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No. 65896-4-1

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

EVAN SARGENT, Respondent/Cross Appellant,

v.

SEATTLE POLICE DEPARTMENT, Appellant/Cross Respondent.

**ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Catherine Shaffer)**

**AMENDED BRIEF OF RESPONDENT / CROSS APPELLANT
SARGENT**

Patrick J. Preston, WSBA #24361
Thomas M. Brennan, WSBA #30662
Attorneys for Evan Sargent
Respondent / Cross Appellant
McKay Chadwell, PLLC
600 University Street, Suite 1601
Seattle, WA 98101
(206) 233-2800

Greg Overstreet, WSBA #26682
Attorney for Evan Sargent
Respondent / Cross Appellant
Allied Law Group, LLC
1110 S. Capitol Way, Suite 225
Olympia, WA 98501
(360) 753-7510

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TABLE OF CONTENTS

I. SARGENT'S ASSIGNMENTS OF ERROR ON CROSS APPEAL..... 1

II. ISSUES PRESENTED..... 1

 A. Sargent's Issues Presented on Cross Appeal..... 1

 B. Issues Presented in the Opening Brief of the Seattle Police Department (SPD)..... 2

III. STATEMENT OF THE CASE 3

 A. Burden of Proof..... 3

 B. Standard of Review..... 4

 C. Introduction 6

 D. Facts 9

 E. Procedural History 18

IV. ARGUMENT 23

 A. A Prevailing Requestor of Records in a Public Records Act (PRA) Enforcement Action Is Entitled to a Mandatory Award of All Attorney Fees and Costs 23

 1. A PRA Fee Award Should Include Work to Calculate Fees Accurately and to Obtain Clarification of the Trial Court's Final Written Order 25

 2. The Trial Court Properly Exercised Discretion to Award Sargent Reasonable Attorney Fees for Work to Obtain Public Records from August 28, 2009 through the August 20, 2010 PRA Show Cause Hearing 27

B.	The PRA Requires SPD to Produce All Requested Disciplinary and Electronic Public Records	29
C.	SPD's Culpability in Continuing to Withhold and to Redact Public Records Since August 2009 Related to Sargent's Unlawful Arrest Justifies Imposition of the Maximum PRA Penalty Under <i>Yousoufian</i>	33
D.	The PRA and Controlling <i>Cowles</i> Decision Require SPD to Produce All Public Records Without Redaction Relating to Sargent's Closed and Declined Investigation.....	38
E.	The PRA Requires Disclosure of Witness Information in a Public Record Absent a Request for Nondisclosure by the Witness or Actual Danger to the Life, Physical Safety or Property of Any Witness	41
F.	The PRA Neither Required Sargent to "Resubmit" Any Records Request to SPD, Nor Authorized SPD's Refusal to Make Existing Records Promptly Available	43
G.	The PRA's Mandate of Broad Disclosure and Narrowly Construed Exemptions Requires SPD to Produce to Sargent Records of His Incarceration Following Unlawful Arrest.....	45
V.	CONCLUSION.....	47

TABLE OF CASES, STATUTES & OTHER AUTHORITIES

I. CASES

<i>Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503 (ACLU II)</i> , 95 Wn. App. 106, 975 P.2d 536 (1999)	24
<i>American Civil Liberties Union of Washington v. Blaine School Dist. No. 503 (ACLU I)</i> , 86 Wn. App. 688, 937 P.2d 1176 (1997)	41
<i>Ames v. City of Fircrest</i> , 71 Wn. App. 284 (1993)	31
<i>Barfield v. City of Seattle</i> , 100 Wn.2d 878 (1984).....	31
<i>Bonamy v. City of Seattle</i> , 92 Wn. App. 403, 960 P.2d 447 (1998), review denied, 137 Wn.2d 1012, 978 P.2d 1099 (1999)	41
<i>Brouillet v. Cowles Publ'g Co.</i> , 114 Wn.2d 788, 791 P.2d 526 (1990)	3
<i>Columbian Publ'g Co. v. City of Vancouver</i> , 36 Wn. App. 25, 671 P.2d 280 (1983)	24
<i>Cowles Pub. Co. v. Spokane Police Dept.</i> , 139 Wn.2d 472, 987 P.2d 620 (1999).....	2, 14, 19, 38, 40
<i>Cowles Pub. Co. v. State Patrol</i> , 109 Wn.2d 712 (1988)...	15, 31, 32
<i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123 (1978)	9, 44
<i>Kitsap Co. Prosecuting Attorney's Guild v. Kitsap Co.</i> , 156 Wn. App. 110, 231 P.3d 219 (2010).....	4
<i>Newman v. King Co.</i> , 133 Wn.2d 565, 947 P.2d 712 (1997)	39
<i>O'Neill v. City of Shoreline</i> , 145 Wn. App. 913, (2008)	4
<i>O'Neill v. City of Shoreline</i> , 240 P.3d 1149, (Oct. 7, 2010).....	33
<i>Prison Legal News, Inc. v. Dep't of Corrections</i> , 154 Wn.2d 628, 115 P.3d 316 (2005).....	3, 31
<i>Progressive Animal Welfare Soc. v. University of Washington</i> , 125 Wn.2d 243, 884 P.2d 592 (1994).....	5
<i>Seattle Times Co. v. Serko</i> , __ Wn.2d __, 2010 WL 4652409 *5 (Nov. 18, 2010)	39
<i>Spokane Police Guild v. Liquor Control Bd.</i> , 112 Wn.2d 30, 769 P.2d 283 (1989).....	5
<i>Spokane Research & Defense Fund v. City of Spokane</i> , 155 Wn.2d 89, 117 P.3d 1117 (2005).....	9, 26
<i>Yacobellis v. City of Bellingham</i> , 64 Wn. App. 295, 825 P.2d 324 (1992)	28
<i>Yousoufian v. Office of Ron Sims</i> , 168 Wn.2d 444, 229 P.3d 735 (2010)	4, 34, 35, 36, 37, 38

II. STATUTES

CrR 4.7(a)..... 40
RAP 10.3(a)(5) 43
RAP 18.1(b)..... 27, 47
RCW 10.97 46
RCW 10.97.080 46
RCW 42.56 1
RCW 42.56.030 5, 8, 27, 41, 43, 46
RCW 42.56.070(1) 30
RCW 42.56.080 2, 44
RCW 42.56.100 3, 44
RCW 42.56.240(1) 2, 39
RCW 42.56.240(2) 2, 41
RCW 42.56.550(1) 3, 30
RCW 42.56.550(3) 4
RCW 42.56.550(4) 23, 24, 26, 27, 47
RCW 70.48.100(1) 45
RPC 3.8(d) 40

III. OTHER AUTHORITIES

PUBLIC RECORDS ACT DESKBOOK:
WASHINGTON'S PUBLIC DISCLOSURE ACT AND OPEN PUBLIC
MEETINGS ACT (Wash. State Bar Assoc. 2006) 5, 6, 24

I. Sargent's Assignments of Error on Cross Appeal

- A. The trial court erred in its order dated September 13, 2010 by not awarding Sargent mandatory attorney fees as prevailing party under the PRA, RCW 42.56, for work done to calculate fees accurately and to obtain clarification of the order for the SPD to produce unlawfully withheld public records.
- B. The trial court erred in its October 1, 2010 order on Sargent's motion for clarification by omitting direction for SPD to produce all disciplinary public records requested by Sargent, given the court's August 20, 2010 oral ruling "directing that all the information thus far withheld . . . be turned over immediately," the lack of any applicable PRA exemption, and to the extent the order was limited to SPD's incomplete production of documents filed under seal.

