Washington Supreme Court No. 90136-8
Court of Appeals, Division One, No. 69129-5

IN THE WASHINGTON SUPREME COURT

JAMES C. EGAN,

Appellant

v.

CITY OF SEATTLE,

Respondent

AMICI CURIAE BRIEF OF ALLIED DAILY NEWSPAPERS OF WASHINGTON, WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION, THE MCCLATCHY COMPANY, PIONEER NEWS GROUP, SOUND PUBLISHING, DAILY SUN NEWS, THE SEATTLE TIMES COMPANY, AND THE WASHINGTON COALITION FOR OPEN GOVERNMENT IN SUPPORT OF APPELLANT'S MOTION FOR EXTENSION OF TIME AND PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Statutes

Other Authorities

I. IDENTITY AND INTEREST OF AMICUS

Amici curiae are newspapers, newspaper associations, and the Washington Coalition for Open Government ("WCOG"), collectively "Amici". The identity and interest of Amici are further described in the accompanying Motion to File Amici Curiae Memorandum. A number of Amici have been the target of Public Record Act ("PRA") injunction suits aimed at preventing them from obtaining records to report on them or publish them. True and correct copies of materials from two such lawsuits involving amici here are attached hereto as **Appendices A and B**. The Division Opinion likely would, if accepted as correct, bar the Amici from using the Anti-SLAPP statute (RCW 4.24.525) in the future to dispose of meritless PRA injunction suits aimed at barring their access to records for the purpose of publishing them and reporting on them. Amici have a legitimate interest in assuring the Court is adequately informed about the issues and the impact its decision to accept or reject the Motion for Extension of Times and Petition for Review will have on all record requestors, not only the parties.

II. LEGAL AUTHORITY AND ARGUMENT

A. Introduction

Amici ask for public records for the purpose of reporting on them, publicizing them, or, for WCOG and its members, using them for

petitioning of the government. Those who wish to prevent those activities can file a PRA injunction lawsuit against Amici forcing them to incur significant expense to defend their right to know, thereby delaying for many months access to public records. The Anti-SLAPP law allows requestors to reach a quick resolution to these lawsuits so they can bring important stories and information to their readers and the public. As currently written, the Division One Opinion may foreclose Amici's future ability to use the Anti-SLAPP law to test a PRA injunction lawsuit. This leads to an unjust result because these PRA requestors will have to face an untenable choice: to incur significant legal bills to defend their right to know through access to public records and to share that knowledge, or abandon the PRA request to avoid the cost of litigation. The Anti-SLAPP law allows for speedy determination of the merits of a PRA injunction suit and its use should not be foreclosed as the Division One Opinion holds. This case has far broader implications than the Appellant's case. It significantly alters the scope of the Anti-SLAPP statute and its application to any claim for which a statute allows an action—which includes nearly every claim in existence.

B. The Division One Opinion Does Not Preserve Protections for Conduct Defined by RCW 4.24.525(2)(e).

The Anti-SLAPP statute RCW 4.24.525(2) states:

> (2) This section applies to **any claim, however characterized, that is based on an action involving public participation and petition**. As used in this section, an "**action involving public participation and petition**" **includes**:
>
> (a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
>
> (b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
>
> (c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
>
> (d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or
>
> (e) **Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition**.

(emphasis added). Section (2)(e) means this "section applies to any claim, however characterized, that is based on ... [a]ny other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition." RCW 4.24.525(2) and (2)(e).

A public records request is "lawful conduct." The public is empowered with strong rights of access under the PRA. See, e.g., RCW 42.56.010-.100, .120, .520, .530, .550, .560, .580. The question Division One failed to fully consider in the Opinion was whether that lawful conduct was "**in furtherance of the exercise** of the constitutional right of free speech in connection with an issue of public concern, or **in furtherance of the exercise** of the constitutional right of petition." RCW 4.24.525(2)(e) (emphasis added). When a newspaper or entity such as WCOG makes a PRA request to investigate and report on a matter of public concern, the "in furtherance" test should be met. When a person or advocacy group uses a PRA request to gather material to petition the government, that test should be met. To use the Anti-SLAPP remedy the requestor need not show that the PRA injunction suit was brought to halt these rights or that the right to the records was itself a Constitutional right.

Division One erroneously held that "Because Egan does not have a constitutional right to the records requested, his request under the PRA does not fall within the ambit of the anti-SLAPP statute as protected participation or petition activity." **City of Seattle v. Egan**, -- Wn.App. --, 317 P.3d 568, 568-69 (2014). Under (2)(e), Egan need only show that his

lawful conduct (the PRA request) was "in furtherance of" the exercise of one of the two constitutional rights. Here, the PRA injunction suit was based on Egan's conduct in making a PRA request for records with a threat to sue for nondisclosure. This conduct was lawful. Egan had a right to request records and a right to threaten to sue if the records were not provided. Egan further had a right to sue on behalf of his clients for actions the records might reveal. Egan stated an intention to publicize the records he received and report on their contents and to use them in his lawsuit for his clients alleging police brutality, illustrating the request was also in furtherance of his free speech and petition rights. Egan showed that his lawful conduct was in furtherance of his right of free speech on an issue of public concern or in furtherance of his right to petition. Accordingly the PRA injunction suit was appropriate to test under the Anti-SLAPP statute. The requestor need only show the request was in furtherance of such rights, and then the burden shifts to the PRA injunction plaintiff to prove by clear and convincing evidence a probability of prevailing on the merits. RCW 4.24.525(4)(b). **See, generally,** Bruce E.H. Johnson & Sarah K. Duran, A View from the First Amendment Trenches: Washington State's New Protections for Public Discourse and Democracy, 87 Wash. L. Rev. 495 (2012).

1. Egan's Request was in Furtherance of his Rights to Free Speech and to Petition

Egan contends he sought the records for at least two purposes: one, for purposes of filing a lawsuit against the Police Department for his clients; two, to investigate police impropriety and to publicize the videos and their findings in lawsuits for his clients and to share them with the media. Division One in **Akrie v. Grant**, 178 Wn.App. 506, 513 n.8, 315 P.3d 567, 571 n. 8 (2013), characterized the filing of a lawsuit as constitutionally-protected speech and petitioning activity. Under this reasoning, Egan's PRA request would be in furtherance of his right to file a lawsuit, and that right is both a free speech right as well as a right to petition and thus covered by Section (2)(e) of the Anti-SLAPP law. His wish to publicize the videos and share them with the media is further an exercise of free speech rights.

2. Egan's Request Related to a Matter of Public Concern

Egan must only establish by a "preponderance of the evidence" that the speech rights he wished to exercise were on an issue of public concern. RCW 4.24.525(4)(b) California has described an issue of public concern as "any issue in which the public is interested." **Nygard, Inc. v. Uusi-Kerttula**, 159 Cal. App. 4th 1027, 1042 (2008). Videos relating to possible police misconduct clearly relate to an issue of public concern, particularly if, as Egan contends, they would be released to public scrutiny

and they might be a source of a lawsuit. The speech would easily meet the definition of "public concern" as the records being sought were dash cam videos related to concerns regarding the propriety of police behavior of a police department recently investigated by the U.S. Department of Justice.

3. Egan's Conduct Should be Held to Fall within Section (2)(e).

The PRA injunction suit was based on Egan's lawful conduct of making his PRA request and his threat to sue. The PRA request and lawsuit threat were acts in furtherance of Egan's free speech and petitioning rights as he intended to publicize the records he received (a free speech a right) and file a lawsuit based on what they showed (both a free speech and a petition right). The Opinion erroneously states "the City's declaratory action did not interfere with Egan's right to petition." **Egan**, 317 P.3d at 570. By filing suit the City forced Egan to choose to stand and litigate at considerable expense or to abandon the request and his commensurate right to petition its denial. Further, denying the litigant relevant evidence that would be helpful and enable him to file suit or prevail on his claim constitutes "interference." Division One further reasoned that the Anti-SLAPP statute did not apply because "the City's action was not **primarily** concerned with limiting Egan's protected activity ..." **Egan**, 317 P.3d at 572 (emphasis added). The City's motive is

irrelevant. The Anti-SLAPP statute applies to **any** claim that is based on lawful conduct in furtherance of the right to free speech or to petition. It does not require that the Plaintiff be "primarily" concerned with limiting protected activity. The Anti-SLAPP law's clear text also does not support a finding that the lawsuit must be motivated by the protected activity or that the protected activity was completely prevented for the statute to apply. The newspaper amici here who were sued with PRA injunctions could still have written news stories about the events but they would not have had the full picture and been able to share that with the public. The test, according to the statute's clear text, must be whether the conduct at which the lawsuit was directed—here the PRA request—was in furtherance of one of two types of protected activity. Division One's Opinion improperly narrowed the scope of the Anti-SLAPP statute effectively removing Section (2)(e) as a basis for its protections.

C. Interpreting the Anti-SLAPP Law as Described Above Does Not Vitiate RCW 42.56.540.

An Anti-SLAPP motion does not preclude a PRA Injunction suit, nor does interpreting it as described above vitiate RCW 42.56.540 as Division One stated in the Opinion. The Anti-SLAPP law inserts a potential remedy into any litigation regarding conduct in furtherance of one of the two protected rights. A party bringing

an Anti-SLAPP motion has the burden of proving his conduct falls within the definition. If he fails, he can be fined and made to pay the Plaintiff's fees and costs. If he succeeds, the burden shifts to the Plaintiff to prove a probability of prevailing. Division One held this is akin to a summary judgment standard. The fact that a statute allows a party to bring a PRA injunction action does not mean the Anti-SLAPP law cannot apply to it. Nearly every cause of action is based on some statute allowing for such a claim, including specifically injunction claims. Such a holding would make the Anti-SLAPP law inapplicable to the vast majority of causes of action and defeat the purpose for which it was written. A defendant faces significant risks by bringing a meritless Anti-SLAPP motion in a PRA injunction case, so their use will be limited. On the other hand, if parties can meet the standards for injunctive relief tested at an early stage, they will not be denied the benefits of RCW 42.56.540. The Petition for Review should be granted and the Opinion reversed or Amici and the public will be deprived of a necessary tool to dispose of improper injunction suits that forestall the Amici and the public from access to public records. The Opinion impermissibly re-writes a statute and alters its purpose.

D. Seattle Cannot Meet the "Clear and Convincing" Test.

Because Seattle's suit was based on an action involving public participation and petition, Seattle must "establish by clear and convincing evidence a probability of prevailing" on the merits. RCW 4.24.525(4)(b). Seattle cannot do so. **Fisher Broad. v. Seattle**, --Wn.3d--, --P.3d --, No. 87271-6, Slip Opinion at 15 (Wash. June 12, 2014), attached as **Appendix C**. This Court has held that police dash cam videos are not categorically exempt and should be disclosed in the absence of actual pending litigation related to the videos. **Id.** For this additional reason, review should be accepted.

E. An Extension of Time Should be Granted

Appellant relied on the date the Opinion was sent to the parties and the date of the cover letter from the Court, not realizing the Opinion had been filed the day before 8 minutes before the Court closed. That 8 minutes should not deprive the Amici and public of this Court's review. An extension of time should be granted and review accepted.

Respectfully submitted this 13th day June, 2014.

Allied Law Group LLC

By: _____

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on June 13, 2014, I delivered a copy of the foregoing

Amici Curiae Memorandum of Allied Daily Newspapers of Washington, The Washington Newspaper Publishers Association, The McClatchy Company, Pioneer News Group, Sound Publishing, Daily Sun News, The Seattle Times Company, and the Washington Coalition for Open Government in Support of Appellant's Motion for Extension of Time and Petition for Review via email pursuant to agreement to:

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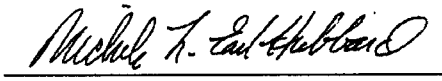
Dated this 13th day of June 2014 at Seattle, Washington.



Michele Earl-Hubbard

Appendix A

SUPERIOR COURT
SNOHOMISH COUNTY, STATE OF WASHINGTON

John Doe No. 1, a Retired Peace Officer, et al,

Petitioners,

vs.

Mark Roe, Snohomish County Prosecuting Attorney, and The Daily Herald,

Respondents.

No. 14 2 01756 0

Petition for Injunctive and Other Relief

COMES NOW the petitioner John Doe No. 1, through his attorney undersigned, and petitions the Snohomish County Superior Court as follows:

Parties

1) Petitioner is a resident of Snohomish County and is a former law enforcement officer, i.e., a "peace officer" as defined by RCW 9A.04.110 (15) ("peace officer") and RCW 9A.04.110 (13) ("officer" and "public officer"). Petitioner has no present law enforcement office or appointment or employment whereby he exercises or assumes any of the powers or functions of a public police officer.

Petitioner proceeds in this action under the name "John Doe No. 1, a Retired Peace Officer" so as to not suffer further the designation and disclosure of being a "*Brady* Cop" as

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defined in more detail below.

2) Mark Roe is the duly elected Prosecuting Attorney for Snohomish County, with primary office located in the Snohomish County Courthouse, 3000 Rockefeller, Everett, Washington, which is in the county seat as required by RCW 36.27.070. Mr. Roe's duties are outlined in RCW Chapter 36.27.

Prosecutor Roe has designated and disclosed certain present and retired law enforcement officers as "*Brady* Cops" and continues to do so as detailed in more specificity below.

3) The Daily Herald is Snohomish County's leading newspaper, with business offices, printing facilities and distribution of newspapers located in Everett, Snohomish County, Washington. The Herald is owned by Sound Publishing, Inc., 19351 8th Ave NE, Poulsbo, Washington, which is a subsidiary of Black Press Group, Ltd., 818 Broughton Street, Victoria, British Columbia, Canada.

The Herald has requested from the Snohomish County Prosecutor, through Washington's Public Disclosure Laws, RCW 42.56, the *Brady v. Maryland* guidelines and procedures, as well as the identities of "*Brady* Cops" as discussed in more detail below.

