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NO. 72159-3-I

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

JANE DOES 1-15, et al.,

Appellants,

v.

KING COUNTY, et al.,

Respondents.

**SUPPLEMENTAL OPENING BRIEF OF
NEWS MEDIA RESPONDENTS**

Eric M. Stahl, WSBA #27619
Bruce E.H. Johnson, WSBA #7667
Davis Wright Tremaine LLP
Attorneys for News Media Respondents

Suite 2200
1201 Third Avenue
Seattle, WA 98101-3045
(206) 622-3150 Phone
(206) 757-7700 Fax

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents, news organizations that made several of the Public Records Act requests at issue in this case, submit this response to the supplemental opening briefs of both the Doe Appellants and Seattle Pacific University (“SPU”).¹ This brief is directed to the Appellants’ second attempt to enjoin public access, this time to 19 DVDs held by the Seattle Police Department (“SPD”) and King County Prosecutor’s Office (“KCPO”) in connection with their investigation of the June 2014 shooting at SPU. To avoid repetition, Respondents incorporate by reference their January 7, 2014 brief; all the arguments regarding the three-minute surveillance video apply equally to the 19 DVDs. This brief focuses on supplemental issues related solely to the 19 DVDs; the trial court’s order denying Appellants’ second round of preliminary injunction motions; and several very recent PRA decisions that confirm the records must be disclosed, with the limited redactions proposed by the agencies. In brief:

- The 19 DVDs are public records, as they were acquired for and relate to SPD and KCPO law enforcement functions. SPU’s repeated contention that 84 percent of the footage depicts only private activity is irrelevant: the definition of a “public record” does not depend on how

¹ Respondents are King Broad. Co., KIRO-TV, Inc., and Hearst Seattle Media, LLC. This brief is filed pursuant to the parties’ Joint Motion to Consolidate and Proposed Briefing Schedule (January 30, 2015), which this Court approved on February 12, 2015.

much, or even if any, of a record actually shows a public actor or government conduct.

- The PRA exemption for victim and witness identities (RCW 42.56.240(2)) permits only narrow redaction of direct identification in the record itself. The proposed facial pixilation satisfies this standard. Appellants' proposed "black box" redactions would impermissibly remove disclosable portions of the records, including the police and fire department response. Furthermore, Section 240(2) does not apply at all to the substantial portions of the 19 DVDs that do not show the Doe students.

- Appellants have no privacy right in the DVDs. First, the public has a manifest concern with the three-plus hours of footage depicting the actions of public servants; and there is certainly nothing "highly offensive" about other portions of the footage that simply depict the campus itself. None of the remaining footage constitutes a privacy intrusion either. As the Supreme Court recently confirmed, PRA privacy-based exemptions are narrow, and are evaluated under the strict Restatement standard. *See Predisik v. Spokane School Dist. No. 81*, 346 P.3d 737, 741 (Wash. April 2, 2015). Only truly private matters are protected; and disclosure of crime records is not an intrusion.

- The "essential to effective law enforcement" exemption (RCW 42.56.240(1)) presumptively does not apply where, as here, the

underlying crime has been solved. The Doe parties' attempt to overcome this presumption with police declarations asserting disclosure could chill future witnesses fails as a matter of law, as recently confirmed in *City of Fife v. Hicks*, __ Wn. App. __, 345 P.3d 1 (Feb. 24, 2015).

- The DVD footage does not fall within the plain language of the PRA's exemption for terrorism prevention plans, RCW 42.56.420(1). SPU's speculation about the potential risk of disclosure falls far short of establishing "a substantial likelihood" of a safety threat; the DVDs do not constitute an assessment or plan; and no agency is maintaining the footage to prevent or respond to terrorism.

II. SUPPLEMENTAL STATEMENT OF THE ISSUES

1. Did the trial court properly deny Appellants' motions for a third-party preliminary injunction under RCW 42.56.540, given its finding that Appellants failed to show any PRA exemption applied?

2. Is private surveillance footage, obtained and used by police and prosecutors to investigate a crime and prosecute the accused perpetrator, a "public record" under RCW 42.56.010(3)?

3. Have Appellants met their burden of establishing that a specific PRA exemption bars release of the DVDs? Specifically:

a. For the portion of the videos depicting individuals, is facial pixilation sufficient to comply with RCW 42.56.240(2)'s requirement that "information revealing [their] identity" be redacted?

b. Is any portion of the DVDs exempt under the investigative records exemption's privacy prong (RCW 42.56.240(1)) – *i.e.*, is it of no legitimate public concern, and highly offensive to a reasonable person?

c. Are the DVDs exempt under the investigative records exemption's "effective law enforcement" prong (*id.*), where the perpetrator has been charged and the investigation is not threatened?

d. Does the PRA's exemption for terrorism assessments and deployment plans, RCW 42.56.420(1), bar disclosure of surveillance footage that neither constitutes nor is part of such an assessment or plan?

III. SUPPLEMENTAL STATEMENT OF THE CASE

A. Facts Relevant to this Appeal

Journalists for Respondents, among others, made PRA requests to SPD and KCPO for investigative records related to the June 5, 2014, shooting at SPU. CP 624-25; CP 743. This appeal initially concerned a three-minute surveillance video, showing accused shooter Aaron Ybarra assaulting students inside Otto Miller Hall and being thwarted by a student monitor. CP 73, 77. On July 22, 2014, the trial court denied Appellants'

motions to preliminarily enjoin release of that video. CP 509. Disclosure remains stayed pending this appeal. CP 562.

The subsequent appeal, and the subject of this supplemental brief, concerns 19 additional DVDs of surveillance footage that SPU gave investigators at the same time it provided them the three-minute video. SPU provided all of this footage in response to a warrant, in order “to aid in the police’s ongoing investigation.” CP 623 ¶ 3.5; CP 477 ¶ 6.

The DVDs contain some 20 hours of footage. They show both Ybarra’s activities of June 5, and an earlier visit he made to campus on May 19. CP 1042. The June 5 footage includes the response of public servants (law enforcement and fire department paramedics) to the incident. CP 1045-46. Neither SPD nor KCPO believes disclosure of the 19 DVDs will threaten the integrity of the investigation or prosecution, and both agencies recognize disclosure is mandated by the PRA. CP 750; CP 807.

