

I. INTRODUCTION

Pursuant to this Court's *Order Granting Motion To Lift Stay And to File Supplemental Briefing* (dated: April 10, 2010), permitting the parties to "address[] *Yo usoufian v Sims* No. 80081 (March 25, 2010) and/or any other cases filed since the party's last brief," the City of Lakewood files the following additional briefing.

II. POINTS & AUTHORITIES

Since the original briefing was completed in this case, both this Court and the Supreme Court have handed down several cases which (1) reinforce that discovery is proper in a case litigated under the auspices of the Public Records Act (PRA), chapter 42.56 RCW; and (2) Mr. Koenig is not entitled to costs or fees under RAP 18.1 should he prevail on appeal.

A. Discovery Is Proper.

In *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 742, 218 P.3d 196 (2009), this Division of the Court of Appeals implies that discovery is permissible in the PRA context. In *BIAW*, the plaintiff-requestor resisted a summary judgment motion brought by the agency, Pierce County. The *BIAW* complained that a continuance of the summary judgment motion should have been permissible in order for it to conduct discovery. In upholding the trial court's grant of summary judgment, and

denial of the BIAW's motion for a continuance of the summary judgment hearing, this Court noted:

BIAW next contends that it argued to the trial court that it should be able to conduct discovery, but that no discovery was allowed. However, the record shows that in the four months of litigation preceding the dismissal of its claim, BIAW never made a single discovery request, never moved under CR 56(f) for a continuance in order to conduct any discovery, and never made the showing required to delay summary judgment for purposes of discovery.

BIAW, 152 Wn. App. at 742.

Notably, this Court did not comment on the fact that discovery was impermissible. Instead, this Court noted that the lack of any discovery undertaken by the requestor supported the trial court's denial of the requestor's motion for a continuance and undermined the requestor's claim for additional time to respond to the agency's motion for summary judgment. Although this Court upheld the trial court's denial of a continuance on other grounds, this Court appears to recognize that discovery is not only permissible in the PRA context, it is expected.

Such an implicit understanding that discovery is proper in PRA litigation appears to be held by the petitioner himself. In *Koenig v. Pierce County*, 151 Wn. App. 221, 228, 211 P.3d 423 (2009), the petitioner apparently had no difficulty in providing a two-day turnaround to a

discovery request propounded to him by Pierce County in another recent PRA case:

On March 10, 2008, Pierce County sent a discovery request to Koenig asking him to “identify with specificity each document withheld from Plaintiff that is the subject of your complaint but which you claim was not made available to you by the Pierce County Sheriff’s Department or the Law Enforcement Support Agency.” On March 12, 2008, Koenig provided a response: “Koenig does not have a copy of the Tara Kelly statement. That document has been wrongfully withheld from Koenig by the County.”

Koenig, 151 Wn. App. at 228 (Emphasis Added).

Among the purposes afforded by full and fair disclosure of discovery is that a party is entitled to research themes and arguments taken by its adversary in prior litigation. 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). Mr. Koenig has taken inconsistent positions with respect to the issue before this Court in the instant appeal, i.e., whether discovery is proper in a PRA case. In one case, Mr. Koenig answers discovery with a very quick turnaround. In another, he resists it.

Mr. Koenig’s inconsistent positions on the issue which presently confronts this Court only serves to highlight the need to inquire into his litigation history on the issue which will ultimately confront the trial court, namely, whether driver’s license information subject to disclosure and if the City somehow erred, whether it should be subject to fines under the

PRA. It stands to reason that during the course of his presumptively active PRA litigation history, Mr. Koenig has addressed the issue of whether driver's license information is properly disclosed under the PRA. The City is aware of at least one case which has been issued by this Court in which this issue has been mentioned involving Mr. Koenig.¹ Undoubtedly, there are others. The City is entitled to discover his litigation history so that it can obtain his prior briefing, research his anticipated position so that it can be fully informed on this point. The disclosure of his prior litigation history is fully within the scope of CR 26(b).

Moreover, as the City has consistently maintained, should the trial court ultimately determine that the City has violated the PRA, Mr. Koenig's litigation history is highly relevant to a determination of penalties. This Division of the Court of Appeals recently observed that,

Using the PRA as a vehicle of personal profit through false, inaccurate, or inflated costs is contrary to the PRA's stated purpose to keep the governed informed about their

¹ The City has previously redacted driver's license information in a prior PRA request submitted by Mr. Koenig with no claim that driver's license information was improperly redacted. See, *Koenig v. City of Lakewood*, 2009 Wash. App. LEXIS 1611 (2009), noted at 150 Wn. App. 1061, *pet for review denied*, 168 Wn.2d 1026 (2010). The City cites to the previous unpublished decision involving these same parties only for purposes of providing context for the instant dispute and not as precedent. *Island County v. Mackie*, 36 Wn. App. 385, 391 n.3, 675 P.2d 607 (1984).

government and costs based on false, inaccurate, or inflated claims do not serve that purpose and are not reasonable.

Mitchell v. Wash. State Inst. of Pub. Policy, 153 Wn. App. 803, 830, 225 P.3d 280 (2009).

