

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
May 03, 2013, 1:35 pm
BY RONALD R. CARPENTER
CLERK

No. 87271-6

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

RECEIVED BY E-MAIL

FISHER BROADCASTING-SEATTLE TV L.L.C. dba KOMO 4,

Appellant,

vs.

CITY OF SEATTLE, a local agency and the SEATTLE POLICE
DEPARTMENT, a local agency,

Respondents.

**ANSWER TO AMICUS CURIAE OF THE DEFENDER
ASSOCIATION AND WASHINGTON DEFENDER ASSOCIATION**

PETER S. HOLMES
Seattle City Attorney

Mary F. Perry, WSBA #15376
Assistant City Attorney
Attorneys for Respondents

Seattle City Attorney's Office
600 - 4th Avenue, 4th Floor
P.O. Box 94769
Seattle, Washington 98124-4769
(206) 684-8200

 ORIGINAL

TABLE OF CONTENTS

Page(s)

I. INTRODUCTION1

II. ARGUMENT.....2

 A. The Court Should Disregard the Amicus Brief Submitted by WCA and TDA Because it Improperly Advances a Legal Theory Not Raised by the Parties2

 B. The *Brady* Duty to Disclose Exculpatory Evidence is Limited to Criminal Proceedings and Inapplicable to a PRA Lawsuit.....4

III. CONCLUSION.....9

TABLE OF AUTHORITIES

Page(s)

CASES

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215
 (1963) ~~1, 2, 3, 4, 5, 6, 7, 8, 9~~ ^{passim}

Boyd v. Criminal Div. of U.S. Dep't of Justice, 475 F.3d 381, (D.C. Cir. 2007) 6

Covington v. McLeod, 646 F. Supp. 2d 66 (D.D.C. 2009) 7

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 828 P.2d 549 (1992)..... 3

Cucci v. Drug Enforcement Agency, 871 F. Supp. 508 (D.D.C. 1994) .. 5, 7

Dawson v. Daly, 120 Wn.2d 782, 845 P.2d 995 (1993) 6

Hearst v. Hoppe, 90 Wn.2d 123, 580 P.2d 246 (1978)..... 6

Johnson v. U.S. Dep't of Justice, 758 F. Supp. 2 (1991) 7, 8

King County Dep't of Adult and Juvenile Detention v. Parmelee, 162 Wn. App. 337, 254 P.3d 927 (2011)..... 5

King County v. Sheehan, 114 Wn. App. 325, 57 P.3d 307 (2002) 7

Richardson v. U.S. Dep't of Justice, 730 F. Supp. 2d 225(D.D.C. 2010) 6

Sargent v. Seattle Police Dep't, 167 Wn. App. 1, 260 P.3d 1006 (2001)..... 7

Seattle Times Co. v. Serko, 170 Wn.2d 581, 243 P.3d 919 (2010)..... 5

Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997)..... 2

Soter v. Cowles Pub'g Co., 162 Wn.2d 716, 174 P.3d 60 (2007) 6

State v. Blackwell, 120 Wn.2d 822, 845 P.2d 1017 (1993) 8

Students Against Genocide v. Dep't of State, 257 F.3d 828, 836 (D.C. Cir. 2001) 6

<i>Sundquist Homes, Inc. v. Snohomish County Public Utility Dist., No. 1,</i> 140 Wn.2d 403, 997 P.2d 915 (2000).....	2
<i>U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press,</i> 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989).....	7
<i>Witt v. Young,</i> 168 Wn. App. 211, 275 P.3d 1218	3

STATUTES

RCW 9.73.090(1)(c)	3, 5
RCW 9.73.100	4
RCW 42.56.070(1).....	4
RCW 42.56.080	5
RCW 42.56.240(5).....	7
RCW 70.02.020	7
RCW 70.48.100(2).....	7

COURT RULES

RAP 9.6.....	3
RAP 10.3(a)(8).....	3
RAP 10.3(c)	3

I. INTRODUCTION

The Washington Defender Association (“WDA”) and The Defender Association (“TDA”) have submitted an amicus curiae brief that raises a new issue that was not previously raised or argued in this case, and for which there is no relevant record. In a rambling discussion about constitutional principles that fails to focus on or even mention the statutory provisions that are before the Court, amici defenders appear to argue that denying access to dash-cam videos under the Public Records Act (“PRA”) violates the government’s constitutional obligation to turn over exculpatory and other evidence favorable to the defense (hereafter referred to simply as “exculpatory” evidence) in criminal cases established in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963).