Nine of the 19 DVDs do not depict any of the Doe students, and the agencies intend to release these without redactions. Each of the remaining 10 disks contains footage depicting at least one of the Doe students. These would be released with faces of the students pixilated in order to redact their identities. CP 353 ¶ 13; CP 773-75; CP 812 ¶¶ 2-4.

Respondents have not objected to the proposed pixilation of the DVDs, or to the Doe parties litigating anonymously. But the victims and

key witnesses of the SPU shooting are not in fact anonymous. They have been widely named in court documents and other public records, by public officials, and in news reports that include their photos and descriptions. CP 210-217, 305-316, 510-511, 514-515, 961-964. For example, John Doe No. 2 (the student who disarmed and subdued Ybarra) was recently recognized publicly by the Congressional Medal of Honor Society, and sat for an on-camera news interview in connection with that well-deserved honor.²

B. Supplemental Procedural History

On September 29, 2014, SPD and KCPO notified Ybarra’s counsel that they intended to release the 19 DVDs. CP 746, 749. While Ybarra had previously attempted to block release of the three-minute surveillance video (in a motion denied by Judge Jim Rogers), he raised no objection to public disclosure of the 19 DVDs. *Id.*; see CP 515.

Pursuant to RCW 42.56.540, KCPO and SPD notified Appellants on October 23, 2014 that the 19 DVDs would be released absent a court order to the contrary. CP 746-50.³ Appellants brought separate motions

² CP 621 ¶ 1.1; CP 511:2. See “Jon Meis honored for ending SPU shooting” (KING-5 News, Mar. 25, 2015), available at <http://www.king5.com/story/news/local/seattle/2015/03/25/jon-meis-honored-for-ending-spu-shooting/70465562/>. (This Court may take judicial notice of the fact of publication and contents of this news story under RCW 5.68.010(4).)

³ SPU contends that “the media claimed [the 19 DVDs] as a public record[.]” SPU Supp. Br. 5. But it was the public agencies in the first instance that determined the disks were public records and were responsive to the pending PRA requests.

to preliminarily enjoin their release. Judge Halpert heard those motions on November 19, 2014. CP 644, 689.

Judge Halpert reviewed the DVDs in camera. CP 1037 ¶ 6. On December 14, 2014, she entered an Order and Second Memorandum Opinion again denying the requests for a preliminary injunction and again finding the videos were subject to PRA disclosure, with only limited redactions. CP 1036, 1041. Judge Halpert noted that the Doe parties “in large part reiterate the arguments they made at the time of the initial hearing,” and for the most part the December opinion “simply incorporate[d] the memorandum opinion of July 22” denying the injunction for the three-minute video. CP 1043-44. The trial court’s December opinion supplements the July decision as follows:

1. “Black box” redaction. In their original preliminary injunction motion, the Doe parties argued that RCW 42.56.240(2) required total suppression of the three-minute video. CP 20 (“The only possible way to protect [the students’] identities is to not release the video.”) Recognizing belatedly that the exemption allows only limited redaction of identifying information, the Doe parties shifted gears in their second injunction motion and made a “new request” to the trial court: that the agencies “completely obscure [the students’] bodies with uniform black boxes,” rather than just pixelating their faces. CP 690, 1043.

The trial court found redaction under RCW 42.56.240(2) must comply with the PRA's mandate to construe exemptions narrowly in favor of disclosure. CP 1044. The court again recognized that redactions from the videos could be no more than needed so that the video itself would not be a source of identification, even if the redacted disclosure "may ultimately permit a member of the public to ascertain the identity of the witness or victim." CP 1045 (citing *Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006)). The court held Appellants' "black box" proposal would unlawfully over-redact the videos by obliterating the response of police and paramedics and other portions of the records for which no exemption applies. CP 1045-46.⁴

2. Terrorism plan exemption: The court held RCW 42.56.420(1), the PRA's exemption for terrorism-related assessments and plans, was not implicated by disclosure of the 19 DVDs. The court recognized the footage came from multiple surveillance cameras, as opposed to the single camera that recorded the three-minute video. But it found the exemption still did not apply because the videos "do not meet the statutory definition of an assessment or plan," regardless

⁴ The court did order additional redactions to one video, depicting students who showed Ybarra around campus on May 19. CP 1046 ("There is nothing of significance that would be obliterated by a black box"). Respondents disagree – nothing in the record suggests pixilation would be insufficient to protect these students' identities – but they have not appealed this ruling.

of whether the footage came from “one camera or one hundred cameras.” CP 1047. The court noted that when the legislature wants to exempt certain security data from PRA disclosure, it does so expressly. CP 1048 (citing RCW 36.28A.060, which exempts first-responder building map information systems).

3. Expanded public concern. The court again rejected Appellants’ assertion of the privacy prong of the PRA’s investigative records exemption (RCW 42.56.240(1)), in part because of the manifest “legitimate concern” with the shooting. RCW 42.56.050; CP 1049. The court noted “[t]his legitimate concern includes Ybarra’s actions on May 19 in preparation for the June 5 attack.” *Id.* Additionally, unlike the three-minute video, much of the footage in the 19 DVDs directly shows government actors – including over three hours depicting SPD and SWAT officers and other emergency personnel. CP 673-74, 1046.

SPU again attacks the December 15 order for “skip[ping] over the trial” without notice and ordering the videos released. SPU Supp. Br. 2, 6; *see also* Doe. Supp. Br. 8 n.21. But just as with the trial court’s first decision, the December rulings do nothing of the sort. The order states simply that “Plaintiff’s Motion for a Preliminary Injunction is DENIED,” but that the temporary injunction barring release “shall remain in effect until lifted by the Court of Appeals” or further trial court order. CP 1039.

Appellants filed separate appeals of the December 15 ruling. CP 1056, 1076. On Feb. 12, 2015, this Court consolidated the appeals with this one and accepted the parties' stipulated briefing schedule.

