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

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JANE DOES 1 through 15, et al.,

*Appellants,*

vs.

KING COUNTY, et al.,

*Respondents,*

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**CITY'S RESPONSE TO BRIEF OF THE PLAINTIFF/APPELLANT  
STUDENTS (JANE DOES 1-15 AND JOHN DOES 1-15)**

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## I. INTRODUCTION

This appeal presents a case of first impression — what is the applicable standard under the Washington Public Records Act (“PRA”), RCW 42.56 et seq., for redacting the identities of individuals depicted in video recordings.

In this case, the City of Seattle (“City”)<sup>1</sup> received public records requests for copies of criminal investigation records compiled by the Seattle Police Department (“SPD”) in the investigation of June 5, 2014 shootings on the campus of Seattle Pacific University (“SPU”) including surveillance videos obtained from SPU. The surveillance videos include a three-minute video that shows Aaron Ybarra shooting and critically injuring a female student. The SPU student victims and witnesses shown in the three-minute video indicated to SPD a desire for non-disclosure of their identities. An additional 19 DVDs of surveillance video were provided by SPU to SPD. The 19 videos include the content of the three-minute video plus videos that depict additional victims and witnesses who asked for non-disclosure.

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<sup>1</sup> King County (“County”) also received requests for similar records. The City and the County have cooperated to provide responsive records on a joint schedule.

The City has responded to the records requests related to the SPU shooting in installments as permitted by RCW 42.56.080. The trial court has conducted two preliminary injunction hearings— the first addressing the installment containing the three-minute video and the second addressing the 19 videos. The trial court denied Appellants’ motions for preliminary injunction in both hearings and Appellants have appealed each order. Only the order on the three-minute video is before the court in connection with the current briefing. Appellants have asked the court to issue a preliminary injunction regarding the three-minute video and to remand this matter for a trial on the merits to determine whether a permanent injunction should issue. The City anticipates that Appellants’ appeal of the order on the 19 videos will involve identical issues.

The City and Appellants agree that the identities of the victims and witnesses who requested non-disclosure are exempt from disclosure under RCW 42.56.240(1).<sup>2</sup> The City was placed in the position of trying to decipher what constitutes identifying information in the context of a video

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<sup>2</sup> Appellants claim that the identities of the students are exempt under RCW 42.56.240(1), which exempts “[s]pecific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies... the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.” They maintain that nondisclosure of the students’ identities is essential to effective law enforcement and to protect their privacy. To the extent that RCW 42.56.240(1) applies in this case, the issue raised in the City’s response remains the same-- what specific identifying information contained in a video recording needs to be redacted in order to protect an individual’s identity.

recording. In doing so, it erred on the side of caution by blurring only the faces of the victims and witnesses who had requested non-disclosure. The plaintiffs maintain that facial blurring insufficiently masks identity because an individual's identity also includes non-facial attributes that require redaction, such as "height, weight, body shape, manner of dress, specific clothing, gait, posture, skin color, tattoos/scars or lack thereof, mannerisms, etc." Appellant's Brief, p. 17.

The court's determination on this issue will affect law enforcement agencies throughout the State that generate and retain mounting volumes of in-car video and body-worn video in addition to dealing with surveillance videos gathered during investigations as in the present case. The City looks to the court for guidance and asks that it apply the same flexible, objective standard to video as courts have applied to print records regarding what specific identifying information contained in a video recording should be redacted in order to protect an individual's identity.

## **II. ISSUE**

The City acknowledges the assignments of error and issues in Appellants' brief; however, the City believes it is more appropriately expressed as follows:

1. Should the same objective, flexible standard for redacting identity from print records also apply to redacting identity from video records?

### III. STATEMENT OF THE CASE

Appellants' statement of the case accurately summarizes the factual and procedural aspects of this case.

### IV. ARGUMENT

#### A. An Agency Must Err on the Side of Disclosure

The Public Records Act is a “strongly-worded mandate for broad disclosure of public records.” *King County v. Sheehan*, 114 Wn.App. 325, 57 P.3d 307 (2002). The PRA’s provisions “are to be liberally construed to promote full access to public records so as to assure continuing public confidence in governmental processes, and to assure that the public interest will be fully protected.” *Spokane Police Guild v. Washington State Liquor Control Board*, 112 Wn.2d 30, 33, 769 P.2d 283 (1989). The PRA requires that an agency disclose public records upon request unless a statute specifically exempts or precludes disclosure. RCW 42.56.070(1). These exemptions must be narrowly construed. RCW 42.56.030; *Progressive Animal Welfare Society (PAWS II) v. University of Washington*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994).

PRA exemptions “are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital

governmental interests, can be deleted from the specific records sought.” *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn. 2d 417, 432-33, 327 P.3d 600 (2013); RCW 42.56.210(1); *see also* RCW 42.56.210. Thus, an agency must produce otherwise exempt records insofar as redaction renders any and all exemptions inapplicable. *Id.*, 177 Wn. 2d at 433.

The PRA is a “complex and often confusing statutory framework that is the result of numerous legislative enactments,” many of which have not been judicially interpreted. *Id.*, 177 Wn. 2d at 436. Even though an agency may lack clear guidance as to the scope of a particular exemption, it will be subject to mandatory costs and attorney fees plus potential penalties if it decides wrongly. RCW 42.56.550(4). An agency’s safest course, therefore, is to err on the side of caution as the City did in this case.

The City provided third party notice to Appellants that it intended to disclose the three-minute video with faces blurred. An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested, and they may 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. *PAWS II*, 125 Wn.2d at 243. In any action under RCW 42.56.540, the initial determination will be

whether the information involved is in fact within one of the PRA's provisions exempting or prohibiting disclosure of specific information or records. *PAWS II*, 125 Wn.2d at 258. The party seeking to prevent disclosure bears the burden of proving that a specific exemption applies. *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 744, 958 P.2d 260 (1998).