Mr. Koenig's actions in his prior lawsuits demonstrate the sort of "inflated claims," which the City should be able to present in mitigation of any penalties. *Id.*, 153 Wn.App. at 830. The PRA contains a one-year statute of limitation. RCW 42.56.550(6). The City has been able to identify three lawsuits in which Mr. Koenig waited until the end of the statute of limitations period before filing.² Each of these three lawsuits were also served towards the end of the 90 day tolling period provided by CR 3 and RCW 4.16.170. The only plausible explanation for such a pattern of deliberate delay is to maximize penalties under the PRA.³ Once suit was commenced, Mr. Koenig, via his Answer and discovery

² In his lawsuit against Pierce County, Mr. Koenig's claim accrued on or about January 3, 2006 (CP 44); he filed suit 364 days later on January 2, 2007 (CP 43) and waited until March 27, 2007 – one week before the expiration of the 90 day tolling period – before serving the county. (CP 46). In a similar lawsuit against the City of Lake Forest Park, Mr. Koenig's claim accrued on September 11, 2006 (CP 51); suit was filed on September 4, 2007 (CP 50) and service accepted by Lake Forest Park on November 7, 2007. (CP 54). In his prior lawsuit against the City of Lakewood, Mr. Koenig waited 364 days before filing, and waited 89 days before service. (CP 64, ¶ 16; CP 65, ¶¶ 22, 23).

³ The PRA contains a per-day penalty of \$5-\$100 per day that a record is unlawfully withheld together with an award of costs and attorneys fees. RCW 42.56.550(4). Thus, in an ordinary case where a requestor commences suit, a requestor who has intentionally delayed the filing of a service of a lawsuit, may, subject to equitable defenses, be awarded a minimum of approximately \$2,265.00 should some violation of the PRA be established (i.e., suit is filed the day before the statute of limitation expires (364 days) and served the day before the expiration of the tolling period (89 days) times the minimum penalty of \$5.00 per day).

responses, was able to narrow the scope of the present controversy to one alleged PRA violation. This issue is whether the City improperly withheld drivers license information. Although this case presents the situation whereby the City sought declaratory relief when Mr. Koenig failed to acknowledge that the City's responses to his requests were adequate, the discovery sought is nevertheless within the liberal scope of discovery under CR 26(b) which the City should be entitled to present to the trial court in mitigation of any penalties. This concern is all the more heightened because this history explains why the City commenced suit, against the backdrop where the sole alleged violation of the PRA is that the City improperly claimed drivers license numbers exempt from disclosure.

The Supreme Court's recent decision in *Yousoufian v. Office of Ron Sims, King County Executive*, 168 Wn.2d 444 (2010) does not necessarily alter the analysis the City originally set forth in its *Respondent's Brief*. This brief analyzed several of the factors based on the then-existing framework originally set forth in *Yousoufian v. Office of Ron Sims, King County Executive*, 165 Wn.2d 439, 200 P.3d 232 (2009), *mandate recalled, noted at*, 2009 Wash. LEXIS 729 (2009). As these factors are essentially the same which was set forth in the recent *Yousoufian* opinion, the City's original analysis remains largely unaltered.

B. Mr. Koenig is Not Entitled To Costs or Fees.

Mr. Koenig has previously requests fees on appeal. Even if he were to prevail, he is not entitled to costs or attorney fees on appeal. *Burt v. Dept. of Corrections*, No. 80998-4 (May 13, 2010). In *Burt*, the plurality held that the requestor was not entitled to fees under RCW 42.56.550 where it has not yet been determined that the agency had violated the PRA:

Finally, [the requestor] requests attorney fees on two bases. First, pursuant to RCW 42.56.550(4), the PRA authorizes awarding all costs, which includes reasonable attorney fees, to the individual who prevails against the agency in a public records request. Because we remand this case and do not resolve whether [the requestor] is entitled to the records requested, it is premature to award costs and attorney fees.

(Slip Op. at p. 13-14; Emphasis Added).

Thus, even if he were to prevail on appeal, because it has not yet been determined whether Mr. Koenig is entitled to the records requested, it is likewise premature to award him his costs and attorney fees.

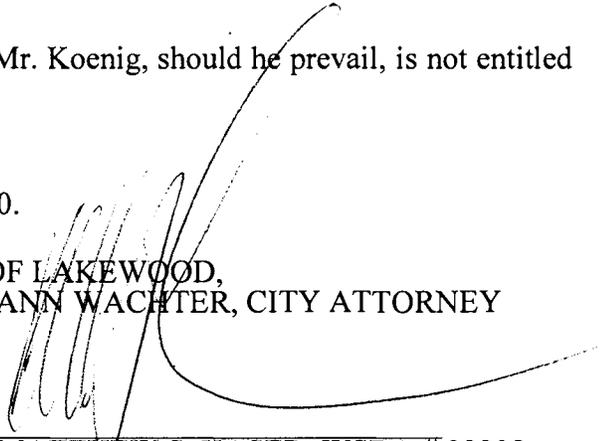
CONCLUSION

Since the original briefing was completed in this case, none of the authorities from either this Court or Supreme Court alter the position taken by the City of Lakewood that (1) the trial court's decision should be

affirmed; or alternatively (2) Mr. Koenig, should he prevail, is not entitled to costs or attorney fees.

DATED: May 28, 2010.

CITY OF LAKEWOOD,
HEIDI ANN WACHTER, CITY ATTORNEY

By: 
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CERTIFICATE OF SERVICE

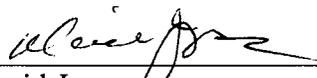
I hereby certify that on May 28, 2010, I served the foregoing Supplemental Brief of Respondent on William John Crittenden, by the following indicated methods:

- * E-Mail to wjcrittenden@comcast.net (brief sent in PDF format), delivery confirmation requested
- * And by ABC Legal Messenger Service to be delivered to:

William John Crittenden
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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 28th day of May, 2010.



David Jones

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