

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  ATTORNEY

No. 38657-7-II

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

CITY OF LAKEWOOD, A Municipal Corporation of the State of
Washington,

Respondent,

Vs.

DAVID KOENIG, individually,

Petitioner.

BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

This matter involves a discovery issue in civil litigation. Yet, the Petitioner maintains that he has special status because this case is styled as a Public Records Act (PRA), chapter 42.56 RCW matter. The Pierce County Superior Court granted the City of Lakewood's ("City") Motion to Compel, where the party resisting discovery, here, Mr. Koenig, did not make a timely request for a protective order, nor set forth any facts which would have justified a protective order. The issue is whether the Pierce County Superior Court abused its discretion in granting the City's motion. Because the Superior Court acted within its discretion in granting the City's motion, there is no basis to reverse the decision of the trial court.

II. RESTATEMENT OF FACTS

Petitioner, David Koenig, obtained discretionary review of a December 5, 2008 Pierce County Superior Court decision compelling him to answer two discovery requests propounded to him.

At issue are two discovery requests, which were served upon him on or about May 13, 2008, in which the City asked:

INTERROGATORY NO.6:

Have you been a party to any lawsuits, including bankruptcy and/or divorce proceedings, in the past ten years? If so, provide:

- a. a description of the nature of lawsuit;
- b. the names of parties (or case name);
- c. the court and cause number;
- d. the name of the attorney representing you;

- e. the name of any insurance company involved; and
- f. the outcome of lawsuit.

REQUEST FOR PRODUCTION 1:

If any of the lawsuits referenced in the preceding interrogatory were resolved by way of settlement or entry of a judgment in your favor, please produce copies of such documents.

(CP 30)

In responses, Mr. Koenig responded,

It is well established that neither the identity of the requester nor the purpose of a request for records are relevant to the question of whether an agency has violated the Public Records Act, Chapter 42.56 RCW ("PRA"). Therefore, Interrogatories Nos. 1-6 are clearly improper as they are not calculated to lead to the discovery of admissible evidence.

(CP 32)

When Mr. Koenig did not timely seek a protective order, the City requested that the Superior Court compel production to these responses.

(CP 19). Mr. Koenig responded, claiming that he should not have to answer this discovery, and for the first time, six months after receiving the discovery at issue, sought a protective order. (CP 141).

At a December 5, 2008 hearing, the Superior Court entered an order directing him to furnish answers to this discovery by January 5, 2009. (CP 176). Mr. Koenig sought discretionary review of this order. (CP 178). A commissioner of this Court granted Mr. Koenig's motion to stay this discovery and granted discretionary review. The City of

Lakewood now requests that this Court affirm the decision of the Pierce County Superior Court.

III. RESTATEMENT OF THE ISSUE

Did the trial court abuse its discretion in granting the City of Lakewood's Motion to Compel Discovery where (i) Mr. Koenig did not timely seek a protective order; (ii) where the information sought by the City was believed to be likely to lead to admissible evidence; and (iii) where Mr. Koenig failed to articulate any specific harm which would merit a protective order per CR 26(c)?

IV. ARGUMENT

Claiming that an agency (such as the City of Lakewood) may not propound discovery in the context of PRA-related without some express authority to do so is contrary to well-settled law. Quite the opposite, the Supreme Court, has held that (1) PRA litigation is to be governed by the Rules of Civil Procedure; and (2) the right of an agency to seek a determination of disclosure of records is rooted in a plain reading of the PRA. By employing the Rules of Civil Procedure in this matter and granting the City's Motion to Compel, the trial court did not commit reversible error.

Under the applicable analysis pertinent to trial court discovery, the proper focus is not whether the City of Lakewood should be entitled to

utilize the Rules of Civil Procedure to obtain discovery in a civil lawsuit – the Supreme Court has already resolved this issue by holding that the Rules of Civil Procedure govern the litigation of PRA cases. Implicit in the Court’s holding is those civil rules pertaining to discovery also apply. Upon application by a party, the trial court retains broad discretion in the manner, timing and scope of such discovery. The proper inquiry in the case at bar is whether the trial court abused its discretion when it applied the Rules of Civil Procedure relevant to discovery, exercised its discretion to order discovery, and compelled Mr. Koenig to produce his recent litigation history. In balancing these factors, the trial court did not abuse its discretion. The decision of the Pierce County Superior Court should be affirmed.

