

69129-5

69129-5

IN THE COURT OF APPEALS
IN AND FOR THE STATE OF WASHINGTON
DIVISION ONE

No. 69129-5 I

JAMES C. EGAN,

Appellant,

vs.

CITY OF SEATTLE,

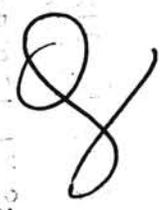
Respondent,

BRIEF OF RESPONDENT CITY OF SEATTLE

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I. INTRODUCTION

The Washington Public Records Act, RCW Chapt. 42.56, (“PRA”) specifically provides that an agency or a person who is named in a record or to whom the record refers can seek injunctive relief to prevent disclosure of a public record. RCW 42.56.540. Courts interpret this provision as giving an agency the right to file a declaratory judgment action to seek judicial guidance whether the agency has properly applied the PRA and to avoid potential per-day penalties from accruing unnecessarily. This appeal raises the question whether the legislature intended to nullify RCW 42.56.540 when it enacted the 2010 changes to the Washington Anti-SLAPP Act, RCW 4.24.525.

Appellant James Egan (“Egan”) requested Seattle Police Department (“SPD”) records under the Public Records Act, RCW Chapt. 42.56, (“PRA”) including police in-car videos from Respondent City of Seattle (“City”). The City provided responsive records to Egan, but denied him copies of in-car videos exempted from disclosure by RCW 9.73.090(1)(c). Egan threatened to sue the City if it did not provide him the videos within two weeks.

The City was involved in a pending lawsuit brought by KOMO TV over a request for public records including in-car videos, but that lawsuit involved additional issues and would not have resolved the threatened dispute with Egan. In order to avoid potential penalties if Egan followed through with his threatened lawsuit, the City brought a declaratory judgment action as provided by RCW 42.56.540 seeking the court’s determination whether it had properly applied RCW 9.73.090(1)(c). As the requester, Egan was a necessary party in the City’s suit. The City notified KOMO of the Egan suit, and KOMO ultimately intervened.

Making a public records request is not a protected public participation and petition activity. The PRA is merely a disclosure statute, and it is well established that there is no constitutional right to government records. Egan, nevertheless, brought a special motion to dismiss the City's declaratory judgment action under RCW 4.24.525. Egan claimed that a PRA request and a threat to sue over denial of one are protected activities and the City was barred from bringing its declaratory judgment action. The trial court denied the special motion because Egan failed to meet his initial burden of showing that the City's declaratory judgment action was based on protected public participation and petition activity. Egan now appeals that decision.

Egan also raises issues regarding whether the City met its burden under RCW 4.24.525 of presenting clear and convincing evidence of prevailing on its declaratory judgment action. Although the trial court dismissed the declaratory judgment action, the City did present evidence that it should have prevailed. First, a specific exemption, RCW 9.73.090(1)(c) applies to the videos. Second, the legislature has prohibited disclosing the videos to the public until all criminal and civil litigation has been disposed of and imposed criminal liability for wrongful disclosure. This reflects a legislative determination that premature disclosure will irreparably harm persons and vital governmental interests. Third, the City presented additional evidence in the trial court of the harm to persons and vital governmental interests caused by such disclosure.

The trial court in this case correctly determined that a PRA request is not a protected activity. The trial court also correctly ruled that an action brought under RCW 42.56.540 after a requester threatens to sue over an agency's response to a public records request is not a SLAPP. The trial court erred, however, in determining that the City failed to meet

its burden of presenting clear and convincing evidence of prevailing on its declaratory judgment action.

This is one of two appeals arising from the same lawsuit. This appeal is limited to Egan's appeal of his anti-SLAPP motion. Egan has provided no argument here claiming that he is entitled to the in-car videos he requested. Additional issues will be addressed in the second appeal, Case ## 69420-1-1.

II. ISSUES

The City acknowledges the assignments of error and issues in Egan's brief; however, the city believes they are more appropriately expressed as follows:

1. Did the trial court correctly determine that Egan failed to meet his burden under RCW 4.24.525 of showing by a preponderance of the evidence that a PRA request is a matter of public participation and participation?
2. Did the trial court correctly determine that the City was not liable under RCW 4.24.525 for exercising its right to seek a declaratory judgment regarding whether particular records are exempt under RCW 42.56.540 after Egan threatened to sue over denial of his public records request?
3. Did the trial court correctly determine that the City's declaratory judgment action brought under RCW 42.56.540 was not based on an action by Egan involving public participation and petition where the City's declaratory judgment action was based on a genuine dispute regarding the applicability of a statutory exemption?
4. Did the City meet its burden under RCW 4.24.525 of presenting clear and convincing evidence of prevailing on its declaratory judgment action where it showed that RCW 9.73.090(1)(c) prohibited disclosing the videos to Egan, that releasing the videos would

not be in the public interest, and that disclosure would substantially and irreparably damage persons and vital government functions?

III. COUNTER STATEMENT OF THE CASE

Egan's Statement of the Case omits key facts and contains significant errors. The City provides the following more complete and impartial recitation of the facts.

Egan maintains an electronic library of "almost 1,000 circumstances of misconduct" by officers and updates this library with information provided to him by SPD in response to his frequent PRA requests. CP 111-12 SPD has provided copies of records in response to requests including records of internal investigations of officers. CP 269-70. SPD has also provided him copies of in-car videos when he has requested them as the legal representative of the subjects of those videos. Appellant's Brief, p. 27; see also, CP 113. Egan presented no evidence to the trial court that the City has ever tried to thwart his efforts to receive responsive, non-exempt records in response to his PRA requests.

A. The City's In-Car Video System

Since 2007, SPD's entire fleet of approximately 275 patrol cars has been equipped with in-car video and sound recording equipment manufactured by COBAN Technologies. CP 81. SPD follows the Washington State Archives Law Enforcement Records Retention Schedule for Law Enforcement Agencies, Version 6.0, July 2010.¹ That schedule reflects two different retention periods for in-car video recordings. The

¹ Available over the internet at <http://www.sos.wa.gov/archives/RecordsManagement/RecordsRetentionSchedulesforLawEnforcementAgencies.aspx> (last downloaded December 20, 2012). Relevant portions of the Schedule are attached to this brief as Appendix B.

first is §8.1.22: “Recordings from Mobile Units—Incident Identified” requires that “[r]ecordings created by mobile units which have captured a unique or unusual action from which litigation or criminal prosecution is expected or likely to result” shall be retained until the matter is resolved and until the appeals process has been exhausted. The second is §8.1.23: “Recordings from Mobile Units—Incident Not Identified” directs that “[r]ecordings created by mobile units that have not captured a unique or unusual incident or action from which litigation or criminal prosecution is expected or likely to result” shall be retained for 90 days after date of recording. CP 81-82. SPD refers to the two categories of videos as “tagged” or “untagged.” “Recordings from Mobile Units: Incident Identified” as “tagged” for retention and “Recordings from Mobile Units; and Incident Not Identified” are “untagged.”CP 82.

RCW 9.73.090(1)(c) states: “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.” The statute does not define “public”, but the City interprets “public” as not including the individual who is the subject of the recording. SPD, therefore, provides copies of videos to the subjects of those videos or their attorneys. SPD also provides copies of in-car videos to criminal defense attorneys as required by RCW 9.73.100 and in response to criminal and civil discovery requests. CP 83-84.

When an agency receives a request for videos from the public, it must determine whether final disposition of any criminal or civil litigation which arises from the event or events which were recorded has occurred. The statute of limitations for a personal injury

lawsuit is three years. As a result, all civil litigation which arises from an event that has been recorded may not even be filed for at least three years from the date of the event. Because of this uncertainty, SPD has adopted three years from the date of the recorded event as the earliest date that it may release a particular tagged in-car video to the public. SPD will then release tagged video after making reasonable efforts to determine that all criminal and civil litigation related to the recorded event has been disposed of. Reasonable efforts mean determining whether there is an active criminal investigation or prosecution, whether a claim or lawsuit has been filed against the City, or whether involved officers are aware of other civil litigation resulting from the recorded event. CP 84-85.