IV. SUPPLEMENTAL ARGUMENT

A. Standards of Review

Once again, the Doe parties seek to proceed as if their injunction request both is and is not governed by the PRA. They simultaneously argue (1) the standard of review is *de novo* because this is a PRA injunction case, but (2) the case is governed entirely by the equitable standards set out in CR 65 and *Tyler Pipe Industries Inc. v. State, Department of Revenue*, 96 Wn.2d 785, 793, 638 P.2d 1213 (1982). Doe Supp. Br. 7-8. As Respondents have explained, if the second statement is correct – if Appellants are seeking reversal under the rules governing preliminary injunctions generally – then this Court can review the orders below only for abuse of discretion. *Wash. Fed'n of State Emps. v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983) (abuse of discretion applies to trial court's grant or denial of preliminary injunctions generally).

But this case in fact arises under RCW 42.56.540. CP 625, 630. That statute is what provides third parties the right to seek, and courts the ability to grant, an order blocking release of a public record. *See, e.g., Dragonslayer, Inc. v. Wash. State Gambling Comm'n*, 139 Wn. App. 433,

440-41, 161 P.3d 428 (2007)). Appellate review of trial court orders entered under Section 540 is de novo, but must be consistent with the PRA’s policy of broad construction favoring disclosure. *See* Resp. Opening Br. § IV.A.1. Courts may not enjoin release of a public record – even preliminarily – unless the party objecting to disclosure proves, factually and “with particularity” (1) that a specific statutory exemption applies, and (2) *if* an exemption applies, that disclosure would both “substantially and irreparably damage” a person or vital governmental functions, and would “clearly not be in the public interest.”⁵ It would be error for the court to engage in equitable balancing to determine whether a PRA injunction is appropriate (as Appellants suggest) unless and until it first finds a statutory exemption in fact applies. *Franklin Cnty. Sheriff’s Office v. Parmelee*, 175 Wn.2d 476, 480, 285 P.3d 67 (2012).

B. SPU Cannot Plausibly Contend The Second Preliminary Injunction Ruling Skipped A “Trial on the Merits”

SPU again assigns error to the trial court’s allegedly “consolidating the preliminary injunction with a trial on the merits” without notice. SPU Supp. Br. 2. It offers no new argument on this point. Respondents address it here only to note that SPU’s argument is even weaker now than it was the first time around, for the following reasons.

⁵ RCW 42.56.540; *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 271, 884 P.2d 592 (1994) (“PAWS”); *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 36, 769 P.2d 283 (1989).

First, if SPU were truly concerned that the trial court might improperly conflate the second preliminary injunction hearing with a trial on the merits, it would have alerted Judge Halpert to this supposed error. After all, SPU had already asserted to this Court, in connection with its appeal of the first injunction and long before filing its second injunction motion, that denial of a PRA preliminary injunction motion amounts to a violation of CR 65(a)(1).⁶ Yet SPU said nothing about this issue to the trial court, in either its briefing or at the second injunction hearing. CP 644 (motion); CP 982 (reply); 11/19/2014 Report of Proceedings. This is because there was no procedural error for SPU to raise. Its argument is a post-hoc contrivance based solely on the trial court's routine denial of a PRA preliminary injunction.

Second, SPU's argument rested in part on the suggestion that the proceedings below occurred too quickly for it to fully marshal its opposition to disclosure. That argument is legally baseless: as previously noted, the PRA mandates *timely* access to public records, and specifically authorizes expedited, summary procedures to resolve disputes over access. RCW 42.56.100, .550(1). It is also factually baseless, particularly with respect to the second preliminary injunction proceedings. SPU was aware of the potential disclosure of the 19 DVDs from the outset of this case in

⁶ *See, e.g.*, SPU Reply for Emergency Motion for Injunctive Relief Pending Appeal (at p. 4), filed with this Court in No. 72159-3-1 on July 31, 2014.

July 2014 (indeed, it tried unsuccessfully to make the additional records part of its first injunction motion, even before the agencies had determined whether and to what extent to release them). CP 510, 562 n.5. It had over four months to prepare its opposition to their release. CP 644. Both SPU and the Doe parties supported their second motions with additional declarations. CP 661-68, 703-96.⁷ Appellants cannot be heard to complain that the second injunction hearing was rushed or perfunctory.

Third, just as before, Judge Halpert's decisions on the second injunction motion neither consolidated the proceeding with a trial nor ordered release of any record. Rather, Appellants moved for a preliminary injunction and the court simply denied those motions, and stayed release pending appeal. CP 1039, 1049. These facts distinguish this case from the authority relied on by Appellants. *See* Resp. Opening Br. § IV.B.

⁷ Conversely, SPU has apparently dropped its reliance on psychologist Richard Adler, whose declaration was offered in the first injunction motion to support suppression of the three-minute video on the ground that its disclosure could cause “copycat” crimes. SPU did not cite Dr. Adler in support of its second injunction motion – perhaps because, as Respondents have pointed out, the very literature he relied on in fact *disclaims* any causal link between media exposure and the incidence of crime, and does not offer any basis for fearing disclosure of public records about actual crime. *See* Resp. Opening Br. 10 n.9.

For this same reason, this Court should deny the Doe Appellants' request for judicial notice of the alleged deleterious effects disclosure of the videos might have. Doe Supp. Br. 23 n.36. While crime victims understandably may prefer not to see reminders of the crime, denying access to public records is not a lawful, or practical, response. *Cf. Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 46, 640 P.2d 716 (1982) (Dolliver, J., concurring) (closing courtroom is not the appropriate way to protect witness: “Once the argument to the contrary is accepted, any vitality in an open judicial system is destroyed.”).

C. The 19 DVDs Are Public Records

SPU (but not the Does, or any other party) persists in arguing the 19 DVDs – indisputably held and used by law enforcement agencies in connection with a criminal investigation and prosecution – are not “public records.” Respondents’ prior brief details why such records fall easily within the broad definition of “public records,” regardless of whether they originated from a private source or depict only private actors. Resp. Opening Br. § IV.C; RCW 42.56.010(3). Those arguments apply with even greater force to the 19 DVDs.

SPU argues that the 19 DVDs are not public records because 84 percent of the footage shows “purely private matters.” SPU Supp. Br. 7-11. There are at least three fatal flaws with this argument.⁸ First, SPU ignores its own evidence showing that over three hours of the DVDs *do* depict public actors engaged in government conduct, including “officers of the Seattle Police Department, SWAT team, emergency medical responders, and firefighters.” CP 673-74. There is no doubt this portion of the footage is a “public record.”