Mr. Koenig’s RAP 18.1 fee request is premature and should be denied insofar as Mr. Koenig has yet to prevail on the merits of this case.

A. The Rules of Civil Procedure Apply.

The Washington Supreme Court has held that “normal civil procedures are an appropriate method to prosecute a claim under the liberally construed [PRA].” *Spokane Research v. City of Spokane*, 155 Wn.2d 89, 104-105, 117 P.3d 1117 (2005). The Supreme Court has further noted in *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007), that the PRA permits the agency to commence suit. *Id.*, 162

Wn.2d at 755. The *Soter* Court expressly clarified that agencies have the right to access the courts and commence suit under the PRA and that the agency's access to the courts does not impinge upon the rights of a requestor to seek public records. *Id.*, 162 Wn.2d at 753, fn. 16.

Although Mr. Koenig claims that the City's initiation of the present suit can be viewed as a tool to "bludgeon" requestors into some sort of compliance (Brief of Appellant at p. 1), the Supreme Court has spoken on the issue:

The Spokesman-Review asserts that agencies will be encouraged to haul records requesters, who are unable to afford to defend themselves, into court. However, a public records requester who does not wish to engage in a court battle could simply withdraw the public records request, making the agency's action moot. In addition, the requester could move for voluntary dismissal of the action if he or she no longer seeks access to the public record. CR 41(a). Withdrawing the record request is not significantly different from deciding to no longer pursue access to the record. Thus, we perceive no chilling effect on record requesters. And the Court of Appeals noted, if a record requester chooses to move forward and prevails, he or she would recover all costs and reasonable attorney fees. RCW 42.56.550(4).

Soter, 162 Wn.2d at 753, fn. 16 (Emphasis Added).

In this case, the City commenced this litigation alleging one cause of action, Declaratory Relief under chapter 7.24 RCW. (CP 3, ¶ IV). Mr. Koenig did not dispute the basic proposition that the City has the right to seek declaratory relief. (CP 17, ¶ 4.1).

Mr. Koenig appears to challenge *whether discovery should be permitted* at all in such a lawsuit. This challenge is belied by both the facts and the law. Because the Supreme Court has noted that the Rules of Civil Procedure apply in such a suit, it necessarily follows that those rules pertinent to discovery, i.e., CR 26-37, apply. Mr. Koenig did not take issue with a number of other requests propounded by the City. (CP 32-35). The dispute in this case is the *scope of discovery* in a lawsuit where the underlying controversy touches on the PRA. Both the Civil Rules and case law answer this question as well.

B. Standard of Review for Discovery Orders.

CR 26(b)(1) provides for a broad scope of discovery; a party “may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” A trial court’s decision on a discovery dispute is reviewed for an abuse of discretion. *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 777, 819 P.2d 370 (1991). A trial court abuses its discretion when its decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The deference afforded the trial court is rooted in the fact that “[t]he trial court is inarguably in the best position to determine the nature

and extent of the burdens and risks” in a discovery dispute. *Gillett v. Conner*, 132 Wn. App. 818, 826, 133 P.3d 960 (2006).

“The standard of relevance for purposes of discovery is much broader than the standard required under the evidence rules for admissibility at trial. The fact that the evidence sought would otherwise be inadmissible at trial is not an impediment to discovery so long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” *Barfield v. City of Seattle*, 100 Wn.2d 878, 886, 676 P.2d 438 (1984)(Internal citations omitted).

In reviewing the trial court’s discovery order under the proper analytical framework, there is no reversible error because the trial court did not abuse its discretion.

C. The Trial Court Did Not Abuse Its Discretion.

The trial court did not err in ordering Mr. Koenig to respond to the City’s discovery requests for three reasons. *First*, Mr. Koenig had the initial burden to seek a protective order. He waited six months before seeking the order, and did so only in response to the City’s motion to compel. Even after a six month delay to prepare his position, Mr. Koenig failed to satisfy his burden. *Second*, it has generally been recognized that an adversary’s litigation history is discoverable in the course of civil litigation. The fact that this case involves litigation in the PRA context is

not a basis for altering this rule. *Third*, the request legitimately seeks information which satisfies CR 26(b)(1)'s broad mandate of information "which is relevant to the subject matter involved in the pending action, wither it relates to the claim or defense of the parties seeking discovery...." Although the parties clearly dispute the weight that the trial court should afford this information should the trial court find the City to have violated the PRA, the dispute over what weight to afford this information should not be a bar to whether this information is discoverable.

