

No. 42972-1-II

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

CITY OF LAKEWOOD,

Respondent,

Vs.

DAVID KOENIG,

Appellant

BRIEF OF RESPONDENT

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I. INTRODUCTION

Although a broadly-worded mandate for the full disclosure of public records, the Washington Public Records Act (PRA), chapter 42.56 RCW is not without its limits. Not every alleged transgression relative to the PRA is actionable. And, not every alleged violation of the PRA warrants judicial relief. This is one of those cases.

In October 2007 Mr. Koenig submitted three PRA requests to the City of Lakewood. The City and Mr. Koenig are no strangers to each other, having previously litigated PRA-related issues before. In a prior case, Mr. Koenig delayed service of process for fifteen (15) months before alerting the City to an alleged PRA violation. The City's investigation revealed he engaged in a similar pattern of delay with two other jurisdictions. Seeking to avoid a repeat, the City requested that Mr. Koenig confirm that he was satisfied with the City's disclosures in response to these requests. As was his right, he declined to do so. But, as was the City's right, it sued to obtain declaratory relief.

Mr. Koenig has not identified a single record which was wrongfully withheld from him. He does not claim that his ability to access any public record has been impeded. What he does claim is that the City cited, in his words, "inapplicable exemptions," when it redacted driver license numbers. He has also expressly disavowed pursuit of claims relative to any other alleged violations.

If this were an issue of whether the City had cited "inapplicable exemptions," Mr. Koenig's claims would be legally barred. But this case can be resolved on simpler grounds. Liability under the PRA will attach for a denial of the right to inspect or produce records. Mr. Koenig does not make this claim. Even if he did, the Washington Supreme Court has already held that social security numbers are exempt under the PRA. As

the losing party below, Mr. Koenig fails to articulate why he believes that this Court should treat driver's license numbers any differently.

To that end, the City of Lakewood requests that this Court affirm the decision below and award it reasonable attorney fees for defending against a frivolous appeal. RAP 18.9.

II. RESTATEMENT OF FACTS

This case returns to this Court for a second time. *City of Lakewood v. Koenig*, 160 Wn. App. 883, 250 P.3d 113 (2011). This Court has previously summarized some of the facts underpinning 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.

Id., 160 Wn. App. at 886-887 (footnote 2 and citation to clerks papers omitted).

Among the discovery which the City did submit to Mr. Koenig, and not at issue in the prior appeal, were several interrogatories.¹ The City asked Mr. Koenig: (1) whether he “maintain[ed] 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 requests forming the basis of this litigation;” (2) whether it was “[his] contention that there are responsive public records which should have been produced in response to these requests, but were not produced;” (3) if there were “any claims of exemption or redaction which [he did] not understand;” (4) whether he claimed that the City “made any improper/incorrect redactions or claimed improper/incorrect exemptions to production.” (CP 175-177; Interrogatories Nos. 8, 9, 10 & 13).²

In response, Mr. Koenig did not identify any documents which he believed were wrongfully withheld. (CP 180). Instead, he claimed that the City cited “inapplicable exemptions,” to redactions of driver’s license numbers. (*Id.*) He also included a cross-reference to his Answer wherein he averred that “[i]t 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.” (CP 17, ¶ 3.5)

¹ Mr. Koenig sought, and this Court granted discretionary review on an unrelated interrogatory and request for production relative to his prior litigation history. This Court affirmed in part, and reversed in part a decision of the superior court related to this discovery dispute. *See generally, City of Lakewood v. Koenig, supra.*

² The relevant discovery and Mr. Koenig’s responses appear as Appendix A to this brief.

Following the issuance of this Court's *Mandate*, the parties each sought summary judgment. (CP 59, 107). The City's motion was granted and Mr. Koenig's motion was denied. (CP 228-30).

Again, Mr. Koenig appeals. (CP 231).

III. 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*, the Supreme Court expressly held that agencies may seek review of exemptions, "[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.