B. Egan's September 23, 2011 Request and the City's RCW 42.56.540 Action

On September 23, 2011, Defendant James Egan submitted a public records request to the Seattle Police Department (SPD) for all complaints made against four SPD officers. He asked for the entire complaint files, SPD Office of Professional Accountability (OPA) findings against the officers, and copies of 36 in-car videos which were reviewed in connection with OPA investigations of those officers. CP 39-41. SPD provided almost 1800 pages of internal investigation files in response to the request CP 45.

The 36 videos requested were made between March 13, 2009 and July 26, 2011. CP 39-41. Egan was not the subject of any of the requested videos, nor did he represent the subjects of 35 of those videos. CP 83. SPD had already provided Egan a copy of one of the videos in response to an earlier request because he represented the subject of that video. CP 152. SPD asked Egan to advise it if he wanted another copy of the already-

provided video, but denied the request for copies of the remaining videos, citing RCW 9.73.090(1)(c) as the applicable exemption. CP 45-47.

On December 7, 2011, Egan wrote to SPD Chief John Diaz to administratively appeal SPD's denial of the videos. His appeal letter said: **"I am asking you to produce the requested videos within the next two weeks, or I will be seeking statutory damages at the maximum level based on the Public Disclosure Act, which trumps the exceedingly broad, self-protective interpretation of RCW 9.73.090(1)(c) recently provided by your office."** CP 49-50 (emphasis in original).

On January 3, 2012, the City filed a declaratory judgment action against Egan under RCW 42.56.540 seeking the Court's determination that the City correctly asserted RCW 9.73.090(1)(c) as "an other" statute within the meaning of RCW 42.56.070(1), and that the City properly denied Egan's request for copies of in-car recordings. CP 1-7.

C. Egan's January 10, 2012 Request and the City's Amended Complaint

Egan submitted another request to SPD on January 10, 2012, for "the same 36 videos I requested on September 23, 2011, which are the subject of *Seattle v. James Egan*, with the entire audio redacted or deleted;" stating "[i]t is my position that these 36 silent videos cannot possibly violate the Privacy Act since they contain no recorded oral communications" (emphasis deleted). CP 52. SPD denied Egan's second request on January 11, 2012, asserting that RCW 9.73.090(1)(c) prohibits the disclosure of in-car sound or video recordings before final disposition of any litigation which arises from the incidents that were recorded. CP 55. The City filed an Amended Complaint in this action on January 11, 2012 seeking the court's determination that the City had properly denied Egan's January 10, 2012 request as well. CP 26-33.

D. The KOMO Lawsuit

When it filed the declaratory judgment action against Egan, the City was involved in another lawsuit regarding its in-car video system, *Fisher Broadcasting – Seattle TV L.L.C., dba KOMO 4 v. City of Seattle*, King County Superior Court, 11-2-31920-2. (“KOMO” lawsuit). CP 94-107. The outcome of the KOMO case would not affect the City’s potential liability in the dispute with Egan.

KOMO filed its lawsuit against the City in September 2011. The complaint and answer were the only relevant pleadings that had been filed in the KOMO litigation at the time the Egan lawsuit was filed. CP 91-92. The case was assigned to the Honorable Jim Rogers.

KOMO lawsuit differs markedly from the City’s action against Egan. KOMO’s complaint included an allegation that the City erroneously applied RCW 9.73.090(1)(c), but the lion’s share of KOMO’s allegations concerned access to database records rather than the in-car videos themselves. CP 95-99.

KOMO’s allegations arose from three requests made to SPD in August and September 2010. Only one of the three requests sought in-car videos. KOMO first requested copies of SPD “officer’s log sheets that correspond to any and all in-car video/audio recordings which have been tagged for retention” from January 1, 2005 to August 4, 2010. CP 97. SPD denied the first request because it had no responsive records. *Id.* KOMO’s second request was for a list of all SPD digital in-car videos tagged for retention from January 1, 2005 to August 11, 2010. KOMO asked that the list “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 log.” *Id.* KOMO’s third request sought essentially the same list it had requested in its second request along with corresponding videos from January 2007 to September 1, 2010. CP 98. SPD denied KOMO’s second requests because it “would have had to be created by a combination of two non-communicating computer systems.” CP 392. It denied KOMO’s third request because it would require creating the list sought in the second request to identify and retrieve the requested videos. CP 98-99.

SPD did not base its denials of KOMO’s third request on a claim that the videos were exempt under the Privacy Act. *Id.* SPD asserted that RCW 9.73.090(1)(c) applied to in-car only after SPD IT personnel worked with its in-car video system vendor to develop the SQL Server script to retrieve and extract the data and performed customized programming to create a list of videos that allowed it to locate and produce actual videos. CP 587-88. This did not occur until March 2011, six months after the City responded to KOMO’s requests. CP 100. KOMO’s complaint included an allegation that the City erroneously applied RCW 9.73.090(1)(c), but the City had denied KOMO’s requests because it did not have existing and identifiable responsive records rather than because RCW 9.73.090(1)(c) exempted disclosure. CP 587-88.

Unlike the KOMO litigation, the only legal issue raised in the Egan litigation was the application of RCW 9.73.090(1)(c). The City notified KOMO of the Egan lawsuit on January 4. CP 78.

The City filed a motion for declaratory judgment and preliminary injunction on January 24, 2012. CP56. The motion indicated that while the relationship between the PRA and the Privacy Act was one of the issues in the KOMO case, the City risked

“potentially significant sanctions through a lawsuit from Egan while awaiting resolution of the [KOMO] matter.” CP 72.

On January 25, 2012, KOMO’s attorney noted a motion for summary judgment in the KOMO lawsuit for March 23, 2012 but did not file and serve the motion at the time of noting it. CP 91-92, 580. On January 26, 2012, KOMO moved to intervene in the Egan suit. CP 86. Approximately one month later on February 23, 2012, KOMO filed and served its motion for summary judgment in the KOMO suit. CP 380.

E. Egan’s Anti-SLAPP Motion

On February 22, 2012, Egan filed a motion to strike and dismiss the City’s amended complaint under RCW 4.24.525, Washington’s anti-SLAPP statute, claiming that his September 23, 2011, and January 10, 2012, PRA requests constituted public participation under the statute. CP 230-52.

On February 28, 2012, Egan and attorneys for the City and KOMO appeared before the Honorable Dean Lum for hearing on the City’s motion for declaratory judgment and preliminary injunction and Egan’s motion to strike. CP 287. The trial court continued the hearing on those matters until Judge Rogers issued his ruling on KOMO’s motion for summary judgment. CP 287.

The City filed a cross-motion for summary judgment in the KOMO case. CP 727-822. Judge Rogers heard oral argument on the cross-motions for summary judgment on March 23, 2012, and issued an order on April 6, 2012. CP 388-401. Judge Rogers found that the City did not violate the PRA in responding to the KOMO’s first request. CP 391. With regard to KOMO’s second request, he found that the evidence was “clear that there was no single record or database responsive” to KOMO’s request, which was “in

compliance with, or beyond the City's responsibility under, the Public Records Act.” CP 392-93. Judge Rogers, nevertheless, found the City liable for violating the PRA because almost a year later the City was able to produce a database for another requester containing some, but not all, of the information requested by KOMO. The court found that “later, when the City gained an understanding that it possessed a record [that] was partially responsive during this period, even if employees did not grasp that fact initially, it had a duty to respond” and “the City knew that database produced to [the other requester] was partially responsive to KOMO’s requests.” CP 394.