One other allegation merits attention; contrary to Mr. Koenig's claims, the commencement of this litigation, and the subsequent issuance of discovery does not discriminate against his rights as a PRA requestor. Because the order at issue was proper, the trial court did not abuse its discretion by compelling Mr. Koenig to answer this discovery.

1. No Facts Were Elicited Which Would Have Justified a Protective Order.

Mr. Koenig failed to meet his burden before the trial court. The Supreme Court has explicitly stated that the party who seeks to resist discovery carries the burden affirmatively seek a protective order under CR 26(c). *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 354, fn 89, 858 P.2d 1054 (1993). A "defendant may not

unilaterally determine what is relevant to plaintiff's claim and defendant's remedy, if any, was to seek a protective order pursuant to CR 26(c)." *Id.*, citing, *Gammon v. Clark Equip. Co.*, 38 Wn.App. 274, 281, 686 P.2d 1102 (1984), *aff'd*, 104 Wn.2d 613, 707 P.2d 685 (1985).

Despite well-settled law, Mr. Koenig did not take it upon himself to seek court protection, instead he argues that the civil rules did not apply to him,

You[r] letter of June 25, 2008, asserts that Koenig should have sought a protective order under CR 26(c). We disagree. This is not a typical civil case.

(CP 112).

But this is "a typical civil case." Despite Mr. Koenig's issues with the civil rules, the Supreme Court has already noted that the Civil Rules are the framework within which the parties are to litigate this dispute. *See generally, Spokane Research, supra*, 155 Wn.2d at 104-105. As outlined above, *Fisons Corp* mandates that the party seeking to resist discovery has the primary burden of seeking a protective order – which Mr. Koenig did only after the City sought to enlist the trial court's assistance – approximately six months after receipt of the discovery.¹ This comes too little, too late. This court would be wholly justified in affirming on the

¹ The discovery at issue was propounded on May 13, 2008. (CP 102). Mr. Koenig waited until November 18, 2008 when he filed his motion for a protective order. (CP 141).

fact that Mr. Koenig did not timely seek a protective order. *Rhinehart v. Seattle Times*, 51 Wn.App. 561, 754 P.2d 1243, *rev. den.*, 111 Wn. 2d 1025 (1988), *affirmed*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984)(waiver of right to object to discovery arises when resisting party fails to timely respond or seek protective order).

Additionally, Mr. Koenig has failed to carry his burden on obtaining a protective order. Under CR 26(c), a trial court, upon a showing of “good cause,” is empowered to issue a protective order to “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” An applicant for a protective order must demonstrate that there are specific harms which would occur if the order were not granted. *See e.g., Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 232, 654 P.2d 673 (1982), *aff’d*, 467 U.S. 20 (1984). “Good cause [for a protective order] must be demonstrated by a specific factual showing. Stock, boilerplate conclusions are not sufficient.” Karl Tegland, 3A Wash. Practice: Rules Practice, § 43, p. 608 (2006 Ed); *accord, Dreiling v. Jain*, 151 Wn.2d 900, 916-17, 93 P.3d 861 (2004)(*citing Foltz v. State Farm*, 331 F.3d 1122 (9th Cir. 2003)) (“[A] party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted. Unsubstantiated allegations will not satisfy the rule. The

requesting party must support, where possible, its request by affidavits and concrete examples.”).

