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No. 87271-6

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

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 NEWS MEDIA ENTITIES AND WASHINGTON COALITION FOR OPEN GOVERNMENT

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ORIGINAL

TABLE OF CONTENTS

Page(s)

I. INTRODUCTION 1

II. ARGUMENT 1

A. A Request for "Log Sheets" Is Not a Request for a Database 1

B. The City Conducted an Adequate Search 3

C. The City Provided Fullest Assistance in Responding to KOMO's Requests 5

D. Response to Media Amici's Interpretation of RCW 9.73.090(1)(c) 16

III. CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Beal v. City of Seattle, 150 Wn. App. 865, 209 P.3d 872 (2009) 3

Bonamy v. City of Seattle, 92 Wn. App. 403, 960 P.2d 447 (1998) review denied, 137 Wn.2d 1012, 978 P.2d 1099 (1999) 2

Cowles Publishing Company v. Spokane Police Department, 139 Wn.2d 472, 987 P.3d 62 (1999) 19

Hangartner v. City of Seattle, 151 Wn.2d 439, 90 P.3d 26 (2004)..... 2

Mechling v. Monroe, 152 Wn. App. 830, 222 P.3d 808 (2009) 5, 6, 15

Mitchell v. Washington State Dept. of Corrections 5, 6

Smith v. Okanogan County, 100 Wn. App. 7, 994 P.2d 857 (2000).... 11, 16

Wood v. Lowe, 102 Wn. App. 872, 10 P.3d 494 (2000) 2

STATUTES

RCW 9.73.090(1)(c) ..... passim

RCW 42.56.070(1)..... 20

RCW 42.56.100 5

RCW 42.56.240(1)..... 18

MISCELLANEOUS

SPD Policies & Procedures Manual, chapt. 17.260..... 3

I. INTRODUCTION

News Media representatives and the Washington Coalition for Open Government (collectively referred to as "media amici") have filed an amicus curiae brief in this case. While their brief echoes arguments made by Appellant Fisher Broadcasting -- Seattle TV L.L.C. dba KOMO 4's ("KOMO"), Respondent City of Seattle ("City") addresses them to the extent necessary to underscore media amici's misunderstanding of the facts in this case and misapplication of the law to those facts.

The theme of media amici's brief is that the City should have known what KOMO really wanted even though KOMO clearly requested something else. They accuse the City of failing to provide fullest assistance to KOMO, even though the record demonstrates that the City explained the technical difficulties to KOMO, offered alternative access and custom programming, undertook custom programming at City expenses, and had City IT personnel meet with KOMO IT personnel. Nothing in media amici's brief should persuade the Court to accept their arguments, and by extension Appellant's arguments.

II. ARGUMENT

A. A Request for "Log Sheets" Is Not a Request for a Database

Media amici argue that the City should have understood that KOMO's August 4, 2010, request for "log sheets" was really a request for a database. Brief of media amici at 9. One need only read the request to realize how astonishing this claim is:

> [A] copy of any and all Seattle Police officer's **log sheets** that correspond to any and all in-car video/audio recordings which have been tagged for retention by officers. This request is for such records dating from January 1, 2005 to the present [August 4, 2010].
>
> KOMO-TV will pay reasonable copy fees but we prefer that this data be released to us in a searchable electronic format organized and searchable by date and other reasonable fields. (CP 96).

The PRA does not require agencies to be mind readers or to intuit a complex request from a completely different request. While the PRA places certain duties on agencies, it also imposes obligations on a requester, including stating a request in a form sufficiently clear so that an agency has reasonable notice that it has received a public records request, and that the request must be for an identifiable public record. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004); *Wood v. Lowe*, 102 Wn. App. 872, 878, 10 P.3d 494 (2000). An agency has no duty to respond until it has received a valid public records request. *Bonamy v. City of Seattle*, 92 Wn. App. 403, 412, 960 P.2d 447 (1998) review denied, 137 Wn.2d 1012, 978 P.2d 1099 (1999). "A public agency cannot be expected to disclose records that have not yet been requested." *Beal v.*

City of Seattle, 150 Wn. App. 865, 875, 209 P.3d 872 (2009) (citations omitted).

