

NO. 64818-7-I

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

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FREDERICK J. FISCHER,

Plaintiff/Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Defendant/Appellee.

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**ANSWERING BRIEF OF APPELLEE**

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## I. INTRODUCTION

The Appellant in this case is a Washington State inmate who requested copies of prison surveillance videotapes which he asserted would show an attack on him by another prisoner. The Department of Corrections (DOC) denied Appellant's request asserting that prison surveillance videotapes are exempt from disclosure under RCW 42.56.240(1). DOC established its entitlement to exempt surveillance videotapes from disclosure with the unrefuted declaration of Washington Prison Administrator Richard Morgan who established the deleterious effects on prison safety and security of disclosing prison surveillance videotapes to inmates. After fully considering the parties' briefing and hearing oral argument from the parties, the trial court correctly concluded that DOC had established that prison surveillance videotapes are exempt from disclosure and dismissed Appellant's Public Records Act (PRA) action:

The video recordings in question constitute specific intelligence information compiled by a law enforcement and penology agency and are exempt from disclosure pursuant to RCW 42.56.240(1). Disclosure of such recordings would negatively impact the DOC's ability to maintain security in its correctional facilities and to address infractions in those facilities. Therefore, Mr. Fischer is not entitled to disclosure of the recordings.

*See* CP 21, Memorandum Decision.

Appellant now appeals the trial court's considered decision in this case.

## **II. STATEMENT OF THE CASE**

### **A. Procedural History**

Appellee is satisfied that Appellant Fischer has accurately and adequately set forth the procedural history of this case in his opening brief.

### **B. Statement Of Material Facts**

1. The primary goals in operating correctional facilities are carrying out the incarceration ordered by the court, protecting the public, providing rehabilitative programs as required or allowed by law, and maintaining order and security within the facilities. The latter is particularly important in order to protect the safety of the public and all persons within the correctional facilities, including volunteers, correctional facility staff, and offenders. Declaration of Department of Corrections Prison Administrator Richard Morgan, CP 29-32.

2. There are numerous methods for maintaining the secure and orderly operation of a correctional facility. One of the most important tools for maintaining the security and orderly operation of prisons is remote electronic surveillance systems which are in use in all of the Department of Correction's (DOC) major facilities. DOC's electronic surveillance systems consist of fixed cameras located in various locations

in a prison that can be monitored contemporaneously by staff and/or have recording capabilities. Electronic surveillance is an essential element of effective control of a population that is 100% criminal in its composition and is accustomed to evading detection and exploiting the absence of authority, monitoring, and accountability. *Id.*

3. If it were financially feasible to do so, every area of a prison would be video monitored and recorded 24 hours a day to ensure any act of victimization would be discovered and persons held accountable. Unfortunately, that is not possible under DOC's budget. Since the resources are not available to accomplish 100% surveillance at all times, it is mission critical that offenders and their cohorts not know the capabilities and the limitations of DOC's surveillance capabilities. *Id.*

4. Not all surveillance cameras in DOC facilities are actively monitored by staff. Some cameras are only monitored by staff and create no recordings. Some cameras are only recorded during specific times of day and not others. Some camera stations (camera housings such as boxes and bubble housings) do not contain cameras at all. Some cameras have poor resolution or can be out of service. Some cameras have very narrow fields of view, while others have wide fields of view. Some are PTZ (pan, tilt, & zoom) which have powerful abilities to capture fine detail at long distances. Some are controlled by the person monitoring the camera.

Some pan a wide field automatically. Some cameras are so well hidden, they are not suspected by offenders to be present. On the other hand, rumors abound among inmates that there are cameras where none exist.

*Id.*

5. It is a significant advantage to have offenders uncertain as to what is being monitored, what is recorded, and what is in the field of view. Offenders will often use “blind spots” (locations that have infrequent staff presence and no electronic surveillance) to commit acts of violence and purveying contraband. In reconstructing incidents and interviewing offenders, it has been found that incident location is often chosen due to a perceived lack of surveillance. Surveillance, real or imagined, is a powerful deterrent to assaults and other problematic behaviors by offenders. *Id.*

6. Providing offenders access to recordings of DOC surveillance videos would allow them to accurately determine which areas are weak or devoid in DOC’s ability to capture identities in the aftermath of an incident or crime. Sexual predators could use this information to prey upon weaker offenders. Offenders could also use this information to commit assaults on other offenders. *Id.*