⁸ In addition, SPU’s argument starts with the flawed premise that the PRA “has a limited purpose[.]” *Id.* at 7. Case law does not describe the PRA that way. Rather, “the stated purpose of the Public Records Act is *nothing less than the preservation of the most central tenets of representative government*, namely, the sovereignty of the people and the accountability to the people of public officials and institutions” *PAWS*, 125 Wn.2d at 251 (emphasis added). The PRA’s rule of broad construction in favor of disclosure applies to its definition of “public records.” *Dragonslayer*, 139 Wn. App. at 444.

Second, the determination of whether a record is or is not a “public record” does not turn on the percentage of its content that shows public actors or conduct. The definition applies to “any writing” held by an agency that meets the other statutory criteria. RCW 42.56.010(3). Each recording at issue in this case is a separate “writing.” RCW 42.56.010(4) (“writing” is any “means of recording any form of communication,” including “video recordings”). The question is whether the writing relates to government conduct or a government function, not whether or not it may *also* contain private information. See *Mechling v. City of Monroe*, 152 Wn. App. 830, 854-55, 222 P.3d 808 (2009) (private nature of information in a public record is not a ground for withholding it, where no PRA exemption applies); *Newman v. King County*, 133 Wn.2d 565, 571, 947 P.2d 712 (1997). As explained below, each recording here meets the remaining statutory criteria of a public record. The fact that it may also depict private actors is irrelevant.

Third, SPU’s argument ignores the point that even records depicting 100 percent private activity *are* public records and *are* related to government conduct when held by police agencies for investigative purposes. The issue is not how much of the record shows public activity, but whether it contains information that relates at all “to the conduct of government or the performance of any governmental...function.” RCW

42.56.010(3). If SPU’s crabbed definition were correct, then the entirely private suicide note at issue in *Comaroto v. Pierce Cnty. Med. Exam’r’s Office* would not have been a “public record” – but it was, simply because it was part of the sheriff’s investigative file. 111 Wn. App. 69, 74, 43 P.3d 539 (2002). Similarly, police incident reports are public records, even though they often contain nothing but accounts of private actions by private individuals. *See, e.g., Koenig*, 158 Wn.2d at 186-87. Likewise, in the case of prosecuting attorney agencies, the definition of “public records” encompasses the prosecutor’s criminal investigative files, *Limstrom v. Ladenburg*, 85 Wn. App. 524, 529, 933 P.2d 1055 (1997), *rev’d on other grounds*, 136 Wn.2d 595, 963 P.2d 869 (1998), and records otherwise “relating to the performance of prosecutorial functions[.]” *Dawson v. Daly*, 120 Wn.2d 782, 789, 845 P.2d 995 (1993).⁹

Thus, the 19 videos meet the first two elements of the definition of “public records”: they are “writings,” and they “contain[] information

⁹ SPU cites Justice Fairhurst’s opinion (dissenting in relevant part) in *Lindeman v. Kelso School Dist.*, for the proposition that a videotape’s “inherent character as a record is defined by the information it contains and to what the information relates[.]” SPU Supp. Br. 9-10, quoting *Lindeman*, 162 Wn.2d 196, 208, 172 P.3d 329 (2007). The citation is highly misleading. The opinion’s reference to the “character” of a record had nothing to do with whether the video at issue met the definition of a “public record” – which was not in dispute in *Lindeman*. *Id.* at 201 (“The parties do not dispute that the videotape is a ‘public record’”). Rather, the discussion concerns whether the video fell within the PRA’s exemption for “[p]ersonal information in any files maintained for students[.]” *Id.* at 201, 208. Justice Fairhurst’s point (which was contrary to the view of seven justices) was that the video should have been treated as if it were part of the student file. *Id.* at 208-09. Neither that point, nor the student file exemption, has any bearing on this case.

relating to” SPD and KCPO’s conduct and performance as the agencies responsible for investigating and prosecuting the crime at SPU. CP 623 (amended complaint, admitting videos obtained “to aid in the police’s ongoing investigation”); CP 746 (DVDs part of case file and provided to Ybarra’s counsel in criminal discovery). *See* RCW 42.56.010(3).

The third and final element – that the records were “prepared, owned, used, or retained” by the agencies, *id.* – is also easily satisfied. Both KCPO and SPD “retained” the videos: “retain” in this context means simply that the agencies “hold or continue to hold in possession or use” the record at issue. *West v. Thurston County*, 168 Wn. App. 162, 186, 275 P.3d 1200 (2012). SPD and KCPO indisputably hold the 19 DVDs, as shown by the fact that they intend to release them pursuant to the PRA. CP 746, 749. Nothing more is required to satisfy the statutory definition.

SPU responds that the third element of a “public record” is not met here because there is no evidence that the videos “were *used* by a government agency.” SPU Supp. Br. 12, 13. Even if SPU were correct about this, its argument ignores the other verbs contained in this element of RCW 42.56.010(3). A record need not be “used” by an agency; again, under the plain language of the statute, it is enough that it is merely “retained.” SPU does not (because it cannot) claim the agencies do not retain the videos. Additionally, both SPD and KCPO did “use” the videos:

as noted above, SPD obtained them as part of its criminal investigation, and KCPO used them in its case file and as part of criminal discovery.

SPU's remaining arguments are also unavailing. Relying on *Concerned Ratepayers Ass'n v. PUD No. 1*, 138 Wn.2d 950, 983 P.2d 635 (1999), SPU argues that use of a record requires more than just mere "possession." SPU Supp. Br. 12. But *Concerned Ratepayers* holds only that an agency may "use" a record even if it is solely in the possession of a private contractor. *Id.* at 958. SPU's reading flips this holding on its head – but the case says nothing about an agency's "use" of a record that the agency itself possesses. SPU's reliance on Division II's recent decision in *Nissen v. Pierce Cnty.*, 183 Wn. App. 581, 333 P.3d 577 (2014), *rev. granted*, 182 Wn.2d 1008, 343 P.3d 759 (Mar. 4, 2015), is also misplaced. SPU Supp. Br. 12. *Nissen* involves text messages sent to and from the private phone of an elected official – some related to his public function and some not. The court's unremarkable statement that private phone records that are not used by or otherwise related to the official's public capacity are not "public records," 183 Wn. App. at 584, has no bearing on records, like the ones at issue here, which *were* acquired and used by police and prosecutors in their investigative capacities.¹⁰

¹⁰ The Supreme Court is scheduled to hear argument in *Nissen* on June 11, 2015.

