

No. 65896-4-I

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

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EVAN SARGENT,

*Respondent/Cross Appellant,*

vs.

SEATTLE POLICE DEPARTMENT,

*Appellant/Cross Respondent.*

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

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**APPELLANT'S ANSWER AND REPLY**

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## **I. INTRODUCTION**

In its review of this case, the Court's primary concern should be the potential abrogation of well-developed principles regarding a law enforcement agency's compliance with the Public Records Act ("PRA"). Respondent/Cross-Appellant Sargent devotes extensive briefing to reciting facts unsupported in the record. The legal arguments in Sargent's Answer to SPD's opening brief rest primarily on a trial court decision that was clearly erroneous in multiple respects.

Sargent's cross appeal assigns error to one correct portion of the trial court's holding. In that cross appeal, Sargent continues to base his legal argument primarily on an incorrect and unworkable interpretation of the PRA that requires a public agency to maintain a public records request as "open" and "pending" in perpetuity.

This case presents multiple issues that could have enormous implications for law enforcement agencies across the State of Washington. This Court must remain cognizant and protective of well-established interpretations of the PRA that serve to protect the safety and security of the public.

**II. REPLY TO SARGENT’S ARGUMENTS IN RESPONSE TO ISSUES PRESENTED IN SPD’S OPENING BRIEF.<sup>1</sup>**

**A. The rationale of the *Cowles* decision does not apply in this case.**

In response to SPD’s argument that it properly applied the *Newman* categorical exemption for an open and active criminal investigative file, Sargent cites the *Cowles Pub. Co. v. Spokane Police Department* case, and the obligation of a prosecutor to provide investigative records during the discovery process.

In its opening brief, the City explained how the rationale of the *Cowles* court is based on the “essential to effective law enforcement exemption” as it may apply to protect “trial preparation, witness examination, and the trial itself.” *Cowles Pub. Co. v. Spokane Police Department* , 139 Wn.2d 472, 478, 987 P.2d 620 (1999). Thus, *Cowles* is inapplicable to the facts in this case. Also, court rules and future obligations to disclose records during the discovery phase of a proceeding have no bearing on the disclosure of records in response to a public

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<sup>1</sup> The criminal investigative file at issue was filed under seal without any redactions or records withheld as Exhibit 1 to the Declaration of Gary T. Smith and subsequently designated as CP 456-582. The references to page numbers of sealed records in Appellant’s Opening Brief refer to the original bates numbered pages. A redacted version of the criminal investigative file, in the form as produced to Sargent in response to his request, was designated as CP 772-884.

records request for a law enforcement investigative file when the investigation is open and active.

Apparently, Sargent continues to argue that a law enforcement agency can no longer assert the *Newman* categorical exemption if any portion of an investigative file has been revealed to a prosecutor at any point in time. But as the court stated in *Newman*: “documents that were created for one ‘purpose...[are] not disqualified from being compiled’ again later for a different purpose.” *Newman v. King County*, 133 Wn.2d 565, 572, 947 P.2d 712 (1997)(quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 155, 110 S.Ct. 471, 107 L.Ed.2d 462 (1989)). Therefore, in this case, documents prepared for a rush filing with the King County Prosecuting Attorney’s office could justifiably be withheld as part of a later reopened investigation.

By declarations, the City established that when initially requested, (1) the criminal investigative file was open and active; and (2) enforcement proceedings were contemplated.<sup>2</sup> CP 142. Under *Newman*,

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<sup>2</sup> In the statement of facts in his Answer, Sargent states that the SPD detective in this case never resubmitted the investigation for additional charging review. But SPD established that when a case is declined with a request for additional investigative work, a detective is free to pursue filing charges with either the King County Prosecuting Attorney (“KCPA”) or the Seattle City Attorney’s office (“CAO”). CP 142. In fact, the detective in this case did refer the case to the CAO at the conclusion of his investigation. *Id.*

that was the only relevant inquiry to determine whether the categorical exemption for open and active police investigations was properly asserted.

In *Seattle Times v. Serko*, a unanimous Washington Supreme Court case decided after the filing of this appeal, the Court approvingly acknowledged the *Newman* categorical decision, and repeated the simple two-step analysis used to determine its proper application. *Seattle Times v. Serko*, 2010 WL 4652409 \*5 (Nov. 18, 2010). The *Serko* court reiterated the primary justification for the categorical exemption, stating that the exemption is necessary because “the decision as to what information may or may not compromise an open investigation is best left to law enforcement, rather than a court reviewing records in camera.” *Id.* at \*6 (citing *Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712 (1997)).

The *Serko* Court held that the categorical exemption did not apply under the facts of that case because “the prosecutor has made his charging decisions with respect to the respondents” and “the investigation...is no longer ongoing.” *Id.* The Court continued, “[t]o that extent, this case is outside the realm of *Newman* and is on point with *Cowles*.” *Id.*

In this case, the prosecutor initially declined charges and requested additional investigative work. SPD was performing active investigatory work at the time of the request. Therefore, unlike the *Serko* case, denial of

the request for an open and active investigative file in this case was outside the realm of *Cowles* and on point with *Newman*.

The City acknowledges that the PRA contains broad disclosure requirements. But pursuant to the terms of the PRA and controlling case law, those broad disclosure requirements for public records must temporarily yield to ensure that the safety of the public is protected. A reversal of the trial court's decision on this point is essential to prevent an unnecessary abrogation of the *Newman* categorical exemption that will negatively affect law enforcement activity and public safety across Washington State.

**B. The withholding of witness identification in this case is a reasonable interpretation of the PRA.**

An affirmative showing of actual fear on behalf of a witness is not a requirement to protect witness identity under the RCW 42.56.240(2) exemption. Whether or not the witness has affirmatively indicated any concern, if disclosure of witness identity would endanger a witness's physical safety, then witness identity is exempt.

Sargent repeats the trial court's erroneous conclusion that, because there was no affirmative showing in the record that witnesses were in actual fear for their physical safety, the PRA did not authorize the redaction of witness identity. But it is in the trial court record, and

undisputed, that the investigative file in this matter involved a suspect who swung a baseball bat at another individual.<sup>3</sup> There is a real and reasonable concern for witness safety when individuals provide information related to such an event that may lead to the prosecution of a violent suspect. CP 143.

The legislative intent of the witness identity exemption was not to impose a requirement that a police department responding to a public disclosure request conduct research regarding the actual state of mind of each witness involved before determining whether to redact witness identity. Under that standard, police may be required to disclose witness identity simply because a witness could not be located at the time of a request, regardless of the potential danger. A proper reading of the witness identity exemption is that it allows a law enforcement agency to determine when redaction is necessary to protect members of the public. SPD made a determination that revealing the identity of witnesses to an alleged violent crime would endanger their physical safety, and justifiably redacted witness names.

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<sup>3</sup> Sargent's PRA complaint itself states that he executed a "check swing" at an off-duty officer. CP 4.

