

72159-3
No. 72189-1

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

JANE DOES 1-15, *et al.*,

Plaintiffs/Appellants,
v.

KING COUNTY, *et al.*,

Defendants/Respondents

**BRIEF OF THE PLAINTIFF/APPELLANT STUDENTS
(JANE DOES 1-15 and JOHN DOES 1-15)**

Bradley P. Thoreson, WSBA #18190
Samuel T. Bull, WSBA #34387
Lee R. Marchisio, WSBA #45351
Bryce C. Blum, WSBA #47080
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
Telephone: (206) 447-4400
Email: thorb@foster.com
 bulls@foster.com
 marcl@foster.com
 blumb@foster.com
Attorneys for Appellant John Does
1-15 and Jane Does 1-15

BRIEF OF THE PLAINTIFF/APPELLANT STUDENTS

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I. INTRODUCTION

This case concerns private security camera footage that the Seattle Police Department and the King County Prosecutor collected in their investigation of a crime – namely, the June 5, 2014 shootings at Seattle Pacific University (“SPU”).

Those law enforcement officials have thus far notified six students shown in that footage that commercial media outlets have asked for a copy of the SPU footage under the Public Records Act (“PRA”) – and that unless a court orders otherwise, they will distribute to all PRA requestors a copy of SPU’s security camera footage after blurring the students’ faces (and only their faces) with “pixilation”.

Blurring only the face of a student in a video, however, does not obscure the other parts of the student’s body that people in their community will recognize to identify that student (e.g., body size and build, manner of dress, specific clothing, posture and way of walking, mannerisms, skin color, tattoos or lack thereof, etc.).

The plaintiff students therefore allege that at least three PRA exemptions prohibit the distribution of SPU’s security camera footage with nothing more than the students’ faces blurred – specifically (1) the PRA’s victim and witness exemption, (2) the PRA’s privacy exemption, and (3) the PRA’s effective law enforcement exemption.

These students filed two preliminary injunction motions to prevent the challenged video footage from being irretrievably released into the stream of internet communications and social media before a trial resolves the factual disputes material to the lawfulness of that release. In other words: preserve the status quo instead of allowing the defendants to moot the case against them by pre-emptively ringing a bell before trial that cannot later be un-rung at trial.

The trial court denied the students' July 2014 preliminary injunction motion concerning the one video Seattle and King County planned to distribute to PRA requestors in July – but distribution of that video has been stayed pending resolution of this appeal.

The trial court has not yet ruled on the students' similar November 2014 motion with respect to the subsequent set of 19 videos Seattle and King County planned to distribute in November – but distribution of that video set has likewise been stayed, at least until the trial court rules on plaintiffs' November 2014 motion.

The plaintiff students submit this brief to explain why it is reversible error to deny a preliminary injunction enjoining distribution of the challenged security camera footage before the lawfulness of that distribution under the PRA is established at trial.

II. ASSIGNMENTS OF ERROR & CORRESPONDING ISSUES

A. Assignments Of Error.

1. The trial court erred by failing to grant the students' preliminary injunction motion under the PRA's victim/witness exemption.
2. The trial court erred by failing to grant the students' preliminary injunction motion under the PRA's privacy exemption.
3. The trial court erred by failing to grant the students' preliminary injunction motion under the PRA's effective law enforcement exemption.

B. Issues Pertaining To First Error.

1. Do the students likely have a clear legal or equitable right under the PRA's victim/witness exemption to have more than just their faces blurred in the video footage?
2. Do the students have a well-grounded fear that their right under that exemption will be immediately invaded without a preliminary injunction?
3. Will the students likely be subject to substantial harm without a preliminary injunction under that exemption?
4. Do the relevant equities support or negate the preliminary injunction the students seek under that exemption?
5. Should this Court issue a preliminary injunction under that exemption and remand the students' permanent injunction claims for trial on the merits?

C. Issues Pertaining To Second Error.

1. Do the students likely have a clear legal or equitable right under the PRA's privacy exemption to have more than just their faces blurred in the video footage?

2. Do the students have a well-grounded fear that their right under that exemption will be immediately invaded without a preliminary injunction?
3. Will the students likely be subject to substantial harm without a preliminary injunction under that exemption?
4. Do the relevant equities support or negate the preliminary injunction the students seek under that exemption?
5. Should this Court issue a preliminary injunction under that exemption and remand the students' permanent injunction claims for trial on the merits?

D. Issues Pertaining To Third Error.

1. Do the students likely have a clear legal or equitable right under the PRA's effective law enforcement exemption to have more than just their faces blurred in the video footage?
2. Do the students have a well-grounded fear that their right under that exemption will be immediately invaded without a preliminary injunction?
3. Will the students likely be subject to substantial harm without a preliminary injunction under that exemption?
4. Do the relevant equities support or negate the preliminary injunction the students seek under that exemption?
5. Should this Court issue a preliminary injunction under that exemption and remand the students' permanent injunction claims for trial on the merits?

III. STATEMENT OF THE CASE

A. The Crime (the SPU shooting).

Aaron Ybarra scouted the Seattle Pacific University campus asking for useful information from students in the weeks before June 5, 2014.¹ Then on June 5 he entered the SPU campus to kill a 19 year old SPU student,² shoot two other SPU students,³ and threaten several other SPU students by aiming his shotgun at them.⁴ He was eventually disarmed and subdued by two SPU students.⁵

B. Private Security Cameras Film The Victims & Witnesses Of That Crime (the plaintiff students).

Part of this crime was captured by security cameras the University operates on its campus.⁶

The University voluntarily provided its surveillance camera videos to the Seattle Police Department to aid in the criminal investigation.⁷ The

¹ E.g., <https://www.documentcloud.org/documents/1185005-satterberg-statement.html> , at p.2.

² CP at 86-88.

³ CP at 510-11.

⁴ CP at 510-11.

⁵ CP at 511.

⁶ CP at 109-10; see also video available for in camera review; RCW 42.56.550(3) ("Courts may examine any record in camera in any proceeding brought under this section."); *Soter v. Cowles Publishing Co.*, 162 Wn.2d 716, 744 n.14, 174 P.3d 60 (2007) (recognizing that appellate review of documents in camera is appropriate).