Judge Rogers found that RCW 9.73.090 is an "other statute" within the meaning of RCW 42.56.070(1), which exempts or prohibits disclosure of specific information or records because “the Legislature deliberately decided to delay the release of in-car videos to citizens making such requests ‘until final disposition of any criminal or civil litigation which arises from the event or events which were recorded.’” CP 400. He further found that the City’s policy of delaying disclosure of tagged video for a period of three years was a narrow and reasonable interpretation of the Privacy Act and a case by case review of videos prior to three years would not effectuate the Legislature’s intent with respect to that act. CP 399-400. KOMO sought direct review by the State Supreme Court of Judge Rogers’ order. CP 403.

The parties submitted additional briefing and appeared before Judge Lum on June 1, 2012. After further briefing, the trial court issued an order on June 26, 2012, denying Egan’s anti-SLAPP motion for failing to meet the first prong of RCW 4.24.525 because an action for injunctive relief brought under RCW 42.56.540 after receiving a PRA request or threat to sue over a request is not based on an action involving public

participation and petition. The order stated that the PRA contains a specific litigation procedure and Egan's "expansive argument" would have significant unintended consequences on third parties in PRA litigation seeking injunctive relief. CP 604.

The June 26, 2012 order also dismissed the City's declaratory judgment action finding that it was "improper not because it was a SLAPP, but because it was unnecessary and was filed to obtain litigation advantage." CP 605. Without citing a specific basis other than "consistent with Washington law," the trial court awarded Egan fees and costs to be determined after submission of a detailed fee declaration attached to a motion to determine the same. *Id.*

On July 25, 2012, Egan filed a notice of appeal of the dismissal of his anti-SLAPP motion. That is the appeal presently before this Court.

The trial court denied the City's motion for reconsideration on August 14, 2012. The City filed a notice of appeal of that order and the portion of the June 26, 2012 order dismissing the City's declaratory judgment action and awarding fees and costs to Egan. That appeal is Case #69420-1-1.

On October 30, 2012, the trial court found that the City violated CR 11 by filing its declaratory judgment action and awarded Egan fees of \$14,676.25. Egan filed a notice of appeal of that order on November 27, 2012.

IV. ARGUMENT

A. Washington's Anti-SLAPP Statute

Egan brought a special motion to strike the City's declaratory judgment action pursuant to RCW 4.24.525, the Washington anti-SLAPP statute. The Legislature enacted RCW 4.24.525 in 2010 to address "lawsuits brought primarily to chill the valid exercise

of the constitutional rights of freedom of speech and petition for the redress of grievance.” Laws of 2010, ch 118. Because the “costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issue,” the statute provides “an efficient, uniform, and comprehensive method for speedy adjudication” with “attorneys’ fees, costs, and additional relief where appropriate.” *Id.*

A party may bring a special motion to strike “any claim that is based on an action involving public participation and petition.” RCW 4.24.525 (4)(a). In deciding an anti-SLAPP motion, a court must follow a two-step process. The party who brings the special motion has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion. RCW 4.24.525(4)(b). If the responding party fails to meet its burden, the court must grant the motion and award the moving party \$10,000 in addition to attorney fees and costs. RCW 4.24.525(6)(a)(i),(ii).

B. Agencies may bring declaratory judgment actions under RCW 42.56.240 to seek guidance and avoid potential penalties.

The Civil Rules govern procedure in PRA suits, and the statute “simply does not define a special proceeding exclusive of all others.” *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 104-105, 117 P.3d 1117 (2005). That procedure includes an agency’s right to seek declaratory relief. *Soter v. Cowles Pub’g. Co.*, 162 Wn.2d 716, 752, 174 P.3d 60 (2007).

Pursuant to RCW 42.56.540, a state or local government entity can seek judgment in superior court as to whether a particular record is subject to disclosure under the Public Records Act. *Id.*, 162 Wn.2d at 751. The PRA permits “an agency or its representative or a person who is named in the record or to whom the record specifically pertains” to seek an injunction to enjoin disclosure of a public record. RCW 42.56.540. That section of the PRA is simply a procedural statute, and is not a source of an exemption to disclosure. *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 257, 884 P.2d 592 (1992).

In order to grant injunctive relief under the PRA, the Court must make three findings: (1) that a specific exemption applies; (2) that disclosure would not be in the public interest; and (3) disclosure would substantially and irreparably damage a person or a vital government interest. *Soter*, 162 Wn.2d at 757.

Egan asserts that the City should not have brought an action under RCW 42.56.540 and in support offers arguments that the Washington Supreme Court has explicitly rejected. First, he argues that the City’s lawsuit pre-empted his ability to seek relief from a court at a time of his own choosing, unduly burdened him, and creates a chilling effect on citizens contemplating whether to make a public records request to SPD. The *Soter* Court soundly rejected similar arguments: “For example, *The Spokesman–Review* asserts that agencies will be encouraged to haul records requesters, who are unable to afford to defend themselves, into court. However, a public records requester who does not wish to engage in a court battle could simply withdraw the public records request, making the agency’s action moot. In addition, the requester could move for voluntary dismissal of the action if he or she no longer seeks access to the public

record. CR 41(a). Withdrawing the record request is not significantly different from deciding to no longer pursue access to the record. **Thus, we perceive no chilling effect on record requesters.**” The Court went on to say: “More importantly, these are arguments more properly presented to the legislature, which is the entity charged with balancing these policy decisions. We cannot ignore the plain language or the legislative history of RCW 42.56.540.” *Id.*, 162 Wn.2d at 752 (emphasis added).

Second, he argues that seeking judicial guidance and avoiding potential liability are impermissible purposes for bringing an action under RCW 42.56.540. Contrary to Egan’s argument, seeking judicial guidance and avoiding potential penalties are the fundamental reasons why an agency brings such an action. The State Supreme Court recently emphasized this: “Because agencies are penalized on a per-day basis for improperly denying a records request an agency’s option to quickly seek a judicial determination that the requested records are not subject to disclosure is an important one.” *Franklin County Sheriff’s Office v. Parmelee*, 175 Wn.2d 476, 480, 285 P.3d 67 (2012).

The *Soter* Court also recognized that seeking declaratory relief under RCW 42.56.540 “spares the agency the uncertainty and cost of delay, including the per diem penalties for wrongful withholding. **It does not prejudice the requester.**” *Soter*, 162 Wn.2d at 752 (emphasis added). The *Soter* Court could not have been clearer in holding that the “plain language of RCW 42.56.540 allows agencies to seek judicial determination regarding the validity of a public record.” *Id.*, 162 Wn.2d at 757.

Moreover, Egan’s argument would convert any agency’s declaratory judgment action or counterclaim in a PRA case into a SLAPP, and would implicitly repeal RCW

42.56.540. Implicit repeal of legislation is highly disfavored. *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 13, 810 P.2d 1359 (1991). It is also highly unlikely given the significant public importance of the PRA. (RCW 42.56.030).

Applying the anti-SLAPP statute to actions brought under RCW 42.56.540 would affect more than public agencies. The statute allows any person named in a record or to whom a record specifically pertains to seek an injunction to prevent disclosure. Third parties who have a legitimate interest in protecting their rights frequently bring actions under RCW 42.56.540 seeking injunctive relief to prevent disclosure of records. These third-party actions are usually brought by parties identified in records who believe disclosure will violate their right to privacy or by businesses that seek non-disclosure of proprietary, trade secret, and other sensitive business-related information provided to government agencies in connection with contract bidding and other transactions.

