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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)**

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

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I. INTRODUCTION

The Seattle Police Department (SPD) bases each of its arguments in this appeal on a misinterpretation of the Public Records Act (PRA), RCW 42.56, that would permit agencies to broadly construe exemptions to categorically withhold public records from Washington's citizens – even where the agency desires to hide the substantiated off-duty misconduct of its employee from public scrutiny. In effect, SPD would convert the PRA into “a withholding statute rather than a disclosure statute.” *See EPA v. Mink*, 410 U.S. 73, 79 (1973) (describing the impetus for enactment of the analogous Freedom of Information Act, 5 U.S.C. 552). The PRA and controlling cases, however, contradict SPD's arguments, which are antithetical to the express legislative intent of the PRA (RCW 42.56.030), the strong public policy of governmental accountability and core democratic principles.

Having failed to sustain its evidentiary burden in the trial court, SPD's Answer and Reply continues to nominally cite inapplicable PRA exemptions to excuse its recalcitrant redaction and withholding of records from Evan Sargent regarding his unlawful arrest and incarceration in 2009. SPD's obvious motive is to shield its own by depriving Sargent of records relevant to establishing civil rights violations documented by closed criminal and internal investigations. The failure of Officer Donald Waters to

intervene in this litigation to assert a desire for nondisclosure under RCW 42.56.240(2) or seek to enjoin disclosure of records sought by Sargent, however, vitiates SPD's exemption arguments on appeal.

This Court stands as an important check and balance on SPD's violations of the law and abuse of power. See *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]"). In unequivocal terms, this Court should affirm the trial court's ruling that SPD violated the PRA in bad faith by withholding public records from Sargent. At the same time, remand is necessary for an order directing SPD to make additional disclosures of electronic and disciplinary records, as well as awarding complete attorney fees to Sargent as the prevailing party under the PRA.

II. SARGENT'S REPLY TO THE SEATTLE POLICE DEPARTMENT'S ARGUMENTS REGARDING ERRORS RAISED IN OPENING BRIEF

SPD's Answer and Reply demonstrates that the agency's flawed internal policies for responding to public records requests, and unlawful assertion of blanket exemptions to redact and withhold records sought by Sargent, must yield to the trial court's correct rulings for SPD to become compliant with its obligations under the PRA. Accordingly, this Court should affirm the trial court

regarding each of the meritless errors raised by SPD.

A. The Trial Court Correctly Held That *Cowles* Required SPD Under the PRA to Disclose Public Records of an Investigation Presented to the Prosecutor

The trial court correctly concluded that SPD violated the PRA by withholding and redacting investigation records sought by Sargent that should have been disclosed “long ago, at first request.” RP 22; CP 213. After SPD unsuccessfully sought charges against Sargent by presenting the King County prosecutor with these records during the first week of August 2009, the exemption under RCW 42.56.240(1) no longer applied. Had the King County prosecutor charged Sargent at that time, the same records would have been subject to mandatory disclosure to Sargent under the criminal discovery rules, and the detective well understood this when he released the records to a separate agency. This is the essence of the controlling holding in *Cowles Pub. Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 987 P.2d 620 (1999), which the trial court correctly found dispositive and which SPD fails to meaningfully distinguish. Once police deliver investigation records to the prosecutor for charging review, the records are no longer essential to the police agency.

SPD’s belabored arguments regarding the holding of the earlier decision in *Newman v. King Co.*, 133 Wn.2d 565, 947 P.2d 712 (1997) simply do not apply to this case. *Newman* involved

records sought by a reporter regarding the slaying of Seattle civil rights leader, Edwin Pratt, an investigation that remains open as an unsolved murder to this day. Conversely, the records sought by Sargent relate to the violation of his civil rights during an incident of road rage by Officer Waters while off duty and the investigation of Detective Nathan Janes, who never resubmitted charges to the King County prosecutor, nor generated a report referring charges against Waters.¹ The trial court succinctly distinguished these circumstances from *Newman*, noting that Sargent's investigation was not a "whodunit." RP 22.

It is unclear why SPD persists in citing *Newman*, given that no argument has been made that the sham investigation of Sargent ever will again become active or referred for charging review. Any creative suggestion on appeal that SPD actually sought to have Officer Waters charged for felony assault with a firearm or malicious mischief is belied by the lack of any record indicating that these charges were referred for prosecution with a Certification for

¹ As noted in Sargent's opening brief, the detective obtained a statement from an independent witness on August 18, 2009 that contradicted the already conflicting stories by Officer Waters in the investigation file about his acts of property damage and use of potentially lethal force against Sargent. See Brief at 13; CP 831. Thus, there was no reasonable possibility that SPD could satisfy charging standards against Sargent given the burden to disprove lawful self-defense beyond a reasonable doubt for an assault conviction; and, further lawful enforcement proceedings against Sargent were not contemplated. See RCW 9.94A.411(2)(a) ("Crimes against persons will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact finder").

Determination of Probable Cause as drafted by the detective regarding Sargent. See CP 808-09. Yet, SPD a year and a half later still refuses to produce complete and unredacted investigation records sought by Sargent. SPD remains as recalcitrant today as when it withheld these records after Sargent's August 31 and September 1, 2009 requests.

SPD's secrecy and defiance in withholding these public records constitutes precisely the kind of abuse of power that critics of the plurality decision in *Newman* cited prior to the Washington Supreme Court's superseding decision in *Cowles*:

Newman's categorical exemption for all open law enforcement files – with no further analysis of whether the nondisclosure of the information sought is essential for effective law enforcement – is contrary to the plain language of the [PRA]. Newman usurps both the constitutional protection and the legislative intent behind the [PRA] by removing the power of decision from the courts. Instead, Newman gives Washington's law enforcement agencies unchecked power to withhold information, thus opening the door for abuse.

Julia E. Markley, Note, *The Fox Guarding the Henhouse: Newman v. King County and Washington's Freedom of Information Act*, 73 Wash. L. Rev. 1107, 1108 (1998); see also *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 593-94, 243 P.3d 919 (2010) ("This all-or-nothing approach was later limited in *Cowles Publishing Co. v.*

Spokane Police Department, 139 Wn.2d 472, 477-78, 987 P.2d 620 (1999), in which a newspaper requested information related to a crime for which an individual had been arrested and the matter referred to the prosecutor for a charging decision. Because the matter was before the prosecutor for a charging decision, ‘the risk of inadvertently disclosing sensitive information that might impede apprehension of the perpetrator no longer exists’’).

Moreover, investigation records of *off-duty* conduct by an officer are never “essential” to effective law enforcement because an officer’s *off-duty* conduct, by definition, does not serve any law enforcement duty and is not necessary to conducting law enforcement. This is why, for disclosure of public records relating to the off-duty acts of a police officer impacting fitness for duty, “privacy considerations are overwhelmed by public accountability.” *Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, 727, 748 P.2d 597 (1988). This appeal involves *off-duty* misconduct of Officer Waters, unquestionably impacting fitness for public duty; disclosure of records sought by Sargent is mandatory under the PRA.

When the *Cowles* holding is read with the statement of legislative intent under RCW 42.56.030, cited with approval in *Serko*, and in light of the strong policy argument above, there is no question that SPD’s blanket assertion of the exemption under RCW 42.56.240(1) to withhold and redact investigation records violated the PRA. The trial court’s ruling should be affirmed.

