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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FISHER BROADCASTING-SEATTLE TV L.L.C., d/b/a KOMO 4,

Appellant,

v.

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

Respondents.

AMICUS CURIAE BRIEF OF WASHINGTON STATE ASSOCIATION
OF MUNICIPAL ATTORNEYS IN SUPPORT OF RESPONDENTS,
CITY OF SEATTLE AND SEATTLE POLICE DEPARTMENT

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SUPREME COURT
STATE OF WASHINGTON
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 ORIGINAL

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A. IDENTITY OF AMICUS CURIAE

Amicus is the Washington State Association of Municipal Attorneys, the organization of municipal attorneys representing the cities and towns across the State, (hereinafter referred to as “WSAMA”).

B. STATEMENT OF CASE

WSAMA adopts the Introductory Statement and Restatement of the Facts submitted by the Respondents, City of Seattle and its Police Department, (hereinafter collectively referred to as “Seattle”).

However, Amicus submits that it is appropriate that the Court recognize the particular nature of the public records requests submitted by the Appellant, Fisher Broadcasting – Seattle TV, L.L.C., d/b/a KOMO 4, (hereinafter referred to as “KOMO”).

The comparison of those requests has been set forth in Appendix “D” to Seattle’s Brief of Respondent and that attachment sets forth, with particularity, the language of the requests. It compares KOMO’s requests with a request from another individual that was specific and which did accommodate the ability of the Respondents, Seattle and its Police Department, to respond through public records processes.

C. SUMMARY OF ARGUMENT

The issues of this case will affect not only the City of Seattle. They

could affect any city, town or county in the state. Many jurisdictions have in-car video cameras that record the interactions between law enforcement officers and the individuals with whom they have contact. In addition, many jurisdictions, likewise, face increasing numbers of public records requests. The outcome of this case could affect both jurisdictions using in-car video systems, and those that do not but which regularly respond to public records requests regarding other documents.

All jurisdictions would have difficulty addressing public records requests if they must provide something – if they are deemed to be in violation of the Public Records Act, RCW Chapter 42.56 – if they either don't provide records that don't exist, or don't interpret a flawed request so as to implicate records that were not requested.

Also, the police vehicles of many jurisdictions have in-car video cameras. All of these jurisdictions need to be able to address public records requests related to those in-car cameras. Cities and towns across the state must be able to determine what is appropriate for dissemination, or when something is appropriate for dissemination. Here, we have a statute that states, pretty clearly, that no sound or video recording made under subsection 1(c) of Section 9.73.090 of the Revised Code of Washington (RCW) may be duplicated and made available to the public by a law enforcement

agency...until final disposition of any criminal or civil litigation which arises from the event or events which were recorded. The effect of this language is drawn into question by KOMO's arguments.

D. ARGUMENT

Seattle has very capably represented the arguments and issues with which it is contending in this case. It is, however, important for the Court to keep in mind that these are issues that do not affect only the City of Seattle. These issues and similar issues are things with which many city, town or county in the state deal every day. The outcome of this case will affect both jurisdictions using in-car video systems, and even those that do not but which must respond to public records requests generally.

1. KOMO'S ARGUMENTS REGARDING THE WORDING OF ITS REQUESTS SHOULD NOT BE ACCEPTED.

The gist of KOMO's argument seems to be that its requests for documents should be read – interpreted – in a way that entitles it to receive public documents even when the actual language of the request did not describe documents that existed at the time. Were that the law, it would be practically impossible for public agencies to respond promptly to public records requests.

First and foremost, a public records request must be construed based

on the language of the request. If we were ever to get to the point that public agencies must interpret a vague, nebulous records request and still face the penalties of violating the Public Records Act, public agencies would be subject to an impossible dilemma. That is precisely the point to which KOMO's argument takes us. Moreover, were that the law, it would create an incentive for requestors to be intentionally less than artful in drafting their public records requests, perhaps hoping for an interpretation that they could then argue violates the law. If public agencies were burdened with the obligation of translating poorly worded requests in such a no-win approach, their ability to respond to public records requests would have become significantly more difficult and unnecessarily tying up more time of the agencies and slowing down their ability to respond to public records requests.

A comparison of the request by Eric Rachner and the requests by KOMO shows that KOMO's requests were not actionable and should not have triggered any obligation on the part of Seattle to provide records that neither existed at the time of the request, nor were actually requested by KOMO. *See* Appendix "D" to Brief of Respondent. Interestingly, notwithstanding KOMO's presentation of a declaration by Eric Rachner, the requests are quite different, as evident by the comparison of the two requests included in Seattle's brief.