II. Issues Presented

A. Sargent's Issues Presented on Cross Appeal

- (1) Under the PRA, a prevailing records requestor is entitled to "all costs, including reasonable attorney fees, incurred in connection with such legal action." Sargent prevailed in a PRA action against SPD. His fee petition included work to calculate fees accurately and to obtain clarification of the trial court's written order. Given the legislative intent for a mandatory PRA award of all costs and fees to make enforcement by a citizen financially feasible, should Sargent's award include this work?
- (2) Sargent's PRA motion to show cause sought an order compelling production of all public records withheld by SPD, including disciplinary and electronic records. Given the trial court's finding that SPD violated the PRA and direction "that all the information thus far withheld . . . be

turned over immediately," should SPD be ordered to produce those records?

B. Issues Presented in the Opening Brief of SPD

- (1) Did the trial court properly exercise its discretion to impose a graduated per diem penalty based on its findings that SPD violated the PRA by withholding public records of an investigation presented to the prosecutor's office and declined for charging before Sargent submitted his initial PRA request to SPD, and later in bad faith by withholding these records after the assigned detective interviewed the last exculpatory witness identified by Sargent?
- (2) Did the controlling *Cowles* decision vitiate SPD's assertion of a PRA exemption under RCW 42.56.240(1) because the records SPD withheld from Sargent related to an investigation that had been presented to the prosecutor and declined for charging, and because SPD failed its burden to prove that nondisclosure was "essential to effective law enforcement"?
- (3) Did the trial court properly reject SPD's assertion of an exemption under RCW 42.56.240(2) for witness identification because SPD failed its burden to prove that any witness sought nondisclosure or that "disclosure would endanger any person's life, physical safety, or property"?
- (4) Given the PRA's requirements that an agency "shall, upon request for identifiable public records, make them promptly available," including partial or installment productions as records are assembled (RCW 42.56.080), and "provide for the fullest assistance to inquirers and the most timely possible action on

requests for information" (RCW 42.56.100), did the trial court properly reject SPD's assertion that it could delay indefinitely production of existing public records requested by Sargent and later seek to justify nondisclosure by claiming that he did not "resubmit" his requests?

- (5) Given the PRA's policy of broad disclosure of public records and narrow construction of exemptions, did the trial court properly reject SPD's assertion of a broad exemption to withhold from Sargent existing records of his own unlawful incarceration under the Criminal Records Privacy Act's general confidentiality provisions?

III. Statement of the Case

A. Burden of Proof

The PRA is a "strongly worded mandate for broad disclosure of public records." *Prison Legal News, Inc. v. Dep't of Corrections*, 154 Wn.2d 628, 635, 644, 115 P.3d 316 (2005). This statutory mandate imposes the burden on SPD to prove complete compliance with the PRA. See RCW 42.56.550(1) ("The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records"); *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 794, 791 P.2d 526 (1990) ("The agency must shoulder the

burden of proving that one of the act's narrow exemptions shields the records it wishes to keep confidential"). SPD must prove the applicability of any exemption as an exception to the general rule of disclosure: "The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." *O'Neill v. City of Shoreline*, 145 Wn. App. 913, 937, 187 P.3d 822 (2008).

B. Standard of Review

The standard of review for an award of statutory attorney fees under the PRA is abuse of discretion. *Kitsap Co. Prosecuting Attorney's Guild v. Kitsap Co.*, 156 Wn. App. 110, 120, 231 P.3d 219 (2010). An abuse of discretion is a manifestly unreasonable decision or one based on untenable grounds or for untenable reasons. *Id.* PRA penalties are reviewed under the same standard. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010).

Review of whether an agency satisfied its burden to prove the applicability of a PRA exemption to withhold public records is "de novo" under RCW 42.56.550(3). 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.”
Progressive Animal Welfare Soc. v. University of Washington, 125
Wn.2d 243, 252, 884 P.2d 592 (1994) (citing *Spokane Police Guild*
v. Liquor Control Bd., 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989)).

The PRA mandates construction of its provisions by the
courts to promote broad disclosure of records by agencies,
consistent with the express legislative intent:

The people of this state do not yield their sovereignty
to the agencies that serve them. The people, in
delegating authority, do not give their public servants
the right to decide what is good for the people to know
and what is not good for them to know. The people
insist on remaining informed so that they may
maintain control over the instruments that they have
created. **This chapter 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.

RCW 42.56.030 (emphasis added); *See generally*, Hon. C.

Kenneth Grosse, “The Public Records Act: Legislative History and
Public Policy,” *PUBLIC RECORDS ACT DESKBOOK: WASHINGTON’S
PUBLIC DISCLOSURE ACT AND OPEN PUBLIC MEETINGS ACT* (Wash.
State Bar Assoc. 2006) (“DESKBOOK”) ch. 2 (describing statutory
construction provisions of PRA favoring disclosure); Greg

Overstreet, "Statutory Construction of the Act," DESKBOOK, ch. 6 (same).¹

C. Introduction

This appeal arises from SPD's refusal to produce existing public records related to a potentially lethal incident of road rage by off-duty SPD Officer Donald Waters against Evan Sargent on July 28, 2009. CP 2. SPD's violations of the PRA are inseparable from concerted, but unsuccessful, efforts by Waters and fellow SPD officers to cause Sargent to be charged falsely and shield Waters from any consequences for his violent and unlawful acts.

The King County Prosecutor's Office (KCPO) reviewed SPD's insufficient investigation and declined to charge Sargent, who was released from jail the day after his arrest. CP 5, 142. The assigned detective received notification of the prosecutor's decline on August 6, 2009. *Id.* After prompting by Sargent's defense counsel in communications with the KCPO, the detective later interviewed witnesses identified by counsel that SPD had not

¹ This chapter of the Deskbook was co-written by Greg Overstreet, co-counsel for Evan Sargent. Overstreet was also the Editor-in-Chief of the Deskbook. However, the WSBA Deskbook does not contain the mere personal opinions of the authors: "This Deskbook is balanced and objective by design. Chapter authors include a Court of Appeals judge, agency attorneys, and requestor attorneys.... Each chapter was edited by a person from the 'other side.' For example, a chapter written by a requestor attorney was edited by an agency attorney. Finally, the Washington State Bar Association provided the final edits, applying their neutrality and accuracy standards." DESKBOOK at 1-3.

sought to interview, including a 911 caller. CP 142, 162-66. Following these exculpatory interviews, the detective never resubmitted the investigation to the KCPO. *Id.*

By the end of August, counsel for Sargent sought public records to document his civil rights violations. CP 5. SPD repeatedly delayed production of these records. On ten occasions between August 31, 2009 and April 21, 2010, Sargent delivered written requests to SPD for the records, which included the existing investigation report and 911 recordings; these requests were repeated and expanded on February 5, 2010 to include existing internal electronic communications and disciplinary investigation records. CP 12-46. Ultimately, SPD produced incomplete and redacted records in the spring of 2010 and then ceased to communicate with Sargent's counsel regarding the unfulfilled requests. On August 5, 2010, Sargent sued SPD to enforce his PRA rights to obtain records he had sought for a year. CP 1. He filed a claim for damages against the City of Seattle the following week based upon SPD's violation of his civil rights. CP 416.