Given multiple express opportunities to do so, Mr. Koenig did not identify a single record which he claimed should have been disclosed under the PRA. What he does identify, as a basis for PRA liability is the alleged non-compliance with a collateral issue: whether the City cited "inapplicable exemptions," in support of its claim that driver's license numbers are exempt from disclosure. In two decisions from the Supreme Court and one decision from this Court, it is now well-established that alleged exemption log-related violations do not serve as a ground for monetary relief in the absence of a "wrongful withholding," of records. *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 809, 246 P.3d 768 (2011); *Sanders v. State*, 169 Wn.2d 827, 860, 240 P.3d 120 (2010); *Mitchell v. Dep't of Corr.*, 164 Wn.App. 597, 606, 260 P.3d 249 (2011). Because Mr. Koenig does not claim (nor could he claim) that the City of Lakewood wrongfully withheld driver's license numbers the City, as a matter of law, could not have violated the PRA and the judgment

below should be affirmed. Even if he did make this claim, because driver's license numbers are exempt from disclosure, the decision below should still be affirmed.

Furthermore, the City requests fees on appeal for defending against a frivolous appeal pursuant to RAP 18.9. Mr. Koenig makes no argument that he should be entitled to driver's license numbers. Ordinarily, this should be the threshold issue. Instead, he focuses on the adequacy of the exemption log as a basis to impose liability under the PRA; an issue already foreclosed by several appellate decisions. Scarce public resources should not be used to relitigate this issue and there is no possibility of reversal.

A. Standard of Review.

The appellate standard of review is simple and succinct: “[w]e review challenges to agency actions under the PRA de novo.” *O’Neill v. City of Shoreline*, 170 Wn.2d 138, 145, 240 P.3d 1149 (2010)(citations omitted).

B. In the Absence of a “Wrongfully Withheld” Record, the City has not Violated the PRA in a Manner Entitling Mr. Koenig to Relief.

Relief under the PRA for an aggrieved requestor relative to the agency's production of documents is two-fold. Costs and attorney fees are available under the Act for “vindicating ‘the right to inspect or copy’ or ‘the right to receive a response.’” *Yakima Herald-Republic*, 170 Wn.2d at 809 (citing, *Sanders*, 169 Wn.2d at 860) (quoting RCW 42.56.550(4)). But penalties are available “only for denials of ‘the right to inspect or copy.’” *Id.* An agency's “response” is insufficient when the “brief explanation *is omitted.*” *Sanders*, 169 Wn.2d at 860 (Emphasis Added)(citing, RCW 42.56.210(3)). “[T]he 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.” *Id.*, 169 Wn.2d at 860. The City complied with its PRA obligations.

Mr. Koenig does not claim that he was somehow denied the right to inspect or copy or even that any documents were withheld from him. (CP 175, 180 (Interrogatory 8)). The City furnished to Mr. Koenig documents responsive to his request and identified those which it exempted from disclosure. It also provided a several page letter explaining its exemptions. (CP 75-77). Because Mr. Koenig does not claim that he was denied the right to inspect or copy and because the City provided him with an exemption log, there is no relief under the PRA to which Mr. Koenig is entitled. The City discharged its duties under the PRA. There is no PRA violation.

What Mr. Koenig takes issue with is the adequacy of the City’s response. Determining whether the City violated the PRA in view of this allegation is a two-step process. The first step is determining whether the City “wrongfully withheld,” the driver’s license numbers under the PRA. *Sanders*, 169 Wn.2d at 836. A “wrongful withholding” is a violation of the PRA and occurs when an agency discloses the existence of a document to a requestor, fails to “exempt” the document under one of the PRA’s enumerated exemptions, and withholds it from production. *Sanders*, 169 Wn.2d at 836. Only if the Court determines that there is a “wrongful withholding,” is the second step triggered. This second step evaluates the applicable remedy for the wrongful withholding. 169 Wn.2d at 846-47.

Instead of engaging in any meaningful analysis of the proper legal standards, Mr. Koenig seeks to jump directly to the remedy, and obtain taxpayer funds because the City of Lakewood withheld from him third-party driver license numbers. But as this Court recently observed, the

adequacy of an exemption statement is not a “freestanding” violation of the Act,

Penalties are available only for a party who prevails on a claim of being denied the right to inspect or copy public records; a claim for the right to receive an exemption statement is not such a claim. *Sanders*, 169 Wn.2d at 860. Failure to provide an exemption statement may constitute an aggravator when deciding the amount of penalties for an agency's wrongful withholding of a record, but penalties are not available for a “freestanding” failure to provide an exemption statement. *Sanders*, 169 Wn.2d at 860-61.

Mitchell, 164 Wn. App. at 606.

