

Supreme Court Case No. 89648-2  
Court of Appeals Case No. 42972-1-II

**SUPREME COURT OF THE STATE OF WASHINGTON**

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CITY OF LAKEWOOD,

Petitioner,

Vs.

DAVID KOENIG,

Respondent.

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**CITY OF LAKEWOOD'S PETITION FOR REVIEW**

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## **I. INTRODUCTION**

In a published opinion, Division II of the Washington Court of Appeals holds that the failure to provide an express exemption within Washington Public Records Act (PRA), chapter 42.56 RCW for personal identifying information, is an “unfortunate oversight,” on the part of the Legislature. Hence, an agency subject to the PRA may not withhold these identifiers and must produce them when contained in a record. In reaching this decision, it reverses a Pierce County Superior Court decision which upholds claims of exemption for driver’s license numbers contained in police reports. The Court of Appeals also holds that the City of Lakewood violated Mr. Koenig’s “right to receive a response.” The Court, in so ruling, provides guidance only that citation to the law supporting such exemption is insufficient, and that something more is required. The Court ultimately directs the City to pay Mr. Koenig’s attorney fees under RCW 42.56.550(4).

This ruling must be reversed because it is contrary to law. Moreover, this ruling forces local governments to violate federal law.

The Pierce County Superior Court notes that the “sole issue” in this case is “whether or not driver license issues are exempt[.]” (VRP 9). Mr. Koenig has previously expressly represented in his trial court

pleadings and discovery responses that his sole issue was with the City's "redact[ion of] driver's license numbers from requested records based on the erroneous assertion that such information is exempt," on various grounds. (CP 17, ¶ 3.5). He affirmatively stated that he did "not care to litigate other possible violations so the matter is moot and/or nonjusticiable." (Id.). In an earlier appeal involving a discovery dispute between the parties, the Court of Appeals expressly noted that 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).

Based on how the pleadings, discovery responses and the Court of Appeal's earlier decision framed this dispute, the trial court reached and decided this issue. Because the only issue decided by the superior court was whether these identifiers are exempt, nothing else is available to appeal. Instead of challenging the basis of the trial court's actual decision, Mr. Koenig assigned error to a theory which he previously stated that he "did not care to litigate." (CP 17, ¶ 3.5). Mr. Koenig's assignment of error,<sup>1</sup> and the basis of the Court of Appeals reversal, introduced a separate issue: whether the City properly explained its claims of exemption.

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<sup>1</sup> Brief of Appellant at p. 4, ¶ 11 (Issues Pertaining to Assignment of Error).

In deciding an issue not raised below, the Court of Appeals misapplied the framework set forth in *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010) relative to RCW 42.56.550(4). This Court has described RCW 42.56.550(4) as setting forth two rights, which it has described as “the right to receive a response,” and the “right to inspect or copy.” Mr. Koenig failed to appeal compliance with the latter right. And, in resolving the appeal, the Court of Appeals exposed sensitive personal identifiers open to public inspection.

To that end, the City of Lakewood petitions this Court pursuant to RAP 13.4(b)(1) and RAP 13.4(b)(4) to grant review and reverse the Court of Appeals decision to the contrary.

## **II. IDENTITY OF PETITIONER**

The Petitioner is the City of Lakewood. The City requests that the Court grant review and reverse the decision identified in Part II.

## **III. COURT OF APPEALS DECISION**

A published opinion was issued by Division II of the Court of Appeals on September 4, 2013. 176 Wn. App. 397, 309 P.3d 610 (2013). The Court of Appeals denied a timely motion for reconsideration on October 28, 2013. A copy of both the *Published Opinion* and the *Order Denying Motion for Reconsideration* are attached.

#### **IV. ISSUES PRESENTED FOR REVIEW**

1. Whether the Court of Appeals erred when it reversed the trial court and concluded that the City failed to comply with the duty to explain its exemptions to redactions of driver's license numbers under RCW 42.56.550(4) notwithstanding Mr. Koenig's representations in discovery that such a duty was not at issue in the case, and thus, the trial court decided an issue which was framed by the pleadings, discovery responses and an earlier decision from the Court of Appeals?

2. Whether the Court of Appeals erred when it reversed the trial court's grant of summary judgment in favor of the City and concluded that the failure to include an express PRA exemption protecting personal identifiers, such as driver's license numbers, was an unfortunate oversight, and thus these identifiers are not exempt from disclosure under the Public Records Act, chapter 42.56 RCW?

#### **V. STATEMENT OF THE CASE**

The Court of Appeals, in an earlier appeal of this matter, succinctly described those facts forming the basis of this dispute.