Brady v. Maryland

4) *Brady v. Maryland*, 373 U.S. 83 (1963), requires state prosecutors to disclose materially exculpatory evidence in the government's possession to the criminal defense. "*Brady* material" or "*Brady* evidence" includes any evidence favorable to the accused, such as evidence (a) that goes towards negating a defendant's guilt, (b) that would reduce a defendant's potential sentence, or (c) goes to the credibility of a witness (i.e., "potential impeachment evidence").

5) Suppression of such "favorable" evidence violates a criminal defendant's 14th Amendment "due process" right irrespective of the good faith or bad faith of the prosecution. That is, violations can occur whether the prosecution willfully or inadvertently suppressed the evidence.

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Brady May Be Limited By Other Interests

6) A criminal defendant's 14th Amendment "due process" right to evidence does not necessarily prevail over all other rights or interests of others.

7) For example, a criminal defendant may be denied medical records of a prosecution witness because of the statutory physician-patient privilege, *State v. Mines*, 35 Wn.App. 932 (1983); statements of a rape victim to her counselor are not discoverable because they are privileged by statute, *State v. Espinosa*, 47 Wn.App. 85, 733 P.2d 1010 (1987); the identity of the prosecution's confidential informant in a drug case is not generally discoverable, *State v. Burleson*, 18 Wn.App. 233, 566 P.2d 1277 (1977). Similarly, absent some compelling reason, the victim of a crime cannot be compelled to submit to a psychiatric examination, *State v. Tobias*, 53 Wn.App. 635, 769 P.2d 868 (1989).

8) The privacy rights of private citizens are recognized in the Washington State Constitution. For example, Article I, section 7 (Invasion of Private Affairs or Home Prohibited) provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Further, Article I, section 30 (Rights Reserved) provides that "The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people."

Implementation of *Brady* Rule in Washington

9) The requirements of *Brady v. Maryland* have not been codified by statute in the Revised Code of Washington (RCW).

10) Moreover, while some court rules may be pertinent, e.g., CrR 4.7(a) and CrR 3.8 (d) require disclosure of material or information which tends to negate the criminal defendant's guilt or impeach witnesses, no court rule specifically directs how the *Brady* Rule is to be *implemented.*

11) Police officers who have been designated as "*Brady* Cops" in Washington State and Snohomish County are those whom prosecutors deem are subject to *potential* impeachment, through evidence that *could* impeach them. See, e.g., attached "Exhibit A,"

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Washington Association of Prosecuting Attorneys "Model Policy" to "Disclosure of Potential Impeachment Evidence for Recurring Investigative or Professional Witnesses" (Adopted June 19, 2013).

12) The development of guidelines, rules and designations of *"Brady* Cops" are determinations regarding the competency and credibility of witnesses and admissibility of evidence, which is a judicial function, and the acts of the prosecution are usurpation of judicial power in violation of the separation of powers granted the Courts under Article IV the Washington State Constitution.

13) As the attached "Exhibit A" illustrates, the designation of an officer as a "*Brady* Cop" is subject to the unbridled discretion of the prosecutor, without standards, and is also an arbitrary and capricious delegation of the prosecutor's discretion to law enforcement agencies. See "Exhibit B," the Washington Association of Sheriffs & Police Chiefs "Model Policy for Law Enforcement Agencies Regarding Potential Impeachment Disclosure" (Revised Policy Approved November 20, 2013). Further, the process is vague and the determination is made without due process for the officer, and is a determination from which there is no appeal, also without due process, which is also arbitrary and capricious conduct.

14) Moreover, the prosecutor's designation attaches and remains well beyond any statute of limitation or purpose of the *Brady* Rule, as evidenced in this case as it has been applied to retired law enforcement officers unlikely to be witnesses in any criminal prosecution, which is a denial of the private person's equal protection, due process and liberty interests. The petitioner has no adequate remedy at law to prohibit such conduct.

15) Additionally, as suggested in the attached "Exhibit A" and in the attached "Exhibit B," the *Brady* Rule requiring disclosure of potential impeachment evidence until this case has been, or should be, applicable only to (a) *presently* employed law enforcement peace officers in (b) criminal cases *presently* being investigated or prosecuted, (c) who are *recurring government* witnesses (d) believed *to be called* to testify *more than once* on a

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regular basis (e) in a *pending or future* trial.

Public Disclosure (RCW 42.17) and "*Brady* Letter" Roster"

16) Almost a year after the petitioner retired, by "Potential Impeachment Disclosure Notice," the then Snohomish County Prosecutor designated petitioner as a "*Brady* Cop" despite his retirement, despite that he was not expected to testify in any present or future pending criminal cases, and despite the unlikelihood that he would even be a recurring government witness.

17) More than five years after the petitioner retired, the present Snohomish County Prosecutor has indicated that petitioner is still designated as a "*Brady* Cop" on its *Brady* roster, despite his continued retirement and notwithstanding the lapse of his RCW 43.101 certification. The prosecutor has stated his intention to disclose petitioner's designation to The Herald, all to petitioner's surprise, disappointment and chagrin and in violation of his privacy as a person retired from law enforcement duties.

The threatened disclosure of the designation is in response to The Herald's public records disclosure request made pursuant to RCW 42.56. See attached "Exhibit C."

18) Not all documents prepared by the Snohomish County Prosecutor's Office regarding petitioner and other law enforcement officers, presently employed or retired, are subject to disclosure under RCW 42.56. See, for example, *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993). Petitioner's designation should not be disclosed under the circumstances in this case and exemptions provided in RCW 42.56.

19) The disclosure of petitioner's *Brady* designation is clearly not in the public interest and would cause substantial and irreparable damage to petitioner. Moreover, petitioner has no adequate remedy at law.

20) Pursuant to RCW 42.56 and the attached "Exhibit C," the petitioner is required to join The Herald as a party to this action for an injunction.

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Prayer for Relief

Petitioner prays for the following relief, alternatively and cumulative:

(1) For the issuance of an injunction restraining the prosecutor (a) from disclosing the *Brady* roster or list containing his true name, or the name of any retired law enforcement officer unlikely to testify regularly during a pending or future trial, and (b) from maintaining and implementing a *Brady* roster without due process of law protections, including appeal and termination of the designation; and

(2) For the issuance of a writ of prohibition under RCW 7.16.290 *et seq* prohibiting the Snohomish County Prosecuting Attorney (a) from usurping the Washington State Supreme Court's rule making powers by creating, establishing and implementing a *Brady* procedure and roster; (b) from maintaining a "*Brady* Cop" roster, particularly including retired law enforcement officers, or officers with an expired RCW 43.101 certification, such as petitioner; (c) from disclosing petitioner's true name and that petitioner is on that *Brady* roster or list; (d) from establishing and maintaining such a *Brady* roster without affording due process, including appeal rights, to any officer who is so designated; and (e) prohibiting such other related acts; and

(3) For the issuance of a writ of certiorari under RCW 7.16.030 *et seq* to review and correct the exercise of arbitrary and capricious power or unbridled discretion of the prosecutor in establishing, maintaining and implementing a *Brady* list or roster in excess of his powers; and

(4) For the issuance of a writ of mandamus under RCW 7.16.150 *et seq* requiring and mandating that the Snohomish County Prosecuting Attorney implement a *Brady* procedure which affords petitioner and other persons designated as "*Brady* Cops" due process of law, including appeal rights and a procedure through which inclusion on the roster may be terminated, particularly after retirement from law enforcement; and

(5) For a declaratory judgment that the *Brady* designation and roster maintained by the prosecutor is contrary to the rights of the petitioner and other retired law enforcement

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officers for the reasons stated above, incorporated here by this reference; and

(6) For damages and costs under RCW 7.16.210 and .260; damages and costs under RCW 7.16.320 and .260; and costs and reasonable fees under RCW 4.84.

DATED this 3 day of January, 2013.

Royce Ferguson, WSBA No. 5879
Attorney for Petitioner

Verification

I declare under penalty of perjury under the laws of the State of Washington that the following is a true statement:

I am the petitioner. I am using the name of "John Doe No. 1, a Retired Peace Officer," because that is who and what I am. I am retired from law enforcement, effective August 18, 2008. Almost a year after I retired, the then Snohomish Prosecuting Attorney issued a "Potential Impeachment Disclosure Notice" dated July 31, 2009. In effect, the notice was issued pursuant to the case of *Brady v. Maryland*, which is discussed in the foregoing petition. Since my retirement, I let my RCW 43.101 law enforcement certification lapse. It was then known, and has been since known, that I am retired from law enforcement and that it is extremely unlikely that I will be testifying in a pending or future criminal trial. I am not endorsed as a witness by any prosecutor in any case. However, as illustrated by the attached "Exhibit 3," I recently became aware that the present prosecutor was going to disclose my name as a person subject to potential impeachment, despite my retirement more than five years ago. I was surprised to learn of this. I do not want my name to be disclosed, which would cause irreparable damage and suffering. There are other retired officers who I believe share this view. We have no speedy or plain remedy at law other than to request a restraining order and other relief, including injunction, which is

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invited by the prosecutor's office.

I have read the foregoing petition and know its contents and verily believe the same to be true.

Signed and dated at Everett, Washington, on January 3, 2014.

John Doe

John Doe No. 1, a Retired Peace Officer, Petitioner

Verification

I declare under penalty of perjury under the laws of the State of Washington that I observed "John Doe" sign the above petition; I have known John Doe for more than 25 years; I know his real identity and verify that he is a real person.

Signed and dated at Everett, Washington on January 3, 2014.

ROYCE FERGUSON
ATTORNEY AT LAW

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EXHIBIT A

ADOPTED – JUNE 19, 2013

MODEL POLICY

DISCLOSURE OF POTENTIAL IMPEACHMENT EVIDENCE FOR RECURRING INVESTIGATIVE OR PROFESSIONAL WITNESSES

WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS
2013

This written policy is designed to achieve compliance with these requirements, and to foster county-wide uniformity in the way potential impeachment of recurring government witness issues are resolved. ***All County deputy prosecuting attorneys are required to know and follow this protocol and all relevant law concerning potential impeachment of recurring government witness disclosure obligations.***

I. BACKGROUND

In representing the State of Washington, Prosecuting Attorneys function as ministers of justice. To administer justice Prosecuting Attorneys accept responsibilities for the integrity of the criminal justice system and responsibilities that run directly to a charged defendant.

One specific responsibility is an affirmative duty to disclose potentially exculpatory information to a charged defendant. There are several sources for disclosure requirements of potentially exculpatory information.

A constitutional Due Process requirement for disclosure is set out in Brady v. Maryland, 373 U.S. 83 (1983). This requirement has been explained and modified by several subsequent cases. This Due Process requirement applies to all information in the hands of governmental agencies. Prosecutors have "a duty to learn of any [exculpatory] information known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitely, 514 U.S. 419 (1995). Impeachment evidence is especially likely to be 'material' under disclosure requirements. Silva v. Brown 416 F.3d 980 (9th Cir.2005). Failure to comply with these requirements can lead to reversal of a criminal conviction.

Independent of the constitutional due process requirement, there are court and practice rules that apply. Prosecutors are required by Criminal Rule 4.7(a)(3) to "disclose any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged." This obligation is "limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff." Criminal Rule 4.7(a)(4). Once information is provided to the Prosecutor's Office by law enforcement agencies, that material becomes subject to disclosure under Criminal Rule 4.7(a)(3).

A closely concurrent duty to disclose such information is also placed upon prosecutors by Rule of Professional Conduct 3.8(d).

The requirements of Due Process and those of Criminal Rule 4.7 and Rule of Professional Conduct 3.8 apply to evidence that could be used to impeach witnesses. The scope of the requirements addressing potential impeachment evidence is different. Due Process will focus upon evidence that raises issues of credibility or competency, and imposes an affirmative duty on prosecuting attorneys to learn of impeachment evidence for recurring witnesses for the prosecution/investigation team i.e. investigators and forensic scientists. The court and practice rules requirements are limited to information possessed by the prosecuting attorney, but categorically include any prior convictions of a recurring witness for the prosecution/investigation team.

A law enforcement officer's or forensic expert's privacy interest does not prevent disclosure of disciplinary records, as such records are considered to be of legitimate concern to the public. *See, e.g. Dawson v. Daly*, 120 Wn.2d 782, 795-96, 845 P.2d 995 (1993); *Cowles Pub'g Co. v. State Patrol*, 44 Wn. App. 882, 724 P.2d 379 (1986), *rev'd on other grounds*, 109 Wn.2d 712, 748 P.2d 597 (1988).

Thus, Prosecuting Attorney disclosure requirements cumulatively include both an affirmative duty to seek out certain impeachment information and a duty to disclose information that may not impact the witnesses credibility.

II. GUIDELINES

1. As required by law, this office requests law enforcement agencies to inform it of information that could be considered exculpatory to criminal defendants. For purposes of disclosure, this office must determine whether the information is potentially exculpatory and how and when to make that information available at pending and future trials. *It is a constitutional obligation that rests singularly with the prosecutor and cannot be delegated to any other agency.*

2. As required by CrR 4.7 and RPC 3.8, this office will disclose to defense attorneys information that tends to negate the defendant's guilt. These requirements extend to any prior convictions as well as any information that a reasonable person, knowing all relevant circumstances, could view as impairing the credibility of an officer that will or could be called to testify in a particular criminal proceeding.

3. The potential impeachment disclosure (PID) standard depends on what a reasonable person could believe. It does not necessarily reflect the belief of this office or a law enforcement agency. Consequently, disclosure may be required in cases where this office and/or the law enforcement agency believe that no misconduct occurred, if a reasonable person could draw a different conclusion. If this office concludes that an officer is subject to PID that does not reflect a conclusion that the officer committed misconduct or that the officer is not credible as a witness.

4. The PID standard requires consideration of all relevant circumstances. Because this office is not an investigatory agency, it lacks the ability to ascertain those circumstances. Consequently, this office relies on law enforcement agencies to conduct investigations into allegations of officer misconduct, and to advise this office of the results of those investigations.

