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Ronald R. Carpenter   
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No. 89648-8

SUPREME COURT OF THE STATE OF WASHINGTON

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CITY OF LAKEWOOD  
*Petitioner,*

v.

DAVID KOENIG,  
*Respondent.*

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STATE OF WASHINGTON  
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RESPONDENT KOENIG'S ANSWER TO  
AMICUS CURIAE BRIEFS OF WSAMA AND WAPRO

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## I. INTRODUCTION

In one of the first cases interpreting the Public Records Act, Chap. 42.56 RCW (PRA)<sup>1</sup>, the agency argued that its refusal to release records should be upheld unless the refusal was arbitrary and capricious. *Hearst v. Hoppe*, 90 Wn.2d 123, 129, 580 P.2d 246 (1978). This Court vehemently disagreed, noting that the agencies subject to the PRA could not be trusted to interpret the act:

The assessor, in essence, contends that the act leaves interpretation and enforcement of its requirements to the very persons it was designed to regulate. ... **[L]eaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization.**

*Hearst*, 90 Wn.2d at 131 (emphasis added). The amicus briefs filed in support of the City of Lakewood confirm that some agencies are just as hostile to transparency as they were more than three decades ago.

The Washington State Association of Municipal Attorneys (WSAMA) asks this Court to weaken the PRA by relieving agencies (and their attorneys) of their statutory duty to *correctly* explain why requested records are exempt. RCW 42.56.210(3). WSAMA suggests that requiring agencies to strictly comply with RCW 42.56.210(3) would add

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<sup>1</sup> The Public Disclosure Act, Chap. 42.17 RCW (PRA), was enacted by the voters in 1972 in Initiative 276. *Hearst v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978). The portions of the act dealing with access to public records were re-codified as the Public Records Act in 2005. RCW 42.56.001, -.020, -.900.

“unnecessary burdens” to public agencies. WSAMA suggests that, instead, requesters should be forced to hire “competent legal counsel” in order to determine whether records are exempt. *WSAMA Br.* at 2, 8.

The Washington Association of Public Records Officers (WAPRO) joins WSAMA in complaining about what it views as the “heightened burden” of requiring an agency to correctly explain why records are exempt. *WAPRO Br.* at 2. WAPRO also mischaracterizes Koenig’s pleadings and the procedural history of this case to suggest that Koenig somehow “waived” his right to a correct explanation of whether driver’s license numbers are exempt. Finally, WAPRO makes baseless attacks on Koenig, while ignoring the undisputed facts that the City is a serial violator of RCW 42.56.210(3) and that Koenig repeatedly warned the City that its redactions were incorrect and a violation of the PRA.

WAPRO seek to dismantle the PRA by allowing agencies to make incorrect exemption claims and then use agency-initiated litigation to shift the burden of PRA compliance to requesters. WAPRO believes agencies should be permitted to use discovery to force requesters to hire attorneys to tell the agencies how to comply with the PRA. WAPRO makes no attempt to explain how such a rule can be reconciled with the language and policy of the PRA, which seeks to provide ordinary citizens with the best possible access to public records. *See* RCW 42.56.030, -.100. The

Court should reject WAPRO's waiver argument. It has no factual basis, and neither WAPRO nor the City has presented any legal argument to support the remarkable view that an agency can use discovery to force a requester to state whether and how an agency has violated the PRA.

Finally, WSAMA and WAPRO argue that driver's license numbers are exempt under the privacy prong of RCW 42.56.240(1). But the 2014 legislature has confirmed that driver's license numbers are *not* categorically exempt under that statute.

## II. ARGUMENT

### A. **Amici WSAMA and WAPRO concede that redaction of driver's license numbers is *not* required by the Driver's Privacy Protection Act, 18 USC § 2721 et seq.**

The City completely failed to address the Driver's Privacy Protection Act (DPPA), in the Court of Appeals. Yet its *Petition for Review* asserts that the Court of Appeals' opinion "forces local governments to violate" the DPPA. *Petition* at 1. Koenig has repeatedly explained that DPPA is *not* a blanket federal exemption for driver's license numbers, that the City has never analyzed DPPA in any meaningful way, and that the City has repeatedly failed to explain why it redacted driver's license numbers but not other "personal information,"

including names and addresses, in the same records.<sup>2</sup> CP 119-121; *App. Br.* at 16-19; *Answer to Pet. Rev.* at 16-20.

Neither WSAMA nor WAPRO support the City's mistaken claim that DPPA required the City to redact driver's license numbers. Both amici make only passing references to DPPA, conceding, *sub silentio*, that redaction of driver's license numbers was *not* required by DPPA.