There is no, or at least there ought to be no, appreciable difference between failing to provide an exemption log and providing one with “inapplicable exemptions.” Under *Sanders* and *Mitchell*, if an agency fails to provide an exemption log, the failure to do so is not a “freestanding,” violation of the PRA, and thus, no liability attaches for this act (although liability may attach if the record is unlawfully withheld altogether). The failure to comply with the brief explanation requirement is a consideration in awarding costs, fees, and penalties if there is a wrongful withholding of a record. *Sanders*, 169 Wn.2d at 848.

Nor is a contrary holding inconsistent with *Sanders* and *Yakima Herald Republic*. As this Court has already explained, in response to a similar argument, the distinctions between those cases are factual in nature, where the agency had already violated the PRA by wrongfully withholding records,

In *Yakima County*, the newspaper was entitled to costs and fees because the county was equivocal about its possession of responsive records and, instead of identifying those records, forced the paper to file a court action. In *Sanders*, the State's failure to provide a brief explanation of the claimed exemptions added to the fees and costs imposed.

DeLong v. Parmelee, 164 Wn. App. 781, 787, 267 P.3d 410 (2011)(internal citations omitted).

Under Mr. Koenig's theory of liability, if an agency has undertaken the effort to provide such a log, and a requestor is able to demonstrate that a claim of exemption was incorrectly asserted (but the record is still exempt from disclosure under another exemption), liability would attach.

But Mr. Koenig's theory of liability does not make either legal or practical sense. If an agency believing a document to be exempt claims several different exemptions (say, Exemptions A, B & C), and a requestor is successful in establishing that Exemptions B & C do not apply, but the agency establishes that Exemption A does apply, under Mr. Koenig's theory, he obtains financial relief for litigating the propriety of Exemptions B & C, but the requestor does not obtain the document. But, case law already holds that if the record is exempt on any ground, an agency will not be liable. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994)(“PAWS”). Under the approach advocated by Mr. Koenig, the holding of *PAWS* is undermined, elevating gamesmanship and profitability over access to records. “[T]he PRA does not always penalize an agency where it is not in strict adherence to the statute's dictates.” *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 829, 225 P.3d 280 (2009). Yet Mr. Koenig's theory seeks to penalize an agency for its failure to strictly adhere to the PRA. It also creates a perverse disincentive for agencies not to provide a brief explanation at all.

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.*, *PAWS*, 125 Wn.2d at 271 fn. 18. Interpreting the brief explanation rule in the matter proposed by Mr. Koenig twists it out of context; the rule is no longer a method of ensuring valid review for documents which have been withheld. It 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.

But in this case, Mr. Koenig does not maintain that the City “wrongfully withheld,” a record from him. The City identified the withheld records as a driver’s license number. It cited various exemptions. In the absence of a claim that the record itself has been “unlawfully withheld,” there is no relief under the PRA which this Court can afford Mr. Koenig by a reversal of the trial court’s decision, there is no basis to reverse.

C. Mr. Koenig has Failed to Identify a Single “Wrongfully Withheld” Record.

Further hindering any meaningful ability to determine whether these records have been “wrongfully withheld,” is Mr. Koenig’s inability to articulate whether he believes that he should be granted access to these driver’s license numbers. The City, as well as the Superior Court, sought at multiple times, to verify whether Mr. Koenig believed that any records were withheld. At each juncture, Mr. Koenig either declined to supply a response, or the responses which he did supply suggest that no record was wrongfully withheld. Mr. Koenig’s failure to expressly state that he should be entitled to these withheld documents precludes relief.

Prior to the commencement of this litigation, the City inquired of Mr. Koenig whether he was satisfied with the responses,

[T]he 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.”

City of Lakewood v. Koenig, 160 Wn.App. at 886.

Underpinning the necessity for suit was the fact that, in addition to a prior case involving the City of Lakewood, the City had discovered that in two other lawsuits, Mr. Koenig delayed service of process for approximately fifteen months post-disclosure, thereby potentially subjecting the City to then-mandatory daily penalties should a violation be established.³

Early in this litigation, the City served interrogatories upon Mr. Koenig. Notably, when asked “[w]hy it is that you believe that the document was improperly/incorrectly redacted or an exemption improperly claimed,” (CP 176 (Interrogatory 9(c))); Mr. Koenig failed to give any explanation, and simply asserted that the exemptions claimed by

³ On May 29, 2012, the City filed a designation of clerk’s papers. As of this filing, neither the index nor the supplemental records have been transmitted to this Court. To avoid any unnecessary delay in the filing of this brief, we have cited to the anticipated pagination of these supplemental clerk’s papers.