On August 20, 2010, the trial court found that SPD not only had violated the PRA, but in bad faith. The court ordered "that all the information thus far withheld . . . be turned over immediately"

and awarded Sargent \$30,270.00 in penalties, based in part upon the maximum \$100.00 per diem amount. RP 30; CP 221. After Sargent submitted a declaration of counsel and supporting exhibits to recover mandatory costs and fees as a prevailing PRA party, the court awarded him an additional \$40,532.00. CP 437.

To this day, SPD refuses to comply with the trial court's August 20, 2010 ruling for immediate production of all unredacted and withheld records, despite the risk of an accruing \$100 per diem penalty and responsibility for Sargent's costs and fees on appeal. SPD also refuses to pay the penalty imposed by the trial court and Sargent's award of costs and fees.

In enacting the PRA in 1972, the Washington legislature codified the public's right to be fully informed of the actions of its government. See RCW 42.56.030. Affirmance of the trial court's findings will vindicate Sargent's individual rights under the PRA, but it also benefits all citizens who live and work in the neighborhoods patrolled by SPD by protecting the public's interest in remaining

fully informed of the actions of SPD's officers and by holding officers publicly accountable for their misconduct.²

D. Facts

Sargent's initial PRA requests of August 31 and September 1, 2009 sought basic investigation records from SPD regarding the potentially lethal incident of road rage perpetrated against him by Officer Waters. CP 13, 16. This incident occurred around 5:00 p.m. on Tuesday, July 28, 2009. It was an extremely hot day for Seattle with temperatures in the mid-90s. Sargent had parked a truck temporarily in a West Seattle alley to pick up a load of laundry from his mother's business, Hands on Health. CP 2. Waters, who was wearing street clothes and driving his personal SUV, cut through the alley to avoid rush-hour traffic. When he reached Sargent's truck, which had its hazard lights flashing, he stopped to find and confront the driver. *Id.*

Sargent returned with a load of laundry and placed it in the truck. Waters approached Sargent and berated him for parking in

² The Washington Supreme Court acknowledged the importance of the broader remedial role of judicial enforcement of the PRA in *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978) ("Strict enforcement of these provisions where warranted should discourage improper denial of access to public records and adherence to the goals and procedures dictated by the statute"). See also *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 100, 117 P.3d 1117 (2005) ("Judicial oversight is essential to ensure government agencies comply with the [PRA]").

the alley, despite having done so himself. Sargent agreed to move the truck. As he attempted to leave, however, Waters yelled at him, unwilling to end the confrontation. Waters pounded on the hood of Sargent's truck and then punched off the side view mirror, startling Sargent and causing him to stall the engine. *Id.*³

As Waters rounded the front of the truck, Sargent fumbled with the door latch and fell to the ground. With Waters nearly standing over him in a fit of rage, Sargent retrieved a Little League baseball bat from the truck and scrambled to his feet. Waters repeatedly tried to grab the bat as Sargent held it back in a defensive posture. Sargent made no attempt to strike Waters, instead protecting himself from the attack with a check-swing. *Id.*

As Sargent screamed for a bystander to call 911, Waters went to his SUV and pulled out a handgun. He leveled it at Sargent, who dropped the bat and put his hands up, fearing for his life. Waters then yelled that he was a police officer. Sargent

³ SPD's statement of facts cites CP 161, a probable cause certification, as the basis for its assertion that "several witnesses stated that Plaintiff drove his vehicle into the path of an off duty police officer, nearly pinning the individual against a concrete wall." Appellant's Opening Brf at 5. There are no facts in CP 161, however, showing that anyone other than Waters was responsible for this fabricated assertion.

responded in disbelief, "you're not a cop," but made no further attempt to defend himself.⁴

Waters called 911 on his cell phone. His immediate concern was to conceal his acts of violence. He told the 911 operator that he was an officer and that other witnesses would be calling. His concerns were well-founded, as the first 911 caller reported a man in the alley with a gun. *Id.*

Waters downplayed the incident to the 911 operator, making no reference to the property damage he had caused or expressing any threat posed by Sargent. Although Sargent remained within walking distance of his truck, and the two were alone in the alley, Waters repeatedly denied safety concerns to the 911 operator. He stated that "everything is under control." He exhibited a complete lack of urgency, asking that responding patrol vehicles not use "lights and sirens." He instead directed the operator to "tell them it's fine." CP 371.

Within minutes, Waters' fellow officers arrived at the alley where they could see the obvious damage to Sargent's truck. Waters concocted a report of an "aggravated assault on an officer" with a weapon, which effectively covered up his assault on Sargent

⁴ Sargent's statement appears in Statement of Probable Cause: Non-VUCSA" of the July 28, 2009 Superform that SPD purportedly has filed under seal.

and the property damage he had caused. Sargent, who had never been arrested and had no criminal history, was handcuffed and transported to the local SPD precinct station. CP 5.

Waters' fabrications about the incident were contradicted by witnesses identified in the following days by a veteran private investigator and former King County Sheriff's Office detective hired by Sargent's defense counsel. CP 162. SPD failed to identify or interview these readily available witnesses at the scene, including a 911 caller. Waters' fabrications also were apparent in the conflicting accounts that he told to the primary officer at the scene when compared to a carefully worded statement that he delayed submitting for more than 27 hours.⁵

None of these inconsistencies were pursued by the detective assigned to the investigation, Nathan Janes. Despite being presented with a wealth of testimony, photographs and physical evidence from defense counsel, Janes sought to have Sargent charged with a felony assault on an officer and refused to consider charging Waters with property destruction or felony assault with a firearm. After reviewing the insufficient investigation, the KCPO declined to charge Sargent and asked

⁵ These facts are contained in SPD's April 5, 2010 production of SPD investigation records that SPD purportedly has filed under seal.

Detective Janes to interview witnesses identified by the defense. CP 142. After reluctantly interviewing these witnesses, Janes never resubmitted the investigation for additional charging review by the KCPO.⁶

During an August 18, 2009 interview of one such witness identified by Sargent's counsel, Detective Janes received confirmation that Officer Waters had lied about Sargent's lawful actions in self-defense. SPD withheld the interview transcript from Sargent until April 2010 before providing a redacted copy that contained the following exchange:

JANES: So I just want to make sure I got this right. 'Cause I have the black guy telling me that this young kid actually swung the bat at him. Tried to hit him in the head and that's why he had to get his gun. Is that true or not?

[REDACTED WITNESS NAME]: Far away, like like.

JANES: Far away so he never had a chance to hit him in the head?

[REDACTED WITNESS NAME]: Not, not at all.⁷

⁶ These facts are contained in SPD's April 5, 2010 production of SPD investigation records that SPD purportedly has filed under seal.

⁷ Although Sargent has not had the opportunity to review SPD's sealed exhibits, it is presumed that SPD has submitted this redacted public record for review on appeal. The quoted passage appears at page 6 of 10.

By the time of Sargent's initial August 31 and September 1, 2009 requests for SPD's basic investigation records, Detective Janes knew the investigation did not support any charge against Sargent. Sargent sought the existing incident report, which identified Waters as the off-duty officer, 911 recordings, and a computer automated dispatch (CAD) log of these recordings. CP 16. SPD refused to promptly disclose any of these records.