**C. SPD’s alternative argument that witness and victim names are exempt under the RCW 42.56.240(1) “essential to effective law enforcement” exemption remains uncontroverted.**

Whether nondisclosure of a particular record is essential to effective law enforcement is an issue of fact. *Koenig v. Thurston Co.*, 155 Wn. App. 398, 407, 229 P.3d 910 (2010). Courts may consider declarations from those with direct knowledge of and responsibility for the investigation to determine whether its nondisclosure is essential to effective law enforcement. *Id.*

Courts specifically have held that witness and victim names in investigative records are exempt pursuant to the RCW 42.56.240(1) “essential to effective law enforcement” exemption. *Tacoma News, Inc. v. Tacoma-Pierce County Health Department*, 55 Wn. App. 515, 778 P.2d 1066 (1989). In *Tacoma News*, the court acknowledged that nondisclosure of witness and victim names was an important means of ensuring the integrity of investigations, and that disclosing the identity of witnesses and victims would discourage potential complainants and witnesses from coming forward in the future. *Id.* at 522. The court based that holding on affidavits, including a statement that the names should not be disclosed due to fears of “retaliation.” *Id.* See also *Cowles Publishing v. Washington State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988) (holding

that the names of individuals who volunteered information during an internal law enforcement investigation were exempt per RCW 42.56.240(1)).

Here, the record reflects an SPD detective's justified concerns regarding the negative effects on this or any future investigations of alleged violent crimes if potential witnesses and victims had knowledge that their identity would be subject to disclosure when they provided information to law enforcement. CP 143. As in the *Tacoma News* case, the SPD detective explained that it would have a "chilling" effect on the willingness of individuals to provide information, and impede SPD's ability to gather information because of retaliation fears. *Id.* Further, if crime victims had knowledge that their names would be subject to disclosure, including to the person accused of a crime, those individuals would be reluctant report crimes to law enforcement. *Id.* That factual showing is uncontroverted, and thus witness and victim names were properly withheld.

**D. There is no authority to impose the novel and unprecedented duty to keep a public disclosure request open and pending.**

It is noteworthy that Sargent does not continue to argue that the trial court was correct in finding that his request for the criminal

investigative file remained “pending.” Instead, in his answer, Sargent mischaracterizes “repeated” requests “from September 2009 through April 2010.” *See* Brief of Respondent/Cross-Appellant Sargent, pg. 45. The record is clear that Sargent submitted a request for the criminal investigative file in September 2009, which SPD responded to and closed, but Sargent did not resubmit that request until several months later, in February 2010. CP 112-113. The trial court erroneously imposed liability because SPD did not maintain that request as “open” and “pending” during that significant period of time, even in the absence of a new request. There is no authority to counter SPD’s argument that the PRA does not obligate an agency to produce records created after receipt of a records request, or otherwise keep a public disclosure request “open” and “pending.”

SPD cited the provisions of the PRA itself, case law interpreting the PRA, the PRA Deskbook, and the PRA Model Rules, all of which clearly support the common understanding that a records requester must resubmit a request to obtain later created records, or to obtain records

when exemptions no longer apply.<sup>4</sup>

**E. SPD properly relied on statutory prohibitions to disclosure in responding to Sargent's request.**

As required by the PRA, SPD narrowly interpreted RCW 10.97, the Criminal Records Privacy Act ("CRPA") and RCW 70.48.100(2), the statute protecting jail records, to withhold only seven pages of a one hundred and twenty-one page criminal investigative file. In arguing that the pages were improperly withheld, Sargent cites the conflict provision in RCW 42.56.030 and, for the first time, sets forth a new characterization of his records requests as requests made under the CRPA provisions that allow the subject of non-conviction records to examine the records based upon a written claim that the non-conviction data was inaccurate.

First, it is clear that if another statute designates records as exempt, the records are not subject to disclosure under the PRA. RCW 42.56.070(1). The "other statutes" exemption functions to supplement the exemptions to disclosure found within the PRA itself. *Ameriquest Mortg. Co. v. Washington State Office of Atty. Gen.*, \_\_\_ Wn.2d \_\_\_, 241 P.3d

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<sup>4</sup> *Smith v. Okanogan County*, 100 Wn. App. 7, 14, 994 P.2d 857 (2000); *Spokane Research v. City of Spokane*, 155 Wn.2d 89, 103-104, 117 P.3d 1117 (2005); WAC 44-14-04004(4)(a); CP 286. Greg Overstreet, co-counsel for Sargent, is clearly aware of the correct authority on this issue because of his status as the editor in chief of the Washington Public Records Act Deskbook. See Brief of Respondent/Cross Appellant, pg. 6, fn. 1. In addition, Mr. Overstreet is the author of the PRA Model Rules contained in the Washington Administrative Code. See <http://alliedlawgroup.com/profiles/greg.php>.

1245, 1255 (2010). Otherwise, any Federal or State statutory prohibition to disclosure, including those protecting highly sensitive information such as medical records, would be meaningless. Courts have held that numerous other state statutes' disclosure provisions are thus incorporated into the PRA. *Id. citing Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004) (RCW 5.60.060(2)(a)); *Progressive Animal Welfare Society v. Univ. of Wash.*, 125 Wn.2d 243, 261-63, 884 P.2d 592 (1994).

As to the CRPA, Sargent's public records requests did not give any indication that they were submitted for the purpose of examining the records to challenge their accuracy per RCW 10.97.080. The requests did not even reference the CRPA at all.<sup>5</sup> Sargent implicitly acknowledges this fact by citing to his PRA complaint, show cause motion, and claim for damages, and now arguing that these documents somehow relate back to his original requests and change the nature of those requests. Clearly Sargent's original requests were not made pursuant to the CRPA provisions for challenges to the accuracy of non-conviction records. Thus, SPD justifiably withheld selected pages from the criminal investigative file per the CRPA.

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<sup>5</sup> Sargent's PRA requests were drafted by a criminal defense attorney who is familiar with the CRPA's provisions. CP 20-22.

Sargent's only response to SPD's argument regarding jail records is to cite the section of RCW 70.48.100(1) dealing with the actual jail register. But Sargent ignores the second section of the statute stating that other than the actual register, jail records "shall be held in confidence." RCW 70.48.100(2).<sup>6</sup> As discussed, exemptions to disclosure in other statutes trump the PRA. *Ameriquest Mortg. Co.*, 241 P.3d at 1255.

Finally, the law that Sargent fails to address is the provision in the PRA itself stating that an agency "shall not distinguish among requesters." RCW 42.56.080. Although Sargent argues that he should be entitled to receive copies of non-conviction records and jail records under the PRA, SPD, having received no contrary authority, is required to treat his request as though it had come from the Seattle Times. SPD acted in compliance with the PRA and statutes that prohibit disclosure of these records.<sup>7</sup>

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<sup>6</sup> Sargent cites the provision of the statute allowing disclosure of jail records upon the written permission of the subject, but again none of his requests provided that authorization, or even cited to the RCW 70.48.100 provisions.

