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No. 89648-8

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF LAKEWOOD, A Municipal Corporation of the State of
Washington,

Petitioner,

Vs.

DAVID KOENIG, individually,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

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I. INTRODUCTION

Because the City of Lakewood redacted driver's license numbers, the Washington Court of Appeals directed the City of Lakewood to pay David Koenig's attorney fees pursuant to the Washington Public Records Act (PRA), chapter 42.56 RCW.

Although it has been recognized as a broad mandate for the full and fair disclosure of public records, the PRA contains an outer limit. As this Court recently recognized, the "PRA's exemptions are provided solely to protect relevant privacy rights or vital governmental interests that sometimes outweigh the PRA's broad policy in favor of disclosing public records." *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 432, 300 P.3d 376 (2013). In this day and age, common sense dictates that the identifiers at issue here are worthy of protection. Yet, while Lakewood was trying to protect this information, the Court of Appeals, observed that "the failure to include an express PRA exemption that ... protects the release of personal identifying information appears to be an unfortunate oversight." *City of Lakewood v. Koenig*, 176 Wn. App. 397, 404 fn. 3, 309 P.3d 610 (2013), *pet. for review granted*, 179 Wn.2d 1022 (2014).

Under this Court's analysis in *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010), RCW 42.56.550(4) provides for attorney fees and

other remedies for an alleged violation of one of two rights under the PRA. This Court has styled these rights as “the right to inspect or copy” and “the right to receive a response.” 169 Wn.2d at 860. Although closely related, *Sanders* recognized that these two rights are distinct. Lakewood violated neither.

In 2008 – six years ago – Mr. Koenig identified in his court filings one disagreement with the City’s production: Lakewood had “redacted driver’s license numbers from requested records based on the erroneous assertion that such information is exempt,” under a variety of state and federal legal authorities. (CP 17, ¶ 3.5; *see also*, CP 17, ¶ 4.1). He specifically disclaimed seeking relief on any other ground. In his words,

It is possible, if not likely in light of the City’s prior behavior, that the City has violated the PRA in other respects. However Koenig does not care to litigate other possible violations so the matter is moot and/or nonjusticiable. [Citations omitted].

(CP 17, ¶ 3.5; emphasis added).

Mr. Koenig’s other court filings and discovery responses, an earlier Court of Appeals decision and the superior court’s grant of summary judgment confirm that it was only the “right to inspect” that was at issue:

- His 2008 sworn interrogatory answers identify no misunderstanding of what was redacted by Lakewood and contain no

claim of misunderstanding the City's redactions when it withheld driver's license numbers.

- In 2011, the Court of Appeals, in addressing a discovery dispute between these parties, noted that this case presented a single issue, "the only issue is whether the City properly withheld driver's license numbers." *City of Lakewood v. Koenig*, 160 Wn. App. 883, 886 fn. 1, 250 P.3d 113 (2011).

- The Pierce County Superior Court granted summary judgment to Lakewood. In doing so, the superior court confirmed that it was "looking at the sole issue of whether or not driver's license issues are exempt, and [the Court] think[s] they are." VRP 9.

Rather than focus limited judicial resources on the issue framed, reached and decided by the Superior Court, Mr. Koenig picked a new issue: whether Lakewood adequately explained its claims of exemption. The Court of Appeals agreed and reversed the superior court.

In doing so, the Court of Appeals misapplied this Court's holding in *Sanders*. The Court of Appeals holding contains an additional casualty. The alleged "unfortunate oversight" identified by the Court of Appeals to include an express PRA exemption comes at a price of more than just attorney fees. It eviscerates any notion that government is responsible for the protection of the privacy of the everyday citizen. The result: the

driver's license number and other personal identifiers of every Washingtonian are subject to inspection under the PRA. Such a holding diminishes, rather than promotes, those tools of open government.

The Court of Appeals decision in this case should be reversed. In doing so, this Court should (1) clarify the scope of its holdings in *Sanders* the "right to receive a response," and the "right to inspect;" (2) based on Mr. Koenig's failure to identify the sufficiency of the City's exemptions as an issue, deem that he waived the right to challenge those issues before the Court of Appeals; and (3) hold that personal identifying information, such as the driver's license numbers here, are exempt from disclosure.

II. ARGUMENT

Under the PRA, "an agency can petition for a judicial determination that records are exempt from disclosure." *Soter v. Cowles Publishing Co.*, 162 Wn.2d 716, 723, 174 P.3d 60 (2007). In *Soter*, this Court recognized that agencies may seek judicial review; "[w]e conclude that pursuant to RCW 42.56.540, a state or local government entity can seek judgment in superior court as to whether a particular record is subject to disclosure under the Public Records Act." *Id.*, 162 Wn.2d at 723.