In October 2007, David Koenig requested information from the City and the Lakewood Police Department in connection with investigations into alleged wrongdoing by three police officers on various occasions. The City complied on November 30, but it redacted the driver's license numbers of the officers, victims, and eyewitnesses

under several provisions of chapter 46.52 RCW and chapter 42.56 RCW. n1

#### FOOTNOTES

n1 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.

In a letter explaining the redactions, the City informed Koenig that it believed that its response was adequate, but it gave Koenig until the close of business on December 21 to notify the City whether the responses satisfied his requests. If Koenig did not respond, the City was prepared to take "appropriate legal action to determine that it has fully complied with each of these requests." Koenig did not respond.

On March 5, 2008, the City sought declaratory relief that it had fully satisfied its obligations to Koenig under the PRA. On May 13, the City served Koenig with interrogatories and requests for production.

*City of Lakewood v. Koenig, supra*, 160 Wn. App. at 886-887 (footnote 2 and citation to clerks papers omitted).

Underpinning the necessity for this lawsuit, the City had identified three other lawsuits (one of which also involved Lakewood) where Mr. Koenig delayed filing of the complaint until the end of the one-year statute of limitations, and delayed service until the end of the 90-day tolling period under CR 3 and RCW 4.16.170.<sup>2</sup>

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<sup>2</sup> At the time, and until a recent amendment to the statute, under the former version of RCW 42.56.550(4), a per-day penalty for the wrongful withholding of a record was mandatory. Laws 2011, ch. 273 § 1. In essence, a requester could delay service and if an agency was deemed to have wrongfully withheld a record, they could be liable for several

After the parties extensively litigated a discovery dispute, both parties sought summary judgment. (CP 59, 107). The City's motion was granted and Mr. Koenig's motion was denied. (CP 228-30).

Mr. Koenig appealed to Division II of the Court of Appeals. (CP 231). In a published decision, the Court reversed. In its seven-page Opinion, Division II held that because the City failed to provide an explanation of how its claimed exemptions applied to the driver's license numbers, the City violated the "brief explanation" requirement of RCW 42.56.210(3). As such, the failure to provide an explanation for withholding the driver's license numbers entitled Mr. Koenig to attorney fees pursuant to RCW 42.56.550(4).

Although Mr. Koenig did not assign error to the trial court's determination that driver's license numbers are exempt from disclosure under the Public Records Act, in an extended footnote, the Court of Appeals went on to state that it noted its "concern over the legislature's

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thousand dollars in penalties without being aware that there was an issue until served fifteen months later.

In three lawsuits, Mr. Koenig effectuated such a delay. In a lawsuit against Pierce County, Mr. Koenig's claim accrued on or about January 3, 2006 (CP 263, ¶ 2.3); he filed suit 364 days later on January 2, 2007 (CP 262) and waited until March 27, 2007 – one week before the expiration of the 90 day tolling period – before serving the county. (CP 265). In a similar lawsuit against the City of Lake Forest Park, Mr. Koenig's claim accrued on September 11, 2006 (CP 270, ¶ 2.4); suit was filed on September 4, 2007 (CP 269) and service accepted by Lake Forest Park on November 7, 2007. (CP 273). In his prior lawsuit against the City of Lakewood, Mr. Koenig waited 364 days before filing, and waited 89 days before service. (CP 142, ¶ 16; CP 143, ¶¶ 22, 23).

failure to expressly provide adequate protection for personal identifying information in the PRA statute.” 176 Wn. App. at 404 fn. 3. Its Opinion concluded with the following,

Allowing the release of a private citizen's personal identifying information exposes private citizens to the risk of harm such as identity theft without furthering this purpose. [Citation and parenthetical omitted]. The legislature has expressed obvious concern over the release of personal identifying information and recognized that the release of personal identifying information serves no legitimate purpose under the PRA. Accordingly, we believe that the failure to include an express PRA exemption that impedes the crime of identity theft and protects the release of personal identifying information appears to be an unfortunate oversight, but that it is up to the legislature, not the courts, to address.

*Id.*, 176 Wn.App. at 404, fn. 3.

The City moved for reconsideration, and the Court of Appeals called for a response. On October 28, 2013, the Court issued a three-page order denying the motion.

The City now seeks review by this Court.

#### **VI. ARGUMENT WHY REVIEW SHOULD BE GRANTED**

The Court of Appeals violated a basic tenant of appellate review: an appellate court should only review the issues reached and decided by a trial court. The trial court expressly noted that the only issue before it was whether driver's license numbers were exempt. Indeed, in 2011 the Court of Appeals identified this as the only issue following remand. Mr.

Koenig's Answer and discovery responses also identify the propriety of the exemptions as the only issue in this case. Yet, Mr. Koenig appealed a different issue, upon which the Court of Appeals reversed.

