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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,

v.

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

Respondents.

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

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I. INTRODUCTION

This appeal examines the Seattle Police Department's ("SPD") deliberate disregard for Washington's Public Records Act (hereinafter "PRA"), RCW ch. 42.56, to shield its dash-cam videos from public scrutiny. In 2010 KOMO-TV reporter Tracy Vedder first sought database information about these dash-cam videos in two public records requests. SPD denied them summarily after the most minimal search, claiming no such databases existed.

Thereafter, Ms. Vedder asked for the videos themselves. SPD denied that request as well, claiming:

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 109) (Emphasis added).

Knowing that SPD policy requires dash-cam videos to be retained,¹ Ms. Vedder sought help from the Seattle City Council to prod their production. Thereafter SPD admitted it possessed thousands of retained dash-cam videos, (CP 125) but claimed KOMO could not have access to them under RCW 9.73.090(1)(c). (CP 77)

SPD did not even mention RCW 9.73.090(1)(c) until six months after Ms. Vedder requested the videos. It now claims RCW 9.73.090(1)(c)

¹ (CP 88).

compels nondisclosure for three years. Paradoxically, SPD's official in-car video policy states that its video system only retains in-car videos for three years, after which "the data is automatically deleted." (CP 88).

After more than a year of dealing with SPD's Kafkaesque² treatment of its dash-cam videos requests, KOMO³ sued SPD and the City of Seattle ("City") for PRA violations. Before filing suit, KOMO learned that SPD did have the requested dash-cam video database when KOMO requested it, because SPD provided it to another PRA requester, Eric Rachner. (CP 81) SPD asserts that it did so because Mr. Rachner, who is technologically savvy, knew how to precisely describe the dash-cam video database in his request, whereas SPD interpreted Ms. Vedder's request as asking for a "different" database. SPD's internal and external communications belie this explanation.

KOMO and the SPD/City filed a motion and a cross-motion for summary judgment, which were heard by King County Superior Court Judge Jim Rogers on March 23, 2012. Judge Rogers issued the Order (CP 546-561) at issue in this appeal on April 6, 2012, finding:

- SPD's response to Ms. Vedder's first database request did not violate the PRA because it was based on a "literal" interpretation of Ms. Vedder's request;

² Kafkaesque means "having a nightmarishly complex, bizarre, or illogical quality". <http://Merriam-Webster.com> (last visited July 30, 2012).

³ The plaintiff is Fisher Broadcasting TV L.L.C. dba KOMO 4 ("KOMO").

- SPD's response to Ms. Vedder's second database request did violate the PRA because it withheld information that was partially responsive to Ms. Vedder's request;
- RCW 9.73.090(1)(c) is an "other statute" exemption to the PRA, and SPD's policy of withholding all dash-cam videos for a period of three years is reasonable;
- SPD's policy of disclosing dash-cam videos before three years have elapsed only to lawyers who have filed claims and people in the videos is "overbroad" because attorneys investigating potential claims should also have earlier access to dash-cam videos;
- SPD's three-year records retention policy for dash-cam videos is contrary to the PRA in light of SPD's interpretation of RCW 9.73.090(1)(c) that videos are not available to PRA requestors until three years have elapsed;
- SPD was subject to a \$25 per day penalty, but only after it provided records to Mr. Rachner, and KOMO was entitled to its attorneys' fees and costs for the PRA violation found by the Court.

On April 27, 2012, KOMO sought direct review from this Court of Judge Rogers's decision.

II. ASSIGNMENTS OF ERROR

1. Did the trial court err by ruling the SPD did not violate the PRA when it denied KOMO's August 4, 2010 PRA request even though SPD had information responsive to the request on that date?
2. Did the trial court err by resolving material factual conflicts in the SPD/City's favor on summary judgment?
3. Did the trial court err in finding that RCW 9.73.090(1)(c) is an "other statute" exemption to the PRA that prohibits disclosure of SPD dash-cam videos to the public?
4. Did the trial court err in sustaining SPD's policy of a blanket withholding of all dash-cam videos from the public for a period of three years?
5. Did the trial court err by failing to find that SPD discriminated against Ms. Vedder because she was a member of the media and by requiring SPD to distinguish among PRA requestors by allowing attorneys investigating potential claims (along with actual civil and criminal litigants) immediate access to dash-cam videos?
6. Did the trial court err in its low penalty assessment by misapplying the factors in *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010)?
7. Is KOMO entitled to attorney's fees and costs on appeal pursuant to RCW 42.56.550(4) and RAP 18.1(a) & (b)?

III. STATEMENT OF THE CASE

A. SPD's Search for Records Responsive to Ms. Vedder's Requests to Dash-Cam Videos was Inadequate.

1. *SPD had a searchable database for dash-cam videos when Ms. Vedder made the August 4 and 11, 2010 database requests.*

SPD has used a digital in-car video/audio recording system ("DICVS") purchased for \$2.5 million at public expense from COBAN Technologies, Inc. ("COBAN") since 2007. (CP 483). As part of the

purchase, the COBAN system creates a master database of in-car videos located on a master SPD server, which stores videos from in-car cameras. (CP 192, 195, 264-69). The in-car video camera is activated once the light bar on a SPD vehicle is turned on. (CP 445) SPD officers are directed to identify, or mark, any recordings to be retained beyond 90 days after they are made; otherwise the DICVS automatically deletes them. (CP 88).

The DICVS has an electronically searchable database that records dash-cam video information.⁴ (CP 38, 103-04, 270, 431) The database has been in place for at least the past three years as evidenced by the records SPD provided to Eric Rachner in response to his PRA request. (CP 38, 103-04, 431) Mr. Rachner's testimony proves that a comprehensive video log database existed as of August 2010, when Ms. Vedder made her two PRA database requests, and SPD provided no evidence to refute Mr. Rachner's testimony. (CP 31-72) Further, in 2010 SPD provided a single 2009 video log sheet to Ms. Vedder that was part of the comprehensive DICVS system that showed existing database search capabilities. (CP 38, 104) Yet SPD twice refused to provide the DICVS database to KOMO, falsely claiming that it did not exist. (CP 97, 99)

⁴ SPD Information Technology Manager Mark Knutson testified that the COBAN system contained data in the original Microsoft SQL Server format responsive to Mr. Rachner's request that sought such data for three years, which he received from SPD. (CP 103-04, 431)

2. *SPD knew Ms. Vedder's August 4 and 11, 2010 requests asked for the DICVS databases.*

Ms. Vedder contacted SPD Sgt. Sean Whitcomb in July 2010 as part of a project to create an index to the video libraries of public agencies that would allow citizens access to public videos in order to monitor the conduct of public employees, like the police. (CP 73-74, 84). She sought information about SPD's video database, and told Sgt. Whitcomb that KOMO's goal was "to have a **digital database** that would in effect be like an index system" for the SPD video library. (CP 73-74, 84) Sgt. Whitcomb shared Ms. Vedder's inquiry within SPD, including Sheila Friend-Gray, SPD's chief public records officer. (CP 202-03, 310).