**B. Driver's license numbers are *not* categorically exempt under the privacy prong of RCW 42.56.240(1).**

RCW 42.56.240(1) provides an exemption for investigative records where nondisclosure is essential under either of two prongs: (i) effective law enforcement, or (ii) protection of any person's right to privacy. *See King County v. Sheehan*, 114 Wn. App. 325, 335-349, 57 P.3d 307 (2002). Both WSAMA and WAPRO claim that the City properly redacted driver's license numbers under the privacy prong of RCW 42.56.240(1). *WSAMA Br.* at 4-5; *WAPRO Br.* at 19.

As a threshold matter, both WSAMA and WAPRO erroneously assert that Koenig has not challenged the trial court's determination that driver's license numbers were exempt. *WSAMA Br.* at 2; *WAPRO Br.* at 18. Neither amicus explains how they arrived at this conclusion, which is

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<sup>2</sup> The definition of "personal information" in 18 USC § 2725(3) includes a person's name, address, and telephone number, but the City disclosed such information in the very same records from which the City redacted driver's license numbers. CP 160-169; *App. Br.* Appendix.

apparently based on one or more of the City's meritless procedural arguments. But the City filed this case, the City has the burden of proof, and the City sought review in this Court. *Petition* at 16-20. As the PRA requester, defendant, and respondent in this Court, Koenig has no obligation to explain why driver's license numbers are *not* exempt. Nonetheless, Koenig has repeatedly explained that none of the City's exemption claims are correct and that the City has not carried its burden of proof. CP 116-129, 198-199; *App. Br.* at 11-29; *Reply Br.* at 4-18.

Additionally, both amici curiae fail to notice that the City has not cited RCW 42.56.240(1) in either its *Petition* or *Supplemental Brief*.<sup>3</sup> The City only asserts (erroneously) that driver's license numbers are exempt under DPPA (see above) and/or RCW 42.56.070. *Supp. Br.* at 15. This Court normally declines to address arguments raised only by amici curiae. *State v. Gonzalez*, 110 Wn.2d 738, 752 n. 2, 757 P.2d 925 (1988).

Driver's license numbers and other identifying information may be redacted in some situations to protect an individual's right to privacy in their identity. See *Bainbridge Is. Police Guild v. Puyallup*, 172 Wn.2d 398, 418-420, 259 P.3d 190 (2011) (officer's name was exempt under privacy prong of RCW 42.56.240(1) where allegations of misconduct were unsubstantiated). But the City did not protect anyone's identity in

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<sup>3</sup> The City cites "RCW 42.56.240" once in a quote to Koenig's answer. *Petition* at 11.

this case. The City disclosed the names and addresses of the persons whose driver's license numbers were redacted. CP 160-169.

Under RCW 42.56.050, a person's right to privacy is violated only if disclosure of information about the person "(1) [w]ould be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." WAPRO and WAPRO provide scant analysis of the two prong test for privacy in RCW 42.56.050, blandly asserting that the public has no legitimate interest in driver's license numbers, and that an exemption for driver's license numbers is necessary to prevent identity theft. *WSAMA Br.* at 5; *WAPRO Br.* at 19. These policy arguments were disputed in the Sunshine Committee, which rejected proposals to create a categorical exemption for driver's license numbers.<sup>4</sup>

If WSAMA and WAPRO were correct, the 2014 legislature would have enacted a categorical exemption for driver's license numbers. Instead, the legislature adopted an exemption for driver's license numbers

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<sup>4</sup> At the Sunshine Committee meetings on September 17, 2013, November 5, 2013, and December 9, 2013, representatives of the media, the Washington Coalition for Open Government (WCOG), and citizens testified, *inter alia*, that there are legitimate investigative uses for driver's license numbers and that there is no evidence that public records requests are used to commit identity theft. See <http://www.atg.wa.gov/page.aspx?id=31323#U4YklCiGfqc> (last visited May 28, 2014) (testimony of Toby Nixon and Rowland Thompson on September 17, 2013 at 186:35 thru 198:30; testimony of Rowland Thompson, Toby Nixon, and Arthur West on November 5, 2013 at 46:00 through 58:26; testimony of Toby Nixon, William Crittenden, and Frank Garred on December 9, 2013 at 98:48 through 130:40).

solely in personnel records. Laws of 2014, ch. 106; RCW 42.56.250(3).<sup>5</sup>

Undeterred, WAPRO claims the 2014 legislature intended to retain an existing categorical exemption for driver's license numbers. *WAPRO Br.* at 18-19. This argument violates general rules of statutory construction and specific rules of interpretation for PRA exemptions. First, if driver's license numbers were already categorically exempt under the PRA, then the 2014 legislation would be entirely superfluous. *See McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004). Second, under the principle of *expressio unius est exclusio alterius*, the limited express exemption for driver's license numbers in RCW 42.56.250(3) means that driver's license numbers are *not* categorically exempt in other types of records. *See Ellensburg Cement Products, Inc. v. Kittitas County*, 179 Wn.2d 737, 750, 317 P.3d 1037 (2014). Third, the PRA must be interpreted in favor of disclosure, and its exemptions must be narrowly