The term “public record” is defined “very broadly, encompassing virtually any record related to the conduct of government.” *O’Neill v. City of Shoreline*, 170 Wn.2d 138, 147, 240 P.3d 1149 (2010). The definition is easily satisfied here: each video on the 19 DVDs is a writing; each contains information related to, and acquired in connection with, SPD’s criminal investigation and KCPO’s prosecution of Ybarra; and each was used and possessed by the agencies.

D. The Redacted DVDs Cannot Be Withheld Under Any Of The Cited PRA Exemptions

As with the three-minute video, the trial court correctly found Appellants failed to meet their initial burden to show the 19 DVDs in fact fall within any PRA exemption. *Spokane Police Guild*, 112 Wn.2d at 36; *Franklin Cnty.*, 175 Wn.2d at 480-81. This Court should affirm.

1. Pixilating The DVDs Satisfies Any Right The Doe Parties Have To Remove Identifying Information

The Doe parties again rely on RCW 42.56.240(2), which states that “[i]nformation revealing the identity of persons who are witnesses to or victims of crime” is exempt from disclosure under the PRA, if “at the time a complaint is filed the complainant, victim, or witness indicates a desire for disclosure or nondisclosure[.]” *Id.* With respect to the 19 DVDs at issue in their second appeal, the Doe parties assert the students’ “entire body must be blacked out.” Doe Supp. Br. 12; CP 690 (Doe motion for

“black box” redaction). The trial court’s rejection of this claim, on the ground that it would redact more information than section 240(2) permits, was correct for all the reasons stated in Appellants’ initial brief. The following additional points apply to the 19 DVDs:

First, nine DVDs do not show the Doe students. CP 773-75, 812. Section 240(2) does not apply to these DVDs (or to any portion of the other 10 disks that do not depict any student), as there is nothing to redact.

Second, the party asserting Section 240(2) must come forward with evidence that the witness or victim requested nondisclosure “at the time a complaint is filed.” RCW 42.56.240(2); *Sargent v. Seattle Police Dep’t*, 179 Wn.2d 376, 395, 314 P.3d 1093 (2013). Appellants claim they requested non-disclosure, but the evidence they cite shows their request fails to meet this statutory requirement. Doe Supp. Br. 10 n.23. The record shows that Appellants (through counsel) first requested nondisclosure on June 19, 2014, two weeks after the crime occurred. CP 65. Moreover, that request was made in a letter addressing *only* the three-minute video. There is no record evidence they timely invoked Section 240(2) with respect to the remaining recordings. *Id.*

Third, the trial court’s refusal to impose a “black box” over the entire body of the students was entirely correct, under the principle that redaction of identifying information under the PRA must be done

narrowly, to remove only information directly identifying the individual in the record itself. The Supreme Court last month affirmed this “four corners” rule, noting (in the related context of a PRA privacy-based exemption) that “[a]gencies and courts must review each responsive record and discern *from its four corners* whether the record discloses” exempt information. *Predisik v. Spokane School Dist. No. 81*, 346 P.3d 737, 741 (Wash. April 2, 2015) (emphasis added). Here, section 240(2) prohibits only direct release of identification in the video; other information must be disclosed, even if it might ultimately lead to identification. *Koenig*, 158 Wn.2d 173.

Looking beyond the actual content of the record in order to determine whether disclosure would reveal an individual’s identity (as Appellants suggest) would put courts and agencies in an untenable position: their ability to determine if a record was exempt, or even to explain the basis for an exemption, would depend on the particular requestor’s knowledge and would require a potentially endless inquiry into external information about the subject of the record. *See id.* at 183-84. For this reason, Washington courts reject arguments that the identity of an individual may be withheld based on concerns that disclosure could “allow someone to track down” other information about them. *King County v. Sheehan*, 114 Wn. App. 325, 344-46, 57 P.3d 307 (2002). It does not

matter whether someone who already knows the individual might recognize them from the disclosed record. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 417-18, 259 P.3d 190 (2011) (“*BIPG*”) (only officer’s name could be redacted, notwithstanding that it “may result in others figuring out [the officer’s] identity.”).

Nor is the standard whether a professional investigator could piece together someone’s identity from a record. Appellants rely on police declarations (from individuals uninvolved in this investigation) for the general point that individuals can be identified through attributes other than their faces. But that fact does not change the analysis; “the outside knowledge of third parties will *always* allow some individuals to fill in the blanks.” *BIPG*, 172 Wn.2d at 414 (emphasis added). Again, the only workable, PRA-compliant standard is the one Washington courts have already adopted and long applied: redacting only those aspects of the record that directly identify the protected individual in the record itself. *Id.* at 417-18; *Koenig*, 158 Wn.2d at 181-82.

Appellants’ proposed “black box” redaction, obscuring even the presence of an individual, plainly withholds more of the record than necessary to redact merely the students’ “identity.” It would also obscure substantial non-exempt information, in plain violation of the PRA. CP 1045-46. Construing the exemption narrowly, RCW 42.56.030, means

that the identifying information should be redacted only to the extent necessary to serve the exemption’s purpose – which, as indicated in the statute itself, is to protect life, physical safety or property. RCW 42.56.240(2). The Doe parties face no threat from disclosure: they have no reason to fear for their safety, given that the perpetrator of the shooting has been incarcerated, and that their identities have already been publicly disclosed. Accordingly, the trial court was correct to find that facial pixilation is sufficient to satisfy Section 240(2).¹¹

2. The DVDs Are Not Exempt Under The Privacy Prong Of The PRA’s Investigative Records Exemption

Appellants argue the 19 DVDs must be suppressed under RCW 42.56.240(1), which in relevant part exempts investigative records from PRA disclosure if doing so is “essential” to protect “any person’s right to privacy.” RCW 42.56.240(1). But like the three-minute video, the 19 DVDs do not implicate any party’s “right to privacy” as defined under the PRA, because these records are of legitimate public concern, and because nothing in them discloses matters that are “highly offensive to a reasonable person.” *See* Resp. Opening Br. § IV.D.2; RCW 42.56.050.