On the merits, the Court of Appeals disregards this Court's holdings set forth in several cases, but most recently in *Sanders v. State and Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009) relative to an agency's obligations in responding to a PRA request. The Court of Appeals decision adds unnecessary confusion, which is evident in those situations where an agency undertakes to claim an exemption, over a specific record, which a specific statute (or series of statutes) specifically exempts. The Court, in deciding the merits, exacerbated this conflict by incorrectly opining that there is effectively no exemption which could be asserted over personal privacy materials.

Review is therefore warranted under RAP 13.4(b)(1) and RAP 13.4(b)(4).

A. The Court of Appeals Should not have Considered Mr. Koenig's Assignment of Error When it was Never Ruled upon by the Trial Court.

The heart of the Court's Opinion is that Mr. Koenig is entitled to relief under RCW 42.56.550(4) as interpreted by *Sanders*. Case law recognizes that RCW 42.56.550 embodies two different rights under the

PRA. In *Sanders*, this Court described them as “the right to receive a response,” and the “right to inspect or copy.” 169 Wn.2d at 860. These two rights are closely related. But as this Court explained, they are distinct:

It is the “response” that is insufficient when the brief explanation is omitted. See RCW 42.56.210(3)(“Agency responses refusing, in whole or in part, inspection of any public record shall include ... a brief explanation of how the exemption applies to the record withheld.” (emphasis added)). 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.

*Sanders*, 169 Wn.2d at 860 (footnoted citation omitted; emphasis by the Court omitted; ellipsis by the Court; underlined emphasis added).

The Opinion weaves together these two rights, effectively treating them as one. But the Court of Appeals did not have to decide this issue at all.

In granting summary judgment to the City, the Superior Court 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).

The trial court had good reason to focus on this "sole issue." In 2011 on discretionary review of a discovery dispute, the Court of Appeals identified that there was only one issue to be determined on remand,

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.

160 Wn. App. at 886 fn. 1. This sentiment was echoed later in the same opinion,

[A]t this point the courts have been confronted only with a discovery dispute. Upon remand to the trial court, the trial court will determine whether the City properly redacted the driver's license numbers.

160 Wn. App. at 895.

It then "remand[ed] for further proceedings consistent with this opinion." 160 Wn. App. at 897. But, when this case returned to the Court of Appeals in 2013, it took a different approach,

[W]e do not resolve the question of whether the City properly redacted driver's license numbers in the disclosed records (an issue not before us in this appeal) ...

176 Wn. App. at 404, fn. 3.

Both the trial court and the 2011 Court of Appeals decision were correct. In both his trial court pleadings and his discovery responses, Mr. Koenig represented at the inception of this case that the only issue was the propriety of the City's claims of exemptions.

In its amended complaint, the City asserted:

The City has completely, fully and accurately supplied responses to Mr. Koenig's Public Records Act requests and the City's responses are in compliance with the terms of the Public Records Act.

(CP 7, ¶ 3.5)

In his Answer, Mr. Koenig provided a detailed response:

Denied. The City has redacted driver's license numbers from requested records based on the erroneous assertion that such information is exempt pursuant to the Federal Driver's Privacy Protection Act, 18 USC § 2721 (FDPPA), *Reno v. Condon*, 528 U.S. 141, 120 S.Ct. 666, 145 L.Ed.2d 587 (2000), RCW 42.56.050, RCW 42.56.240, RCW 46.52.120 and or RCW 46.52.130. 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).

Paragraph 4.1 of both the amended complaint and the answer follow this theme, with Mr. Koenig, again, providing the narrow focus of this case:

... The parties have an existing and genuine dispute only to the extent that Koenig is willing to litigate the issues

raised in this action. As set forth in paragraph 3.5 (above) there is a genuine dispute as to whether the City properly redacted driver's license numbers. All other possible violations of the City in response to Koenig's October 2007 requests are moot and/or nonjusticiable.

(CP 17, ¶ 4.1; emphasis added).

Mr. Koenig's discovery responses confirm the limited scope of his disagreement with the City. For brevity, we highlight three.

Interrogatory No. 9:

With respect to the subject public records which form the basis of this litigation, do you contend that the City of Lakewood made any improper/incorrect redactions or claimed improper/incorrect exemptions to production? If so, please state for each such document: [Identify particulars]

Interrogatory No. 10:

With respect to the subject public records which form the basis of this litigation for which the City of Lakewood has made redactions or claimed an exemption to production, are there any claims of exemption or redaction which you do not understand? If so, as for each such claim, please state and identify: [Identify particulars]

(CP 176; emphasis added).