Prompting the City to bring suit for declaratory relief, Lakewood identified three cases (one of which also involved the City) where Mr. Koenig had waited until the expiration of RCW 42.56.550(6)'s one-year

statute of limitations before filing suit and then consuming nearly all of the ninety-day tolling period under RCW 4.16.170 and CR 3 before effectuating service of process. *See also, Koenig v. Pierce County*, 151 Wn. App. 221, 226-227, 211 P.3d 423 (2009), *rev. denied*, 168 Wn.2d 1023 (2010)(noting almost three month delay between filing and sending complaint out for service of process). Given these instances of a nearly fifteen month delay, the advantage to commencing suit “is that the agency can obtain quick judicial review, curbing, but not eliminating, the accumulation of the per diem penalties,” should there be a violation of the PRA. *Soter*, 162 Wn.2d at 756. But, as we explain below, in protecting these personal identifiers, Lakewood did not violate the PRA.

A. The Court of Appeals Misapplied *Sanders v. State*.

The relevant portion of the PRA which governs is RCW 42.56.550(4). This statute currently provides in full:¹

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for

¹ While this case was pending, RCW 42.56.550(4) was amended. Laws 2011, ch. 271, § 1. Pre-amendment, the statute previously provided for a five dollar per day minimum penalty for the unlawful withholding of a public record. This amendment does not affect the City’s analysis. Therefore, the current version of the statute is cited.

each day that he or she was denied the right to inspect or copy said public record.

In *Sanders*, this Court recognized that RCW 42.56.550(4) provides for two different rights. Borrowing from the statutory text, this Court has styled them as “the right to inspect or copy” and “the right to receive a response.” 169 Wn.2d at 860. A violation of either allows for attorney fees to a prevailing requester, but only a violation of the former triggers per-day penalties. *Id.*; see also, *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 809, 246 P.3d 768 (2011)(quoting, *Sanders supra*).

Sanders recognized that these two rights are related, but distinct:

Because of this difference, the penalty section does not expressly authorize a freestanding penalty for the failure to provide a brief explanation. It is the “response” that is insufficient when the brief explanation is omitted. See RCW 42.56.210(3) [parenthetical omitted]. In contrast, the right to inspect or copy turns on whether the document is actually exempt from disclosure, not whether the response contained a brief explanation of the claimed exemptions.

169 Wn.2d at 860-861 (footnoted citation, some internal citations and emphasis by the Court omitted; underlined emphasis added).

As we outline herein, Mr. Koenig put “the right to inspect or copy” squarely at issue in his trial court pleadings. But for the first time after the 2011 appeal, challenged “the right to receive a response.” Mr. Koenig lost the right to challenge compliance with the former by not assigning error to

it on appeal, and he waived the right to assert a violation of the latter by expressly forfeiting it before the trial court.

1. The “Right to Receive a Response” Was Never Identified as an Issue Until After the 2011 Court of Appeals Decision.

Mr. Koenig’s pleadings and discovery response all focus on what he labeled an “erroneous assertion” by the City that driver’s license numbers are exempt from disclosure. At the inception of this case, Mr. Koenig asserted that this was his theory. Both the trial court and the Court of Appeals in the 2011 appeal accepted the framing of this issue.

Given the opportunity to specify whether he believed that Lakewood “made any improper/incorrect redactions or claimed improper/incorrect exemptions to production,” or whether “there [were] any claims of exemption or redaction which [he] d[id] not understand,” apart from the above-cited cross-reference in his answer, he failed to identify any such exemptions or records. (CP 176 (Interrogatories Nos. 9 & 10); CP 180 (Answers to Interrogatories Nos. 9 & 10)). What he did claim in response to the City’s query of whether it violated the PRA, is that he claimed that the City cited “inapplicable exemptions,” in alleged violation of RCW 42.56.210(3)(CP 177 (Interrogatory No. 13); CP 180 (Answer to Interrogatory No. 13)).

Relying on these statements, in granting summary judgment to the City, the Superior Court appropriately recognized that the only issue before it was whether driver's license numbers are exempt:

The Court: ... I am looking at the sole issue whether or not driver license issues are exempt, and I think they are. And that's my ruling. And - -

[Counsel for Mr. Koenig]: Could you state why they are exempt, please, for the record?

The Court: It's set forth in the statute.

[Counsel for Mr. Koenig]: Which statute?