¹¹ Appellants again argue that redaction of more than the students’ faces is supported by the reversed Division II opinion in *Lindeman v. Kelso School Dist.*, 127 Wn. App. 526, 111 P.3d 1235 (2005), *rev’d*, 162 Wn.2d 196, 172 P.3d 329 (2007). That opinion is inapposite based on both its facts and the exemption at issue. It involved a video that would have been redacted into oblivion to comply with the blanket student file “personal information” exemption at issue – unlike the digital recordings here, which can be finely pixilated. Moreover, in reversing Division II, the Supreme Court ordered the *entire video released*. 162 Wn.2d 196. The case provides no support for Appellants.

The Washington Supreme Court’s April 2015 decision in *Predisik* confirms that the news Respondents’ privacy analysis is entirely correct. The case recognizes “the PRA will not protect everything that an individual would prefer to keep private.” *Predisik*, 346 P.3d at 741. The PRA’s concept of privacy is “narrower”: “a person has a right to privacy under the PRA only in ‘matter[s] concerning the private life.’” *Id.*, citing *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 135, 580 P.2d 246 (1978) and Restatement (Second) of Torts § 652D. As explained previously, the Restatement – which Appellants simply ignore – specifically recognizes that (1) records about crime and crime victims are of legitimate public concern, even where a victim objects to publicity, and (2) disclosure here would not be “highly offensive,” because the records contain no intimate or private revelations and because the facts shown in them have already been widely publicized. *See, e.g.*, Restatement § 652D cmt. b, f.

As the parties asserting the exemption, Appellants bear the burden of proving **both** prongs of the PRA’s privacy test are satisfied. *PAWS*, 125 Wn.2d at 271. The remainder of this section briefly summarizes why disclosure of the 19 DVDs would violate neither prong.

The DVDs contain matters of legitimate public concern. The Doe parties argue the footage is of no public concern because the contents do not relate to government conduct. Doe Supp. Br. 17-18. This

argument is wrong for three independent reasons. First, over three hours of the footage does show government actors (police and paramedics) engaged in their public function. CP 673-74, 1046. The public has a legitimate concern in how these first responders performed.

Second, as a matter of law, the public concern in an event does not require depiction of “government conduct.” If it did, then disclosure of routine police incident reports or video crime evidence would be privacy invasions. Courts have consistently held otherwise. *Koenig*, 158 Wn.2d at 186-87; *Anderson v. Suiters*, 499 F.3d 1228, 1235-37 (10th Cir. 2007); *see Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (records of the “commission of crime” are “without question” matters of legitimate concern to the public). To the extent the videos do not depict police activity, they still relate to the government’s law enforcement function: police and prosecutors possess the videos precisely because they depict a matter of legitimate public concern – the investigation of the shooting. *See* CP 623 ¶ 3.5 (“The surveillance videos were produced to the Seattle Police Department to aid in the police’s ongoing investigation.”). The public has a direct and legitimate interest in seeing the evidence used by authorities to investigate such a crime, and to prosecute its perpetrator. Under the PRA, the public need not rely solely on the official summary of events, but instead is entitled to inspect “all” public records.

RCW 42.56.070(1); *PAWS*, 125 Wn.2d at 251. The public’s legitimate concern also extends to Ybarra’s actions on campus in May in apparent preparation for the June 5 shooting. CP 1049.

Third, SPU suggests there is no public concern in portions of the video depicting “empty corridors” and “parking lots.” SPU Supp. Br. 18. SPU is incorrect: again, the public has a legitimate interest in all of the evidence used by police and prosecutors to investigate and prosecute this crime. *See Cox*, 420 U.S. at 492. Moreover, even if SPU were correct that the public has little concern with these public records because they depict nothing interesting, its argument would fail under the other element of the privacy test (discussed below): disclosure of such uneventful footage cannot be considered “highly offensive” to any individual.

Respondents have previously addressed the remaining points in Appellants’ supplemental briefs regarding the “public concern” element.¹²

Disclosure would not be “highly offensive to a reasonable person.” The supplemental Doe brief offers no new argument on this element. Instead, the Doe parties rely on the same trio of easily

¹² Appellants rely entirely on *Cowles Pub. Co. v. Pierce Cnty. Prosecutor’s Office*, 111 Wn. App. 502, 45 P.3d 620 (2002), a Division II case finding disclosure of personal information about a defendant’s family, solicited to support death penalty mitigation, would invade the defendant’s privacy. The case is distinguishable, as it did not involve evidence of the commission of a crime. *Id.* at 509, 510. Moreover, the court improperly “weighed” family members’ privacy against the public interest. *Id.* at 510; *see Dawson*, 120 Wn.2d at 795. The Supreme Court has twice declined to extend *Cowles* beyond its limited facts. *See Seattle Times Co. v. Serko*, 170 Wn.2d 581, 594 n.3, 243 P.3d 919 (2010); *Koenig v. Thurston Cnty.*, 175 Wn.2d 837, 845-47, 287 P.3d 523 (2012).

distinguished Division II and III cases in which privacy intrusions were found, based on disclosure of *private communications* with or about immediate family members.¹³ Doe Supp. Br. 16.

SPU argues disclosure of the DVDs would be “highly offensive” to the university because it would undermine its security system. SPU Supp. Br. 17-18. It cites no authority for the proposition that an institution has such a personal privacy interest. To the contrary, the PRA’s privacy test is meant to protect individuals from disclosure of intimate facts such as sexual relations, family quarrels, and “details of a man’s life in his home.” *Hearst*, 90 Wn.2d at 123; *Predisik*, 346 P.3d at 741. The 19 DVDs contain no such personal or intimate information. Moreover, other provisions of the PRA specify the extent to which threats to safety or security may justify non-disclosure. *See, e.g.*, RCW 42.56.240(2), .420. SPU offers no legal basis for using the PRA’s privacy test as an end-run around the limits of these narrow exemptions.