<sup>7</sup> Sargent does not counter SPD's argument that two entries in the criminal investigative file were appropriately redacted per the "essential to effective law enforcement" exemption in RCW 42.56.240(1); and that a two-page decline memo is exempt under both RCW 42.56.240(1) and the RCW 42.56.290 exemption that applies to attorney work product.

**F. Even assuming a violation of the PRA, the trial court abused its discretion in its unprecedented award of \$100 per day.**

Sargent attempts to retroactively justify the unprecedented imposition of the maximum penalty award by setting forth unsupported facts and incorrectly applying the *Yousoufian* factors.<sup>8</sup> This argument is unsupported in the record, and it misses the point.

As discussed in the City's opening brief, the trial court based its imposition of the statutory maximum per day penalty on a finding that records were withheld and redacted "intentionally." That is not the correct standard. The trial court's penalty award, and failure to consider or request briefing on the *Yousoufian* factors, was a clear abuse of discretion.

**III. RESPONSE TO SARGENT'S ASSIGNMENTS OF ERRORS ON CROSS APPEAL**

Sargent essentially presents three issues in his cross appeal: (1) that SPD should have produced electronic versions of email communication in response to his records request; (2) that SPD should have produced disciplinary investigative records in response to his request; and (3) that

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<sup>8</sup> For example, Sargent alleges SPD withheld records as part of a "concerted effort" to impede any filing of a civil rights claim. In addition, Sargent argues that SPD's justifiable application of the *Newman* categorical exemption somehow supports an allegation of a lack of training within the SPD Public Records Unit.

the court should have awarded attorney's fees for non-attorney work performed prior to litigation.

**A. The PRA does not require electronic versions of email to be produced when they have not been requested in such format.**

Sargent omits key facts regarding any alleged request for “electronic” records. First, the actual text of the referenced records request refers to “[a]ll written or recorded communications (including electronic communications such as email or text messages) by or concerning [the investigation]” CP 42. In fact, SPD produced hard copies of email communication responsive to this request. CP 841-847.

In support of his argument, Sargent cites to the *O'Neill* decision holding that metadata embedded within email is a public record subject to disclosure. *O'Neill v. City of Shoreline*, \_\_\_ Wn.2d \_\_\_, 240 P.3d 1149 (2010). But Sargent's citation to *O'Neill* misses a critical point of the court's holding. In *O'Neill*, the court held that a government agency is not obligated to produce metadata or electronic versions of records unless the records request specifically references “metadata.” *Id.* at 1155-1156. Sargent's records requests never referenced metadata, thus *O'Neill* provides no support for his argument.

The correct authority on this issue holds that an agency is not obligated to provide records in any particular format. *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009). In that case, the requester expressly requested that emails be produced in an electronic format. *Id.* at 838. The court noted that there was no provision in the PRA that expressly requires an agency to provide electronic versions of records, but did remand to the trial court to determine whether it was reasonable and feasible for the City to do so. *Id.* at 849-850.

Although Sargent requested emails, unlike the requester in *Mechling*, he did not request that emails be produced in an electronic format. Unlike the requester in *O'Neill*, he did not request metadata. Thus, SPD acted in full compliance with the PRA when it produced hard copy versions of those electronic communications.

**B. The trial court correctly concluded that SPD was not under any obligation to produce disciplinary investigative records.**

**1. Background of the disciplinary investigation at issue.**

A separate SPD investigation of potential misconduct on behalf of the off-duty officer involved in the July 29, 2009 incident was initiated on October 15, 2009. CP 278. A Sergeant within the SPD Office of Professional Accountability (“OPA”) actively investigated the matter,

including phone and in person interviews with the complainant and the subject officer. CP 148-149. OPA investigations involve review and analysis by Lieutenants and civilian auditors, all of which involves potential contact with witnesses and additional fact finding. *Id.*

On April 2, 2010 and April 13, 2010, an attorney representing Evan Sargent contacted SPD OPA to offer information intended to assist the investigation. CP 149.

By memo dated April 30, 2010, the Civilian Director of OPA made a final disposition decision in the matter, concluding with a finding that the allegation of misconduct was “not sustained.” CP 145, 278. On May 26, 2010, OPA notified the complainant that the investigation of the matter was complete. CP 145. On June 1, 2010, by letter to the Civilian Director, counsel for Sargent expressed concern that OPA did not consider his correspondence that set forth what he believed to be inconsistencies in the subject officer’s statement and other shortcomings in the investigation. CP 145-146. By letter dated June 10, 2010 the Civilian Director responded to Sargent’s counsel with an assurance that OPA considered all of the information and arguments previously provided, and that she did not deem it necessary to reopen the investigation. *Id.*

**2. Sargent requested records of the disciplinary investigation while the investigation was open.**

On February 5, 2010, Sargent submitted an additional request for, among other things, information regarding any disciplinary investigation of the specific officer involved in the July 29, 2009 incident. CP 125. At that time, the disciplinary investigation was open and active. CP 148-149, CP 278. On March 10, 2010 SPD denied that portion of his request, stating that the investigation was ongoing and thus exempt pursuant to the RCW 42.56.240(1) “essential to effective law enforcement” exemption. CP 130. Sargent did not resubmit this separate request for records of the disciplinary investigation, even after receiving a May 26, 2010 notification that the investigation was complete. CP 114.

**3. The trial court ruled that there was no PRA violation or obligation to produce the separate disciplinary investigative records.**

The trial court did not find a violation of the PRA in SPD’s response to this separate request for disciplinary investigative records

from Sargent.<sup>9</sup> Sargent filed a “motion for clarification” arguing that the trial court’s initial order should also encompass “electronic” and “disciplinary” records. In that motion, Sargent argued that his separate February 5, 2010 request for disciplinary records remained “pending” after SPD’s March 10, 2010 denial of the request based on RCW 42.56.240(1). CP 184.

In response to Sargent’s motion, SPD argued that, after the initial denial, Sargent never resubmitted his request for the separate disciplinary investigative records, and further that even if they were requested, two separate exemptions applied to the contents of the investigative file. CP 263. Regardless, SPD affirmatively proceeded to provide documentation to Sargent and the trial court reflecting the form in which SPD would have responded to a request for the disciplinary records, if it had received a valid request after the investigation was closed. CP 281, 886-891. Further, SPD affirmatively provided the full content of the disciplinary

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<sup>9</sup> Sargent’s cross appeal states that “[f]or reasons unknown to counsel” the trial court’s initial order did not include all of the language of the proposed order filed by Sargent, but appeared on his letterhead. As clearly stated by the City in communication to the trial court, which included counsel for Sargent, the City presented a redlined version of Plaintiff’s proposed order that accurately reflected the court’s August 20, 2010 oral ruling. CP 283.

investigative record to the trial court for review *in camera*. CP 281, 583-765.<sup>10</sup>

The trial court's final order on the motion for clarification clearly reiterated that it only ordered the production of records "[t]o the extent the following were included in the material submitted *in camera* to the court as Exhibit A to the Smith declaration and pertaining to the police criminal investigation of plaintiff under SPD Incident No. 09-264202." CP 441. Further, the trial court affirmatively struck any reference to the disciplinary investigative file from the subsequent list of documents ordered for production. CP 442.