Ms. Vedder also asked to talk to, or visit with, SPD Information Technology ("IT") employees that operate SPD's "video database to learn about its operation." (CP 74, 84-85). Whitcomb passed this request to his superior, Assistant Chief of Police Dick Reed stating "I don't see any harm in accommodating her." Reed responded "This is related to a LAWSUIT. We need to consult with SLD. I can't remember the name of the attorney or the name of the case. Nice try...for KOMO." (CP 202). No one from SPD's IT staff ever met with, or talked to, Ms. Vedder about the DICVS database despite her repeated requests. (CP 74)

Ms. Vedder then submitted a PRA request on July 22, 2010 for records about the COBAN system, and SPD policies and procedures for

video recording, which were disclosed. (CP 86-93) The SPD policies and procedures state that the video system “only retains archived imagery for three years. At the conclusion of that time period the data is automatically deleted.” (CP 88) They advise officers to inform “inquiring citizens” as to “how they may view or obtain a copy of the subject recording,” anticipating public requests for dash-cam videos. (CP 90) It does not contain SPD’s newly-minted “policy” preventing disclosure for three years. (CP 87-93).

Thereafter, Ms. Vedder was stonewalled in her efforts to get further information about the SPD dash-cam video database. On August 3, 2010, she requested user’s and training manuals for the COBAN system. (CP 204-06). SPD refused, claiming they could not be reproduced under federal copyright law and they were exempt under RCW 42.56.240(1) as essential to law enforcement. (CP 205). An internal note produced in discovery stated that Ms. Vedder could “see it [the manual] but not copy it.” (CP 204). But SPD did not tell Ms. Vedder this, nor did SPD allow her to see the manual.

On August 4, 2012, Ms. Vedder then asked for:

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.

She requested this “data ... in a searchable electronic format organized and searchable by date and other reasonable fields.” (CP 96). SPD produced no evidence that Ms. Friend-Gray, to whom the request was directed, conducted any search of SPD files, or instructed anyone else to do so, to respond to this request. Indeed, SPD submitted no declaration from Ms. Friend-Gray at all in this case. Through discovery, KOMO learned that the only effort Ms. Friend-Gray made to locate the requested record was to send the request to Bill Alcayaga, an employee of the video unit, who told her on August 4, 2010:

We do not keep Officer log sheets here in the Video Unit. Those types of records would have been kept by the Individual Precincts where the Officers worked and turned them in each day. (CP 231)

In this litigation, SPD has claimed, disingenuously, that it “interpreted” Ms. Vedder’s request as referring to the “log sheets” described in the SPD Policies & Procedures Manual (CP 90), which note equipment failures resulting in camera deactivation, and that these log sheets had been destroyed for years. (CP 344, 399-400). Ms. Friend-Gray, however, sought no clarification from Ms. Vedder as to what she meant by her request for “log sheets.” She expressed no confusion about the request to Ms. Vedder or anyone else – probably because Ms. Friend-Gray had been in the communications loop from Sgt. Whitcomb regarding Ms. Vedder’s earlier requests for dash-cam video databases. (CP 202-03).

Ms. Friend-Gray did not tell Ms. Vedder about SPD's "interpretation" of her request, or that log sheets were not kept in the video unit but might be kept in some other place, or that the log sheets had been destroyed (which SPD apparently didn't know about until this litigation because this destruction was never mentioned until the City filed its cross-motion for summary judgment.) (CP 344, 399-400). Rather, MS. Friend-Gray simply emailed Ms. Vedder on August 10, 2010:

This letter is in response to your public disclosure request for the information listed above. A search of the files of the Seattle Police Department resulted in no records being responsive to your request. (CP 97).

Ms. Vedder was incredulous about this response, which denied the existence of any log, index or database of in-car videos. So on August 11, 2010, she asked for the records of in-car videos using slightly different wording:

In accordance with RCW 42.56, please supply a list of any and all digital in-car video/audio recordings that have been tagged for retention⁵ by Seattle Police Officers from January 1, 2005 to the present. This list should include, but not be limited to, the officer's name, badge number, data, time and location when the video was tagged for retention and any other notation that accompanied the retention tag.

⁵ Ms. Vedder asked for videos "tagged for retention" because these would have been retained by the DICVS beyond 90 days, indicating a police need to archive the recorded activity for future investigation or prosecution. The SPD clearly distinguishes between video tagged for retention or untagged. (CP 88, 369).

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 98). (emphasis supplied)

Again, Ms. Friend-Gray sent this request to Mr. Alcayaga, and IT management within the SPD. Mr. Alcayaga e-mailed:

We are unable to data mind (sic) this report request due to the way the COBAN System is set up. We can search by individual name, date and time only. We cannot generate mass retention reports due to limitations of software constraints. (CP 236).

Bruce Hills in IT management told Ms. Friend-Gray, that he could contact COBAN for information “if this needs to be pursued further.” (CP 231) She told him to “stand by for right now. We will advise if you need to go further.” (CP 234). Ms. Friend-Gray again denied Ms. Vedder’s August 11, 2010 request on August 18, 2010 parroting Mr. Alcayaga’s e-mail:

I have consulted content experts within SPD and have learned the following: 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).

Although Ms. Vedder’s request of August 11 did not ask for “mass retention reports,” on August 18, 2010 she sent a public records request to Ms. Friend-Gray for a “single retention report.” (CP 100). Even though she had told Ms. Vedder that no video “logs” existed, Ms. Friend-Gray

provided a report entitled “View Video Logs” to Ms. Vedder on August 24, 2010 revealing a database that could be searched by date, event, and retention and showing that detail reports could be printed. (CP 100-104). Ms. Vedder also asked for an additional screenshot of the COBAN data entry end user interface and received one on August 31, 2010 again showing search functionality. (CP 105-106).

Throughout the 2010 summer, Ms. Vedder communicated clearly with Sgt. Whitcomb and SPD public records staff that she was looking for a “database” that documents the SPD’s in-car videos. (CP 75-76). No one ever told her that SPD did not understand her requests (or was interpreting them to refer on to the “log sheets” that noted equipment failures resulting in camera deactivation). This is in remarkable contrast to SPD’s efforts to seek clarification of Mr. Rachner’s PRA request. (CP 43-53, 422-23) They just summarily denied her requests.

