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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.

**PETITIONER'S RESPONSE TO AMICUS ALLIED DAILY
NEWSPAPERS OF WASHINGTON, WASHINGTON NEWSPAPER
PUBLISHERS ASSOCIATION, AND THE WASHINGTON
COALITION FOR OPEN GOVERNMENT**

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 ORIGINAL

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I. INTRODUCTION

Pursuant to this Court's Letter Order of May 20, 2014, the City of Lakewood responds to the brief of Amicus, Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association and the Washington Coalition for Open Government.

II. POINTS AND AUTHORITIES

The Washington Public Records Act (PRA), chapter 46.52 RCW "brief explanation," requirement, serves a simple purpose. It allows the requestor and a reviewing court to (1) determine what materials, if any, were withheld; and (2) the grounds for the withholding. *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 250, 884 P.2d 592 (1994); *Sanders v. State*, 169 Wn.2d 827, 846, 240 P.3d 120 (2010). In this case, that purpose was satisfied. The concerns of Amicus are not borne out by this record, and when evaluated in context of this requirement, are misplaced.

A. The "Brief Explanation," Requirement Serves to Allow a Court and Requestor to Make a Threshold Determination of Whether the Record is Exempt.

Courts have held that the purpose of the "brief explanation" requirement under RCW 42.56.210(3) is two-fold. The first is that it allows a requestor to make a threshold determination whether a record is

exempt from disclosure. The second is that it allows a court to review an agency's claim of exemption. In this case, both goals were accomplished.

With respect to Mr. Koenig's ability to make a threshold determination, one needs to look only to Mr. Koenig's statements to realize as much. Mr. Koenig framed the issue thusly for the Superior Court in the early stages of this litigation,

The *only* substantive issue in this case is whether the City properly redacted driver's license number from certain investigative records requested by Koenig under the [PRA]. The City's burdensome discovery requests have absolutely nothing to do with the dispositive question of whether such redactions were appropriate.

(CP 362-363; emphasis in original).

In determining whether the redactions were appropriate presupposes that the requestor and the court were informed of the grounds of the exemption in the first instance. Here, there is no question that Mr. Koenig was so informed.

Although an exemption log is but one part of the legal analysis in determining whether a requestor has enough information to determine whether an exemption applies, it does not tell the entire story. The PRA "closely parallels the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1970), as amended, (Supp. V, 1975), and thus judicial interpretations of that act are particularly helpful in construing our own."

Hearst Corp. v. Hoppe, 90 Wn.2d 123, 128, 580 P.2d 246 (1978). Hence, federal cases interpreting FOIA find it appropriate to also evaluate those statements made by a requestor in determining whether a responding agency has discharged its obligations, and it is those statements in this case made by Mr. Koenig which address amicus' concerns and resolve this case in Lakewood's favor.

“It is the function, not the form, which is important, and the question is whether the particular taxonomy employed affords the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding.” *Church of Scientology Int'l v. United States Dep't of Justice*, 30 F.3d 224, 231 (1st Cir. 1994)(internal citations and quotations omitted). The level of detail “required in a particular case will, however, depend upon the nature of the document at issue and the particular exemption asserted.” *Information Acquisition Corp. v. Department of Justice*, 444 F. Supp. 458, 462 (D.D.C. 1978). This result follows because the index requirement is, under FOIA, “not ends in themselves, but only means by which the FOIA plaintiff gains the ability to present its case effectively.” *Id.* (internal citations and quotations omitted). But, in those instances, where a requestor is knowledgeable about the grounds, additional detail is

unnecessary. *Brown v. FBI*, 658 F.2d 71, 74 (2d Cir. 1981)(internal citations omitted; emphasis added).

In this case, the correspondence from Mr. Koeing, his Answer and his other in-court statements refutes any claim that he did not know what was being withheld and Lakewood's stated grounds for withholding. No amount of reformatting or wordsmithing would have altered this outcome.

Dispositive on this issue is that Mr. Koenig's own discovery responses read in tandem with his answer confirm that ultimately the adequacy of the exemption log was a non-issue for him. Mr. Koenig affirmatively represented that aside from the City's (allegedly) "erroneous assertion that [driver's license numbers are] exempt," on multiple grounds, and that he "d[id] not care to litigate any possible violations[.]" (CP 17). He was asked in discovery what other possible PRA violations Lakewood may have committed. Yet, he did not identify a failure to supply a "brief explanation," as one of those violations. The closest he comes arises in his response to Interrogatory No. 13 wherein he claims that "[b]y citing inapplicable exemptions the City further violated RCW 42.56.210(3)." (CP 180 (Answer to Interrogatory No. 13)).

Where the withheld records are withheld on wholly legal grounds, additional detail in an exemption log is unnecessary because "[t]he parties are equally capable of addressing the legal question by analyzing the

applicable statutes.” *Minier v. CIA*, 88 F.3d 796, 804 (9th Cir. 1996). If Mr. Koenig genuinely believed that the City failed to adequately explain what had been withheld, he had an opportunity to identify this as an issue early in the litigation.¹ He chose to make the affirmative waiver and both he, and amicus, must necessarily live with the consequences of his failure to do so.

B. Amicus Fails to Make a Persuasive Case for Withholding Personal Identifiers Such as Drivers License Numbers.

Throughout these proceedings, Lakewood has steadfastly maintained that driver’s license numbers are exempt from disclosure on a number of grounds. And, contrary to the claims of amicus, Lakewood has not engaged in burden shifting. (Amicus Br. at p. 2). Rather, Lakewood identified a number of statutes and posed cogent arguments as to why these materials were exempt. The trial court agreed and “adopt[ed] the City’s legal analysis.” (VRP 9). Not only does the trial court’s statement evidence that it was able to vet the exemption for validity, satisfying the “brief withholding,” requirement. *Sanders*, 169 Wn.2d at 846. Mr. Koenig did not assign error to the trial court’s determination that these materials were exempt from disclosure.

¹ Both his interrogatory responses and his answer were served upon Lakewood on the same day. (CP 18, 182).

To-date, neither Amicus nor Mr. Koenig have provided a countervailing theory or argument as to why, as a wholly practical matter, this Court should reach a contrary outcome. Lakewood carried its legal burden before the superior court to demonstrate why these identifiers are exempt and has continued to advance this argument in the appellate courts.

At best, Amicus has taken aim at the statutes cited by the City. But with the trial court having ruled in Lakewood's favor, it fails to advance some theory – any theory – why this sort of information is subject to release. Reciting additional legal authorities at this juncture would be duplicative of the briefing on-file. And, as we illustrated in our other briefs (which also does not require further and extensive briefing here), both this Court and the Legislature have imposed strong protections towards ensuring that this sort of information is not available for public dissemination. The decision to afford public protection of these identifiers has already been made.

Amicus fails to provide any contrary theory which would appeal to the citizenry, or the court as to why personal identifiers in the form of driver's license numbers should be freely releasable.

CONCLUSION

Amicus raises no concerns justifying affirmance of the decision of the Court of Appeals. This Court should reverse the decision of the Court of Appeals in this matter.

DATED: May 29, 2014.

CITY OF LAKEWOOD,
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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.

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