B. The Trial Court Correctly Found That SPD Failed Its Burden of Proof Under the PRA to Demonstrate the Applicability of the Witness Identification Exemption

SPD's argument that it need not offer evidence of actual witness safety concerns to show the applicability of an exemption under RCW 42.56.240(2) justifying its withholding of witness identification information in investigation records is contrary to its burden of proof under the PRA. SPD's Answer and Reply repeats the agency's robotic assertions in the trial court of generalized safety concerns underlying its impermissible policy of asserting blanket exemptions to always redact witness names. SPD failed its burden, which is set forth in RCW 42.56.550(1) and emphasized in controlling case law. See *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").

1. SPD's Redactions of Witness Names Not Only Violate the PRA Due to SPD's Failure to Prove Any Safety Concerns, But Are Illogical

In the absence of an applicable exemption, the PRA does not authorize a public agency to redact witness identification information contained in public records. See, e.g., *Mechling v. City of Monroe*, 152 Wn. App. 830, 847, 222 P.3d 808 (2009) (holding that the PRA "does not exempt disclosure of personal e-mail

addresses used by elected officials to discuss city business” and requiring disclosure without redaction on remand). The PRA does not contain a general exemption for witness names in police reports in the absence of demonstrable danger to “any person’s life, physical safety, or property.” RCW 42.56.240(2). Such redactions would undermine the PRA’s broad construction.

SPD’s Answer and Reply continues to fail to identify any proof in the record or hearing before the trial court of any request by Officer Waters or any actual witness for confidentiality. Likewise, SPD fails to identify proof that any such witness had any actual safety concerns. These very witnesses met with Sargent’s defense investigator and gave voluntary statements that exculpated Sargent. The trial court was well aware of this circumstance in making its common sense ruling. See RP 26.

SPD’s generalized arguments in briefing before the trial court and on appeal instead prove the overly broad assertion of this exemption, despite the PRA’s mandate of narrow construction of exemptions. SPD’s attempt to justify redaction of witness names is undermined further by its express denial of safety concerns in the Superform from the investigation report. This July 28, 2009 document from the date of Sargent’s unlawful arrest, contains a

handwritten "N" by the officer completing the form, Officer Gregory Traver, indicating that SPD had no objection to Sargent's release from jail and that SPD had no basis to assert:

WHY SAFETY OF INDIVIDUAL OR PUBLIC WILL BE THREATENED IF SUSPECT IS RELEASED ON BAIL OR RECOGNIZANCE (CONSIDER HISTORY OF VIOLENCE, MENTAL ILLNESS, DRUG DEPENDENCY, DRUG DEALING, DOCUMENTED GANG MEMBER, FAILURE TO APPEAR, LACK OF TIES TO COMMUNITY.

CP 806.

SPD's redactions also are illogical. In September 29, 2009 correspondence, SPD identified Officer Waters as the off-duty officer designated as the supposed victim in the investigation report. CP 68. Throughout the investigation records that SPD produced six months later, however, SPD redacted Waters' name. The redaction of Waters' previously disclosed name makes no sense and fails to advance even hypothetical privacy or safety concerns, which SPD in any event made no effort to prove before the trial court. Under the PRA, disclosure of even exempt materials can be authorized by a court when withholding "is clearly unnecessary to protect any individual's right of privacy or any vital governmental function." RCW 42.56.210(2).

Further examples of SPD's illogical redactions exist. SPD's production of "approximately one hundred (110) pages of responsive records" from the investigation report (see Opening Brief at 7), which actually included duplicates and multiple pages generated by Sargent's counsel, was rife with redactions of the names of exculpatory witnesses *identified by Sargent's counsel*. Even counsel's email communications with the King County prosecutor identifying these witnesses contain such illogical redactions. CP 841-847. Despite Sargent alerting SPD of the agency's apparent "fundamental misunderstanding of SPD's obligations under the PRA and the applicability of exemptions" regarding these redactions, SPD to this day has not produced unredacted records. CP 35.

For these reasons, the trial court correctly ruled that "everything else in the redacted records needs to be turned over posthaste" due to SPD's violation of the PRA and should be affirmed. RP 27. Accordingly, the trial court should be affirmed.

2. **SPD Failed Its Burden of Proof Under the PRA to Demonstrate That Redactions of Witness Names Were "Essential" to Effective Law Enforcement**

Because SPD failed its burden to establish an exemption under RCW 42.56.240(2), given that no witness sought confidentiality or expressed safety concerns, SPD's assertion that redactions were "essential" to effective law enforcement under

RCW 42.56.240(1) defies credibility. SPD cites the non-controlling decision in *Tacoma News, Inc. v. Tacoma-Pierce Co. Health Dept.*, 55 Wn. App. 515, 778 P.2d 1066 (1989), in a further attempt to justify its internal policy of redacting witness names in every investigation report – without regard to any lack of actual safety concerns or confidentiality requests. But unlike SPD’s insufficient generalized showing before the trial court, hypothetically referring to “any future investigations,” it is apparent that the agency in *Tacoma News* satisfied its burden under the PRA through evidence that was specific to the disclosures sought:

The Health Department's affidavits indicate that the witnesses in the investigation provided information voluntarily, but would not have done so without assurances of confidentiality. David Potter, president of the Pierce County Paramedics Association, opined in his affidavit that ‘the identifying details and names of the people who are involved in this case as complainants and witnesses should not be made public due to fears of “ostracism or retaliation.”

Id. at 522. Thus, *Tacoma News* is readily distinguishable and the narrow construction of exemptions mandated by RCW 42.56.030 requires the rejection of SPD’s claim of error.

C. The Trial Court Correctly Ruled That SPD Violated the PRA By Failing to Produce Public Records in Response to Repeated and Pending Requests By Sargent

SPD recklessly asserts that in finding PRA violations, the trial court held that the PRA requires an agency to maintain a public records request “in perpetuity.” Answer and Reply at 1. The record demonstrates that the trial court never made such a ruling. Instead, the trial court correctly found that Sargent’s “initial request continued to be pending and was being broadened by the requesting party. Not only did the plaintiff not go away when he didn’t get everything he asked for, but he pursued this by way of appellate and other communications with the city attorney’s office” RP 23. This has full support in the multiple and repeated communications to SPD by Sargent’s counsel to obtain public records, which included ten written requests between August 31, 2009 and April 21, 2010 and related email and telephonic communications. See CP 12-46.

SPD clings to its misinterpretation that the PRA permits it to require citizens to resubmit requests for existing and identified public records. No such provision exists in the PRA. SPD’s pretense that Sargent ultimately abandoned his repeated and pending records requests in April 2010 is exposed in the prayer for relief of the PRA complaint, which sought “an order that SPD produce all requested public records set forth above without

redaction immediately to Mr. Sargent.” CP 11. But despite the trial court’s order for SPD to produce these records posthaste, and despite the undisputed conclusion of criminal and internal investigations last year, *SPD continues to withhold requested records and has not provided records without redactions.*

On a very basic level, it is unclear what SPD hoped to achieve by filing this appeal while defying the court’s order for records production in light of Sargent’s records requests, which remain demonstrably pending in the pleadings of the underlying litigation. These circumstances beg affirmance. As discussed below, they also demonstrate that imposition of the maximum penalty is warranted by continuing bad faith violations of the PRA.

