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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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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.

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**CORRECTED**

BRIEF OF AMICUS CURIAE

WASHINGTON ASSOCIATION OF SHERIFFS AND POLICE CHIEFS

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SUPREME COURT  
STATE OF WASHINGTON  
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## **I. IDENTITY AND INTEREST OF AMICUS WASPC**

The Washington Association of Sheriffs and Police Chiefs (WASPC) represents the interests of most State and local law enforcement agencies in Washington and regularly provides support and training to local law enforcement agencies, including training on the Public Records Act (PRA) and policies regarding responses thereto. WASPC provides model policies for local law enforcement agencies and makes recommendations regarding the kinds of tools agencies might purchase or use in the furtherance of quality police work. Therefore, WASPC is concerned about the implications that will flow from the decision in this case between Fisher Broadcasting (hereinafter "KOMO") and the Seattle Police Department (SPD) as it relates to public policy and police guidance grounded in state privacy statutes and the impact it will have on the use and acceptance of dash-cams by law enforcement.

## **II. ISSUE OF INTEREST TO AMICUS WASPC**

Does RCW 9.73.090(1)(c), the Washington Privacy Act's prohibition on disclosure of police dash-cam videos until final disposition of any litigation involving the recorded events, require SPD to delay disclosure under the PRA for three years, the length of the statute of limitations on litigation?

### III. STATEMENT OF THE CASE

WASPC's interest focuses on a pure legal issue about which there are no disputed facts. The trial court decided that RCW 9.73.090(1)(c) is an "other statute" as contemplated in RCW 42.56.070(1).<sup>1</sup> The court ruled "RCW 9.73.090(1)(c) does not exempt any records from public disclosure, it merely delays disclosure..."<sup>2</sup> The court agreed with SPD that public disclosure of dash-cam videos must be delayed for three years, the civil statute of limitations. WASPC seeks affirmance of this part of the ruling and clarity that an agency must follow the clear directive of RCW 9.73.090(1)(c), that *no recordings* made pursuant to RCW 9.73.090(1)(c) are to be made available to the public before the disposition of *any* litigation that arises therefrom.

### IV. ARGUMENT

#### A. RCW 9.73.090(1)(c) IS AN "OTHER STATUTE" WITHIN THE MEANING OF RCW 42.56.070(1)

RCW 42.56.070(1) provides in pertinent part:

(1) Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of subsection (6) of this section, this chapter, *or other statute* which exempts or prohibits disclosure of specific information or records. (Emphasis added.)

RCW 9.73.090(1)(c) provides, in pertinent part:

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<sup>1</sup> Record of Proceedings: Pg. 540, line 21, et seq.

<sup>2</sup> Record of Proceedings: Pg. 541, lines 6-7.

(1) The provisions of RCW 9.73.030 through 9.73.080 shall not apply to police, fire, emergency medical service, emergency communication center, and poison center personnel in the following instances: \* \* \* (c) Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles. \* \* \*

*No sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until final disposition of any criminal or civil litigation which arises from the event or events which were recorded. Such sound recordings shall not be divulged or used by any law enforcement agency for any commercial purpose. (Emphasis added.)*

The express language of RCW 9.73.090(1)(c) imposes a *temporal restriction* on the release of the dash-cam videos to the public. On its face, RCW 9.73.090(1)(c) regulates the release of public records, and, therefore, is an “other statute” for purposes of the PRA. KOMO appears to argue that RCW 9.73.090(1)(c) cannot qualify as an “other statute” under RCW 42.56.070(1) because RCW 42.56.030 provides that where a statute is in “conflict” with the PRA, the PRA governs. Appellant’s Reply Brief, at 10. This makes no sense.