⁷ CP at 110.

University's surveillance videos were subsequently passed on to the King County Prosecutor prosecuting this crime.⁸

C. **First Response Of Police And Prosecutor To PRA Requests For The University's Security Camera Footage.**

The Seattle Police Department received PRA requests from commercial media outlets asking for a copy of the University's security camera footage relating to the shooting.⁹

On June 25, the police department stated the first video it planned to distribute in response to those PRA requests would be 3 minutes of footage that "starts as defendant Aaron Ybarra enters the building and ends after defendant has been subdued by one male student with the assistance of a second male student. The two students are still awaiting police arrival when the video ends."¹⁰

On June 25, the police department also notified the four SPU students shown in that video of the crime that:

We . . . understand that those students have expressed a desire for nondisclosure of their identities. RCW 42.56.240(2) [of the Public Records Act] allows agencies to redact information "revealing the identity of persons who are witnesses to or victims of crime" and the students' desire for nondisclosure "shall govern." SPD [Seattle Police Department] intends to provide requestors

⁸ CP at 200, ¶2

⁹ See CP 76-78 (notice letter from police department's counsel describing the video requests made by KOMO television, Q13 FOX television, and KIRO television); One individual, Aurthur West, also made a similar request to the King County CP at 45-47.

¹⁰ CP 77 at ¶1 (notice letter from police department's counsel).

the video with the faces of the four SPU students blurred or “pixilated” in order to redact their identities.¹¹

The police department’s June 25 letter also notified those SPU students that it would distribute the video with no more than the students’ faces blurred unless they secured a court order enjoining that distribution by July 9, 2014.¹²

Since the University’s security camera footage was passed on to the prosecutor, the King County Prosecuting Attorney received similar PRA requests from commercial media outlets.¹³ The County Prosecutor sent the four SPU students a letter that took the same position as the Seattle Police Department.¹⁴

D. SPU Students File Suit To Enjoin Distribution Of The University’s Security Camera Footage With No More Than Their Faces Blurred.

The four SPU students in that first video, along with additional SPU students pictured in other security camera footage that the police or prosecutor might attempt to distribute in response to PRA requests, filed this suit on July 2, 2014 alleging that the PRA does not allow the police or prosecutor to distribute the University’s private security camera footage

¹¹ CP 77 at ¶1 (notice letter from police department’s counsel).

¹² CP 77 at last paragraph (notice letter from police department’s counsel).

¹³ See CP 73-74 (notice letter from prosecutor’s counsel describing the video requests made by KING 5 television and KIRO 7 television)

¹⁴ CP 73-74 (notice letter from from prosecutor’s counsel, but setting July 8 deadline for the SPU students to secure a court order).

with nothing more than the students' faces blurred.¹⁵ Specifically, the students allege that since blurring only the face on a person's body does not conceal that person's identity, the police and prosecutor's proposed release is precluded by at least three PRA exemptions – i.e., those relating to (1) information identifying a crime victim or witness, (2) personal privacy, and (3) promoting effective law enforcement.¹⁶

E. Disclosure Of The *First* Video Is Currently Enjoined Pending Resolution In This Appeal.

Although the trial court denied the students' preliminary injunction motion regarding the first video, this Court's orders currently preclude the first video from being distributed until the students' PRA objections are resolved in this appeal.¹⁷

The trial court's denial of that first preliminary injunction motion is the Order currently on appeal.¹⁸

¹⁵ CP 1-10 (Complaint); CP 11-24 (Motion for Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not Issue)

¹⁶ RCW 42.56.240(1)-(2).

¹⁷ CP at 133-138, 509-23 (On July 22, 2014, Judge Helen Halpert, King County Superior Court, issued an Order Denying Preliminary Injunction And Extending Temporary Restraining Order Until 4:00 p.m. July 25, 2014, along with a companion Memorandum Opinion); Commissioner's Ruling Extending Stay Pending Appeal And Granting Discretionary Review, 12 (Aug. 15, 2014) (No. 72159-3-1).

¹⁸ Commissioner's Ruling Extending Stay Pending Appeal and Granting Discretionary Review (Aug. 15, 2014) (No. 72159-3-1/12).

F. **Second Response Of Police And Prosecutor To The PRA Requests.**

After the appeal concerning that first video was filed on July 22, 2014, the police department and prosecutor sent letters on October 23, 2014 stating that they were going to distribute a set of 19 additional security camera videos in response to the PRA requests, and that those videos pictured six SPU students (the previous four students plus two more).¹⁹

Those October 23, 2014 letters notified the six SPU students that the police and prosecutor would release that second set of videos with nothing more than the six students' faces blurred unless they secured a court order enjoining that distribution by November 14, 2014.²⁰

G. **The Students Move To Enjoin Distribution Of The Second Set Of Security Camera Videos With No More Than Their Faces Blurred.**

The plaintiff students promptly filed a preliminary injunction motion with respect to that second set of security camera videos on November 10, 2014, asserting once again that the PRA does not allow the

¹⁹ *Contemporaneously with this brief, plaintiff students filed a Motion to Supplement the Record or Order Additional Evidence on Review on December 8, 2014. The facts contained therein (and referenced here) were offered in support of plaintiff students' second motion for preliminary injunction, but are relevant to the present appeal. Plaintiffs'/Appellants' Motion to Supplement (Dec. 8, 2014). These facts are not currently part of the Clerk's Papers. The Court has not yet ruled on the motion. Declaration of Samuel T. Bull at ¶ 9, Ex. F (Dec. 8, 2014) (Temporary Order Enjoining Release Of Surveillance Videos, Does (Nov. 19, 2014) (No. 14-2-18514-6 SEA)).*

²⁰ *Bull Decl. at ¶¶4-5, Exs. A & B (October 23, 2014 notice letter from prosecutor's counsel; October 23, 2014 notice letter from police department's counsel).*

police or prosecutor to distribute the University's private security camera footage of these students with nothing more than the students' faces blurred.²¹

H. Disclosure Of The *Second* Set Of Videos Is Currently Enjoined Pending The Trial Court's Ruling On The Corresponding Motion.