D. SPD’s Citation to the Criminal Records Privacy Act to Withhold Public Records of Sargent’s Jail Records Fails the PRA’s Mandate of Narrowly Construed Exemptions

SPD’s objection to Sargent’s citation of provisions of the Criminal Records Privacy Act (CRPA), RCW 10.97, further showing the unlawful nature of SPD’s withholding of his jail records is unclear. SPD complains that Sargent “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.” Answer and Reply at 10. Because SPD cited the CRPA in its Opening Brief, Sargent is well

entitled to respond. See Sargent's Answer at 45-47. SPD's complaint merits little further response because its broad construction of the CRPA to withhold records of Sargent's unlawful detention again fails the PRA's mandate under RCW 42.56.030 that the PRA controls over any conflicting other statute to narrowly construe any exemption from disclosure. SPD here again elevates form over substance in a strained argument that the law does not allow Sargent to have access to his own jail records. This point was well articulated by the trial court, which should be affirmed: "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.

E. The Trial Court Properly Exercised Discretion to Impose a Per Diem PRA Penalty Graduated to the Maximum Due to SPD's Bad Faith in Withholding Public Records Requested by Sargent

SPD complains that the trial court's imposition of the maximum \$100 per diem penalty was "unprecedented." In addition to the express statutory precedent for this penalty amount under RCW 42.56.550(4), a Superior Court order issued more than a year earlier imposed the same penalty. See Appendix A., Order Awarding Plaintiff Carey Fees, Costs, And Penalties, May 4, 2009, at 3 ("The Court FURTHER ORDERS Plaintiff is to be awarded a penalty of \$100 per day for one set of records that were denied to

Plaintiff for 526 days . . . amounting to a penalty of \$52,600”). This argument therefore must fail.

SPD also argues that the trial court’s penalty otherwise was an abuse of discretion under *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010), which was decided only a few months before the trial court’s ruling. Sargent’s Answer provides this Court with a complete *Yousoufian* analysis demonstrating that the trial court’s graduated penalty to the maximum per diem amount was a proper exercise of statutory discretion under the PRA. See Answer at 33-38. Remand on this point, therefore is unnecessary and would be futile. The trial court should be affirmed.

In addition, this Court should reject SPD’s claim of error because Washington Supreme Court precedent makes clear that SPD’s bad faith in withholding and redacting records sought by Sargent – which continues to date – is the principle factor in setting the penalty:

Although a showing of bad faith or economic loss is not required in the determination of whether an award for delay in disclosure should be granted they are factors for the trial court to consider in determining the amount to be awarded. When determining the amount of the penalty to be imposed “the existence or absence of **[an] agency’s bad faith is the principal factor which the trial court must consider.**”

Amren v. City of Kalama, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997) (quoting *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 303, 825 P.2d 324 (1992)) (emphasis added). The trial court ruled that SPD's continued withholding and redacting of records beyond October 23, 2009, the date of the final interview of exculpatory witnesses identified by Sargent to SPD, was no longer even arguably in good faith. RP 28. In light of this ruling, and given SPD's complicit and extensive violations of Sargent's civil rights through and following his unlawful arrest and incarceration, the agency's bad faith violations of the PRA require affirmance of the maximum penalty, which should extend through this appeal.

III. SARGENT'S REPLY TO THE SEATTLE POLICE DEPARTMENT'S ARGUMENTS REGARDING ERRORS RAISED ON CROSS APPEAL

Controlling law supports Sargent's two cross appeal issues for remand to the trial court. In response to these issues, however, SPD would have this Court accept the premise that interpretation of the PRA should be allowed by those at whom it was aimed by the Legislature. In this upside down world, SPD could withhold and redact disciplinary and electronic records based upon its unilateral determination, no matter how demonstrably flawed, that an employee did not commit misconduct while off duty – even where that employee fails to assert any objection to disclosure; and SPD could dictate that a records requestor is limited to *pro bono* legal

representation in preparing and advocating a records request that SPD denies in repeated bad faith violations of the PRA prior to an enforcement action. The Court should reject these arguments.

A. The PRA Requires SPD To Produce Disciplinary and Electronic Records Regarding the Closed Internal Investigation of Officer Waters

As an initial matter, this issue is less one of substantive reversible error, than of clarification. Stated simply, the trial court's oral ruling granted all relief sought by Sargent's Complaint and Motion to Show Cause; but the written order failed to reflect this relief and is ambiguous because it lacks specific findings of fact and conclusions of law regarding the ruling on disciplinary and electronic records sought.

Further proceedings not only are necessary to clarify this discrepancy, but because SPD continued to produce piecemeal disciplinary and electronic records in the months following the August 20, 2010 evidentiary hearing, demonstrating that SPD's *in camera* submission before the hearing was deficient and unreliable.² See CP 287, 886-891; Appendix B, September 8, 2010 email communication by Gary Smith and attachment entitled "9-7-2010 transmittal.pdf"; September 23, 2010 email communication by Gary Smith and attachment entitled "9-23-2010 transmittal.pdf."

² SPD's pleadings also potentially misled the court, e.g., in Chief Diaz's gross mischaracterization that "[a] large majority of complaints result in a not-sustained disposition," when the actual number was 10 percent in 2009. CP 290; 319.

Video recordings disclosed by SPD as late as November 17, 2010 (referenced on page 18 of Sargent's opening brief and not disputed by SPD) depict Officer Waters generating a handwritten record at the apparent request of the primary investigating officer immediately after the July 28, 2009 incident, which SPD has failed to produce. These circumstances necessitate additional proceedings in the trial court.

SPD's obligation under the PRA to produce requested disciplinary records is not exempted by *Newman*, because *Newman* involved an unsolved murder investigation that is distinguishable from the closed criminal investigation of Sargent that preceded the closed internal investigation of Officer Waters. Likewise, SPD's citation of *Cowles Publishing*, 109 Wn.2d 712, offers no support in the alternative to exempt SPD's disclosure obligations, because that decision drew a sharp distinction between misconduct by on-duty versus off-duty officers. As noted, where the public records that relate to the officer's off-duty acts bear upon his fitness to perform public duty, "privacy considerations are overwhelmed by public accountability." *Id.* at 727. In this case, the misconduct of Officer Waters occurred while he was off-duty, dressed in street clothes, and driving a personal vehicle through an alley to avoid traffic. His violence against Sargent's person and property while armed, and his misrepresentations to investigators, unquestionably bore upon his fitness for public duty.

The divided decision in *Bellevue John Does 1-11 v. Bellevue School District #405*, 164 Wn.2d 199, 189 P.3d 139 (2007) is factually distinguishable because unlike the disciplinary records sought by Sargent regarding the investigation of a single incident off-duty road rage by Officer Waters, *Bellevue* involved a broad media request that included “unsubstantiated”³ allegations of the “terrible atrocity” of sexual abuse of children committed by multiple teachers in three school districts over a 10-year period. The single act of road rage by Officer Waters, while a deplorable violation of Sargent’s civil rights, hardly equates to a “terrible atrocity,” with the elevated privacy concerns of the extreme social taboo of child sexual abuse. By contrast, *Bellevue* also is distinguishable as *stare decisis*, because, as noted, *Cowles* held that if the off-duty acts of a police officer bear upon his fitness to perform duty, “privacy considerations are overwhelmed by public accountability.” *Cowles*, 109 Wn.2d at 726-27.