Multiple reported cases have been brought by third parties asserting privacy interests. *See, e.g., Bellevue John Does v. Bellevue School Dist.*, 164 Wn.2d 199, 189 P.3d 139 (2009) (teachers who were the subject of unsubstantiated allegations of misconduct with students); *Tiberino v. Spokane Co.*, 103 Wn. App. 680, 13 P.3d 1104 (2000) (an employee seeking nondisclosure of email with highly personal content unrelated to agency business); *Brown v. Seattle Public Schools*, 71 Wn. App. 613, 860 P.2d 1059 (1993) (an elementary school principal seeking to enjoin disclosure of performance evaluation that did not reflect specific incidents of misconduct); and *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn. 2d 398, 259 P.3d 190 (2011) (a police officer seeking to enjoin disclosure of investigative records of unsubstantiated allegations of sexual assault).

Likewise, many reported cases have been brought by businesses seeking injunctive relief to prevent disclosure of proprietary, trade secret, or other business-related information. *See, e.g., Northwest Gas Ass'n. v. WUTC*, 141 Wn.App. 98, 168 P.3d 443 (2007) (gas pipeline operators seeking nondisclosure of highly-detailed shapefile data that they were required by law to provide to the WUTC); *Dragonslayer, Inc. v. Wash. State Gambling Comm.*, 139 Wn. App. 433, 161 P.3d 428 (2007) (card room operators seeking to enjoin disclosure of audited financial statements provided to the State Gambling Commission); and *Ameriquest Mortg. Co. v. Wash. State Office of Atty. Gen.*, 170 Wn. 2d 418, 241 P.3d 1245 (2010) (a mortgage company seeking to enjoin disclosure of confidential customer loan file information provided to an agency).

Because he or she is a necessary party, a requester must be joined in any action seeking to enjoin disclosure of records. *Burt v. Dep't. of Corr.*, 168 Wn2d. 828, 231 P.3d 196 (2009). Thus, an agency or third party bringing an action under RCW 42.56.540 **must** join the requester. If a PRA request or threat to sue over a request is sufficient to meet the first prong of the statute, a requester brought into court could automatically bring an anti-SLAPP motion, and a third party would be forced to respond to it. As a result, individuals and businesses will be reluctant to seek an injunction for fear that they would be forced to defend an anti-SLAPP motion in addition to pursuing the injunction action. This is doubly burdensome to third parties because they also bear the cost of the underlying injunction action. When the Legislature adopted RCW 4.24.525, it could not have intended to impose this onerous burden on any party who seeks to exercise the right to injunctive relief provided by RCW 42.56.540.

C. The trial court correctly found that a PRA is not a protected activity.

Egan had the burden of showing by a preponderance of the evidence that the challenged action involved “public participation and petition, defined as:

(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.

RCW 4.24.525(2)(a)-(e).

The trial court held that the phrase "based on an action involving public participation and petition" must mean more than based on the public records request itself, otherwise RCW 42.56.540 "would be rendered a nullity." The trial court also rejected Egan's argument that a threat to sue for failure to disclose documents was public participation and petition. The court observed that the Public Records Act itself contains the injunctive provision, and the Court observed that it appears the drafters of the PRA sought to balance important and competing public policy considerations. As a result, they could not have intended that these policy considerations not matter once a requester threatens to sue, even if the records are clearly exempt.

The trial court distinguished the California cases cited by Egan because those cases did not involve a specific litigation procedure outlined in its public records act like our PRA. More importantly, the Court was concerned that innocent third-party citizens with individual privacy rights would be unwilling to protect those rights by bringing actions for injunctive relief under the PRA. The trial court correctly determined that the City's claim was not based on an action involving public participation and petition: first, because it clearly pre-existed Egan's request and threat to sue, and second, because Egan had provided no evidence supporting his position other than the text of the statute itself. CP 604-05.

The Revisions in 2010 to Washington's anti-SLAPP statute are based t on California law and California cases provide persuasive authority. *See, Aronson v. Dog Eat Dog Films*, 738 F. Supp. 2nd 1104, 1110 (W.D. Wash. 2010). The California and Washington anti-SLAPP statutes, however, differ in significant respects. The California statute incorporates a probability standard and essentially creates an early opportunity for summary judgment. *Jones v. City of Yakima Police Dept.*, 2012 WL 1899228 (E.D. Wn. May 24, 2012). In contrast, the Washington anti-SLAPP statute requires a responding

party to demonstrate a likelihood of prevailing on his or her claims by *clear and convincing evidence*. As a result, the Washington statute radically alters a plaintiff's burden of proof. *Id.* See also, Tom Wyrwich, *A Cure for a "Public Concern": Washington's New Anti-SLAPP Law*, 86 Wash. L. Rev. 663, 665 (2011)(courts applying Washington's anti-SLAPP statute must "pay special attention to provisions of the California statute that the Washington State Legislature expressly, adopted, modified, or ignored").

"Accordingly, courts evaluating a special motion to strike pursuant to RCW 4.24.525 must carefully consider whether the moving party's conduct falls within the '**heartland**' of *First Amendment activities* that the Washington Legislature envisioned when it enacted the anti-SLAPP statute." *Jones*, 2012 WL 1899228. (emphasis added); see also, *Fielder v. Sterling Park Homeowners Assoc.*, 2012 WL 6114839 (W.D. Wn. Dec. 10, 2012).

The PRA does not implicate the constitutional right of free speech or petition; it merely provides a statutory procedure for access to public records. Federal courts have repeatedly found that there is no general constitutional right of access to government information. See *Houchins v. KQED*, 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978). ("Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."); *Shero v. City of Grove*, 510 F.3d 1196, 1201 (10th Cir. 2007). ("The City is not compelled by the *First Amendment* to provide information to Mr. Shero but must only provide the [public records] to him under *state law*.") (emphasis in original.)

The U.S. Supreme Court has distinguished the Washington PRA from activity protected by the First Amendment. “The PRA is not a prohibition on speech, but instead a disclosure requirement. ‘[D]isclosure requirements may burden the ability to speak, but they ... do not prevent anyone from speaking.’ ” *Doe. No. 1 v. Reed*, ___ U.S. ___, 130 S.Ct. 2811, 2818 (2010).

Washington Courts similarly hold that the PRA is a statutorily created means of accessing public records, and the First Amendment does not compel the government to supply particular information. *King County Dept. of Adult and Juvenile Detention v. Parmelee*, 162 Wn.App. 337, 254 P.3d 927 (2011), rev. denied, 175 Wash.2d 1006, 285 P.3d 885. *See also, City of Tacoma v. Tacoma News, Inc.*, 65 Wn.App. 140, 151, 827 P.2d 1094 (1994) (the right to “government information is not more nor no less than what the legislature has chosen to grant by statute.”)

Even a **wrongful** denial of records in response to a statutory open records provision is not a First Amendment violation. *Shero v. City of Grove*, 510 F.3d 1196, 1202 (2007). Mr. Shero had requested copies of records called “council packets”, and informed the city in writing of his intent to sue after his request was denied. The city’s attorney filed declaratory judgment action in state court under the Oklahoma Open Records Act (“OORA”) and Shero filed a counterclaim seeking a ruling that the council packets were public records subject to disclosure. The state court ruled that the city wrongfully denied Shero’s request for council packets, and the city paid Shero \$28,000 to settle his OORA claim. *Id.*, 510 F.3d at 1199.

Shero then brought a 42 U.S.C. § 1983 in federal court alleging, among other things, that the city violated his First Amendment rights when it refused to provide him

the council packets as required by state law. Similar to Egan's arguments that the City retaliated against him because of how he intended to use the videos, Shero claimed that the city retaliated against him and attempted to chill his speech about government corruption at city council meetings by rejecting his requests for council packets. Citing *Houchins*, the Court rejected Shero's arguments:

Clearly, then, Mr. Shero has no First Amendment right to receive the council packets from the City, but rather only a state right under the OORA as the state court held. The City is not compelled by the *First Amendment* to provide information to Mr. Shero but must only provide the council packets to him under *state law*, and Mr. Shero has already received his remedy in state court.

Id., 510 F.3d at 1202. (emphasis in original).