This Court must presume that the Legislature did not intend an inconsistency.<sup>3</sup> This Court must also presume that the Legislature, by including the restriction on public disclosure in RCW 9.73.090(1)(c), did

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<sup>3</sup>*State ex rel Peninsula Neighborhood Ass’n v. Dep’t of Transportation*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000).

not intend the language to be unnecessary.<sup>4</sup> Moreover, this Court's "objective is to give effect to the intent of the legislature."<sup>5</sup> In giving effect to the Legislature's intent, this Court will "attempt to harmonize apparently contradictory statutes prior to resorting to canons of construction that give preference to one statute over another." *Ibid.*

The mere creation of a regulation, restriction, or prohibition (hereinafter "exemption") of the release of public records in a statute outside of the PRA (RCW 42.56) cannot be the basis of a claim of a conflict such that the PRA would govern. That would render meaningless the phrase "other statute" in the PRA and invalidate numerous other statutory provisions outside the PRA.<sup>6</sup> Not only would KOMO's view abrogate exemptions found in numerous other statutes, it ignores the settled proposition that the "legislature is presumed to have full knowledge of existing laws."<sup>7</sup>

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<sup>4</sup> *McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004).

<sup>5</sup> *Bank of America, N.A. v. Owens*, 173 Wn.2d 40, 53, 266 P.3d 211 (2011).

<sup>6</sup> A comprehensive list of over 100 such statutes can be found in the WSBA Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Law, Appendix to Chapter 12. Depending on how this Court decides this issue regarding an "other statute" WASPC is concerned about the future application of this decision as it relates to such things as crime victim information (RCW 7.68.140), or records regarding domestic violence (DV) victims (RCW 40.24.070), shelters for DV victims (RCW 70.123.075), or law enforcement peer support group counselors (RCW 5.60.060(6)) to name just a few.

<sup>7</sup> *Thurston County v. Gorton*, 85 Wn.2d 133, 138, 530 P.2d 309 (1975). See also *BLAIR v. Dep't of Labor & Indus.*, 123 Wn. App. 656, 665, 98 P.3d 537 (2004), rev. denied 154 Wn.2d 1030, 116 P.3d 399 (2005), ("the legislature enacted this [exemption from public inspection of L&I records] with full knowledge of existing public disclosure laws.")

KOMO also argues that there is a “conflict” between the two statutes because there is no alternative means of acquisition of the records. (Appellant’s Brief, at 34-35; Appellant’s Reply Brief, at 12.) KOMO relies on *Deer v. DSHS*.<sup>8</sup> In *Deer*, at 92, the Court of Appeals said: “Because chapter 13.50 RCW contains an alternative means of requesting and seeking juvenile dependency records that balances and protects the privacy needs of the juvenile and his or her family, we find no conflict.” KOMO argues that this statement by the court is a pronouncement of the only means by which a court could determine there is no conflict. Additionally, in Appellant’s Reply Brief, at 12, KOMO argues that SPD’s interpretation of RCW 9.73.090(1)(c) “poses a clear, direct conflict with the PRA because it *prevents* access to public records.” [emphasis in original.] KOMO’s position overlooks the holding by the Court of Appeals in *Hangartner v. Seattle*.<sup>9</sup> In deciding that RCW 5.60.060 (attorney/client privilege) was an “other statute”, the court discussed the non-disclosure of privileged records. There was no alternative process in *Hangartner*, and the decision prevented the publication of public records; yet, that Court determined RCW 5.60.060 to be an “other statute” not in conflict with the PRA.

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<sup>8</sup> *Deer v. DSHS*, 122 Wn. App. 84, 93 P.3d 195 (2004).

<sup>9</sup> *Hangartner v. Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004).

There is no authority setting out the litmus test for when there is a conflict. Rather, the courts have considered whether the statutes can be 1) harmonized, 2) read to avoid absurd results, and 3) read to give meaning to all parts of the statute. See discussion *infra* at 6-9. SPD's interpretation of RCW 9.73.090(1)(c) is understandable and allows this Court to do all three.

With that foundation in mind, WASPC turns its attention to the interpretation of RCW 9.73.090(1)(c) as it relates to when the dash-cam videos can be released to the general public.

**B. THE RESTRICTION ON PUBLIC DISCLOSURE OF DASH-CAM VIDEOS FOUND IN RCW 9.73.090(1)(c) IS NOT LIMITED TO THOSE RECORDINGS INVOLVED IN EXISTING LITIGATION**

The language of RCW 9.73.090(1)(c) says, in pertinent part:

*No ... recording made under this subsection (1)(c) may be duplicated and made available to the public ... until final disposition of any criminal or civil litigation which arises from the event .... [Emphasis added.]*

The language of the statute is clear; no recordings are to be made public until final disposition of any litigation. In the case of *State v. Roggenkamp*, this Court said:

We review a question of statutory construction de novo. Statutory construction begins by reading the text of the statute or statutes involved. If the language is

unambiguous, a reviewing court is to rely solely on the statutory language. [Citations omitted.]<sup>10</sup>

Not only does this Court assume that the Legislature does not intend to create an inconsistency and that the Legislature does not include unnecessary language but “[w]here statutory language is unambiguous, we accept that the legislature means exactly what it says.”<sup>11</sup>

The statute says: NO recording made pursuant to the subsection is to be copied and made public until the disposition of ANY litigation that arises from the event. The word “no” is an absolute. Not even one such recording may be copied and released to the public (within the temporal restriction). The word “any” is an absolute as well. It is all inclusive. It not only includes “pending” litigation; it includes “threatened” “likely” or “possible” litigation as well. With words such as “no” and “any”, the analysis should stop there. That is true even where the Legislature might not have done an artful job of explaining itself. In *Hangartner*,<sup>12</sup> this Court said:

When statutory language is plain and unambiguous, the statute's meaning must be derived from the wording of the statute itself. This rule holds true, even if the Legislature intended something else but failed to express it adequately. [Citations omitted.]

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<sup>10</sup> *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005).

<sup>11</sup> *State v. Marohl*, 170 Wn.2d 691, 698, 246 P.3d 177 (2010). [Citations omitted.]

<sup>12</sup> *Hangartner v. Seattle*, 151 Wn.2d 439, 452-453, 90 P.3d 26 (2004).

So, if the Court determines the language is ambiguous and the analysis continues, it must start with the Legislature's intent. That intent can be found in the language of the statute and its application to a reasonable scenario.

In this case, this Court should avoid the absurd consequences that could stem from the interpretation urged by KOMO. If the Court were to apply KOMO's interpretation (which requires that the Court add the word "pending" to the statute but not include "possible" or "threatened" or "likely" or "anticipated") the antithesis of the legislation could result. Consider this scenario drawn from our collective experience. Start with these five assumptions: 1) an event occurs on day one, 2) on day two a public records request is made by a requestor, 3) pursuant to the KOMO interpretation that the prohibition in RCW 9.73.090(1)(c) does not apply because there is no *pending* litigation at that point in time, law enforcement produces the recording to the requestor, 4) the event recorded is an event from which litigation arises, and 5) that litigation (criminal or civil) is commenced one month after the event.

The recording would have been copied and provided to the public before the final disposition of the litigation which arose from the event. This leads to an absurd result. The express language and intent of the statute were frustrated as soon as the action was commenced one month

after the event. In fact, a requestor could make a daily request for all recordings from the preceding night, before litigation could be commenced. Following KOMO's logic, EVERY recording would be released to the public, including those that involve an event from which litigation arises. That result flies in the face of the express language of the statute that *no* such recording is to be copied and provided to the public. To interpret RCW 9.73.090(1)(c) as KOMO would have the Court interpret it, the absolute antithesis of the purpose of the legislation is what could end up happening.<sup>13</sup>

**C. RCW 9.73.090(1)(C)'S REQUIREMENT FOR AN EXTENDED DELAY IN DISCLOSURE OF DASH-CAM VIDEOS PROTECTS PRIVACY INTERESTS OF PERSONS CAPTURED ON DASH-CAM VIDEOS<sup>14</sup>**

KOMO's briefing is focused exclusively on what the dash-cam recordings might show regarding police behavior. But police behavior is only part of what is captured. Whether one is considering the civil and criminal fair trial interests of potential litigants or one is considering the

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<sup>13</sup> WASPC does not question the responsible behavior of KOMO TV. It is not likely that KOMO would make a PRA request daily, as the scenario posits. However, if this Court adopts KOMO's interpretation there is nothing that would keep any other member of the public from making daily requests, leading to the result diametrically opposed to the express language of the statute, which law enforcement personnel have a sworn duty to follow.

<sup>14</sup> WASPC notes that it is describing, not necessarily endorsing, protection of information privacy interests as one of the Legislature's purposes in adopting the delayed-release provision in RCW 9.73.090(1)(c). How the Legislature should weigh information privacy interests in the balance against law enforcement interests, voyeuristic interests, and other interests relevant to this or other legislation, or how the courts should do so in developing court-made doctrines, is irrelevant to the issues in this case, and therefore those concerns are not addressed in this brief.

privacy interests of all persons, one must consider, as the Legislature did, all persons whose words, actions, associations and the like are captured on dash-cam videos.