The trial court had not issued a ruling with respect to the second set of videos as of the time this Brief is being signed. The trial court's current order precludes that second set from being distributed until further court rulings.²² (The trial court's ruling on that second preliminary injunction motion will undoubtedly be appealed by the party against whom that Order is entered, since that ruling will entail the same issue of blurring no more than a student's face under the three PRA exemptions at issue in this appeal of the trial court's Order on the first preliminary injunction motion.)

²¹ See Bull Decl. at ¶7, Ex. D (*Plaintiffs' Mot. For Prelim. Inj., Does* (Nov. 10, 2014) (No. 14-2-18514-6 SEA)).

²² Bull Decl. at ¶9, Ex. F (*Temporary Order Enjoining Release Of Surveillance Videos, Does* (Nov. 19, 2014) (No. 14-2-18514-6 SEA)). The trial court heard oral argument on that second motion November 19, 2014. Bull Decl. at ¶8, Ex. E (*Minute Entry, Does* (Nov. 19, 2014) (No. 14-2-18514-6 SEA)). The trial court took the matter under advisement and issued an Order prohibiting the City and County from releasing the second set of SPU videos until the court issues a ruling. *Id.*; Bull Decl. at ¶9, Ex. F (*Temporary Order Enjoining Release Of Surveillance Videos, Does* (Nov. 19, 2014) (No. 14-2-18514-6 SEA)).

IV. LEGAL DISCUSSION

A. Standard Of Review Is De Novo

The trial court denied injunctive relief in this PRA case based on the pleadings and documents submitted by the parties. That denial is therefore reviewed de novo. RCW 42.56.550(3); see *Northwest Gas Ass'n v. Washington Utilities & Transp. Comm'n*, 141 Wn.App. 98, 112-13, 168 P.3d 443 (2007) (citing *Dawson v. Daly*, 120 Wn.2d 782, 788, 845 P.2d 995 (1993)).

B. Preliminary Injunction Standard: “Likelihood” Rather Than “Certainty” Of Success.

To secure a *permanent* injunction, the plaintiff must establish the following three requirements on the merits:

- (1) a clear legal or equitable right,
- (2) a well-grounded fear of immediate invasion of that right, and
- (3) that the acts complained of will result in substantial harm.

See *Tyler Pipe Indus., Inc. v. State, Dep't of Revenue*, 96 Wn.2d 785, 793, 638 P.2d 1213 (1982).

To secure a *preliminary* injunction, on the other hand, Washington law requires the plaintiff to only show a likelihood of prevailing on those three requirements at trial. That is because “[a]t a preliminary injunction hearing, the plaintiff need not prove, and the trial court does not reach or resolve, the merits of the issues underlying the three requirements for

permanent injunctive relief.” *Ameriquest Mortgage Co. v. State Atty. Gen.*, 148 Wn.App. 145, 157, 199 P.3d 468, 473 (2009).

Each of those three requirements is “examined in light of equity, including the balancing of the relative interests of the parties and the interests of the public, if appropriate.” *Rabon v. City of Seattle*, 135 Wn.2d 278, 284, 957 P.2d 621 (1998); *Tyler Pipe*, 96 Wn.2d at 792.

As the following pages explain, the plaintiff students have satisfied the likelihood of success standard for a preliminary injunction to prevent the challenged video footage from being released before a trial on the merits of the students’ claim that PRA exemptions preclude that release.²³

²³ *The trial court’s Memorandum Opinion seems to ignore the governing likelihood of success standard by assessing plaintiffs’ pre-trial preliminary injunction request as a permanent injunction on the merits. (For example, the word “likelihood” does not appear in the trial court’s memorandum opinion, and it relies on permanent rather than preliminary injunction case law. CP at 509-519.) But Civil Rule 65 does not allow a trial court to consolidate a preliminary injunction hearing with a trial on the merits for a permanent injunction unless it expressly notifies the parties that it is doing so. CR 65(a)(2). And the trial court did not do that here. (Washington law recognizes that that advance notice requirement is critical because parties are generally “unable to develop their evidence fully for the preliminary injunction hearing because of the expedited timeframe.” Northwest Gas Ass’n, 141 Wn.App. at 114. The purpose of Rule 65’s notice requirement “is to give the parties notice and time to prepare so that they will have a full opportunity to present their cases at the permanent injunction hearing.” Northwest Gas Ass’n, 141 Wn.App. at 114.) Washington law accordingly holds that a trial court commits reversible error if it attempts at a preliminary injunction hearing to resolve plaintiff’s legal claims on the merits instead of analyzing the likelihood of plaintiff’s success in the future. Northwest Gas Ass’n, 141 Wn.App. at 114-5; Ameriquest, 148 Wn.App. at 157. The trial court’s denial of the students’ preliminary injunction motion accordingly cannot be defended by suggesting the trial court rendered the governing “likelihood of success” standard irrelevant by treating the students’ preliminary injunction request as a permanent injunction request instead.*

C. **Washington Law Entitles These Students To A Preliminary Injunction Under The PRA's Victim/Witness Exemption.**

1. **Likelihood of a clear legal or equitable right under the PRA's victim/witness exemption.**

(a) ***This exemption requires the redaction of all information within the released footage that identifies the student shown in that footage.***

Defendants agree that each SPU videotape is a public record subject to the Public Records Act.

But that Act has an express exemption that prevents government agencies from disclosing a record that contains information revealing the identity of a crime victim or witness if that witness or victim objects to the government agency's disclosure of that record. RCW 42.56.240(2); *accord Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 394, 314 P.3d 1093 (2013).

Once a witness or victim indicates a desire for non-disclosure, the Public Records Act does not allow the disclosing agency any discretion to do otherwise. The Act unequivocally states that if a witness or victim "indicates a desire for disclosure or non-disclosure, such desire shall govern." RCW 42.56.240(2) (emphasis added).