In a September 10, 2009 letter, Sargent reiterated his requests and alerted SPD that "the off duty acts of the complainant police officer bear upon his fitness to perform public duty. Therefore, this is not a matter of personal privacy but one of genuine public concern." CP 20. Sargent also demanded that SPD specify the precise exemption and factual basis for withholding these records, which SPD had failed to do. The letter cited the Washington Supreme Court's controlling holding that police investigative records are "presumptively disclosable" if a suspect has been arrested and the matter has been referred to a prosecutor for a charging decision. *Cowles Pub. Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 481, 987 P.2d 620 (1999). The letter further quoted an earlier decision holding that an officer's "off duty actions in public which bear upon his ability to perform his public office do

not fall within the activities to be protected . . . as a matter of 'personal privacy.'" CP 19 (quoting *Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, 726-27 748 P.2d 597 (1988)). SPD nevertheless continued to withhold the requested records.

In a September 25, 2009 letter, Sargent again cited the urgent need for SPD to take prompt action to produce the requested records due to issues of police misconduct and public safety. CP 38. Sargent also warned SPD that its failure to provide public records was subject to a PRA enforcement action and an award of "attorney fees, costs, and a penalty of up to \$100 per day to the prevailing party for wrongful denial of access to requested public records." Again, however, SPD refused to produce the requested records. *Id.*

Instead, in a September 29, 2009 letter, SPD identified Waters as the off duty officer and thanked Sargent for his "patience in the matter." CP 68. On the same date, Detective Janes had discussed Sargent's PRA requests with an employee of the legal department before meeting with two SPD sergeants and hatching a plan to attempt to have Evan Sargent charged by the Seattle City Attorney while continuing to withhold the requested public records. RP 16, CP 207. For the next four months, SPD made no further

effort to produce any part of the records or contact Sargent regarding the status of his PRA requests. On October 23, 2009, Detective Janes interviewed the last defense witness. CP 166.

On January 13, 2010, Detective Janes referred the deficient investigation to the City Attorney, even though the KCPO had declined charging and Janes knew from interviewing independent witnesses that Sargent had committed no crime. On January 20, 2010, Janes received a decline from the City Attorney. CP 7.

After learning of this alarming development, Sargent sent SPD a letter on February 5, 2010 repeating his unfulfilled original PRA requests and additionally seeking related disciplinary and electronic public records. CP 41. The letter made clear that the August 31, 2009 request for the incident report included "all referenced or related witness statements or other investigation documentation or materials." *Id.*

On March 10, 2010, after more than six months of delay, SPD produced a redacted "General Offense Report," 911 recordings and a redacted CAD log. CP 70. SPD failed to produce requested witness statements or other investigation materials, disciplinary or electronic records. Sargent responded in a March 25, 2010 letter notifying SPD of the multiple deficiencies, including

SPD's failure to provide "all notes referenced or related witness statements or other investigation documentation or materials." CP 33. Objecting to the redactions, Sargent warned of the "fundamental misunderstanding of SPD's obligations under the PRA and the applicability of exemptions," noting "the investigation has been conclusively declined for prosecution." Sargent made clear that his unfulfilled requests remained pending and that SPD would be subject to the "penalty under the PRA that grows with each day of an agency's noncompliance." CP 34.

In an April 5, 2010 letter, SPD provided its last written response to Sargent's pending records requests. CP 88. The letter's check-the-box format ignored the multiple deficiencies raised by Sargent regarding the March 10, 2010 production. SPD's staff attorney summarily stated "[t]his concludes my response to your public disclosure request." *Id.* Although the letter invited Sargent's questions "pertaining to your request," SPD never responded to a subsequent April 21, 2010 letter or voice message from Sargent's counsel on May 14, 2010 inquiring whether SPD intended to respond to unfulfilled requests and seeking information about withheld records to limit the scope of an anticipated PRA enforcement action. CP 44, 58; RP 6.

E. Procedural History

On August 5, 2010, Sargent filed a PRA complaint and a motion to show cause against SPD in King County Superior Court. Sargent's exhibits included his written records requests over the course of a year, as well as documentation of SPD's various responses and repeated delays. Sargent moved for production of all requested records without redactions, the maximum per diem penalty under the PRA, and an award of attorney fees and costs.

The trial court conducted a show cause hearing on August 20, 2010. SPD failed to call any witnesses or offer any evidence beyond its single responsive pleading and attached declarations, which complained generally of SPD's administrative inconvenience in responding to PRA requests and witness safety concerns in other cases. SPD also filed under seal certain withheld public records requested by Sargent for *in camera* review.⁸

The trial court concluded that SPD had failed its burden to prove the applicability of any PRA exemption and that SPD had unlawfully withheld the requested records. The court ruled that

⁸ The public records SPD filed under seal before the trial court did not include all public records responsive to Sargent's PRA requests. For example, in response to Sargent's request for electronic records, SPD identified and produced two email messages on September 8, 2010 and video recordings from dashboard cameras in patrol vehicles on November 17, 2010 after filing this appeal.

Cowles Pub. Co. v. Spokane Police Dept., 139 Wn.2d 472, 987 P.2d 620 (1999) compelled production of the investigation records originally requested by Sargent on August 31, 2009: "At least as to documents initially provided to the prosecutor on a rush file basis, those should have been turned over to the plaintiff in this case long ago, at first request." RP 22; CP 213. In applying *Cowles*, the court explained that:

The effective law enforcement exemption doesn't apply anymore when the investigation is concluded in the sense that the witnesses have been interviewed, the suspect has been determined, and the case is in a position where the police are ready to disclose it to the prosecutor. As soon as they are ready to disclose it to the prosecutor, they are essentially asking the prosecutor to disclose it to the defendant. That's the first thing that happens when charges are filed, is that all that information is turned over to the defendant. So whenever the police submit a case to the prosecutor, they are doing so with the intention or understanding that it's going to be released to the defendant. They know that's going to happen.

RP 24-25; CP 215.

The court found that there was not "an open and active investigation in this case. And we haven't had one for a substantial period of time." RP 20; CP 211. Specifically, the court found that the investigation concluded on "October 23rd of 2009, when the investigating detective called the last witness on his list and got a

recorded statement from him. That was the end of his investigation.” *Id.* Moreover, no exemption applied to justify SPD’s redaction of witness names or the identity of Waters because SPD failed to prove a request by a witness for nondisclosure, or that disclosure would endanger anyone’s physical safety or property. RP 26-27; CP 217.

Weighing SPD’s “deliberate nondisclosure” of records requested repeatedly by Sargent over the course of a year, the court imposed a \$5 per diem penalty for SPD’s arguable “good faith” violations of the PRA from August 31, 2009 through October 23, 2009, the date of the last witness interview, then graduated the amount to the maximum \$100 per diem penalty based upon SPD’s continued and intentional withholding of records in bad faith. RP 27-28; CP 218.

Granting Sargent’s request for injunctive relief, the court ordered “that all the information thus far withheld . . . be turned over immediately.” RP 30; CP 221. The court also ordered that, with the single exception of cell phone number of Officer Waters, “everything else in the redacted records needs to be turned over posthaste.” RP 27; CP 218. Lastly, the court directed Sargent’s

counsel to submit a declaration for an award of attorney fees. RP 30-31; CP 221.