KOMO contends that: (1) *Lewis v. Department of Licensing*, 157 Wn.2d 556, 139 P.3d 1078 (2006) “held that privacy interests are not implicated by RCW 9.73.090(1)(c)”; and (2) privacy interests cannot have been an object of the Legislature’s intent because, after expiration of the extended statutory delay-period posited by SPD, the records will be subject to disclosure. KOMO Reply 15-16. KOMO is wrong on both counts.<sup>15</sup> *Lewis* did include a narrow holding that dash-cam conversations are not “private conversations” for purposes of the Privacy Act. *Lewis*, 157 Wn.2d at 460. But *Lewis* did *not* broadly hold, as KOMO contends, that the Privacy Act “does not implicate privacy *interests*.” Nor does *Lewis* contain any analysis that supports that proposition.<sup>16</sup>

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<sup>15</sup> KOMO also suggests that there is no privacy interest here because case law on constitutional search and seizure restrictions on law enforcement does not generally recognize a privacy right against police investigation and surveillance of open conduct in public areas. Appellant’s Brief, at 33 n. 16. KOMO fails to note this Court’s decision in *State v. Jackson*, 150 Wn.2d 251, 261-64, 76 P.3d 217 (2003), recognizing privacy protection under article I, section 7 of the Washington constitution against the government’s warrantless use of electronic tracking devices to monitor citizens’ *public* travels. More importantly, nothing in constitutional search and seizure law suggests that privacy interests exist only within the narrow confines of those privacy interests that are protected by constitutional law. Indeed, there are a wide range of additional privacy interests that the Legislature or courts might take into account in other contexts outside constitutional law cases.

<sup>16</sup> The *Lewis* decision quoted the following from the House Bill Report on the 2000 legislation: “People pulled over for a traffic stop have a *lower* expectation of privacy than situations involving wiretaps.” *Lewis*, 157 Wn.2d at 463, quoting from H.B. Rep. on

The concept of “private conversations” under the Privacy Act is narrow, and it requires a highly fact-specific, contextual determination. *State v. Clark*, 129 Wn.2d 211, 224-31, 916 P.2d 384 (1996). On the other hand, the concept of “privacy *interests*,” even where restricted to the *information* privacy interests that in part underlie RCW 9.73.090(1)(c), is quite broad and variable.

The concept of information privacy recognizes that people generally have an interest in having a measure of control over how much information about themselves is presented to the general public. “Society accepts that public reputation will be groomed to some degree . . . . Society protects privacy because it wants to provide individuals with some degree of influence over how they are judged in the public arena.”<sup>17</sup>

The abstract concept of information privacy interest includes, at the very least, anything that involves personal information where public disclosure of such information would be embarrassing to someone. There are varying *rights* of information privacy depending on whether one is

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Subst. H.B. 2903, 56<sup>th</sup> Leg. Reg. Sess. Wash, 2000 (Emphasis added). The adjective “lower” is markedly different from the adjective “no.” The House Bill Report recognizes that people pulled over for a traffic stop (not to mention passengers and passersby) do have a privacy interest, just a lower one than persons in certain other contexts.

<sup>17</sup> Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 Duke L.J. 957, 1040 (2003). It is likely that this information privacy interest underlies the Washington Legislature’s original decision to require all-party consent to recording of private conversations. People will say things in a private conversation that they do not want to be judged on by others not a party to the conversation.

considering constitutional law, criminal law, contracts law, torts law, evidentiary privileges, or various statutes such as the Privacy Act and the Public Records Act. These varying rights of privacy are subsets of a broader “concept of privacy.” See generally Daniel J. Solove, Paul M. Schwartz, *Information Privacy Law*.<sup>18</sup>

A person’s decision to go out in public does not necessarily mean the person wishes to surrender all privacy interests while out in public. In a case involving a lawsuit grounded in the tort of information privacy intrusion, the California Supreme Court explained: “The mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone.”<sup>19</sup>

Here, the Legislature has recognized that the mere fact that a person can be seen by someone while out in public does not automatically mean that the person must be subject to being seen by everyone right now through immediate dissemination of a dash-cam video. Evidence of the

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<sup>18</sup> Daniel J. Solove, Paul M. Schwartz, *Information Privacy Law* (4<sup>th</sup> Ed. 2011) at 1-3, 10-53 (discussing the concept of information privacy and varying protections by different doctrines and statutory schemes).

