

NO. 72256-5-I

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

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Appellant,

v.

ROBERT NORTHUP,

Appellee.

APPELLANT'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

At Northup's request, the Court ordered supplemental briefing. This supplemental briefing is limited specifically to the application of *City of Lakewood v. Koenig*, --- Wn.2d ---, --- P.3d ---, 2014 WL 7003790 (2014), to Northup's appeal. *Koenig* does not help Northup, however. Northup did not challenge the Department's brief explanations in the trial court or his opening brief, and, therefore, cannot do so now. Moreover, even if Northup had properly raised the issue on appeal, the Department's exemption log satisfies the standards articulated in *Koenig*.

II. STATEMENT OF ISSUES

1. Whether Northup waived any argument regarding the Department's brief explanation by failing to raise the argument in his complaint, his response to the Department's summary judgment motion, and his opening brief.

2. Whether the Department's explanation of its redactions to the 16-page debrief violated the brief explanation requirement as interpreted in *City of Lakewood v. Koenig*, --- Wn.2d ---, --- P.3d ---, 2014 WL 7003790 (2014).

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III. ARGUMENT

A. Northup Waived Any Argument That the Department Violated the Brief Explanation Requirement by Failing to Raise the Issue Below or in His Opening Brief

In his motion for supplemental briefing, Northup appears to argue that supplemental briefing is required to determine whether the Department violated the brief explanation requirement as codified in RCW 42.56.210(3) and interpreted in *Koenig*.¹ But he has never alleged a violation of the brief explanation requirement. A party waives an argument by failing to raise it below. *See Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) (noting that failure to raise an issue before the trial court generally precludes a party from raising it on appeal); *Green v. Normandy Park*, 137 Wn. App. 665, 688, 151 P.3d 1038 (2007) (same). Northup filed three complaints in the trial court; none of those three complaints raised a claim under RCW 42.56.210(3) or challenged the adequacy of the Department's brief explanation. CP 528-31, 545-547, 563-65. Therefore, Northup did not properly raise the issue below because he failed to raise the issue in his complaint.

Even if Northup had properly raised the issue in his complaint, he abandoned the issue by failing to make any argument based on RCW

¹ Because the only issue discussed by the Court in *Koenig* was the brief explanation requirement, there appears to be no other possible basis for Northup to seek to invoke that case in this appeal.

42.56.210(3) in his motion for summary judgment or in response to the Department's motion for summary judgment. CP 99-118. 309-332. A party abandons a claim by failing to address the claim in its opposition pleadings, present evidence to support the claim, or otherwise argue the claim when responding to a motion for summary judgment. *See West v. Gregoire*, --- Wn. App. ---, 336 P.3d 110, 113 (2014). Northup abandoned his claim by failing to present any argument or evidence challenging the Department's brief explanation in response to the Department's motion for summary judgment.

Furthermore, even if Northup had not waived this claim by failing to plead it in his complaint and had not abandoned this claim by failing to raise it in response to the Department's motion for summary judgment, he waived it by not assigning error or otherwise arguing that the Department violated the brief explanation requirement in his opening brief. An appellate court will not consider an issue when the appellant has failed to raise it in his assignments of error and failed to present any argument on the issue. *See State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995). Based on his failure to raise the issue in his complaint, his opposition to the Department's motion for summary judgment, or his opening brief, Northup has thrice waived this issue.

Finally, Northup cannot claim that the novelty of the Supreme Court's decision precluded him from properly raising the issue below. The *Koenig* decision was based on the Court's interpretation of the brief explanation requirement found in RCW 42.56.210(3). This statute existed long before Northup filed this case. Additionally, the Supreme Court's decision was not the first appellate decision to interpret this provision. A number of published appellate decisions, including the Court of Appeals' opinion in *Koenig*, have interpreted this requirement. *See Sanders v. State*, 169 Wn.2d 827, 845-48, 240 P.3d 120 (2010); *City of Lakewood v. Koenig*, 176 Wn. App. 397, 309 P.3d 610 (2013); *Gronquist v. Wash. State Dep't of Licensing*, 175 Wn. App. 729, 754-55, 309 P.3d 538 (2013). Assuming, without conceding, that *Koenig* represents a change in the law, it was a change that was foreseeable based on the logic of these appellate decisions.