Moreover, SPD fails to demonstrate how disclosure of the records of the internal investigation of Officer Waters “(1) [w]ould be

³ The *Bellevue* Court expressly defined “unsubstantiated” allegations as “not supported or borne out by fact.” *Id.* at 205, n.1 (quoting Webster’s Third New International Dictionary 2512 (2002)). SPD conspicuously omits the Court’s definition in favor of broader definition of “substantiate” from Black’s Law Dictionary. See Answer and Reply at 41, n.21. SPD also cites a broad definition of “preponderance” that is at odds with the verbatim language of OPA’s “not sustained” disposition standard. *Id.* The “not sustained” disposition, also conspicuously absent in SPD’s brief, means “the allegation of misconduct was neither proved **nor disproved** by a preponderance of the evidence.” CP 332 (emphasis added). It therefore is the equivalent of a deadlocked jury.

highly offensive to a reasonable person, and (2) is not of legitimate concern to the public” under RCW 42.56.050. See also *Bellevue*, 164 Wn.2d at 212; *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 135-36, 580 P.2d 246 (1978). The trial court record contains no evidence specifically relating to Officer Waters and the July 28, 2009 incident to satisfy SPD’s burden to demonstrate the applicability of an exemption. Unlike the plaintiff teachers accused of sexual abuse of children in *Bellevue*, Officer Waters never sought to intervene as a party in this PRA enforcement action to seek to enjoin disclosure of his internal investigation records, despite receiving notice. See CP 287. SPD did not file a sworn declaration by Waters on this issue or call him as a witness. By comparison, the *Bellevue* Court noted that “unredacted records” regarding similarly situated non-party teachers were released to the requestor by the agencies. *Id.* at 206, n.4.

Koenig v. Thurston Co., 155 Wn. App. 398, 229 P.3d 910 (2010) again fails to provide an analogy regarding disclosure of disciplinary records about the off duty acts of a police officer. The “victim impact statements” discussed in *Koenig* implicate distinguishable confidentiality concerns and sensitive information of vulnerable crime victims, as shown by the agency and not controverted by the requestor.

Unlike the *Bellevue* and *Koenig* decisions, the Washington Supreme Court’s *en banc* decision in *Amren*, 131 Wn.2d 25 is

analogous because it involved records of complained police misconduct. In *Amren*, a citizen sought a State Patrol report from the City of Kalama regarding a variety of complaints against the police chief – a report that the mayor cited to conclude that the allegations of misconduct were “unfounded and false.” *Id.* at 29. The *Amren* Court first discussed the PRA’s legislative history and emphasized its “strongly worded mandate for broad disclosure of public records” before concluding that the State Patrol’s report of alleged misconduct by the police chief constituted a public record that was presumptively disclosable. Holding that the City of Kalama failed its burden to prove the applicability of an exemption, the *Amren* Court ordered disclosure of the report with an award of mandatory penalties and fees. In response to the “City’s contention that its decision concerning the veracity of the report should not be reviewable,” the *Amren* Court responded in dictum by noting “this court has repeatedly stated” that “[l]eaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization.” *Id.* at 34, n.6 (quoting, *inter alia*, *Servais v. Port of Bellingham*, 127 Wn.2d 820, 834, 094 P.2d 1124 (1995)).

The *Amren* Court’s dictum is significant because it shows that an agency’s determination of the veracity of a complaint of police misconduct does not relieve the agency of its presumptive obligation to disclose related records. Thus, in Sargent’s case, SPD’s strained argument regarding the importance of the flawed

“not sustained” disposition by its internal investigations department, the Office of Professional Accountability (OPA), regarding the complaint of misconduct against Officer Waters lacks merit. Again, the analogous controlling decision in *Cowles Publishing*, 109 Wn.2d 712, emphasized the public’s overriding interest in obtaining records of an officer’s off-duty acts that bear upon fitness for public duty. Here, the internal investigation records sought by Sargent fit this holding completely and must be disclosed under the PRA.

To allow OPA’s unilateral determination that a complaint of misconduct by an officer is “sustained” to be the dispositive threshold giving rise to SPD’s obligation under the PRA to produce records of an internal investigation is to allow SPD to devitalize the PRA’s mandate of open records. In 2009, SPD’s policy of only making available records of “sustained” dispositions accounted for less than two percent of all complaints of misconduct by citizens, as shown by Chief John Diaz’s declaration and exhibits in this litigation. Thus, SPD withheld 98 percent of records from the public. This constitutes an impermissibly broad construction of the PRA’s exemptions by SPD to withhold public records *en masse* to deprioritize accountability by restricting public review of the accuracy and integrity of SPD’s disciplinary process.⁴

⁴ OPA’s process is inherently biased in favor of the officers accused of misconduct, as shown by OPA’s failure to sustain misconduct by Officer Waters in light of the independent witness who contradicted Waters’ statement. This is because OPA is comprised entirely of SPD personnel, from the Chief of Police, who has the ultimate authority over whether to impose discipline, to the so-called

B. A PRA Award of Attorney Fees To a Prevailing Party Should Include Work To Obtain Clarification of the Trial Court's Order and To Calculate Fees Accurately

SPD's Answer fails to address the controlling abuse of discretion standard regarding the trial court's award of attorney fees. It is not sufficient for SPD simply to assert its opinion regarding the "necessity to retain an attorney" to prepare and pursue a records request,⁵ especially given SPD's notoriety for PRA noncompliance in comparison to the vast majority of law enforcement agencies in Washington. CP 152, 156 (2007 Seattle Post Intelligencer article noting that "[o]nly police agencies operated by sovereign Indian tribes not subject to the state's open records law provided less information"). Ultimately, SPD's continued withholding and redaction of records requested by Sargent a year and a half ago, alone, proves the necessity of the full course of Sargent's legal representation to obtain enforcement of his PRA rights and that the trial court's award was fully justified. Nor is it germane or appropriate for SPD to state that the PRA's mandated

"Civilian" Director (whose salary is paid by the same employer as the officers she is supposed to evaluate) to the internal investigators. The citizen complainant is allowed neither the opportunity to review and evaluate the internal investigation report and witness statements, nor a process to appeal biased actions or erroneous decisions by OPA personnel.

⁵ As with SPD's efforts to delay production of existing public records that are subject to disclosure by requiring that citizens "resubmit" requests, SPD's view on what legal work is necessary to obtain records is another example of SPD attempt to rewrite and devitalize the PRA's mandates.

award of attorney fees to a prevailing records requestor constitutes a “windfall” to counsel. Instead, it is incumbent on SPD to demonstrate that the trial court’s award of \$40,532.00 for a year of legal representation was a “manifestly unreasonable decision or one based on untenable grounds or for untenable reasons.” *Kitsap Co. Prosecuting Attorney’s Guild v. Kitsap Co.*, 156 Wn. App. 110, 120, 231 P.3d 219 (2010). SPD fails this burden on appeal.

For the reasons set forth in Sargent’s cross appeal, however, this Court should remand so that the trial court may recalculate its fee award to include all work documented to enforce his rights under the PRA through August 31, 2010. Exclusion of the \$8,281.00 in fees was manifestly unreasonable in light of the PRA’s mandate of complete recovery of fees to a prevailing party to promote enforcement of the Act by making representation “financially feasible.” *Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503 (ACLU II)*, 95 Wn. App. 106, 115, 975 P.2d 536 (1999). SPD has not offered a discernable counterargument in its Answer and Reply. Accordingly, the relief sought by Sargent should be granted. Additionally, this Court should award Sargent reasonable fees incurred to prosecute this appeal. RAP 18.1; see *Amren*, 131 Wn.2d at 35 (awarding records requestor “reasonable attorney fees

incurred at the trial court and on appeal" for appeal involving agency's unsuccessful challenge to fees award).