III. **PROCESS**

1. The Prosecuting Attorney is the main contact point for all information relating to PID determinations.

2. Any law enforcement agency that receives information concerning alleged misconduct relating to truthfulness, bias, or other behavior that could be exculpatory to criminal defendants, and involves an officer engaged in criminal cases, is requested to investigate or arrange for the investigation of those allegations. Any law enforcement agency that employs individuals who routinely perform expert witness services are additionally asked to investigate confirmed performance errors committed by those individuals, where those errors could compromise an expert witness's opinions.

3. At the initiation and upon completion of the investigation, the agency is requested to notify the Prosecuting Attorneys Office of the relevant allegation and determination. This should be done whether or not the agency determined that the allegations were well founded.

4. If this office obtains information about alleged misconduct by a law enforcement officer or agency expert witness that has not been fully investigated, it will ask the officer's agency to conduct an investigation. This may occur where, for example, an officer or expert witness employee has resigned from his/her agency in lieu of termination.

5. When a Prosecuting Attorney is advised that an investigation is pending concerning a recurring government witness, the witness may be added to a "pending review" list to be monitored regularly for sustained findings of misconduct related to dishonesty or falsehood. On pending cases involving the recurring government witness, the Prosecuting Attorney shall notify defense counsel of the existence of the open investigation and direct further inquiry to the investigating agency. *Law enforcement shall immediately advise the Prosecuting Attorney if at any point in the investigation, an allegation of misconduct relating to dishonesty or falsehood is confirmed or acknowledged.*

6. The Prosecuting Attorney's Office will notify the agency and the officer/employee whether or not the information satisfies the PID Standard.

7. If the allegations are sustained and they involve misconduct related to dishonesty or falsehood, the investigating agency shall notify the Prosecuting Attorney. An allegation is sustained when it is factually supported, even if discipline is not imposed. The witness may then be added to the "Potential Impeachment Disclosure List" or other process for future disclosure. If the allegations are determined to be unfounded, the witness will be removed from the "pending review" status. If appropriate, this office will seek protective orders covering such information.

8. If it is uncertain whether or not the information meets the PID standard, the information will be submitted to the court for an *in camera* inspection in a case in which the officer or expert witness is a listed witness.

9. The Prosecuting Attorney's Office will maintain a record of the information that he or she reviewed in making the determination, which could include a copy of the law enforcement agency's final IA determination, if any.

10. These guidelines are intended for the guidance of the Prosecuting Attorney's Office and law enforcement agencies. It may be modified or abrogated by the Prosecuting Attorney at any time. Exceptions may also be authorized by the Prosecutor or his designee. These guidelines do not confer legal rights on any individual or entity.

IV. Deputy Prosecuting Attorney Responsibilities

1. If a DPA or any staff member becomes aware of PID material regarding a recurring government witness, the deputy or staff member shall inform the elected prosecuting attorney or their designee.

2. If the elected prosecuting attorney or their designee believes that the information could constitute PID material, he or she will direct the DPA to prepare a memorandum summarizing the material. The memo should focus only on facts and avoid conclusions or speculation.

V. *If your office maintains a PID* List

A secure electronic database may be maintained with copies of all PID material. Hard copies of the PID material will be kept in a single secure location. Access to the PID materials will be monitored.

When a subpoena is issued, a DPA should receive notice that a recurring government witness is associated with PID material. The DPA will also be permitted to view the PID list to determine if any witness has PID material.

Witnesses on the PID list will be classified as having either potential impeachment evidence (PID material), or criminal convictions that do not encompass a crime of dishonesty or false statement.

VI. When A Deputy Prosecuting Attorney Discovers That A Potential Trial Witness Is On The PID List, or subject to PID disclosure.

When a DPA becomes aware that a subpoenaed witness is on the PID list, or subject to PID disclosure, the DPA should request more detail about the nature of the PID material. If the DPA determine that the potential PID material is not discoverable, due to the specific facts of the case and the witness's anticipated testimony, the DPA shall notify the elected prosecuting attorney or their designee.

In all other instances, the DPA should discuss with the elected prosecuting attorney or their designee whether the material should be disclosed directly to the defense attorney, or if it should be submitted to the court for an *in camera* review. The DPA should also discuss with the elected prosecuting attorney or their designee the need for a protective order. The DPA shall notify the elected prosecuting attorney or their designee if a judge in their case makes a ruling regarding the admissibility of the PID material.

VII. When Potential PID Material Is Discovered During Trial

The DPA should talk to the elected prosecuting attorney or their designee to determine an appropriate action.

EXHIBIT B

WASHINGTON ASSOCIATION OF SHERIFFS & POLICE CHIEFS
3060 Willamette Drive NE Lacey, WA 98516 ~ Phone: (360) 486-2380 ~ Fax: (360) 486-2381 ~ Website: www.waspc.org

Serving the Law Enforcement Community and the Citizens of Washington

MODEL POLICY FOR LAW ENFORCEMENT AGENCIES REGARDING POTENTIAL IMPEACHMENT DISCLOSURE

Revised Policy Approved November 20, 2013
Original Policy Approved November 19, 2009

I. PURPOSE

This Policy addresses potential impeachment disclosure information that may be in the possession of law enforcement agencies. It sets forth law enforcement duties and procedures regarding disclosure of information about law enforcement employee/officer witnesses pursuant to the *Brady* rule. It is intended to meet prosecutorial obligations and preserve the constitutional due process rights of defendants, while permitting efficient and effective law enforcement investigation and prosecution of criminal cases. This policy is intended to function in conjunction with established *Brady* policies/procedures applicable to prosecutors. Law enforcement agencies should be familiar with the *Brady* policies of the prosecuting attorneys in their jurisdiction.

II. BACKGROUND

THE *BRADY* RULE

The prosecution must disclose to the defense evidence that is favorable to a defendant. *Brady v Maryland*, 373 U.S. 83 (1963). This duty to disclose such evidence is applicable even though there has been no request by the accused. *United States v. Agurs*, 427 U.S. 97, 107 (1976). The rule encompasses material exculpatory evidence including impeachment evidence. *United States v. Bagley,* 473 U.S. 667, 676 (1985). Evidence is material "if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different," i.e. prejudice to the defendant must have occurred as a result. *Kyles v. Whitley* 514 U.S. 419, 433-434 (1995). Suppression by the prosecution of material exculpatory evidence violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution. Thus, violations can occur whether the State willfully or inadvertently suppressed the evidence. *Strickler v. Greene, 527 U.S. 263,* 280-281 (1999). In order to ensure compliance with these rules, the United States Supreme Court has urged the "careful prosecutor" to err on the side of disclosure. *Kyles v. Whitley*, 514 U.S. 419, 440 (1995).

III. DEFINITIONS—POTENTIAL IMPEACHMENT EVIDENCE

Recurring Government Witness

Recurring government witness are those law enforcement employees/officers for whom it is reasonable to believe will or may be called to testify more than once or on a regular basis.

Exculpatory Evidence
Evidence is exculpatory if it is evidence that is favorable to the defendant, is material to the guilt, innocence, or punishment of the defendant, and impeachment evidence that may impact the credibility of a government witness, including a police officer. Exculpatory evidence must be disclosed.

Materiality
Evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense the result of the proceeding would have been different. A "reasonable probability" is established when the failure to disclose the evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Such evidence must have a specific, plausible connection to the case, and must demonstrate more than minor inaccuracies. Evidence is material if it is facially apparent as exculpatory.

Impeachment Evidence
Evidence that might be used to impeach a witness is exculpatory evidence and must be disclosed to the defense by the prosecutor. Impeachment evidence is evidence that demonstrates that a witness is biased or prejudiced against a party, has some other motive to fabricate testimony, has a poor reputation for truthfulness or has past specific incidents that are probative of the witness' truthfulness or untruthfulness. Prior inconsistent statements are impeachment evidence. Impeachment evidence that is merely cumulative (i.e. duplicative to evidence already provided or presented) or impeaches on a collateral issue need not be disclosed.

Admissibility of impeachment evidence is determined on a case by case basis by the courts. Therefore even evidence that is likely to be inadmissible can still be considered potential impeachment evidence information, and thus be required to be submitted to the prosecutor.

IV. LAW ENFORCEMENT AGENCY DUTIES

Generally
Law enforcement officers must collect and document exculpatory and impeachment information discovered pursuant to administrative and criminal investigations and provide the same to the prosecution. Law enforcement agencies with information that could impeach any non-law enforcement witness must provide that information to the prosecution as well.

Training
All employees must be properly trained on the department's obligation to disclose potential impeachment information.

For the purposes of this model policy, employee means anyone employed by the agency who may be called to testify under oath. However, the existence of the policy and a copy should be made known and available to all employees.

Employer–Employee Agreements regarding Law Enforcement Conduct
Law enforcement agencies shall investigate all complaints regarding their officers in accordance with their established policies. If an agreement, settlement or other understanding is reached

between an agency and an employee regarding a complaint, investigation or response, the agency should consider the impact of the subject matter of the complaint, investigation or response on the employee's ability to serve as a witness in any criminal proceeding for any jurisdiction.

V. LAW ENFORCEMENT AGENCY RESPONSE TO POTENTIAL IMPEACHMENT INFORMATION REQUEST—CATEGORIES OF EVIDENCE AND PROCEDURES

Agencies must review all their internal investigation files to determine if any possible potential impeachment information exists on any of their employees who may be called as witnesses by the prosecution. If such information exists, they must submit the information to the prosecutor. The prosecution is under a continuing duty to disclose potential impeachment information and therefore agencies must also notify the prosecutor any time they become aware of new potential impeachment information.

If an agency receives a request from a prosecutor for possible potential impeachment information on an employee/officer the law enforcement agency shall comply with the request as soon as practicable and according to the policies and procedures below:

Substantiated/Sustained Findings of Misconduct Related to Dishonesty
Law enforcement shall disclose to the prosecution as potential impeachment material information regarding any final determination by the Chief Law Enforcement Executive of a substantiated or sustained finding related to an employee's/officer's dishonesty or untruthfulness, regardless of whether or not discipline was given. Agencies should follow their current policies regarding document retention for substantiated/sustained/founded findings and disciplinary processes.

Criminal Convictions
Law enforcement shall disclose to the prosecution as potential impeachment material information regarding criminal convictions of an employee/officer related to dishonesty or untruthfulness, if known. [1]

Unsubstantiated Finding
There is no requirement that law enforcement provide prosecutors with information concerning unsubstantiated findings about an employee.[2]

---

[1] It should be noted that although it is not required by *Brady* per se, Washington CrR 4.7 (1)(iv) provides that the prosecutor shall provide the defendant with "any record of prior criminal convictions known to the prosecuting attorney of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial." Therefore it is best practice to provide the prosecutor with all known criminal conviction information of any agency recurring government witness in addition to that specifically reflecting on an employee's dishonesty or untruthfulness.

[2] This model policy addresses agency practice regarding potential impeachment information and is intended to provide guidance for law enforcement in assisting prosecutors in complying with the requirements of *Brady*. It is not intended to address all situations regarding agency disclosure or nondisclosure of information regarding employees or officers which may raise questions of civil liability or other legal consequences. For example, failure to disclose relevant information may expose an employee or agency to 42 USC 1983 section IV civil rights violation claims. As discussed in the model policy, agencies should consult with legal counsel as necessary.

In-Lieu-of Actions/Agreements
Actions/agreements such as resignation, demotion, retirement or separation from service of an employee/officer in lieu of disciplinary action do not control whether information is potential impeachment information. Each law enforcement executive should consult with the appropriate legal counsel in making a determination if information not related to substantiated findings is potential impeachment information or in cases where he or she is uncertain regarding what action to take.

Current or Ongoing Investigations
Pending criminal or administrative investigations are considered preliminary in nature, and the prosecution should be notified of their existence. Law enforcement has an obligation to communicate confirmed or acknowledged *Brady* information which occurs during the course of a criminal or administrative investigation. U.S. V. Olsen, 704F.3d1172 (2013). Each chief law enforcement executive should consult with the appropriate legal counsel in making a determination if information not related to substantiated findings is potential impeachment information or in cases where he or she is uncertain regarding what action to take.

Expert Witnesses
Law enforcement information regarding agency employee expert witnesses may be considered potential impeachment evidence. Any final agency determination of a substantiated or sustained finding related to an expert witness's unsatisfactory employment performance that compromises the expert's conclusions or ability to serve as an expert witness, regardless of whether or not discipline was given, must be turned over to the prosecution.

Other Potential Impeachment or Relevant Information
Each law enforcement executive should consult with appropriate legal counsel in making a determination if evidence not related to substantiated or sustained findings of dishonesty or untruthfulness is potential impeachment information. This may include evidence related to current or ongoing investigations, disciplinary actions, in-lieu-of actions, and employment agreements or when he or she is uncertain regarding what action to take. It is also best practice to consult with legal counsel in cases regarding potential disclosure of other evidence that may be relevant in a case (such as excessive use of force findings in current cases with allegations of excessive use of force, findings of bias etc.),

What is Not Potential Impeachment Information
Allegations that are not substantiated, are not credible, without merit, false or have been determined to be unfounded are not potential impeachment information.

Notification to Subject Employee/Officer
If potential impeachment information is found in law enforcement agency files, the agency shall notify the employee/officer who is the subject of the potential impeachment information, consistent with agency policy. The employee/officer notification shall include the opportunity to review the information that has been presented to the prosecutor. The notification shall comply with all policies and procedures, collective bargaining agreements and other regulations applicable to the agency and employee/officer. If the possible potential impeachment information identifies any other individual who may have privacy rights to the information, the agency shall

notify that person, consistent with agency policy, of the agency's provision of the information to the prosecutor and/or court.

Record Keeping

If the information is provided to the prosecutor and determined to be potential impeachment information, the law enforcement agency should note in the employee/officer file that such information was subject to disclosure. In cases where a court determines that information must be disclosed to the prosecution and defense, the agency should note in the file that the information was subject to disclosure and maintain a copy of the court order with the information in the file. If the court determines that the information should not be disclosed to the prosecution and defense, the agency should note in the file that the information was not subject to disclosure and include a copy of the court's finding in the file.