In a lawsuit against Pierce County, Mr. Koenig’s claim accrued on or about January 3, 2006 (CP 264, ¶ 2.3); he filed suit 364 days later on January 2, 2007 (CP 263) and waited until March 27, 2007 – one week before the expiration of the 90 day tolling period – before serving the county. (CP 266). In a similar lawsuit against the City of Lake Forest Park, Mr. Koenig’s claim accrued on September 11, 2006 (CP 271, ¶ 2.4); suit was filed on September 4, 2007 (CP 270) and service accepted by Lake Forest Park on November 7, 2007. (CP 274). 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).

the City were “inapplicable.” (CP 180; Answers to Interrogatories 9 and 13). Mr. Koenig also responded he did not believe that any records were improperly withheld. (CP 175, 180 (Interrogatory No. 8)).

Finally, at the hearing on the parties’ cross-motions for summary judgment, Mr. Koenig was given a prime opportunity to clarify whether he was, in fact, seeking driver’s license numbers,

[Counsel for the City]: ... And I submit if you are to put the question bluntly to Mr. Koenig and counsel, you won’t get a yes or no answer because if he answers that driver’s license numbers should have been redacted, under *Mitchell*, City wins; if the answer is no, the City should have not redacted driver’s license numbers, you are now in the position of arguably being the first judge I am aware of in the state having to make a decision should driver’s license numbers be released into the wild under the Public Records Act[.]

The Court: Well, let’s jump into the fray and ask [Mr. Koenig’s counsel]: Should driver’s license ID numbers be redacted or not?

[Counsel for Mr. Koenig]: Your Honor, that’s not the question. The question in this case ---

The Court: Well, it is my question.

[Counsel for Mr. Koenig]: Well, it may be your question, Your Honor, but the point is, the City of Lakewood sued my client while we were smack in the middle of another public records case pending in front of Judge Serko. They sent my client a letter saying, “If you don’t tell us we have complied with the PRA, we are going to sue you.” We said, “You don’t have the right to do that. And we don’t want you doing it to us, and we don’t want you to do it to anybody else.”

So no, we are not going to answer your request because you don’t have the right to give out a sloppy

response, and then tell the requester that if they are not satisfied, they are going to get hauled into court. ...

(VRP 5-6).

Taken as a whole, the superior court properly granted the City summary judgment. Given multiple opportunities both before and during this litigation to assert whether records were wrongfully withheld, Mr. Koenig's responses suggested that he believed that no records were wrongfully withheld and when the superior court sought to clarify, Mr. Koenig evaded the question. Critically, however, Mr. Koenig failed to answer the question of "why" he felt the records were improperly exempted from disclosure. In the absence of an express claim on Mr. Koenig's part that any records were "wrongfully withheld," it cannot be said that the City of Lakewood violated the PRA in any manner which entitles Mr. Koenig to relief.

D. The Superior Court Properly Determined that Driver's License Numbers are Exempt Under the PRA.

In view of Mr. Koenig's failure to enunciate a basis to claim that he should be entitled to driver's license numbers, the inquiry whether the City violated the PRA should be at an end. So long as the record is exempt under the PRA, on any ground, whether asserted in the exemption log or for the first time post-suit, liability will not attach. *See e.g., PAWS*, 125 Wn.2d at 253.

"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)). The Supreme

Court has recognized that the release of social security numbers are highly offensive to a reasonable person and not of legitimate concern to the public. *PAWS*, 125 Wn.2d at 254. This court has similarly and explicitly recognized that the disclosure of public employees' identification numbers would be highly offensive, because disclosure could lead to public scrutiny of individuals concerning information unrelated to any governmental operation and impermissible invasions of privacy. *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 221-22, 951 P.2d 357 (1998). There is no functional difference between the social security numbers and employee identifiers in these cases, and at bar, the drivers license numbers. The legal inquiry ought to be at an end.

To the extent that the PRA itself should be analyzed, several PRA provisions are sufficiently similar to reinforce this conclusion. The City originally identified RCW 42.56.050 as a ground by which to exempt driver's license numbers. (CP 75-77). It also argued that RCW 42.56.070(1) and other related statutes exempted these records. (CP 64-71). As the Supreme Court recently observed,

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. RCW 42.56.070(1).

Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 407, 259 P.3d 191 (2011)(Emphasis Added).