IV. CONCLUSION

Sargent respectfully requests this Court affirm the trial court's ruling that SPD violated the PRA, award of a penalty graduated to the maximum per diem amount due principally to SPD's bad faith in withholding and redacting public records, and award of reasonable attorney fees. Sargent further requests remand for the trial court to direct SPD to produce all disciplinary and electronic records requested by Sargent, and to include an award of fees documented for work done to obtain clarification of the trial court's final written order and calculate fees accurately for a year of representation provided by counsel to enforce Sargent's PRA rights.

DATED this 11th day of March, 2011



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 11th day of March, 2011, I filed the Reply Brief of Respondent/Cross Appellant Evan 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:

VIA EMAIL AND LEGAL MESSENGER

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

DATED March 11th, 2011 in Seattle, King County, Washington.



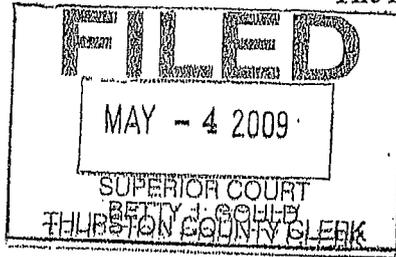
Gale Valdez-Antolin
Legal Assistant
McKay Chadwell, PLLC
600 University Street, Suite 1601
Seattle, WA 98101
Phone: (206) 233-2800
Facsimile: (206) 233-2809
Email: gmv@mckaychadwell.com

2011 MAR 11 PM 4:48
COURT OF APPEALS
DIVISION I
SEATTLE, WA

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EXPEDITE
 No hearing set
 Hearing is set
Date:
Time:
Judge/Calendar:

The Honorable Gary Tabor



RECEIVED

MAY 06 2009

Law, Lyman, Daniel
Kamerrer & Bogdanovich

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

HAROLD CAREY,
Plaintiff,

vs.

MASON COUNTY,
Defendant.

No. 07-2-00323-9

ORDER AWARDING PLAINTIFF
CAREY FEES, COSTS, AND
PENALTIES

[Proposed]

This Matter came before the Court on Plaintiff's Motion for Determination of Fees,
Costs, and Penalties; and The Court, having reviewed:

1. Plaintiff's Motion for Determination of Fees, Costs, and Penalties;
2. Declaration of Harold Carey in Support of Motion for Fees, Costs, and Penalties;
3. Declaration of Michele Earl-Hubbard in Support of Motion for Fees, Costs, and Penalties;
4. Declaration of Shelley Hall
5. Declaration of Judith Endejan
6. Defendant's Response to Plaintiff's Motion for Fees, Costs, and Penalties,
7. Declaration of Shannon Goudy in Support of Findings of Fact and Conclusions of Law and Order,

1 8. Declaration of John E. Justice in Support of Findings of Fact and Conclusions of
2 Law and Order,

3 9. Declaration of John E. Justice in Opposition to Plaintiff's Motion for Fees, Costs,
4 and Penalties

5 10. Plaintiff's Reply in Support of Plaintiff's Motion for Determination of Fees,
6 Costs, and Penalties,

7 11. 3/24/2009 Declaration of Michele Earl-Hubbard,

8 12. Declaration of Harold Carey in Support of Reply for Motion for Determination of
9 Fees, Costs, and Penalties,

10 And the records and pleadings contained in the case file. Therefore, the Court, considering itself
11 fully advised on the matter, orders as follows:

12 IT IS HEREBY ORDERED that Plaintiff is to be awarded his reasonable attorney's fees
13 to be paid by Mason County in the amount of \$62,758.90, 40 percent of Plaintiff's total incurred
14 attorney fees of \$156,897.25, reduced to reflect that Plaintiff prevailed on the violations outlined
15 below, but was not successful on other alleged violations of the Public Records Act contained in
16 Plaintiff's Amended Complaint. However, the Court did not reduce the fees in exact proportion
17 to the percentage of successful claims, taking into account that much of the preparation would
18 have taken place regardless of how many claims there were involved in the lawsuit;

19 IT IS FURTHER ORDERED that Plaintiff is to be awarded costs in the amount of
20 \$12,000, to be paid by Defendant Mason County;

21 The Court FURTHER ORDERS that Plaintiff is to be awarded a penalty of \$25 per
22 record per day for the 784 days (392 days for each of two requests) that he was denied records
23 responsive to two of Plaintiff's pre-lawsuit records requests made on January 25, 2006, admitted
24 at trial as Plaintiff's Exhibit 1, for the records concerning (1) the North Bay/Case Inlet Sewer

1 System and (2) the Highway 101 Connector Project until the day that he received such records
2 on February 21, 2007, amounting to a total of \$19,600 to be paid to Plaintiff for failing to timely
3 respond to Mr. Carey's January 25, 2006, records requests;

4 The Court FURTHER ORDERS Plaintiff is to be awarded a penalty of \$100 per day for
5 one set of records that were denied to Plaintiff for 526 days (609 total days, reduced by 83 days
6 for which penalties were waived) that were requested through Plaintiff's March 5, 2007, records
7 request admitted as Plaintiff's Exhibit 30, and produced to Plaintiff on November 4, 2008,
8 amounting to a penalty of \$52,600;

9 It is FURTHER ORDERED that Defendant Mason County shall pay to Plaintiff the total
10 amount of \$146,958.90, including the awards of Fees, Costs, and Penalties enumerated above,
11 which shall be paid to Plaintiff care of his counsel, to Allied Law Group LLC, in trust.

12 Both parties, Harold Carey and Mason County, that they will not pursue any appeal in
13 this case, including an appeal of this Order or any other ruling or order of the Court in this case.

14
15 DATED this 30th day of April, 2009.

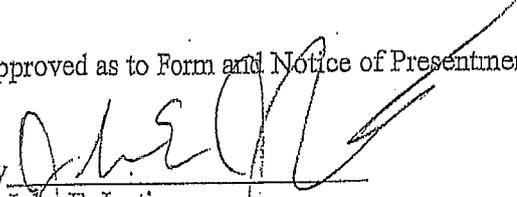
16
17 GARY R. TABOR
Hon. Gary Tabor

18 Prepared and presented by:
19 ALLIED LAW GROUP LLC
Attorneys for Plaintiff Harold Carey
20 By [Signature]
21 Michele Earl-Hubbard, WSBA #26454
Chris Roslaniec, WSBA #40568
22 2200 Sixth Avenue, Suite 770
Seattle, WA 98121
23 (206) 443-0200 - Telephone
(206) 428-7169 - Facsimile
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Approved as to Form and Notice of Presentment Waived

By



John E. Justice
Law, Lyman, Daniel, Kamerrer, and Bogdanavich
2674 RW Johnson BLVD SW
Tumwater, WA 98508-1880
Phone: (360) 754-3480
Facsimile: (360) 357-3511

September 8, 2010 email communication by Gary Smith and
attachment entitled "9-7-2010 transmittal.pdf"

Patrick Preston

From: Smith, Gary [Gary.Smith@seattle.gov]
Sent: Wednesday, September 08, 2010 1:28 PM
To: Patrick Preston
Cc: Skjonsberg-Fotopoulos, Shawna; Thomas Brennan
Subject: Sargent v. Seattle
Attachments: 9-7-2010 transmittal.pdf

Pat,

During our phone conversation on Tuesday last week, you referenced a specific email that was not produced in response to your public disclosure request. In response, I asked SPD to conduct another full review of their files. That review is complete and located two emails, a one page July 29, 2009 memo from the KCPA to SPD, and a two page July 31, 2009 request for additional investigation from Christy Keating with KCPA to SPD Detective Nate Janes that apparently were not included in the response to your public disclosure request.