EXHIBIT C

Snohomish County
Prosecuting Attorney
Mark K. Roe

Administration
Robert G. Lenz, Operations Manager
Robert J. Drewel Building, 7th Floor / M/S 504
3000 Rockefeller Avenue
Everett, WA 98201-4046
(425) 388-3772
Fax (425) 388-7172

December 24, 2013

[redacted]

Notice to Subject of Public Record
Pursuant to RCW 42.56.540

Re: Public Disclosure Request Concerning Potential Impeachment Disclosure (PID)
PDR 1307295

Dear Mr[redacted]

The State Public Records Act (PRA), chapter 42.56 RCW, requires Snohomish County to allow public inspection or copying of any public record requested by a member of the public, unless the County is allowed by law or prevented by court order from disclosing the requested record.

On October 11, 2013, the County received a public records request from Scott North Reporter/Editor of The Daily Herald requesting "all records contained in the prosecutor's office "potential impeachment disclosure" (PID) files. Mr. North later clarified his request as seeking "the PID memos and associated materials." (A copy of the request and clarification are attached).

You have been identified as an individual with an interest in these records. Pursuant to RCW 42.56.540, we are notifying you of our intent to release the PID memo. A copy of the memo is attached for your review. You may seek an order in Snohomish County Superior Court to enjoin the release of this record under RCW 42.56.540. If you do not obtain an injunction by 4:30 on January 17, 2014, our office will release the record.

The requester has an interest in any legal action to prevent the disclosure of the requested records so the requestor must be made a party to any action seeking to enjoin production of these records.

Should you have any questions, please contact me at 425-388-3527.

Very truly yours,

Dave H. Wold
Public Disclosure Specialist

Appendix B

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

SACHA MIKE and MARIA PRESTON,

Plaintiffs,

vs.

SUNNYSIDE SCHOOL DISTRICT and EAGLE NEWSPAPERS, INC., an Oregon Corporation,

Defendants.

EAGLE NEWSPAPERS, INC. dba DAILY SUN NEWS, an Oregon corporation,

Cross-Claim Plaintiff,

vs.

SUNNYSIDE SCHOOL DISTRICT, a Washington local government agency,

Cross-Claim Defendant.

EAGLE NEWSPAPERS, INC. dba DAILY SUN NEWS, an Oregon corporation,

Counter-Claim Plaintiff,

vs.

SACHA MIKE and MARIA PRESTON,

Counter-Claim Defendants.

No. 13-2-02558-1

DECLARATION OF BOB STORY

ALLIED
P.O.. Box 33744
Seattle. WA 98133
(206) 443-0200

I, Bob Story, hereby declare under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct:

1. I am of legal age, have personal knowledge of the facts set forth herein, and am competent to testify.

2. Eagle Newspapers Inc. dba Sunnyside Daily Sun News ("Daily Sun News"), is an Oregon Corporation. It operates the Sunnyside Daily Sun News, a daily newspaper in Sunnyside, Washington, in Yakima County.

3. I am the Managing Editor of the Daily Sun News.

4. I have been a journalist for 29 years.

5. The Daily Sun News made the public records request at issue in this case.

6. Defendant/Cross-Claim Defendant Sunnyside School District ("the District" or "Defendant") is located in Yakima County Washington.

7. The public records at issue are located within Yakima County.

8. The public records at issue are owned, were used, are retained, or were prepared by the District.

9. The District is an "agency" pursuant to RCW 42.56.010(1).

10. The District is subject to the Public Records Act ("PRA"), ch. 42.56 RCW.

11. The District is the agency to which the public records requests at issue were made.

12. The Daily Sun News is the only daily newspaper in Sunnyside, Washington. The Daily Sun News has a circulation of 3300 readers in print and many times this online. It serves as the primary source of news regarding the actions of local governments in Sunnyside and the public's eyes and ears to monitor government activity.

13. On or about October 9, 2012, my staff and I learned that two public school teachers, Sacha Mike and Maria Preston, had been accused of misconduct and were being investigated.

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14. Ms. Preston was accused of using two sexually explicit and graphic poems in her high school speech class, one of them titled "I Ate Fig Newtons Until I Puked." Ms. Preston instructed her students to memorize the two poems. This poem is available at http://www.othervoicespoetry.org/vol4/griffin/fig-newtons.html

15. Ms. Mike was accused of posting a poster with inappropriate words in her classroom and of encouraging students to use profanity in her class and their writing.

16. Both teachers were placed on administrative leave but paid through the end of the school year.

17. My staff and I learned that the investigations had been completed and that allegations had been sustained.

18. Ms. Preston was disciplined and is appealing her discipline.

19. Ms. Mike resigned.

20. On July 18, 2013, I made a Public Record Act ("PRA") request to the District for records related to the investigations.

21. The Daily Sun News had written several news stories related to the investigation of Sacha Mike and Maria Preston and the PRA request was made as part of the continued newsgathering and reporting on the investigation and discipline of these public school teachers.

22. Attached hereto as **Exhibit A** is a true and correct copy of an article I wrote entitled *"Controversial poem lands SHS teacher in hot water."*

23. Attached hereto as **Exhibit B** is a true and correct article I wrote entitled *"Misconduct investigation continues"*.

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A. July 18,2013, Records Request

24. On July 18, 2013, I made a PRA request to the District for the following public records:

> I am requesting ALL information – including but not limited to all reports of an investigative, legal, termination or mutual agreement nature, concerning the past and current employments of Sacha Mike and Maria Preston.

25. On July 19, 2013, the District responded by email stating:

> I have received your public records request. I will work with the our [sic] human resources department and legal counsel on establishing a timeline for completion of your request.

A true and correct copy of my PRA request and the Districts response is attached hereto as **Exhibit C.**

26. On July 22, 2013, the District emailed me stating:

> We have notified Sacha Mike and Maria Preston of our intent to release the public records you have requested. We have allowed them and their counsel until 5:00pm on August 5, 2013 to initiate legal action to preclude the release of documents.

A true and correct copy of this email is attached hereto as **Exhibit D.**

27. The District gave the teachers 14 days to block release of the records to me.

28. The District has never provided a withholding index or identified any records responsive to the request.

29. The District has never stated any exemptions or declared any records to be exempt.

30. Plaintiffs Sacha Mike and Maria Preston filed a Complaint on August 5, 2013, against my employer The Daily Sun News but have never filed a motion for a temporary or preliminary injunction.

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31. There exists today no judicial order blocking release of the records, and the District has not brought any motion for a show cause or other hearing seeking to have the exemption status of records determined.

32. Defendant/Cross-Defendant Sunnyside School District has refused to release the records despite the lack of a judicial order.

33. Defendant/Cross-Defendant Sunnyside School District has not brought any motion to have the exemption claims adjudicated and the Plaintiffs' injunction request brought before the Court.

34. Defendant/Cross-Defendant Sunnyside School District has voluntarily withheld responsive, non-exempt, records to the Daily Sun News without any judicial order requiring it to do so.

35. Defendant/Cross-Defendant Sunnyside School District has favored the interests of Plaintiffs, its current or former employees, over the interests of the Daily Sun News.

36. The Daily Sun News and its readers have been impermissibly deprived of relevant, timely, and important government records related to a matter of legitimate public concern due to the Defendant/Cross-Defendant Sunnyside School District's actions.

39. The Daily Sun News was served with this lawsuit on August 5, 2013.

40. Counsel for the Daily Sun News wrote to counsel for Plaintiffs/Counter-Claim Defendants Mike and Preston on August 15, 2013, the day after being retained, advising them of the illegality and lack of merit of this lawsuit and demanding they dismiss their suit by August 22, 2013, or face the Counter-Claims now been asserted.

41. Plaintiffs/Counter-Claim Defendants Mike and Preston have refused to dismiss their suit or correct the misstatements of the law and facts presented to the Court in their filings.

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42. The Daily Sun News and I have a lawful right to investigate and report on newsworthy matters in our community.

43. The Daily Sun News and I have written articles about Sacha Mike and Maria Preston, the complaints against them and investigation of them.

44. The Daily Sun News through me has made a lawful Public Records Act request to the Sunnyside School District for public records as part of its newsgathering with the intention of sharing the records it obtained with the public.

45 Ms. Mike and Ms. Preston have filed a lawsuit against the Daily Sun News to block our receipt of any further public records about Ms. Mike and Ms. Preston and to obstruct the Daily Sun News in any further reporting on them.

46 Ms. Mike's and Ms. Preston's suit is in retaliation for the earlier lawful reporting on them in the Daily Sun News.

47. The Daily Sun News' reporting on Ms. Mike and Ms. Preston is a "written statement . . in a . . . public forum in connection with an issue of public concern" and thus covered by RCW 4.254.525(2)(d).

48. The Daily Sun News' PRA request of July 18, 2013, was "other lawful conduct in furtherance of the exercise of free speech in connection with an issue of public concern" and thus covered by RCW 4.24.525(2)(e).

49. Ms. Mike and Ms. Preston cannot establish by clear and convincing evidence a probability of prevailing on the claim, and thus their claims must be dismissed under RCW 4.25.525, the Anti-SLAPP Statute. (SLAPP stands for Strategic Lawsuits Against Public Participation.).

50. The lawyers for Ms. Mike and Ms. Preston were warned of this law and that the Daily Sun News would bring an Anti-SLAPP motion and seek the fees, costs, $10,000 fine and

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additional sanctions the law allows if the lawsuit was not dismissed.

51. Ms. Mike and Ms. Preston disregarded the warning and refused to dismiss the lawsuit, requiring The Daily Sun News to incur costs and fees and assert its Counter-Claim.

52. This is a difficult time for newspapers, as it is for many businesses. We have to make choices about which battles we can fight and which we have to give up. The decision to engage in a legal battle, or defend against one, can involve a decision to hire a new staff person or retain one, or pay lawyers instead and cut our staff. When government employees can file a lawsuit to delay release of records, and name the newspaper as a party required to defend, it is a real challenge for the newspaper to keep up the fight, keep demanding its right of access to records, rather than walk away.

53. This newspaper has chosen to stand up and fight, but we know of other news organizations that may have instead just withdrawn their requests.

54. The residents of Sunnyside, Washington, and the parents and students in the Sunnyside School District deserve to see the records we have requested. We have watched every month the records showing the pay these teachers received while they remained on administrative leave. We continue to watch, and to pay, the wages of the one teacher who is still fighting. We deserve to see for ourselves if we agree with the decision reached by the District, and to monitor the actions of our School District charged to educate and protect our children while under its care.

55. I did not expect my newspaper would become a defendant in a lawsuit when I made my simple PRA request for records that are unquestionably public and not exempt.

56. I urge the court to speak swiftly and clearly on this matter so that litigants and agencies think twice before doing something like this again.

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I declare under penalty of perjury that the foregoing is true and correct.

Signed this 30th day of August, 2013 at Sunnyside, Washington.

Bob Story

Bob Story

ALLIED
P.O.. Box 33744
Seattle, WA 98133
(206) 443-0200

Declaration of Bob Story

Exhibit A

Controversial poem lands SHS teacher in hot water

by Bob Story

A poem that might make even the saltiest of sailors blush could end up costing a Sunnyside High School teacher her job.

Maria Preston was put on paid administrative leave last Friday, following a formal complaint by a member of the community who objected to two poems the English teacher introduced in her class to students, who reportedly were instructed to commit the literary works to memory.

The two poems, most notably the one titled "I Ate Fig Newtons Until I Puked," would be described by most as extremely graphic and explicit from a sexual standpoint.

Preston will be kept from her high school classroom until an independent investigation by a source not associated with the local school district is completed. The questions that beg to be answered include whether or not Preston consulted with the head of the English department or school administrators before introducing the poems in her speech class and, if so, did she have their endorsement to use the materials.

Apparently what isn't at issue is the inappropriateness of the poems that were used as a teaching aid at the high school level.

Schools Superintendent Dr. Rick Cole indicated that despite efforts to preserve freedom of speech, and academic freedoms on the part of teachers, in this instance the instructor in question went beyond acceptable boundaries.

"It's over the line and needs to be investigated," said Cole yesterday afternoon, who as expected was evasive in answering most questions, including confirming the name of the teacher in question, until, he said, the investigation is completed.

The Sunnyside School Board was made aware of the use of the poems in Preston's class at a closed door executive session meeting that was conducted during the directors' regularly scheduled work session this past Monday evening.

Cole said copies of the poem were not distributed to the board members that night, but that most of them had already obtained copies beforehand. The board, he said, took no formal action at Monday's meeting.

What did come out of the meeting, though, was the decision to launch an investigation. Cole said yesterday that three different firms have been identified to handle the matter. Once the decision is made on which agency will be hired, it's estimated the investigation will take a minimum of two weeks to complete.

"It will take some time for them to go through all this," said Cole, noting the process will be a bit on the slow side but hopefully expedient enough to reach a conclusion that will help bring the matter to a close soon.

The school district has a policy in place that requires teachers introducing controversial supplemental materials into their classes to consult beforehand with a superior. As explained by Cole, however, the onus is on the teacher to determine if the materials are controversial. He would not comment if it's presently known if Preston sought input from school administrators or her superiors in the English department before using the poems in class. That, he said, will most likely be revealed in the investigation.

Cole indicated there is a fine line in upholding the academic freedoms teachers rely upon in their classroom instructions, when compared with the materials introduced to students that have to meet acceptable standards.

"Part of my job," said Cole, "is to protect the due process of all staff members; and to ensure the safety and security of all our students."

The most controversial of the poems used in Preston's class, "I Ate Fig Newtons Until I Puked," falls far below even the most liberal standards of this newspaper to publish the piece in this story. Those readers who want to view the poem themselves, and form their own opinions on its merits as a classroom teaching aid, can access it on-line, although caution is advised because of the poem's graphic nature. The poem is on the website othervoicespoetry.org and can be located searching the different volumes for the author's name, S.A. Griffin.