The Court: It's all in the briefing. I am adopting the City's legal analysis.

(VRP 9).

Mr. Koenig's statements, the 2011 Court of Appeals decision and the Superior Court's analysis squarely frames the "right to inspect or copy," identified by *Sanders* as to sole issue in this matter.

2. Mr. Koenig's Change in Position Precludes Appellate Review of Either of the Rights Outlined in *Sanders*.

The trial court's oral decision is unambiguous: it ruled that driver's license numbers were exempt. Mr. Koenig did not assign error to that decision. What he did instead was identify an "issue" that the trial court did not rule upon, and which he affirmatively stated that he did not care to litigate. Upon returning to the Court of Appeals a second time, Mr.

Koenig identified a new issue: “[w]hether the City has explained why driver’s license numbers are exempt under the PRA.” Brief of Appellant at p. 4, ¶ II (Issues Pertaining to Assignment of Error). This suggests that the “right to receive a response,” is now the issue.

As excerpts of the two opinions generated by Court of Appeals, when placed side-by-side illustrate (with emphasis added), one questions whether this is the same case;

2011	2013
The City redacted other information, but Koenig did not litigate those redactions. As such, <u>the only issue</u> is whether the City properly withheld driver's license numbers.	[W]e do not resolve the question of whether the City <u>properly redacted</u> driver's license numbers in the disclosed records (an issue not before us in this appeal) ...
160 Wn. App. at 886 fn. 1.	176 Wn. App. at 404, fn. 3.

Mr. Koenig did not assign error to the trial court’s decision that driver’s license numbers were exempt from disclosure. The Court of Appeals properly recognized that this issue was not before it. 176 Wn. App. at 404, fn. 3. Appellate review of this issue should be barred. RAP 10.3(g).

Mr. Koenig lost the right to challenge compliance with either of the rights outlined in *Sanders*. The “right to receive a response,” was disavowed as an issue in his 2008 filings. The “right to inspect,” was lost

by the failure to assign error to it before the Court of Appeals. Regardless, in the interests of completeness and without waving the right to contest Mr. Koenig's ongoing ability to manufacture new arguments, we address how the City of Lakewood has complied with both of these rights.

B. Even if the Right to Receive a Response Was Properly Before any Lower Court, Mr. Koenig's Previous Representations and this Court's Holdings Confirm that he Received a Proper Response.

RCW 42.56.210(3) governs an agency's obligations when it denies a request. It provides,

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.

The "brief explanation" requirement contained in RCW 42.56.210(3) is one aspect of the right to receive a response under RCW 42.56.550(4). *Sanders*, 169 Wn.2d at 848.

The Court of Appeals and Mr. Koenig read the language in *Sanders* too broadly. Read in context with the records at issue in *Sanders* and in conjunction with other Washington holdings, Lakewood claims of exemption were proper.

In *Sanders*, the agency (the Office of the Attorney General) identified the withheld documents on two general grounds, the attorney-

client privilege and the work product privilege. 169 Wn.2d at 840. The AGO's disclosure log "did not contain any facts or explanation of how its claimed exemptions applied to each document withheld." *Id.*, 169 Wn.2d at 837. What the AGO did was to identify certain properties of the withheld documents, which included the document's author, recipient, date of creation, and broad subject matter along with its specification of the exemption. 169 Wn.2d at 845.

In rejecting the adequacy of the AGO's production, this Court observed:

The identifying information about a given document does not explain, for example, why it is work product under the PRA's "controversy" exemption. Allowing the mere identification of a document and the claimed exemption to count as a "brief explanation" would render the brief-explanation clause superfluous.

Sanders, 169 Wn.2d at 846 (internal citation and parenthetical omitted).

The purpose behind the brief explanation rule is simple and straightforward; "[c]laimed exemptions cannot be vetted for validity if they are unexplained." *Sanders*, 169 Wn.2d at 846. Impeding the ability of the requestor and the trial court to evaluate the claim of exemption was that the level of detail over the records was insufficient.

As this Court has separately held, the description of the document and the grounds for withholding, "need not be elaborate," but should

include basic identifying documentation of the document. *See e.g., Progressive Animal Welfare Soc'y v. Univ. of Wash*, 125 Wn.2d 243, 271 fn. 18, 884 P.2d 592 (1994). This Court has also explained, “[i]n order to ensure compliance with the statute and to create an adequate record for a reviewing court, an agency's response to a requestor must include specific means of identifying any individual records which are being withheld in their entirety.” *Id.*, 125 Wn.2d at 271. In a footnote, this Court identified what information about the record should be provided:

The identifying information need not be elaborate, but should include the type of record, its date and number of pages, and, unless otherwise protected, the author and recipient, or if protected, other means of sufficiently identifying particular records without disclosing protected content. Where use of any identifying features whatever would reveal protected content, the agency may designate the records by a numbered sequence.