In the week that followed, Sargent's counsel drafted a declaration for an award of fees and costs pursuant to the court's ruling. To proceed economically, counsel enlisted paralegal support to review a year's worth of billings and to generate an accurate itemized billing exhibit that excluded work done for Sargent's criminal defense representation and non-PRA claim for damages.

The court filed a written PRA order, dated August 26, 2010, to memorialize its oral rulings. The order, however, did not appear to reflect accurately the oral ruling that SPD produce "all the information thus far withheld," instead referencing only the documents SPD filed under seal for *in camera* review without specific direction for SPD to produce withheld disciplinary and electronic records.⁹

In his August 19, 2010 reply brief, Sargent identified for the court an example of an electronic record that SPD claimed did not exist, but yet was referenced by Detective Janes in his August 11,

⁹ For reasons unknown to counsel, the court's August 26, 2010 order appeared on the McKay Chadwell pleading paper of Sargent's counsel, but did not include the language of the proposed order filed by Sargent.

2010 declaration. CP 151. Thus, it was reasonable to infer that SPD's sealed exhibits did not include all records responsive to Sargent's PRA requests, and that the scope of the written order did not grant Sargent the complete relief stated in the court's oral ruling.

On August 31, 2010, Sargent's counsel drafted a motion for clarification to address irregularities in the written order. CP 184. On the same date, after failing to comply with any part of the court's oral ruling or written order, SPD filed a notice of appeal of the order. CP 175. On September 1, 2010, Sargent filed the motion seeking clarification of the order, and on September 2, 2010, his counsel filed a declaration and exhibit setting forth all billing entries for work done to obtain the public records that SPD had withheld and redacted. CP 233.

On September 14, 2010, the court filed an order awarding Sargent \$40,532.00 of a requested \$48,813.00 in fees and costs. CP 437. The court awarded fees for all work done through the show cause hearing, but excluded fees documented in counsel's declaration exhibit for work done from August 23, 2010 through August 31, 2010 to prepare the fee declaration and draft the motion for clarification.

On October 1, 2010, the court filed an order on Sargent's motion for clarification. CP 440. Unfortunately, handwriting in the order was difficult to decipher and the order further did not clearly address whether the court had directed SPD to produce all electronic records requested by Sargent. Regarding disciplinary records, the order simply contained a line through a paragraph of the proposed order on the topic without indicating what, if any, PRA exemption might apply. To date, SPD has refused to produce the requested disciplinary records. SPD has, however, produced limited electronic records responsive to Sargent's February 5, 2010 PRA requests including two email messages received by Sargent's counsel on September 8, 2010 and patrol car video recordings received on November 17, 2010.

IV. Argument

A. A Prevailing Requestor of Records in a PRA Enforcement Action Is Entitled to a Mandatory Award of All Attorney Fees and Costs

Under the PRA, a prevailing records requestor is entitled to recover "all costs, including reasonable attorney fees, incurred in connection with such legal action." RCW 42.56.550(4). The mandatory award of attorney fees and costs to a prevailing records requestor in a PRA action is intended to make enforcement of the

Act "financially feasible" by citizens. *Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503 (ACLU II)*, 95 Wn. App. 106, 115, 975 P.2d 536 (1999). Awarding full attorney fees and costs additionally recognizes the public service that the PRA plaintiff fulfills in enforcing the law to encourage agency compliance:

Pursuing legal action to require an agency to comply with the law is an expensive and time-consuming effort that is not always successful. The award of attorney fees and a penalty if the requesting party prevails seem to be a reward for the requesting party to take this risk. Perhaps the policy behind this provision is also a recognition that the requesting party is providing a public service in enforcing the law and should be rewarded for doing so. See *Columbian Publ'g Co. v. City of Vancouver*, 36 Wn. App. 25, 32, 671 P.2d 280 (1983) (penalties awarded to successful requestor because it "vindicated" the public's right to obtain public records).

Consequently, [RCW 42.56.550(4)] seems to have several related objectives. It encourages agencies to comply with the law and then penalizes the agencies when they do not do so. Conversely, it encourages requesting parties to enforce the law and then rewards them for doing so. For these reasons, this section is of critical importance to the Act. It is the glue that holds the Act together and makes it effective.

DESKBOOK at 17-2 –17-3.

Thus, the trial court properly awarded Sargent fees and costs through the August 20, 2010 show cause hearing, but abused its discretion in light of the purpose of PRA's fees provision by excluding necessary work done to prepare the fee request and to obtain clarification of the final order.

1. A PRA Fee Award Should Include Work To Calculate Fees Accurately and To Obtain Clarification of the Trial Court's Final Written Order

Sargent prevailed in a PRA enforcement action against SPD. The trial court concluded that SPD violated the PRA by withholding and redacting, among other public records, investigation records originally sought in Sargent's August 31, 2009 request. The court's award of fees and costs, however, only allowed Sargent to recover attorney fees through the August 20, 2010 show cause hearing. In so doing, the court unreasonably failed to award \$8,281.00 in fees for work done afterward, through August 31, 2010, and substantiated in the exhibit to the declaration of Sargent's counsel seeking an award of fees mandated by the PRA. CP 233. As set forth in the exhibit and counsel's sworn declaration, this work was necessary to obtain clarification of the court's final written order,

which SPD appealed during the same time frame, and to accurately calculate the fee request.

The PRA mandates complete recovery of a prevailing record requestor's costs and reasonable fees. As noted above, the PRA's award of fees promotes enforcement of the Act, which in turn benefits the public's interest by encouraging compliance by agencies. Without enforcement of the Act by private parties, a secretive agency such as SPD lacks the impetus to comply with records requests of other citizens who may not have the assistance of counsel. As noted in Sargent's pleadings, SPD is notorious for its noncompliance with public records requests, making a complete award of fees even more important to deter such unlawful action by SPD. CP 150, 156-58. When it comes to the mandatory award of attorney fees in RCW 42.56.550(4) of the PRA, "Strict enforcement of this provision discourages improper denial of access to public records." *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 101, 117 P.3d 1117 (2005). Most significantly, however, the court's order unreasonably forced Sargent's counsel to perform *pro bono* legal services that were, in fact, necessary to comply with the court's oral ruling and written order to calculate and generate an accurate request for an award of costs and fees, and

to obtain clarification of the final written order materially affecting Sargent's PRA remedies as a prevailing records requestor. CP 184.

For these reasons, Sargent requests this Court reverse the trial court's order on fees and remand for a complete award for all work done to enforce his rights under the PRA through August 31, 2010. In addition, Sargent seeks an award of all costs and attorney fees on appeal under RCW 42.56.550(4) and RAP 18.1(b).

2. The Trial Court Properly Exercised Discretion to Award Sargent Reasonable Attorney Fees For Work To Obtain Public Records From August 28, 2009 Through the August 20, 2010 PRA Show Cause Hearing

As noted, the recovery of all costs and attorney fees is mandatory under the PRA for a prevailing records requestor. On appeal, SPD claims that the trial court abused its discretion by awarding attorney fees for work performed by Sargent's counsel to enforce his PRA rights prior to the filing of the PRA enforcement action. SPD's argument, however, is contrary to the express construction under RCW 42.56.030 that the PRA shall be "liberally construed" to ensure that "the public interest will be fully protected" and to promote the public policy of broad disclosure of public records by agencies. Moreover, the decision cited by SPD in

Yacobellis v. City of Bellingham, 64 Wn. App. 295, 825 P.2d 324 (1992) did not even address the issue of an award of PRA fees for work done prior to courtroom litigation: “Yacobellis neither challenges the trial court’s determination of the applicable time period for computation of the attorneys fees award nor the time period for computation of the statutory award. Thus, we do not address either issue here.” *Id.* at 299 n.3.