Appellants secured a temporary restraining order to prevent disclosure pending determination whether a preliminary injunction should issue. Appellants initially asserted that the three-minute video should be entirely withheld. They modified their position prior to the preliminary injunction hearing to say that the video should be redacted by placing a black box over the entire body of each victim or witness shown in the video.

**B. The Same Objective, Flexible Standard Applies to Redacting Identity from All Types of Records**

In considering print records, courts have applied an objective standard in redacting identities. *See, Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn. 2d 398, 414, 259 P.3d 190 (2011). (“Even though a person's identity might be redacted from a public record, the outside knowledge of third parties will always allow some individuals to fill in the blanks.”); see also, *Predisik v. Spokane Sch. Dist. No. 81*, 179 Wash. App. 513, 521, 319 P.3d 801 (2014), *review granted*, 180 Wash.

2d 1021, 328 P.3d 903 (2014) (Holding that administrative leave records had to be disclosed with only identities redacted even though it is possible for a third party with knowledge of the underlying disciplinary matter to conclude that particular individuals were the subject of the records.) Simply stated this means that an individual with no knowledge of the matter underlying the record could read the record and would not recognize the particular individual whose identity had been redacted.

It logically follows that a similar objective standard should apply to videos. The redaction should be sufficient to mask a subject's identity so that third-parties without knowledge of the underlying events would not recognize a subject whom they know in an independent, unrelated context. For example, redaction should be sufficient that the media could display a redacted video without risk that a witness's co-worker or other close associate unaware of the recorded event would say "I saw you on the news last night."

Courts have also applied a flexible standard to print records because they frequently contain identifying information beyond names that must be redacted in order to not disclose identity. *Resident Action Council*, 177 Wn. 2d at 446 (requiring redaction of the names and identifying information of tenants from grievance hearing decisions); *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 227,

189 P.3d 139 (2008) (holding that the names and identifying information of subject teachers could be redacted from letters of direction that did not reflect any substantiated allegations or impose any discipline.); *Ollie v. Highland Sch. Dist. 203*, 50 Wn.App. 639, 645, 749 P.2d 757, review denied, 110 Wash.2d 1040 (1988) (requiring disclosure of school personnel records with names and identifying details redacted); *Tacoma News, Inc. v. Tacoma-Pierce County Health Dep't*, 55 Wn. App. 515, 523, 778 P.2d 1066, 1070 (1989) (holding that names and other identifying features—such as addresses and current or former positions held and names of employers—of complainants and persons who produced information related to investigation could be redacted). See also, RCW 42.56.070(1) (“To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record.”)

The redaction requirement for videos should be similarly flexible depending upon the identifying details contained in the particular video. While not addressing the redaction standard directly, courts appear to have applied this logical, flexible approach to video redaction. In a case involving videos of Guantanamo Bay detainment facility operations, a court determine that exempt staff identities could be redacted by

appropriate audio and visual edits, such as “screening names and voices, blurring faces and identifying portions of uniforms, and blacking-out written materials on walls.” *Dhiab v. Obama*, 2014 WL 4954458, at \*11 (D.D.C. Oct. 3, 2014). It may be necessary to consider the context of a particular video to determine the scope of redaction. For example, a court found that individuals who prepared and appeared in a video aired on national cable television had minimal interest in nondisclosure “[u]nlike surveillance tapes that capture a person's image without their consent.” *Showing Animals Respect & Kindness v. U.S. Dep't of Interior*, 730 F. Supp. 2d 180, 197 (D.D.C. 2010). In some cases, exempt information may need to be edited (cut) out of video or portions of audio muted. *See, Com. v. Kitchen*, 730 A.2d 513, 522 (1999). There even may be rare cases in which it is impossible to redact exempt content if doing so would leave no meaningful information. For example, in a case involving a school bus surveillance video in which multiple children appeared in every frame, the court speculated “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 Sch. Dist. No. 458*, 127 Wash. App. 526, 541, 111 P.3d 1235 (2005), rev'd,

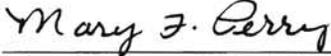
162 Wash. 2d 196, 172 P.3d 329 (2007). While the Supreme Court ultimately held that the school bus video was not exempt mooring the redaction issue, the quotation illustrates the practical complexity of redacting videos and the need for flexible redaction standards.

## V. CONCLUSION

The City seeks the court's guidance regarding the standard to apply in redacting identifying information that needs to be redacted in the context of the subject surveillance videos. Appellants have asked the court to issue a preliminary injunction and to remand this matter for a trial on the merits to determine whether a permanent injunction should issue. If the court does so, the City asks the court to simply extend to videos the objective, flexible standards that already apply to redacting an individual's identity from print record: Redaction should sufficiently mask identifying details so that third-parties without knowledge of the underlying events would not recognize a subject whom they know in an independent, unrelated context.

DATED this 7<sup>th</sup> day of January, 2015.

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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 January 7 2015, I caused to be delivered via email addressed to:

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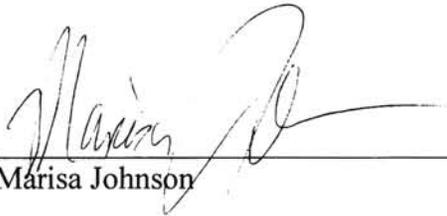
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a copy of City's Response to Brief of the Plaintiff/Appellant Students (Jane Does 1-15 and John Does 1-15).

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

DATED this 7<sup>th</sup> day of January, 2014, at Seattle, King County, Washington.

  
\_\_\_\_\_  
Marisa Johnson