125 Wn.2d at 271, fn.18

This Court, pre-*Sanders*, has noted that an agency must provide enough information so as to allow a requestor and a court to determine three things:

(1) what individual records are being withheld, (2) which exemptions are being claimed for individual records, and (3) whether there is a valid basis for a claimed exemption for an individual record.

Rental Hous. Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 540, 199 P.3d 393 (2009).

In *Rental Hous. Ass'n*, the Court cited with approval a portion of the Attorney General's Model Rules for Public Disclosure, WAC 44-14-04004(4)(b)(ii). 165 Wn.2d at 539. That rule reflects that the explanation "should provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper." Id.

Sanders, read together with *PAWS* and *Rental Housing Ass'n*, reflects that the level of detail will necessarily be different depending on the record. For some records, such as those claimed as privileged or where a record is withheld in its entirety (as in *Sanders*), an increased level of detail will likely be necessary to make this threshold determination and put the stated exemption in context. For others, such as those here, the nature of the withheld record is evident on its face. Yet other records may fall between these two extremes. In other words, the level of explanation will be primarily (but not exclusively) records-centric – not exemption-centric. Wherever the line might be, "[i]t is the 'response' that is insufficient when the brief explanation is omitted." *Sanders*, 169 Wn.2d at 860 (citing, RCW 42.56.210(3)(emphasis added).

In this case, the City did provide a "brief explanation," and "cit[ed] the statute[s] the [City] claims grants an exemption from disclosure." WAC 44-14-04004(4)(b)(ii). Both the trial court and Mr. Koenig had no difficulty in ascertaining what was claimed as exempt from disclosure by

Lakewood. Prior to this litigation, in a series of letters, Lakewood twice explained its exemption claims. (CP 75-77, CP 86-89). Mr. Koenig was able to identify the City's claimed grounds for exemption. (CP 79-84). The real issue, appears to focus on Mr. Koenig's assertion that the City's stated grounds "erroneous[ly] assert[ed] that such information is exempt[.]" (CP 17, ¶ 3.5). In doing so, he also averred that "he did not make a final determination whether the City's exemptions claims were actually correct until [post-suit]." (CP 16, ¶ 3.4).

To interpret the "brief withholding," as suggested by Mr. Koenig is incongruent with this Court's precedent and with the PRA itself. If an agency were to provide too much detail, and over-claim exemptions "agencies' responses to PRA requests would be too slow." *Sanders*, 169 Wn.2d at 847. Similarly, an agency is not bound by its initial responses and may supplement once suit is filed. *Sanders*, 169 Wn.2d at 847 (citing, *PAWS*, 125 Wn.2d at 253). Indeed, it is ultimately immaterial what legal grounds Lakewood may have asserted; an agency's interpretation of a statute is accorded no deference. *See e.g., Chi. Title Ins. Co. v. Office of Ins. Comm'r*, 178 Wn.2d 120, 133, 309 P.3d 372 (2013). And, litigating the propriety of a claimed exemption where there is no claim that the document itself has been wrongfully withheld comes squarely within the confines of the maxim *de minimis non curat lex*. Given the opportunity to

state for the trial court whether he believed that driver's license numbers were wrongfully withheld, Mr. Koenig – twice – declined to respond. (VRP 5).

Mr. Koenig's answer, read together with his discovery responses, confirms that Mr. Koenig was able to make a "threshold determination" whether the exemption was proper. WAC 44-14-04004(4)(b)(ii). And, the claims of exemption allowed both Mr. Koenig and the trial court to determine what was being withheld, what grounds were invoked and whether there was a basis for such withholding. Lakewood complied with the "brief withholding," requirement.

C. This Court Should Take the Opportunity to Confirm that the PRA Protects Personal Privacy Rights and that Lakewood Properly Protected These Rights.

"To the extent necessary to prevent an unreasonable invasion of personal privacy interests protected by the PRA, the agency shall redact identifying details and produce the remainder of the record." *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 407-408, 259 P.3d 190 (2011)(plurality)(citing, RCW 42.56.070(1)). Driver's license numbers are one such personal privacy interest for which redaction is appropriate.