KOMO provided very specific information in its request, information that logically appeared to describe a document previously used by the Seattle Police Department ("SPD"), as reflected in the *SPD Policies & Procedures Manual*, chapt. 17.260. (CP 89). KOMO asked for records electronically but that would not convert it to a request for a database. Any document may be produced in an electronically searchable form; e.g., a paper document may be scanned into PDF format and processed to be searchable. That, nevertheless, does not transform the information into a database.

Media amici baselessly accuse the City of "pretending" KOMO had asked for something else and providing an "after-the fact interpretation of the request." Br. of media amici at 9-10. The City provided the uncontroverted declarations of the long-time SPD Video Unit employee, to whom the request was referred and David Strom, SPD Senior Warehouser of Archival Records regarding the City's interpretation of the request and the fact that the log sheets no longer exist. (CP 398-400). This included a copy of an internal email showing SPD's interpretation of the request at the time it was made. (CP 231).

B. <u>The City Conducted an Adequate Search</u>

Media amici argue that even if SPD correctly interpreted the August 4, 2010 request, it violated the PRA because it failed to conduct an adequate search for those log sheets. Br. of media amici at 11-12. In responding to a PRA request, an agency must conduct an adequate search. *Neighborhood Alliance of Spokane County v. County of Spokane,* 172 Wn.2d 702, 724, 261 P.3d 119 (2011). When the agency fails to provide records, it must submit "reasonably detailed, nonconclusory affidavits" establishing "that all places likely to contain responsive materials were searched." *Id.,* 172 Wn.2d at 721. The City submitted the uncontroverted testimony of David Strom that SPD phased out the use of log sheets in 2002 and all log sheets would have been destroyed by 2004. (CP 398-400). KOMO requested officer's log sheets from January 1, 2005 to August 4, 2010, but SPD would not have generated officer's log sheets during this period. *Neighborhood Alliance* does not require agencies to conduct useless searches for records that cannot exist because no place is likely to contain responsive materials.

Media amici's repetition of KOMO's speculation and conjecture regarding the City's interpretation of the request for log sheets and the adequacy of the City's search does not overcome the reasonably detailed,

nonconclusory declarations submitted in good faith by the City. *Neighborhood Alliance*, 172 Wn.2d at 721.

C. The City Provided Fullest Assistance in Responding to KOMO's Requests

Media amici argue that the City failed to provide "fullest assistance" in responding to KOMO's request. Br. of media amici at 7. This argument fails both factually and legally. The PRA requires that agencies adopt rules and regulations to "provide for the fullest assistance to inquirers." RCW 42.56.100. This has been interpreted to require an agency to provide email that requires no redactions electronically if it is "reasonable and feasible" to do so, but the same court specifically rejected the contention that an agency could be required to electronically disclose redacted e-mails that would need to be scanned back into electronic format after being redacted. *Mechling v. Monroe,* 152 Wn.App. 830, 849-50, 222 P.3d 808 (2009).This is far from the expansive reading that media amici appear to give the case.

Mitchell v. Washington State Dept. of Corrections addresses "fullest assistance" in extracting and producing information from databases. 164 Wn.App. 597, 277 P.3d 670 (2011). There, a requester asked for data contained in two electronic databases to be disclosed electronically. To produce the records electronically, the agency would be

required to print the records, redact them, and then scan them back into electronic format. The court cited *Mechling* and held that "such duplication of effort is outside of the agency's obligation of 'fullest assistance' under the PRA." 164 Wn.App. at 607. The level of effort in *Mitchell* is inconsequential compared to the level of effort responding to KOMO's request would require. The City would have to secure SQL server script from a system vendor, devote substantial time to custom programming, get the cooperation of different vendors to allow systems to communicate in order to ultimately create a new database compiling information from multiple systems. Nothing in the PRA or *Mechling* compels an agency to undertake such extraordinary measures.

Like any large entity, agencies purchase computer systems geared to meeting operational needs within the agency's budgetary constraints. While mindful of the requirement to provide access to records under the PRA, agencies must deal with the realities of what level of technology is available at a given time. KOMO refused to believe that SPD could not provide the records it requested despite copious evidence to the contrary. Rather than accept the reality of how SPD was able to access database information in the COBAN In-Car Video System (ICV), KOMO and media amici continue to accuse the City of dishonesty. See, e.g., media amici's accusation that SPD "pretended" that KOMO had not asked for a

database. Br.of media amici at 9. They make these accusations despite the uncontroverted facts in the record.