Our Supreme Court has accordingly emphasized that the PRA takes the disclosure decision out of the hands of the disclosing agency and puts it into the hands of the victims and witnesses themselves. *See*

Sargent, 179 Wn.2d at 394; *accord*, Seattle Police Department’s notice letter in this case (“We . . . understand that those students have expressed a desire for nondisclosure of their identities. RCW 42.56.240(2) [of the Public Records Act] allows agencies to redact information ‘revealing the identity of persons who are witnesses to or victims of crime’ and the students’ desire for nondisclosure ‘shall govern.’”)²⁴

The plaintiff students are witnesses and victims shown in the challenged video footage – and they’ve objected to the public disclosure of that footage.²⁵ Defendants therefore acknowledge that the victim/witness exemption grants these students the right to have identifying information redacted out of the footage before it’s released.²⁶

The police and prosecutor took one step towards that redaction. They blurred the plaintiff students’ faces with pixilation – a redaction permitted only if a PRA exemption applies.²⁷

²⁴ CP 77 at ¶1 (*notice letter from police department’s counsel*) (*underline added*).

²⁵ CP 27 at ¶13, CP 511. *The trial court (which reviewed the video in camera) verified this fact, stating that “[a]ll of the victims and witnesses portrayed in the videotape have requested that their identities not be disclosed.” CP at 511.*

²⁶ *See King County PAO Resp. at p.3 (“The PAO has determined the facial images of certain victims and witnesses on the videos are exempt from disclosure under RCW 42.56.240(1) and RCW 42.56.240(2).”), City of Seattle Resp. at p.2 (“The City and Plaintiff Does agree that the identities of the victims and witnesses who requested non-disclosure ... are exempt under RCW 42.56.240(2).”), Commercial Media Opp., at p. 3 (leaving unchallenged the County’s and City’s proposed blurring of witness and victim facial images, and assuming for the purposes of plaintiff witnesses’ and victims’ second motion for preliminary injunction that they requested non-disclosure for RCW 42.56.240(2) purposes), Does (Nov. 17, 2014) (No. 14-2-18514-6 SEA).*

²⁷ CP at 183-84 & 347-48; *see, e.g., RCW 42.56.240(1).*

In short: there is no dispute that the PRA's victim/witness exemption grants these students the right to have all identifying information in the video footage redacted out before that footage is publicly released.

(b) *Blurring a student's face does not redact out all information in the footage identifying that student.*

Defendants claim that blurring out a student's face removes all information in the video footage identifying that student.

But you don't need to see a person's face to know who that person is. Especially a person you've seen before in your school, workplace, neighborhood, church, etc. Two examples illustrate this fact:

- In high school you often recognized the person walking in front of you down the hall without seeing that person's face. Instead, from the back you could identify classmates by seeing things other than their face – e.g., their height, weight, body shape, manner of dress or specific clothing, gait, posture, skin color, tattoos or scars, mannerisms, etc.
- At work you often recognize the person in front of you down the hall without seeing that person's face. Instead, from the back you can identify co-workers by seeing things other than their face – e.g., their height, weight, body shape, manner of dress or specific clothing, gait, posture, skin color, tattoos or scars, mannerisms, etc.

The same is true here. Even if the plaintiff students' faces are completely blacked out, the video footage would still show viewers the students' height, weight, body shape, manner of dress, specific clothing, gait, posture, skin color, tattoos/scars, mannerisms, etc. To remove all the

non-facial identifying information from a video, the student's entire body must be blacked out. Simply blurring the student's face does not redact all information in the video identifying that student.

The need to redact more than just the student's face has been recognized in Washington case law. In *Lindeman v. Kelso School District*, the Court of Appeals accordingly recognized that redacting all identifying information from a videotape requires redaction of more than just a student's face. Indeed, it held that removing all identifying information could even require the entire videotape to be withheld since, in that case, there would not be much left of the tape once all information identifying the students was redacted:

If it were possible to redact the tape, such redaction would obliterate audio and visual personal information such as students' faces, bodies, voices, clothing, and so forth, which would otherwise tend to reveal protected student identities. After such redaction, there would be no meaningful information remaining on the tape.

Lindeman v. Kelso School Dist. No. 458, 127 Wn.App. 526, 541, 111 P.3d 1235 (2005), rev'd on other grounds, 162 Wn.2d 196, 172 P.3d 329 (2007).

The need to redact more than just the student's face is also confirmed by the law enforcement testimony plaintiffs were able to discover after the July fire drill required to promptly respond to the police

department's and prosecutor's threat to publicly distribute the first video unless the plaintiff students rushed to court for a preliminary injunction.²⁸

The declarations from those two veteran law enforcement professionals detail how individuals are regularly identified by attributes other than their faces – such as height, weight, body shape, manner of dress, specific clothing, gait, posture, skin color, tattoos/scars or lack thereof, mannerisms, etc.²⁹

Non-facial attributes like these are on full display in the video footage defendants plan to publicly distribute under the PRA. These two veteran law enforcement professionals confirm that people who live, work, or go to school in the plaintiff students' communities will therefore be able to recognize those students in video footage – even when their faces are blurred.³⁰ These two veteran law enforcement professionals also

²⁸ *As noted elsewhere in this brief, since the timing of defendants' later threat to publicly distribute a set of 19 additional videos in November allowed the plaintiff students time to secure that supporting law enforcement testimony, the students submitted it to the trial court with their November preliminary injunction motion concerning that set of 19 videos. Since the defendants' threatened distribution of 1 video in July and 19 videos in November entail the same factual issues and PRA exemptions, plaintiffs are filing with this brief a motion to supplement the appellate court record to include this law enforcement testimony currently in the trial court record.*

²⁹ *See supra note 19; see Bull Decl. at ¶ 10, Ex. G & H (Dekmar Decl. at ¶11, Davidson Decl. at ¶9, Does (Nov. 10, 2014) (No. 14-2-18514-6 SEA)). The County and the City have not proposed to redact similar identifying information from the video at issue or the nineteen (19) additional videos. CP at 183-84 & 347-48; Bull Decl. at ¶¶4-5, Exs. A & B (October 23, 2014 notice letter from prosecutor's counsel; October 23, 2014 notice letter from police department's counsel).*