B. SPD Denies the Existence of In-Car Videos.

On August 30, 2010, SPD officer Ian Birk shot John T. Williams, an event captured in a dashboard camera video. (CP 119). To Ms. Vedder, this heightened the need for access to and examination of, in-car videos, even if SPD refused to provide a record, log, list, or database of them. (CP 76). Not having the tools to refine her request, Ms. Vedder

decided to ask for the dash-cam videos themselves. On September 1, 2010, Ms. Vedder sent in her next PRA request:

In accordance with RCW 42.56, please supply copies of any and all digital, in-car video/audio recordings from the Seattle Police Department 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. (CP 107).

This newest request for the actual videos drew a “wow” from another SPD public records officer and it was passed along to Dick Reed, Shawna Skjonsberg-Fotopoulos, legal advisor to SPD, Chief John Diaz, and Mark Knutson, the IT Director for SPD. (CP 241). Knutson directed Bruce Hills, on his staff, to contact COBAN to determine how to respond to the latest request. COBAN responded immediately:

1. COBAN will write a SQL Server script for Seattle PD **at no cost**, the script provides information on “manual retained” videos, including video date/time, officer ID and Name. Your IT staff can run the script on SQL Server directly, then copy and paste the results to a spreadsheet. We can have this done **in a day** once it is confirmed by you. (Emphasis supplied). (CP 239).

Mr. Hills responded: “I will forward this along to our requestor, and let you know what they decide.” (CP 239).

Mr. Hills sent the COBAN offer to Ms. Friend-Gray, but she disregarded it. Instead, she summarily denied Ms. Vedder's request on October 1, 2010:

As we have previously stated to you in our August 18, 2010 response to you for a prior public disclosure request "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 254).

Ms. Friend-Gray told Ms. Vedder that KOMO could appeal this denial, which effectively states that no documents (to wit, dash-cam videos) exist, to Police Chief Diaz.

KOMO appealed on October 7, 2010. (CP 242-250) The appeal was denied two months later by Chief Diaz through Ms. Skjonsberg-Fotopoulos:

Upon careful review of this appeal I have learned the following from content experts within the Department. Specifically, the Department did conduct a thorough inquiry and search into the information technology capabilities that are internal to SPD, which would be required in order to fulfill such a request. The outcome of my review resulted in a finding that SPD does not have the capabilities to search for "tagged records" only, which is consistent with the Public Request Unit's initial responses. Without this internal capability, the Department cannot create a list of retained videos, which would be used, in effect, to know what videos should be downloaded. Conversely, if you (sic) client has a specific date, time and officer then we are able to query the system for that level of

detail, as opposed to the current query of retained video only.

To further indicate the length SPD went to regarding this request, please note SPD content experts took this request further by contacting the vendor regarding such capabilities. Under the current platform SPD is not able to create such a list and download videos based upon the requestor's parameters. However, the vendor is able to create a list and download such videos **for a fee**. Such a process is outside the scope of the Public Records Act.⁶ (Emphasis supplied) (CP 255)

Despite being requested in discovery, SPD produced no evidence of any "thorough inquiry and search" during KOMO's appeal. And the only evidence of any vendor contact was the response from COBAN, quoted above, which would have provided a list of "tagged records" for free. (CP 239).

After the appeal was denied, KOMO contacted the City Council for assistance in locating and obtaining SPD in-car videos because clearly SPD maintained dash-cam videos but would not produce them. (CP 251-58). A member of Council President Richard Conlin's staff contacted SPD and the City Attorney's Office about the KOMO request. (CP 77). This prompted Mr. Knutson to e-mail COBAN on March 11, 2011:

Last September you had offered to provide a query of the COBAN database that would list all existing videos flagged for retention January of 2007 (sic). Your email said you could provide the list for free. We could use the list now.

⁶ *Id.*

Can you provide a list of all the exiting (sic) videos in our system that are flagged for retention since 1/1/07? If you can log in and provide this list, that would be great. If you could send me the SQL, I could find someone on staff to run this if needs (sic) be. (CP 261).

Within two hours, COBAN replied, providing “the SQL script that will get you what you need.” (CP 260). This basic SQL query was run quickly and easily on March 12, 2011 by Toby Baden in the DICVS database. Indeed, Mr. Baden demonstrated familiarity with the SQL query by making a slight correction to the script provided by COBAN. (CP 259). As a result of the query, SPD was able to identify 16,000 videos flagged for retention since 2008. SPD now could locate dash-cam videos flagged for retention. But it still refused to disclose them.

At a March 23, 2011 meeting, SPD, through the City Attorney’s Office, claimed for the first time that dash-cam videos less than three years old could not, and would not, be disclosed. (CP 77) SPD asserted that RCW 9.73.090(1)(c) prevents release of the videos before any possible related litigation is disposed of, and SPD has therefore adopted a policy not to disclose them for three years because RCW 4.16.080 sets a three-year limitation for the filing of tort claims. (CP 77-78). Since that meeting, and to this date, SPD has refused to provide KOMO with dash-

cam videos tagged for retention that is less than three years old. (CP 365-73)

After the meeting with the Seattle City Attorney's office, SPD agreed to provide a "sample" of dash-cam videos for a small time period in 2007. It then modified its offer to a time period of 2009 (within the three-year time period). (CP 135-39). KOMO agreed to review these, without waiver of its September 1, 2010 request for all dash-cam videos. (CP 78). Thereafter, months of delays ensued and KOMO was restricted in its ability to review even the videos that were eventually produced. (CP 77-81). During this time, KOMO discovered that 111 of the promised dash-cam videos had been permanently deleted from the COBAN system. (CP 159-165). And in discovery, SPD admitted that 105,385 dash-cam videos were permanently lost in 2008. (CP 215-16).

C. SPD's Response to the Rachner PRA Request Shows It Had Material Responsive to Ms. Vedder's August 2010 Requests.

During the summer of 2011, Ms. Vedder learned that Eric. Rachner, had requested and received a copy of the DICVS database from SPD. (CP 81) SPD was processing Mr. Rachner's request during the same time period (Spring 2011) when SPD was dealing with KOMO's request, after the Seattle City Council intervened, and SPD could have, and should have connected the two database requests. (CP 402, 430-31) Mr. Rachner testified how quickly and easily a download of the DICVS

database could be accomplished in a “searchable electronic” format, searchable with most of the parameters stated in Ms. Vedder’s August 4 and August 11, 2010 PRA requests. (CP 34-37) The database quickly and easily identifies retained dash-cam videos. (CP 36, 37, 56-58, 104)

After SPD provided the database to Mr. Rachner and Ms. Vedder requested a copy and she was given one. (CP 81). She told SPD that this should have been provided to her in response to her 2010 PRA requests for information about the DICVS database. Ms. Friend-Gray told her:

This email is a follow-up to a conversation you had with Sgt. Whitcomb during the week of September 6, 2011. Sgt. Whitcomb told me that you believed that you had made a request for the SPD in-car video log database like Mr. Rachner had previously made a request for. The Department has researched the requests that we have received from you and we have been unable to locate a request for a video log database. The closest request that the Department received from you was on August 11, 2010 and that was for a list of all videos that were tagged. (CP 183).