Both interrogatories contain an identical answer:

See paragraph 3.5 in Koenig's Answer regarding the redaction of driver's license numbers.

(CP 180). The City also submitted a "catch all,"

Interrogatory No. 13:

Do you maintain that the City of Lakewood otherwise violated the provisions of the Public Records Act, chapter 42.56 RCW in the processing of the public records request

forming the basis of this litigation? If so, please state with specificity all facts upon which you base such contention.

Answer:

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 177 (Interrogatory No. 13); CP 180 (Answer to Interrogatory No. 13)).

To recap Mr. Koenig's trial court representations, (1) in his answer, he claimed that the City made the "erroneous assertion," that driver's license numbers were exempt; (2) failed to identify whether he believed the City made any "improper/incorrect redactions" or made "any claims of exemption or redaction which [he did] not understand[.]" but (3) did "not care to litigate other possible violations." But when twice asked by the trial court, Mr. Koenig failed to give an answer to whether he was indeed maintaining that driver's license numbers were exempt or not. (VRP 5). Nowhere did Mr. Koenig identify the sufficiency of the response as an issue.

As this Court has stated, "it is a well established principle that a party who has knowingly and deliberately assumed a particular position in judicial proceedings is estopped to assume a position inconsistent therewith to the prejudice of the adverse party." *Rushlight v. McLain*, 28 Wn.2d 189, 194, 182 P.2d 62 (1947). Mr. Koenig initially took the

position that the City improperly withheld these records and specifically disclaimed any other PRA violations. Now, after the superior court ruled against him, instead of challenging the basis of the superior court's decision, he made an entirely different challenge.

Despite these assertions and its earlier statements, the Court of Appeals reversed the trial court. But neither the Opinion nor its order on reconsideration addresses Mr. Koenig's statements in his pleadings or his discovery responses. Instead, it addressed an entirely different issue. This misapplication merits review under RAP 13.4(b)(1).

B. The Court of Appeals Misapplied this Court's Holdings Interpreting the PRA's Brief Explanation Requirement.

On the merits, the Court of Appeals issued a decision which conflicts with this Court's jurisprudence relative to the "brief withholding requirement," triggering review under RAP 13.4(b)(1). 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. 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, 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 at 540.

The trial court and Mr. Koenig had no difficulty in ascertaining what may have been missing. The City redacted driver's license numbers upon identified various grounds. Mr. Koenig claimed that the City's stated grounds "erroneous[ly] assert[ed] that such information is exempt[.]" (CP 17, ¶ 3.5). The trial court was competent and able to rule upon these claims of exemption to the point where it was able to "adopt[] the City's legal analysis." (VRP 9). Mr. Koenig's Answer and discovery responses clearly establish that he was fully aware of what those grounds may be. Although he might disagree with those grounds, he did not chose to appeal the assertion of those exemptions which the trial court expressly adopted.

Interpreting the brief explanation rule in the matter proposed by Mr. Koenig takes it out of context; the rule is no longer a method of ensuring valid review for documents which have been withheld. As *Sanders* itself recognizes, RCW 42.56.550(4)'s "first sentence entitles a

prevailing party to costs and reasonable attorney fees for vindicating ‘the right to inspect or copy’ or ‘the right to receive a response[.]’” 169 Wn.2d at 860. The “vindication,” piece is key; fees should not be available where an agency may not have made an explanation to the satisfaction of a requester. Otherwise, no requester will accede. Rather, this Court has set a bright line in determining when the right to receive a response is violated and fees become available; it occurs when, “when the brief explanation is omitted.” 169 Wn.2d at 860. To allow the Court of Appeals interpretation of RCW 42.56.550(4) to go unchecked turns the PRA into a test whereby an agency is graded with taxpayer dollars on a pass-fail basis because a requestor claims that its response is not precise enough.

C. Whether Personal Identifying Information, Such as Driver’s License Number Should be Exempt Under the PRA is an Issue of Broad Public Importance Meriting Review.

In granting summary judgment to the City, the trial court “adopt[ed] the City’s legal analysis,” as to why driver’s license numbers are exempt. (VRP 9). In an extended footnote and without explanation as to why this analysis is somehow incorrect, the Court of Appeals went on to state that the omission of an express PRA exemption which would protect the release of personal identifying information appeared to be an “unfortunate oversight,” by the legislature. 176 Wn. App. at 404 fn. 3. If the Court of Appeals has identified the issue worthy of legislative

attention, it should be worthy of this Court's attention. Resolution of this issue creates an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4).

Two events of note which occurred while this case was pending decision, reinforces the need to either deem that Mr. Koenig has waived this issue and summarily reverse the decision below or address this issue.