³⁰ *See supra note 19; see Bull Decl. at ¶ 10-11, Exs. G-1 (Dekmar Decl. at ¶¶14-15, Davidson Decl. at ¶¶9-13, Doe 1 Decl. at ¶11, Does (Nov. 10, 2014) (No. 14-2-18514-6 SEA)).*

confirm that the only way to fully redact a student's identifying information from a security camera video is to completely obscure the student's entire body – for example, by covering the student's body with a large black box.³¹

(c) *Legal or equitable right conclusion: these students have a legal right under the PRA's victim/witness exemption to have more than just their face blurred on the video footage.*

The above discussion explains why blurring just a person's face in video footage does not remove all information in that footage identifying the person. The plaintiff students have accordingly demonstrated the required likelihood of a legal right under the PRA's victim/witness exemption to have more than just their face blurred in the challenged videos.

2. Likelihood of immediate invasion.

The plaintiff students' fear of immediate invasion absent a preliminary injunction is undeniably well grounded – for the police and prosecutor have both stated they will distribute the challenged video footage with no more than the students' faces blurred unless a court orders

³¹ See *supra* note 19; see *Bull Decl. at ¶ 10, Exs. G-H (Dekmar Decl. at ¶15, Davidson Decl. at ¶14, Does (Nov. 10, 2014) (No. 14-2-18514-6 SEA)*.

them not to.³² That invasion absent an injunction is more than just “likely”; it’s certain.

3. Likelihood of substantial harm.

The defendants cannot dispute that if the police or prosecutor distribute the challenged video footage to PRA requestors, that video footage (with no more than the students’ faces blurred) will be irretrievably released into the stream of internet communications and social media. Once released, it can never be taken back – even if a subsequent trial on merits rules that that release was unlawful under the PRA. Such a nullification of a student’s right of non-disclosure in a video is irreversible and irreparable.

Nor can defendants dispute the substantial nature of the harm caused to young adults when photographic images of them are released against their will on the internet or in social media. Indeed, this Court can take judicial notice of the severe consequences that unwanted postings cause to the person whose image is posted on the web or in social media against their will.³³

³² *Supra Part III.C above.*

³³ *Pursuant to ER 201, this Court should take judicial notice of the fact that once a video is published on the Internet it is instantaneously distributed throughout the globe, profoundly impacting the lives of the persons involved. Examples of mass publication of private videos and images are all too common. For example, in 2010, a student at Rutgers University committed suicide because his roommate filmed him having a sexual encounter with another man and then broadcast it on the Internet. See*

Put bluntly: In today's internet and social media world, the harm caused by the release of objected-to video footage is irreversible, irreparable, and substantial.

4. Equities

Balancing the equities does not override the above showing that these students satisfy the three-part test for a preliminary injunction pending discovery and trial.

To the contrary, the equities support the students' request for that temporary, pre-trial injunctive relief:

- Denying the students' request for preliminary injunctive relief irreparably prejudices them – it effectively renders their non-disclosure right under the PRA irrelevant by allowing the challenged video footage to be released regardless of whether

http://www.nbcphiladelphia.com/news/Student-Suicide-Possibly-Linked-to-Sex-Tape-Scandal--104030073.html. As another example, this past month hackers obtained private photos of various celebrities and posted them on a small web platform – and within hours, the images could be found on every corner of the Internet. Despite the best efforts of some of the most sophisticated Internet companies, those images simply could not be removed faster than they could be reposted on any number of alternative hosting sites. See <http://deadline.com/2014/10/hacked-celebrity-photos-google-lawsuit-jennifer-lawrence-844715/>. The victims of such internet postings have been profoundly impacted by the immediate, unfettered distribution the Internet offers to anyone desiring to publicly disseminate images distressing to the person shown in those images. See, e.g., <http://www.thedailybeast.com/articles/2014/10/07/jennifer-lawrence-s-furious-perfect-response-to-nude-photo-leak-it-is-a-sex-crime.html>. This Court should also take judicial notice of the impact of re-traumatization on victims of crime or disasters. See, e.g., http://gainscenter.samhsa.gov/atc/text/papers/trauma_paper.htm (“Social scientific studies have learned what those who have lived through disasters already know: there are two dimensions of experiencing a disaster, both of which can be traumatic. The first is the disaster itself, which, as with Katrina, includes danger, destruction, and death. Anyone who survives the disaster event is then left in a changed world, one in which destruction of the physical environment, disruption and even rupture of the social environment of family and neighborhood, and often displacement destabilize or even destroy one's sense of self, safety, and normalcy.”)

trial on the merits proves that release violates the PRA's victim/witness exemption.

- Denying the students' preliminary injunction request also robs them of their right to develop the record and defend their PRA right as crime victims and witnesses at trial.³⁴
- Granting the students' temporary injunction request does not prejudice the defendant police or prosecutor. They will not be subject to PRA penalties or fee awards in this third-party injunction suit. *See Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 757, 958 P.2d 260 (1998).
- Granting the students' temporary injunction request does not prejudice the defendant PRA requestors either – it merely delays their receipt of the partially redacted video proposed by the police and prosecutor until trial on the merits determines whether that release violates the PRA's victim/witness exemption.

Balancing the equities accordingly supports – rather than negates – the propriety of the preliminary injunctive relief the students' seek.

³⁴ *Indeed, one reason courts use the "likelihood of success on the merits" standard for issuing a preliminary injunction is to give parties "time to prepare so that they will have a full opportunity to present their cases at the permanent injunction hearing." Northwest Gas Ass'n, 141 Wn.App. at 113-14. Washington law recognizes that the emergency nature of preliminary injunction proceedings often leaves parties "unable to develop their evidence fully". Id. at 114. Thus, the purpose of a preliminary injunction is "to preserve the status quo while the plaintiff compiles the evidence necessary to establish the need for a permanent injunction, to be proven at a future trial on the merits." Id. Denying the students' preliminary injunction motion denied them that opportunity to develop and prove their entitlement to a permanent injunction at a future trial on the merits.*

5. **The PRA's crime victim/witness exemption provides the first reason why this Court should issue a preliminary injunction and remand the students' claims for trial on the merits.**

This Court could simply reverse the trial court's decision and remand for another preliminary injunction hearing.