IV. ARGUMENT

A. The Trial Court Decision is Subject to De Novo Review.

A trial court reviews an agency’s PRA action de novo. RCW 42.56.50(3) (“[j]udicial review of all agency actions taken or challenged under RCW 42.56030 through 42.56.520 shall be de novo”). Where, as here, the record before the trial court consists entirely of “documentary evidence, affidavits and memoranda of law,” appellate courts stand in the

same position as the trial court and review of the trial court's decision is also de novo. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 753, 213 P.3d 596 (2009); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 612, 963 P.2d 869 (1998).

Further, statutory interpretation presents a question of law, to which de novo review applies. *Bank of America, N.A. v. Owens*, 173 Wn.2d 40, 49, 266 P.3d 211 (2011). Therefore, the trial court's interpretation of RCW 9.73.090 and 42.56.070 is also subject to de novo review by this court.

B. The SPD Violated the PRA in its Denials of Three PRA Requests Submitted by Ms. Vedder.

SPD denied Ms. Vedder's two requests for dash-cam DICVS databases, claiming these either did not exist or that systems "limitations" precluded generating the records requested. SPD then used these denials to refuse to disclose the actual videos, a position affirmed by Chief Diaz when KOMO appealed to him.

All of these denials violated the PRA.

1. *SPD violated the PRA when it denied Ms. Vedder's August 4, 2010 request.*

The trial court erred by concluding that SPD did not violate the PRA in denying Ms. Vedder's August 4, 2010 request for "log sheets." By accepting the SPD's asserted "literal" interpretation of the request at

face value, the trial court failed to give effect to the context of the request and the contemporaneous documentary evidence that belied SPD's explanation, and improperly viewed inferences and found facts in favor of SPD on its cross-motion for summary judgment. In addition, the trial court failed to follow Washington law that puts the burden on the agency to show it conducted an adequate search for records responsive to the request, liberally construed. RCW 42.56.030; .550(1).

First, the trial court ignored the actual language of the request. Ms. Vedder requested "log sheets that correspond to any and all in-car video/audio recordings which have been tagged for retention by officers," and explained that she was seeking "data" "in a searchable electronic format organized and searchable by date and other reasonable fields." (CP 96). By accepting SPD's after-the-fact explanation that it interpreted the request to mean certain "log sheets" that note equipment failures resulting in camera deactivation, the trial court erroneously focused on the phrase "log sheets" to the exclusion of the rest of the request.

Second, there is no evidence in the record that SPD's responding public records officer, Ms. Friend-Gray, interpreted the "log sheet" request as calling for the "log sheets" referenced in an SPD manual. The sole reference in that manual to "log sheets" (CP 90) discusses equipment failures resulting in camera deactivation. The language in Ms. Vedder's

request asks for records that correspond to video and audio recordings tagged for retention. SPD did not submit any declaration from Ms. Friend-Gray to support SPD's after-the-fact explanation. Nor, in light of the rest of Ms. Vedder's request, would such an interpretation have been reasonable, particularly in the context of Ms. Vedder's prior requests to Sgt. Whitcomb for a "digital database" of SPD's video system, which Ms. Friend-Gray knew about. (CP 202-03). While Mr. Alcayaga, to whom Ms. Friend-Gray turned in responding to the request, says that he thought "log sheets" referred to the deactivation log sheets that were phased out in 2002 (CP 439-40), that information was not contained in his response to Ms. Friend-Gray at the time of the request and denial. (CP 231) Nor does Mr. Alcayaga state in his declaration (CP 438-41) that he explained this interpretation to Ms. Friend-Gray. And she certainly did not raise the issue with Ms. Vedder. Nor did she follow up on the request in any way, except to deny it.

Third, the trial court's acceptance of SPD's after-the-fact, unsupported, and implausible explanation (CP 55, 359-63) violates well-settled law that on summary judgment, any doubt as to an issue of a material fact is resolved against the moving party and courts are to consider all facts submitted and **the reasonable inferences therefrom** in the light most favorable to the nonmoving party. *Atherton Condo.*

Apartment Owners Ass'n v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Here, the trial court reversed this procedure by relying on presumptions in favor of SPD, the moving party on its cross-motion for summary judgment.

Further, even if it were proper for the trial court to accept SPD's after-the-fact explanation, it would not be sufficient to support the trial court's curt conclusion that "there was no violation of the PRA". (CP 551). The trial court failed to analyze whether SPD conducted an adequate search for the requested records, and failed to apply the rule that a records request must be liberally construed.

"An adequate search is a prerequisite to an adequate response, so an inadequate search is a violation of the PRA because it precludes an adequate response." *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 724, 261 P.3d 119 (2011). "[T]he agency bears the burden, beyond material doubt, of showing its search was adequate." *Id.* at 722. This is "the focus of the inquiry" when an agency claims documents do not exist. *Id.* This means that "agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered." *Id.*

Here, SPD produced no evidence of anything more than a perfunctory search conducted by one e-mail to one IT employee who

provided an inconclusive statement that did not prove anything about the existence of even the records he says he thought Ms. Vedder was asking for. SPD provided no evidence that Ms. Friend-Gray, who knew Ms. Vedder was seeking video databases, made any further inquiry after receiving this rather puzzling response to her email. Nor is there evidence that Ms. Friend-Gray even followed up on the information she did receive. In this litigation, SPD claims compliance with its search duties because the “log sheets” one employee allegedly thought Ms. Vedder was looking for no longer exist. (CP 344) But there is no evidence Ms. Friend-Gray knew this when she denied the August 4, 2010 request. The trial court should have found that SPD’s inadequate search violated the PRA.

In addition, the trial court should have found that SPD’s alleged misinterpretation of Ms. Vedder’s request was itself a violation. An agency has a duty to liberally construe the scope of a records request. *Knight v. Food & Drug Admin.*, 938 F. Supp. 710, 716, (D. Kan. 1996).⁷ This duty prohibits an agency from “hiding the ball,” as discussed in the Public Records Act Deskbook: “Public Disclosure and Open Public Meeting Laws” 4-3 (WSBA 2006 ed. and 2010 supp.):

It makes sense that a requestor is not required to provide the exact name of the requested record. The principle that

⁷ This court frequently relies on federal judicial interpretations regarding the federal version of the PRA. *Neighborhood Alliance*, 172 Wn.2d at 720.

an agency cannot play “hide the ball” by demanding that requestors name the exact document they seek has been applied by federal courts interpreting the federal Freedom of Information Act. *See, e.g., Horsehead Indus., Inc. v. U.S. Envtl. Prot. Agency*, 999 F. Supp. 59, 66 (D.D.C. 1998) (“agency must be careful not to read the request so strictly that the requestor is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requestor.”) (Citation omitted.)