First, less than one month after oral argument at the Court of Appeals, the Administrative Officer of the Courts (AOC) suffered a serious security breach. Court website hack puts personal information at risk. <http://www.king5.com/news/local/WA-court-website-breach-personal-info-risk-206804361.html> (May 9, 2013). In this well-publicized breach, the AOC acknowledged,

[A] security breach occurred on its public website. No court records were altered and no personal financial information, such as bank account numbers or credit card numbers, is maintained on the site. However, up to 160,000 social security numbers and 1 million driver license numbers may have potentially been accessed.

Washington Courts Data Breach Information Center  
[www.courts.wa.gov/databreach](http://www.courts.wa.gov/databreach) (Last Visited: November 21, 2013).

On one hand, the judiciary, as an institution, publically and forthrightly committed itself to undertake extensive and widespread efforts to protect the same sort of personal privacy information which the City is also seeking to protect. Separately, it enacted mandatory requirements,

directing litigants not to file this same information with a court. *See e.g.*, GR 22. It also signaled that as to those personal privacy materials (including driver's license numbers) which it may possess, will not be subject to public disclosure. *See* GR 31.1(l)(5).<sup>3</sup> However, the Opinion effectively compels any agency holding driver's license numbers to produce this very same information in the future under pain of per day penalties and the imposition of reasonable attorney fees.

As noted before both the trial court and the Court of Appeals, there are several statutory schemes which specifically compel agencies to safeguard driver's license information and to provide notice when this information has been inadvertently released. Is an agency to do as AOC did, supply notice and safeguard this information? Is it supposed to produce it in response to a PRA request and then give the citizenry notice? Worse yet, if such notice is given, under the Court of Appeal's holding, the everyday citizen whose personal identifiers appear in a police report is without recourse to take any meaningful steps, such as a third-party injunction action under RCW 42.56.540, and block an agencies' release of this information, rendering any protections illusory.

Second, two determinations by United States Supreme Court made while this decision was pending merit examination. The first is its

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<sup>3</sup> The rule has been adopted, but it is not yet effective. *See* GR 31.1(o).

decision in *Maracich v. Spears*, 570 U.S. \_\_\_\_, 133 S. Ct. 2191 (June 17, 2013), which revisits the Federal Driver's Privacy Protection Act of 1994 (FDPPA), 18 U.S.C.S. § 2721 *et seq.*, Mr. Koenig recognized the FDPPA was claimed by the City 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*, 133 S.Ct. at 2199.

These liability concerns are not idle ones. The second determination by Supreme Court occurred on a decision which became final after oral argument in this matter, wherein a federal court of appeals concluded sufficient facts were adduced for trial in the FDPPA context. In *Senne v. Vill. of Palatine*, 695 F.3d 597 (7th Cir. 2012), *cert denied*, 133 S. Ct. 2850 (June 24, 2013), an en banc Seventh Circuit Court of Appeals concluded that a municipality's display of a parking ticket, containing driver's license numbers and other personal identifiers on a motorist's vehicle, will survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss any FDPPA claim. Under the Act, each disclosure of driver's license information allows an aggrieved party to seek liquidated damages not less than \$2,500. *See* 18 USC § 2724(b).

What's an agency to do? Federal law states that the unauthorized disclosure prompts liability under the FDPPA. Withholding under the

state PRA triggers penalties and attorney fees. Both result in the agency paying somebody over information which should indisputably be private.

In any event, if the Court of Appeals must delve into an issue to which no error has been assigned, the sole issue reached and decided by the trial court should receive more analysis than a half-page footnote. More significantly, if the Court of Appeals holds that this class of information is not covered by the PRA, and is worthy of Legislative attention, this Court should accept review as an issue of public importance. RAP 13.4(b)(4).

**CONCLUSION**

This Court should (1) accept review; and (2) reverse the decision of the Court of Appeals.

DATED: November 26, 2013.

CITY OF LAKEWOOD,  
HEIDI ANN WACHTER, CITY ATTORNEY

By: \_\_\_\_\_

MATTHEW S. KASER, WSBA # 32239  
*Assistant City Attorney, City of Lakewood*

**CERTIFICATE OF SERVICE**

I hereby certify that on this day, I electronically filed the foregoing by using the Electronic Filing - Court of Appeals (COA) Login system available at <http://www.courts.wa.gov/secure/index.cfm?fa=secure.login&app=coaFiling2>.

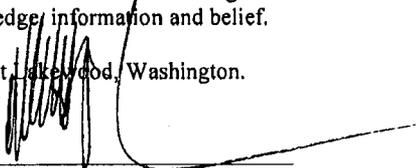
I further certify that, using that same system, I caused a copy of this document to be emailed to the following address(es), and based on prior experience with this system, this court will treat the automatically-generated transmittal letter as proof of service on the named parties:

William John Crittenden [wjcrittenden@comcast.net](mailto:wjcrittenden@comcast.net)  
Counsel for the Appellant.