7. Prison surveillance cameras provide staff and officials a steady and valuable stream of intelligence information which is used in

prison investigations and is often used to support prison infractions and/or criminal prosecutions. DOC is authorized by statute to create and enforce a comprehensive system of prison discipline which is reflected in Chapter 137-25 WAC and Chapter 137-28 WAC. Inmates who violate prison rules are subject to a broad array of sanctions, including the loss of good conduct time which increases the amount of time an offender must stay in prison. If an inmate or any other person were allowed to get any of DOC's recorded surveillance videotapes through public disclosure, they would get not only the specific intelligence information that was recorded, but also the specific intelligence information of the surveillance and recording capabilities of the surveillance cameras in DOC institutions. For the reasons described above, nondisclosure of prison surveillance videotapes is essential to effective law enforcement by DOC, including the effective enforcement of DOC disciplinary regulations. *Id.*

### III. ARGUMENT

The PRA is a strongly worded mandate for broad disclosure of public records. *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389 (1997). Washington's PRA requires every governmental agency to disclose any public record upon request, unless the record falls within certain specific exemptions. *O'Connor v. Dep't of Social and Health Services*, 143 Wn. 2d 895, 905, 25 P.3d 426 (2001). Any information

about government conduct is a public record regardless of its physical form or characteristics. *Smith v. Okanogan County*, 100 Wn. App 7, 12, 994 P.2d 857 (2000). A person seeking documents under the PRA must “identify the documents with reasonable clarity to allow the agency to locate them.” *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447. Requested public records must be disclosed unless they fall within a specific statutory exemption. *Prison Legal News, Inc. v. Dep’t of Corrections*, 154 Wn.2d 628, 635, 115 P.3d 316 (2005). Exemptions are construed narrowly and the agency bears the burden of proving that a specific exemption applies. *Id.*, at 636. However, courts should consider the unique circumstances of prisons in deciding whether an inmate has established a violation of the PRA by DOC. *Sappenfield v. Dep’t of Corr.*, 127 Wn. App. 83, 88-89, 110 P.3d 808 (2005).

RCW 42.56.240(1) states in full:

The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:

(1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person’s right to privacy;

The information in DOC surveillance videotapes is “specific intelligence information”. *Id.* As established by DOC’s Director of Prisons, Richard Morgan, an unquestioned expert on prison security issues, prison surveillance cameras provide DOC staff and officials a “steady and valuable stream of intelligence information.” CP 29-32.

DOC surveillance videotapes contain not only the “specific intelligence information” that has been recorded, but also “the specific intelligence information of the surveillance and recording capabilities of the surveillance cameras in DOC institutions.” CP 29-32. DOC surveillance videotapes contain specific intelligence information and are therefore exempt from disclosure if nondisclosure is “essential to effective law enforcement or for the protection of any person’s right to privacy.” RCW 42.56.240(1). The nondisclosure of DOC surveillance videotapes is unquestionably essential to effective law enforcement by DOC.

Mr. Morgan has testified that “it is mission critical that offenders and their cohorts not know the capabilities and the limitation of DOC’s surveillance capabilities.” CP 29-32. Moreover, “it is a significant advantage to have offenders uncertain as to what is being monitored, what is recorded, and with is in the field of view.” CP 29-32. If surveillance videotapes are disclosed, “sexual predators could use this information to prey upon weaker offenders. Offenders could also use this information to

commit assaults on other offenders.” CP 29-32. In sum, “nondisclosure of prison surveillance videotapes is essential to effective law enforcement by DOC.” CP 29-32.

Mr. Morgan’s expert opinion concerning the deleterious effect of the disclosure of prison surveillance videotapes finds support in both federal and state case law. In *Linderman v. Kelso Sch. Dist. No. 458*, 162 Wn.2d 196, 172 P.3d 329 (2007), the Plaintiffs requested a videotape of an incident that occurred on a school bus and the school refused to release the videotape under an exemption in the PRA for personal information in files maintained for students in public schools. While the Supreme Court held that the PRA exemption cited by the school district did not apply and ordered disclosure, the court recognized the security purposes of surveillance cameras:

Here the surveillance camera serves as a means of maintaining security and safety on the school buses.