A public agency should not have to try to guess what might have been the intended request when the request for public documents itself does not identify a record that exists. Public agencies should not have to suffer the potential consequences of a public record violation when the request for documents that the agency received does not exist. If KOMO were correct and the argument were taken to its next logical progression, public agencies would have to evaluate what of various potential requests could have been intended or could have been requested instead and try to meet those requests even though they would be markedly different than what was actually requested. That is not fair to the agency and the time expended by the agency is an unfair imposition on the agency.

As this Court would undoubtedly understand, based upon the public record cases that have come before it in recent years, processing public record requests by cities, towns and counties consumes a significant amount of time and the work is growing seemingly exponentially. If KOMO were correct in its argument, the amount of time that would be involved in responding to public records requests could be expected to grow at an even faster rate. And for what purpose? Searching files for records that do not exist or that were not requested? A public agency has no duty to respond until it receives a valid public record request. *Bonamy v. City of Seattle*, 92 Wn. App 403, 412,

960 P.2d 447 (1998). And 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 873 (2009). Additionally, requestors of public records must request identifiable public records. *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). Likewise, there is no ongoing duty to provide updated responses to a request or to provide documents created after the request has been received. *Sargent v. City of Seattle Police Department*, 167 Wn. App 1, 10, 260 P.3d 1006 (2011). The Public Records Act does not require agencies provide updates to previous responses or monitor whether documents previously withheld as exempt may later become subject of a disclosure. *Id.* Were the law such so as to impose an on-going obligation for future records searches, the burdens on public agencies would be substantial, and even the requestors would not be able to know when to treat the responses they received as finalized.

KOMO also argues that its particular requests for public records should trigger a violation of the Public Records Act even though its language was not specific and even though its requests for records was for records that did not exist at the time. Public agencies that daily contend with public records requests should be entitled to rely upon the express language of a

request and use that language to determine whether records exist and are subject to disclosure pursuant to the Public Records Act. If cities, towns and counties were, instead, required to translate, interpret or speculate about what may have been requested, and how the request could have been re-worded, the result would be a never ending dilemma.

In addition to imposing the burden to translate what could have or should have been said in a request, KOMO's reading of the Act makes all public records requests significantly more complicated. Rather than evaluating simply what is requested, a jurisdiction, under threat of public record violation penalties for non-dissemination, would end up creating documents or providing documents not actually requested so as to avoid the burden that KOMO's position imposes upon them. Moreover, it may be that individuals involved in what could become a blossoming cottage industry of public records requests in this area would intentionally formulate nebulous requests for the specific purpose of manufacturing a Public Records Act case. The argument would be that when a public records officer interprets the vague request differently than what the requester later says was intended, the failure to give a certain public record is a violation of the Public Records Act.

2. THE PUBLIC RECORDS ACT AND THE "OTHER STATUTE" EXEMPTION

Admittedly, the Public Records Act, Chapter 42.56 RCW, imposes a

broad mandate for disclosure of public records. However, that statute does not control everything and likewise, undoubtedly, there are public records that would not be appropriate for disclosure or where disclosure is limited, even under the Public Records Act. RCW 42.56.270 lists a litany of public records and public record documents that would be exempt from disclosure. Those other exceptions are accommodated through the language of RCW 42.56.070(1) which states in pertinent part as follows:

(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.

Many state and federal laws provide exemptions from disclosure or that have prohibitions on disclosure. Included among the long list of things not encompassed within RCW Chapter 42.56 would be such statutes as:

RCW 9A.82.170, Criminal Profiteering Act;
RCW 10.97.070, Washington State Criminal Records Privacy Act;
RCW 10.98.070, Criminal Justice Information Act;
RCW 41.04.364 Public Employment, Civil Service, and Pensions;
RCW 42.52.050, Ethics in Public Service;
RCW 69.41.044, .280, Legend Drugs – Prescription Drugs;
RCW 84.36.389, Property Taxes – Exemptions;
RCW 42.40.040, 42.41.045, Whistleblower Protection;
RCW 48.62.101, Local Government Insurance Transactions;
RCW 70.94.205, Washington Clean Air Act;
45 CFR 160 & 164; Ch 70.02 RCW, Personal Health Records
42 USC 405(c)(2)(C)(viii)(1) – (Social Security Numbers)

to name just a very few among the many more such statutes.

With that, the suggestion that RCW 9.73.090(1)(c) does not provide for such an exemption or limitation on disclosure makes no sense. Clearly, that statute states that:

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.

RCW 9.73.090(1)(c) (part).

The legislature intended that exemption or limitation on disclosure, and stated it clearly. The audio recordings from video cameras mounted in law enforcement vehicles is an exception to the consent requirements for other recorded conversations. Early disclosure of the recordings video cameras mounted in law enforcement vehicles could understandably affect the criminal or civil actions – regardless of when they are filed and pending.

a. RCW 9.73.090(1)(C) an “Other Statute” Exemption to the Public Record Act.