Because any argument regarding the Department's brief explanation has been waived, it is unnecessary for the parties to brief the application of *Koenig*. It does not apply to any issue properly before the Court in this case and this Court need not consider any argument based on *Koenig*.

B. The Department's Explanation of Its Claimed Exemptions Did Not Violate RCW 42.56.210(3) as Interpreted by *Koenig* Because Its Exemption Log Provided Sufficient Information for Northup to Evaluate the Claimed Exemptions

Under RCW 42.56.210(3), an agency that withholds or redacts a document must “include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.” The purpose of the brief explanation requirement is to provide sufficient information for the requester to evaluate the claimed exemptions and to provide meaningful judicial review. *Koenig*, 2014 WL 7003790, at *3. When an agency fails to provide a sufficient explanation, the requester is entitled to costs and attorney’s fees. *Id.* at *5.

In *Koenig*, the Supreme Court evaluated the City of Lakewood’s explanation for the redaction of driver’s license numbers in response to a public records request for three sets of records. *Id.* at *1. The Court concluded that Lakewood’s explanation was insufficient because it failed to cite specific exemptions and failed to explain how a statute that provided for confidentiality of an individual’s driving record kept by the state department of motor vehicles applied to records held by the City. *Id.* at *3-4. The Court indicated that the level of information required to fulfill the brief explanation requirement depends on the nature of the exemption

and the document or information redacted. *Id.* at *3. When it is clear from the face of the record the type of information that is redacted and that the information is exempt, simply citing to a statute could be sufficient. *Id.* However, in other circumstances, more information may be required. *Id.* Ultimately, the inquiry is not whether the information was correctly redacted but whether the agency provided sufficient information in its brief explanation to allow the requester to make a threshold determination that the exemption applies. *Id.* at 3-4; *see also* WAC 44-14-04004(b)(ii).

Here, the Department provided a sufficient explanation related to its redaction of the 16-page debrief.² When the Department produced the redacted debrief, it provided Northup with an Agency Denial Form/Exemption that contained the pages that were redacted and the basis for the redactions. CP 502-03. The Department's Agency Denial Form/Exemption Log stated that the "records concern security threat groups and contain information the disclosure of which may compromise the safety and/or security of people and/or a facility." CP 502. The explanation then cites two specific statutory provisions: RCW 42.56.240(1) and a provision that was later codified as RCW

² Northup's motion for supplemental briefing did not identify specifically which explanation of the Department he was contesting. The Department produced over 5,600 pages of records in response to Northup's request. CP 49-50. As a result, the Department is left to speculate which explanation Northup is contesting. Based on the context of the motion, however, the Department believes that Northup is referring to the debrief.

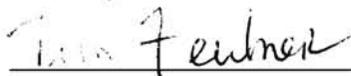
42.56.240(12). Examining this explanation along with the carefully redacted debrief, the information provided by the Department allowed Northup to determine generally what information had been redacted and the basis for the redaction. Such information was sufficient to allow Northup to make a threshold determination of whether the claimed exemptions applied. Therefore, the Department's exemption log complied with the brief explanation requirement as articulated in *Koenig*.

IV. CONCLUSION

The Department respectfully requests that the Court decline to consider whether the Department violated the brief explanation requirement because Northup has waived any such argument. If the Court considers Northup's arguments, the Department requests that the Court find that the Department did not violate the brief explanation requirement as articulated in *Koenig*.

RESPECTFULLY SUBMITTED this 2nd day of February, 2015.

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I certify that I served a copy of the foregoing document on all parties or their counsel of record as follows:

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

EXECUTED this 2nd day of February, 2015, at Olympia, WA.



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