In this case, SPD hid the ball by allegedly relying on Ms. Vedders’s use of the phrase “log sheets” to the exclusion of the rest of her request and its context. This “literal” reading of the request, which the trial court adopted, is contrary to the “liberal” reading required by the PRA.

2. *SPD violated the PRA by its response to both the August 4 and the August 10, 2010 requests because it failed to disclose existing records.*

The trial court correctly found that the SPD violated the PRA by denying Ms. Vedder’s second request for a dash-cam database. However this finding also applies to the denial of the August 4, 2010 request because the DICVS database was in existence on both dates. (CP 38, 103-04, 264-70, 431) SPD does not deny this, but claims that this database was not requested by Ms. Vedder. This defense disregards SPD’s duties, previously discussed, to construe PRA requests broadly and to conduct an adequate search for records responsive to a broadly interpreted request.

These duties are implicit in the PRA's requirement that agencies provide the "fullest assistance" to requestors. RCW 42.56.100. SPD and Ms. Friend-Gray clearly disregarded this duty with respect to both the August 4 and the August 10 requests. They performed, at best, a minimal search for each request. They then misled Ms. Vedder on October 1, 2010 stating that "SPD is unable to query the system to generate a retention report" (CP 242), even though COBAN had already proffered a solution to the problem by writing a query for free.

Chief Diaz perpetuated this "systems limitations" basis for a denial even though the COBAN system was purchased with clear database capabilities (CP 190, 201, 264-70), and the single retention sheet provided to Ms. Vedder showed ample search capabilities existed. (CP 104)

The trial court erred in its misapprehension of SPD's alleged helpfulness in trying to respond to Ms. Vedder's requests. The record does not support the Order's statement that "the City gave KOMO information about how to contact COBAN, create documents and download in-car videos, at KOMO's expense in December 2010." (CP 553) On the contrary, the SPD's denial of KOMO's appeal in December 2010 (CP 250) does none of those things. Instead, it overstates SPD's alleged helpful efforts in contacting the vendor and misleads KOMO by stating that COBAN will charge a fee to "create a list" when COBAN

actually said it could provide query capabilities in a day, and would do so for free. (CP 239).

SPD subsequent “efforts” in the spring of 2011 to respond to KOMO’s requests, due to Seattle City Council intervention, do not erase the violations that had already occurred. SPD has claimed throughout that in both of her requests, Ms. Vedder failed to use the “magic words” to describe the database that Mr. Rachner got from SPD. But any reasonable construction of Ms. Vedders’s records requests would have required SPD to disclose the DICVS database to Ms. Vedders, just as it did to Mr. Rachner particularly when SPD was handling both Mr. Rachner’s request and renewed activity over the KOMO request in the spring of 2011.

Instead, SPD took the narrowest, most crabbed construction of Ms. Vedder’s requests possible, denying the requests completely because it had no single record with all of the data fields she sought. SPD reasoned that since Ms. Vedder’s request asked for a, b, c, and d, a record that contained only a, b, and c would not be responsive and therefore SPD could refuse to disclose it. As Mr. Rachner explained, SPD could have used the database he received to provide some, although perhaps not all, of the data requested by Ms. Vedder. SPD’s responses were based on hyper-technical, self-serving interpretations of Ms. Vedder’s requests

particularly when SPD denied her any assistance to help her formulate her request properly and SPD never told her what it could provide to her.

SPD contends that Ms. Vedders did not ask for the “same” record that Mr. Rachner asked for, which is consistent with its dogged insistence on interpreting her requests in the most literal and limited way to avoid a response. First, if SPD misunderstood what Ms. Vedders was looking for, it never sought clarification from Ms. Vedders, as it did with Mr. Rachner. (CP 422-23). Second, any distinction between Mr. Rachner’s request formulation and Ms. Vedder’s is just semantics. He asked for “all COBAN activity logs in electronic form ... in their original Microsoft SQL Server format.” (CP 40). Ms. Vedder preceded her formal PRA requests with a request about the COBAN video system “your video database”. (CP 84). Her related, subsequent PRA requests sought:

- “all ... log sheets that correspond to any and all in-car video-audio recordings which have been tagged for retention ... in a searchable electronic format.” (CP 96) [and]
- “a list of any and all digital in-car video-audio recordings ... in a searchable electronic format organized and searchable by date, and other reasonable fields.” (CP 98).

The bottom line is that both Ms. Vedders and Mr. Rachner sought a record for which many synonymous terms were possible (i.e., log, list, database). But SPD chose an unduly literal, narrow, and unreasonable

construction in order to deny Ms. Vedders's requestss. By using this construction, it avoided providing the same responsive documents to Ms. Vedders that it provided easily to Mr. Rachner. And this occurred despite the fact that the same IT staffer, Toby Baden, worked on responding to both the Vedders and Rachnar PRA requests for databases at the same time, and so must have been aware of the SQL database that contained the data Ms. Vedder sought. (CP 402).⁸

In short, SPD did not do an adequate search and violated the PRA in response to both of Ms. Vedders's database PRA requests. *See, Summers v. U.S. Dep't of Justice*, 934 F. Supp. 458, 461 (D.D.C. 1996) (agency did not conduct an adequate search for records responsive to a request for agency director's "commitment calendars" because it failed to search its records database for "appointment" or "diary" of the director; after all, the agency knows what the records are called and where they are located – a requestor does not). SPD had existing, identifiable records responsive to Ms. Vedders's database requests, which the PRA required it to disclose, yet claimed no such records existed. This was wrongful under

⁸ Mr. Rachner submitted his request in February of 2011 and communicated with SPD IT staff throughout the spring of 2011. (CP 32-34) Ms. Vedders's meeting with the Seattle City Attorney's Office occurred in the spring of 2011. (CP 77-78)

the PRA. RCW 42.56.510; *Yousoufian v. King County*, 152 Wn. 2d. 421, 429, 98 P. 3d 463 (2004).

C. The Trial Court Erred by Accepting the SPD's Interpretation of RCW 9.73.090(2) as an "Other Statute" Exemption.

The trial court held that SPD did not violate the PRA with respect to Ms. Vedders's September 1, 2010 request for the videos themselves because it held that RCW 9.73.090(1)(c) is an "other statute" that creates a PRA exemption under RCW 42.56.070(1), and allows SPD to withhold all dash-cam videos from public access for three years. (CP 560-61).⁹ This is contrary to law in several significant ways.