Respondent City agrees that the government has a duty to provide exculpatory evidence to defendants in criminal prosecutions, but that is not the case or the issue before this Court. This case deals with an agency’s statutory obligations to the general public under PRA. Those PRA obligations are distinct from *Brady* obligations that only arise in the specific factual and procedural context of a particular criminal

prosecution. A *Brady* issue must be addressed to the criminal court under a record made in a particular criminal case..

Amici defenders' constitutional *Brady* argument should not be considered because it raises a new issue, and there is no relevant record. Furthermore, the argument is irrelevant to the Court's statutory construction task here. Nothing in their amicus brief should obscure the actual issues in this PRA case.

II. ARGUMENT

A. The Court Should Disregard the Amicus Brief Submitted by WDA and TDA Because it Improperly Advances a Legal Theory Not Raised by the Parties

WDA and TDA do not address issues raised by the parties below or on appeal and instead argue their own issue urging the Court to bootstrap *Brady* principles into the PRA. The Court will not address arguments raised only by amici. *Sundquist Homes, Inc. v. Snohomish County Public Utility Dist., No. 1*, 140 Wn.2d 403, 413-14, 997 P.2d 915 (2000); *see also, Seeley v. State*, 132 Wn.2d 776, 808, 940 P.2d 604 (1997) ("This Court has recognized that it need not address issues raised solely by an amicus or issues not raised at the trial court unless it is

necessary to reach a proper decision.”) Moreover, their argument is beyond the scope of the proceeding below and irrelevant to its outcome.¹

Amici Defenders appear to argue that RCW 9.73.090(1)(c) should not be applied to criminal defense attorneys who make PRA requests for videos of individuals who are not their clients. A criminal defense attorney did not make the requests at issue here, a TV reporter did. As a result, an analysis of *Brady* will not change the result, and the Court should not consider it.²

¹ The amici defenders’ brief also attempts to introduce factual matters outside the record. Amici Def. Br. at 9-11 (discussing in their brief and attaching as an appendix an investigative report by the United States Department of Justice unrelated to this PRA case). These matters should be disregarded both because they are irrelevant and because they are not part of the record in this case. *See generally Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (argument based on factual background must be supported by citation to the record). RAP 9.6; 10.3(c); 10.3(a)(8) (“An appendix may not include materials not contained in the record on review without permission from the appellate court.”); *Witt v. Young*, 168 Wn. App. 211, 214 n.5, 275 P.3d 1218 (“Although Witt attached a copy of her claim as an exhibit to her brief, . . . this document has not been included in the clerk’s papers, and Witt’s attachment is not properly before us.”), *review denied*, 175 Wash.2d 1026, 291 P.3d 254 (Wash. Dec 05, 2012).

² The WDA and TDA brief is vague as to how *Brady* might be implicated by the City’s practices with dash-cam records. With the exception of this footnote, the City assumes throughout this responsive brief that amici defenders are hypothesizing how the City will respond to PRA requests by criminal defense attorneys. But perhaps amici are not hypothesizing how the City will respond to *PRA requests* by criminal defense attorneys, but instead amici are hypothesizing that the City will not properly carry out its obligation of disclosure under *Brady* in *criminal* cases. If hypothetical criminal cases are the connection to *Brady* that is being suggested by amici, the argument should be disregarded both because (1) that argument likewise is a new issue raised by amici, and (2) there is no factual or legal basis in this PRA case for this Court to engage in speculation about how the City will deal with its *Brady* duties in criminal cases. The policies of the City for response to PRA requests (as to which the record in this case relates) are not relevant to how the City works with municipal and county prosecuting authorities on a case by case basis to deal with *Brady* duties in criminal cases (as to which there is no record in this case).

B. The *Brady* Duty to Disclose Exculpatory Evidence is Limited to Criminal Proceedings and Inapplicable to a PRA Lawsuit.

WDA and TDA's brief is not about defense counsels' access to dash-cam videos of their clients because the Privacy Act specifically allows defense attorneys access to dash-cam videos whenever a criminal charge has been filed against a client who is subject of the recording. RCW 9.73.100. Rather, WDA and TDA argue that defense counsel should be provided access to *any* dash-cam videos they request under the PRA because of the government's obligation to turn over exculpatory evidence that is required by the Constitution under *Brady*. Amici Def. Br. at 11.

While they acknowledge that the Privacy Act may exempt dash-cam video under the PRA, amici defenders argue that the City must waive the exemption when WDA, TDA, or another defense attorney makes a PRA request for dash-cam video based upon conjecture that it *might* reveal possibly exculpatory evidence.