But that would needlessly waste time and resources. This Court of Appeals may stand in the place of the trial court and, in the interests of judicial economy, apply the governing "likelihood of success" standard to determine if preliminary injunctive relief is appropriate. *See, e.g., Northwest Gas Ass'n*, 141 Wn.App. at 115 ("[M]indful that this is an accelerated appeal and to conserve the parties' and the courts' resources, we review the record de novo, address the requirements for injunctive relief, hold that the trial court erred in refusing to issue a preliminary injunction, reverse the trial court's order that the [defendant] release the requested information immediately, and remand for a trial on the merits of the [plaintiff's] request for a permanent injunction."); *Ameriquest*, 148 Wn.App. at 156 (granting preliminary injunction to prevent the release of public records after reviewing the record de novo and applying the correct preliminary injunction standard).

For the above reasons, this Court should issue the preliminary injunction that the students seek to preserve the status quo, and remand the students' permanent injunction request for a trial on the merits.

D. Washington Law Also Entitles These Students To A Preliminary Injunction Under The PRA's Privacy Exemption.

1. Likelihood of a clear legal or equitable right under the PRA's privacy exemption.

(a) *The PRA exempts video footage in an investigative record if disclosure would invade a student's privacy.*

The PRA exempts information in an investigative record compiled by law enforcement when nondisclosure of that information is essential to protect a person's right to privacy. RCW 42.56.240(1) & (1)(a). The existence of this PRA exemption is not disputed.

(b) *The challenged video footage is part of an investigative record compiled by law enforcement.*

Our Supreme Court defines an "investigative record" under RCW 42.56.240(1) as a record "compiled as a result of a specific investigation focusing with special intensity upon a particular party." *Dawson*, 120 Wn.2d at 792 (internal quotation marks omitted). The investigation must pertain to criminal activity or other allegations of malfeasance. *Id.*

Such records are deemed “compiled” if they are “placed in the investigation file.” *Newman v. King County*, 133 Wn.2d 565, 573, 947 P.2d 712 (1997).

The video footage of the plaintiff students in this case was placed in the investigation files pertaining to the alleged criminal activity of Mr. Ybarra. There accordingly is no dispute that the video footage in this case is part of an investigative record compiled by law enforcement

(c) Releasing video footage with just the student’s face blurred invades the student’s privacy.

As explained in Part IV.C.1.(b) above, blurring just the face on a student’s body does not redact out all information in the video identifying that student. Publicly releasing that footage violates a student’s right to privacy under the PRA if that public release of the video (i) would be highly offensive to a reasonable person and (ii) is not of legitimate concern to the public. RCW 42.56.050.

(i) Releasing this footage over the filmed student’s objection would be highly offensive to a reasonable person in that student’s position.

Washington courts have explained circumstances where disclosure of information would be highly offensive to a reasonable person in the objecting party’s position:

Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at

most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget.

Comaroto v. Pierce County Med. Examiner's Office, 111 Wn.App. 69, 77, 43 P.3d 539, 541 (2002) (quoting Restatement (Second) of Torts § 652D, at 386 (1977)).

Those circumstances exist here. The videos showing these students being subjected to, and responding to, Mr. Ybarra's criminal actions show an aspect of the plaintiff students' lives that they've never intended to expose to the public eye. The traumatic experience Mr. Ybarra put them through is a part of their past history that they would rather forget. They want to keep those images to themselves, rather than have the commercial media irretrievably inject this video footage of them into the World Wide Web. The array of circumstances noted by the Washington court in *Comaroto* confirm that publicly releasing the challenged video footage of these young adults over their objection would be highly offensive to a reasonable person in their position. (At the very least, the array of circumstances noted in *Comaroto* show at this preliminary injunction stage that there's a sufficient "likelihood" that that

public release would be highly offensive to a reasonable person in these students' position.)

The invasion of personal privacy in this case is also illustrated by the wide array of information in investigative records that Washington courts have held would, if disclosed, unlawfully violate an individual's right to personal privacy under this PRA exemption. Such privacy-invading information includes:

- mitigation packages with statements from family members about how they would feel if a relative were sentenced to death;³⁵
- personal email;³⁶ and
- suicide notes.³⁷

If Washington law considers the release of mitigation packages, personal emails, and suicide notes highly offensive to a reasonable person in the objecting party's position, then releasing video footage showing a student's being subjected to, and responding to, criminal actions – over that student's objection to the release – would similarly be highly offensive to a reasonable person in that student's position. (At the very least, the above array of privacy-invading information acknowledged by

³⁵ *Cowles Publishing Co. v. Pierce County Prosecutor's Office*, 111 Wn.App. 502, 510, 45 P.3d 620 (2002).

³⁶ *Tiberino v. Spokane County*, 103 Wn.App. 680, 689-90, 13 P.3d 1104 (2000)

³⁷ *Comaroto*, 111 Wn.App. at 78.

Washington courts show at this preliminary injunction stage that there's a sufficient "likelihood" that that public release would be highly offensive to a reasonable person.)

(ii) ***Releasing this footage over the filmed student's objection does not serve a legitimate public concern.***

Washington courts emphasize that "the basic purpose and policy of [the Public Records Act] is to allow public scrutiny of government, rather than to promote scrutiny of particular individuals who are unrelated to any governmental operation." *Cowles Publishing*, 111 Wn.App. at 510 (quoting *In re Request of Rosier*, 105 Wn.2d 606, 611, 717 P.2d 1353 (1986)).³⁸

To determine whether a record relates to a legitimate public concern under the Public Records Act, courts therefore focus on whether the contents of that record relate to governmental conduct or functionality instead of simply whether the "matter" that record relates to is of public concern. See *Tiberino*, 103 Wn.App. at 690.