Notably, the *Shero* Court also held that the city's declaratory judgment action was not retaliatory, "the nature and purpose of a declaratory judgment is to declare rights, not to attack the opposing party." *Id.* "Being properly named as a defendant in a declaratory judgment suit, however styled, would not chill a person of ordinary firmness from continuing to engage in constitutionally protected activity" *Id.*

A PRA request falls well short of the "'heartland' of First Amendment activities that the Washington Legislature envisioned when it enacted the anti-SLAPP statute." *Jones*, 2012 WL 1899228.

A. The City's declaratory judgment action was not based on protected activity: it was based on an actual, present dispute.

The first-prong analysis requires a court to review the parties' pleadings, declarations and other supporting documents to determine whether the gravamen of the underlying claim is based on protected activity.

A defendant filing an anti-SLAPP motion to strike "must make an initial prima facie showing that the plaintiff's suit arises from an act in furtherance of defendant's right of petition or free speech." *Braun v. Chronicle Publ'g Co.*, 52 Cal.App.4th 1036, 1042-43, 61 Cal.Rptr.2d 58, 61 (1997). If the substance, or gravamen, of the complaint does not challenge defendant's acts in furtherance of the right of free speech or petition, the court does not consider whether the complaint alleges a cognizable wrong or whether the plaintiff can prove damages. *Coretronic Corp. v. Cozen O'Connor*, 192 Cal. App. 4th 1381, 1389-90, 1221 Cal.Rptr.3d 254, Cal.App.2Dist. (2011).

A claim is not a SLAPP just because it is filed in response to, or even in retaliation for, threatened litigation— Even if the court views it as an oppressive litigation tactic. *City of Cotati v. Cashman*, 29 Cal. 4th 69, 77, 52 P.3d 695, 124 Cal. Rptr. 2d 519 (2002). When evaluating whether the moving party meets its threshold burden, a court must look to the “principle thrust or gravamen of the plaintiff’s cause of action.” *Martinez v. Metabolife Internat. Inc.*, 113 Cal.App. 4th 181, 187, 6 Cal. Rptr 3d 494 (2003). Similarly, his Court must focus on the gravamen of the City’s declaratory judgment action; otherwise, it risks allowing a party “to circumvent the showing expressly that an alleged SLAPP *arise from* protected speech or petitioning.” *Cotati*, 29 Cal. 4th 78.

One court noted: “We publish this opinion, however, to emphasize that a cross-complaint or independent lawsuit filed in response to, or in retaliation for, threatened or

actual litigation is not subject to the anti- SLAPP statute simply because it may be viewed as an oppressive litigation tactic. No lawsuit is properly subject to a special motion to strike under [the anti-SLAPP statute] unless its allegations arise from acts in furtherance of the right of petition or free speech.” *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 924, 116 Cal.Rptr.2d 187 (2002).

Where a claim is based on an actual, present conflict between the parties regarding the legal interpretation of particular legislation, the defendant does not meet its burden on the first prong. *City of Cotati v. Cashman*, 29 Cal. 4th at 79; *see also, Alameda County Land Use Assn. v. City of Hayward*, 38 Cal App. 4th 1716, 1723, 45 Cal. Rptr.2d 752 (1995).

The trial court correctly determined that the City’s declaratory judgment action was based on the actual, present conflict regarding the interpretation of the PRA in connection with RCW 9.73.090(1)(c), and Egan, therefore, could not meet the first prong of RCW 4.24.525.

Egan tries to support his argument by misreading and mischaracterizing cases. The two cases Egan relies on actually support the City’s position. *Equilon Enterprises, LLC v. Consumer Cause*, 29 Cal.4th 53, 124 Cal.Rptr. 2d 507 (2002); *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 47 Cal. App.4th 777, 54 Cal.Rptr.2d 830 (1996). *Equilon Enterprises* cannot be interpreted, as Egan contends, to mean that any declaratory judgment action brought against a party who threatens litigation is a SLAPP. The declaratory judgment in *Equilon Enterprises* was not based on an actual, present legal dispute between the parties; rather, it was a direct attack on the sufficiency of a party’s Proposition 65 notices.

California Proposition 65 is a voter-approved initiative that enacted the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code § 25249.5 *et seq.* Under Proposition 65, the state must publish a list of chemicals known to cause cancer or reproductive toxicity and businesses must provide warnings before consumers are exposed to such chemicals. *American Meat Institute v. Leeman*, 102 Cal. Rptr.2d 759, 762, 180 Cal.Rptr. 4th 728 (2009). A private citizen may bring an action to enforce Proposition 65 in certain instances, but at least 60 days before filing a lawsuit the citizen must give notice to the alleged violator, the Attorney General, district attorneys and city attorneys in the jurisdiction where the violation occurred. *Id.* 102 Cal. Rptr.2d at 764.

In *Equilon Enterprises*, a consumer group served an oil company's predecessors in interest, the state attorney general, a county district attorney, and a city attorney with Proposition 65 notices of intent to sue for alleged groundwater pollution. Rather than address the underlying pollution dispute, the oil company brought a declaratory judgment action asking for a determination that the notices of intent to sue were invalid as well as an injunction barring the group from filing litigation based on the allegedly defective notices. *Equilon Enterprises*, 29 Cal.4th at 57. Far from holding that any declaratory judgment action filed after even arguably protected activity has taken place, the Court specifically held that “ ‘the act underlying the plaintiff's cause’ or ‘the act which forms the basis for the plaintiff's cause of action’ must *itself* have been an act in furtherance of the right of petition or free speech.” *Id.*, 29 Cal.4th at 66, *citing Computer Xpress, Inc. v. Jackson*, 93 Cal.App. 4th 993, 1003, 113 Cal.Rptr.2d 625.

The result in *Equilon Enterprises* would have been different if rather than directly attacking the consumer group's Proposition 65 notices, the oil company had instead sought declaratory relief based on an actual dispute. For example, a declaratory judgment action brought by two trade associations in response to Proposition 65 notices was not a SLAPP where the associations sought a determination that the Federal Meat Inspection Act pre-empted Proposition 65. *American Meat Institute*, 102 Cal. Rptr.2d at 767.

Egan's reliance on *Dove Audio* is equally misplaced. Just as in *Equilon Enterprises*, the complaint in *Dove Audio* directly attacked pre-litigation communication as opposed to being based on an underlying legal dispute. In *Dove Audio*, celebrities including Audrey Hepburn had made a recording, and the recording company was contractually obligated to pay a percentage of the royalties to charity. A lawyer for Hepburn's estate sent a letter to the other celebrities expressing an intention to lodge a complaint with the state attorney general requesting an investigation into whether the recording company had paid those royalties. The letter also sought the support of the recipients. In response, the recording company brought an action against the lawyer for **libel** and **interference with an economic relationship**. *Dove Audio, Inc.*, 47 Cal. App.4th at 780.

The *Dove Audio* suit did not address the underlying contractual dispute. Rather, it directly attacked the lawyer's prelitigation letter. As a result, it is the type of classic SLAPP described by George Pring, who with Penelope Canan, coined the term "SLAPP." See, George W. Pring, SLAPPs: Strategic Lawsuits against Public Participation, 7 Pace Envtl. L. Rev. 3, 9.

Perhaps if the City had brought a defamation claim against Egan or sought to enjoin him from making all public records requests in the future, he might have an argument that the anti-SLAPP statute applied. But that is not the case here. Compare this case to an Arizona case where a school district brought a declaratory action to enjoin four individuals from making any future requests without leave of court. The requesters moved for dismissal under the state anti-SLAPP statute, but the court did not reach that issue because it could resolve the matter under Arizona public records law. *Congress Elementary School District No. 17 of Yavapai County v. Warren*, 227 Ariz. 16, 251 P.3d 395, 397 (2011).