Michele Earl-Hubbard [michele@alliedlawgroup.com](mailto:michele@alliedlawgroup.com)  
Counsel for Amicus

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge, information and belief.

EXECUTED this 26<sup>th</sup> day of November, 2013 at Lake Wood, Washington.

  
\_\_\_\_\_  
Matthew S. Kaser



No. 42972-1-II

regardless of whether the driver's license numbers are exempt. We hold that Koenig is entitled to costs and attorney fees because the City failed to provide Koenig with a brief explanation of the basis for not providing the records requested and thereby violated RCW 42.56.210(3) (the "brief explanation" requirement). Accordingly, we reverse the trial court's denial of Koenig's attorney fee request and remand for entry of an award of attorney fees in accord with this opinion. Former RCW 42.56.550(4).

#### FACTS

On October 6, 2007, Koenig submitted three public records requests to the City. The first request included "all records about the arrest and prosecution of a Lakewood Police Detective." Clerk's Papers (CP) at 10. Koenig's second request included "all records about the arrest and prosecution of a Tacoma Police Officer by the name of Michael Justice." CP at 12. The third request included "all records about an auto accident that occurred in the City of Fife." CP at 14.

The City responded to Koenig's request on November 30, 2007. The City's response included a list of all the withheld documents and any redactions in the documents produced. In the records pertaining to the Lakewood detective's arrest, the City redacted the detective's driver's license number. In its response to Koenig's request, the City also stated,

[U]nless you have notified the City – in writing – by the close of business on December 21, 2007, that its responses satisfy your requests, the City is prepared to take appropriate legal action to determine that it has fully complied with each of these requests. Of course, if you believe that the City's redactions and/or withholding of documents to be in error, we ask that you advise the City (again, in writing) of the grounds for which you believe the City's decisions to be in error so that we may reevaluate our decisions in light of your stated concerns.

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CP at 77. In the records pertaining to the Tacoma police officer's arrest, the City redacted the Tacoma police officer's driver's license number. In the records pertaining to the Fife accident, the City redacted the "driver's license numbers . . . of (1) the involved officer; (2) the alleged victim; and (3) the listed eyewitnesses." CP at 76.

On March 5, 2008, the City filed a declaratory judgment action in Pierce County Superior Court. The City sought an order declaring that it had fully complied with Koenig's public records requests.<sup>1</sup> On November 3, 2011, the City filed a motion for summary judgment. In response, Koenig filed a cross motion for partial summary judgment and a request for costs and attorney fees under the PRA<sup>2</sup> for the City's failure to include in its response a brief explanation for its redactions. The trial court granted the City's motion for summary judgment and denied Koenig's request for costs and attorney fees. Koenig timely appeals only the order denying his request for costs and attorney fees.

#### ANALYSIS

Koenig argues that because the City failed to provide an adequate explanation for the redaction of driver's license numbers in its original response, the City committed a violation of the PRA entitling him to costs and attorney fees regardless of whether the driver's license numbers are exempt. Koenig relies on *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010),

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<sup>1</sup> Prior to filing the motion for summary judgment, Koenig and the City had a dispute regarding discovery which we resolved in *City of Lakewood v. Koenig*, 160 Wn. App. 883, 250 P.3d 113 (2011).

<sup>2</sup> Former RCW 42.56.550(4).

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for the proposition that failure to provide an explanation for refusing to produce documents is a free-standing PRA violation that entitles him to costs and attorney fees. The City argues that under *Sanders*, a “brief explanation” violation is not a separate violation and that lack of a brief explanation can only aggravate penalties for improperly withheld records. Koenig is correct, under our Supreme Court’s interpretation of the plain language in former RCW 42.56.550(4), a requester is entitled to costs and attorney fees when the responder fails to provide a brief explanation of the exemption authorizing it to redact driver’s license numbers.

Here, we must determine whether the City violated the plain language of RCW 42.56.210(3) by failing to provide a brief explanation for the redactions contained in the response to Koenig’s public records request. We hold that it did. Furthermore, we must determine whether Koenig is entitled to costs and attorney fees based on the City’s violation of the brief explanation requirement. We hold that he is.