162 Wn.2d at 203.

Several federal cases have also recognized that the nondisclosure of prison surveillance videotapes is critical to effective law enforcement in prison. In *Gaither v. Anderson*, 236 F.3d 817 (7th Cir. 2000), an inmate filed a federal habeas corpus action challenging a prison disciplinary action because prison officials did not provide him a copy of a prison

surveillance videotape that the inmate alleged was exculpatory. The Court of Appeals rejected the inmate's assertion that he should have been allowed to view the videotape at issue:

*Chavis* recognizes that its rule requiring disclosure of exculpatory evidence to an inmate is limited to situations in which such disclosure would not create security issues. *Chavis*, 643 F.2d at 1286. Here, prison officials articulated a legitimate security concern for refusing to disclose the videotape, namely, because they "did not want the offenders to know the capabilities of the cameras for security reasons."

*Gaither*, 236 F.3d at 820 (citing *Chavis v. Rowe*, 643 F.2d 1281 (7th Cir. 1981)).

In a case involving a virtually identical issue, the same Court of Appeals reached a similar conclusion:

Piggie would not have been entitled to disclosure under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) if his viewing the tape would entail a security risk, and we have had no trouble approving of nondisclosure where prison officials have asserted a bona fide security justification, for example, that if the inmate were permitted to watch the tape, he might learn the location and capabilities of the prison surveillance system, thus allowing him to avoid detection in the future. *Gaither*, 236 F.3d at 820.

*Piggie v. Cotton*, 344 F.3d 674, 676 (7th Cir. 2003).

Finally, DOC has established conclusively that DOC surveillance videotapes are essential to DOC's "law enforcement" responsibilities. Mr. Morgan has demonstrated that surveillance videotapes are always used to

detect unlawful behavior and are often used to infract inmates for violations of DOC's disciplinary regulations which are clearly law enforcement activities:

Prison surveillance cameras provide staff and officials a steady and valuable stream of intelligence information which is used in prison investigations and is often used to support prison infractions and/or criminal prosecutions. DOC is authorized by statute to create and enforce a comprehensive system of prison discipline which is reflected in Chapter 137-25 WAC and Chapter 137-28 WAC. Inmates who violate prison rules are subject to a broad array of sanctions, including the loss of good conduct time which increases the amount of time an offender must stay in prison. If an inmate or any other person were allowed to get any of DOC's recorded surveillance videotapes through public disclosure, they would get not only the specific intelligence information that was recorded, but also the specific intelligence information of the surveillance and recording capabilities of the surveillance cameras in DOC institutions. For the reasons described above, nondisclosure of prison surveillance videotapes is essential to effective law enforcement by DOC, including the effective enforcement of DOC disciplinary regulations.

CP 29-32.

The Supreme Court has held that law enforcement "involves the imposition of sanctions for illegal conduct." *Prison Legal News v. Dep't of Corr.*, 154 Wn.2d 628, 640, 115 P.3d 316 (2005). The Supreme Court has also consistently held that Washington's regulations have the full force and effect of law. *Manor v. Nestle Food Co.* 131 Wn.2d 439, 445, 932 P.2d 628 (1997); *accord. Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 323,

119 P.3d 825 (2005). Law enforcement includes the “detection of persons committing infractions”. RCW 10.93.020(2). DOC is clearly enforcing the law in enforcing its disciplinary regulations which allow for the imposition of significant sanctions on inmates for committing infractions.

*Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712 (1997) supports the trial court’s decision in this case. The court in *Newman* recognized that the exemption relied upon by DOC in the case at bar contains “broad language”. *Id.*, 133 Wn.2d at 572. The court in *Newman* applied this broad language to exempt all documents in an open criminal investigation file, without regard to whether or not individual documents in the file may be available to the public from other sources:

King County has met its burden of showing the language and scope of the statutory exemption are broad and encompass all documents. No segregation of the documents is provided for under the language of the exemption.

*Newman*, 133 Wn.2d at 575.

*Newman* supports DOC’s reliance on RCW 42.56.240(1) to exempt prison surveillance videotapes from disclosure. DOC has established affirmatively that prison surveillance videotapes are properly exempt from disclosure under RCW 42.56.240(1), therefore Plaintiff’s claim based on his request for such videotapes was properly dismissed by the trial court.