If SPD did not want to risk liability for an award of attorney fees to Sargent, it should have complied with its obligations under the PRA and promptly produced the basic investigation records requested by Sargent on August 31, 2009. To limit Sargent’s award of fees to work performed a year later in prosecuting a PRA enforcement action would only encourage SPD to deny records requests by unrepresented citizens.

SPD’s remaining arguments regarding “excessive” fees fail to demonstrate an abuse of discretion by the trial court. Moreover, none of the cases cited by SPD impose a bright line rule to provide authority for these arguments. Sargent’s counsel submitted a detailed itemization of all work done to enforce his PRA rights. CP 233. Counsel specifically excluded from this calculation criminal defense representation and work done to prepare Sargent’s civil

rights claim. Counsel utilized paralegal support to proceed as economically as possible. Counsel also afforded SPD multiple opportunities to comply with its PRA obligations, providing controlling legal authority and dispositive analysis to SPD as early as September 2009. CP 17.

SPD forced Sargent into costly litigation to enforce his PRA rights. The trial court did not abuse its discretion in finding Sargent's itemized request for fees to be reasonable given the scope of the litigation.

B. The PRA Requires SPD To Produce All Requested Disciplinary and Electronic Public Records

Sargent's PRA enforcement action expressly sought an order compelling SPD to produce all requested disciplinary and electronic records. The trial court granted this relief in its oral ruling by directing "that all the information thus far withheld . . . be turned over immediately." RP 30; CP 221. The court further directed that with the single exception of the cell phone number of Officer Waters, "everything else in the redacted records needs to be turned over posthaste." RP 27; CP 218. Under these circumstances, the court's written order logically should have directed SPD to produce all requested disciplinary and electronic records. The order,

however, failed to do so, and given SPD's duty under the PRA and controlling authority to provide these records, the Court of Appeals should remand for the trial court to enter an order unambiguously setting forth this relief.

Under the PRA, disclosure is the rule; withholding is the exception. See RCW 42.56.070(1) ("Each agency . . . shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions" from disclosure). As previously noted, the burden of proof is on SPD to prove that an exemption from disclosure allows it to withhold each and every record or part of a record. RCW 42.56.550(1). SPD failed this burden in the trial court regarding the disciplinary and electronic records sought by Sargent. Sargent's reply in support of the motion to show cause plainly noted the failure of SPD's responsive pleading to dispute the validity of Sargent's requests for these records:

It is, however, important to note what SPD has not disputed in its response: that the email and text messages of SPD personnel are public records subject to disclosure upon request under the PRA; that no issue of personal privacy exists regarding the actions of Officer Waters in damaging Sargent's property and threatening his life with lethal force, and in the related and subsequent actions and statements of Waters and other SPD personnel that are

contained in SPD's public records; and that SPD's disciplinary records related to the July 28, 2009 incident – again including electronic communications – are public records subject to disclosure upon request under the PRA.

CP 150-51.

Regarding the request for disciplinary public records, in *Prison Legal News*, 154 Wn.2d at 644, the Washington Supreme Court held that misconduct investigations by the Department of Corrections of medical staff were not exempt from disclosure under the PRA under the effective law enforcement exemption. *Prison Legal News* followed a line of similar Washington appellate decisions. See *Barfield v. City of Seattle*, 100 Wn.2d 878, 885, 676 P.2d 438 (1984) (SPD department internal investigation files involving complaints against officers not exempt under PRA); *Ames v. City of Fircrest*, 71 Wn. App. 284, 857 P.2d 1083 (1993) (internal investigation file of chief of police not exempt under PRA). Notably, in *Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, the Washington Supreme Court held that where the off duty acts of a police officer bore upon the officer's fitness to perform public duty, the public concern outweighed the officer's "slight weight" in privacy and the public records must be disclosed:

If the off duty acts of a police officer bear upon his or her fitness to perform public duty or if the activities reported in the records involve the performance of a public duty, then the interest of the individual in "personal privacy" is to be given slight weight in the balancing test and the appropriate concern of the public as to the proper performance of public duty is to be given great weight. In such situations privacy considerations are overwhelmed by public accountability.

Id. at 726.

As Sargent stated repeatedly in letters to SPD, the unlawful off duty acts of violence by Officer Waters and subsequent efforts to cover-up his wrongdoing by attempting to cause Sargent to be charged falsely bore upon his fitness of public duty. Even SPD's flawed and one-sided internal investigation by the Office of Professional Accountability (OPA), did not exonerate Waters.¹⁰ Instead, OPA's "not sustained" finding meant that credible evidence existed of his misconduct. Despite widespread criticism of SPD's withholding of public records of internal investigations in flagrant disregard of the PRA's mandates, SPD effectively admitted in its trial court pleadings to withholding records for 98 percent of all

¹⁰ OPA defines the "not sustained" finding for the investigation of Officer Waters as follows: "**Not Sustained:** the allegation of misconduct was neither proved nor disproved by a preponderance of the evidence." CP 332. Thus, by definition, a "not sustained" finding means that an internal investigation contained credible evidence of misconduct – but not, purportedly, by a "preponderance," or 51 percent.

citizen complaints of misconduct in 2009, due to OPA's use of a "sustained" finding for only 2 percent of the 1,442 complaints, and SPD's policy of only disclosing disciplinary records for investigations yielding a "sustained" result. CP 290.

Electronic records, including internal SPD electronic communications, requested by Sargent indisputably constituted public records subject to disclosure under the PRA. See *O'Neill v. City of Shoreline*, __ Wn.2d __, 240 P.3d 1149, 1154 (Oct. 7, 2010) ("an electronic version of a record, including its embedded metadata, is a public record subject to disclosure. There is no doubt here that the relevant e-mail itself is a public record, so its embedded metadata is also a public record and must be disclosed").

Given the broad mandate of disclosure under the PRA, and in light of the above circumstances, SPD is obligated to produce all requested disciplinary and electronic records. The trial court's order on Sargent's motion for clarification failed to expressly direct this relief. Thus, the Court of Appeals should remand for entry of an appropriate order directing production.

C. SPD's Culpability in Continuing To Withhold and To Redact Public Records Since August 2009 Related

To Sargent's Unlawful Arrest Justifies Imposition of
the Maximum PRA Penalty Under *Yousoufian*

The trial court properly exercised discretion to impose a graduated penalty totaling \$30,270.00 for SPD's violations of the PRA in withholding public records from Sargent for an entire year. The court's total reflected a \$5 per diem penalty for SPD's arguable "good faith" violations of the PRA from August 31, 2009 through October 23, 2009, the date of the last interview of a witness identified by Sargent, and the maximum \$100 per diem penalty based upon SPD's continued and intentional withholding of records in bad faith, which continues to date. RP 27-28; CP 218. SPD responded to the trial court's imposition of the maximum penalty, and direction to produce all withheld public records within five days, by continuing to withhold the records and refusing to pay the penalty and Sargent's award of costs and fees.