Thus, whether treated as a stand-alone exemption, or redacted to further the privacy interests contained in these statutes, although the PRA does not contain an express exemption for driver's license numbers, RCW 42.56.050 and RCW 42.56.070, read in context with other provisions of the PRA, most notably, RCW 42.56.590 and other statutes, specifically,

chapter 19.215 RCW, amply supports the trial court's determination that a person's driver's license number is exempt from disclosure under the PRA.

RCW 42.56.230(7) comes the closest to an express exemption. It provides, an exemption for "[d]ocuments and related materials and scanned images of documents and related materials used to prove identity, age, residential address, social security number, or other personal information required to apply for a driver's license or identicard." If the "[d]ocuments and related materials," associated with a driver's license application is exempt, it stands to reason that the driver's license number itself is also exempt.

In any event, other exemptions cited by the City provide a basis for affirming the trial court. Specific intelligence information or investigative records compiled by law enforcement is exempt from disclosure under the PRA when necessary for the protection of any person's right to privacy. RCW 42.56.240(1). These materials were collected by law enforcement while investigating criminal misconduct and a traffic collision. Under RCW 42.56.050, the right to privacy "is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." In *PAWS*, the Supreme Court recognized that analogous personal identifiers qualified. 125 Wn.2d at 254. ("It 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.")

Under RCW 42.56.590, a governmental entity which owns or licenses computerized data that includes personal information is required to disclose any breach of the security of the system to any resident of this state whose unencrypted data may have been acquired. While the City

does not claim that the information requested by Mr. Koenig is the sort of computerized data it maintains, read together, the PRA as a whole, and RCW 42.56.590(5) and (6) provide strong protections over driver's license numbers.

Pursuant to RCW 42.56.590(1), agencies are required to disclose security breaches of certain statutorily-defined "personal information." RCW 42.56.590(5)(b) specifically includes a "Driver's license number or Washington identification card number."

In interpreting statutes, a court does not read words in isolation; it reads the statute in the context of the whole statute and larger statutory scheme and avoids an interpretation which would lead to an absurd result. *City of Auburn v. Gauntt*, --- Wn.2d ---, ¶ 13, 2012 Wash. LEXIS 298 (Wash. Apr. 19, 2012)(citing, *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002); *Wright v. Jeckle*, 158 Wn.2d 375, 379-80, 144 P.3d 301 (2006)). It seems absurd that on one hand, an agency is required to notify citizens of a security breach of a driver's license number, but on the other hand, must disclose this same information to anyone who requests it via the PRA.

Similar sorts of protections over driver's license numbers exist throughout Washington law and carry over into the PRA. In his briefing, Mr. Koenig argues that the City claimed these statutes and court rules as exemptions under the PRA. The City has done no such thing. What the City has done is use the existence of these authorities and the policies behind them, to reinforce the general privacy principles which are covered by other exemptions.

One statutory scheme, in particular, the provisions of chapter 19.215 RCW, require that agencies destroy or dispose of certain personal

identification information. Under the policy statement of RCW 19.215.005:

The legislature finds that the careless disposal of personal information by commercial, governmental, or other entities poses a significant threat of identity theft, thus risking a person's privacy, financial security, and other interests. The alarming increase in identity theft crimes and other problems associated with the improper disposal of personal information can be traced, in part, to disposal policies and methods that make it easy for unscrupulous persons to obtain and use that information to the detriment of the public. Accordingly, the legislature declares that all organizations and individuals have a continuing obligation to ensure the security and confidentiality of personal information during the process of disposing of that information.

(Emphasis Added)

The Legislature in enacting RCW 19.215.005 did not choose its words lightly. In this statute, the Legislature speaks of a “continuing obligation,” to safeguard personal information. To that end, agencies have a statutory duty to destroy such personal information when it is done with it. RCW 19.215.020(1). If there is a “continuing obligation,” to safeguard this information at destruction, it necessarily implies a pre-existing duty to safeguard this information at the time it is used by the entity in question. In fact, the Legislature expressly provides that driver’s license numbers are expressly included within the ambit of RCW 19.215.010(5).

As the City also pointed out to the superior court, a number of other statutes reinforce the privacy protections associated with driver license information. Our legislature has criminalized the possession of another person’s driver’s identification, classifying this offense as a gross misdemeanor. RCW 9A.56.330. Application of a concealed pistol license ordinarily requires a driver’s license number. RCW 9.41.070(4). Such

applications are exempt from disclosure under the PRA. RCW 42.56.240(4).