The importance of that distinction between personal conduct and government conduct is illustrated by the court's decision in *Cowles*

³⁸ See also, *Tiberino*, 103 Wn.App. at 690 (the PRA's basic goal is to "keep the public informed so it can control and monitor governmental conduct") (underline added); *Comaroto*, 111 Wn.App. at 72) (the PRA's "purpose is to preserve the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions") (internal quotation marks omitted).

Publishing, 111 Wn.App. at 510. That decision rejected the commercial media's claim that family information in a death penalty case's mitigation statement is subject to public disclosure: "[w]e hold that while a prosecutor's death penalty decision is a matter of legitimate public concern, personal information about the defendant's family is not." *Id.*

The same applies here. While the government's decision to prosecute Mr. Ybarra might be a legitimate public concern, video footage of the plaintiff students' personal conduct relating to Mr. Ybarra's actions is not. No government conduct is shown in the challenged video footage. Indeed, SPU's video footage ends before police officers arrive. The only actions portrayed in that footage are instead solely those of the plaintiff students and Mr. Ybarra.

Just as some people like to hear gossip or like to watch intimate YouTube videos on the Internet, some people might similarly want to watch a video of one of the plaintiffs being shot. Or one of the plaintiffs having a shotgun pointed in their face. Or one of the plaintiffs struggling with an attacker.

But that watching does not serve a legitimate public concern under the PRA. To paraphrase the previously-quoted ruling of the *Cowles Publishing* court, watching a private surveillance camera video of the plaintiff students in this case does not allow public scrutiny of government

– rather, it promotes scrutiny of particular individuals who are unrelated to any governmental operation. Releasing this private SPU video footage over the filmed student’s objection simply does not serve a legitimate public concern under the PRA.

(d) *Legal or equitable right conclusion: these students have a legal right under the PRA’s privacy exemption to have more than just their face blurred in the video footage.*

The above discussion explains the reasons why blurring more than just the student’s face in video footage is essential to protect that student’s privacy rights. The plaintiff students have accordingly shown the required likelihood of a legal right under the PRA’s privacy exemption to have more than just their face blurred in the challenged videos.

2. Likelihood of immediate invasion.

Immediate invasion absent an injunction is more than just “likely”; it’s certain. The police and prosecutor have both stated they will distribute the challenged video footage with no more than the students’ faces blurred unless a court orders them not to. *See supra* Part IV.C.2.

3. Likelihood of substantial harm.

In today’s Internet and social media world, the harm caused by the release of objected-to video footage of a student in violation of the PRA’s privacy exemption is irreversible, irreparable, and substantial. *See supra* Part IV.C.3.

4. Equities

Balancing the equities does not override the above showing that these students satisfy the three-part test for a preliminary injunction pending discovery and trial.

To the contrary, the equities support the students' request for that temporary injunctive relief pending a trial on the merits:

- Denying preliminary injunctive relief irreparably prejudices them –it effectively renders their right to privacy under the PRA irrelevant by allowing the challenged video footage to be released regardless of whether trial on the merits proves the release violates the PRA's privacy exemption.
- Denying preliminary injunctive relief also robs these students of their previously-explained right to develop the record and defend their PRA right to privacy.
- Preliminarily granting that temporary injunctive relief does not prejudice the defendant police or prosecutor.
- Preliminarily granting that temporary injunctive relief does not prejudice the defendant PRA requestors either –it merely delays their receipt of the partially redacted video proposed by the police and prosecutor until trial on the merits determines whether that release violates the PRA's privacy exemption.

Balancing the equities accordingly supports – rather than negates – the propriety of the preliminary injunctive relief these students seek.

5. **The PRA's privacy exemption provides a second reason why this Court should issue a preliminary injunction and remand the students' claims for trial on the merits.**

As noted earlier, this Court could simply reverse the trial court's decision and remand for another preliminary injunction hearing – but that

would needlessly waste time and resources since this Court can stand in the place of the trial court and apply the governing “likelihood of success” standard to determine if preliminary injunctive relief is appropriate. *See supra* Part IV.C.5. The above discussion of the PRA’s privacy exemption accordingly provides a second reason why this Court should issue the preliminary injunction these students seek to preserve the status quo, and remand the students’ permanent injunction request for trial on the merits.

E. Washington Law Also Entitles The Students To A Preliminary Injunction Under Under The PRA’s Effective Law Enforcement Exemption.

1. Likelihood of a clear legal or equitable right under the PRA’s effective law enforcement exemption.

(a) *The PRA exempts video footage in an investigative record if nondisclosure is essential to promote effective law enforcement.*

The Public Records Act exempts information in an investigative record compiled by law enforcement when nondisclosure of that information is essential to promote effective law enforcement. RCW 42.56.240(1) & (1)(b). The existence of this exemption is not disputed.

(b) *The challenged video footage is part of an investigative record compiled by law enforcement.*

There is no dispute that the challenged video footage is part of an investigative record compiled by law enforcement. *Supra* Part IV.D.1.(b).

(c) ***Releasing video footage with just the objecting citizen's face blurred impairs effective law enforcement.***

As explained in Part IV.C.1.(b) above, blurring just the student's face in a video does not redact out all information in that video identifying the student. Releasing such footage of victims and witnesses to irretrievable circulation forever on the World Wide Web – over the strong objection of those victims and witnesses – does not promote effective law enforcement.

To the contrary, that release impairs effective law enforcement by making victims and witnesses less willing to come forward or cooperate with law enforcement officers.

To determine whether releasing a record will hinder law enforcement efforts, courts often consider the “chilling effect” of disclosing that record. See *Cowles Publishing*, 111 Wn.App. at 509. This “chilling effect” doctrine recognizes that effective law enforcement requires the active cooperation of crime victims and witnesses. *Id.*

This doctrine has been applied in a wide array of cases.