Mr. Koenig has made no factual showing of any potential harm. Mr. Koenig failed the initial burden to establish an entitlement to a protective order. *Fisons Corp.*, 122 Wn.2d at 354. He never satisfied this burden. There is no testimony, declarations, or evidence of any kind that this discovery request had chilled his right to seek public records or impaired his right to support a claim or defense. There is no claim that his aggregation of what should otherwise be public information was an annoyance, caused him embarrassment, oppressed him or was an undue burden or expense. He has argued that the commencement of this litigation by the City is somehow a tool used to bludgeon him, but this is only an unsupported argument. He cites no facts to support this contention, and the law is otherwise. As the Supreme Court has specifically noted, an agency’s right to seek court redress under the PRA does not impose a chilling impact on requestors. *Soter*, 162 Wn.2d at 753, fn. 16. The trial court further recognized this when it opined that “some of the requests are not that out of line, quite honestly going through them. And looking at the purpose of discovery, it’s not necessarily to lead to things that are - -.” (VRP 11). Here, the trial court lacked any meaningful facts from Mr. Koenig which would have supported limitations on

discovery. As such, the trial court did not abuse its considerable discretion.

Mr. Koenig also suggests as an alternative that the trial court should have deferred action on this discovery until after such time as it determined whether the City violated the PRA. But a trial court has broad discretion in not only how it approaches discovery, but how litigation is handled. CR 26(c), CR 26(d); *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 556, 815 P.2d 798 (1991). The City has expressed its desire for this same prompt resolution on all issues. Indeed, a number of provisions of the PRA are designed to expedite resolution of PRA-related requests. *See e.g.*, RCW 42.56.550(1)(requestor can use show cause provision). The trial court apparently agreed that an otherwise prompt disposition when it ordered the discovery at issue answered. This is not an abuse of discretion.

2. An Adversary's Prior Litigation History Is Routine In Civil Discovery.

The discovery request at issue is wholly proper. As noted by one out-of-state court, there is certain information which is so basic to be beyond dispute to be discoverable:

It should be noted, in the Court's experience, that the discovery of background information such as name, address, telephone number, date of birth, driver's license number, and social security number is considered routine information in almost all civil discovery matters.

Gober v. City of Leesburg, 197 F.R.D. 519, 521 (M.D. Fla. 2000).

The information sought by the City in this case is the sort of routine information sought in any civil matters. As the Supreme Court recognized, "although certain information may not be used as proof at the trial, still, information obtained by discovery may aid a party in preparing his case, in anticipating his opponents' position, and in gathering further evidence." *Barfield*, 100 Wn.2d at 886, *citing*, 4 J. Moore & J. Lucas, *Federal Practice* para. 26.56[4], at 26-170 (2d ed. 1983). Prior litigation history qualifies as appropriate background information and for which discovery is proper.

Washington courts have recognized that prior litigation history is generally recognized as discoverable in ordinary civil litigation as clearly relevant and likely to lead to admissible evidence. *See e.g., Cobb v. Snohomish County*, 86 Wn. App. 223, 236, 935 P.2d 1384 (1997), *review*

denied, 134 Wn.2d 1003, 953 P.2d 96 (1998) (issue of parties' prior litigation was relevant under doctrine of avoidable consequences to issue of reasonableness of not making such a payment in case at hand).² Prior litigation is discoverable as it is also likely to lead to the discovery of prior convictions which is material and relevant to this action because the fact of conviction of certain crimes is admissible under ER 609 to impeach a witness. The trial court further observed that such information goes to whether a claimant has standing to even seek damages. (VRP 10-11). Mr. Koenig complains that the text of this interrogatory mirrors that of a standard interrogatory required of certain cases in King County Superior Court. So what? If anything, this illustrates that the discovery at issue is basic discovery.

3. The Information Is Relevant And Likely To Lead To Admissible Evidence.

This information is the sort of relevant information and likely to lead to admissible evidence should Mr. Koenig establish that the City erred in redacting driver's license numbers as it may be relevant to the per-day assessment afforded by RCW 42.56.550(4).

² Of course, Mr. Koenig seemed to have believed that the City of Lakewood's prior litigation history must have had some relevance to the issues in this case as evidenced by his submission of documents from other litigation involving the City. (CP 60-98)(pleadings from *David Koenig v. City of Lakewood*, Pierce Co. Superior Ct. 06-2-14000-7, COA Case No. 37761-6-II (decision pending)); (CP 127-138)(pleadings from *City of Lakewood v. Frederick Cornell*, Pierce Co. Superior Ct. Cause No. 08-2-13913-7); CP 139 (Pierce Co. Superior Ct. Docket from *City of Lakewood v. John Hathaway*, Pierce Co. Superior Ct. Case No. 07-2-09965-0).