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<sup>5</sup> The inaccurate description of the Sunshine Committee proceedings by the author of the WAPRO brief (*WAPRO Br.* at 19) is inadmissible and would be inadmissible even if he were a member of the legislature, rather than only one of many members of a committee merely advising the legislature. *Yakima v. Int'l Fire Fighters*, 117 Wn.2d 655 at 677, 818 P.2d 1076 (1991). The Sunshine Committee considered and rejected two different proposals by the author of the WAPRO brief to create a categorical exemption for driver's license numbers. The first proposal would have amended RCW 42.56.230(7)(a) to include driver's license numbers to the existing exemption for driver's license application materials. [http://www.atg.wa.gov/uploadedFiles/Home/About\\_the\\_Office/Open\\_Government/Sunshine\\_Committee/Materials/Item3\\_2.pdf](http://www.atg.wa.gov/uploadedFiles/Home/About_the_Office/Open_Government/Sunshine_Committee/Materials/Item3_2.pdf) (last visited May 23, 2014). The second proposal would have amended RCW 42.56.230(5) to the existing categorical exemption for credit card and bank account numbers. [http://www.atg.wa.gov/uploadedFiles/Home/About\\_the\\_Office/Open\\_Government/Sunshine\\_Committee/Materials/Agenda%20Item%202.3%20Proposal.pdf](http://www.atg.wa.gov/uploadedFiles/Home/About_the_Office/Open_Government/Sunshine_Committee/Materials/Agenda%20Item%202.3%20Proposal.pdf) (last visited May 23, 2014).

construed. RCW 42.56.030; *Progressive Animal Welfare Soc'y v. UW (PAWS II)*, 125 Wn.2d 243, 251, 260, 884 P.2d 592 (1994). RCW 42.56.240(1) cannot be construed as a categorical exemption for driver's license numbers.<sup>6</sup>

Even if the Court agreed that driver's license numbers are exempt under the privacy prong of RCW 42.56.240(1), the City would still be liable for its violation of RCW 42.56.210(3) because the City did not cite RCW 42.56.240(1) until after the discovery appeal.

**C. Incorrect exemption claims violate RCW 42.56.210(3) and the right to receive a response under RCW 42.56.550(4).**

WSAMA and WAPRO argue that RCW 42.56.210(3) does not require an agency to provide a correct statement of exemptions. WAPRO makes this argument explicitly. *WAPRO Br.* at 6-10. WSAMA proceeds from the erroneous assumption that the City's exemptions were correct.<sup>7</sup>

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<sup>6</sup> Citing *Roe v. Teletech Customer Care Management LLC*, 171 Wn.2d 736, 751, 257 P.3d 586 (2011), WAPRO suggests that the 2014 legislature may have intended to clarify an ambiguous exemption for driver's license numbers. *WAPRO Br.* at 18-19. *Roe* is inapplicable because RCW 42.56.250(3) was (and is) unambiguous, *Roe*, 171 Wn.2d at 751, and the legislature clearly changed RCW 42.56.250(3) to add driver's license numbers to the list of items that are exempt in agency personnel records and mailing lists only. Laws of 2014, ch. 106; see RCW 42.56.250(3). The 2014 legislature did not amend RCW 42.56.240(1).

<sup>7</sup> WSAMA mistakenly assumes that driver's license numbers are categorically exempt under the privacy prong of RCW 42.56.240(1). *WSAMA Br.* at 6; see section B (above). WSAMA fails to note that the City also erroneously cited RCW 46.52.120, -.130, and DPPA as exemptions, CP 75-76, added additional incorrect exemption claims during litigation, and failed to retract any of those exemptions, even after Koenig explained that the exemptions were erroneous. See *App. Br.* at 15-29.

*WSAMA Br.* at 6. The most notable feature of these arguments is their total failure to address the plain language of RCW 42.56.210(3), which requires a *correct* statement and explanation of exemptions:

(3) Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.

RCW 42.56.210(3).<sup>8</sup> This statute employs the definite article “the,” the adjective “specific,” and the gerund “authorizing,” all in reference to a statute legally justifying the “withholding” of public records. It obligates agencies to state “the specific exemption authorizing the withholding of the record,” not one or more incorrect exemptions. By definition, an incorrect exemption cannot “authorize” withholding of a public record. The statute also requires a brief explanation of “how the exemption applies to the record,” and nothing in the text suggest that an incorrect exemption can be adequately explained.