Copies of the emails are attached. The July 29, 2009 memo and the July 31, 2009 request for additional investigation are exempt from disclosure pursuant to the RCW 42.56.240(1) exemption for records the nondisclosure of which is essential to effective law enforcement. Also, consistent with redactions applied to other documents in response to your request (which are currently subject to review by an appellate court) the identifying information of witnesses is redacted from the documents attached pursuant to the RCW 42.56.240(1) exemption for records the nondisclosure of which is essential to effective law enforcement, and the RCW 42.56.240(2) exemption for the identity of witnesses to a crime.

Please let me know if you have any difficulty opening the attachments, or if you would like to receive hard copies via regular mail.

Gary



Gary T. Smith
Assistant City Attorney

Seattle City Attorney's Office
Civil Division
600 4th Avenue, 4th floor
P.O. Box 94769
Seattle, WA 98124-4769
Phone: 206-733-9318
FAX: 206-684-8284
gary.smith@seattle.gov

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Nathan Janes - Re: Evan Sargent - SPD investigation 09-264202

From: Nathan Janes
To: Port, Cindi
Subject: Re: Evan Sargent - SPD investigation 09-264202

Hi.

I've done a bit of work on this case. I've spoken with the defense investigator, the defense attorney a few times and this witness, as well as others. I already have a statement from this witness. Per your office's request, I left the defense attorney a message last week asking for him to make good on his offer to allow an interview of his client. I guess sending you this statement was his response. He did leave me a message saying he was going to talk with the prosecutors office about arranging some rules for an interview.

When it comes to interviewing his client, I could care less about this statement or any other. It does not affect my desire to have as many facts as possible before determining the proper course of action for this case. And an interview with his client will do just that. He can help complete the picture for me of what happened.

This case is taking more time than anticipated to complete. So I at this time I am withdrawing this case for consideration by the King County Prosecutors Office. Consider this a formal request.

When my investigation is complete I will determine the proper course of action for this case and, if it is appropriate, resubmit it to your office. For now please let the defense attorney know that he needs to deal directly with me. I'm sure he wants to help me have all the available information, including a quality interview with his client. Hopefully we'll be able to arrange an interview quickly so we can resolve this matter.

Thank you for your assistance in the past on this case. I appreciate it.

Sincerely,

Nathan Janes
Detective
Seattle Police Homicide/Assault Unit
206-684-5558
nathan.janes@seattle.gov

>>> "Port, Cindi" <Cindi.Port@kingcounty.gov> 9/14/2009 11:33 AM >>>

Nate, I receive the following witness statement from defense counsel. Would you please talk to Mr. [REDACTED] (if you haven't already). Thank you. -cindi

Interview with [REDACTED] 17 [REDACTED] SW Barton St., Seattle, WA 98106 cell # [REDACTED]

I heard from other employees of the Matador on 7/28/2009 that the kitchen manager "Victor" may have witnessed the incident in the alley on 7/28/2009. I left phone messages on his cell but he didn't call me back.

about:blank

9/14/2009

I went to the Matador restaurant, 4546 California Ave., SW, Seattle, WA 206-932-9988, on Friday August 28, 2009 at 1:25 p.m. I gave [REDACTED] a business card and reminded him that I was the Investigator for the young man involved in the incident on 7/28/2009. He apologized for not returning my calls and said he been very busy. He said he did witness what happened in the alley and we went to the back of the restaurant so he could show me where he was and what he saw and heard.

He was at the back (east) of the restaurant near the kitchen when a large black man (6'2" to 6'4" and between 225 and 250#) came to the northern most glass door opening into the alley. The man asked [REDACTED] if he knew who was driving the light brown pickup that was blocking the alley. [REDACTED] told him he didn't know who was driving it. The black man appeared to be upset. About 5 minutes later, [REDACTED] was on the phone with his chef at the back of the restaurant again when the same black man came to the other glass door that goes into the alley. He was hot and more upset about the truck. He asked [REDACTED] if he had just spoken with him and [REDACTED] told him he was but he still didn't know who the truck belonged to. The light brown truck was parked in the alley near the back of the restaurant and about 10 feet from where [REDACTED] and the black man were speaking. [REDACTED] said he couldn't see a vehicle north of the pickup truck. [REDACTED] said the black man was wearing cargo style shorts (similar to a man standing in the alley when we were talking).

[REDACTED] continued working on the inventory at the back of the restaurant until about 5 minutes later he heard some screaming from the alley. When he looked out he saw the black man pounding on the hood of the pickup with his fists as the truck was backing up and turning into the parking lot east of the alley and across from the south glass door of the Matador. Then as the passenger's side of the truck came around near the black man, he punched the passenger's side mirror off with his left hand. The driver of the truck got out with a baseball bat and walked toward the front of his truck. The black man walked north and [REDACTED] went out to tell the driver of the truck not to raise the bat near the back of his restaurant. Then [REDACTED] noticed the black man got out of his car with a gun and said he was a cop. The driver of the truck said he didn't see a badge and that was only what the man was claiming. The black man walked toward the kid with the gun down by his side then [REDACTED] went into the Matador and asked his manager to call 9-1-1. [REDACTED] never saw the black man display a badge. He said he put the gun into his pants pocket. [REDACTED] spoke with the 9-1-1 dispatcher and gave them his name and information. Now he can't recall everything the two men said to each other in the alley but the black man was clearly upset and the aggressor. [REDACTED] was not contacted by uniformed officer on 7/28 and has not been contacted by a follow up detective.

[REDACTED] said someone else came and spoke with him about the incident on Thursday 8/27/2009. He didn't recall his name and assumed the man was me following up on the earlier phone messages. He said the man didn't show him a badge and he didn't give him a business card. He told the man the same story he relayed to me.

[REDACTED] still has his Portland area cell phone because he worked for the Matador franchise in Portland and was transferred here to be the kitchen manager. There are 4 Matador restaurants in the Seattle area.

Roger Durn

Nathan Janes - Re: PDR Appeal: #09-264202

From: Nathan Janes
To: Clarose, Renee
Subject: Re: PDR Appeal: #09-264202

The case was sent to the prosecutors, but it has been recalled. I have pulled it back. The prosecutors are no longer involved, nor should they be until I have finished my investigation and have determined what should be done with the case.

So, no, at this time the prosecutors do not have it.

Also, Pat Preston is representing the suspect. They have volunteered to give me a statement, but they want to know what I know so they can tailor the suspect's statement to fit the facts. This would be bad. It would compromise the case and undermine the veracity of the suspect.

I will let you know when it can be released. Please let me know what happens and let me know about any additional contact by Pat Preston or anyone else, and please let me know if you need any additional information.

Thank you for your assistance on this case.

Sincerely,

Nathan Janes
Detective
Homicide/Assault Unit

>>> Renee Clarose 9/15/2009 3:06 PM >>>

The requestor is an attorney named Patrick Preston. He did not say whether he represents the suspect. A copy of his appeal request is attached.

Clarify, please -- the case has not been forwarded to the prosecutor's office?

>>> Nathan Janes 9/15/2009 2:18 PM >>>

Hi.

This is an ongoing investigation. NO ONE gets anything until I've completed my investigation, which should hopefully be in a week or so.