SPD purchased the COBAN ICV system as an "off-the-shelf" system with specific capabilities provided by the vendor at the time of purchase. (CP 403). These included a limited template of fields of information that can be entered into the system by officers in the field. Although the system appears to allow entries in other fields, the COBAN system purchased by SPD does not allow retrieval of information using those fields. (CP 440, 483). The system SPD purchased from COBAN limited retrieval of videos to **three fields: officer's name, serial number, and date and time.** (CP 440, 483).

Because SPD's other primary computer systems, the Versaterm Computer Aided Dispatch ("CAD") and Report Management System ("RMS") do not communicate with the COBAN system, as a result, neither CAD event numbers nor General Offense numbers are communicated to or cross-referenced in the COBAN system. (CP 428, 454). Similarly, the location where the recording was made is not contained in the COBAN system. (CP 461). As a result it is difficult to sort and correlate large numbers of videos with particular events. Nevertheless, even with its limited search criteria, the COBAN system

was the best system available to meet SPD's operational needs at the time it was purchased. (CP 454, 455).

As purchased, and at the time of KOMO's requests, SPD had limited ability to search the COBAN system and could not produce a searchable database from it. The COBAN system could provided a maximum of 500 results to a particular prompted query (i.e., using only the three searchable field categories) with no more than 16 results displayed on the system computer screen at a time. The operator could scroll down from display page to display page of 16 results until he or she reached the 500th result, and then had to enter another query of prompts in order to get more results. There was no way to see or print out more than 16 results at a time. The most one could do was to print a screen shot of 16 results, then scroll down and print a screen shot of the next 16 results, and so forth. (CP 440, 483-84).

On August 11, 2010, KOMO asked for a list of any and all digital in-car video/audio recordings that had been tagged for retention by Seattle Police Officers from January 1, 2005 to the present. The request specified that the list should include, but not be limited to, the officer's name, badge, number, date, time and location when the video was tagged for retention and any other notation that accompanied the retention log. (CP 98).

SPD's timely response explained the limitations of the COBAN system: "SPD is unable to query the system the way you have requested. **We can search by individual officer name, date and time only.** We cannot generate mass retention reports due to system limitations. Thus we do not have any responsive records." (CP 99).

On September 1, 2010, KOMO requested "copies of any and all digital, in-car video/audio recordings ...that have been tagged for retention by anyone from January 2007 to the present. The recordings should also include, but not be limited to, corresponding identifying information such as the date, time, location and officer(s) connected to each unique recording. ... Depending on the size of the digital files, KOMO TV would prefer to provide our own hard drive onto which the files may be downloaded." (CP 115-16).

SPD IT Support Manager Bruce Hills contacted COBAN to see whether it could provide programming to reconfigure the SPD system capabilities and, if so, how much it would cost. (CP 459). On September 14, 2010, COBAN President Allan Chen responded that COBAN would provide a SQL Server script to SPD at no cost but also said that it would "**take some real programming**" costing approximately $1500 and COBAN did not know whether it was even "feasible to integrate our recording software with [SPD's Versaterm system] for data exchange."

(CP 479). In SPD's experience, the RMS vendor has been unwilling to provide custom working due to support concerns, so this was not a realistic proposal. (CP 459-60).

SPD responded to KOMO on October 1, 2010, again informing her that "**SPD is unable to query the system to generate a retention report that would provide a list of the retained videos**. Without this capability we are unable to respond to your request. Therefore we have no documents responsive to your request." (CP 247).

KOMO's attorney appealed the denial of the September 1, 2010 request. SPD responded that "SPD does not have the capabilities to search for 'tagged records' only, which is consistent with the Public Request Unit's initial responses." The response further explained that SPD could not create a list of retained videos without this internal capability to know what videos should be downloaded. **SPD offered alternative access to records using "specific date, time and officer"** because SPD was "able to query the system for that level of detail, as opposed to the current query of retained video only." SPD also offered to facilitate **customized programming** by the COBAN vendor at KOMO's expense. (CP 250).