Even if the language of RCW 42.56.210(3) were ambiguous, the language must be liberally interpreted in favor of public disclosure. RCW 42.56.030; *PAWS II*, 125 Wn.2d at 251. “Administrative inconvenience or

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<sup>8</sup> This language was part of the original 1972 Initiative 276. Laws of 1973, ch. 1, § 31; former RCW 42.17.310(4). The word “public” was added to former RCW 42.17.340(4) by Laws of 1975, 1st Ex. Sess., ch. 17, § 17.

difficulty does not excuse strict compliance with the PRA.” *Rental Housing Ass’n v. Des Moines*, 165 Wn.2d 525, 535, 199 P.3d 393 (2009).

WSAMA and WAPRO argue that the statement of exemptions and brief explanation required by RCW 42.56.210(3) is sufficient if it allows a requester to make a “threshold determination” of whether the agency’s exemptions are proper.<sup>9</sup> *WSAMA Br.* at 6; *WAPRO Br.* at 1-11. These arguments ignore the actual language of RCW 42.56.210(3) and take bits of this Court’s prior decisions out of context to suggest that incorrect exemption claims are sufficient as long as they are adequately explained.

Nothing in *PAWS II*, *Rental Housing*, or *Sanders* supports the argument that an incorrect exemption claim complies with RCW 42.56.210(3). Nor were those cases based on a free-floating policy analysis or an “expansion” of the PRA, as WAPRO suggests. *WAPRO Br.* at 7. In each of these cases the Court strictly enforced the actual language of the PRA, and rejected arguments that were inconsistent with the PRA and/or the requirement that the PRA be strictly interpreted and enforced.<sup>10</sup>

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<sup>9</sup> The phrase “threshold determination” is used in WAC 44-14-04004(4)(b)(ii), which is quoted in *Rental Housing*, 165 Wn.2d at 539.

<sup>10</sup> *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 246 P.3d 768 (2011), and *Resident Action Council v. Seattle Housing Authority*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (2014), also cited by amici curiae, mention RCW 42.56.210(3) only in passing.

*PAWS II* rejected the agency's argument that former RCW 42.17.330 (RCW 42.56.540) provided an additional substantive exemption because such an interpretation "would render the carefully crafted exemptions of [former] RCW 42.17.310 superfluous," and because the PRA repeats three times that exemptions must be construed narrowly. 125 Wn.2d 260-261. The Court also held, based on the plain language of former RCW 42.17.310(4), that the PRA prohibits "silent withholding." 125 Wn.2d at 270. The requirement that agencies identify all responsive records with particularity was based on "the plain terms" of the PRA and supported by the need for proper judicial review. 125 Wn.2d at 271.<sup>11</sup>

*Rental Housing* held that the one-year limitation period in RCW 42.56.550(6) did not begin to run until the agency provided a privilege log as required by RCW 42.56.210(3) and *PAWS II*. 165 Wn.2d at 538. *Rental Housing* rejected the agency's argument that the legislature did not intend the phrase "claim of exemption" in RCW 42.56.550(6) to require a privilege log, stating that "requiring a privilege log does not add to the statutory requirements, but rather effectuates them." 165 Wn.2d at 540.

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<sup>11</sup> Both WAPRO and WSAMA devote a substantial portion of their briefs to an irrelevant discussion of "silent withholding," which is clearly prohibited by the PRA. See *PAWS II*, 125 Wn.2d at 270. WSAMA argues at length that "Lakewood did not commit 'silent withholding'" even though Koenig has not argued otherwise. *WSAMA Br.* at 8-11. WAPRO urges the Court to "clearly distinguish" between silent withholding and what WAPRO characterizes as "lesser violations" of the PRA. *WAPRO Br.* at 6 n. 11. These arguments are not relevant to any issue raised by the parties.

*Sanders* held that merely identifying a record and specifying the exemption did not comply with the “brief explanation” requirement of RCW 42.56.210(3): “an agency withholding or redacting any record must specify the exemption *and* give a brief explanation of how the exemption applies to the document.” *Sanders*, 169 Wn.2d at 846. This Court also held, based on the plain language of RCW 42.56.550(4), that a violation of the right to receive a response requires an award of attorney fees whether or not records are wrongfully withheld. 169 Wn.2d at 848, 860.

WAPRO asserts that requiring a correct statement of exemptions would impose a “useless” burden on agencies. *WAPRO Br.* at 7. But an incorrect exemption claim may result in a wrongful denial of a request for records, and, as WSAMA acknowledges, an incorrect exemption claim forces the requester to retain “competent legal counsel” to determine whether an agency has violated the PRA. *WSAMA Br.* at 8. Where records are determined to be exempt for some reason other than the erroneous exemption cited by the agency, the cost of such “competent legal counsel” would fall on the requester unless the “right to receive a response” in RCW 42.56.550(4) includes the right to a *correct* explanation of why records are exempt. A correct explanation of exemptions is required by both the plain language of RCW 42.56.210(3) and the proper review and enforcement of the PRA. *See PAWS II*, 125 Wn.2d at 271.