<sup>19</sup> *Sanders v. ABC*, 20 Cal.4<sup>th</sup> 907, 85 Cal. Rptr. 2d 909, 978 P.2d 67, (1999); see also Helen Nissenbaum, *Privacy As Contextual Integrity*, 79 Wash. L.R. 119, 154-55 (2004) (explaining that under her context-based theory of privacy it matters how broadly information is disseminated, and suggesting an argument for a right of privacy even for public information or for conduct in public places); Jeff Sovern, *Opting In, Opting Out, Or No Options At All: The Fight For Control Of Personal Information*, 74 Wash. L.R. 1033, 1052-53 (1999) (discussing what constitutes information privacy and why people value it).

Legislature's recognition of information privacy interests and their peril from an increasingly voyeuristic public is also reflected in the second sentence of the second unnumbered paragraph of RCW 9.73.090(1)(c) providing: "Such sound recordings [captured by the dash-cam technology] shall not be divulged or used by any law enforcement agency for any commercial purpose."

In RCW 9.73.090(1)(c) and several other statutes addressing government-generated videotaping of public activity, the Washington Legislature has recognized that a person has at least a qualified privacy interest in not being viewed on videotape by great masses of the populace during a police detention just because he or she has gone out in public. Statutes authorizing photo toll systems do not permit *any* public dissemination of the images. RCW 46.63.160(6)(c); RCW 47.56.795(2)(b); RCW 47.46.105(2)(b). Likewise, the statute authorizing traffic safety cameras at stoplights, railroad crossings, and school speed zones do not permit *any* public dissemination of the images. RCW 46.63.170(1)(g).<sup>20</sup>

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<sup>20</sup> Also, while custodial interrogations do not involve conduct in public, the total bar on public disclosure of videotaped custodial interrogations under RCW 9.73.090(1)(b)(iv), despite the fact that such communications between police and suspects are not private (see discussion of private conversations issue in *Lewis*, 157 Wn.2d at 466-67 regarding *State v. Cunningham*, 93 Wn.2d 823, 829, 613 P.2d 1139 (1980)) likewise reflects legislative protection of, among other interests, the information privacy interests of persons involved in contacts with law enforcement in circumstances where the contacts do not involve private conversations but privacy and other interests are implicated.

The concept of information privacy brings up other considerations as well. Weigh the possibility for public embarrassment, shame or indignity if the stopped person or passenger or passerby or other person whose image, words or actions are involuntarily (albeit legally) captured by the dash-cam:<sup>21</sup>

- 1) Is a youngster in the background who might be caught in a compromising position;
- 2) Is out on an obvious date with or displays affection to someone not his or her significant other;
- 3) Is contacted by police in a parking lot of an abortion clinic, strip club, gay bar, a needle exchange, or other location where the person contacted might want to go unnoticed;
- 4) Has a wardrobe malfunction, e.g., woman's skirt is blown over her head by a gust of wind, man's pants fall down, man's toupee slips or comes off, a temporarily bald cancer patient's head cover slips off, a person's usually covered tattoo becomes inadvertently exposed;

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<sup>21</sup> While KOMO might try to avoid presenting dash-cam videos in a way that embarrasses citizens, there is no way to guarantee that it can do so. In addition, public disclosure is not limited to the media, whether responsible or not, but extends to everyone making a request for records. Judicial notice can be taken of the legislative fact that in 2000 when RCW 9.73.090(1)(c) was adopted by the Legislature, we were already living in our increasingly voyeuristic Internet age and society. "Legislative facts" of which judicial notice may be taken are social, economic, and scientific realities or facts that enable the court to interpret the law. *Wyman v. Wallace*, 94 Wn.2d 99, 102, 615 P.2d 452 (1980).