California courts have ruled that an anti-SLAPP motion is not an appropriate challenge to a declaratory judgment action on whether an initiative is within the scope of the initiative power. e.g. *City of Riverside v. Stansbury*, 155 Cal. App. 4th 1582, 66 Cal.Rptr.3d 862 (2007). In reviewing the first prong of this test, the court stated:

The City filed a lawsuit against Stansbury and RPR (respondents), seeking a declaration that the proposed initiative was invalid as it was not a proper subject for a local initiative. Contending that the City's lawsuit was “an affront to [their] First Amendment rights,” Stansbury and RPR countered with an anti-SLAPP motion (Code Civ. Proc., § 425.16), which was granted. On appeal, the City maintains that its complaint was directed not at protected conduct, as required under the anti-SLAPP statute, but rather, at the validity of the proposed initiative. We agree and reverse the order. Indeed, as the City and amici curiae point out, if the trial court's ruling is

allowed to stand, no one could ever challenge an initiative's constitutionality prior to the election, which is contrary to law.

Id. at 1585 (footnotes omitted).

By analogy, the Court should hold that an anti-SLAPP motion is not an appropriate challenge to a declaratory judgment on whether a particular exemption applies. Otherwise, no one could ever seek declaratory judgment under RCW 42.56.540. A result that is contrary to law.

D. Even if Egan had met the first prong of the anti-SLAPP statute, the City presented clear and convincing evidence of a probability of prevailing on its declaratory judgment action.

Whether or not the Court determines that Mr. Egan has met the first prong of the anti-SLAPP statute, his motion would fail because the City showed clear and convincing evidence of a probability of prevailing on the merits of its declaratory judgment action.

Clear and convincing evidence is evidence sufficient to convince the Court that the fact in issue is highly probable. *Tiger Oil Corp. v. Yakima County*, 158 Wn. App. 553, 562, 22 P.3d 936 (2010). In order to grant injunctive relief under the PRA, the Court must make three findings: (1) that a specific exemption applies; (2) that disclosure would not be in the public interest; and (3) disclosure would substantially and irreparably damage a person or a vital government interest. *Soter*, 162 Wn.2d at 757. The City's evidence showed a high probability that it will prevail on its declaratory judgment action.

1. The City showed that RCW 9.73.090(1)(c) applies to the requested videos.

In Washington State, the consent of all parties to a conversation is generally required to legally record it, but the Washington Privacy Act (RCW Chapt. 9.73) has carved out exceptions allowing one-party consent in limited instances, including in-car recordings. The portion of the Privacy Act that applies to these recordings, RCW 9.73.090(1)(c), contains specific directions and limitations regarding access to those recordings:

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. Such sound recordings shall not be divulged or used by any law enforcement agency for any commercial purpose.

The Privacy Act not only prohibits public disclosure of in-car recordings before final disposition of related criminal and civil litigation, it makes the wrongful disclosure of any recording in violation of the Act a crime. RCW 9.73.080 (2). In enacting RCW 9.73.090, the Legislature intended "to provide a very limited exception to the restrictions on disclosure of intercepted communications." Laws of 2000, ch. 195, sec. 1. This Court has held that, even though conversations recorded during routine traffic stops are not private, law enforcement agencies must strictly comply with RCW 9.73.090(1)(c). *Lewis v. State Dept. of Licensing*, 157 Wn.2d 446, 451-2 and 465-66, 139 P.3d 1078, 1080 and 1086-87 (2006).

The choice of the word "public" in the statute is not explained, but a reasonable inference is that the individual who is the subject of the recording is not the "public" and, therefore, may have a greater right to access the recording. The *Sargent* Court's interpretation of the jail records statute, RCW 70.48.100(2), is instructive. *Sargent v.*

Seattle Police Dept., 167 Wn. App. 1, 26 P.3d 1006 (2011). That statute says that “records of a person confined in jail shall be held in confidence and shall be made available only to criminal justice agencies ... or ... [u]pon the written permission of the person.” The *Sargent* Court held that an individual may have his own records, and where the subject’s attorney makes the request, it amounts to a grant of permission. *Id.*, 167 Wn.App. at 20. Similarly, SPD provides copies of in-car videos to the subjects of those videos upon request. SPD provides copies on in-car videos to the subjects’ attorneys. *See*, RCW 9.73.100. It also provides them in response to criminal and civil discovery requests.

Courts try to read an “other statute” and the PRA so that they can be harmonized. *See Deer v. Dept. of Social & Health Svc.*, 122 Wn.App, 84, 91-93, 93 P.3d 195, 198 (2004). The *Deer* court analyzed the interaction between the PRA and RCW Chapt. 13.50, which provides procedures for obtaining access to juvenile records. The court found no conflict between the two statutes because RCW Chapt. 13.50 specifies an alternative means of obtaining juvenile records that “balances and protects the privacy needs of the juvenile and his or her family.” *Deer*, 122 Wn.App. at 92, 93 P.3d at 199. As a result, RCW ch. 13.50 provides the “exclusive process” for obtaining juvenile justice and care records. *Id.* A later case held that a requester was not entitled to PRA penalties and attorney’s fees when she should have sought the records using the procedure provided in RCW Chapt. 13.50. *In re the Dependency of KB*, 150 Wn.App.912, 923-24, 210 P.3d 330, 335 (2009).

The Privacy Act provides limitations on disclosure not reflected in the PRA, but

the two statutes can be read in harmony as the *Deer* and *In re the Dependency of KB* Courts read the PRA and Chapter 13.50 RCW. In order to read the statutes in harmony, one must apply the delay of disclosure contained in RCW 9.73.090(1)(c) to releases under the PRA. Just as in *Deer*, this additional requirement must be read as supplementing the PRA. To interpret it otherwise would require an assumption that the PRA abrogates the Privacy Act, and a court will not read a statute or rule in a manner that renders it “superfluous, void or insignificant.” See *State v. Thomas*, 121 Wn. 2d 504, 512, 851 P.2d 673, 677 (1993) (internal citation omitted).

The Privacy Act prohibits disclosure of in-car videos to the public until final disposition of any criminal or civil litigation which arises from the event or events which were recorded, but leaves it to an agency to determine whether final disposition of any criminal or civil litigation which arises from the event or events which were recorded has occurred. Egan argues that an agency may withhold video only if **actual litigation** has arisen from the events recorded.

This is contrary to how courts have interpreted similar language in insurance policies: “The phrase ‘arising out of’ is unambiguous and has a broader meaning than ‘caused by’ or ‘resulted from.’ The phrase is understood to mean ‘originating from’, ‘having its origin in’, ‘growing out of’, or ‘flowing from’.” *Allstate Ins. Co. v. Brown*, 121 Wn.App. 879, 887, 91 P.3d 897 (2004) (citations omitted). Thus the Privacy Act’s unambiguous language means litigation “having its origin in” or “flowing from” the events recorded. Litigation can have its origin in an event that occurs long before the actual litigation is filed. In the context of a statute of limitations, when a cause of action arises and when it accrues so that the statutory period is tolled are often not the same. For

example, a products liability “arose” when the plaintiff fell from the scaffolding, but did not “accrue” for purposes of applying the statute of limitations until the plaintiff discovered or should have discovered all the elements of the cause of action. *Martin v. Patent Scaffolding*, 37 Wn.App. 37, 42-43, 678 P.2d 368, *review denied*, 101 Wn.2d 1021 (1984).

More important, Egan’s nonsensical interpretation would require agencies to release recordings when clearly anticipated criminal or civil litigation had not yet been filed. The absurd result would be a race to request recordings before litigation, including criminal charges, could be filed. This not only fails to comport with the strict standards imposed in the rest of the legislation, it is the type of “absurd” result the *Cotati* Court cautioned against. *Cotati*, 29 Cal. 4th at 77.