The PRA obligates state and local agencies to provide access to public records upon request unless they fall within a specific exemption or "other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1). Under the PRA, agencies may not distinguish between requesters, and, generally, requesters cannot

be required to provide information as to the purpose of their request.

RCW 42.56.080. The PRA does not confer substantive rights, rather it is a procedural statute that allows the general public access to public records.

King County Dep't of Adult and Juvenile Detention v. Parmelee, 162 Wn. App. 337, 354, 254 P.3d 927 (2011); *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 597, 243 P.3d 919 (2010)³.

Washington courts have not addressed the specific question of the relationship between the PRA and *Brady*, but Federal courts faced with similar challenges to an agency's application of the Freedom of Information Act ("FOIA") have determined that the *Brady* requirement to disclose exculpatory and impeachment material to a defendant in criminal proceedings is "not coextensive" with an agency's statutory obligations under FOIA. *Cucci v. Drug Enforcement Agency*, 871 F. Supp. 508, 514 (D.D.C. 1994). Because the PRA closely parallels FOIA, Washington

³ Amici Defenders include a separate section in their brief with a rambling discussion of *Serko* that does not pertain to this PRA case. Amici Def. Br. at 12-13. *Serko* involved a failed attempt by criminal defendants to broadly bar disclosure of law enforcement records based solely on *court-created constitutional* fair trial protections. *Serko*, 170 Wn.2d at 597. *Serko* did not involve any specific disclosure exemption or prohibition in the PRA or elsewhere in the RCWs. In contrast, the instant case concerns the explicit prohibition on disclosure of RCW 9.73.090(1)(c) providing *statutory* protection of fair trial interests of *both criminal and civil* litigants that qualifies as an "other" statute under RCW 42.56.070(1). That Amici Defenders fail to grasp the inapplicability of *Serko* to the instant case is manifested by the fact that their entire 14-page amicus brief does not contain a single reference to *any* specific statutory provision, much less any discussion of the language and legislative policy of RCW 9.73.090(1)(c).

courts look to the judicial interpretation of FOIA in construing the PRA.

Hearst v. Hoppe, 90 Wn.2d 123, 128, 580 P.2d 246 (1978).

Federal courts base their holdings regarding *Brady's* inapplicability on FOIA provisions that are identical to PRA provisions. Neither statute allows an agency to consider a requester's reason for seeking access to the particular record. *Richardson v. U.S. Dep't of Justice*, 730 F. Supp. 2d 225, 234 (D.D.C. 2010); *Dawson v. Daly*, 120 Wn.2d 782, 797, 845 P.2d 995 (1993), *abrogated in part on other grounds*, *Soter v. Cowles Pub'g Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007). See *Boyd v. Criminal Div. of U.S. Dep't of Justice*, 475 F.3d 381, 390 (D.C. Cir. 2007) ("The disclosure obligation that *Brady* imposes at a defendant's criminal trial based on constitutional considerations is not the same disclosure obligation imposed under FOIA by Congress. . . . In other words, the disclosure requirements are not coextensive.") Unlike a *Brady* disclosure made only to the individual defendant, "a disclosure made to any FOIA requester is effectively a disclosure to the world at large." *Id.* (quoting *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 836 (D.C. Cir. 2001)). Likewise, neither Federal agencies nor Washington agencies may distinguish among requesters. *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771, 109 S.

Ct. 1468, 103 L. Ed. 2d 774 (1989); *King County v. Sheehan*, 114 Wn. App. 325, 341, 57 P.3d 307 (2002).⁴

Because of the fundamental differences between an agency's statutory obligations to the general public under FOIA and the *Brady* requirement to provide exculpatory and impeachment evidence in the specific context of a criminal prosecution, a "plaintiff may not trump the agencies' invocation of FOIA exemptions by arguing that the exempted information should be provided as exculpatory evidence." *Cucci*, 871 F. Supp. at 514. An agency is not "required by FOIA to forego a statutory exemption for a document in its possession because the document has been identified as possibly exculpatory." *Johnson v. U.S. Dep't of Justice*, 758 F. Supp. 2, 5 (1991). Moreover, this argument "is misplaced because a *Brady* violation is a matter appropriately addressed to the court that sentenced the [plaintiff], not through a FOIA action." *Covington v. McLeod*, 646 F. Supp. 2d 66, 71 (D.D.C. 2009) (citation omitted). For

⁴ Some exemptions and statutes are based on confidentiality or privacy considerations, such as limitations on release of health care information that can be readily associated with a particular patient (RCW 70.02.020), information revealing the identity of child victims of sexual assault who are under age 18 (RCW 42.56.240(5)), and certain records of persons confined in jail (RCW 70.48.100(2)). The individual who is the subject of the confidential/private information or his/her legal representative, as opposed to other members of the public, may have access to the information that is exempt when requested by members of the general public. *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. at 771; *Sargent v. Seattle Police Dep't*, 167 Wn. App. 1, 20, 260 P.3d 1006 (2001).

identical reasons, TDA and WDA may not use *Brady* to trump the PRA to gain greater access to records than any other requester.