Who is asking for the report? I need to know, as I believe someone may be trying to get the information I have in order to tailor their statement to me.

Thank you for your assistance.

Sincerely,

Det. Nathan Janes #5261
Homicide/Assault

NOT FOR DISCOVERY--CONFIDENTIAL DOCUMENT

Det. Nathan Janes

206-684-5558
nathan.janes@seattle.gov

>>> Renee Clarose 9/15/2009 2:02 PM >>>

Hello Det. Janes:

The Legal Unit is processing a public disclosure request appeal related to #09-264202. See attachment.

Questions:

- 1) Has the case been referred to KCPA? If so, when?
- 2) There was no media release for this report. Would there be any objections to releasing the GO and officer statements?

The due date for SPD's response is **Sept. 22.**

Thank you,

Renee Clarose
Legal Unit Assistant

(206) 233-5141
Seattle Police Department
610 5th Avenue, Unit A001
PO Box 34986
Seattle, WA 98124-34986

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY



King County

Office of the Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516
Seattle, Washington 98104
(206) 296-9000

Date: September 30, 2009
To: Det Nathan Jans

From: Senior Deputy, Filing Unit
Filing Deputy: Christy Keating

Regarding Defendant(s): GARGENT, Evan Anthony
Police Incident Number: 09-264202

This case was presented for filing some time ago. Additional information on investigation was requested by the Filing Unit Deputy prior to charges being filed. We are returning this case to you because we have not received a response from you regarding the requested information.

If you would like to have the case reviewed, please resubmit it with the requested information attached.

Thank You,

Filing Unit, Seattle

September 23, 2010 email communication by Gary Smith and
attachment entitled "9-23-2010 transmittal.pdf"

Patrick Preston

From: Smith, Gary [Gary.Smith@seattle.gov]
Sent: Thursday, September 23, 2010 12:37 PM
To: Patrick Preston
Cc: Skjonsberg-Fotopoulos, Shawna; Thomas Brennan
Subject: RE: Sargent v. Seattle
Attachments: 9-23-2010 transmittal.pdf

Pat,

As I mentioned, although the parties dispute whether Plaintiff resubmitted his public disclosure request after the disciplinary investigation was closed, the Seattle Police Department proceeded to produce the records in the form that they would be released in response to a records request for a disciplinary investigative file involving the subject officer. Attached are the non-exempt records and an exemption log indentifying records withheld.

This investigation into allegations of officer misconduct resulted in a not-sustained finding. Information identifying the subject officer has been redacted from the records attached pursuant to the RCW 42.56.240(1) Public Records Act exemption for information that is essential for effective law enforcement and for the protection of an individual's right to privacy. Other redactions are applied and records withheld pursuant to the same exemption.

As discussed in the City's response to your motion for reconsideration, disclosure of this information and records which detail the investigation would have a chilling effect on the willingness of officers to participate in the investigation and thus pose a significant threat to a vital law enforcement function.

In addition, under the Supreme Court's holding in *Bellevue John Does v. Bellevue School District*, release of the details of unsubstantiated allegations of misconduct in conjunction with an employee's name would identify the employee in connection with matters of no legitimate public interest. Therefore, in order to protect employee privacy, the details of an investigation of unsubstantiated allegations are not subject to disclosure.

Please feel free to give me a call with any questions.

Gary



Gary T. Smith
Assistant City Attorney

Seattle City Attorney's Office
Civil Division
600 4th Avenue, 4th floor
P.O. Box 94769
Seattle, WA 98124-4769
Phone: 206-733-9318
FAX: 206-684-8284
gary.smith@seattle.gov

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From: Patrick Preston [mailto:pjp@mckay-chadwell.com]
Sent: Wednesday, September 22, 2010 10:58 AM
To: Smith, Gary
Cc: Thomas Brennan
Subject: RE: Sargent v. Seattle

Gary,

If you have knowledge of any anticipated or pending "court injunction" action by SPD or any third party with whom you have been communicating regarding Mr. Sargent's pending PRA requests, please advise immediately.

Regards,

Pat

Patrick J. Preston
McKay Chadwell, PLLC
1601 One Union Square
600 University Street
Seattle, WA 98101
(206) 233-2800 (main)
(206) 233-2818 (direct)
(206) 233-2809 (fax)
pjp@mckay-chadwell.com

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From: Smith, Gary [mailto:Gary.Smith@seattle.gov]
Sent: Tuesday, September 21, 2010 4:50 PM
To: Patrick Preston
Cc: Thomas Brennan
Subject: FW: Sargent v. Seattle

Pat,

As mentioned below, SPD intended to produce the records at the close of business on September 22, 2010 unless served with a court injunction preventing release. I am overseeing this response, but will be out of the office unexpectedly tomorrow afternoon, therefore you may expect a transmittal on the morning of September 23, 2010 unless a court injunction prevents release.

Thank you,

Gary



Gary T. Smith
Assistant City Attorney

Seattle City Attorney's Office
Civil Division
600 4th Avenue, 4th floor
P.O. Box 94769

Seattle, WA 98124-4769
Phone: 206-733-9318
FAX: 206-684-8284
gary.smith@seattle.gov

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From: Smith, Gary
Sent: Wednesday, September 08, 2010 9:23 AM
To: Patrick Preston
Cc: 'Thomas Brennan'
Subject: Sargent v. Seattle

Pat,

Although the parties dispute whether Plaintiff resubmitted his public disclosure request after the disciplinary investigation was closed, the Seattle Police Department is proceeding to produce the records to Plaintiff in the form that they would be released in response to a records request.

SPD is contractually obligated to provide third party notification to the subject of the record and allow an opportunity for the third party to obtain a court injunction preventing release. SPD intends to produce the records at the close of business on September 22, 2010 unless served with a court injunction preventing release.

Please feel free to contact me with any questions.

Gary



Gary T. Smith
Assistant City Attorney

Seattle City Attorney's Office
Civil Division
600 4th Avenue, 4th floor
P.O. Box 94769
Seattle, WA 98124-4769
Phone: 206-733-9318
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gary.smith@seattle.gov

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Public Disclosure Redaction Log



August 10, 2010

SPD IIS # 09-0395

Document Description	Pages Redacted or Withheld	Redacted	Withheld	Exemption	Comments
Investigation Summary Report	Pages 173-174 and 176-177	X		RCW 42.56.240(1) and RCW 42.56.230	Information is essential to effective Law enforcement and right to privacy
Certification of Completion and OPA Disposition	1 page		X	RCW 42.56.240(1) and RCW 42.56.230	Information is essential to effective Law enforcement and right to privacy
Incident report	Pages 140-159		X	RCW 42.56.240(1) and RCW 42.56.230	Information is essential to effective Law enforcement and right to privacy
Proposed Disposition	Pages 178-180		X	RCW 42.56.240(1) and RCW 42.56.230	Information is essential to effective Law enforcement and right to privacy
Correspondence	Pages 133-139, 160-172 and 175		X	RCW 42.56.240(1) and RCW 42.56.230	Information is essential to effective law enforcement and right to privacy
Case Summary	Pages 1-2		X	RCW 42.56.240(1) and RCW 42.56.230	Information is essential to effective Law enforcement and right to privacy
Follow-up Form	Pages 3-6		X	RCW 42.56.240(1) and RCW 42.56.230	Information is essential to effective Law enforcement and right to privacy
Exhibit A: Incident report	Pages 7-54		X	RCW 42.56.240(1) and RCW 42.56.230	Information is essential to effective Law enforcement and right to privacy
Exhibit B: Subject's statement	Pages 55-63		X	RCW 42.56.240(1) and RCW 42.56.230	Information is essential to effective Law enforcement and right to privacy
Exhibit C: Officer statement	Pages 64-71		X	RCW 42.56.240(1) and RCW 42.56.230	Information is essential to effective Law enforcement and right to privacy
Exhibit D: Witness statement	Pages 72-82		X	RCW 42.56.240(1) and RCW 42.56.230	Information is essential to effective Law enforcement and right to privacy