Finally, WSAMA and WAPRO assert that requiring a correct statement of exemptions would unduly burden agencies. *WSAMA Br.* at 11-12; *WAPRO Br.* at 11-12. These complaints are nothing more than a bald policy argument from those public officials who cannot be trusted to interpret the PRA. *Hearst*, 90 Wn.2d at 131. Strict enforcement of the plain language of RCW 42.56.210(3) requires the Court to hold that incorrect exemption claims violate RCW 42.56.210(3) and the right to receive a response under RCW 42.56.550(4).

**D. Koenig never waived any of his claims with respect to driver's license numbers. Koenig repeatedly informed the City that its redactions were erroneous, inadequately explained, and in violation of RCW 42.56.210(3).**

WAPRO argues that Koenig "affirmatively waived" his right to attorney fees for the City's failure to properly respond to Koenig's PRA requests. *WAPRO Br.* at 3, 5, 12-18. Like the City, WAPRO makes no attempt to explain why an agency would be permitted to use discovery to shift the burden of PRA compliance to the requester. Instead, WAPRO misrepresents the record and Koenig's pleadings and discovery responses, and attempts to present new legal arguments that the City never raised.

Before this case was even filed Koenig told the City that its exemption claims for driver's license numbers were erroneous and/or inadequately explained, and Koenig specifically asked the City to explain

its redactions. CP 80-82. Koenig wrote:

In sum, the City has not established that driver's license numbers were properly redacted. Please explain these redactions as required by *PAWS II* and RCW 42.56.210(3).

CP 82. In other words, Koenig clearly told the City that proper redaction includes the duty to correctly explain why records have been redacted. In response, the City did not claim to be confused about what Koenig meant by "properly redacted." Instead, the City disagreed with Koenig's interpretation of *PAWS II* and RCW 42.56.210(3), asserted that the exemption for driver's license numbers was "self-evident," and refused to provide any "unnecessary explanation." CP 88.

At the very beginning of this case, Koenig told the City that it was improper for an agency to use PRA litigation to shift the burden of PRA compliance to the requester. Koenig's *Answer* stated:

The City seems to believe that it is entitled to respond to public records requests with ambiguous, poorly-researched, erroneous or otherwise insufficient exemption claims and then demand that the requester perform time-consuming legal research to determine whether the City's exemption claims are correct. Koenig and other requesters have no obligation to perform such research or to tell the City whether it has made yet another erroneous exemption claim.

CP 16. Koenig specifically denied that the City had properly redacted driver's license numbers. CP 17. The City wrongly believed that incorrect exemption claims complied with RCW 42.56.210(3), and

mistakenly assumed that proper redaction did not include the duty to correctly explain why driver's license numbers were exempt. But that assumption is directly contrary to the plain language of the PRA:

(3) Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.

RCW 42.56.210(3). In other words, the City failed to properly redact driver's license numbers because it did not explain, either to Koenig or this Court, why driver's license numbers are exempt.

In his discovery response Koenig unambiguously told the City that it had violated RCW 42.56.210(3) by citing incorrect exemptions:

See paragraph 3.5 in Koenig's *Answer* regarding the redaction of driver's license numbers. By citing inapplicable exemptions the City further violated RCW 42.56.210(3).

CP 180. Ignoring the second sentence above, WAPRO falsely asserts that Koenig's discovery response "simply referred the City to paragraph 3.5 in his answer." *WAPRO Br.* at 17.

On remand the City finally moved for summary judgment on whether driver's license numbers are exempt under the PRA. CP 59-71. Koenig filed a cross-motion, explaining that none of the City's exemptions were applicable, that the City had not carried its burden of proof, and that the City was liable for Koenig's attorney fees under RCW 42.56.210(3)

and *Sanders*. CP 107-134. In reply, the City argued that Koenig was attempting to create an issue of fact by contradicting his discovery responses. CP 184-185. Koenig's reply explained that the cases cited by the City dealt with inconsistent factual testimony and had no application where a party (the City) claims to have misunderstood the legal significance of an adversary's claims, and that Koenig's claims were not inconsistent with his discovery responses anyway. CP 197-198. Koenig also noted that the City did not claim to be surprised or prejudiced by Koenig's argument that the City was liable for violating RW 42.56.210(3).

At the motion hearing the City argued that Koenig was obligated to convince the court that driver's license numbers were *not* exempt, and that Koenig could not recover attorney fees under *Sanders, supra*, unless he carried that burden. VRP 3-5, 7-9. Koenig's undersigned counsel correctly refused to allow either the trial court or the City to shift the burden of proof to the requester. VRP 5-7. Apparently based on the City's incorrect analysis of *Sanders*, the trial court erroneously concluded that the only issue in the case was whether driver's license numbers were exempt, and the trial court granted the City's motion without explaining why driver's license numbers were exempt. CP 229; RP 9.