At the time of KOMO's requests, SPD's access to the COBAN system was hindered by built-in limitations and because the COBAN and

Versaterm systems did not communicate. To correlate and compile the information requested by KOMO would require not only custom programming, but also the unlikely cooperation of two vendors. The PRA does not obligate agencies to compile information into a new record. Citizens may not compel an agency to synthesize information into some sort of compilation. *Smith v. Okanogan County,* 100 Wn. App. 7, 13-4, 994 P.2d 857 (2000) ("an agency is not required to create a record which is otherwise non-existent").

Moreover, the City provided KOMO the fullest assistance. It explained the system's limitations to KOMO on multiple occasions. SPD told KOMO that its search capability was limited to three fields: officer's name, serial number, and date and time. It explained that it was unable to query the system to generate a retention report that would provide a list of the retained videos. Moreover, it offered KOMO access to records using the three searchable fields "specific date, time and officer" or alternatively, customized programming. KOMO, nevertheless found SPD's responses "dubious" and KOMO's attorney sent a letter to the Seattle City Council President on March 4, 2011. (CP 251).

SPD then asked COBAN to provide the SQL query that had been discussed in September 2010 to create a list of all existing videos since January 2007. SPD used it to provide a list for KOMO, which reflected

the three searchable fields. When SPD provided this list to KOMO, KOMO claimed it was "useless" without the other data fields it had requested. (CP 326, 405).

SPD undertook this customized programming at no fee to try to identify videos tagged for retention and to provide KOMO access to videos with the information about them that was available. (CP 406). This was the first time that the City asserted that videos were exempt under RCW 9.73.090(1)(c) because it was the first time that records (i.e., the videos in the format requested) responsive to KOMO's request were accessible. (CP 354).

KOMO continued to seek a record correlating information from SPD's different systems. On March 23, 2011, KOMO asked when it would get the first installment of videos along with their corresponding incident reports, and on April 5, 2011, KOMO wanted "copies of all GO reports associated with the 70 hours of video" to sift through. (CP 139, 379).

In an effort to help KOMO understand how SPD's systems worked, SPD's IT Manager Mark Knutson met with members of KOMO's IT staff on April 19, 2011. Knutson's uncontroverted declaration shows that during this meeting he explained the parallel acquisition of the data and the distinction between SPD's systems and how they don't necessarily

document the same events nor can they be easily correlated. At the end of the meeting, he believed that KOMO's IT personnel understood what could and could not be done with SPD's existing tools. (CP 432).

After viewing the video for barely a week, KOMO sent an email to the City saying that viewing so many videos wasn't "particularly efficient." Having "learned a lot about how the system works" and having "found that there are lots of videos that were retained that we have no interest in whatsoever," KOMO proposed limiting viewing to videos related to particular officers' badge numbers. (CP 147).

In February 2011, another requester Eric Rachner requested "a copy of the full and complete database of all Coban DVMS activity logs in electronic form." Rachner's request contained the following detailed description of the records he was seeking as follows, "The Coban DVMS system's database runs on Microsoft SQL Server, therefore it should be convenient to provide the logs in electronic form, in their original Microsoft SQL Server format. The responsive records will include all rows of all columns of all tables related to the logging of video-related activity within the Coban DVMS. Note that I am not requesting the actual content of any audio or video recordings."(CP 40).

The record demonstrates the significant differences between the KOMO and Rachner requests. Rachner asked the City to extract data that

resided only in the COBAN system, while KOMO asked the City to create lists correlating information that resided on two different systems that did not communicate. Rachner did not ask the City to take additional steps to exclude certain information, while KOMO asked it to provide only data related to tagged video. Even though Rachner made it clear that he was requesting a database, SPD still had to request clarification to determine the precise database he was requesting. (CP 406).

Media amici claim that the City should have understood that KOMO wanted "the database" that Rachner wanted. Br. of media amici at 9-10. The uncontroverted evidence shows that even though Rachner's request much more clearly requested a database, SPD had to request clarification from Rachner to determine the precise database he was requesting. (CP 406).

SPD Information Applications Manager Toby Baden spent more than 16 hours providing the first installment to Rachner in June 2011. This involved a multi-step process including redacting network information to avoid a security breach. (CP 406). SPD provided Eric Rachner the final installment of his request on August 22, 2011. (CP 55).