In March 2010, the Washington Supreme Court issued its decision in *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010), setting forth sixteen mitigating and aggravating factors for a court to consider in imposing a PRA penalty. The trial court's PRA penalty should be upheld as fully consistent with these factors and a reasoned exercise of proper discretion.

The *Yousoufian* factors, simply put, set the daily penalty based upon an agency's culpability level in violating the PRA. The mitigating factors that may decrease a PRA penalty are:

(1) a lack of clarity in the PRA request, (2) the agency's prompt response or legitimate follow-up inquiry for clarification, (3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions, (4) proper training and supervision of the agency's personnel, (5) the reasonableness of any explanation for noncompliance by the agency, (6) the helpfulness of the agency to the requestor, and (7) the existence of agency systems to track and retrieve public records.

Yousoufian, 168 Wn.2d at 467 (footnotes omitted).

Here, Sargent's PRA requests not only were clear, but repeated, and included citations to controlling provisions of the PRA, case law and notification of accruing penalties and attorney fees; nevertheless, SPD did not promptly respond to these requests. Instead, SPD perpetuated multiple delays before producing redacted and incomplete records over six months later, and continues to withhold records to date. The absence of mitigating factors also includes: (a) the finding that SPD did not act in good faith by withholding records beyond the date of the last witness interview (as part of a concerted effort to deprive Sargent of public records necessary to his claim of civil rights violations and

relevant to issues of public safety); (b) SPD's noncompliant responses showed a lack of proper training and supervision, especially in light of Sargent's notice of the "fundamental misunderstanding of SPD's obligations under the PRA and the applicability of exemptions"; (c) SPD's ultimate refusal to respond to Sargent's April 21, 2010 letter and May 14, 2010 voice message from counsel regarding withheld records was the antithesis of helpfulness; and (d) flaws in SPD's system to track and retrieve records were evident. For example, in SPD's failure to retrieve email records referenced in the declaration of Detective Janes, and continued dilatory identification and disclosure of electronic records such as video recordings even as this appeal has been pending.

Under these circumstances, no mitigating factors exist to demonstrate an abuse of discretion by the trial court in imposing a graduated PRA penalty. On the other hand, the following aggravating factors under *Yousoufian* that may increase the per diem amount fully support imposition of the maximum penalty:

- (1) a delayed response by the agency, especially in circumstances making time of the essence, (2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions, (3) lack of proper training and supervision of the agency's personnel, (4) unreasonableness of any explanation

for noncompliance by the agency, (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency, (6) agency dishonesty, (7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency, (8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency, and (9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.

Id. at 467-68 (footnotes omitted).

Given the importance of stated public safety concerns regarding the fitness of Officer Waters to perform public duty, and Sargent's need for the requested records to seek remedies for the violations of his civil rights, SPD's delays in producing redacted and incomplete records over six months later were dangerous and egregious. SPD's multiple PRA violations, including the unlawful assertions of blanket exemptions and ultimate refusal to communicate with the records requestor, were the antithesis of strict compliance. As noted above, SPD's noncompliant responses showed a lack of proper training and supervision, and were unreasonable in light of ongoing public safety concerns. Issues of agency dishonesty were plain in the conflicting statements of Officer Waters and exculpatory information provided to Detective

Janes by witnesses identified by Sargent, both of which undermined assertion of any exemption. It was foreseeable to SPD that its withholding of public records would be injurious to Sargent's efforts to prepare a claim for damages based upon civil rights violations. Lastly, given SPD's size as an agency and trusted position in Washington's largest metropolitan area to protect citizens and uphold the law, SPD's bad faith violations of the PRA regarding Sargent's records requests warranted imposition of the maximum penalty to deter future noncompliance.

In sum, the trial court's penalty should be upheld as a proper exercise of discretion under the *Yousoufian* factors. As such, the maximum \$100 per diem penalty should continue to run through this appeal and any remand, given SPD's continued failure to withhold requested public records in bad faith. *See generally Yousoufian*, 168 Wn.2d 444 (discussion of accruing penalties over protracted appeals and remands).

D. The PRA and Controlling *Cowles* Decision Require SPD To Produce All Public Records Relating to Sargent's Closed and Declined Investigation

The trial court properly found that SPD failed its burden to prove the applicability of an exemption for effective law enforcement to justify withholding investigation records requested

by Sargent. RCW 42.56.240(1) exempts public records from disclosure that meet the following definition: "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." Records are "essential to effective law enforcement if the investigation is leading toward an enforcement proceeding." *Seattle Times Co. v. Serko*, ___ Wn.2d ___, 2010 WL 4652409 *5 (Nov. 18, 2010) (citing *Newman v. King Co.*, 133 Wn.2d 565, 573 947 P.2d 712 (1997)).

The court's detailed ruling rejected SPD's claim of an exemption under RCW 42.56.240(1) and distinguished the narrow holding of *Newman*, a case involving an unsolved murder investigation. RP 18-25. By contrast, the court found that there was not "an open and active investigation in this case. And we haven't had one for a substantial period of time." RP 20; CP 211. The investigation concluded on "October 23rd of 2009, when the investigating detective called the last witness on his list and got a

recorded statement from him. That was the end of his investigation.” *Id.*

Instead, the court concluded that the broad disclosure requirements of the PRA and controlling subsequent decision in *Cowles Pub. Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 987 P.2d 620 (1999) compelled production of investigation records originally requested by Sargent on August 31, 2009, because SPD had presented the investigation of Sargent to the KCPO for charging, an action that triggers discovery obligations by the prosecutor. RP 24-25; CP 215. These undebatable obligations exist under CrR 4.7(a) and RPC 3.8(d).

SPD’s arguments on appeal fail to identify any error in the trial court’s ruling. The reference to a “categorical exemption” in *Newman*, remains uncategorically subject to the subsequent holding in *Cowles*:

In sum, we hold in cases where the suspect has been arrested and the matter referred to the prosecutor, any potential danger to effective law enforcement is not such as to warrant categorical nondisclosure of all records in the police investigative file.

Cowles, 139 Wn.2d at 479.

A reversal of the trial court’s ruling would require this Court to establish a new exemption for investigations presented for rush

charging by a prosecutor but declined due to insufficient evidence, contrary to the PRA's express requirement under RCW 42.56.030 that exemptions be construed narrowly. Such a reversal also runs contrary to precedent: "The mandate of liberal construction requires the court to view with caution any interpretation of the [PRA] that would frustrate its purpose." *American Civil Liberties Union of Washington v. Blaine School Dist. No. 503 (ACLU I)*, 86 Wn. App. 688, 693, 937 P.2d 1176, 1178 (1997); see also *Bonamy v. City of Seattle*, 92 Wn. App. 403, 408-409, 960 P.2d 447 (1998), review denied, 137 Wn.2d 1012, 978 P.2d 1099 (1999) (courts should view with caution any interpretation of PRA which frustrates the purposes of the Act).

Accordingly, the trial court's conclusion that SPD failed to demonstrate the applicability of the effective law enforcement exemption should be upheld.