**C. Sargent's argument regarding any obligation to produce disciplinary records is based on a misinterpretation of PRA case law.**

Investigative records compiled by law enforcement are exempt if nondisclosure is essential to effective law enforcement or for the protection of any person's right to privacy. RCW 42.56.240(1). This exemption may be broken into four elements, but only three requirements: (1) the records must be specific investigative records; (2) compiled by a law enforcement agency; nondisclosure of which is (3) essential to

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<sup>10</sup> CP 583-765 were filed in the trial court and transmitted to the Court of Appeals under seal

effective law enforcement; or (4) for the protection of any person's right to privacy. Thus, once the first two prongs of the test are established, records are exempt if "essential to effective law enforcement" or "for the protection of a person's right to privacy."

The first two elements are met here. Records of disciplinary investigations conducted by police internal investigation units are specific investigative records. See *Cowles Publishing Co. v. State Patrol*, 109 Wn.2d 712, 728-729, 748 P.2d 597 (1988). The disciplinary investigation records in this case were compiled by the SPD OPA, Investigations Section ("OPA-IS") a component of the Seattle Police Department, a law enforcement agency.

In *Cowles* the court explicitly held that the "essential to effective law enforcement" exemption applies to law enforcement internal investigations. *Id.* Sargent fails to address this portion of the holding of the *Cowles* case, instead improperly citing to that court's analysis of the separate "right to privacy" component of the RCW 42.56.240(1) exemption regarding sustained allegations of misconduct.<sup>11</sup>

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<sup>11</sup> The disciplinary investigation at issue resulted in an unsustained finding. CP 278. See section III(F)(2), *infra*, for a discussion of the "right to privacy exemption as it applies to unsustained disciplinary investigations.

The other cases cited by Sargent provide no support for his argument that the RCW 42.56.240(1) “essential to effective law enforcement exemption” cannot apply to records of police internal investigations. In *Prison Legal News*, the court held that providing health care to inmates did not meet the definition of law enforcement. *Prison Legal News v. Department of Corrections*, 154 Wn.2d 628, 644, 115 P.3d 316 (2005). Thus, the RCW 42.56.240(1) exemption was inapplicable to misconduct investigations involving prison medical staff. *Id.* But in that holding the court explicitly cited to the *Cowles v. State Patrol* case, and acknowledged that “the investigation of police performing the functions of their jobs is an investigation of law enforcement.” *Id.* at 642, fn. 14 (emphasis added).

Similarly, the *Ames* case cited by Sargent actually acknowledges that an internal investigation of a law enforcement officer by a law enforcement agency is potentially exempt pursuant to the “essential to effective law enforcement exemption.” *Ames v. City of Fircrest*, 71 Wn. App. 284, 294, 857 P.2d 1083 (1993). The court in that case held that the identity of a police chief who was the subject of sustained misconduct was not exempt under RCW 42.56.240(1) because that specific investigation was a “unique inquiry aimed at the head of the department,” and the police chief’s name already had been widely publicized. *Id.* at 296. Thus, Ames

did not make the requisite factual showing that the essential to effective law enforcement exemption justified withholding his name. Also, unlike *Cowles*, there was not the same concern with any impact on future police internal investigations. *Id.*

Finally, the *Barfield* case did not even involve a records request pursuant to the PRA, but instead analyzed the RCW 42.56.240(1) “essential to effective law enforcement” and right to privacy exemptions in the context of a motion to compel discovery in civil litigation. *Barfield v. Seattle*, 100 Wn.2d 878, 885, 676 P.2d 438 (1984). Sargent cites the case as standing for the proposition that internal investigation records are “not exempt under the PRA.” *See* Brief of Respondent/Cross-/Appellant Sargent, pg. 31. But *Barfield* merely held that the PRA exemption did not preclude discovery when internal investigation records could be provided under a protective order. *Id.* at 885.

In sum, it is clear that the RCW 42.56.240(1) exemptions both for effective law enforcement, and protection of individual privacy, apply to records of law enforcement disciplinary investigations.

**D. SPD properly denied Sargent's request for an open and active disciplinary investigative file based on the *Newman* categorical exemption.**

In response to Sargent's February 5, 2010 additional request for disciplinary investigative records related to a specific officer, SPD informed Sargent that the investigation was open and active, cited the RCW 42.56.240(1) exemption, and stated "[p]lease resubmit your request in four to six weeks as the investigation is still open." CP 129-130. Apparently, Sargent's only argument in his cross appeal is that the "essential to effective law enforcement" exemption can never apply to the contents of law enforcement investigations of law enforcement personnel. As previously discussed, that argument is based on a misinterpretation of case law.

It is clear that the "essential to effective law enforcement" exemption applies categorically to records of open and active law enforcement investigations. *Newman, supra*. It is equally clear that that an internal investigation of a law enforcement officer by a law enforcement agency is a law enforcement investigation. *Cowles v. State Patrol, supra*. *Newman* itself cites to the holding in *Cowles* and acknowledges that an internal police investigation is an "enforcement

proceeding” where the categorical exemption applies. *Newman*, 133 Wn.2d at 573.

*Newman* did not limit its holding to investigations of crime involving civilians. As the court concluded, “the broad language of the statutory exemption requires the nondisclosure of information compiled by law enforcement and contained in an open and active police investigation file because it is essential for effective law enforcement.” *Id.* at 574.<sup>12</sup>

Cases decided after *Newman* acknowledge the simple two step analysis to determine whether the “investigative records exemption” applies categorically. That test as set forth in *Seattle Times v. Serko*, is as follows:

“The application of the investigative records exemption requires that the records in question be compiled by law enforcement and that they be essential to effective law enforcement. *Newman*, 133 Wn.2d at 572, 947 P.2d 712. Records are essential to effective law enforcement if the investigation is leading toward an enforcement proceeding. *Id.* at 573, 947 P.2d 712.”

*Seattle Times v. Serko*, 243 P.3d at 926.

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<sup>12</sup> The reasoning of *Newman* is also directly applicable to the records of internal investigations. An internal investigation is assigned to a sworn officer who interviews witnesses and gathers evidence in the same manner as an officer investigating any other matter. CP 149. Further, the investigation may evolve into a pursuit of criminal charges. CP 278. Clearly, the same concern exists with the courts, rather than the law enforcement agency, determining what information is sensitive during the pendency of the investigation.

Applying the *Newman* test, it is clear that SPD properly asserted the categorical exemption in response to Sargent's February 5, 2010 request. At the time Sargent submitted this additional request for disciplinary records, OPA was actively investigating the matter, conducting phone and in person interviews. CP 148-149, CP 278. Further, that work was subject to review and analysis by Lieutenants and civilian auditors, all of which involves potential contact with witnesses or additional fact finding. CP 149. Therefore, resources were allocated to an active investigation which meets the first prong of the *Newman* test.