- Bob Story can be contacted at 509-837-4500, or email BStory@DailySunNews.com

Declaration of Bob Story

Exhibit B

MON

March 4, 2013

Volume 112,
Number 44

DAILY SUN NEWS

'TODAY'S LOCAL NEWS TODAY'
~ Continuing A Tradition Since 1901 ~

1 Section, 12 Pages

Sunnyside, WA • 50¢

WEATHER FORECAST

FRIDAY	SATURDAY	SUNDAY
High - 63°	High - 59°	High - 53°
Low - 37°	Low - 25°	Low - 18°
Record - 71°, 10°	Record - 70°, 10°	Record - 71°, 15°

See weather on page 5.

Knights claim State 1B title

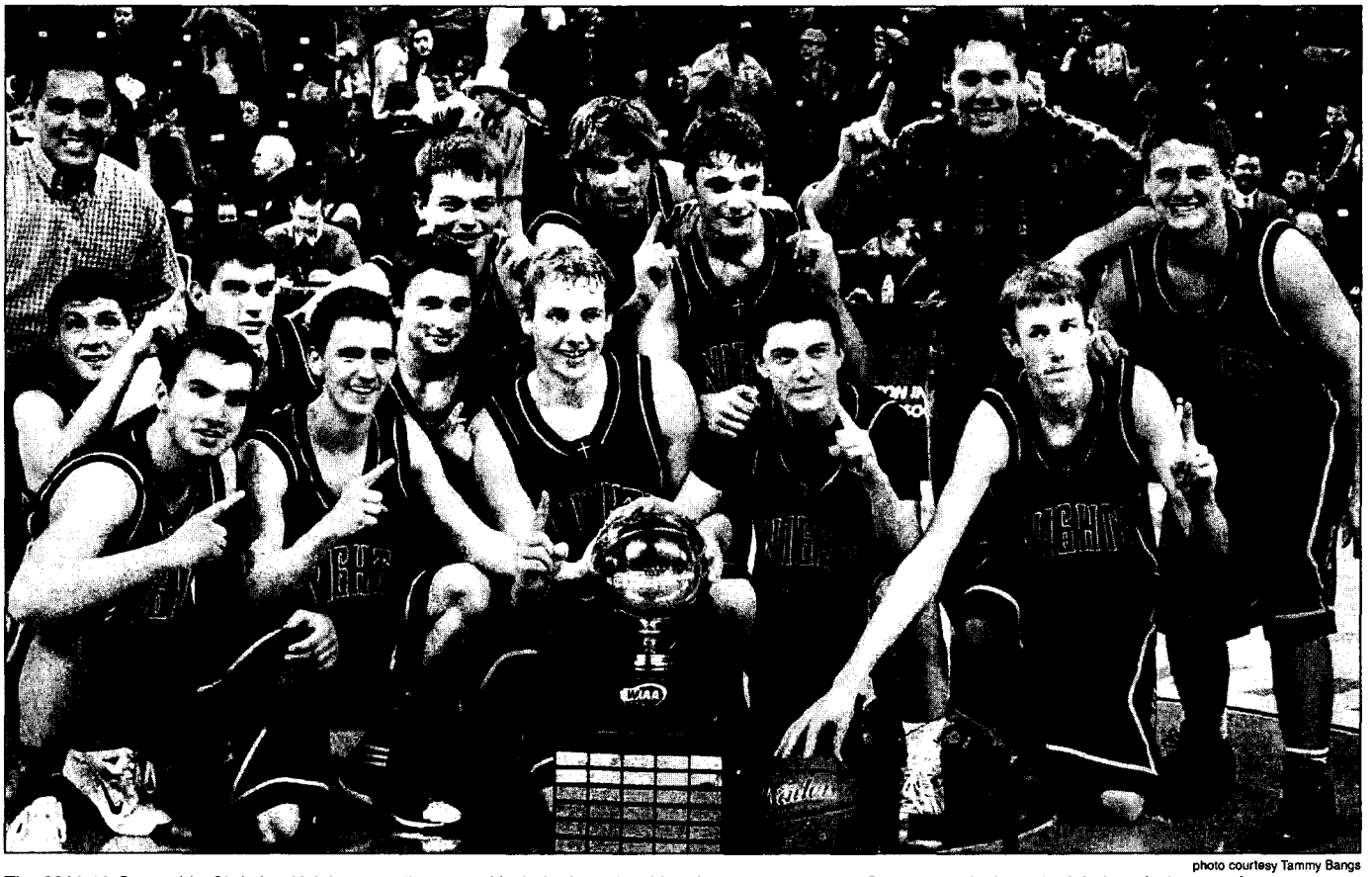

photo courtesy Tammy Bangs

The 2012-13 Sunnyside Christian Knights proudly pose with their championship trophy earned in last Saturday's State 1B title game. It is the program's fifth title in the last seven years. See pages six through eight in today's paper for more coverage on the Sunnyside Christian boys and girls teams at State.

Misconduct investigation continues

One teacher resigns, second still officially on staff at Sunnyside High

by Bob Story

Roses are red;
Violets are blue;
One teacher is gone;
The other's sticking like glue

A series of extremely graphic and sexually explicit poems that students at Sunnyside High School were given to memorize last fall led to two teachers being relieved of their duties in the classroom. Both staff members were placed on paid administrative leave, and both have been receiving their paychecks since then.

That arrangement will be coming to an end for one of the two teachers, however. Sacha Mike submitted a letter of resignation, which was formally approved by the Sunnyside School Board last Thursday.

It appears the other teacher in question, Maria Preston, isn't leaving without exhausting any and all means available to her. Sunnyside Schools Superintendent Dr. Rick Cole confirmed last Friday that district personnel have investigated all avenues to bring the matter to a close, including offering a settlement agreement to Preston.

Initially, back in October 2012, the school district hired an independent investigator to look into the allegations of misconduct. The results of that investigation, sought via a public records request, have not been disclosed because attorneys for the two plaintiffs convinced a Yakima County Superior Court judge to block the release of the documents, as well as other documents such as e-mail correspondence and lesson plans used by the two teachers.

Cole said the matter has been turned over to both the Washington State Office of Superintendent of Public Instruction and the local school district's insurance carrier for independent investigations. He also noted that Sunnyside Deputy Police Chief Phil Schenck has been forwarded the case against Preston, and is awaiting word from Schenck on whether or not criminal charges – related to introducing sexually explicit materials to minors – will be filed against Preston.

The other teacher, Sacha Mike, apparently wasn't using the controversial poems in her classes. She was drawn into the investigation, though, when complaints were lodged about a poster in her classroom that featured several sexually-oriented words deemed by some as offensive. The initial complaints against Mike also included her allowing, and encouraging, students to use profanity-laced language in her classes.

Cole said in accepting Mike's resignation last Thursday, the school board approved a settlement agreement with the teacher. He verified she will receive full pay and benefits through the end of the current school year.

Asked if there was other compensation agreed to, Cole said he couldn't reveal the nature of the settlement agreement "...until such a time it is publicly disclosable."

From a timeline standpoint, Cole said he's hoping to turn over all materials related to the investigations of both Mike and Preston within two to three weeks.

Bob Story can be contacted at 509-837-4500, or email BStory@DailySunNews.com

Below normal March temperatures predicted

The National Weather Service is predicting March will be colder than normal.

Normally highs in the Sunnyside area rise from 54 degrees to 64 degrees during the month of March, and lows rise from 30 to 37 degrees.

Normal precipitation in the Sunnyside area is .6 inches. The weather service is predicting March 2013 precipitation levels will be about normal.

Last month averaged a little colder than normal, too.

The average temperature was 37.3 degrees, 1.3 degrees below normal.

The high temperatures averaged 50.4 degrees, which was 1.5 degrees below normal. The lows averaged 24.2 degrees, or 4.1 degrees below normal.

The warmest day during the month of February 2013 was 58 degrees, measured on Valentine's Day, Feb. 14.

On Feb. 20, the lowest temperature for the month was measured when the mercury level dropped to 20 degrees. The low temperature never reached above freezing, 32 degrees.

Precipitation levels for the month of February were .61 inches below normal at .02 inches. Measureable precipitation was received in the Sunnyside area on just one day, Feb. 28.

Winds on Feb. 25 measured the highest for the month with a gust as fast as 45 miles per hour.

Declaration of Bob Story

Exhibit C

-----Original Message-----
From: Curtis Campbell [mailto:curtis.campbell@sunnyside.wednet.edu]
Sent: Friday, July 19, 2013 7:33 AM
To: Story Bob
Subject: Re: my email

Hi Bob,

I have received your public records request. I will work with the our human resources department and legal counsel on establishing a timeline for completion of your request.

Curtis

sent from my iPhone

On Jul 18, 2013, at 8:00 AM, Story Bob <BStory@DailySunNews.com> wrote:

> 7-18-13
>
> Curtis.....
>
> This e-mail is intended to serve as an official public records request to the Sunnyside School District. I am requesting ALL information - including but not limited to all reports of an investigative, legal, termination or mutual agreement nature, concerning the past and current employments of Sacha Mike and Maria Preston.
>
> Bob Story
> Managing Editor
> Daily Sun News
> Sunnyside, Wa.

Declaration of Bob Story

Exhibit D

Story Bob

From: Curtis Campbell [curtis.campbell@sunnysideschools.org]
Sent: Monday, July 22, 2013 12:03 PM
To: Story Bob
Cc: Rick Cole
Subject: Re: my email

Hi Bob,

We have notified Sacha Mike and Maria Preston of our intent to release the public records you have requested. We have allowed them and their counsel until 5:00pm on August 5, 2013 to initiate legal action to preclude the release of documents.

Curtis Campbell
Executive Services Director
Sunnyside School District
P: 509.836.8703
F: 509.837.0535
www.sunnysideschools.org
www.facebook.com/sunnysideschools

On Jul 18, 2013, at 8:00 AM, Story Bob <BStory@DailySunNews.com> wrote:

7-18-13

Curtis.....

This e-mail is intended to serve as an official public records request to the Sunnyside School District. I am requesting ALL information - including but not limited to all reports of an investigative, legal, termination or mutual agreement nature, concerning the past and current employments of Sacha Mike and Maria Preston.

Bob Story
Managing Editor
Daily Sun News
Sunnyside, Wa.

Appendix C

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FISHER BROADCASTING–SEATTLE TV LLC dba KOMO 4, Appellant, v. CITY OF SEATTLE, a local agency, and the SEATTLE POLICE DEPARTMENT, a local agency, Respondents.	)	No. 87271-6 En Banc Filed JUN 12 2014

GONZÁLEZ, J.—KOMO news reporter Tracy Vedder made three unsuccessful public records requests to the Seattle Police Department (SPD) relating to "dash-cam" videos taken by SPD officers. We conclude that two of the requests should have been granted.

FACTS

Since 2007, SPD's entire patrol fleet has been equipped with in-car video and sound recording equipment. SPD's recording system was manufactured by COBAN Technologies, a private company that provides both the recording equipment and the computer system that manages at least the

initial video storage and retrieval. The COBAN system was not integrated into SPD's records management system or its computer aided dispatch system, and at least at the time this case arose, recordings could be searched only by "officer's name, serial number, date and time." Clerk's Papers (CP) at 403, 440, 454.

SPD's written policy directs officers to use their in-car video recorders to "document all traffic stops, pursuits, vehicle searches and citizen contacts when occurring within camera range." CP at 88 (SPD Policies and Procedures chapter 17.260). Under this written policy, videos are kept for 90 days unless an officer tags an individual video as "required for case investigation/prosecution," in which case they are kept for at least three years. *Id.* Under SPD policy, videos needed longer than three years should be burned onto a DVD and stored in a relevant case file. Otherwise, videos are scheduled to be destroyed after three years.

In 2010, Vedder made both informal requests for information and a series of formal Public Records Act (PRA), chapter 42.56 RCW, requests. On August 3, 2010, she asked for user and training manuals on the dash-cam video system. SPD denied this request on the grounds the materials were protected under federal copyright law and RCW 42.56.240(1)'s exception for materials essential to effective law enforcement.

On August 4, 2010, Vedder requested "a copy of any and all Seattle police officer's log sheets that correspond to any and all in-car video/audio records which have been tagged for retention by officers. This request is for such records dating from January 1, 2005 to the present." CP at 96.[1] On August 10, 2010, SPD's public record's officer, Sheila Friend Gray, responded that no relevant records existed.

The next day, Vedder requested "a list of any and all digital in-car video/audio recordings that have been tagged for retention by Seattle Police Officers from January 1, 2005 to the present. This list should include, but not be limited to, the officer's name, badge number, date, time and location when the video was tagged for retention and any other notation that accompanied the retention tag." CP at 98. On August 18, SPD denied the request on the grounds that "SPD is unable to query the system in the way you have requested. We can search by individual officer name, date, and time only. We cannot generate mass retention reports due to system limitations. Thus we do not have any responsive records." CP at 99.

On September 1, 2010, Vedder requested "copies of any and all digital, in-car video/audio recordings from the Seattle Police Department that have been tagged for retention by anyone from January 2007 to the present. The

[1] Vedder's declaration in support of KOMO's motion for summary judgment states that the request was submitted on August 4, 2010, as does Judge Rogers' order on cross motions for summary judgment. CP at 75, 535. The request was sent to SPD by e-mail late afternoon on August 3, 2010. CP at 95-96.

recordings should also include, but not be limited to, corresponding identifying information such as the date, time, location, and officer(s) connected to each unique recording." CP at 110. SPD contacted COBAN for help with this request. COBAN told SPD that such a list could be generated by running a computer script that COBAN was willing to provide for free, but coding the program to enable mass copying of the videos "will take some real programming" and would cost at least $1,500. CP at 239. SPD denied Vedder's third request on October 1, 2010, telling her, "'SPD is unable to query the system to generate a retention report that would provide a list of the retained videos.' Without this capability we are unable to respond to your request. Therefore we have no documents responsive to your request." CP at 254. After Vedder pressed the matter, SPD's attorney told her that the privacy act prevented release of the videos that were less than three years old.