"The general purpose of the exemptions to the Act's broad mandate of disclosure is to exempt from public inspection those categories of

public records most capable of causing substantial damage to the privacy rights of citizens or damage to vital functions of government.” *Limstrom v. Ladenburg*, 136 Wn.2d 595, 607, 963 P.2d 869 (1988)(citing, *PAWS*, 125 Wn.2d at 273 (Andersen, C.J., concurring)).

This Court has previously recognized that the release of social security numbers is highly offensive to a reasonable person and not of legitimate concern to the public. *PAWS*, 125 Wn.2d at 254. In doing so, the Court cited to what is now codified as RCW 42.56.050. Particularly noteworthy is that, although this Court recognized that the statute contains a two-part analysis, this Court’s treatment of the issue largely consists of one sentence: “[i]t is true that the disclosure of a public employee’s Social Security number would be highly offensive to a reasonable person and not of legitimate concern to the public.” *Id.*, 125 Wn.2d at 254. If it was this obvious for the Court when *PAWS* was decided in 1994 that social security numbers are exempt from disclosure, it should be just as obvious today for related personal identifiers, such as driver’s license numbers.

After this Court’s pronouncement in *PAWS* relative to social security numbers, government has given increased attention towards protecting these personal identifiers.

On the legislative front, in 2002, chapter 19.215 RCW was enacted. Laws 2002, ch. 90. This statutory scheme directs that a

governmental entity is to “take all reasonable steps to destroy, or arrange for the destruction of ... personal identification numbers issued by government entities in an individual's records within its custody or control when the entity is disposing of records that it will no longer retain.” RCW 19.215.020(1). Driver’s license numbers are specifically included as such a personal identifier. RCW 19.215.010(5).

Within the PRA, codified at RCW 42.56.590, is a provision which specifically requires a government agency to disclose any security breach of its computer systems wherein unencrypted personal information may have been released. RCW 42.56.590(1). Driver’s license numbers are included. RCW 42.56.590(5)(b). It is incongruent on one hand, to require an agency to produce these records in response to a PRA request, yet on the other be required to provide notice when these records are disclosed.

The judiciary has also gotten involved. Recently, this Court has promulgated a series of rules which direct litigants not to file these personal identifiers with a court. *See e.g.*, GR 22. Further, although the rule is not yet effective, this Court has also signaled that as to those personal privacy materials (including driver’s license numbers) which a court might possess, will not be subject to public disclosure. *See* GR

31.1(l)(5).² At the federal level, the Federal Driver's Privacy Protection Act of 1994 (FDPPA), 18 U.S.C.S. § 2721 et seq., provides protection. And, as Mr. Koenig acknowledged, the City identified it as a basis for exempting these records. (CP 17, ¶ 3.5). The Supreme Court recognized the FDPPA imposes civil liability on those who obtain, disclose or use personal information, which includes driver's license numbers. *Maracich v. Spears*, 133 S. Ct. 2191, 2199 (2013). The disclosure of this information may trigger liquidated damages against the disclosing agency. See, *Senne v. Vill. of Palatine*, 695 F.3d 597 (7th Cir. 2012), *cert denied*, 133 S. Ct. 2850 (2013).

Thus, in any event, these personal privacy identifiers are exempt from disclosure. This Court should take the opportunity to so hold.

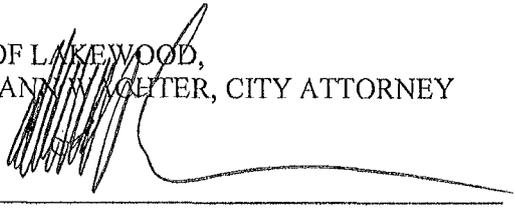
² And, whether it was directed to the subject matter of this case or a form letter sent in all cases (the latter being more likely), in this case, upon receipt of Lakewood's *Petition for Review*, this Court's Clerk directed the parties to the provisions of GR 31(e) directing the parties not file documents containing personal identifiers, including driver's license numbers. Letter, *City of Lakewood v. David Koenig*, No. 89648-8 (Wash. Dec. 13, 2013). This Court's Clerk added "it is imperative that such personal identifiers not be included in filed documents." *Id.* at p. 2.

CONCLUSION

This Court should reverse the decision of the Court of Appeals in this matter.

DATED: April 4, 2014.

CITY OF LAKEWOOD,
HEIDI ANN WALTER, CITY ATTORNEY

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, I served the foregoing on the following individuals by the following indicated methods:

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The undersigned hereby declares, under penalty of perjury, that the foregoing statements are true and correct.

Executed at Lakewood, Washington this 4th day of April, 2014.


Max Bowie

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Rec'd 4-4-14

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