As the Supreme Court has clarified during the pendency of this appeal, in assessing penalties under the PRA, trial courts are guided with a number of factors to consider should it be compelled to impose penalties under the PRA. *Yousoufian v. Office of Ron Sims, King County Executive*, 165 Wn.2d 439, 458-459, 200 P.3d 232 (2009). The Supreme Court announced some sixteen non-exclusive factors which can be resummarized (accounting for overlap) as, (1) clarity of the PRA request; (2) promptness of the agency's response (including requestor's need for records); (3) the agency's attitude towards the request (i.e., was the agency helpful and did they act in good faith, or negligent or worse); (4) was the agency staff trained and supervised; (5) reasonableness of any explanation for noncompliance; (6) did the agency have a mechanism to track and retrieve public records; (7) potential for harm, including economic loss or loss of governmental accountability; (8) deterrent effect of the penalty to deter future misconduct considering the size of the agency; and (9) the facts of the case. *See id.*

Discovery of Mr. Koenig's litigation history has a potential impact on several of these factors. More importantly, only a handful of these factors solely examine the agency's conduct. Rather, for most of these *Yousoufian* factors, the agency's conduct is largely measured against its interactions with a requestor and cannot be viewed in isolation. *Amren v.*

City of Kalama, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997); *accord*, *Yousoufian v. King County Executive*, 152 Wn.2d 421, 98 P.3d 463 (2004). Several of these factors merit discussion.

One of the *Yousoufian* factors looks to whether an agency is helpful in responding to a requestor. In this case, the City made clear that it wanted to ensure that it fully responded to Mr. Koenig's request. While Mr. Koenig appears to dispute the City's motives in this regard, the City's rationale for doing so makes perfect sense – the City noted a pattern of deliberate delay on Mr. Koenig's part before commencing suit against governmental entities – ostensibly to maximize a monetary award should the agency be in error. (CP 40-55). As the City noted before the trial court, it had already been sued once by Mr. Koenig some fifteen months after it denied an earlier request, with Mr. Koenig waiting until the last day of the one-year statute of limitations before filing suit, and until the last day of the 90 day tolling period before serving the City. The City also learned that Mr. Koenig has delayed filing lawsuits in King and Pierce Counties until the last day of the applicable statute of limitation and delayed service of these suits until the eve of the applicable tolling period. There are likely other examples.

Such a delay also goes towards whether a requestor has a genuine interest in the records (thus, potentially increasing the penalty). In

Youfousian, the requested records pertained to a prompt then-pending public vote on the funding of a new football stadium. Those records had temporal relevance to the information. By contrast, a pattern of deliberate delay in procuring allegedly wrongfully-denied records serves to undermine any claims that the requestor had a prompt need for these records.

Youfousian also looks to whether the request is clear and whether the agency has been prompt and reasonable in its handling of the request. An examination of other requests by Mr. Koenig which have merited litigation is helpful. In this case, Mr. Koenig has limited his request to a claimed improper redaction of third-party driver's license numbers. The City has maintained that with its past interactions with Mr. Koenig, that although there have been mistakes, it has attempted in good-faith to resolve PRA-related disputes. The City, however, believes that where it is the requestor that is being unreasonable (by failing to reasonably clarify such a request), the demonstration through other examples involving agencies and subsequent contact with these agencies would serve to illustrate that the City of Lakewood has done what it could reasonably be expected to satisfy this requestor. Of course, this also stands to reason that this requestor wants these records; in published press accounts, Mr. Koenig seems to brag about his success with suing governmental agencies.

(CP 37). If these other lawsuits appear to be manufactured suits for perceived technical violations of the PRA, this only serves to put the City's response vis-à-vis this requestor in a suitable light should the trial court reach the penalty phase of this litigation.

“The fundamental principle of discovery is that a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” *Doe v. Puget Sound Blood Center, supra*, 117 Wn.2d at 777. Discovery is not limited to the precise issues framed by the pleadings. *Id., citing, Bushman v. New Holland Div.*, 83 Wn.2d 429, 434, 518 P.2d 1078 (1974). The information sought by the City is relevant and not privileged. The trial court did not abuse its discretion in directing Mr. Koenig to respond to this discovery.