Our objective in interpreting a statute is to carry out the legislature’s intent. *Sprint Spectrum, LP v. Dep’t of Revenue*, 174 Wn. App. 645, 658, 302 P.3d 1280 (2013) (citing *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010)). We begin with the statute’s plain meaning. *Sprint*, 174 Wn. App. at 645 (citing *Lake*, 169 Wn.2d at 526). “We discern the plain meaning from the ordinary meaning of the language at issue, the statute’s context, related provisions, and the statutory scheme as a whole.” *Sprint*, 174 Wn. App. at 658 (citing *Lake*, 169 Wn.2d at 526). When a statute’s language is unambiguous, we determine the

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legislature's intent from the plain language of the statute alone. *Sprint*, 174 Wn. App. at 658 (citing *Waste Mgmt. of Seattle, Inc. v. Util. & Transp. Comm'n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994)).

The PRA's brief explanation requirement provides that an agency response to a PRA request "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). A statement that is limited to identifying the information that is withheld and baldly citing a statutory exemption violates the brief explanation requirement. *Sanders*, 169 Wn.2d at 845-46. Here, the City's response to Koenig's PRA request as it related to the driver's license numbers stated,

[The Lakewood police detective's] Driver's License number has been redacted pursuant to RCW 46.52.120 and RCW 46.52.130.

....

... The City has redacted the dates of birth, driver's license numbers and social security numbers of (1) the involved officer; (2) the alleged victim; and (3) the listed eyewitnesses [in the Fife collision records]. These redactions are made pursuant to RCW 42.56.050, RCW 42.56.240, RCW 46.52.120, and RCW 46.52.130.

....

... The driver's license number of Michael Justice has been redacted pursuant to RCW 42.56.050, 46.52.120, and 46.52.130.

CP at 75-76. The City did no more than identify the information that was withheld and cite the statutes that it believed exempted the information. The City's response violated the brief explanation requirement in RCW 42.56.210(3). *Sanders*, 169 Wn.2d at 845-46; RCW 42.56.210(3).

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Because the City violated the brief explanation requirement, the plain language of former RCW 42.56.550(4) mandates an award of costs and attorney fees to Koenig. Former RCW 42.56.550(4) states,

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 less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

Our Supreme Court recognized the difference between costs and attorney fees referenced in the statute's first sentence and penalties referenced in the second sentence. *Sanders*, 169 Wn.2d at 860. A prevailing party is entitled to costs and attorney fees "for vindicating 'the right to inspect or copy' or 'the right to receive a response.'" *Sanders*, 169 Wn.2d at 860 (emphasis added) (quoting RCW 42.56.550(4)).

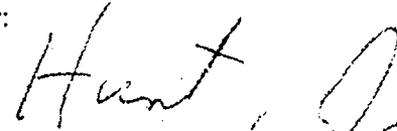
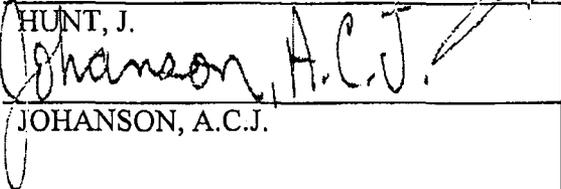
As we explained above, an adequate response to a public records request must include a brief explanation of how the claimed exemption applies. We hold that the City failed to comply with the brief explanation requirement and Koenig prevails on this issue. Under former RCW 42.56.550(4), Koenig was entitled to costs and attorney fees when the City violated the brief explanation requirement. Therefore, the trial court erred by denying Koenig's request for costs and attorney fees. Accordingly, Koenig is entitled to an award of reasonable attorney fees, including fees on appeal, pursuant to former RCW 42.56.550(4) and RAP 18.1.

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We reverse the trial court's denial of Koenig's attorney fee request and remand for entry of an award of attorney fees in accord with this opinion.<sup>3</sup>

  
QUINN-BRINTNALL, J.

We concur:

  
HUNT, J.  
  
JOHANSON, A.C.J.

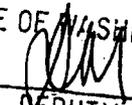
<sup>3</sup> Although we do not resolve the question of whether the City properly redacted driver's license numbers in the disclosed records (an issue not before us in this appeal), we note our concern over the legislature's failure to expressly provide adequate protection for personal identifying information in the PRA statute. We recognize that the legislature has rejected a general personal privacy exemption. RCW 42.56.050. However, we use the phrase "personal identifying information" to mean information such as Social Security numbers, driver's license numbers, tax identification numbers, employee numbers, or any other identifying information that would allow a private individual to be identified and subjected to inappropriate scrutiny or harm. See RCW 42.56.590(5); RCW 9.35.005(3); RCW 19.215.010(5); *Tacoma Pub. Library v. Woessner*, 90 Wn. App. 205, 221-22, 951 P.2d 357, 972 P.2d 932 (1998).