When the legislature established the Privacy Act codified in Chapter 9.73 RCW, it addressed concepts previously not incorporated in state law. The Washington State legislature generally intended to provide limitations on un-consented recording of conversation. In that chapter, the statutes prohibit disclosure of disclosing telegrams (RCW 9.73.010), sealed letters (RCW

9.73.020) and recording private conversations except with consent (RCW 9.73.030, 040). Along with that, however, the legislature did intend to recognize the utility of sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles. RCW 9.73.090 provided for an exception to the consent requirement for recording. In fact, that statute does not require consent, only that the officer recording such conversations with individuals through the use of the video cameras mounted in law enforcement vehicles, must advise the person or persons being recorded but does is not required to obtain their consent. In this regard, for that matter, this Court has held that conversations recorded during routine traffic stops by video cameras mounted in law enforcement vehicles are not private. *Lewis v. State Department of Licensing*, 157 Wn.2d 446, 451-452 and 465-466, 139 P.3d 1078 (2006). *Lewis* also held, however, that law enforcement officers must strictly comply with the requirements of RCW 9.73.090(1)(c). This Court's dictate is in keeping with the clear language of the statute. Moreover, this statute, a statute that imposes significant consent structure to private conversations, written and electronic, is not without its own protective measures. The officer must inform the subject that he or she is being recorded.

A law enforcement officer shall inform any person being recorded by sound under this subsection (1)(c) that a sound

recording is being made and the statement so informing the person shall be included in the sound recording, except that the law enforcement officer is not required to inform the person being recorded if the person is being recorded under exigent circumstances. A law enforcement officer is not required to inform a person being recorded by video under this subsection (1)(c) that the person is being recorded by video.

RCW 9.73.090(1)(c) (part).

Furthermore, the statute dictates that the police officer using the in-car recording device must be in uniform, the recording must be operated simultaneously with any video camera, and the recording device may not be turned off by the officer during the operation of a video camera. These requirements are precise and unique to the police use of in-car recording equipment. This is different, intended to be different than any other public records statutes. For that matter, the testimony for this particular statute helps show what its intention was.

Testimony For: Video without the sound is presently admissible. The camera is an unbiased witness. The bill is narrowly tailored to include only those recordings made from police vehicles. *The bill will result in greater officer safety and better evidence gathering, especially in drunk driving cases.*

S.B. Rep. on Substitute H.B. 2903 56th Leg., Reg. Sess. (Wash.2000).

And,

Testimony For: Currently when an officer makes a traffic stop, the video recorder in the police car may only take video

images of the encounter. This bill will allow a sound recording also to be made in this situation. The intent of this bill is not to invade privacy--it doesn't authorize recordings in homes, in businesses, or of phone conversations. People pulled over for a traffic stop have a lower expectation of privacy than situations involving wiretaps. *Allowing sound recordings in this context will help ensure officer safety, provide an important evidentiary tool, and create a checks and balances system for officer conduct.*¹

H.B. Rep. on Substitute H.B. 2903 56th Leg., Reg. Sess. (Wash.2000)

Citations to legislative records can be used to show legislative intent. *State v. Reding*, 119 Wn.2d 685, 690, 835 P.2d 1019, 1022 (1992) (courts look to legislative bill reports and analyses to discern the Legislature's intent).

Clearly, the intention of this statute is very much different than that of the Public Records Act. The intentions of RCW 9.73.090(1)(c) should not be side-stepped or made to give way to the purposes of KOMO in making its public records request.

Again, that statute, a statute with which public agencies must strictly comply, prohibits sound or video recordings being duplicated or made available to the public until final disposition of any criminal or civil litigation

¹ KOMO appears to argue that the only way to achieve the legislatively intended checks and balances and officer accountability is to give all public records requestors immediate access to all videos that do not relate to already existing litigation. Brief of Appellant at 31-33, Reply Brief at 16. But in light of the statutory language narrowly restricting disclosure, it is more reasonable to conclude that checks and balances and accountability of officers are achieved (1) *primarily* by having the videos available immediately for criminal and civil litigation and internal police agency review and disciplinary and civil service proceedings, and (2) *secondarily* by making the videos available for public disclosure on the delayed basis specified in RCW 9.73.090(1)(c).

which arises from the event or events which were recorded.

b. The Plain Language of RCW 9.73.090(1)(C) Prohibits Disclosure of Records Requested by KOMO.