Public Disclosure Redaction Log



August 10, 2010

SPD IIS # 09-0395

Document Description	Pages Redacted or Withheld	Redacted	Withheld	Exemption	Comments
Exhibit E: Witness statement	Pages 83-94		X	RCW 42.56.240(1) and RCW 42.56.230	Information is essential to effective Law enforcement and right to privacy
Exhibit F: Witness statement	Pages 95-99		X	RCW 42.56.240(1) and RCW 42.56.230	Information is essential to effective Law enforcement and right to privacy
Exhibit G: Scene photos	Pages 100-110		X	RCW 42.56.240(1) and RCW 42.56.230	Information is essential to effective Law enforcement and right to privacy
Exhibit H: Photos of damage	Pages 111-115		X	RCW 42.56.240(1) and RCW 42.56.230	Information is essential to effective Law enforcement and right to privacy
Exhibit I: RCW reviewed	Pages 116-118		X	RCW 42.56.240(1) and RCW 42.56.230	Information is essential to effective Law enforcement and right to privacy
Exhibit J: SMC reviewed	Pages 119-120		X	RCW 42.56.240(1) and RCW 42.56.230	Information is essential to effective Law enforcement and right to privacy
Exhibit K: Policies and procedures reviewed	Pages 121-130		X	RCW 42.56.240(1) and RCW 42.56.230	Information is essential to effective Law enforcement and right to privacy
Exhibit L: CDs containing 911 calls and In-Car video and Digital copies of Exhibits "F" and "G"	Pages 131 and 5 CDs		X	RCW 42.56.240(1) and RCW 42.56.230	Information is essential to effective Law enforcement and right to privacy

Seattle Police Department

Investigation Summary Report

Case Type: Preliminary Investigation Report

Case Number: 09-PIR-0395

Incident Date: 07/28/2009

Date Reported: 10/15/2009

Origin: Phone

Report Number: 09-264202

Location: 4546 California AV SW

Address:

Precinct: Southwest Sector: William

Beat: 2 Census Tr.:

Status: Open

Date Closed:

Complainant(s)

Preston, Patrick J

Race: Sex: M

Phone: 206-233-2818

Address: 1601 One Union Square

Seattle, WA 98101

Subject of Complaint No

Witness(es)

Sargent, Evan A

Race: White Sex: M

Phone: 206-450-6523

Address: 4104 SW 102 ST

Seattle, WA 98148

Employee(s)

[REDACTED]
Supervisor:

ID#: [REDACTED]

Race: Black Sex: M

Assignment: [REDACTED]

Allegation: [REDACTED]

Violation: [REDACTED]

Finding:

Tracking:

Group: IIS Sergeants

Assigned To: Rogers, Brett J

Role: Intake

Assign Date: 10/19/2009

Due Date:

Completion Date: 10/22/2009

Group: IIS Captain/Lieutenant Assigned To: Kuehn, Mark Edward

Role: Reviewer

Assign Date: 10/22/2009

Due Date:

Completion Date: 10/22/2009

30-174

Group: PIR Distribution
Assign Date: 10/22/2009

Assigned To: SW Pct
Due Date:

Role: Reviewer
Completion Date:

Narrative:

Preliminary Investigation Report – Commander Review

LIEUTENANT'S REVIEW:

ISSUE: The complainant alleged the named employee intentionally damaged his client's vehicle while off-duty and then provided responding officers with an inaccurate version of events, which led to his client's arrest.

ANALYSIS: The complainant is a defense attorney representing the subject in this criminal assault case. (The pending case was apparently returned by KCDPA to the Homicide Unit for additional investigation.) According to the GOR, the named employee, while off-duty and driving his personal vehicle, contacted the subject concerning a vehicle which was blocking an alley. A dispute ensued during which the subject's vehicle's mirror was broken and the subject armed himself with a baseball bat. When the named employee armed himself with a firearm, the subject relinquished the bat. On-duty officers and a supervisor responded, and the subject was arrested for assault.

The complainant alleges that the named employee was the aggressor in this incident and intentionally damaged the subject's mirror. He further alleges that the named employee deliberately provided the responding officers with an inaccurate account of what occurred.

It seems that the proper forum for determining the disputed facts of this encounter is a courtroom and not an OPA/IS investigation. If, after the matter is resolved in the court system, there appears to be potential misconduct issues involving the named employee, an OPA/IS referral would be appropriate. However, with the criminal case still pending, an OPA/IS investigation would be premature. (Attacking the credibility of a State's witness in criminal cases, through whatever means are available, is not an uncommon defense tactic.)

[REDACTED]

Seattle Police Department

Investigation Summary Report

Case Type: Internal Investigation

Case Number: 09-IIS-0395

Incident Date: 07/28/2009

Date Reported: 10/15/2009

Origin: Phone

Report Number: 09-264202

Location: 4546 California AV SW

Address:

Precinct: Southwest Sector: William

Beat: 2 Census Tr.:

Status: Assigned for Investigation

Date Closed:

Complainant(s)

Preston, Patrick J

Race: Sex: M

Phone: 206-233-2818

Address: 1601 One Union Square
Seattle, WA 98101

Witness(es)

Sargent, Evan A

Race: White Sex: M

Phone: 206-450-6523

Address: 4104 SW 102 ST
Seattle, WA 98148

Subject of Complaint Yes

Employee(s)

[Redacted]

ID#: [Redacted]

Race: Black Sex: M

Supervisor:

Assignment: [Redacted]

Allegation:

Violation:

Finding:

Tracking:

Group: IIS Sergeants

Assigned To: Rogers, Brett J

Role: Intake

Assign Date: 10/19/2009

Due Date:

Completion Date: 10/22/2009

Group: IIS Captain/Lieutenant

Assigned To: Kuehn, Mark Edward

Role: Reviewer

Assign Date: 10/22/2009

Due Date:

Completion Date: 10/22/2009

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Group: IIS Sergeants
Assign Date: 11/24/2009

Assigned To: Rogers, Brett J
Due Date: 2/5/2010

Role: Investigator
Completion Date:

Narrative:

Updated 11/24/2009 12:32:16 PM by 4254:

At the direction of the OPA Director, this case was reclassified from a PIR to an IIS investigation. Prior to notice being sent, the case will be reviewed by the Law Department for an opinion on a possible criminal law violation.

According to the GOR, the named employee, while off-duty and driving his personal vehicle, contacted the subject concerning a vehicle which was blocking an alley. A dispute ensued during which the subject's vehicle's mirror was broken and the subject armed himself with a baseball bat. When the named employee armed himself with a firearm, the subject relinquished the bat. On-duty officers and a supervisor responded, and the subject was arrested for assault.

The complainant alleges that the named employee was the aggressor in this incident and intentionally damaged the subject's vehicle's mirror. He further alleges that the named employee deliberately provided the responding officers with an inaccurate account of what occurred.