Appellant did not challenge or refute the evidence from Mr. Morgan in the trial court and does not challenge such evidence on appeal. Indeed, Appellant does not challenge DOC's assertion that as a general rule prison surveillance videotapes are exempt from disclosure under RCW 42.56.240(1). Appellant argues only that DOC has waived the exemption from disclosure in this particular case because inmates are able to see the surveillance camera monitor used by prison staff in the area of the surveillance cameras at issue.

Appellant has cited no authority to support his argument that an agency waives an exemption under the PRA under the circumstances presented in this case. The evidence presented by Appellant in the trial court is that inmates could see the monitor screen used by prison staff to monitor the various cameras which allegedly captured the images requested by Appellant.<sup>1</sup> However, the fact that inmates could casually see the video camera monitor does not undermine DOC's claim of an exemption in this case. Appellant's evidence presents a challenge only to DOC's assertion that non-disclosure of prison surveillance videotapes is "essential to effective law enforcement". RCW 42.56.240(1). Appellant's evidence does not challenge DOC's assertion that prison surveillance

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<sup>1</sup> DOC was prepared to provide evidence that inmates' ability to see the surveillance camera monitor at issue was not as unfettered as Plaintiff indicated in his declaration. However, the trial court denied DOC's motion to supplement the record as moot because the court had already ruled in DOC's favor. CP 11.

videotapes are specific intelligence information that has been compiled by DOC. While the evidence presented by Appellant demonstrates that inmates may be able to figure out what the various surveillance cameras could see and not see in real time, this evidence does not tell inmates anything about the recording capabilities of the surveillance system. Moreover, this evidence tells inmates nothing about the quality of images that are captured and retained. Mr. Morgan has testified that prison security would be reduced if inmates were able to determine which cameras record images and precisely what those recordings show:

It is a significant advantage to have offenders uncertain as to what is being monitored, what is recorded, and what is in the field of view . . . Providing offenders access to recordings of DOC surveillance videos would allow them to accurately determine which areas are weak or devoid in DOC's ability to capture identities.

CP 29-32.

Appellant's evidence regarding inmates being able to see a particular video monitor is not pertinent to recordings and does not rebut Mr. Morgan's testimony. The trial court addressed this issue correctly and succinctly:

Some of the monitors can be seen by inmates or others in the facility, but it cannot be determined from viewing the monitor what is actually being recorded and the quality of the recording.

*See* CP 21, Memorandum Decision.

Nondisclosure of prison surveillance videotapes is “essential to effective law enforcement” regardless of whether or not inmates may be able to see real time images on some security camera monitors in prison.

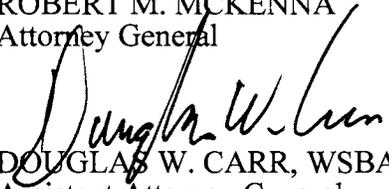
Though not directly applicable to the PRA, case law concerning the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a), the federal counterpart to the PRA, supports DOC’s position that it has not waived the exemption in RCW 42.56.240(1) under the circumstances of this case. Under FOIA, a federal agency waives an exemption from disclosure only if it voluntarily and officially discloses the documentation at issue to a non-federal party. *Florida House of Rep. v. U.S. Dept. of Commerce*, 961 F.2d 941, 946 (11th Cir. 1992); *Frugone v. C.I.A.*, 169 F.3d 772, 774 (D.C. Cir. 1999). The disclosure made to inmates in this case, who could allegedly see the surveillance camera monitor used by prison staff, was neither voluntary nor official. Plaintiff submitted no evidence establishing that DOC has an official policy of allowing inmates to see prison surveillance camera monitors or prison surveillance videotapes. Moreover, the request in this case is for videotapes which DOC has not disclosed to inmates or members of the public. While the evidence presented by Plaintiff admittedly establishes a chink in DOC’s security armor, it does not rise to the level of a waiver of the exemption in RCW 42.56.240(1).

#### IV. CONCLUSION

The trial court correctly concluded that prison surveillance videotapes are exempt from disclosure under RCW 42.56.240(1). Appellee respectfully requests that this court affirm the considered judgment of the trial court in this case.

RESPECTFULLY SUBMITTED this 17th day of June, 2010.

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