When an OPA investigation is initiated, it may lead to enforcement proceedings, including termination and potential criminal charges. CP 278. Thus, when the investigation began, enforcement proceedings were contemplated, which meets the second prong of the *Newman* test.

The OPA investigation did not conclude until the OPA Civilian Director issued a final disposition memo on April 30, 2010. CP 145. In response to Sargent's request for the disciplinary investigative file in February 2010, SPD properly asserted the *Newman* categorical exemption.

**E. Sargent did not resubmit a clear records request for disciplinary investigative records after February 5, 2010, even after receiving notification that the investigation was complete.**

The PRA requires a response to requests for identifiable public records. RCW 42.56.080. A person requesting public records must state the request with “sufficient clarity to give the agency fair notice” that it has received a request for records. *Wood v. Lowe*, 102 Wn. App. 872, 878, 10 P.3d 494 (2000). The PRA does not require that an agency respond to questions about public records. *Bonamy v. Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998). Moreover, the PRA does not require public agencies to be “mind readers” in determining whether an individual is submitting a public disclosure request. *Id.*

The PRA does not require written requests for records, but it does require that requests be recognizable as public disclosure requests. *Beal v. City of Seattle*, 150 Wn. App. 865, 876, 209 P.3d 872 (2009). The request’s medium may be relevant to its clarity, and an oral statement may be less clear than a written request would have been. *Id.*

After Sargent’s February 5, 2010 request for disciplinary investigative records, which SPD responded to and closed, the only additional written communication that the SPD Legal Unit received from

Sargent was a letter dated April 21, 2010. CP 135-137. In that letter, Sargent requested “substantive responses to the following questions for clarification arising from your most recent correspondence so that we may narrow the issues for the most economical litigation.” *Id.* At the time of Sargent’s April 21, 2010 letter, the disciplinary investigation remained open and active. CP 145, CP 278. Also, SPD already had provided a complete summary of its work responding to Plaintiff’s requests on March 10, 2010, and explained the exemptions applied to certain records in its final response on April 5, 2010. CP 129-130, 132-133.

Although Sargent alleges that he left a voice mail with the SPD Legal Unit after sending the April 21, 2010 letter, the SPD Legal Unit has no record of this voice mail. CP 58. But even as described by counsel for Sargent, the intent of the voice mail was simply “following up on” Plaintiff’s April 21, 2010 letter submitting questions for clarification. CP 58.

The PRA does not require that a public agency respond to questions regarding records. *Bonamy*, 92 Wn. App. at 409. Further, the court may consider the medium of a communication to determine whether it is a valid request for records. *Beal*, 150 Wn. App. at 876. Considering Sargent’s history of clear written records requests, a later voice mail message “following up” on a list of questions is inherently unrecognizable

as a records request. SPD cannot be penalized for failing to respond to these communications.<sup>13</sup>

**F. Even if there were a valid request for a separate disciplinary investigative file, two separate exemptions apply to disclosure.**

**1. The contents of an unsustained disciplinary investigative file are exempt because nondisclosure is essential to effective law enforcement.**

Whether nondisclosure of a particular record is essential to effective law enforcement is an issue of fact. *Koenig v. Thurston Co.*, 155 Wn. App. at 407. Courts may consider declarations from those with direct knowledge of and responsibility for the investigation to determine whether its nondisclosure is essential to effective law enforcement. *Id.*

In *Cowles Publishing Co. v. Washington State Patrol*, the Washington State Supreme Court held that the names contained in law enforcement internal investigations of misconduct that resulted in sustained findings are exempt from disclosure pursuant to the essential to effective law enforcement exemption. *Cowles Publishing Co.* 109 Wn.2d

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<sup>13</sup> Sargent chose not to resubmit a clear request, even after receiving notification that the disciplinary investigation was complete by letter to counsel for Sargent on May 26, 2010. CP 145.

at 733.<sup>14</sup> The court acknowledged that effective law enforcement requires a workable and reliable procedure for accepting and investigating complaints against law enforcement officers to ensure that law enforcement officers do not abuse their authority or engage in unlawful activities. *Id.* at 729. Further, reliable internal investigation procedures uphold the integrity of the law enforcement agency in the minds of the public and the officers. *Id.*

The *Cowles* court based this decision on several findings. First, the internal investigations at issue were conducted on the assumption that the information gathered would remain confidential. *Id.* at 730. Because of that assumption, the officers under investigation were not afforded traditional due process protections. *Id.* For example, unlike a criminal defendant, officers were required to provide information pursuant to an investigation or face discipline, including dismissal. *Id.* Although workable internal investigation procedures required operation without traditional due process safeguards, that did not provide a justification for exposing an officer to public ridicule. *Id.*

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<sup>14</sup> Although *Cowles* was a plurality opinion on this issue, the Supreme Court had the opportunity to overrule or disavow its reasoning in the later *Brouillet* case. *Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990). In that case, instead of modifying its holding in *Cowles*, the Court issued a unanimous opinion that clarified its earlier reasoning. *Id.* at 797.

Second, the evidence indicated that internal investigations depend upon the trust and cooperation of other officers within the agency. *Id.* at 733. That cooperation is only available if officers know that the information provided will be kept confidential. *Id.* Public disclosure of officer names would subject the officers, and even their families, to public ridicule and harassment. *Id.* at 730-731. Thus, if information were subject to public disclosure, officers would not report incidents of misconduct, or provide information to assist the investigation. *Id.* at 733.

From the evidence presented in that case, the court concluded that disclosure of officer identities and other investigatory techniques would severely limit a law enforcement agency's ability to investigate and enforce the law, and could seriously hinder any future law enforcement efforts. *Id.* at 732-733.

The *Cowles* court analyzed the essential to effective law enforcement exemption in the context of sustained complaints of officer misconduct. But in this case, SPD submitted declarations from those with direct knowledge of and responsibility for SPD disciplinary investigations to show how the essential to effective law enforcement exemption applies

more broadly to the contents of unsustained disciplinary investigations.<sup>15</sup>

Police Chief John Diaz explained how the OPA-IS plays a vital role in managing a metropolitan police agency. CP 289. SPD's ability to investigate and discipline officers is crucial in maintaining the integrity of the agency and assuring public confidence in SPD. *Id.* A workable and reliable procedure for accepting and investigating complaints is necessary to ensure that officers do not abuse their authority or engage in unlawful activities. *Id.* SPD established the OPA-IS as one of the key methods to ensure police accountability by providing civilian oversight to SPD's complaint investigation process. *Id.*

The Civilian Director of the OPA described how officers who are the subject of internal investigations have only limited due process rights. CP 278. Subject officers do not have the right to interrogate witnesses, and they are not entitled to assert the privilege against self incrimination. *Id.* They are compelled to provide information, despite the fact that the information they provide may lead to a criminal investigation against

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<sup>15</sup> The investigation of the officer involved in SPD Incident No. 09-264202 resulted in a "not- sustained" finding. CP 278. Sargent argues that this finding indicates that there was credible evidence of misconduct. That is not correct. In fact, the not-sustained finding indicates that misconduct was not shown to have occurred by a preponderance of the evidence. CP 332. That finding is identical to the "unsubstantiated" allegations in the *Bellevue John Does* case, discussed *infra*.

them. CP 278. Officers who are witnesses in internal investigations must similarly cooperate or risk discipline or dismissal. *Id.*

Because of these unique, stringent requirements, officers and investigators rely on the assumption that the details of misconduct allegations, and information collected as part of a misconduct investigation, will be kept confidential if the investigation results in an unsustained finding. *Id.* Without that expectation of confidentiality, officers would be reluctant to assist in OPA-IS investigations. CP 278.