First, this interpretation is wholly unsupported by the unambiguous language of the statute SPD relies on, which provides:

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) (Emphasis added). The statute clearly refers to present litigation that actually arises from particular recorded events; but

⁹ The trial court correctly noted that "it is unreasonable and contrary to law to have a three-year records retention policy while interpreting RCW 9.73.090 to require records requestors to wait three years for video." (CP 558). The SPD dash-cam video states that the DICVS automatically deletes videos after three years. (CP 88). This court need not address the issue because the SPD's interpretation of RCW 9.73.090, sustained by the trial court, is wrong. Dash-cam videos should be released to the public unless actual litigation arising from the dash-cam video is pending at the time of a request, long before any three-year destruction date.

the SPD/trial court interpretation inserts non-existent language to bar the release of all dash-cam videos for three years based on the possibility that litigation might, theoretically, arise in the future.¹⁰ Moreover, the three-year rule imposed by SPD, and adopted by the trial court, has no textual basis in the statute at all. This conflicts with this Court's directive to not add words to a statute. *Restaurant Dev. Inc. v. Cananwill*, 150 Wn.2d 674, 680, 80 P.3d 598 (2003).

Second, SPD's interpretation and the trial court's order blatantly disrespect the commands of the PRA¹¹ and case law interpreting it to liberally construe the PRA to effectuate open government. *Rental House Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 540, 199 P.3d 393 (2009). The PRA "is to be liberally construed to promote full access to public records, and its exemptions are to be narrowly construed." *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389 (1997). The PRA unequivocally places on the agency the burden to establish that nondisclosure is justified. See *Progressive Animal Welfare Soc'y v. Univ. of Wash. (PAWS II)*, 125 Wn.2d 243, 251-52, 884 P.2d 592 (1994) and RCW 42.56.550(1). By adopting SPD's broad interpretation of RCW

¹⁰ The City will not even allow for the release of in-car video after an investigation has concluded if it is within the three-year period. (CP 187).

9.73.090(1)(c) (as well as its narrow interpretation of KOMO's PRA requests), the trial court impermissibly reversed the burden of proof here.

Most importantly, however, RCW 9.73.090(1)(c) does not qualify as an "other statute" exemption to the PRA under RCW 42.56.070(1). In order to qualify as an "other statute" exemption, RCW 9.73.090(1)(c) must not conflict with the PRA, and must exempt or prohibit disclosure of specific public records in their entirety.¹² *Progressive Animal Welfare Soc'y v. Univ. of Wash. (PAWS II)*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994). The trial court erred by not conducting the "other statute" analysis mandated by *PAWS II*.

In *Paws II*, this Court distilled the essence of the PRA.

The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. RCW 42.17.251. Without tools such as Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison: 'A popular Government, without popular information, or the means of

¹¹ RCW 42.56.030 ("chapter shall be liberally construed and its exemptions narrowly construed" "In the event of conflict ... this chapter shall govern"); RCW 42.56.550(1) ("[t]he burden of proof shall be on the agency").

¹² Under SPD's interpretation, RCW 9.73.090(1)(c) cannot qualify as an "other statute" exemption to the PRA because it does not exempt or prohibit disclosure of specific public records in their entirety. See *PAWS II*, 125 Wn.2d at 262. Under SPD's and the trial court's formulation, some records get provided to attorneys in criminal and civil cases; thus not all records are exempt.

acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps, both.’

125 Wn.2d at 251. (Emphasis added.)

The Order violates this core purpose of the PRA by preventing access to a critical tool for public accountability – SPD dash-cam videos – at a time when SPD’s accountability is a matter of utmost public concern.¹³ Recently, the U.S. Department of Justice investigated allegations of SPD police misconduct, finding in a scathing December 2011 report “a pattern or practice of constitutional violations regarding the use of force that result from structural problems, as well as serious concerns about biased policing.” In the report, the U.S. Department of Justice said that it examined “hundreds of hours of video footage.”¹⁴ Thus, reading RCW 9.73.090(1)(c) as a PRA exemption, contradicts the core purpose of the PRA.

¹³ The media have covered many incidents where police misconduct can only be disclosed and examined by reviewing dash-cam videos. Recent examples include a dash-cam video that documented an SPD officer bouncing a man’s head off a car hood during an arrest as reported in The Seattle Times on June 7, 2012. See Mike Carter, “Court Paves Way for Civil Suit Against Police” (June 7, 2012) http://seattletimes.nwsources.com/html/localnews/2018381659_spdforce08m.html

¹⁴ U.S. Dep’t of Justice, Civil Rights Div., U.S. Attorney’s Office, W.Dist.of Wash., *Investigation of the Seattle Police Dep’t* (Dec. 16, 2011) available at http://www.justice.gov/crt/about/spl/documents/spd_findletter_12-16-11.pdf at p. 2, 3.

In fact, the SPD purchased the COBAN system with significant public funds and touted it a means of providing public accountability.¹⁵ Its position now directly contradicts that stated purpose. There is no way to reconcile the PRA's purpose with SPD's interpretation of RCW 9.73.090(1)(c). In the event of a conflict between the PRA and any other act, the PRA's provisions shall govern. RCW 42.56.030.

The trial court and SPD surmise some hypothetical legislative intent to read RCW 9.73.090(1)(c) as a blanket exemption to protect some unspecified interest deemed by the legislature superior to the PRA. (CP 558-59). But this interpretation disregards the actual legislative history of RCW 9.73.090(1)(c), which is discussed in *Lewis v. State*, 157 Wn.2d

¹⁵ SPD told the public the system would help assure officers behave properly many times, including the following: (a) On February 25, 2002 Deputy Chief John Diaz, then commander for the new video system, told the public that the video system was "a way to increase community confidence in the department" News Advisory, City of Seattle, Nickels, Compton Announce Video Cameras in Seattle Police Cars, <http://www.seattle.gov/news/detail.asp?ID=2462&Dept=40>; (b) Mayor Nickels stated in a news advisory released July 18, 2002 that the video system was a "strategy to enhance police accountability and improve police-community relations; he stressed video in "all patrol cars" as to "improve public confidence and trust in our police"; "the goal is simple: increased accountability" (News Advisory, City of Seattle, Mayor Nickels Announces Strategy to Enhance Police Accountability and Improve Police-Community Relations, <http://www.seattle.gov/news/detail.asp?ID=2784&Dept=40>); elsewhere this release stated a goal of the project was to "Ensure accountability"; (d) Seattle Police Dep't Policy and Procedure Manual 17.260, In-Car Video

446, In *Lewis*, this court said that one of the statute’s purposes was to “allow sound recordings ,, [that] will help ensure officer safety, provide an important evidentiary tool, and create a **checks and balances system for officer conduct.**” (Emphasis added). The Order effectively negates this purpose by making dash-cam videos unavailable for years. *Lewis* is the only case to interpret RCW 9.73.090(1)(c), and it does not address the issue of public release of dash-cam videos. *Lewis* only interpreted the unambiguous mandatory (“shall”) language that requires police to follow specified procedures when recording interrogations. *Lewis* held that traffic stop conversations are not private conversations. *Id.* at 472. “[C]onversations with police officers are not private.”¹⁶ *Id.*

states an official purpose of the system is “To establish video data accountability....”