All of the reasons why disclosure of the three-minute video would not be “highly offensive” apply to the footage on the 19 DVDs. First, it is no invasion of privacy to “merely give[] further publicity to information

¹³ *Comaroto*, 111 Wn. App. 69, involved a suicide note to the deceased’s family. The court found it would be highly offensive to disclose the deceased’s final personal thoughts to her loved ones. 111 Wn. App. at 77-78. *Cowles v. Pierce Cnty.* concerned personal family information and relatives’ “feelings” about a defendant. 111 Wn. App. at 509. *Tiberino v. Spokane County*, 103 Wn. App. 680, 685, 13 P.3d 1104 (2000), involved personal emails a woman sent to her mother and sister about her alleged rape.

about the plaintiff that is already public.” Restatement § 652D, cmt. b. The facts shown in the videos have already been widely discussed publicly. *See supra*, § III.A & n.2. Second, the DVDs do not disclose any intimate or private activity of the sort protected by the PRA’s privacy test. The portion of the footage that does not depict the students cannot possibly intrude their privacy; and, as noted previously, the fact that one is a victim or witness to a high-profile, widely reported crime is not private. Third, Appellants have not demonstrated the DVDs show any conduct occurring in a place where they had a reasonable privacy expectation. Events in places where large numbers of people congregate, such as a college campus or a busy campus hall, are not private. *See, e.g., Spokane Police Guild*, 112 Wn.2d at 38.

For the foregoing reasons, and as further detailed in Respondent’s earlier brief, Appellants have not met their burden of establishing any PRA privacy-based exemption.

3. The DVDs Cannot Be Withheld As “Essential To Effective Law Enforcement”

The Doe supplemental brief argues non-disclosure of the DVDs is “essential to effective law enforcement,” and thus exempt under RCW

42.56.240(1). Doe Supp. Br. 19-21. SPU does not assert Section 240(1)'s "effective law enforcement" prong with respect to the 19 DVDs.¹⁴

Relying on declarations from a police chief in LaGrange, Georgia and a retired Tacoma detective, the Doe Appellants argue crime victims may generally be "less willing to come forward or cooperate with law enforcement officers" unless these records are suppressed. Doe Supp. Br. 19-21; CP 776, 783. This is *precisely* the type of "general contention of chilling future witnesses" the Supreme Court had held "is not enough to exempt disclosure" under RCW 42.56.240(1). *Sargent*, 179 Wn.2d at 395.

In February 2015, Division II considered a similar Section 240(1) claim, supported by a police official's declaration that is materially indistinguishable from those offered by the Doe parties. *City of Fife v. Hicks*, __ Wn. App. __, 345 P.3d 1, at ¶ 33 (Feb. 24, 2015). The Court held the "necessary to effective law enforcement" exemption could *not* be demonstrated by a declaration that "asserts only that disclosure of witness identities could make conducting various types of investigations more difficult in the future because people would be less likely to voluntarily cooperate or come forward with information." *Id.* ¶ 41. The Doe Appellants present an even weaker case: unlike the declarant in *Hicks* – an assistant chief of the police department at issue (*id.* ¶ 33) – the Doe

¹⁴ SPU did assert this exemption with respect to the three-minute video. *See* SPU Opening Br. 29.

Appellants' declarants have had no personal involvement in the underlying investigation here, and no basis for asserting that disclosure of the 19 DVDs would imperil any specific law enforcement investigation.¹⁵

Appellants have not met their burden to show nondisclosure of the 19 DVDs is "essential to effective law enforcement." The records are "presumptively disclosable upon request," because the suspect in the underlying investigation has been referred for prosecution. *Cowles Pub. Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 481, 987 P.2d 620 (1999); *Sargent*, 179 Wn.2d at 389-90. Other than their assertion of a generalized "chilling effect" – which, as noted above, is insufficient as a matter of law – Appellants make no attempt to refute that presumption, and provide no basis for this Court to find disclosure is necessary to protect effective law enforcement. SPD and KCPO do not claim disclosure threatens their investigation or the prosecution of Ybarra. *See* CP 746, 749. The DVDs cannot be suppressed based on this exemption.

¹⁵ The Doe parties again rely on *Haines-Marchel v. State Dep't of Corr.*, 183 Wn. App. 655, 334 P.3d 99 (2014), but that case does not support finding a "chilling effect" here. *Haines-Marchel* rests on a prison-specific rationale – that "effective law enforcement" required nondisclosure of a report about confidential prison informants, given the particular risks of "serious attacks against inmates suspected of providing tips to authorities" and "false reports intended to induce authorities to take action against other inmates." *Id.* at 101, 106. There is no such danger that the pixilated videos here will expose any "confidential" witness, given the publicity the students have already received.

4. The DVDs Are Not Exempt As A Terrorism-Related Plan or Assessment Under RCW 42.56.420

SPU renews its argument that surveillance video evidence of a crime, of the sort routinely captured by security cameras used by public and private institutions, are categorically exempt under the PRA's provision for terrorism assessments and response plans. SPU Supp. Br. 14-16. The exemption, RCW 42.56.420(1)(a), cannot be stretched so far without ignoring the provision's plain language and the PRA's mandate to read exemptions narrowly. RCW 42.56.030.

The exemption applies to records "assembled, prepared, or maintained to prevent, mitigate, or respond to criminal terrorist acts,... the public disclosure of which would have a substantial likelihood of threatening public safety, consisting of: (a) Specific and unique vulnerability assessments or specific and unique response or deployment plans, including compiled underlying data collected in preparation of or essential to the assessments, or to the response or deployment plans[.]" RCW 42.56.420(1)(a). The statute was passed in 2002, in response to heightened security concerns after 9/11. See Laws of 2002, ch. 335, §1.

As the Court is aware, Section 420(1)(a) has been construed in just one decision. In *Northwest Gas Ass'n v. Washington Utils. and Transp. Comm'n*, 141 Wn. App. 98, 168 P.3d 443 (2007), Division II applied the

exemption to records that are readily distinguishable from the surveillance videos in this case. The request in *Northwest Gas* sought disclosure of *all* pipeline “shapefile data” held by WUTC. *Id.* at 108. The responsive records consisted of “private, individual highly detailed gas pipeline structural and location information and underlying data,” including “exact geographic positioning system coordinates for the pipelines and terminals, locations and types of metering facilities, taps, mileposts, cathodic protection test sites, and valves, plus information about the diameter of the pipeline, depth, and commodities transported.” *Id.* at 101, 105-06. Division II found that the records – essentially the pipeline security blueprints – were exempt under RCW 42.56.420(1), based on evidence that “the WUTC currently ‘maintains’ the pipeline shapefile data to assist in responding to terrorist attack,” and that “keeping this shapefile data out of the hands of potential pranksters and terrorists is also critical to providing for the public safety[.]” *Id.* at 120 (emphasis added).