SPD Assistant Chief Dick Reed, charged with the administrative management of SPD Human Resource issues, explained how law enforcement is a high-stress occupation, and an OPA-IS investigation significantly increases that stress level for officers who are the subject of complaints and their families. CP 273-274. Police officers may be the subject of complaints that range from specious to criminal.<sup>16</sup> Any complaint of misconduct results in anxiety and apprehension on behalf of the named and involved employees, which can also affect the officers' families. CP 274.

When an officer is found to have committed misconduct, it is understood that the officer's identity is subject to disclosure. CP 274.

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<sup>16</sup> A large majority of complaints received by OPA-IS do not lead to a finding of sustained misconduct. CP 278, 319.

While this causes stress, it is accepted as the necessary protocol for ensuring public trust in SPD. *Id.* But the potential for harassment, annoyance and embarrassment is more significant in relation to a complaint that resulted in no finding of misconduct. CP 275. In such a case, the effect on the officer's mental health and ability to provide police services would be greatly affected. *Id.* Thus, it is accepted and understood that the officer's identity, and details of the underlying allegations and investigation, will be kept confidential. *Id.*

In sum, declarations from those with knowledge of the function and role of OPA-IS support the fact that it is essential to maintain the confidentiality of OPA-IS internal investigations in order to maintain the morale of SPD as whole, protect individual officers from public ridicule, and ensure a workable and reliable procedure for investigating complaints against law enforcement officers. CP 273-275, CP 276-279, CP 288-291.

In *Cowles Publishing Co. v. State Patrol*, the Court found that evidence of similar facts warranted even the nondisclosure of the identities of officers who were the subject of sustained internal investigations. *Cowles Publishing Co. v. State Patrol*, 109 Wn.2d at 730-731. In that case, deleting the names of officers from internal investigations

sufficiently protected their identities because the plaintiff requested all sustained complaints filed during a particular year.<sup>17</sup> *Id.* at 714.

Unlike the law enforcement agencies in *Cowles*, SPD's current internal investigation procedures recognize the significant distinction between a sustained internal investigation and one that is unsustained. In fact, it is SPD's policy to provide the contents of sustained internal disciplinary investigation records including the names of officers who are the subject of the investigations in response to PRA requests.<sup>18</sup> CP 291.

But in this case, Sargent has asked for the records of an unsustained internal disciplinary investigation by the name of the officer who is the subject of the investigation.<sup>19</sup> *Cowles Publishing Co. v. State Patrol* does not address this issue. The single case in which the contents of an internal investigation were requested by the name of the subject officer is similarly inapposite. *See Ames v. Fircrest*, 71 Wn. App. 284, 857

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<sup>17</sup> The plaintiff in that case initially requested all internal investigation records pertaining to citizen complaints against Spokane Police Department officers regardless of their outcome. The request was subsequently amended to only seek sustained complaints from 1983. The case is silent regarding the reason why the request was amended. *Cowles Publishing Co. v. State Patrol*, 109 Wn.2d at 714.

<sup>18</sup> SPD redacts the names of complainants and witnesses from sustained investigations as allowed by *Cowles Publishing Co. v. State Patrol*. It also redacts other information that is exempt under the PRA or other statute, such as the residential addresses or residential telephone numbers of employees, Social Security Numbers and medical records.

<sup>19</sup> In his reply, Sargent may argue that the wording of his request for records of the disciplinary investigation of "[the subject officer] and/or any other SPD personnel" arising from SPD Incident No. 09-264202 makes this request more similar to the broad request at issue in *Cowles*. But Sargent was aware that only one off-duty officer was involved in the incident, and that was the only officer named in his request.

P.2d 1083 (1993). There the Court of Appeals found that nondisclosure of the internal investigation into the former Fircrest Chief of Police was not essential to effective law enforcement. The facts in *Ames* differ dramatically from those here. The investigation in *Ames* was sustained and the chief had publicly accepted responsibility for mismanaging the police department. The *Ames* court specifically distinguished that case from the type of situation in this case by saying “this was not a routine investigation conducted by an established internal investigation division; it was a unique inquiry aimed at the head of the department.”<sup>20</sup> *Id.* at 296.

The very recent case of *Koenig v. Thurston County*, 155 Wn. App. 398, 229 P.3d 910 (2010) deals with a set of facts more analogous to the present case. In that case, a requester sought victim impact statements submitted by crime victims as part of a court sentencing proceeding. The County Prosecutor withheld the records in their entirety, citing the “essential to effective law enforcement” exemption.

In its analysis, the court acknowledged that the “broad language of this exemption, which the legislature has not defined, clashes with the

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<sup>20</sup> In his reply, Sargent may argue that *Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006) controls when records are requested by the name of an individual. But on appeal, that case analyzed the separate “privacy” prong of RCW 42.56.240(1), and not the separate “essential to effective law enforcement” exemption. See the discussion of *Koenig*, *infra*.

PRA's presumption and preference for disclosure." *Id.* at 407. The court considered declarations from individuals familiar with the function and purpose of victim impact statements stating that disclosure of any portions "would have a chilling effect by making victims reluctant to fully disclose the impact of crimes." *Id.* at 410. Further, the declarants explained how public disclosure "would discourage victims from submitting victim impact statements in the first place." *Id.*

The requester in *Koenig* did not present any affidavits or evidence of his own, but instead argued that any uncomfortable details could simply be edited out of the statements themselves. *Id.* at 411. In finding that redaction did not provide sufficient protection of effective law enforcement, the court noted that "[t]he ease with which a victim could be identified negates the purpose of redaction." *Id.* at 412. Further, because redaction is a subjective process, a victim may not trust that all sensitive information would be removed. *Id.* Moreover, any suggestion that redaction sufficiently addresses law enforcement concerns "contradicts the purpose of impact statements" which is to provide a confidential forum for victims to express the impact of crimes. *Id.* at 411. Because of the potential chilling effect on participation in the law enforcement process, and the fact that parsing the records did not address that concern, the Court

concluded that the exemption protected the entire contents of the records at issue.

As supported by declarations submitted by individuals familiar with the SPD OPA investigative process, disclosure of the contents of unsustained internal investigations would have a similar chilling effect on officers' willingness to come forward with complaints, and to cooperate with internal investigations. The *Koenig* court observed that “[s]entencing decisions are part of the law enforcement process, and a victim impact statement is an important tool in reaching these decisions.” *Id.* at 411. Likewise, managing and disciplining SPD officers is part of the law enforcement process, and OPA internal disciplinary investigations are an important tool in these processes. Moreover, as in *Koenig*, any suggestion that the records be parsed or redacted conflicts with the expectation of confidentiality that is an integral part of SPD internal investigations, and that is intended to ensure full and complete cooperation.