The statutory language from RCW 9.73.090(1)(c), pivotal to this case, reads as follows:

(c) Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles. All law enforcement officers wearing a sound recording device that makes recordings corresponding to videos recorded by video cameras mounted in law enforcement vehicles must be in uniform. A sound recording device that makes a recording pursuant to this subsection (1)(c) must be operated simultaneously with the video camera when the operating system has been activated for an event. No sound recording device may be intentionally turned off by the law enforcement officer during the recording of an event. Once the event has been captured, the officer may turn off the audio recording and place the system back into "pre-event" mode.

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.

A law enforcement officer shall inform any person being recorded by sound under this subsection (1)(c) that a sound recording is being made and the statement so informing the person shall be included in the sound recording, except that the law enforcement officer is not required to inform the person being recorded if the person is being recorded under exigent circumstances. A law enforcement officer is not required to inform a person being recorded by video under this subsection (1)(c) that the person is being recorded by video.

RCW 9.73.090 (1) (emphasis added).

That language is not ambiguous. “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.” As such, it calls for no interpretation by the court. If the meaning is plain on the face of the statute, the court follows that plain meaning. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002).

However, for the sake of argument, if that language could be seen as ambiguous, even if just to reconcile it with the provisions of RCW Chapter 42.56, courts employ various rules of statutory interpretation to discern the legislative intent for the statute as a whole. *Whatcom County v. Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). The court construes a statute so as to effectuate that intent, avoiding a literal reading if it would result in unlikely, absurd, or strained consequences. *Id.* (purpose of enactment should prevail over express but inept wording).

Here, the *intention* of the language of the statute is obvious, to prohibit or restrict dissemination of in-car police audio-video recordings until final disposition of any criminal or civil litigation which arises from the event

or events which were recorded. Moreover, the legislature made clear that in RCW 9.73.090(1)(c) it intended only “a very limited exception to the [Privacy Act’s] restrictions on disclosure of intercepted communications.” Sec. 1, ch. 195, Laws of 2000.

KOMO argues that the public agency should allow dissemination of those recordings if, at the time of the request, there is no pending civil or criminal litigation. Reply Brief of Appellant, page 14. Not only does that not make any sense, it defeats the very purpose of the exclusionary language of the statute. If there were grounds for criminal prosecution in the recordings, there would need to be the opportunity for the police to submit to a charging prosecutor the video and other evidence of criminal conduct before charges could be filed. Not only does that make sense from a practical stand point, pursuant to Rule 3.8 of the Rules for Professional Conduct (RPC) a prosecutor cannot charge a suspect with a criminal violation unless and until the prosecutor can ascertain that the charge is supported by probable cause. Likewise, a plaintiff who wishes to bring a civil action based upon his or her contact with law enforcement, or anyone else, related to events recorded by the video mounted in law enforcement vehicles would reasonably need to assemble whatever evidence that might warrant filing a civil cause, and that takes time as well. If KOMO were correct that the in-car video recordings

are disclosable (must be disclosed) unless criminal or civil charges are then pending, this language would never mean anything if any requesting party makes a request for those recordings prior to the criminal charges or civil case being filed. Were the Court to agree with KOMO in these regards, the result may be that requests for these recordings would occur in every instance so as to not lose the opportunity to acquire the recordings should a criminal or civil case be filed. Again, that defeats the very purpose of RCW 9.73.090(1)(c), and defeats, as well, its stated exception to the privacy law of RCW 9.73.

E. CONCLUSION

For all the reasons stated by Seattle, and as argued by the Washington Association of Sheriffs and Police Chiefs, and by WSAMA, it is respectfully requested that the Court deny the relief requested by KOMO, and uphold the intent of RCW 9.73.090(1)(c), that no sound or video recording from in-car cameras may be duplicated and made available to the public until final disposition of any criminal or civil litigation arising from the events which were recorded.

It is further requested that the Court reject the arguments of KOMO to, essentially, impose the burden on local governmental entities to have to translate, interpret or construe Public Records requests, not in terms of what

was requested, but what might have been requested or, perhaps, should have been requested. The public agency should be entitled to take at face value requests for public records, especially when what was requested did not exist.

Respectfully submitted this 6th day of March, 2013.

A handwritten signature in black ink, appearing to read "Daniel B. Heid", written over a horizontal line.

Daniel B. Heid, WSBA #8217
for Amicus, Washington State Association of
Municipal Attorneys

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Subject: WSAMA Amicus request - Motion and Brief - Fisher Broadcasting v Seattle - - No. 87271-6

Dear Mr. Carpenter:

Attached hereto please find an electronic copy of the Motion for Leave to file Brief of Amicus Curiae and Brief of the Washington State Association of Municipal Attorneys in the above-referenced case. I am also including an electronic copy of a cover letter. Also, in addition to mailing my pleadings to counsel of record, per the certificate of mailing (appended to the Motion), for their convenience, I am also cc'ing them with this e-mail.

Please let me know if you have any questions. Thank you.

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