E. The PRA Requires Disclosure of Witness Information in a Public Record Absent A Request for Nondisclosure by the Witness or Actual Danger To the Life, Physical Safety or Property of Any Witness

The trial court properly found that SPD failed its burden to prove the applicability of an exemption to redact public records for information identifying Officer Waters and witnesses. RCW

42.56.240(2) exempts information in public records from disclosure that meets the following definition: "Information revealing the identity of persons who are witnesses to or victims of crime or who file complaints with investigative, law enforcement, or penology agencies, other than the commission, if disclosure would endanger any person's life, physical safety, or property. If at the time a complaint is filed the complainant, victim, or witness indicates a desire for disclosure or nondisclosure, such desire shall govern."

Given SPD's plain failure to present evidence that Officer Waters or any witness had requested nondisclosure, or that disclosure of their redacted names would endanger any person's life, physical safety, or property, the trial court properly concluded that the exemption did not apply: "The fact that people were witnesses to a crime is not alone sufficient. The agency must also demonstrate the disclosure would endanger their or somebody else's life or physical safety or property. No such showing has been made to me in any of the documents submitted to me." RP 25-26. Moreover, the court found that no victim or witness "expressed desire in any of the materials I have" for nondisclosure of identity. The court's rejection of the exemption was appropriate

in light of the PRA's mandated construction for broad disclosure of records. See RCW 42.56.030.

Lastly, SPD's characterization of Sargent's single incident of lawful self-defense in response to the property damage and assaultive confrontation by Officer Waters as showing a "predilection toward violence," especially in light of Sargent's lack of criminal history, is objectionable and appears to violate the requirement of RAP 10.3(a)(5) that a party present a "fair statement of the facts." Sargent objects to this inflammatory and unsupported assertion.

F. The PRA Neither Required Sargent To "Resubmit" Any Records Request to SPD, Nor Authorized SPD's Refusal To Make Records Promptly Available

The trial court properly concluded that the PRA does not require a requestor to "resubmit" a request for public records that has not been fulfilled by an agency:

It's not the burden of the person asking for a disclosure to continue to request disclosure at frequent intervals. Once a person has asked that specific items be turned over to them, then it's the City's burden to determine when, if ever, it can do that.

RP 28-29.

On appeal, SPD fails to identify any provision of the PRA placing such a burden on a records requestor, which would allow SPD to impose unilaterally requirements contrary to the Act's legislative intent and narrow construction of exemptions for nondisclosure. *See Hearst Corp.*, 90 Wn.2d at 131 ("leaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization"). SPD's citations to the Washington Administrative Code therefore are inapposite. SPD did not even partially fulfill Sargent's original PRA requests of August 31, 2009 and September 1, 2009 until March 2010. By then, however, Sargent's February 5, 2010 letter to SPD not only reiterated his original PRA requests, but expanded them. Thus, SPD's existing PRA obligations also expanded to provide investigation records beyond the investigation report, disciplinary and electronic records. SPD's obligation remained to make these records "promptly available" under RCW 42.56.080. *See also* RCW 42.56.100 (agencies must have policies to provide the "most timely possible action on requests").

Sargent requested existing records in SPD's possession. SPD's repeated delays in responding to Sargent's requests and withholding of these records under non-applicable exemptions

violated the PRA. Although the PRA imposed no burden on Sargent to renew his records requests because SPD possessed responsive records at the time of his requests, his repeated letters to SPD from September 2009 through April 2010 gave the agency every conceivable opportunity for complete compliance. SPD, however, chose not to comply and forced Sargent to file a PRA enforcement action. The trial court properly interpreted SPD's burden of prompt production under the PRA in its oral ruling and written order.

G. The PRA's Mandate of Broad Disclosure and Narrowly Construed Exemptions Required SPD To Produce To Sargent Public Records of His Incarceration Following Unlawful Arrest

The trial court properly found that SPD failed its burden to prove the applicability of an exemption to withhold public records of Sargent's incarceration following his unlawful arrest: "I don't know of anything in the law that forbids the release of booking information to the very person who was booked. And none has been cited to me." RP 27. See RCW 70.48.100(1) (jail register stating the "name of each person confined in the jail with the hour, date, and cause of confinement" shall be "open to the public") and (2)(d)

“records of a person confined in jail . . . shall be made available . . .
(d) Upon the written permission of the person”).

On appeal, SPD cites no case holding that an arrestee is not entitled under the PRA to disclosure of his or her own booking information and jail records. Instead, SPD presents a strained argument under the Criminal Records Privacy Act (CRPA), RCW 10.97, to justify yet another failure to narrowly construe an asserted exemption to the PRA’s general rule of disclosure.

The PRA provides: “In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.” RCW 42.56.030. Thus, even if the CRPA could be read to forbid an arrestee from obtaining his or her own booking and jail records, this prohibition is subordinate to the PRA’s express construction in favor of disclosure.

Moreover, the CRPA directs all criminal justice agencies to “permit an individual who is, or who believes that he or she may be, the subject of a criminal record maintained by that agency, . . . to see the criminal history record information held by that agency pertaining to the individual.” RCW 10.97.080. The CRPA further authorizes retention and reproduction of such records “for the purpose of challenge or correction when the person is the subject

of the records asserts the belief in writing that the information regarding such person is inaccurate or incomplete.” *Id.* The CRPA cites this purpose as authorized by the PRA, while prohibiting “copying of nonconviction data for any other purpose.” *Id.*

Sargent’s PRA complaint, show cause motion and claim for damages more than assert the inaccuracy of his arrest and incarceration for an alleged aggravated assault on an officer.

Sargent has asserted his innocence and that SPD violated his civil rights. Under these circumstances, the trial court properly ordered SPD to produce withheld booking and jail records under the PRA.

V. CONCLUSION

This Court should affirm the trial court’s finding that SPD violated the PRA in bad faith in withholding public records from Sargent. Paramount concerns over public safety and protection of civil rights, coupled with SPD’s repeated and intentional delays, warrant imposition of the maximum PRA penalty and a complete award of Sargent’s request for reasonable attorney fees and costs. Sargent further requests imposition of the continuing \$100 per diem penalty for the pendency of this appeal and any remand, and reimbursement of his costs and fees on appeal under RAP 18.1(b) and RCW 42.56.550(4).

Remand is necessary for the trial court's determination that SPD submitted incomplete public records under seal, to order SPD to produce promptly all requested disciplinary and electronic records, and to recalculate Sargent's award of all attorney fees and costs as the prevailing party in this PRA enforcement action.

DATED this 13th day of January, 2011

A handwritten signature in black ink, appearing to read 'PJP', written over a horizontal line.

Patrick J. Preston, WSBA #24361
Thomas M. Brennan, WSBA #30662
McKay Chadwell, PLLC
Attorneys for Respondent / Cross
Appellant Evan Sargent

Greg Overstreet, WSBA #26682
Attorney for Evan Sargent
Respondent / Cross Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2011, I filed the Amended Brief of Respondent/Cross Appellant Sargent and this Certificate of Service with the Court of Appeals, Division I, in Seattle, Washington, and caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

Gary T. Smith, Assistant City Attorney
Seattle City Attorney's Office
Attorney for Appellant
600 Fourth Avenue, 4th Floor
Seattle, WA 98124
gary.smith@seattle.gov

VIA EMAIL DELIVERY

DATED January 13th, 2011 in Seattle, King County, Washington.



Gale M. Valdez-Antolin
Legal Assistant
McKay Chadwell, PLLC
600 University Street, Suite 1601
Seattle, WA 98101
Phone: (206) 233-2800
Facsimile: (206) 233-2809
E-mail: gmv@mckaychadwell.com