The *Koenig* court found that the entire contents of a victim impact statement are exempt. Redacting the victim impact statement was inadequate to protect the law enforcement function in that case “because victims will be reluctant to provide victim impact statements if they know the statements will be disclosed in any form.” *Id.* See also *Cowles Publishing v. Pierce County Prosecutor’s Office*, 111 Wn. App. 502, 45

P.3d 620 (2002)(holding that mitigation packages submitted to a prosecutor as part of a sentencing decision are exempt in their entirety to prevent a “chilling effect” on disclosure of mitigation information).

The evidence provided by SPD in this case demonstrates that disclosure of the contents of unsustained disciplinary investigations would have a similar chilling effect on officers’ willingness to come forward with complaints and to cooperate with internal investigations. As in *Koenig*, disclosure of the entire contents of the internal disciplinary investigation poses a significant threat to a vital law enforcement function.

**2. Disclosing the contents of an unsustained investigative file in conjunction with the identity of the officer who is the subject of the investigation would violate that officer’s right to privacy.**

The PRA also exempts investigative records compiled by law enforcement if disclosure would violate any person’s right to privacy. RCW 42.56.240(1). The State Supreme Court has held that disclosing the identity of the subject of a sustained internal investigation would not violate that person’s right to privacy. *Cowles Publishing Co. v. State Patrol*, 109 Wn.2d at 727. The Court has not reached a similar holding regarding unsustained internal investigation records. In fact, the *Cowles Publishing Co. v. State Patrol* Court recognized that “[r]elease of files

dealing ... with complaints which were later dismissed would constitute a more intrusive invasion of privacy than would the release of files relating only to completed investigations which resulted in some sanctions against the officers involved.” *Id.* at 725.

In so stating, *Cowles Publishing Co. v. State Patrol* left the door open for a determination that the disclosure of the contents of an unsustained internal investigation in conjunction with the name of the subject of the investigation would violate that individual’s right to privacy.

The PRA states that privacy is invaded if release of information about a person (1) would be highly offensive to a reasonable person; and (2) is not of legitimate concern to the public. RCW 42.56.050; *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 136, 580 P.2d 246 (1978). When considering whether there is legitimate public concern in disclosure of records, the Supreme Court has concluded that the public concern must be “reasonable.” *Bellevue John Does 1-11 v. Bellevue School District #405*, 164 Wn.2d 199, 217, 189 P.3d 139 (2007) citing *Dawson v. Daly*, 120 Wn.2d 782, 798, 845 P.2d 995 (1993). Thus, “[r]equiring disclosure where the public interest in efficient government could be harmed significantly more than the public would be served by disclosure is not reasonable.” *Dawson v. Daly*, 120 Wn.2d at 798.

The State Supreme Court has held that the identities of public school teachers who are the subject of unsubstantiated allegations of sexual misconduct are exempt from disclosure. *Bellevue John Does 1-11 v. Bellevue School District #405*, 164 Wn.2d 199, 189 P.3d 139 (2007). The *Bellevue Does* Court found that disclosure of the identities of school teachers accused of sexual misconduct would be highly offensive to a reasonable person. *Id.* at 216. It also determined that the disclosure of the identities of school teachers who were the subject of unsubstantiated allegations of misconduct is not a matter of legitimate interest to the public. *Id.* at 221.

The Court in *Bellevue Does* did not limit its holding to allegations of sexual misconduct. As acknowledged in later cases, it stands for the proposition that substantiated instances of misconduct on the job, or in public and bearing on performance of a public duty, are within the legitimate public interest and subject to disclosure under the PRA, while unsubstantiated allegations of misconduct and private activities are exempt from disclosure. *Corey v. Pierce Co.*, 154 Wn. App. 752, 767, 225 P.3d 367 (2010).

Sargent likely will argue that the “not sustained” finding as utilized by the SPD OPA indicates that the investigation concluded that some misconduct occurred. That is not accurate. The designation means that

misconduct was not proved by a preponderance of the evidence. CP 332. In other words, the allegations were unsubstantiated.<sup>21</sup> In *Bellevue Does* the school district considered allegations substantiated when “a school district determines it has sufficient information to conclude that an employee engaged in the sexual misconduct.” *Bellevue Does*, 164 Wn.2d at 219. Notably, the court held that attempting to make a distinction between unsubstantiated and “patently false” accusations was “vague and impractical.” *Id.* at 218. Thus, the relevant inquiry is whether there is a finding of misconduct.

In this case, Sargent named a specific officer and requested records of a disciplinary investigation involving the officer that resulted in no findings of misconduct. *Bellevue Does* did not address the issue of how to respond to a request for records regarding an unsubstantiated allegation of misconduct when it is requested by the name of the subject. That was because the school district had already produced redacted records, and the request at issue in that case sought all records of investigations of alleged misconduct for a ten year period, which involved fifty-five teachers. *Id.* at 206. As a result, *Bellevue Does* does not foreclose the conclusion that

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<sup>21</sup> To substantiate means to “[t]o establish the existence or truth of (a fact, etc.), esp. by competent evidence; to verify.” Black’s Law Dictionary (9<sup>th</sup> ed. 2009). Preponderance means “[s]uperiority in weight, importance, or influence. *Id.*

disclosure of the contents of an unsustained internal investigation in conjunction with the name of the subject of the investigation would violate that individual's right to privacy.

In fact, *Bellevue Does* supports withholding the entire contents of an unsubstantiated internal investigation because disclosing it in conjunction with the officer's name would inevitably identify him or her in connection with matters that are of no legitimate public interest. *See also Tacoma v. Tacoma News, Inc.*, 65 Wn.App. 140, 827 P.2d 1094 (1992) (records of a criminal investigation of unsubstantiated child sexual abuse by a public official were exempt in its entirety). Redacting the name of the subject officer in this case will not protect his privacy because, as the *Tacoma News* court said, "whatever information ... not redacted would continue to be unsubstantiated and not of legitimate concern to the public." *Id.* at 152.

Sargent may argue that *Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006) supports an argument that only identifying information may be redacted from the disciplinary investigative records at issue. In that case, the requester named a child who was the victim of a sexual assault and requested records related to the investigation. The court held that a statute exempting the identity of child victims of sexual assault justified redacting only the child's identity. But the applicable statute in

that case specifically defined identifying information as name, address and photograph. *Id.* at 181. Because of the statute, the court concluded that the legislature had determined there was a legitimate public interest in other records related to the investigation. *Id.* at 186. Thus, the court held that it must apply the strict terms of that specific statute, and only identifying information as specifically defined could be withheld. *Id.*

In this case, however, there is no statute that explicitly limits or defines what identifying information is exempt under the PRA. The relevant standard is whether the release of information violates an individual's right to privacy. Case law applying the right to privacy exemption has established that a public employee has a privacy interest in his or her name associated with unsubstantiated allegations of misconduct.