¹⁶ This is consistent with settled law that holds there is no reasonable expectation of privacy in a public place. *E.g., Florida v. Riley*, 488 U.S. 445, 450 (1989) (holding that no reasonable expectation of privacy inheres in what is left “visible to the naked eye”). For example, Oregon holds that a police officer—and by logical extension a police cruiser—located in a public place does not infringe any personal privacy interest. *Oregon v. Campbell*, 306 Or. 157 759 P.2d 1040, 1047-48 (Or. 1988). “To the extent that a person exposes activities to public view while working, that person necessarily foregoes any privacy interests as to those activities.” *Oregon v. Meredith*, 184 Or. App. 523 56 P.3d 943, 947 (2002), *aff’d*, 96 P.3d342 (2004). Equally well-settled is that roads and highways, the locales most likely to be depicted in dash cam videos, epitomize public places. See, e.g., *United States v. Knotts*, 460 U.S. 276, 281-82 (1983) (“A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”); *Jardine v. Florida*, 73 So. 3d 34, 58 (Fla. 2011) (“An airport and a highway are unquestionably public places with little or no privacy.”).

at 460. The Order recognized (CP 556 n.3) that RCW 9.73.090(1)(c) does not protect a privacy interest at all, let alone one superior to the PRA.

Moreover, unlike the statutes that have been held to qualify as “other statute” exemptions to the PRA, RCW 9.73.090(1)(c) does not specify an alternative procedure for obtaining public records. *See Deer v. Dep’t of Soc. & Health Servs.*, 122 Wn. App. 84, 93 P.3d 195 (2004); *In Re the Dependency of KB*, 150 Wn. App. 912, 210 P.3d 330 (2009). *Deer* and *KB* dealt with procedural statutes that allow specified parties access to records of juvenile justice records that are deemed “confidential” under RCW 13.50.100(2), albeit by different means than the PRA. These records can be obtained only pursuant to procedures specified in RCW 13.50.010, .100 which “virtually mirrors the PRA – both provide for attorney fees, costs and other sanctions when DSHS wrongfully denies a records request.” *KB*, 150 Wn. App. at 923. Thus, the Court of Appeals in these cases could reconcile the provisions in RCW 13.50 with the PRA because the party requesting the documents had a process to obtain juvenile records, with protections like the PRA if the records were denied.

In contrast, RCW 9.73.090(1)(c) does not provide a procedure to obtain access to the records it covers. Rather, it places a limited restriction on the release of certain recordings. The City has never denied that dash-cam videos are public records, so the only procedure to obtain them is by the PRA. Reading RCW 9.73.090(1)(c) as a blanket three-year ban on disclosure would therefore conflict with the PRA's preeminent policy of promoting access to records held by government agencies.

SPD asserts, at most, some generalized impact that disclosure before three years might have if a case related to a dash-cam video arises in the future. (CP 366-67). That assertion suggests, albeit imprecisely, that disclosure to the public might impact fair trial rights. But this court has held that there is no "fair trial" exemption to bar disclosure of critical public records without a heightened and particularized showing of harm to due process rights. *See, e.g., Seattle Times Co. v. Serko*, 170 Wn.2d 581, 595, 243 P.3d 919 (2010). No such showing is made here.

In sum, no policy or legislative purpose would be violated by refusing to interpret RCW 9.70.010(1)(c) as an "other statute" exemption to the PRA. On the contrary, read narrowly, and recognizing that the PRA expressly trumps it, RCW 9.73.090(1)(c)

is a limited, and temporary, nondisclosure requirement when a PRA request is made for a dash-cam video for cases that exist at the time of the PRA request.

In sum, SPD's refusal to provide the requested in-car videos, in addition to the existing in-car video database, violates RCW 42.56.070(1); .080; 210(3), and .520.¹⁷ All of the requested in-car videos should have been disclosed to Ms. Vedders. *Rental House Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 539, 199 P.3d 393 (2009).

D. The Trial Court Erred In Its Penalty Assessment.

In the Order (CP 554-56) the trial court conducted a penalty analysis allegedly applying the multi-factor analysis of *Yousoufian v. Office of Ron Sims*, 168 Wn. 2d 444, 229 P.3d 735 (2010). It concluded that a \$25.00 per day fine from the day Mr. Rachner received his first batch of COBAN files to the day Ms. Vedder received her COBAN files. (CP 556)¹⁸

¹⁷ There is no question of fact that the videos did exist: a screenshot of the Burke/Williams incident from an in-car video appeared on the front page of the Seattle Times. (CP 119). The DOJ reviewed hundreds of hours of in-car videos. (see ft. 14). SPD admitted they existed by the very fact they agreed to produce certain in-car videos to Ms. Vedders as a result of her meeting with the Seattle City Attorney's Office in March of 2011. (CP 129).

¹⁸ The trial court changed this finding in its June 6, 2012 Findings, Conclusion and Order Granting KOMO's Motion for Attorneys' Fees, Costs and Penalties awarding a penalty of \$10,000 based upon the number of days that lapsed since the date of the denied request. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 102, 117 P.3d 1117 (2005). KOMO has filed a

The trial court's penalty analysis is flawed for several reasons. First, it minimizes the wrongful denial of KOMO's three public records requests by the City's alleged assistance after March of 2011 when the City Council's intervention required SPD to appear to be helpful and compliant. As explained in Sec. IV.B. SPD violated the PRA by its narrow, self-serving interpretations for KOMO's requests that ignored its existing database that was provided to Mr. Rachner. The trial court did not consider the SPD's failure to seek clarification of Ms. Vedder's request or the SPD's woefully inadequate search. These are factors that should be weighed in a penalty determination – and they go against the SPD. *Neighborhood Alliance*, 172 Wn.2d at 718, 724.

Second, as explained herein, the trial court erred in its two conclusions finding that the SPD did not violate the PRA by denying the August 4, 2010 request and the request for dash-cam videos under RCW 9.73.090(1)(c). Reversal for these errors should require reconsideration of the penalty, which does not adequately assess the SPD's culpability or the heightened public interest in access to dash-cam videos.