- 5) Reveals intimate medical information such as HIV-positive status, a mental or nervous breakdown, convulsions, or other serious medical condition or disability;
- 6) Reports being raped or molested by a family member.<sup>22</sup>

KOMO argues that privacy interests cannot have been an object of the Legislature's intent because, after expiration of the extended statutory delay-period posited by SPD, the dash-cam videos will be subject to disclosure.<sup>23</sup> Appellant's Reply Brief, at 15. And, while KOMO can focus only on how it intends to use the recording, this Court cannot be so limited. KOMO ignores the possibility that members of the public can make the same requests (or more) as KOMO. What might be an Internet and YouTube sensation if disseminated by an irresponsible member of the public near the time of the event is likely to generate much less public interest or voyeurism if disseminated three years later.<sup>24</sup> By that time, the

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<sup>22</sup> Consider also the personal safety concerns of a person captured on dash-cam video where that person is being stalked or is in hiding from a domestic abuser. Consider, too, that the statute requires that the audio and video both be activated and the device may not be turned off even during private moments until the police contact is terminated.

<sup>23</sup> If this Court agrees with KOMO that dash-cam videos do not ever implicate any privacy interests of drivers, passengers, passersby or others whose images, activities and conversations are captured on dash-cam videos, WASPC asks that the Court make clear that, as a matter of law, no individual or agency civil or criminal liability under chapter 9.73 RCW or under any privacy-based common law legal theory can ever attach to an agency's production of a dash-cam video in response to a PRA request.

<sup>24</sup> Daniel J. Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution*, 86 Minn. L. Rev. 1137, 1176-78 (2002) ("Privacy can be violated by altering levels of accessibility, by taking obscure facts and making them widely accessible."); and Peter A. Winn, *Online Court Records: Balancing Accountability And Privacy In An Age Of Electronic Information*, 79 Wash. L.R. 307, 388-20 (2004) (in a

potentially embarrassed subject on the recording will have time to anticipate the dissemination and take steps to rehabilitate that which can be rehabilitated.<sup>25</sup>

**D. RCW 9.73.090(1)(c)'S REQUIREMENT FOR AN EXTENDED DELAY IN DISCLOSURE OF DASH-CAM VIDEOS CREATES A STATUTORY FAIR TRIAL PROTECTION UNDER THE PRA FOR BOTH CIVIL AND CRIMINAL LITIGANTS**

RCW 9.73.090(1)(c) delays public disclosure of dash-cam recordings until final disposition of any criminal *or* civil litigation that arises from the recorded events. SPD explains that the Legislature created this qualified prohibition on disclosure in recognition of the significant prejudice to the rights of potential litigants and the justice system that can be caused by dissemination of dash-cam videos. Respondent's Brief, at 43-45. Dissemination of the powerful but sometimes misleading evidence of dash-cam recordings (particularly those that are incomplete, heavily edited, or without essential context) of recent events can taint both witnesses<sup>26</sup> and the jury pool.<sup>27</sup> This is unfair to litigants and potential

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subsection captioned "Legal Protections for the Privacy Value in Practical Obscurity," the author discusses U.S. Supreme Court opinions supporting that proposition).

<sup>25</sup> Although not commonly done, individuals can seek judicial intervention to protect against the release of highly private or personally offensive information. RCW 42.56.540.

<sup>26</sup> A witness in a criminal case or a civil case (including police discipline processes and coroner's inquests) who views a YouTube posting could have his/her testimony compromised before law enforcement even interviews him or her. How will those involved in the process (police, prosecutors, defense attorneys, judges, jurors) know whether the person's statement to the police (or testimony in court, for that matter) has

litigants who have not yet had an opportunity to complete discovery and fully adjudicate civil or criminal matters which may arise from the recorded events. Respondent's Brief, at 43-45.<sup>28</sup>

KOMO's only substantive response on this point suggests that this Court rejected a similar "fair trial" argument in *Seattle Times Company v. Serko*, 170 Wn.2d 581, 595, 243 P.3d 919 (2010). Appellant's Brief, at 35; Appellant's Reply Brief, at 16, n. 17. KOMO's reliance on *Serko* is misplaced. *Serko* involved a failed attempt by criminal defendants to bar disclosure of law enforcement records based on *court-created constitutional* fair trial protections. *Serko* did not involve any specific disclosure exemption or prohibition in the PRA or in the RCWs. In stark contrast, the instant case concerns an explicit prohibition on disclosure providing *statutory* protection of fair trial interests of *both criminal and*

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been affected? There is no way to know. In a criminal matter, a person's liberty could be negatively affected.