Practical reasons also exist for distinguishing the processing of a request under FOIA or PRA from the requirement to provide *Brady* material in a criminal prosecution. As the *Johnson* court observed regarding the FBI:

It has neither the competence nor the authority to make *Brady*-type judgments. The FBI is not required to determine whether or not a paper sought by a FOIA requester is or is not a paper that presently constitutes or retroactively would have constituted *Brady* material in one or more state or federal prosecutions. Nor is the FBI required by FOIA to forego a statutory exemption for a document in its possession because the document has been identified as possibly exculpatory. Judicial process is available, both pre-trial and post-trial, for these purposes.

Johnson, 758 F. Supp. at 5. The same considerations apply when a law enforcement agency responds to a PRA request. Judicial process is available in criminal cases, both pre-trial and post-trial, for courts to determine if *Brady* requirements have been met.

Moreover, even in a criminal proceeding, a defendant must advance some factual predicate that makes it reasonably likely the requested file will bear information material to his or her defense. *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993) (“A bare assertion that a document “might” bear such fruit is insufficient”). WDA and TDA

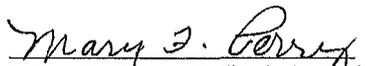
assert only that gaining unlimited access to the videos under the PRA *might* reveal possibly exculpatory evidence. This fails to meet the standard for *Brady* disclosure in a criminal prosecution, much less to support wholesale elimination of a PRA exemption.

III. CONCLUSION

WDA and TDA attempt to introduce a new issue that is not applicable to this case. *Brady* principles do not apply to requests made under the PRA, and the Court should disregard the amicus brief submitted by WDA and TDA.

DATED this 3d day of May, 2013.

PETER S. HOLMES
Seattle City Attorney


Mary F. Perry, WSBA 15376
Attorneys for Respondents
City of Seattle

DECLARATION OF SERVICE

Marisa Johnson states and declares as follows:

I am competent to testify in this matter, am a Legal Assistant in the Law Department, Civil Division, Seattle City Attorney's Office, and make this declaration based on my personal knowledge.

2. On May 30th, 2013, I caused to be delivered by ABC

Legal Messengers, addressed to:

Judith A. Endejan
Graham & Dunn PC
2801 Alaskan Way Pier 70
Suite 300
Seattle, WA 98121-1134

Laurie Morris
The Defender Association
810 Third Avenue, Suite 800
Seattle, WA 98104

Travis Stearns
Jessica Liddle
Washington Defender Association
110 Prefontaine Place S., Suite 610
Seattle, WA 98104

Bruce E.H. Johnson
Eric M. Stahl
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045

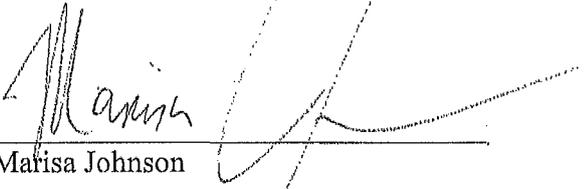
James E. Lobsenz
Carney Badley Spellman
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010

Suzanne Lee Elliott
705 Second Avenue, Suite 1300
Seattle, WA 98104-1797

a copy of Respondent's Answer to Amicus Curiae of Washington Defender's Association and Washington Defender Association.

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

DATED this 3rd day of May, 2013, at Seattle, King County, Washington.



Marisa Johnson

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, May 03, 2013 1:37 PM
To: 'Johnson, Marisa'
Cc: Perry, Mary; Seu, Carlton
Subject: RE: Fisher Broadcasting v City of Seattle - Supreme Ct. No. 87271-6

Received 5/3/13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Johnson, Marisa [<mailto:Marisa.Johnson@seattle.gov>]
Sent: Friday, May 03, 2013 1:32 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Perry, Mary; Seu, Carlton
Subject: Fisher Broadcasting v City of Seattle - Supreme Ct. No. 87271-6

Attached please find a copy of the Answer to Amicus Curiae of the Defender Association and Washington Defender Association in the above matter for:

Mary F. Perry
WSBA#15376
206-733-9309
mary.perry@seattle.gov