The facts of this case warrant a much higher penalty assessment. The SPD treated Ms. Vedder's database request perfunctorily, no doubt

Supplemental Designation of Clerk's Papers to provide this Court with the latest trial court orders.

colored by her status as a member of the media.¹⁹ The SPD's illogical absurd contention (sustained by Chief Diaz' rejection of the KOMO appeal) that because it could not locate retained dash-cam videos they do not exist (CP 254-55) can only be interpreted as a deliberate roadblock to disclosure. The SPD had a database to locate retained videos because it produced one to Mr. Rachner. Even if it did not have one, the SPD was offered – but rejected – full database enhancements from COBAN to locate the retained videos. The SPD then misrepresented its system capabilities to Ms. Vedder on October 1, 2010 (CP 254) and December 10, 2010. (CP 255)

Third, when KOMO refused to accept its obviously-unfounded position on its “system capabilities,”²⁰ the SPD then rolled out a new reason to deny – its interpretation of RCW 9.73.090(1)(c), which does not appear in its official video policy that has language indicating that citizen requests will be provided access. (CP 87-92)

Fourth, the public interest in dash-cam videos at this point in SPD's history is heightened and justified by the U.S. Department of Justice investigation and public disclosure of incidents of alarming

¹⁹ “Nice try KOMO” said a top SPD official, setting the tone for subsequent SPD treatment of Ms. Vedder's requests. (CP 202)

misconduct.²¹ Rather than act to promote public transparency for police conduct, the SPD has withdrawn with a siege-like mentality. Its actions to thwart access to tools that assess police conduct - dash cam videos – are consistent with this mentality. This is repugnant to the letter and spirit of the PRA. They refute the trial court’s conclusion that penalties should be used to deter further PRA violations.

In sum, the trial court’s assessment of penalties should be reversed. The case should be remanded to set a penalty at the high end of the range to reflect the egregiousness of the SPD’s PRA violations in this case.

E. The Trial Court’s Order Violates the PRA’s Anti-Discrimination Provisions.

The PRA states “[a]gencies shall not distinguish among person’s requesting records.” RCW 42.56.080. An agency must treat all requesters equally, and cannot consider the identity of the requester in responding to a PRA request. See, e.g., *Livingston v. Cedeno*, 164 Wn.2d 46, 186 P.3d 1055 (2008); *King County v. Sheehan*, 114 Wn. App. 325, 341, 57 P.3d 307 (2002). The trial court refused to consider SPD’s discrimination against Ms. Vedder because she is a member of the media. When Ms.

²⁰ It defies common sense to accept SPD’s claim that it could not search its video system for retained videos, which would effectively render the system useless for criminal and investigation purposes.

²¹ These are thoroughly discussed at length in the Statement of *Amici Curiae* News Media Entities and Washington Coalition for Open Government In Support of Direct Review, pp. 4-8.

Vedder first started requesting records for the in-car videos Assistant Police Chief Reed set the tenor for SPD's response: "Nice try – KOMO." (CP 202) All of the SPD Public Disclosure Worksheets produced in discovery identified Ms. Vedder as a member of the "media." (CP 298-309) SPD produced a video log database to a non-media requester, Mr. Rachner, when it refused to provide the same to Ms. Vedder and it also provided videos to other members of the public. (CP 276-96) From the foregoing, a reasonable inference can, and should have been drawn, that SPD violated RCW 42.56.080 in its treatment of Ms. Vedder.

The Order is also troubling for its future discriminatory impact. The Order will require agencies to discriminate by allowing attorneys contemplating lawsuits to have access to dash-cam videos, but denying access to other requesters for three years. (CP 559) This makes no legal or factual sense. This ruling would require SPD to question the purpose of such "attorney requesters," which could invade attorney-client privileged communications. Further, it provides access to a requester for a purpose from which no actual litigation might arise and places no restrictions on further dissemination of dash-cam videos.

The ruling requires SPD to draw a distinction that the PRA prohibits and it should be set aside.

F. KOMO is Entitled to Attorneys' Fees and Costs on Appeal

Attorney's fees and costs are clearly awardable on appeal. *PAWS II*, 125 Wn.2d 243, 271, 884 P.2d 592 (1994). Because the Order should be reversed for the foregoing reasons, KOMO will be the prevailing party on appeal and should be allowed attorney fees and costs on appeal pursuant to RCW 42.56.550(4); RAP 18.1(a) and (b).

V. CONCLUSION

The Order contains significant errors of law in sustaining the SPD's denials of KOMO PRA requests for dash-cam video databases and the dash-cam videos themselves. Continued denial of public access to these videos for three years under a strained, misinterpretation of RCW 9.73.090(1)(c) would prevent the very public accountability the PRA was enacted to promote. The requested public records are necessary to shed light on SPD police activities at a time when public confidence in the SPD has been severely shaken by the U.S. Department of Justice investigation and other SPD activities. The Order should be reversed and attorneys' fees, costs and penalties should be awarded, consistent with this Court's direction.

Respectfully submitted this 30th day of July, 2012.

GRAHAM & DUNN PC

By Judith A. Endejan
Judith A. Endejan, WSBA# 11016
Attorneys Fisher Broadcasting-
Seattle TV L.L.C. dba KOMO 4

DECLARATION OF SERVICE

Donna Cauthorn declares and states as follows:

I am a citizen of the United States and a resident of the state of Washington; I am over the age of eighteen (18) years; am competent to be a witness in a court of law; and am not a party to the this action.

On the 30th day of July, 2012, I caused to be served, via hand-delivery by Washington Legal Messengers service, a true and correct copy of the document to which this declaration is attached, **Brief of Appellant**, addressed and delivered as follows:

Mary F. Perry, WSBA #15376
Gary T. Smith, WSBA # 29718
Seattle Assistant City Attorneys
600 Fourth Avenue, 4th Floor
P.O. Box 94769
Seattle, WA 98124-4769
BY EMAIL on 7/30/12 AND
HAND DELIVERY on 7/31/12

Attorneys for Plaintiff, City of
Seattle

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

Signed at Seattle, Washington this 30th day of July, 2012.



Donna Cauthorn
Legal Secretary to Judith A. Endejan

OFFICE RECEPTIONIST, CLERK

To: DCauthorn@GrahamDunn.com
Cc: JEndejan@GrahamDunn.com; Mary.Perry@Seattle.Gov; gary.smith@seattle.gov
Subject: RE: FOR FILING Brief of Appellant, No. 87271-6 Fisher dba KOMO v City of Seattle, SPD

Rec. 7-30-12

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.

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Importance: High

Clerk,

Attached is a brief of Appellant Fisher Broadcasting-Seattle TV LLC dba KOMO in Cause No. 87271. Please acknowledge receipt by reply email.

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