4. Propounding Discovery In This Case Does Not Discriminate Against A Requestor.

Mr. Koenig further complains that the City has somehow discriminated against him in the processing of this litigation. This argument fails for several reasons. First, as noted above, Mr. Koenig does not dispute the basic proposition that the City has the right to seek declaratory judgment in the case at bar. (CP 7, ¶ 4.1; CP 17, ¶ 4.1). This is reinforced by his own answers to that discovery which he did not seek a protective order. When afforded the opportunity to outline the ways in

which he claims that the City violated the PRA, he did not identify this as one of them. (CP 110, 33).³ The simple fact of the matter is that the commencement of a lawsuit, such as this, cannot constitute discrimination of a requestor under the PRA.

A governmental entity may take appropriate post-production actions as it may pertain to these records. *Livingston v. Cedeno*, 164 Wn.2d 46, 186 P.3d 1055 (2008). The circumstances of *Livingston* illustrate this point. In *Livingston*, an inmate made a request for records under the PRA to the Department of Corrections (DOC). The records which were sought were training records of a corrections officer. In response to this request, DOC copied and mailed the records to the inmate at the prison. However, DOC seized these records as “contraband” under its inmate mail policy. The inmate claimed that DOC violated the PRA by seizing those records which he requested.

³ The City also sought in discovery,

Interrogatory No. 13: Do you maintain that the City of Lakewood otherwise violated the provisions of the Public Records Act, chapter 42.56 RCW in the processing of the public records requests forming the basis of this litigation? If so, please state with specificity all facts upon which you base such contention. (CP 110)

Answer: See paragraph 3.5 in Koenig’s *Answer* regarding the redaction of driver’s license numbers. By citing inapplicable exemptions the City further violated RCW 42.56.210(3). (CP 33).

Paragraph 3.5 of Koenig’s *Answer* notes in part, “Koenig does not care to litigate other possible violations so the matter is moot and/or non-judicial.” (CP 17).

The Supreme Court concluded that by seizing the records, DOC did not violate the PRA. Although the PRA compelled DOC to produce the records, and DOC complied with its mandate under the PRA, what DOC did afterwards, by seizing the records, was a different issue. This was so because DOC's post-production conduct was not governed by the PRA. Instead, DOC's conduct was governed by different considerations, namely, a statutory scheme designed to ensure the safety of correctional facilities.

Livingston marks a distinction between two functionally different governmental functions: the disclosure of records and compliance with the PRA, on one hand, and the agency's post-disclosure conduct on the other hand. As *Livingston* illustrates, what an agency does after it satisfies its obligations under the PRA, is distinct from the PRA and more specifically, does not violate the agency's obligations under RCW 42.56.080.

RCW 42.56.080 requires, "[a]gencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.070(9) or other statute which exempts or prohibits disclosure of specific information or records to certain persons... ." There is no claim, and indeed there are no facts to support any claim that Mr. Koenig's request for records was

processed any differently than that of any other requestor. Mr. Koenig received the same records that any similarly-situated requestor would have received. The City made the same redactions to his records which another hypothetical requestor would have had, and the City would have made the same claims of exemption had another requestor sought these same records. This is all that RCW 42.56.080 requires.

Mr. Koenig protests, without support of any law, what the City did after it produced the records. As *Livingston* notes, what an agency does after it complies with its disclosure obligations does not implicate the PRA. Although an agency may face liability should it have erred in withholding disclosable documents, the fact that an agency takes post-disclosure action does not violate the PRA.

Indeed, to hold as Mr. Koenig suggests, would be to undermine the Supreme Court's *Soter* decision which clarifies that agencies have the same right of access to the courts that requestors do. Under the approach advocated by Mr. Koenig, any agency-initiated litigation would be viewed as discriminatory against that particular requestor as it would necessarily entail an analysis of why the agency behaved the way that it did in filing such a lawsuit. Such an inquiry goes beyond the scope of the plain language of RCW 42.56.080.