SPU argues the output of its security cameras is analogous to the detailed, attribute-level data revealing the confidential specifications of the pipeline system. SPU Supp. Br. at 15. The analogy is entirely inapt. No one is requesting access to the unique capabilities or vulnerabilities of SPU’s video security system. Blueprints, specifications and attribute-level

data about SPU's cameras may exist – but that is not the subject of any PRA request. The requests seek only the pictures taken by the system.

As the trial court noted correctly, the “possibility that a person viewing the videotape could ascertain the capabilities and location of that camera” is too remote to implicate RCW 42.56.420. CP 518. The additional declarations submitted by SPU (CP 661, 668) simply repeat what SPU argued in its earlier briefing: it is a possibility that the system's capabilities could be reverse-engineered from viewing the videos. But this speculative possibility falls far short of establishing facts from which a court or agency could conclude that public disclosure of the videos has “a substantial likelihood of threatening public safety,” as expressly required to satisfy the exemption. RCW 42.56.420(1).

SPU asserts that “[r]eleasing *any* of this footage would share the security system's vulnerabilities” and undermine campus security. SPU Supp. Br. 16. This proves too much. Under SPU's reasoning, routine crime records would be categorically exempt from disclosure. Indeed, SPU suggests that even the portion of the 19 DVDs showing police activity must be suppressed because seeing these public servants in action “would explain the police team's attack response to future terrorists.” *Id.* at 16 n.2. This extreme position cannot be squared with the PRA or Washington's well-established commitment to transparency. For

example, Seattle police use a dashboard camera system to record traffic stops. These recordings reveal “details of its surveillance capabilities” in no less a fashion than SPU claims the video here reveals information about SPU’s capabilities, and certainly have the same capacity to capture police responses to terrorist or criminal activity. Yet dash-cam videos are generally subject to disclosure under the PRA. *Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 326 P.3d 688 (2014).¹⁶

The 19 DVDs do not fall within the plain language of the statutory exemption for at least the following reasons. First, SPU has failed to meet its burden of showing that public disclosure of the videos poses “a substantial likelihood of threatening public safety,” as noted above. RCW 42.56.420(1). Given that the perpetrator has been identified, appeared to act alone, and is currently incarcerated pending trial, public safety would not be threatened by the videos’ release. Second, the DVDs do not constitute “[s]pecific and unique vulnerability assessments or specific and unique response or deployment plans,” which is all that RCW 42.56.420(1)(a) covers. The footage on the DVDs does not constitute any sort of assessment or plan. As such, the statute simple does not apply.

Third, SPU has presented no evidence that SPD or KCPO has maintained

¹⁶ Similarly, routine criminal discovery would grind to a halt if disclosure of surveillance images were as dangerous as SPU asserts. Yet the videos at issue here have been shared with Mr. Ybarra in his criminal defense with no apparent objection from SPU, and presumably will be used at his public trial. CP 746.

the videos to “prevent, mitigate, or respond to” terrorism, as required by RCW 42.56.420(1). SPU asserts that *it* used the footage after the fact to “assess its security vulnerabilities,” SPU Supp. Br. at 14, but *Northwest Gas* instructs that it is the *agency*’s purpose that matters when evaluating the exemption. 141 Wn. App. at 120 (finding exemption applies because the WUTC “currently ‘maintains’ the pipeline shapefile data to assist in responding to terrorist attack”). Here, SPD and KCPO have identified no risk at all that would result from disclosure of the DVDs.

For the foregoing reasons, SPU’s attempt to shoehorn the contents of routine surveillance footage into terrorism exemption fails.

V. CONCLUSION

The 19 DVDs are public records, and are not exempt from disclosure under the PRA. The trial court was entirely correct to deny Appellants’ preliminary injunction motions. This Court should affirm.

RESPECTFULLY SUBMITTED this 20th day of May, 2015.

Davis Wright Tremaine LLP
Attorneys for News Media Respondents

By  _____
Eric M. Stahl, WSBA #27619
Bruce E.H. Johnson, WSBA #7667
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Telephone: 206-622-3150
Fax: 206-757-7700
E-mail: ericstahl@dwt.com
brucejohnson@dwt.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of May, 2015, he caused the foregoing document to be served upon the following in the manner indicated:

Bradley P. Thoreson
Samuel T. Bull
Thomas F. Ahearne
Foster Pepper, PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299
thorb@foster.com
bulls@foster.com
aheat@foster.com

VIA EMAIL AND
FIRST CLASS MAIL

Michael R. McKinstry
Daniel J. Ichinaga
Nathaniel L. Taylor
Geoffrey A. Enns
Keith Kemper
Abigail St. Hilaire
Ellis, Li & McKinstry PLLC
2025 First Avenue, Penthouse A
Seattle, WA 98121-3125
mmckinstry@elmlaw.com
dichinaga@elmlaw.com
ntaylor@elmlaw.com
genns@elmlaw.com
kkemper@elmlaw.com
asthilaire@elmlaw.com

VIA EMAIL AND
FIRST CLASS MAIL

John Gerberding
King County, Office of the Prosecuting Attorney
516 3rd Avenue, Room W400
Seattle, WA 98104-2388
John.gerberding@kingcounty.gov

VIA EMAIL AND
FIRST CLASS MAIL

Mary Perry
Jessica Nadelman
Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
mary.perry@seattle.gov
Jessica.nadelman@seattle.gov

VIA EMAIL AND
FIRST CLASS MAIL

Kenneth Masters
Masters Law Group
241 Madison Avenue North
Bainbridge Island, WA 98110
ken@appeal-law.com

VIA EMAIL AND
FIRST CLASS MAIL

Arthur West
120 State Avenue N.E., #1497
Olympia, WA 98501
awestaa@gmail.com

VIA EMAIL AND
FIRST CLASS MAIL

Erica Hill
ehill@kcpq.com

VIA EMAIL

Sarah Garza
sgarza@komotv.com

VIA EMAIL

Johnita Due
Johnita.due@turner.com

VIA EMAIL

Executed this 20th day of May 2015 at Seattle, Washington.



Eric M. Stahl

DWT 26784969v4 0100848-000001