Meanwhile, in February 2011, Eric Rachner requested "a copy of the full and complete database of all Coban D[igital] V[ideo] M[anagment] S[ystem (DVMS)] activity logs in electronic form." CP at 40. He suggested since "Coban DVMS system's database runs on Microsoft SQL [(structured query language)] server, . . . it should be convenient to provide the logs, in electronic form, in their original Microsoft SQL Server format. The responsive records will include all rows of all columns of all tables related to the logging of video-related activity within the Coban DVMS." *Id.* After working closely with

Rachner, SPD began to provide the records in June. That summer, Rachner showed Vedder what he had received from SPD. According to Vedder, "I was amazed because the COBAN DVMS database provided to Mr. Rachner was exactly the sort of list of videos in electronic format that I had requested on August 11, 2010." CP at 81.

On September 19, 2011, KOMO sued SPD under the PRA for failing to timely produce records in response to Vedder's August 4, August 11, and September 1, 2010 requests, among other things. The next day the SPD gave Vedder a copy of materials it had produced for Rachner. Early in 2012, both parties moved for summary judgment. Judge Rogers found that SPD properly denied Vedder's request for police officer's log sheets and for the videos themselves. However, he found SPD had improperly rejected Vedder's request for the list of videos. The court initially levied a "$25.00 a day fine from the day Mr. Rachner received his first batch of COBAN files to the day Ms. Vedder received her COBAN files," plus fees and costs. CP at 540.[2]

We granted direct review. SPD is supported on review by the Washington State Association of Municipal Attorneys and the Washington Association of Sheriffs and Police Chiefs. KOMO is supported on review by the Washington Association of Criminal Defense Lawyers, the Washington

[2] Later, Judge Rogers clarified the penalty would accrue from the date the request was denied, not the date the materials were provided to Rachner. CP at 840-41.

Defender Association and the Defender Association, and the News Media Entities and Washington Coalition for Open Government.

ANALYSIS

"The PRA mandates broad public disclosure." *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 385, 314 P.3d 1093 (2013) (citing RCW 42.56.030); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). It declares that "[t]he 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." RCW 42.56.030. The PRA is "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." *Id.* To that end, State and local agencies are required to disclose their records upon request, unless the record falls within an exception. *Gendler v. Batiste*, 174 Wn.2d 244, 251, 274 P.3d 346 (2012) (citing RCW 42.56.070(1)). The agency refusing to release records bears the burden of showing secrecy is lawful. *Sargent*, 179 Wn.2d at 385-86 (citing *Newman v. King County*, 133 Wn.2d 565, 571, 947 P.2d 712 (1997)). The PRA does not, however, require agencies to "'create or produce a record that is nonexistent.'"

Gendler, 174 Wn.2d at 252 (quoting *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004)).

Agencies must make a sincere and adequate search for records. RCW 42.56.100; *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 720, 723, 261 P.3d 119 (2011). When an agency denies a public records request on the grounds that no responsive records exist, its response should show at least some evidence that it sincerely attempted to be helpful. *See, e.g.*, *Neighborhood Alliance*, 172 Wn.2d at 722.

Our review of both the agency action and the court opinions below is de novo. *Gendler*, 174 Wn.2d at 251 (citing RCW 42.56.550(3)).

1. "OFFICER'S LOG SHEETS"

Vedder requested "a copy of any and all Seattle police officer's log sheets that correspond to any and all in-car video/audio records which have been tagged for retention by officers. This request is for such records dating from January 1, 2005 to the present." CP at 96. The department responded that it had no relevant records. Judge Rogers found this did not violate the PRA. We agree.

Records requestors are not required to use the exact name of the record, but requests must be for identifiable records or class of records. WASH. STATE BAR ASS'N, PUBLIC RECORDS ACT DESKBOOK: WASHINGTON'S PUBLIC DISCLOSURE AND OPEN PUBLIC MEETINGS LAWS § 4.1(1)-(2) (2006 ed. &

2010 Supp.). The record establishes that "log sheets" specifically referred to paper forms that had not been used since 2002 and that these forms had been destroyed in 2004. Among other things, David Strom, senior warehouser of archival records for the SPD, testified that "log sheets" were "paper forms that officers filled out during their patrols. The 'log sheets' contained areas in which officers entered information regarding calls dispatched via radio, location, clearance code, notes, mileage and vehicle condition." CP at 399. Friend Gray looked for responsive records, was told definitively that "officer's log sheets" referred to a specific class of documents that no longer existed, and communicated her finding to Vedder. We find SPD's response complied with the PRA and affirm Judge Rogers' denial of this claim.

2. "LIST OF ALL RETAINED VIDEOS"

We turn now to Vedder's request for "a list of any and all digital in-car video/audio recordings that have been tagged for retention by Seattle Police Officers from January 1, 2005[, including] officer's name, badge number, date, time and location when the video was tagged for retention and any other notation that accompanied the retention tag." CP at 98. Judge Rogers found SPD violated the PRA when it told Vedder it had no responsive records. We agree.

SPD contends that Vedder was asking it to create a new record. This is clearly true to some extent; producing a document that would correlate *all* of

the information Vedder requested would have required mining data from two distinct systems and creating a new document. This is more than the PRA requires. *Citizens for Fair Share v. Dep't of Corrections*, 117 Wn. App. 411, 435, 72 P.3d 206 (2003) (citing *Smith v. Okanogan County*, 100 Wn. App. 7, 13-14, 994 P.2d 857 (2000)). However, as SPD's later response to Rachner demonstrated, it did have the capacity to produce a partially responsive record at the time it denied her request. It should have done so.

We recognize that neither the PRA itself nor our case law have clearly defined the difference between creation and production of public records, likely because this question did not arise before the widespread use of electronically stored data. Given the way public records are now stored (and, in many cases, initially generated), there will not always be a simple dichotomy between producing an existing record and creating a new one. But "public record" is broadly defined and includes "existing data compilations from which information may be obtained" "regardless of physical form or characteristics." RCW 42.56.010(4), (3). This broad definition includes electronic information in a database. *Id.*; *see also* WAC 44-14-04001. Merely because information is in a database designed for a different purpose does not exempt it from disclosure. Nor does it necessarily make the production of information a creation of a record.

Whether a particular public records request asks an agency to produce or create a record will likely often turn on the specific facts of the case and thus may not always be resolved at summary judgment. But for SPD's response to Rachner's request, this might well have been such a case. However, the uncontroverted evidence presented showed that a partially responsive response could have been produced at the time of the original denial. The failure to do so violated the PRA.

In the alternative, SPD argues that Vedder was requesting metadata and that while metadata is subject to the PRA, it must be specifically requested. Br. of Resp't at 33 (citing *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 151-52, 240 P.3d 1149 (2010)). In *O'Neill*, we defined "metadata" as ""data about data' or hidden information about electronic documents created by software programs." 170 Wn.2d at 143 (quoting Jembaa Cole, *When Invisible Electronic Ink Leaves Red Faces: Tactical, Legal and Ethical Consequences of the Failure to Remove Metadata*, 1 SHIDLER J.L. COM. & TECH. ¶ 7 (Feb. 2, 2005)). But Vedder was not seeking to peer beneath some text in an electronic database. She was not requesting metadata in any meaningful sense.

We find the rest of SPD's arguments unavailing. We hold that SPD violated the PRA when it incorrectly told Vedder it had no responsive records and affirm.

3. THE VIDEOS AND THE PRIVACY ACT

We turn now to Vedder's request for "copies of any and all digital, in-car video/audio recordings from the Seattle Police Department that have been tagged for retention by anyone from January 2007 to the present." CP at 110. After consulting with COBAN, SPD denied this request based on the grounds that it was "'unable to query the system to generate a report that would provide a list of retained videos.' Without this capability we are unable to respond to your request." CP at 254. But SPD had the capability to produce the list, so to the extent that its ability to produce the videos was contingent on its ability to produce the list, its initial response violated the PRA.

SPD also argues it is barred from releasing the videos by RCW 9.73.090(1)(c) of the privacy act. Under the PRA, "other statutes" may exempt or prohibit disclosure of certain records or information. *See Ameriquest Mortg. Co. v. Office of Attorney Gen.*, 170 Wn.2d 418, 440, 241 P.3d 1245 (2010) (quoting RCW 42.56.070(1)). All exceptions, including "other statute" exceptions, are construed narrowly. *Hearst*, 90 Wn.2d at 138-39. Generally, Washington's privacy act requires all parties to a private communication to consent to any recording. RCW 9.73.030. However, some recordings made by police are exempted from disclosure whether or not they record private conservations. Relevantly:

> The provisions of RCW 9.73.030 through 9.73.080[3] shall not apply to police . . . in the following instances:
>
> . . . .
>
> (c) Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles. . . .
>
> No sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until final disposition of any criminal or civil litigation which arises from the event or events which were recorded.

RCW 9.73.090(1)(c). SPD argues that this statute functions as an "other statute" exception to the PRA. We agree in part, but given the general rule that exemptions are to be interpreted narrowly, RCW 42.56.030, we find this exemption is limited to cases where the videos relate to actual, pending litigation.[4]

The legislature added RCW 9.73.090(1)(c) in 2000. LAWS OF 2000, ch. 195, § 2. It stated that its intent was "to provide a very limited exception to the restrictions on disclosure of intercepted communications." LAWS OF 2000, ch. 195, § 1. Prior to that time, RCW 9.73.090 had authorized certain law enforcement and emergency recordings and restricted their use to "valid police or court activities." LAWS OF 2000, ch. 195, § 2. This amendment and the

---

[3] These provisions make intercepting, recording, or divulging private communications unlawful, RCW 9.73.030; establish grounds for a an ex parte court order authorizing interception, RCW 9.73.040; make unlawfully intercepted communications generally inadmissible in court, RCW 9.73.050; create a civil action for damages, RCW 9.73.060; exempt certain common carriers and 911 calls, RCW 9.73.070; and make violation of the act a gross misdemeanor, RCW 9.73.080.

[4] We note that RCW 9.73.090(1)(c) is not a complete bar to release of videos pertaining to ongoing litigation. It does not bar release of videos to all parties involved in that litigation and may not be a bar to release pursuant to a court order.

statement of legislative intent strongly suggest that the legislature intended to provide greater guidance on the use of these authorized recordings. It does not suggest the legislature intended to create a broad categorical exception to the PRA. We note that neither the statute nor even the bill reports mention the PRA or its predecessor. *See, e.g.*, H.B. REP. on H.B. 2876, 59th Leg., Reg. Sess. (Wash. 2006); H.B. REP. on H.B. 2903, 56th Leg., Reg. Sess. (Wash. 2000); RCW 42.56.050, .240. Indeed, exempting recordings from disclosure "until final disposition of any criminal or civil litigation which arises from the event," RCW 9.73.090(1)(c), would be a strange way to protect privacy. Privacy does not evaporate when litigation ends.

Of course, we turn to extrinsic evidence of legislative intent only when the plain language of the statute does not answer the question. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). In determining the plain meaning of a statute, we consider "all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* at 11. In this case, the statute as a whole suggests the legislative goal was neither to instill categorical delay nor protect personal privacy. Instead, the statute as a whole provides a limited exception to the rules against recording and the rules requiring disclosure to protect the integrity of law enforcement investigations and court proceedings. In authorizing "[s]ound recordings that correspond to video images recorded

[without all parties' consent] by video cameras mounted in law enforcement vehicles," RCW 9.73.090(1)(c), our legislature built on an exception to the privacy act that had for decades permitted recording of emergency calls and interviews of persons in custody. LAWS OF 1970, 1st Ex. Sess., ch. 48; LAWS OF 2000, ch. 195. For decades the privacy act has admonished that these "recordings shall only be used for valid police or court activities." LAWS OF 1970, 1st Ex. Sess., ch. 48, §1(2)(d) (codified at RCW 9.73.090(1)(b)(iv)). Context suggests that the legislature's intent in providing that "[n]o sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until final disposition of any criminal or civil litigation which arises from the event or events which were recorded" is to give more guidance to agencies attempting to limit their use of these recordings to "valid police or court activities," RCW 9.73.090(1)(b)(iv). So long as "police or court activities" are ongoing, RCW 9.73.090(1)(c) restricts disclosure—most likely to protect those very "police or court activities" recited by the statute. *Accord Sargent*, 179 Wn.2d at 395. Neither the statutory text nor the legislative history suggests that categorical delay was legislative purpose. Delay was simply the means to an end—likely, to avoid tainting pending litigation.

KOMO contends that RCW 9.73.090(1)(c) is not an "other statute" exception to the PRA because it does not provide an alternative method of

obtaining public records. Br. of Appellant at 34 (citing *Deer v. Dep't of Soc. & Health Serv.*, 122 Wn. App. 84, 93 P.3d 195 (2004); *In re Dependency of K.B.*, 150 Wn. App. 912, 210 P.3d 330 (2009)). But while it was true that in both *Deer* and *K.B.* there was an alternative statutory procedure to obtain records, neither case held that was a necessary factor.[5]

We hold that RCW 9.73.090(1)(c) is a limited exception to immediate disclosure under the PRA, but it is one that applies only where there is actual, pending litigation. We reverse and remand for further proceedings on this claim as well.[6]

---

[5] KOMO also contends that RCW 9.73.090(1)(c) does not qualify as an "other statute exception" because such other statutes "must exempt or prohibit disclosure of specific public records in their entirety." Br. of Appellant at 30 (citing *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994)) (*PAWS*). This is based on a widespread, but mistaken, reading of that passage in *PAWS*. In that passage, we considered the University of Washington's contention that several other statutes exempted unfunded grant proposals from disclosure *in their entirety*, rather than merely allowed their redaction to protect specific information. *PAWS*, 125 Wn.2d at 261-62. We articulated a test to determine when that was so. *Id.* That test is not helpful for determining whether a specific statute creates *any* exception under the PRA but only for determining whether it exempts a record in its entirety. Notably, *PAWS* itself did not apply that test to determine whether the Uniform Trade Secrets Act, chapter 19.108 RCW, or an antiharassment statute, RCW 4.24.580, applied, but simply looked to their plain language. 125 Wn.2d at 262-63.