On appeal, the City made misleading factual arguments about Koenig's pleadings, and complained about Koenig's refusal to allow the

City to shift the burden of proof to Koenig. *Resp. Br.* at 2-5, 9-12. But the City did not renew its erroneous legal argument in the trial court regarding inconsistent testimony. *Id.* Koenig's reply brief explained that the City was attempting to shift the burden of PRA compliance to the requester, and that the City's unsupported procedural arguments were contrary to the purpose and structure of the PRA. *Reply Br.* at 4-8.

The Court of Appeals correctly held that (i) the City violated RCW 42.56.210(3) by failing to explain its exemptions, and (ii) the City is liable for attorney fees under RCW 42.56.550(4) and *Sanders. Lakewood*, 176 Wn. App. at 401. Like the trial court, the Court of Appeals simply ignored the City's unsupported, meritless procedural arguments. *Id.*<sup>12</sup>

The City argued for the first time in its *Petition* that Koenig's allegedly inconsistent statements trigger judicial estoppel under *Rushlight v. McLain*, 28 Wn.2d 189, 182 P.2d 62 (1947). Koenig's *Answer* at 10 explained that the City cannot raise a new issue in a petition for review. Furthermore, judicial estoppel requires a showing of prejudice. *Rushlight v. McLain*, 28 Wn.2d at 197. The City has never claimed to be surprised

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<sup>12</sup> The City filed its *Motion for Reconsideration*, presenting new erroneous arguments about appellate procedure and alleged defects in Koenig's assignments of error. Koenig responded, explaining that the City's understanding of appellate procedure was incorrect, and that the City had not objected to Koenig's assignments of error in its brief of respondent. *Answer to Mot. Recon.* at 1-4. The Court of Appeals correctly rejected the City's new arguments. *Order Denying Mot. Recon.*

or prejudiced by Koenig's claim that the City is liable under RCW 42.56.210(3), and the City has abandoned its judicial estoppel theory.<sup>13</sup>

- 1. Like the City, WAPRO ignores the burden of proof and makes no attempt to explain why an agency would be permitted to use discovery to shift the burden of PRA compliance to the requester.**

Koenig has repeatedly explained that the City has attempted to use discovery to shift the burden of PRA compliance to the requester. CP 16, 82, 193, 199; *App. Br.* at 12; *Reply Br.* at 4-8; *Answer to Mot. Recon.* at 8; *Answer to Petition* at 1, 6; *Koenig Supp. Br.* at 10-14. The burden of PRA compliance is on the agency. The agency has a statutory duty under RCW 42.56.210(3) to tell the requester why records are exempt. Allowing an agency to use discovery to shift those burdens to the requester is contrary to the plain language, structure, and purpose of the PRA. *Id.* In the earlier discovery appeal, the Court of Appeals noted that in FOIA litigation “[the government will not] be permitted to use discovery to frustrate the purposes of the FOIA.” *Lakewood v. Koenig*, 160 Wn. App. 883, 890, 250 P.3d 113 (2011) (quoting *Weisberg v. Webster*, 749 F.2d 864, 868 (D.C. Cir. 1984)). By conducting discovery, “the government does not,

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<sup>13</sup> The City's *Supplemental Brief* presents yet another misleading factual argument about Koenig's pleadings and discovery responses, and asserts that Koenig's alleged “change of position” somehow precludes this Court's review of the only legal issue actually decided in the published opinion of the Court of Appeals: whether the City is liable for violations of RCW 42.56.210(3) under *Sanders*. *Supp. Br.* at 2-3, 6-10. Once again, the City's argument is unsupported by any legal authority, and the City does not claim to be surprised or prejudiced.

and indeed cannot, shift the burden of proof placed on it by the statute.” *Weisberg*, 749 F.2d at 868. The City’s waiver arguments rest entirely on the assumption that an agency may use discovery to shift its burdens to the requester. **But the City has never addressed that legal issue in any of its pleadings or briefs.**

Similarly, WAPRO has failed to address the legal issue in any meaningful way. Instead, WAPRO resorts to a straw man argument. WAPRO argues that interrogatories are not objectionable under CR 33(b) merely because the propounding party has the burden of proof. *WAPRO Br.* at 17. But Koenig never objected to the City’s interrogatories on that basis. CP 180. Koenig argues that the City had no right to rely on Koenig’s interrogatory answer where the PRA (RCW 42.56.210(3)) expressly and unambiguously requires the City to determine whether records are exempt, and to explain those exemptions to the requester. *See Koenig Supp. Br.* at 12. WAPRO asserts that the City had the right to ask Koenig how the City had violated the PRA, but WAPRO fails to explain why the City was entitled to rely on Koenig’s answer. *WAPRO Br.* at 17.