As the City stressed in its briefing before the Superior Court and reiterates here, the failure to expressly call-out and specifically exempt driver's license numbers may be a textual gap in the PRA. But it is also one which the judiciary has already determined on its own is worthy of protection. By court rule, driver's license information is a "restricted personal identifier[]," which is not to be publicly filed with a court. GR 15(b)(6); GR 15(c)(2)(E); GR 22(b)(6).

Although the PRA itself does not contain a precise exemption for driver's license numbers, viewing the applicable landscape, it should be abundantly clear that there is ample authority to exempt driver's license numbers from public disclosure. Thus, whether viewed as a stand-alone exemption under the PRA or one supported by multiple statutes, under any set of circumstances, driver's license numbers are exempt. As such, this Court should affirm the superior court.

E. The Appeal is Frivolous. The City Requests Attorney Fees.

In accordance with RAP 18.1 and 18.9(c)(2), the City of Lakewood requests its attorney fees for responding to a frivolous appeal. "An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal." *Fay v. Northwest Airlines*, 115 Wn.2d 194, 201, 796 P.2d 412 (1990)(citing, *Green River Comm'ty College Dist. 10 v. Higher Educ. Personnel Bd.*, 107 Wn.2d 427, 442-43, 730 P.2d 653 (1986)). Viewed within the confines of this rule, this appeal satisfies these legal requirements. Viewed in a common sense manner, this case cries for the imposition of these fees.

Under the precedent set forth in *Sanders v. State, Yakima County v. Yakima Herald-Republic* and this Court's decision in *Mitchell v. Washington State Dept. of Correction* the adequacy of an exemption log is not a "freestanding," violation of the PRA. Rather, as set forth above, there first must be a determination that a record has been unlawfully withheld.

As we set forth above, not only does Mr. Koenig fail to make the claim that driver's license numbers are unlawfully withheld, he fails to advance any argument why a governmental entity (such as the City of Lakewood) should be obligated to produce this sort of information which it may hold on any citizen. Before the Superior Court, the Court twice asked him whether driver's license numbers should be produced, and Mr. Koenig twice told the court that he wouldn't answer the question. (VRP 5-6). A holding which would require a governmental agency to produce this sort of information defies legal sense. In this day and age, it also defies common sense.

The PRA carries with it an exalted and noble purpose.

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030.

Granting relief to Mr. Koenig furthers none of the purposes behind the PRA. The disclosure of driver's license numbers does not implicate "giv[ing] their public servants the right to decide what is good for people to know." *Id.* Nor does it have anything to do with "maintain[ing] control over the instruments [the people] have created." *Id.*

On the other hand, this Court has held that the PRA is not a game to be used by requestors to purloin taxpayer funds from agencies for alleged technical violations of the Act and that sanctions are – in appropriate cases – appropriately assessed against requestors who misuse the Act:

Using the PRA as a vehicle of personal profit through false, inaccurate, or inflated costs is contrary to the PRA's stated purpose to keep the governed informed about their government; costs based on false, inaccurate, or inflated claims do not serve that purpose and are not reasonable.

Mitchell v. Wash. State Inst. of Pub. Policy, 153 Wn. App. at 830 (Emphasis Added).

Taking a few steps back from the legal framework and viewed from a "person on the street," lens, this case merits the imposition of terms. Any reasonable ordinary citizen would want its government to keep in confidence and withhold from prying eyes the very data (in the form of driver's license numbers) which keeps him/her safe from all manner of ills ranging from identity thieves to those who may seek to snoop on their neighbor's credit ratings.

This is one of those, hopefully isolated, cases in which the PRA is being abused. Driver's license numbers do not "keep the governed informed about their government." RCW 42.56.030. Rather the unauthorized release of this sort of information "make[s] it easy for unscrupulous persons to obtain and use that information to the detriment

personal identifier. Mr. Koenig seeks profit simply because an agency has redacted something wholly proper, and in the process consume both this Court's valuable time as well as the City's scant resources to litigate this academic issue.

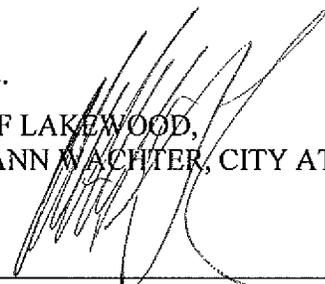
Mr. Koenig presents no debatable issues upon which reasonable minds may differ, as to why driver's license numbers should be producible under the PRA, and there should be no reasonable possibility of reversal. RAP 18.9. Accordingly, the City requests its attorney fees for defending against a frivolous appeal, in an amount to be determined by a commissioner of this Court.