[6] KOMO also argues that SPD violated the PRA by not providing a privilege log on the videos it did not disclose. Reply Br. of Appellant at 9 (citing RCW 42.56.210(3)). KOMO raised this in its complaint and summary judgment motion but did not assign error to the trial court's failure to reach it or otherwise address the issue in its opening brief. Given that, we decline to reach it. For similar reasons, we decline to reach whether SPD showed undue favoritism towards Rachner.

CONCLUSION

We hold that SPD complied with the PRA when it declined Vedder's request for officer log sheets. We hold that SPD did not comply with the PRA when it failed to produce a list of retained videos. We hold that RCW 9.73.090(1)(c) may exempt specific videos from public disclosure during the pendency of litigation but does not create a blanket exemption for any video that might be the subject of litigation. KOMO is entitled to attorney fees on the claims it prevailed upon. We remand to the trial court for further proceedings consistent with this opinion.

González, J.

WE CONCUR:

J.M. Johnson, P.T.

Stephens, J.

Gordon McCloud, J.

No. 87271-6

GORDON McCLOUD, J. (concurring)—I agree with the majority's resolution of this case. In particular, I agree that RCW 9.73.090(1)(c) cannot be read to bar the release of the police dashboard camera ("dash-cam") videos at issue here. I write separately to emphasize that the majority's analysis of how the Public Records Act (PRA), chapter 42.56 RCW, might apply if the conversations at issue here were private is unnecessary, because those conversations were not private at all.

This court has clearly held that conversations between police officers and the drivers they stop are not private for purposes of the privacy act, chapter 9.73 RCW. *Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 460, 139 P.3d 1078 (2006). So has the Court of Appeals. *State v. Flora*, 68 Wn. App. 802, 806, 845 P.2d 1355 (1992) ("The State urges us to adopt the view that public officers performing an official function on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby

enjoy a privacy interest which they may assert under the statute. We reject that view as wholly without merit.").

For this reason, RCW 9.73.090(1)(c) cannot be characterized as a privacy protection at all. Hence, it is not an "other statute" designed to protect privacy that trumps the PRA's disclosure mandate. Instead, RCW 9.73.090(1)(c) must be read to bar the "law enforcement agency" from making a *unilateral* "agency" determination to release such recordings before litigation based on the subject of these recordings is final. RCW 9.73.090(1)(c). The law enforcement agency, however, has a duty to make a lawful, nonunilateral decision about disclosure. To comply with both its disclosure requirement and its RCW 9.73.090(1)(c) limitation, the law enforcement agency need only get advice from outside that agency—e.g., from the city attorney, the prosecuting attorney, or the attorney general—before making a decision to disclose.

ANALYSIS

I. RCW 9.73.090(1)(c) Does Not Make Conversations Between Law Enforcement Officers and the Drivers They Stop Private

As discussed above, "this court and the Court of Appeals have repeatedly held that conversations with police officers are not private." *Lewis*, 157 Wn.2d at 460 (collecting cases).

If the subject of the dash-cam video is not private for purposes of the privacy act, then it is hard to believe that the legislature limited the reproduction and distribution of such videos (via RCW 9.73.090(1)(c)) to protect privacy. Moreover, as the majority points out, the fact that that statute allows law enforcement officers to eventually distribute the recording to the public also undermines the claim that RCW 9.73.090(1)(c) was enacted to protect anyone's privacy. *See* majority at 13 ("Privacy does not evaporate when litigation ends."). Finally, as this court has made clear, public records from a public agency that are available under court rules regarding discovery (including dash-cam videos, *see* Rules of Criminal Procedure (CrR) 4.7) are not exempt from disclosure under the PRA. *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 910, 25 P.3d 426 (2001); *id.* at 913 (Chambers, J., concurring). This also undermines the notion that RCW 9.73.090(1)(c) was designed as a privacy exemption.

The only natural reading of RCW 9.73.090(1)(c)—which is a separate paragraph tucked into a statute otherwise devoted to the different topic of *permitting* recordings—is that it is there to protect the right to a fair trial. (The City agrees. Br. of Resp't at 43-44 ("[Police dashboard camera] recordings play a significant evidentiary role in civil and criminal litigation,

and the Legislature recognized the impact that disclosure of recordings to the public could have if they were released before the subject of the recordings had an opportunity to fully adjudicate any criminal charges or civil claims related to the events that were recorded" (citing Clerk's Papers at 487-88)).

Broad distribution of discovery of any sort prior to litigation can pose problems for the litigant, particularly for the criminal defendant, and the legislature is certainly entitled to adopt measures to try to protect the jury pool from taint. RCW 9.73.090(1)(c) seems like such a measure. It is directed to the "law enforcement agency subject to this section," and it bars that "law enforcement agency"—but no one else—from certain dissemination. RCW 9.73.090(1)(c). It bars that agency's unilateral, unsupervised distribution of police recordings before the trial in which the recordings might become evidence (subject to "final disposition"), and it bars that "law enforcement agency" from "commercial" distribution at any time. It makes sense that the legislature would do this to protect fair trials. *Id.*

II. RCW 9.73.090(1)(c) Does Not Create an "Exemption" from Disclosure

The City, however, argues—and the majority partially agrees—that RCW 9.73.090(1)(c) creates a statutory "exemption" from disclosure, per

the language of RCW 42.56.070(1), trumping the PRA's disclosure mandate. Majority at 12.

But the City doesn't really treat RCW 9.73.090(1)(c) as a true *exemption* from disclosure; "exempt" material is material that can never be disclosed. Instead, dash-cam videos are routinely released to individuals outside the "law enforcement agency." RCW 9.73.090(1)(c). They are available to aid prosecutorial decisionmaking (which occurs outside the "law enforcement agency"). *Id.* They are available to criminal defense counsel and their agents (who work outside the "law enforcement agency"). *Id.* They are even available for admission into evidence in court. And despite the fact that RCW 9.73.090(1)(c) says that these recordings can't be made "available to the public" by the "law enforcement agency," our courtrooms are, of course, open to the public and the press. All that reproduction and disclosure, including disclosure to the public at trial, occurs well before "final disposition of any criminal or civil litigation which arises from the event . . . recorded." *Id.* And it probably also occurs long before the three year time limit adopted by the agency[1] (but not by the legislature) expires.[2]

[1] I mention the three-year time limit because it shows that even the agency adopting that limit acknowledges that RCW 9.73.100(1)(c) permits distribution to the public at some point. I do not mention the three-year time limit to endorse it as lawful; the media amici have the better argument that "[d]etermining the scope of

Is all that distribution of dash-cam videos to prosecutors, defense counsel, juries, and public courtrooms unlawful or does it violate RCW 9.73.090(1)(c)? No one contends that this disclosure is unlawful, but why not? Why are dash-cam videos subject to disclosure in open court if RCW 9.73.090(1)(c) bars their public dissemination?

The answer is that RCW 9.73.090(1)(c) does *not* bar all public dissemination of dash-cam videos. Instead, the statute, by its plain language, applies *only* to the "law enforcement agency subject to this section." RCW 9.73.090(1)(c). It does not bar prosecutors from using them in open court—

PRA exemptions is the purview of the courts, not the agency holding the records." Br. of Amici Curiae News Media Entities et al. at 5 (citing *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 149, 240 P.3d 1149 (2010); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 130, 580 P.2d 246 (1978)).

[2] The City asserts (in its brief responding to the Washington Association of Criminal Defense Lawyers (WACDL)) that RCW 9.73.090(1)(c) is just like many other statutes that completely bar distribution of photos to the public even though the events captured were as public as the events captured by dash-cam videos. A review of the language of the statutes the City cites, though, shows that they use completely different language. They say that the videos and photos taken at tolls and similar places are completely private, not at all open to "the public," and that they cannot ever be distributed to the public except for the listed purposes. *See* Answer to Amicus Curiae WACDL at 12 ("RCW 9.73.090(l)(c) is just one of several statutes restricting or *prohibiting* dissemination of law-enforcement videos and images. The Legislature authorizes photo toll systems but prohibits *any* public dissemination of the images. RCW 46.63.160(6)(c); RCW 47.56.795(2)(b); RCW 47.46.105(2)(b). Likewise, the statute authorizing traffic safety cameras at stoplights, railroad crossings, and school speed zones does not permit *any* public dissemination of the images. RCW 46.63.170(l)(g). These statutes are based on the nature of the recording rather than the place where it is recorded.").

prosecutors are not the "law enforcement agency subject to this statute." *Id.* It does not bar criminal defense lawyers from using them in open court—these lawyers are not the "law enforcement agency" either. *Id.* It does not bar judges from admitting them into evidence in open court or from entering an order to disclose them—judges are obviously not "law enforcement agenc[ies]." *Id.* And it certainly does not bar courts from adopting and enforcing rules compelling disclosure of recordings by "video cameras mounted in law enforcement vehicles." *Id.*; *see, e.g.*, CrR 4.7(a)-(e) (listing discoverable materials); Rules of Evidence (ER) 402 (relevant evidence admissible); *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (due process clause requires disclosure of any evidence favorable to the accused).

That means that RCW 9.73.090(1)(c) is not an "other statute which *exempts* or *prohibits* disclosure of specific information or records," creating a categorical "exempt[ion]" from disclosure, at all. RCW 42.56.070(1). It is, instead, a statute about who gets to decide whether to release dash-cam videos before "final disposition." RCW 9.73.090(1)(c). It bars law enforcement agencies from making that decision unilaterally.

This interpretation of RCW 9.73.090(1)(c) is consistent with our prior case law, which holds that RCW 9.73.090 creates special rules applicable solely to police.[3] We have held that police must strictly observe those rules, which require officers to notify drivers and arrested persons that they are being recorded "*even though the conversations involved clearly were not private.*" *Lewis*, 157 Wn.2d at 465-66 (emphasis added).

III. Since RCW 42.56.070 Mandates Disclosure of Dash-Cam Videos of Law Enforcement Encounters with the Public and RCW 9.73.090(1)(c) Regulates Who Can Make the Disclosure Decision, the Law Enforcement Agency Must Turn to Counsel from Outside That Agency

If the duty to release dash-cam recordings (RCW 42.56.070) conflicted with the bar against law enforcement agencies making a decision to release these recordings, then the duty to release would prevail. RCW 42.56.030 ("In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.").

But we have a duty to harmonize statutes, if possible. *State v. Fagalde*, 85 Wn.2d 730, 736-37, 539 P.2d 86 (1975) (citing *Publishers Forest Prods. Co. v. State*, 81 Wn.2d 814, 505 P.2d 453 (1973)). The two

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[3] *See Lewis*, 157 Wn.2d at 464-67 ("the legislature enacted the provisions in . . . RCW 9.73.090(1)[(c)] . . . so that police officers would comply with those provisions"); *State v. Cunningham*, 93 Wn.2d 823, 829, 613 P.2d 1139 (1980) (interpreting former RCW 9.73.090(2) (1977), *recodified as* RCW 9.73.090(1)(b), which is "specifically aimed at the specialized activity of police").

statutes at issue here can be harmonized if the "law enforcement agency" makes its decision based on advice of its counsel from outside that agency, rather than unilaterally. RCW 9.73.090(1)(c). Such a requirement is in keeping with current practices; police departments and individual officers routinely consult counsel such as the local city attorney.[4] The outside-agency legal advisor would not be bound by RCW 9.73.090(1)(c)'s procedural limits (though it would be bound to consider other exemptions). And, if the disclosure request ends up in court, the court is not bound by RCW 9.73.090(1)(c)'s limit on "law enforcement agenc[ies]," either. *Id.*

There will certainly be cases—and this could be one—in which a personal privacy interest could justify withholding dash-cam videos from the public. The PRA exempts from production "specific investigative records" where nondisclosure "is essential . . . for the protection of any person's right

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[4] *See In re Estate of Hansen*, 81 Wn. App. 270, 279-80, 914 P.2d 127 (1996) (noting that police department frequently obtained prior approval from Kent City Attorney, even though such approval was not required, before pursuing seizures warrants); *Fann v. Smith*, 62 Wn. App. 239, 241, 814 P.2d 214 (1991) (describing advisory memo from Seattle City Attorney to Police Relief and Pension Fund Trustees); Seattle City Attorney, http://www.seattle.gov/law/precinct_liaisons/ (last visited Apr. 8, 2014) (describing Seattle City Attorney's "Precinct Liaison Program," whose responsibilities include "[p]roviding real-time proactive legal advice for officers in each precinct"). This type of outside consultation is statutorily required for other agencies, as well. *See* RCW 36.27.020(2) (duty of prosecuting attorney to advise "all county and precinct officers"); RCW 43.10.030(4) (duty of Attorney General to "[c]onsult with and advise the several prosecuting attorneys in matters relating to their duties").

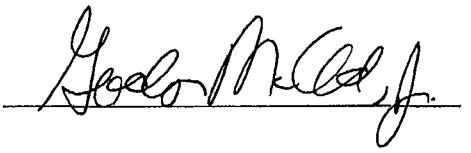
to privacy." RCW 42.56.240(1). But this is not a categorical exemption. As with the exemption recently discussed in *Sargent v. Seattle Police Department*, this exemption requires the agency to justify nondisclosure on a case-by-case basis. 179 Wn.2d 376, 394, 314 P.3d 1093 (2013) ("when an agency withholds internal investigation information citing the effective law enforcement exemption, the burden will rest with the agency to prove that specific portions of the internal file are essential to effective law enforcement").