<sup>27</sup> Assume that a juror saw the video when it first appeared on TV or YouTube and formed impressions and discussed it with others. Assume further, the juror does not remember that he/she saw the video months (maybe years if it's a civil case) earlier. So, in the courtroom, the juror might not make the connection and, thus, might not mention having seen it, discussed it, or made decisions about the contents when asked by counsel during voir dire. However, during trial, the video is shown and the juror recognizes it. The juror might call that to the bailiff's attention; the juror might not. Neither leads to a good result. If disclosed, there may be grounds for a mistrial. Or, if not disclosed, we have a trial influenced by information not introduced in the courtroom, but we don't know it.

<sup>28</sup> While KOMO might try to avoid presenting dash-cam videos in a misleading manner, there is no way to guarantee that it can do so. In addition, public disclosure is not limited to the media, whether responsible or not, but extends to everyone making a request for records. And, in this day and age of YouTube and the Internet, there is no control over the secondary dissemination of information.

*civil* litigants that qualifies as an “other” statute under RCW 42.56.070(1).<sup>29</sup>

Protecting the judicial process is not the only concern. Consider the possible harm that could come from premature disclosure of sensitive information. In some cases, detectives will withhold some unique piece (or pieces) of information from disclosure so that he/she will have something against which to test the veracity of a confession, or to lay a trap for a perpetrator.<sup>30</sup>

Law enforcement agencies are concerned about the integrity of their investigations and the prosecutions that follow. They are concerned about officer contacts with witnesses, victims, and suspects. They are concerned about the resources expended in having a retrial. They are also concerned (as we are sure KOMO is) about the fair trial rights of all litigants. WASPC asks this Court not to overlook the integrity of law enforcement investigations as well as the fair trial interests the Legislature expressly undertook to protect.

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<sup>29</sup> KOMO also attacks SPD’s fair trial discussion as being speculative and without support in legislative history. Appellant’s Reply Brief, at 16 n. 17. This attack is just as baffling as KOMO’s reliance on the *Serko* decision. This Court needs no citation to legislative history here where the Legislature made its intent manifest by expressly delaying public disclosure under RCW 9.73.090(1)(c) “until final disposition of any criminal or civil litigation which arises from the event or events which were recorded.”

<sup>30</sup> Even if KOMO argues that law enforcement can withhold those recordings, that presupposes that law enforcement will know at the beginning of an investigation what will be a particularly unique piece of information. That asks too much. Often times, the import of a piece of information might not come to light until much later and other information has become known.

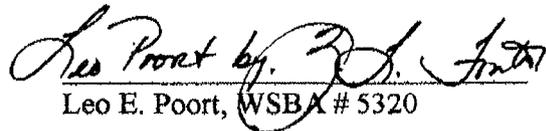
Depending on this Court's decision, agencies not already using dash-cams will make decisions about whether to use this technology. They may choose to forego the use of this tool to avoid the risks they could face having to decide whether to face civil (or criminal) penalties for, on the one hand, violation of the Privacy Act or, on the other hand, violation of the PRA.

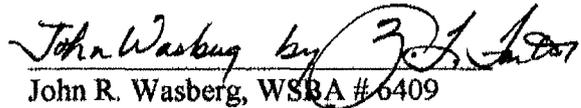
## V. CONCLUSION

WASPC asks the Court to affirm the trial court and hold that RCW 9.73.090(1)(c) is an "other statute" as contemplated in RCW 42.56.070(1), and requires SPD and other agencies using dash cameras to delay disclosure of dash-cam videos under the PRA for three years, the length of the statute of limitations for civil litigation.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of March, 2013.

  
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Attached are: 1) CORRECTED Brief of amicus Curiae Washington Association of Sheriffs and Police Chiefs; 2) Certificate of Mailing; and 3) Transmittal letter re: Corrected Brief. All pertaining to the following case:

**Case No:** 87271-6

**Case Name:** Fisher Broadcasting-Seattle TV L.L.C. dba KOMO 4, Appellant, v. City of Seattle, a local agency, and the Police Department, a local agency, Respondents.

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