Thus, even after the City explained to KOMO how its computer systems could search, offered KOMO alternate access to records, offered to arrange custom programming, undertook custom programming at City

expense, and had SPD IT personnel meet with KOMO's IT staff, KOMO never requested the database that Rachner requested. When the City provided KOMO with the initial results of its custom programming, which was limited to the information in the COBAN system as Rachner had requested, KOMO rejected it as "useless." (CP 326, 405).

In September 2011, KOMO told SPD that it believed that it had "made a request for the SPD in-car video log database like Mr. Rachner had previously made a request for." SPD researched KOMO's requests and had been unable to locate a request for a video log database, but provided KOMO a copy of the database that had been provided to Rachner. (CP 184). KOMO then filed this lawsuit.

Even under the extremely expansive reading of *Mechling* media amici propose, the touchstone for measuring fullest assistance is whether it is "reasonable and feasible" for the agency to provide records in the format requested. The record here shows that it was neither reasonable nor feasible to do so. At the time of KOMO's requests, SPD simply did not have the technical capability to provide KOMO the records in the format requested. SPD's access to the COBAN system was hindered by built-in limitations and because the COBAN and Versaterm systems did not communicate correlating and compiling the information requested by KOMO would require not only custom programming, but also the unlikely

cooperation of two vendors. The PRA does not obligate agencies to compile information into a new record. Citizens may not compel an agency to synthesize information into some sort of compilation. *Smith v. Okanogan County,* 100 Wn. App. 7, 13-4, 994 P.2d 857 (2000). ("an agency is not required to create a record which is otherwise non-existent"). In the fall of 2010, the City gave specifics to KOMO about the limits of its ability to query the COBAN system, offered records in an alternate format and offered customized programming COBAN. (CP 250, 537).

In the trial court, KOMO relied on the declaration of Eric Rachner, but his declaration addresses only the COBAN database to which his request was limited. Rachner offered no evidence regarding the lists containing the information requested by KOMO. (CP 31-38). Rachner suggests that the City could have engaged in a fifteen-step process to extract data using SQL server script. (CP 35-36). This is unpersuasive for two reasons: (1) this process would only extract information from the COBAN system, which KOMO had already rejected, and (2) this multi-step process not only exceeds the City's obligation under the PRA, it would still not retrieve all of the information KOMO wanted.

D. Response to Media Amici's Interpretation of RCW 9.73.090(1)(c)

Media amici repeat arguments regarding RCW 9.73.090(1)(c) made by Appellant and amicus Washington Association of Criminal Defense Lawyers (WACDL). Br. of Media Amici at 12-19. Respondent has addressed those issues in its responsive briefing to Appellant and WACDL. Br. of Resp. at 38-45; Answer to Amicus WACDL at 14-18. See also the briefs of amici Washington State Association of Municipal Attorneys ("WSAMA) and Washington Association of Sheriffs and Police Chiefs ("WASPC"). Br. of amicus WSAMA at 7-16; Br. of amicus WASPC at 9-18. The City will respond only to the few places where media amici have attempted to add gloss to the arguments about legislative intent.

Media amici assert that if the Legislature had intended to address privacy interests, the Legislature would not have limited RCW 9.73.090(1)(c)'s reach to only those videos that "result in litigation." Br. of media amici at 15. This is classic question begging; media amici are assuming in this argument that their strained, narrow reading of the statute's term "arises" is correct. But as the City and amici WASPC and WSAMA have explained, KOMO and media amici are misreading "arises," and the reach of the statute and the protection of privacy interest extends to all dash-cam videos, not just those to those where litigation has already arisen at the time of a request for records. Br. of Resp. at 43; Br. of amicus WSAMA at 15; Br. of amicus WASPC at 6.