There could be other situations in which nondisclosure would be considered necessary to protect a defendant's fair trial right. *See Seattle Times Co. v. Serko*, 170 Wn.2d 581, 595-96, 243 P.3d 919 (2010) (listing factors for courts to consider when determining whether to compel nondisclosure to protect defendant's fair trial right). But that is not a categorical exemption, either. *Id.* at 596 ("Application of the standard should be done as to each record requested, with the trial court conducting an in camera review.").

CONCLUSION

I therefore concur in the majority's conclusion that RCW 9.73.090(1)(c) does not create a blanket exemption from disclosure. I would

add only that the trial court erred in interpreting RCW 9.73.090(1)(c) as an "other statute" that categorically exempts recordings from chapter 42.56 RCW's disclosure requirement.



No. 87271-6

FAIRHURST, J. (concurring in part/dissenting in part)—I agree with the majority that the trial court correctly concluded that the Seattle Police Department (SPD) did not violate the Public Records Act (PRA), chapter 42.56 RCW, by stating that it had no responsive records to Tracy Vedder's request for "'police officer's log sheets.'" Majority at 7 (quoting Clerk's Papers (CP) at 96). I also agree with the majority that the trial court correctly concluded SPD violated the PRA by stating that it had no responsive records to Vedder's request for "'a list of any and all digital in-car video/audio recordings.'" *Id.* at 8 (quoting CP at 98).

I disagree, however, with the majority's conclusion that SPD violated the PRA by withholding the dashboard camera recordings requested by Vedder. The PRA requires state and local agencies to disclose public records upon request. An exemption to this requirement is a record that falls within an "other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1). Under Washington's privacy act, chapter 9.73 RCW, police dashboard video recordings are not available to the public "until final disposition of any

criminal or civil litigation which arises from the event or events which were recorded." RCW 9.73.090(1)(c). The majority finds that RCW 9.73.090(1)(c) is an other statute but interprets the prohibition found in RCW 9.73.090(1)(c) as "limited to cases where the videos relate to actual, pending litigation." Majority at 12. While I agree that this provision creates an exemption to the PRA, I disagree with this limitation and rewriting of the statute. I would affirm the trial court on all grounds.

The PRA is a "strongly worded mandate for broad disclosure of public records." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The PRA requires all state and local agencies to "make available for public inspection and copying all public records, unless the record falls within the specific exemptions of [the PRA] or other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1). That is to say, RCW 42.56.070(1) "incorporates into the [PRA] other statutes which exempt or prohibit disclosure of specific information or records" and that supplement, or do not conflict with, the PRA. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 261-62, 884 P.2d 592 (1994) (citing former RCW 42.17.260(1) (1992), *recodified as* RCW 42.56.070, LAWS OF 2005, ch. 274, § 103).

RCW 9.73.090(1)(c) specifically prohibits disclosure of video recordings to "the public" and prohibits disclosure to the public "until final disposition of any

criminal or civil litigation."[1] *See* WAC 44-14-06002(1) (distinguishing "exemption" from "prohibit[ion]" on the grounds that an agency has the discretion to disclose exempt public records, but an agency has no discretion to disclose records that are confidential or prohibited from disclosure). RCW 9.73.090(1)(c) does not conflict with the PRA and prohibits disclosure of specific public records in their entirety. Thus, we agree with the majority that RCW 9.73.090(1)(c) is an other statute that operates as an exception to the PRA, prohibiting disclosure of in car law enforcement video recordings.

However, we disagree with the majority at the scope of the exemption. The majority limits the prohibition to "cases where the videos relate to actual, pending litigation." Majority at 12. The majority imposes this limitation citing the proposition that an exemption or disclosure prohibition found in a supplemental statute should be narrowly interpreted to maintain the PRA's goal of free and open examination of public records. *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 386-87, 314 P.3d 1093 (2013). While we agree that a court should interpret other statute exemptions narrowly, the court must still interpret the other statute in good faith and

[1]While RCW 9.73.090(1)(c) prohibits disclosure to the public, it does not prohibit disclosure of police dashboard video camera recordings to "all parties involved in . . . litigation [relating to the substance of the recording]" or disclosure "pursuant to a court order." Majority at 12 n.4. I would add that if criminal charges are brought against the subjects of such videos, police are required to make such videos available to the subject's counsel under RCW 9.73.100.

may not impose an improperly narrow interpretation simply to reach a desired result. The majority improperly interprets the exemption too narrowly, essentially rewriting the statute in a way that is contrary to legislative intent and the statutory language itself.

"The goal of statutory interpretation is to discern and implement the legislature's intent." *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (citing *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). "In interpreting a statute, this court looks first to its plain language." *Id.* "If the plain language of the statute is unambiguous, then this court's inquiry is at an end." *Id.* We need not go beyond the plain language in this case to see the majority's limitation of the prohibition to "actual, pending litigation" is unduly narrow. Majority at 12.

The language of RCW 9.73.090(1)(c) prohibits disclosing the video recordings to the public until "final disposition of any criminal or civil litigation." "Final disposition" could mean entry of final judgment by a trial court or the exhaustion of appellate remedies. *Id.* Litigation might also be final when the possibility of litigation is foreclosed by a statute of limitations or other procedural mechanism. Although "final disposition" can be "reasonably interpreted in more than one way," it is not ambiguous "simply because different interpretations are conceivable." *State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66 (2002) (citing *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001)).

The meaning of "any" is more clear. The word "any" has been given broad and inclusive connotations. *State v. Sutherby*, 165 Wn.2d 870, 880-81, 204 P.3d 916 (2009) (citing *Rosenoff v. Cross*, 95 Wash. 525, 527, 164 P. 236 (1917)); *State ex rel. Evans v. Bhd. of Friends,* 41 Wn.2d 133, 145, 247 P.2d 787 (1952) (the state constitution's prohibition on legislative authority to authorize any lottery or grant any divorce was unambiguously phrased in the broadest sense). The word is not limited by specific reference to a point in time. *Rosenoff*, 95 Wash. at 528 ("The words 'theretofore' and 'any' are broad and inclusive as to time and subject-matter. They negat[e] any intention to make only the violation of existing law a disqualification."). The meaning of the phrase "any order" has been held to be "'so plain as to admit of no argument as to the[] meaning.'" *State ex rel. Tacoma E. R.R. v. Pub. Serv. Comm'n*, 102 Wash. 589, 591, 173 P. 626 (1918) (internal quotation marks omitted) (quoting *State ex rel. Great N. Ry. v. Pub. Serv. Comm'n*, 76 Wash. 625, 627, 137 P.132 (1913) (citing *State ex rel. R.R. Comm'n v. Or. R.R. & Nav. Co.*, 68 Wash. 160, 123 P. 3 (1912))). In *State ex rel. Tacoma Eastern Railroad*, we emphasized that "any" must mean "all" because if it meant anything less, the legislature would have said as much. 102 Wash. at 591-92 ("[W]e are constrained to hold that the legislature, in using the words 'any order,' meant all orders, unless they had specifically excepted therefrom certain orders or class of orders in the foregoing statutes."). This case law demonstrates that there is a uniform, consistent, and thus

plain meaning for the widely used term "any." So we reaffirm Washington precedent and interpret "'any' to mean 'every' or 'all.'" *Sutherby*, 165 Wn.2d at 881 (internal quotation marks omitted) (quoting *State v. Smith*, 117 Wn.2d 263, 271 & n.8, 814 P.2d 652 (1991)); *State v. Westling*, 145 Wn.2d 607, 611, 40 P.3d 669 (2002); *Smith*, 117 Wn.2d at 271 ("Washington courts have repeatedly construed the word 'any' to mean 'every' and 'all.'").

Although the "final disposition" language can be reasonably interpreted in more than one way, none of those ways equate "any" to "actual" and "pending" litigation. Furthermore, the stated purpose of RCW 9.73.090(1)(c) is to prohibit the disclosure of police dashboard video recordings. Requiring law enforcement to publicly disclose dashboard video recordings upon request—except when there is actual, pending litigation—is directly in contradiction to the purpose and language of the statute, i.e., to prohibit public disclosure until final disposition of any criminal or civil litigation. Under the majority's theory, one need only ask for the recordings the day before filing the suit when there was no actual or pending litigation, which would obliterate the purpose of the statute. This court must enforce statutes "in accordance with [their] plain meaning," and the plain meaning does not limit disclosure only to cases with filed lawsuits. *Armendariz*, 160 Wn.2d at 110.

Washington's privacy act aims to protect citizens from having their private conversations recorded without their consent. *See* RCW 9.73.030. However, the

legislature carved out some exceptions to this rule, including allowing police officers to record interactions with citizens with an in car video camera. RCW 9.73.090. In the same provision where it created the exception to the privacy act, the legislature included language preventing such videos from public disclosure. The plain interpretation of this language in the context of the privacy act is that the legislature created the exception to retain some of the privacy rights of the citizen who was videotaped by the police. The majority insists that the real legislative goal was to protect the integrity of law enforcement investigations and court proceedings but makes this inference from looking at the historical development of the provision. Majority at 13-14. When the plain reading of a statute is clear, inferences and historical trends have no place. *See Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-11, 43 P.3d 4 (2002). An intent to exclude these videos from disclosure to retain the privacy of the citizens is clear from the text of the present statutory scheme, and the inquiry should end there.

The trial court and KOMO expressed concern about SPD's policy of destroying dashboard video recordings after three years—the same length of time as the statute of limitations for civil tort claims. It is conceivable that under this policy, SPD could destroy a recording before the recording would be subject to disclosure under RCW 9.73.090(1)(c). This hypothetical situation is not enough, however, to make RCW 9.73.090(1)(c) ambiguous. *See Watson*, 146 Wn.2d at 955 (The courts

"are not 'obliged to discern any ambiguity by imagining a variety of alternative interpretations.'" (internal quotation marks omitted) (quoting *State v. Keller*, 143 Wn.2d 267, 276-77, 19 P.3d 1030 (2001))). Moreover, KOMO's concerns are unfounded because, under RCW 42.56.100, an agency is prohibited from destroying records scheduled for destruction if the agency receives a public record request "at a time when such record exists." If such a request is made, the agency "may not destroy or erase the record until the request is resolved." *Id.*; *see also O'Neill v. City of Shoreline*, 170 Wn.2d 138, 149, 240 P.3d 1149 (2010) ("[T]he PRA does not allow agencies to destroy records that are subject to a pending records request."). Nothing prevents KOMO from making a public records request and from eventually obtaining dashboard video camera recordings. But KOMO, like other members of the public, must adhere to the delayed disclosure requirements of RCW 9.73.090(1)(c).

RCW 9.73.090 is an other statute that operates as an exemption to the PRA. The plain language of this statute instructs that in car video recordings should not be released to the public until final disposition of any criminal or civil litigation. The SPD retains any video that might be the subject of litigation for three years, and if no litigation has been filed by that time, the video may be destroyed. The legislature has determined that three years is sufficient time either for litigation to be commenced or for the SPD to be sure none will be filed regarding that video. Since

the statute plainly requires any litigation regarding an in car video to be final before any public disclosure, this three year time period is a logical application that ensures compliance with the statute.

CONCLUSION

RCW 9.73.090(1)(c) is an other statute that exempts or prohibits public disclosure of specific information. RCW 9.73.090(1)(c) is not in conflict with the PRA and specifically prohibits public disclosure of police dashboard video camera recordings in their entirety until final disposition of any criminal or civil litigation. The majority's overly narrow interpretation of RCW 9.73.090(1)(c) is contrary to the legislature's intent to prohibit public disclosure of police dashboard video camera recordings until final disposition of any criminal or civil litigation, which is clear from the plain language of the statute. Although "final disposition" has a couple of reasonable interpretations, no interpretation supports concluding that it means "actual, pending litigation." Majority at 12. I would affirm the trial court's conclusion that SPD did not violate the PRA by withholding the video recordings requested by Vedder.

Fairhurst, J.

Owens, J.

Wiggins, J.

Madsen, C.J.

OFFICE RECEPTIONIST, CLERK

To: Michele Earl-Hubbard; 'Perry, Mary'; 'Phil Talmadge'; 'James Egan'; 'Jay W. Wilkinson'
Subject: RE: Filing for Case No. 90136-8 Egan v. Seattle

Received 6/13/2014

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Michele Earl-Hubbard [mailto:michele@alliedlawgroup.com]
Sent: Friday, June 13, 2014 1:18 PM
To: OFFICE RECEPTIONIST, CLERK; 'Perry, Mary'; 'Phil Talmadge'; 'James Egan'; 'Jay W. Wilkinson'
Cc: Michele Earl-Hubbard
Subject: RE: Filing for Case No. 90136-8 Egan v. Seattle

Attached please find for filing in the above-referenced case an Amici Curiae Memorandum of Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association, The McClatchy Company, Pioneer News Group, Sound Publishing, Daily Sun News, The Seattle Times, and the Washington Coalition for Open Government in Support of Appellant's Motion for Extension of Time and Appellant's Petition for Review, and Appendices A, B and C thereto.

The Motion to file this Amicus Memorandum was just filed by email in a separate email.

The attorney filing this is Michele Earl-Hubbard, WSBA #26454, attorney for the above Amicus Curiae. Full contact information is below.

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From: Michele Earl-Hubbard
Sent: Friday, June 13, 2014 1:14 PM
To: 'SUPREME@COURTS.WA.GOV'; 'Perry, Mary'; 'Phil Talmadge'; 'James Egan'; 'Jay W. Wilkinson'
Cc: Michele Earl-Hubbard
Subject: Filing for Case No. 90136-8 Egan v. Seattle

Attached please find for filing in the above-referenced case a Motion for Leave to File Amici Curiae Memorandum of Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association, The McClatchy Company, Pioneer News Group,. Sound Publishing, Daily Sun News, The Seattle Times, and the Washington Coalition for Open Government in Support of Appellant's Motion for Extension of Time and Appellant's Petition for Review, and Appendices A and B thereto.

The Amicus Memorandum shall be sent in a separate email momentarily.

The attorney filing this is Michele Earl-Hubbard, WSBA #26454, attorney for the above Amicus Curiae. Full contact information is below.

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