The legislature has acknowledged that disclosure of such personal identifying information can be harmful to private citizens. See ch. 9.35 RCW. In other statutes, the legislature has recognized that driver's license numbers are personal identifying information needing protection from public disclosure to guard against harm to private citizens, such as identity theft. See, e.g., RCW 42.56.590(5)(b), (6); RCW 19.215.005. However, it has not yet expressly provided a specific provision for the exemption of personal identifying information in the PRA.

The PRA exists to ensure government transparency and accountability. RCW 42.56.030. Allowing the release of a private citizen's personal identifying information exposes private citizens to the risk of harm such as identity theft without furthering this purpose. See *Tacoma Pub. Library*, 90 Wn. App. at 221-22 (disclosure of personal identifying information can be highly offensive because it "could lead to public scrutiny of individuals concerning information unrelated to any governmental operation"). The legislature has expressed obvious concern over the release of personal identifying information and recognized that the release of personal identifying information serves no legitimate purpose under the PRA. Accordingly, we believe that the failure to include an express PRA exemption that impedes the crime of identity theft and protects the release of personal identifying information appears to be an unfortunate oversight but that it is up to the legislature not the courts, to address.

FILED  
COURT OF APPEALS  
DIVISION II

2013 OCT 28 AM 11:19

STATE OF WASHINGTON  
BY   
DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**DIVISION II**

CITY OF LAKEWOOD,

Respondent,

v.

DAVID KOENIG,

Appellant.

No. 42972-1-II

ORDER DENYING MOTION FOR  
RECONSIDERATION

The City of Lakewood filed a motion asking the court to reconsider its published opinion filed on September 4, 2013. We address the City's motion as follows:

First, the City argues that our opinion addresses an issue that was not decided by the trial court. The City is incorrect. The trial court denied Koenig's motion for summary judgment which alleged that the City violated the PRA by failing to explain why the driver's license numbers were exempt and that Koenig was entitled to attorney fees. Our opinion decided whether the trial court properly denied Koenig's motion for summary judgment. Therefore, we properly addressed an issue decided by the trial court.

Second, the City argues that we misapplied our Supreme Court's holding in *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010). The City agrees that *Sanders* recognizes two

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separate rights under the PRA: the right to receive a response and the right to inspect or copy. *Mot. for Reconsideration*, at 5. The City alleges that we confused these two rights. But the City's argument is essentially based on the assertion that Koenig "did not assign error to the trial court's determination that the records were exempt." As we have repeatedly stated, the issue is whether the City violated the right to receive a response by failing to include a brief explanation, a violation recognized by *Sanders*, not whether the driver's license numbers were actually exempt. Therefore, the City's argument fails.

Third, the City argues that we "overlooked" our Supreme Court's ruling in *Rental Housing Association of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 539, 199 P.3d 393 (2009), and our decision conflicts with this ruling. *Motion for Reconsideration*, at 7. Even if the City had cited *Rental Housing Association* in its brief, which it did not, the City's argument is incorrect. The City argues that under *Rental Housing Association*, an explanation is sufficient if it identifies the document and cites a statute, provided that together these two pieces of information are sufficient to allow the requestor to determine whether the claimed exemption is proper. *Motion for Reconsideration*, at 8. In *Rental Housing Association*, our Supreme Court stated, "Indeed, RCW 42.56.210(3) requires identification of a specific exemption *and* an explanation of how it applies to the individual agency record." 165 Wn.2d at 538. Contrary to the City's assertion, our decision holding that identification of the withheld record and citation to an exemption is consistent with, not contrary to, our Supreme Court's statement in *Rental Housing Association*.

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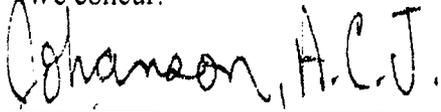
The City's motion for reconsideration is denied.

**IT IS SO ORDERED.**

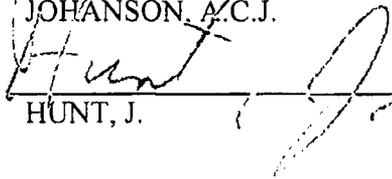
DATED this 28<sup>th</sup> day of October, 2013.

  
QUINN-BRINTNALL, J.

We concur:



JOHANSON, A.C.J.



HUNT, J.

# LAKWOOD CITY ATTORNEY

**November 26, 2013 - 1:06 PM**

## Transmittal Letter

Document Uploaded: 429721-Petition for Review.pdf

Case Name: City of Lakewood v. Koenig

Court of Appeals Case Number: 42972-1

Is this a Personal Restraint Petition? Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: \_\_\_\_

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Matthew S Kaser - Email: [mkaser@cityoflakewood.us](mailto:mkaser@cityoflakewood.us)

A copy of this document has been emailed to the following addresses:

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