As explained in section (C), WAPRO seeks to interpret RCW 42.56.210(3) PRA to force requesters to hire attorneys in order to obtain proper responses to PRA requests. The same is true with respect to WAPRO’s unwarranted assumption that an agency may use discovery to

shift the burden of PRA compliance to the requester. Suppose, hypothetically, that (i) an agency erroneously denied a request for records, (ii) the agency then sued the requester and submitted the same interrogatories to the requester that Lakewood submitted to Koenig in this case, and (iii) the pro se requester failed to respond to the interrogatories because he or she could not afford an attorney. If the City and WAPRO were correct, the agency would have no obligation to correct its erroneous exemption claims or to prove that the withholding of records was authorized by specific PRA exemptions as required by RCW 42.56.550(4).

The utter failure of WAPRO (and the City) to address this issue is no mere oversight. No legal authority or rationale allows agencies to misuse discovery in this way. WAPRO (and the City) are attempting to maneuver this Court into approving agency use of discovery to shift the burden of PRA compliance to the requester without any consideration of the consequences of such a ruling. Because the City and its supporting amici have failed to brief this issue, the Court should explicitly refuse to consider the argument that Koenig's pleadings and discovery responses "waived" his rights under the PRA.

2. **Like the City, WAPRO relies on a self-serving interpretation of Koenig's pleadings and discovery responses to create the misleading impression that Koenig waived his right to a proper explanation of why driver's license numbers were redacted.**

Setting aside WAPRO's total failure to address the legal issue , WAPRO takes bits of Koenig's pleadings out of context to concoct the misleading impression that Koenig waived any claim for a proper explanation under RCW 42.56.210(3). WAPRO notes that Koenig raised only the issue of whether the City "properly redacted" driver's license numbers, and then asserts—based on nothing more than WAPRO's own self-serving assumptions—that Koenig's demand for proper redaction included only a "right to inspect" claim. *WAPRO Br.* at 3, 5, 13, 14, 15. WAPRO does not cite anything to support its erroneous assumption that proper redaction means only a "right to inspect" claim.

Even before this case was filed Koenig told the City that proper redaction includes the duty to correctly explain why records have been redacted under RCW 42.56.210(3). Koenig wrote:

In sum, the City has not established that driver's license numbers were properly redacted. Please explain these redactions as required by *PAWS II* and RCW 42.56.210(3).

CP 82. In other words, Koenig clearly told the City that proper redaction includes the duty to correctly explain why records have been redacted. *Id.* WSAMA assumes that an agency can 'properly redact' records without

correctly explaining why the records have been redacted. Neither Koenig nor the lower courts ever accepted the City's tortured interpretation of the phrase "properly redacted," or the suggestion that Koenig waived his claim for a proper explanation of exemptions under RCW 42.56.210(3).<sup>14</sup>

Nor did Koenig use the phrase "only issue," as WAPRO repeatedly and erroneously asserts.<sup>15</sup> That phrase appears in a footnote in the Court of Appeals' opinion in the earlier discovery appeal.

The City redacted other information, but Koenig did not litigate those redactions. As such, the only issue is whether the City properly withheld driver's license numbers.

*Lakewood*, 160 Wn. App. at 886 n.1. This footnote correctly recognized that Koenig did not wish to challenge the City's redaction of other information, such as dates of birth. Like the City, WAPRO mischaracterizes this footnote to suggest that Koenig challenged only the bare fact that driver's license numbers were redacted and not the sufficiency of the City's exemption claims for driver's license numbers. But the Court of Appeals understood that Koenig had challenged the

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<sup>14</sup> Furthermore, the phrase "properly redacted" is not used in the PRA; that phrase was just Koenig's shorthand description of the City's duty to explain why driver's license numbers were exempt. WAPRO's argument might have had some merit if Koenig had actually used the terms "right to inspect" or "right to response" in his letters (above), *Answer*, or response to interrogatories. But he did not do so.

<sup>15</sup> WAPRO repeatedly asserts, without any citation to the record, that Koenig's *Answer* stated that the "only issue" was whether the City properly redacted driver's license numbers. *WAPRO Br.* at 3, 5, 14. In fact, the phrase "only issue" does *not* appear in the *Answer*. CP 15-18.

City's compliance with RCW 42.56.210(3), and did not accept the City's erroneous interpretation of its own prior opinion.

WAPRO also argues that Koenig's request for "penalties and attorney's fees under RCW 42.56.550(4)" (CP 18) shows that Koenig was pursuing only a "right to inspect" claim. *WAPRO Br.* at 14, 16. This argument makes no sense. RCW 42.56.550(4) encompasses *both* the right to "right to receive a response" and the "right to inspect." *See Sanders*, 169 Wn.2d at 860. Nothing in Koenig's pleadings supports WAPRO's erroneous argument that Koenig pursued only a "right to inspect" claim.