We anticipate that Sargent will argue that there is a legitimate public interest in the release of internal disciplinary investigation records because it is necessary to determine whether the investigation was adequate. The *Bellevue Does* Court explicitly rejected this argument because it did not protect the privacy rights of those who were the subject of unsubstantiated complaints. *Bellevue Does*, 164 Wn.2d at 221. Essentially, the quality of the investigation has no bearing on whether an individual's right to privacy is violated. *Id.* Again, the records request in this case is not a broad request for all disciplinary records from a certain

timeframe as in *Bellevue Does*. The request at issue identifies a specific officer and requests disciplinary records related to the individual.

Moreover, any legitimate public interest must be “reasonable.” *Dawson*, 120 Wn.2d at 798. In *Dawson*, the Court held that the public interest in disclosure of employee performance evaluations was not reasonable because of the countervailing harm to the public’s interest in the efficient operation of government. *Id.* at 799. The court set forth two rationales for its holding. First, if employee performance evaluations were public, “employee morale would be seriously undermined.” *Id.* Second, disclosure would cause even greater harm to the public by making supervisors reluctant to give candid evaluations. *Id.* See also *Bellevue John Does*, 164 Wn. 2d at 225 (applying the same balancing test to conclude that there is no legitimate public concern in release of letters of direction that do not discuss instances of misconduct).

In this case, SPD provided extensive evidence of the potential for harm to the OPA investigative process if there were no expectation of confidentiality associated with an unsustained allegation of misconduct. See discussion, *supra* at Section III(F)(1). If SPD were obligated to provide complete unsustained disciplinary investigative records when requested by the name of the subject officer with only his or her identity redacted, effectively OPA-IS would never be able to provide any assurance of

confidentiality. The resulting harm to the public's interest in effective OPA-IS investigations far outweighs any public interest in release of records with only names redacted in response to the specific type of request at issue in this case.

In addition, SPD does provide information regarding any allegations of misconduct on behalf of an SPD officer that results in an OPA investigation, even if requested by the name of the officer, and regardless of the outcome as sustained or unsustained. In this case, SPD provided documentation reflecting the form in which SPD would have responded to a valid request for the specific disciplinary records at issue. The documentation includes an "investigation summary report" prepared by the assigned OPA-IS Sergeant investigating the matter that provides a high level summary of the allegations against the subject officer. CP 886-889. The documentation also includes an exemption log identifying the full contents of the disciplinary investigative file. CP 890-891.<sup>22</sup>

Furthermore, SPD has presented extensive evidence regarding the role of civilian oversight, which monitors and ensures the adequacy of the

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<sup>22</sup> Courts have recognized that there is no requirement under the PRA for an exemption log to contain detail that reveals protected content. *See Koenig v. Pierce County*, 151 Wn. App. 221, 211 P.3d 423 (2009); *See also Soter v. Cowles*, 162 Wn.2d 716, 743-744, 174 P.3d 60 (2007) . In addition, SPD would not withhold certain records identified on the exemption log if they were requested in a context other than a records request for a disciplinary investigative file made by reference to the name of a specific officer.

OPA-IS process. CP 277, 294-332. Sargent may question the adequacy of this oversight in a different forum. Those questions, however, do not override an officer's privacy interest in the nondisclosure of the details of an investigation of an unsubstantiated allegation, and the public's interest in effective oversight and investigation of police misconduct.

**G. Assuming any violation of the PRA, the Act does not allow recovery for non-attorney work performed prior to PRA litigation, or for attorney work on unsuccessful claims.**

A trial court's ruling on the amount of attorney fees will be reviewed for an abuse of discretion. *Kitsap County Prosecuting Attorney's Guild v. Kitsap County*, 156 Wn.App. 110, 120, 231 P.3d 219 (2010).

**1. The purpose of the PRA attorney fee provision is not punitive.**

First, Sargent incorrectly argues that the attorney fee provision should serve a punitive purpose.<sup>23</sup> Although the fee provision encourages enforcement, any punitive purpose of the PRA is served by the separate per day penalty provision. See *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 304, 825 P.2d 324 (1992) (acknowledging the different

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<sup>23</sup> Sargent cites to a media article and alleges that SPD "is notorious for its noncompliance" regarding records requests for records related to sustained disciplinary investigations. That article is incorrect, unsupported by fact, and outdated.

purposes of the attorney fee and penalty provisions). Sargent's argument also makes no logical sense. Why would the legislature have intended for an attorney to receive a windfall based on the agency's culpability, when the requester was the individual actually harmed?

**2. By its terms, and as interpreted by case law, the PRA does not allow recovery for non-attorney work performed prior to litigation.**

Sargent quotes a footnote out of context from the *Yacobellis* case and argues that the case did not address the issue of work done prior to litigation. That is not correct. The cited footnote merely acknowledges that the parties in that case did not dispute the timing of the start of actual attorney work drafting pleadings. *Id.* at 299, fn. 3. In fact, the central issue in the case was recovery for attorney's fees incurred before work on litigation. The *Yacobellis* court concluded that such fees are not recoverable because "attorney fees not covered by the attorney fees provision itself should not be permitted to bootstrap their way into the statutory award." *Id.* at 304.

Further, Sargent fails to address the plain language of the statute stating that a prevailing party is entitled to fees incurred in connection with PRA litigation. Clearly the public purpose of the fee provision is to provide an avenue for requesters to pursue court action to enforce the

requirements of the PRA. Submitting a public records request involves nothing more than asking for an identifiable document. There is no necessity to retain an attorney for that purpose, and thus the PRA does not function to subsidize that non-attorney work.

#### **IV. CONCLUSION**

SPD fully complied with the PRA in responding to all of Sargent's records requests, and properly asserted exemptions and preclusions to disclosure. In finding that SPD violated the PRA, the trial court applied an incorrect interpretation of the PRA's requirements that will affect the ability of law enforcement agencies across Washington State to ensure the safety and security of the public. This court should reverse the trial court's ruling finding a violation of the PRA and awarding attorney's fees and per day penalties.

Sargent did not request records in an electronic format. Further, SPD properly responded to Sargent's only valid records request for disciplinary investigative records. This court should affirm the trial

court's ruling that SPD had no obligation to provide records in electronic format or to produce disciplinary investigative records.

DATED this 4<sup>th</sup> day of February, 2011.

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By: 

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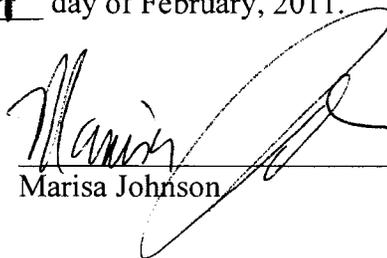
**CERTIFICATE OF SERVICE**

I, certify that on this date I caused a copy of Appellant's Opening Brief to be filed with the court and served by legal messenger on:

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Signed at Seattle, Washington, this 4 day of February, 2011.

  
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Marisa Johnson

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