Media amici also assert that any privacy interests of those persons captured on dash-cam videos are "**already**" [bolding in original] protected under RCW 42.56.240(1) ("investigative records [where non-disclosure is essential] for the protection of anyone's right to privacy." Br. of media amici at 15. There are at least three flaws in this argument: (1) Just because the Legislature chose to provide one way to protect privacy interests does not mean that the Legislature did not choose another way to protect privacy interests (see discussion of privacy interests issue in Br. of Resp. at 42-45; Br. of amicus WASPC at 9-16). (2) Whether disclosure of a record violates a person's right to privacy is not, nor has it ever been, the litmus test for determining whether a record is exempt. Many exemptions in the PRA protect information based on concerns having nothing to do with privacy. Ans. to amicus WACDL at 10-11; and (3) The Legislature has recognized that a person has at least a qualified privacy interest in videos and images taken for law enforcement purposes even though they may have been recorded where others might have seen them. Br. of amicus WASPC at 9-16; Ans. to amicus WACDL at 12.

Next, media amici argue that the legislative intent in RCW 9.73.090(1)(c)'s prohibition on disclosure was not to protect fair trial interests (notably, they are at odds with amicus WACDL on this point; see Br. of amicus WACDL at 14). Br. of media amici at 16. They rely for this

point on *Cowles Publishing Company v. Spokane Police Department*, 139 Wn.2d 472, 479, 987 P.3d 62 (1999). Their reliance on *Cowles* is misplaced. *Cowles* held that fair trial interests were not implicated by the term "investigative records . . . the non-disclosure of which is essential to effective law enforcement." This case, on the other hand, involves the question of whether the Legislature intended to protect fair trial interests when it prohibited disclosure of dash-cam videos until any litigation which may arise from the recorded events is finally disposed of. To state the question is to answer it; prohibition on disclosure based on the possibility of litigation inherently manifests legislative intent to protect fair trial interests.

Also on the fair trial question, media amici discuss cases that stand for the proposition that "[*c]ourts* may not bar public access based on . . . generalized fear of publicity." Br.of media amici at 16. Those cases are inapposite. This case is not about what *courts may do* in contexts where no statute expressly prohibits disclosure. This case is solely about whether the Legislature intended under the express provisions of RCW 9.73.090(1)(c) to bar public disclosure of dash-cam videos. It did.

Finally, the City also wishes to point out a factual error in media amici's briefing on RCW 9.73.090(1)(c). Media amici discuss three purported examples of SPD dash-cam videos it claims led to the

Department of Justice's investigation of SPD. Two of the three examples media amici indicates are not SPD dash-cam videos. The first video is a jail surveillance video of a King County Sheriff's Deputy kicking a teenage girl in a jail cell.[1] The second is a video taken by an employee of KCPQ-TV of SPD officer Shandy Cobane using a racial slur.[2]

III. CONCLUSION

Nothing in media amici 's brief should dissuade this Court from (1) affirming the trial court and holding that RCW 9.73.090(1)(c) is another stature under RCW 42.56.070(1) that prohibits law enforcement agencies from making dash-cam videos available to the public until all criminal and civil litigation which arises from the event or events recorded and that the City application of the three-year statute of limitations is a narrow and reasonable interpretation of that statute, and (2) reversing the trial court and holding that the City did not violate the PRA in responding to KOMO's August 4, 11, and September 1, 2010 requests.

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[1] Mike Carter, "Official says Department of Justice monitoring Schene case," Seattle Times (February 24, 2010) http://seattletimes.com/html/theblotter/2011177946_official_says_department_of_ju.html

[2] Steve Miletich, "Seattle police to look whether department discouraged release of video," Seattle Times (May 20, 2010) http://seattletimes.com/html/localnews/2011917010_opa21m.html

DATED this 3rd day of May, 2013.

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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 3rd, 2013, I caused to be delivered by ABC Legal Messengers, addressed to:

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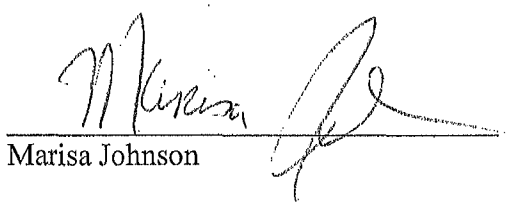
a copy of defendant's Answer to Amicus Curiae of News Media Entities and Washington Coalition for Open Government.

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

DATED this 30 day of May, 2013, at Seattle, King County, Washington.



Marisa Johnson

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Attached please find a copy of the Answer to Amicus Curiae of News Media Entities and Washington Coalition for Open Government in the above matter for:

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