Finally, WAPRO repeatedly accuses Koenig and his undersigned counsel of attempting to "switch" from a "right to inspect" claim to a "right to response" claim. *WAPRO Br.* at 13, 15, 17. These arguments are entirely based on WAPRO's mischaracterization of Koenig's pleadings and on WAPRO's own incorrect understanding of RCW 42.56.210(3).<sup>16</sup>

**3. WAPRO's additional procedural arguments are meritless and cannot be raised by amicus curiae.**

The City's procedural arguments have changed each time this case has moved up to a higher court. The City argued about inconsistent

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<sup>16</sup> WAPRO speculates that Koenig attempted to bring a right to response claim on remand from the discovery appeal because Koenig "now had the benefit of the *Sanders* decision." *WAPRO Br.* at 17. *Sanders* was issued on September 16, 2010. Months before that date Koenig argued in his briefs in the discovery appeal that there is no requirement in RCW 42.56.550(4) that Koenig cause the disclosure of records in order to be awarded attorney fees, and that fees should be awarded for any violation of the PRA, including a failure to explain exemptions. *App. Br.* (No. 38657-7-II) at 27; *Reply Br.* (No. 38657-7-II) at 20.

factual testimony in the trial court (CP 184-185), provided no legal argument in its *Resp. Br.*, argued about appellate procedure in its *Motion for Reconsideration*, and then argued “judicial estoppel” in its *Petition* at 13. These arguments were not only meritless—and rejected or ignored by the lower courts—but also barred by RAP 2.5(a).

Nonetheless, WAPRO attempts to add more meritless procedural argument to the pile. First, WAPRO argues that Koenig failed to plead a “right to response” claim under CR 8. *WAPRO Br.* at 13-14. This argument is entirely based on WAPRO’s misleading characterization of Koenig’s *Answer*, which specifically denied that the City had properly redacted driver’s license numbers, and Koenig’s discovery response, which clearly told the City that it had violated RCW 42.56.210(3).

WAPRO also argues that if Koenig had sought to amend his complaint to include a “counterclaim” such an amendment would have been denied. *WAPRO Br.* at 15-16. This argument relies on WAPRO’s mistaken assertion that Koenig’s *Answer* presented only a “right to inspect” claim, and on WAPRO’s false assertion that Koenig’s pursuit of a “right to response” claim on remand from the first appeal “was prejudicial to the City and thus properly rejected by the trial court.” *WAPRO Br.* at 18. In fact, (i) the City has never claimed to be surprised or prejudiced by Koenig’s argument that the City is liable for violating RCW 42.56.210(3),

and (ii) the trial court did not even mention, much less accept, the City's procedural arguments. The trial court order, drafted by the City, states:

Pursuant to CR 56, there are no material issues of fact in dispute; the driver's license numbers exempted by the City of Lakewood in response to Mr. Koenig's Public Records Act (PRA), chapter 42.56 RCW requests are properly exempt from disclosure as a matter of law. Mr. Koenig's claims that the City made claimed improper exemptions is not, as a matter of law, a viable basis for liability under the PRA.

CP 229. Nothing in this order supports WAPRO's allegation of prejudice to the City or its false statement that the trial court accepted the City's procedural arguments. The order shows only that the trial court bought the City's argument that an agency could not be liable for attorney fees unless the *requester* established that records were improperly withheld.

Not only are WAPRO's procedural arguments based on mischaracterization of the facts, those arguments cannot be considered because the City has not preserved them. *Gonzalez*, 110 Wn.2d at 752 n. 2. By focusing on meritless procedural arguments that the lower courts never addressed, WAPRO has wasted this Court's time, and forced Koenig to incur even more attorney fees for which the City is liable.

### **III. CONCLUSION**

This Court should reject the attempts of WSAMA and WAPRO to weaken the PRA and shift the burden of PRA compliance to the requester.

RESPECTFULLY SUBMITTED this 29th day of May, 2014.

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**Certificate of Service**

I, the undersigned, certify that on the 29th day of May, 2014, I caused a true and correct copy of *Respondent Koenig's Answer to Amicus Curiae Briefs of WSAMA and WAPRO* and *Motion to File Single Overlength Answer to Multiple Briefs of Amici Curiae* to be served, by the method(s) indicated below, to the following person(s):

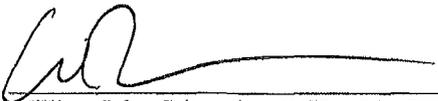
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Dear Clerk-

Enclosed please find respondent Koenig's (i) Respondent Koenig's Answer to Amicus Curiae Briefs of WSAMA and WAPRO, and (ii) Motion to File Single Overlength Answer to Multiple Briefs of Amici Curiae.

Thank you.

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