D. Any Request For Attorney Fees Under the PRA Should Be Denied.

Mr. Koenig requests that this Court, pursuant to RAP 18.1(b) and RCW 42.56.550(4), award him his attorney fees should he prevail. However, even if he were obtain a reversal of the trial court decision, because he has yet to prevail on the merits, i.e., demonstrate that the City erred by redacting driver's license information, Mr. Koenig's request for fees is premature and should be denied.

The standard for determining the entitlement to prevailing party status for an award of fees, under RCW 42.56.550, "relates to the legal question of whether the records should have been disclosed on request." *Spokane Research*, 155 Wn.2d at 103; *see also, Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 196, 181 P.3d 881 (2008)(fee request denied as premature where requestor had not yet obtained records, only determined agency was subject to PRA). Mr. Koenig has yet to obtain a determination that the City violated the PRA. The request is premature.

The premature nature of this discovery dispute mirrors a recent discovery dispute where this Court has had the opportunity to deny a RAP 18.1 attorney fee request where discretionary review was obtained to review a trial court discovery order where the petitioner had yet to prevail

at trial. *See, McCallum v. Allstate Prop. & Cas. Ins. Co.*, 149 Wn. App. 412, 428, 204 P.3d 944 (2009). Although *McCallum* involves a different statutory scheme than the one at issue in the case at bar, there is enough of a similarity between these two cases which justify a denial of RAP 18.1 fees at this time.

In *McCallum*, the respondent sued her insurer under the Consumer Protection Act (CPA), chapter 19.86 RCW for the alleged bad-faith handling of an insurance claim. In the course of that litigation, the defendant-insurer obtained discretionary review of a trial court order which vacated a protective order prohibiting disclosure of certain claim handling information. This Court concluded that the trial court properly vacated the discovery order. Although the CPA authorizes an award of reasonable attorney fees for a prevailing claimant, per RCW 19.86.090, this Court nevertheless denied the respondent's RAP 18.1 fee request on the ground that the respondent had yet to establish that her insurer violated the CPA.

Most significantly, both the CPA and the PRA provide a liberal construction. The CPA is designed to protect consumers from unfair and deceptive acts and practices in commerce. RCW 19.86.020. In turn, the legislature has mandated that the CPA "be liberally construed that its beneficial purposes may be served." RCW 19.86.920. The PRA, like the

CPA, provides a liberal construction “to assure that the public interest will be fully protected.” *Yousoufian*, 165 Wn.2d at 457, *quoting*, RCW 42.56.030. But even a liberal construction has its limits; one of those, as *McCallum* illustrates, is that a RAP 18.1 attorney fee request will be denied on discretionary review over a discovery issue where a claimant has yet to prevail on the underlying merits of the controversy between the parties.

Such is the case here. Mr. Koenig has yet to prevail on the underlying merits of this case. Mr. Koenig has yet to demonstrate that the City erred by withholding and redacting driver’s license numbers from those documents which he requested. As such, Mr. Koenig is not a prevailing party. His RAP 18.1 fee request should be denied.

CONCLUSION

For the foregoing reasons, the decision of the Pierce County Superior Court should be affirmed in all respects, and Mr. Koenig’s request for attorney fees should be denied.

DATED: June 2, 2009.

CITY OF LAKEWOOD,
HEIDI ANN WACHTER, CITY ATTORNEY

By: _____

MATTHEW S. KASER, WSBA # 32239
Associate City Attorney, City of Lakewood

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CERTIFICATE OF SERVICE

I hereby certify that on June 2nd, 2009, I served the foregoing Brief of Respondent on William John Crittenden, by the following indicated methods:

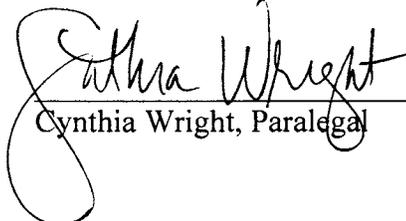
* E-Mail to wjcrittenden@comcast.net (brief sent in PDF format), delivery confirmation requested

* And by ABC Legal Messenger Service to be delivered to:

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The undersigned hereby declares, under penalty of perjury, that the foregoing statements are true and correct.

Executed at Lakewood, Washington this 2nd day of June, 2009.



Cynthia Wright, Paralegal