2. The City provided clear and convincing evidence that release of the videos would not be in the public interest and would substantially and irreparably damage persons and vital governmental functions.

Contrary to Egan’s assertions, the plain language of the Privacy Act and the evidence the City presented shows that release of the videos would not be in the public interest and would substantially and irreparably damage persons and vital governmental functions.

The PRA or an “other statute” may exempt or prohibit disclosure of records. There is a substantive difference between an exemption and a prohibition. Exemptions are permissive and an agency has the discretion to provide an exempt record. In contrast, an agency has no discretion to release a record or the confidential portion of a record if a statute classifies information as confidential or otherwise prohibits disclosure. WAC 44-14-06002(1); *see also*, *Bldg Indus. Ass’n of Wash. V. State Dept. of Labor & Indus.*, 123

Wn.App. 656, 666, 98 P.3d 537 (2004) (the general mandate that the PRA be liberally construed does not permit a court to ignore the plain language of a specific statute prohibiting disclosure.)

The *Soter* Court recognized that when the Legislature enacts exemptions and prohibitions on disclosure, it weighs the relative benefit and harm posed by disclosure. As the court acknowledged, “[i]t may be that in most cases where a specific exemption applies, disclosure would also irreparably harm a person or a vital government interest.” *Soter*, 162 Wash.2d at 757. When it enacted RCW 9.73.090(1)(c), the Legislature did more than exempt disclosure of videos, it **prohibited** their disclosure until all civil and criminal litigation related to a video has been disposed of. This Court recently said that “the PRA makes room for an ‘other statute’ that expressly prohibits redactions or disclosures of entire records.” *Ameriquest Mortgage Co. v. Attorney General*, 170 Wn.2d 418, 440, 241 P. 3d 1245 (2010). And where the legislature has prohibited disclosure, a court has no authority to thwart that legislative mandate. *BLAW*, 123 Wn.App. at 666.

The legislature not only prohibited disclosure of in-car video before final disposition of related criminal and civil litigation, it **criminalized** it: “Any person who knowingly alters, erases, or wrongfully discloses any recording in violation of RCW 9.73.090 (1)(c) is guilty of a gross misdemeanor”(RCW 9.73.080 (2)). The legislature, thus, clearly evidenced its intent to prevent the irreparable harm to persons and vital government interests that disclosing in-car videos before all criminal and civil litigation is disposed of would cause. Neither an agency nor the Court has the discretion to thwart legislative mandate of this significance.

These 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. Egan focuses only on disclosing videos to expose possible police misconduct, but fails to acknowledge or even mention the potential impact disclosure could have on individual citizens and the legal system. Video images are more powerful than a written description, and they can quickly “go viral” on-line.² Viewers feel that they have “witnessed” recorded events even if the recordings are incomplete, fail to provide essential contextual information, or have been heavily edited.³

The Ninth Circuit held that live streaming pretrial detainees in a county facility to internet constituted “punishment” prior to adjudication of guilt and violated the due process clause. *Demery v. Arpaio*, 378 F.3d 1020 (2004), *certiorari denied*, *Arpaio v. Demery*, 545 U.S. 1139 (2005). There, the Court found that this constituted “a level of humiliation that almost anyone would regard as profoundly undesirable and strive to

² One legal expert on privacy refers to “internet shaming” as the result of posting embarrassing or humiliating video online without affording the targets a chance to defend or explain themselves. Daniel J. Solove, *The Future of Reputation: Gossip, Rumor, and Privilege on the Internet*, 10, Yale University Press, 2007. Once posted online, videos become permanent and searchable. Once there, the resulting damage can’t be undone.

³ Researchers have been able to use doctored video to convince subjects to testify that they actually witnessed events that hadn’t happened or even to confess to committing misdeeds that never occurred. Nash, R.A. and Wade, K.A., (2008), Innocent but proven guilty: eliciting confessions using doctored-video evidence. *Appl. Cognit. Psychol.*, 23: 624–637 doi:10.1002/acp.1500, Researchers have been able to use doctored video to convince subjects to testify that they actually witnessed events that hadn’t happened or even to confess to committing misdeeds that never occurred. Nash, R.A. and Wade, K.A., (2008), Innocent but proven guilty: eliciting confessions using doctored-video evidence. *Appl. Cognit. Psychol.*, 23: 624–637 doi:10.1002/acp.1500, www2.warwick.ac.uk/fac/sci/psych/people/.../nash-wade-inpress.pdf (last accessed December 20, 2012).

avoid.” *Demery*, 378 F.3d at 1029-30. And the Court could not see how displaying images of the county's pretrial detainees to internet users from around the world was rationally connected to goals associated with educating the citizenry of Maricopa County. *Id.*, 378 F.3d at 1032.

The potential impact extends to individuals who are never prosecuted or even charged, to victims, witnesses, and mere passersby. The Ninth Circuit failed to see how turning pretrial detainees into the unwilling objects of the latest reality show served any legitimate goals. *Id.* The delay expressed in RCW 9.73.090(1)(c) reflects similar concerns regarding in-car videos. Oversight of police must be balanced against other legitimate public interests. In RCW 9.73.090(1)(c), the legislature recognized the public interest in due process and affording individuals the right to defend criminal charges or pursue civil claims in an impartial atmosphere.

In *Bainbridge Island Police Guild*, the State Supreme Court found that if disclosure would be highly offensive to a reasonable individual that person would be substantially and irreparably damaged by its disclosure.¹⁷² Wn.2d at 420. Most people would be highly offended to have videos of their arrests broadcast before they had a chance to defend themselves or worse before charges against them were dropped. These considerations are even stronger for a victim, witness, or even a passerby whose identity becomes inextricably linked with an embarrassing video online. Damage to the reputations of the individuals in the videos may be irrevocably damaged because once it is online it can never be retrieved.

Vital government interests in full and fair investigation and litigation of crimes and claims would also be irreparably damaged by the premature release and/or misleading

broadcast of videos before matters are fully adjudicated. Complainants, victims, and witnesses would be reluctant to come forward and have their statements recorded if they feared immediate release of the recordings.

The Legislature recognized the likelihood of irreparable harm to persons and vital government interests when it prohibited and criminalized disclosure of in-car videos before all criminal and civil litigation is disposed of. The City met its burden under RCW 4.24.525 of presenting clear and convincing evidence of prevailing on its declaratory judgment action. It showed that RCW 9.73.090(1)(c) prohibited disclosing the videos to Egan, that releasing the videos would not be in the public interest, and would substantially and irreparably damage persons and vital government functions.

V. CONCLUSION

The City respectfully requests the Court to affirm the trial court decision that a PRA request is not a protected activity, and that an action brought under RCW 42.56.540 after a requester threatens to sue over an agency's response to a public records request is not a SLAPP, and to overturn the trial court's decision the City failed to meet its burden of presenting clear and convincing evidence of prevailing on its declaratory judgment action.

DATED this 21st day of December, 2012.

PETER S. HOLMES
Seattle City Attorney

By: Mary F. Perry
Mary F. Perry, WSBA #15376
Gary T. Smith, WSBA #29718

Assistant City Attorneys
Attorneys for Plaintiff City of Seattle

DECLARATION OF SERVICE

Marisa Johnson states and declares as follows:

1. I am over the age of 18, am competent to testify in this matter, am a Legal Assistant in the Law Department, Civil Division, Seattle City Attorney's Office, and make this declaration based on my personal knowledge and belief.

2. On December 21, 2012, I caused to be delivered by ABC Legal Messengers, addressed to:

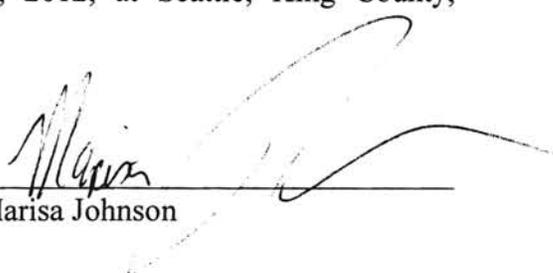
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(206) 624-8300
Attorney for Defendant Fisher Broadcasting

a copy of Brief of Respondent City of Seattle.

