of December, 2012.

Respectfully submitted,



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Association of Sheriffs and Police Chiefs

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<sup>17</sup> Sargent also claims confidentiality inhibited his ability to meaningfully participate in the internal investigation and investigate civil rights claims. This exemption, however, did not prevent SPD from sharing any and all information with Sargent or otherwise involving him in the investigation if SPD thought that would further that investigation. The purpose of the categorical exemption is to allow SPD, not a complainant, to direct the investigation. As for any civil rights claims, the categorical exemption ended well before any statute of limitations ran and PRA exemptions do not apply in civil discovery.