For example, the court in *Cowles Publishing* held the PRA's effective law enforcement exemption precluded the public disclosure of sentencing mitigation packages because such disclosure would create a

chilling effect discouraging a defendant's family members from providing information necessary to make charging decisions. 111 Wn.App. at 510.³⁹

As another example, the court in *Haines-Marchel* held the PRA's effective law enforcement exemption precluded the public disclosure of information concerning confidential informants because such disclosure would have a chilling effect on informant cooperation in the future. *Haines-Marchel v. State Dep't of Corrections*, ___ Wn.App. ___, 334 P.3d 99, 106-107 (2014).⁴⁰

The same rationale holds true for victims and witnesses filmed on surveillance videos.

Common sense dictates that such victims and witnesses will be more reluctant to report crimes or provide important information to police or prosecutors for fear that their cooperation can lead to the video footage of them being released over their objection to heighten public scrutiny and intrigue about them and their relationship to the crime. That chilling effect would impair law enforcement since police and prosecutors ordinarily rely on victim and witness cooperation to investigate and prosecute crimes.

³⁹ The court further noted that prosecutors in law enforcement would then end up being left with "press releases from the defense, not meaningful input." 111 Wn.App. at 510.

⁴⁰ That court also explained that the Supreme Court's *Sargent* decision did not reject this "chilling effect" doctrine – but rather held that merely asserting "[a] general contention of chilling future witnesses is not enough to exempt disclosure." *Haines-Marchel*, ___ Wn.App. ___, 334 P.3d at 106-107 (citing *Sargent*, 179 Wn.2d at 395).

The previously-noted testimony of veteran law enforcement officers reiterates this chilling effect and its impairment of effective law enforcement – they confirm that victims and witnesses filmed on a private surveillance tape will be more reluctant to report crimes or provide important information to law enforcement officers if their cooperation can lead to the video footage of them being publicly released over their objection.⁴¹ (As this brief previously explained, this more recent law enforcement testimony was not available in time for plaintiffs’ July preliminary injunction motion concerning the one video defendants proposed for public distribution that month, but was available later in time for plaintiffs’ November preliminary injunction motion concerning the set of 19 videos defendants proposed for release that month. *See supra* Part IV.C.1.(b).)

(d) *Legal or equitable right conclusion: these students have a legal right under the PRA’s effective law enforcement exemption to have more than just their face blurred on the video footage.*

The above discussion explains the reasons why blurring more than just the victim’s or witness’s face in video footage is essential to promote

⁴¹ *See supra* note 19; *see Bull Decl. at ¶¶ 10-11, Exs. G-I (Dekmar Decl. at ¶¶ 16-23, Davidson Decl. at ¶¶ 15-18, Doe I Decl. at ¶¶ 8-11, Does (Nov. 10, 2014) (No. 14-2-18514-6 SEA)); see also, Haines-Marchel, ___ Wn.App. ___, 334 P.3d at 106-107 (“Paul’s declaration establishes that disclosure of information about prison informants would threaten their safety and inhibit future informants from coming forward.”) (emphasis added).*

effective law enforcement. The plaintiff students have accordingly shown the required likelihood of a legal right under the PRA's effective law enforcement exemption to have more than just their face blurred in the challenged videos.

2. Likelihood of immediate invasion.

Immediate invasion absent an injunction is more than just "likely"; it's certain. The disclosing agencies have stated they will distribute the challenged video footage with no more than the students' faces blurred unless a court orders them not to. See *supra* Part IV.C.2.

3. Likelihood of substantial harm.

In today's internet and social media world, the harm caused by the release of objected-to video footage of a victim or witness in violation of the PRA's effective law enforcement exemption is irreversible, irreparable, and substantial. See *supra* Part IV.C.3.

4. Equities

Balancing the equities does not override the above showing that these students satisfy the three-part test for a preliminary injunction pending discovery and trial.

To the contrary, the equities support the students' request for that temporary injunctive relief pending trial because releasing victim and witness videos over the victim's or witness's objection harms more than

just the objecting victims and witnesses. The chilling effect that such releases have on victim and witness cooperation with (and trust in) law enforcement officers also harms society as a whole. Balancing the equities accordingly supports – rather than negates – the propriety of the preliminary injunctive relief these students seek.

5. The PRA’s effective law enforcement exemption provides a third reason why this Court should issue a preliminary injunction and remand the students’ claims for trial on the merits.

As noted earlier, this Court could simply reverse the trial court’s decision and remand for another preliminary injunction hearing – but that would needlessly waste time and resources since this Court can stand in the place of the trial court and apply the governing “likelihood of success” standard to determine if preliminary injunctive relief is appropriate. *See supra* Part IV.C.5. The above discussion of the PRA’s effective law enforcement exemption accordingly provides a third reason why this Court should issue the preliminary injunction these students seek to preserve the status quo, and remand the students’ permanent injunction request for trial on the merits.

V. CONCLUSION

If the trial court’s preliminary injunction denial is allowed to stand, the challenged video footage of these students will be irretrievably

released into the ever-present Internet and social media world these students will live in for the rest of their lives.

If the trial court's preliminary injunction denial is allowed to stand, the upcoming trial on the merits of the students' permanent injunction claims will be meaningless and irrelevant. At trial, it will be too late to shut the barn door, because the horse will have already been long gone.

If the trial court's preliminary injunction denial is allowed to stand, the PRA's disclosure exemptions will be meaningless and irrelevant as well. The rights and protections they establish for citizens such as the SPU students in this case will be of no import whatsoever.

The plaintiff students respectfully submit that this Court should not allow the trial court's preliminary injunction denial to stand. For the reasons detailed in this brief, these students respectfully request that this Court reverse the trial court's decision, and enter a preliminary injunction enjoining release of the challenged video footage pending trial on the merits of the students' permanent injunction claims.

DATED this 8th day of December, 2014.



Bradley P. Thoreson, WSBA #18190

Samuel T. Bull, WSBA #34387

Lee R. Marchisio, WSBA #45351

Bryce C. Blum, WSBA #47080

FOSTER PEPPER PLLC

1111 Third Avenue, Suite 3400

Seattle, Washington 98101-3299

Telephone: (206) 447-4400

Facsimile: (206) 447-9700

Email: thorb@foster.com

bulls@foster.com

marcl@foster.com

blumb@foster.com

Attorneys for Appellants Jane Does
and John Does (the "plaintiff
students")