IV. CONCLUSION

The City of Lakewood therefore requests that this Court (1) affirm the decision of the Pierce County Superior Court in this matter; and (2) award it reasonable attorney fees for defending against this frivolous appeal pursuant to RAP 18.9.

DATED: June 11, 2012.

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
Counsel for the Appellant.

Matthew S. Kaser mkaser@cityoflakewood.us
Counsel for the Respondent

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 11th day of June, 2012 at Lakewood, Washington.


Ann-Marie Evans

APPENDIX

Excerpts from Plaintiff's First Interrogatories and Requests for Production of Documents (And Answers Thereto) (Clerks Papers 175-177, 180)

1 INTERROGATORY NO. 7:

2 Please identify every person who assisted you in preparing your responses to these
3 interrogatories. As to each such person, please set forth their name, address and capacity in
4 which they are connected to you. As to any non-party (excluding counsel) please identify those
interrogatories and/or requests for production which said individual participated in preparing
the response.

5 ANSWER:

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9 INTERROGATORY NO. 8:

10 With respect to the subject public records requests which form the basis of this
11 litigation, is it your contention that there are responsive public records which should have been
produced in response to these requests, but were not produced? If so, please state for each such
document:

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- 13 a. A brief description of the document;
14 b. A description as to your belief why each such document is a public record which
should have been produced.

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15 ANSWER:

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1 INTERROGATORY NO. 11:

2 With respect to any of the documents identified in the preceding three interrogatories,
3 have you obtained the documents so identified by means other than public records requests
4 directed to the City of Lakewood? If so, please identify;

- 4 a. The document obtained;
- 5 b. How you obtained it;
- 6 c. The source from whom you obtained it; and
- 7 d. The date you obtained it.

8 ANSWER:

9
10

11 INTERROGATORY NO. 12:

12 Does your answer to plaintiff's complaint set forth any affirmative defenses (or if you
13 have not yet answered the complaint, do you anticipate asserting any affirmative defenses)? If
14 so, please state the facts upon which each affirmative defense is based.

15 ANSWER:

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17

18 INTERROGATORY NO. 13:

19 Do you maintain that the City of Lakewood otherwise violated the provisions of the
20 Public Records Act, chapter 42.56 RCW in the processing of the public records requests
21 forming the basis of this litigation? If so, please state with specificity all facts upon which you
22 base such contention.

23 ANSWER:

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28 PLAINTIFF'S FIRST INTERROGATORIES AND REQUESTS FOR
PRODUCTION OF DOCUMENTS

Page 8
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CITY OF LAKEWOOD
Legal Department
6000 Main Street S.W.
Lakewood, Washington 98499
(253) 589-2489 FAX (253) 589-3774

1 **INTERROGATORY NO. 7:**

2 Plaintiff's undersigned counsel.

3 **INTERROGATORY NO. 8:**

4 Based on a lack of information Koenig does not contend that any responsive records
5 have been improperly withheld in their entirety.

6 **INTERROGATORY NO. 9:**

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

9 **INTERROGATORY NO. 10:**

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

12 **INTERROGATORY NO. 11:**

13 See answer to interrogatories nos. 1-6. Without waiving that objection, the answer to
14 this interrogatory is no.

15 **INTERROGATORY NO. 12:**

16 An "affirmative defense" is generally a defense on which the defendant has the burden
17 of proof. *See State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). Because the
18 agency has the burden of proof in a PRA case Koenig has no idea what the City means by
19 "affirmative defense" in the context of the PRA
20

21 **INTERROGATORY NO. 13:**

22 See paragraph 3.5 in Koenig's *Answer* regarding the redaction of driver's license
23 numbers. By citing inapplicable exemptions the City further violated RCW 42.56.210(3).
24
25
26

LAKEWOOD CITY ATTORNEY

June 11, 2012 - 2:01 PM

Transmittal Letter

Document Uploaded: 429721-Respondent's Brief.pdf

Case Name: City of Lakewood v David 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: Respondent's

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

Other: _____

Comments:

No Comments were entered.

Sender Name: Ann-marie Evans - Email: aevans@cityoflakewood.us

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

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