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21 day of December, 2012, at Seattle, King County, Washington.



Marisa Johnson

APPENDIX A

Time Line of Events

The following timeline illustrates the sequence of events in this case relevant to this appeal.

September 23, 2011: Egan requests all complaints made against four SPD officers including the entire complaint files, SPD OPA findings and copies of 36 in-car videos reviewed in connection with those OPA investigations. CP 39-41.

September 28, 2011: SPD sends five-day letter to Egan with estimated response date of November 30, 2011. CP 43

November 30, 2011: SPD responds to Egan's request asking whether he wants another copy of the one previously provided and denies request for the other 35 videos. SPD provides first installment of records responsive to Egan's request other than videos. CP 45-47. SPD ultimately provides 1759 pages of investigative records, and, because he was the attorney for the subject, one of the videos to Egan in response to his request. CP 270.

December 7, 2012: Egan sends letter appealing denial of videos : **"I am asking you to produce the requested videos within the next two weeks, or I will be seeking statutory damages at the maximum level based on the Public Disclosure Act, which trumps the exceedingly broad, self-protective interpretation of RCW 9.73.090(1)(c) recently provided by your office."** CP 49-50

January 3, 2012: City files complaint seeking the Court's determination that it correctly asserted RCW 9.73.090(1)(c) as "an other" statute within the meaning of RCW 42.56.070(1) and properly denied Egan's request for copies of in-car recordings. CP 1-7.

January 4, 2012: City notifies KOMO's attorney of declaratory judgment action. CP 78.

January 10, 2012: Egan requests the 36 videos with audio redacted or deleted. CP 52.

January 11, 2012: City denies January 10 request and files Amended Complaint seeking the Court's determination that it properly denied Egan's January 10 request as well. CP 26-33.

January 24, 2012: City files and serves motion for declaratory judgment and preliminary injunction in this action. CP 56.

January 25, 2012: KOMO'S attorney notes motion for summary judgment against the City in the KOMO lawsuit but does not file or serve the motion until almost a month later. CP 91-92.

January 26, 2012: KOMO moves to intervene in this action. CP 86

February 23, 2012: KOMO files and serves motion for summary judgment in KOMO lawsuit on the City. CP 380.

February 28, 2012: Initial hearing on anti-SLAPP motion and preliminary injunction; Egan trial court continues the hearing until KOMO trial court can issue ruling on KOMO's motion for summary judgment. CP 287.

March 23, 2012: KOMO trial court hears cross-motions for summary judgment in KOMO lawsuit. CP 388-401.

April 6, 2012: KOMO trial court issues order on cross-motions for summary judgment in KOMO lawsuit finding: (1) the City did not violate the PRA in responding to the first of KOMO's three requests; (2) although it was clear that there was no single record or database responsive to KOMO's second request, the City violated the PRA because months later, the City was able to produce a record for another requester that contained some but not all of the information that KOMO requested; and (3) RCW 9.73.090 is an "other statute" within the

meaning of RCW 42.56.070(1), which exempts or prohibits disclosure of in-car videos to citizens making such requests ‘until final disposition of any criminal or civil litigation which arises from the event or events which were recorded and the City’s policy of delaying disclosure of tagged video for of three years was a narrow and reasonable interpretation of the Privacy Act.

Id.

June 1, 2012: Second hearing before Egan trial court in this case. CP 604.

June 26, 2012: Trial court issues order denying Egan’s RCW 4.24.525 motion to dismiss and dismissing the City’s RCW 42.56.540 motion. CP 601-621.

July 25, 2012: Egan files notice of appeal of the dismissal of his anti-SLAPP motion. CP 622-28.

APPENDIX B



This schedule applies to: Law Enforcement Agencies

Scope of records retention schedule

This records retention schedule covers the public records of local law enforcement agencies relating to the functions of law enforcement, communications and dispatch, criminal case investigation, and the management of the agency's assets and human resources. This records retention schedule is to be used in conjunction with the *Local Government Common Records Retention Schedule (CORE)* and other approved schedules that relate to the functions of the agency, which can be found at: <http://www.sos.wa.gov/archives/RecordsRetentionSchedules.aspx>.

Disposition of public records

Public records covered by records series within this records retention schedule must be retained for the minimum retention period as specified in this schedule. Washington State Archives strongly recommends the disposition of public records at the end of their minimum retention period for the efficient and effective management of local resources.

Public records designated as Archival must not be destroyed. Records designated as Archival (Appraisal Required) must be appraised by the Washington State Archives before disposition. Records designated as Archival (Permanent Retention) must be transferred to the Washington State Archives. Public records must not be destroyed if they are subject to ongoing or reasonably anticipated litigation. Such public records must be managed in accordance with the agency's policies and procedures for legal holds. Public records must not be destroyed if they are subject to an existing public records request in accordance with RCW 42.56. Such public records must be managed in accordance with the agency's policies and procedures for public records requests.

Revocation of previously issued records retention schedules

All previously approved disposition authorities for records that are covered by this retention schedule are revoked, including those listed in all general and agency unique retention schedules. Local government agencies must take measures to ensure that the retention and disposition of public records is in accordance with current, approved records retention schedules.

Authority

This records retention schedule was approved by the Local Records Committee in accordance with RCW 40.14.070 on July 29, 2010.

Signature on File

For the Attorney General: Cindy Evans

Signature on File

For the State Auditor: Mark Rapozo

Signature on File

The State Archivist: Jerry Handfield



8.1 CASE MANAGEMENT

The activity of managing the agency's criminal cases and investigations.

ITEM NO.	DESCRIPTION OF RECORDS	DISPOSITION AUTHORITY NUMBER (DAN)	RETENTION AND DISPOSITION ACTION	DESIGNATION
8.1.20	National Crime Information Center (NCIC) Inquiry Logs Logs documenting all NCIC/III inquiries performed by the agency.	LE07-01-11 Rev. 1	Retain until completion of Washington State Patrol audit <i>then</i> Destroy.	NON-ARCHIVAL NON-ESSENTIAL OFM
8.1.21	Polygraph Tests Records relating to polygraph examinations administered as part of a criminal case investigation. Includes, but is not limited to: <ul style="list-style-type: none">• Uninterpreted polygraph results;• Interpretive reports. Excludes polygraph tests administered for personnel or human resources purposes covered by <i>CORE</i> .	LE2010-073 Rev. 0	Retain until disposition of pertinent case file <i>then</i> Destroy.	NON-ARCHIVAL NON-ESSENTIAL OPR
8.1.22	Recordings from Mobile Units – Incident Identified Recordings created by mobile units which have captured a unique or unusual action from which litigation or criminal prosecution is expected or likely to result.	LE09-01-08 Rev. 1	Retain until matter resolved <i>and</i> until exhaustion of appeals process <i>then</i> Destroy.	NON-ARCHIVAL NON-ESSENTIAL OFM



8.1 CASE MANAGEMENT

The activity of managing the agency's criminal cases and investigations.

ITEM NO.	DESCRIPTION OF RECORDS	DISPOSITION AUTHORITY NUMBER (DAN)	RETENTION AND DISPOSITION ACTION	DESIGNATION
8.1.23	<i>Recordings from Mobile Units – Incident Not Identified</i> Recordings created by mobile units that <i>have not</i> captured a unique or unusual incident or action from which litigation or criminal prosecution is expected or likely to result.	LE09-01-09 Rev. 1	Retain for 90 days after date of recording <i>then</i> Destroy.	NON-ARCHIVAL NON-ESSENTIAL OFM