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Supreme Court No. 87417-4

Court of Appeals No. 65896-4-I

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SUPREME COURT
OF THE STATE OF WASHINGTON

EVAN SARGENT,

Petitioner,

v.

SEATTLE POLICE DEPARTMENT,

Respondent.

SEATTLE POLICE DEPARTMENT'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Petitioner Evan Sargent (“Sargent”) asks this Court to depart from its well-established interpretation and application of the effective law enforcement exemption¹ to the Public Records Act (“PRA”), but offers no grounds to do so. For decades, law enforcement agencies in Washington State have relied on this exemption to protect the integrity of criminal and disciplinary investigations. The exemption effectively prevents interference with open and active investigations while allowing disclosure of records after an investigation is complete.

The Court of Appeals correctly held that the Seattle Police Department (“SPD”) properly invoked the effective law enforcement exemption in response to Sargent’s PRA requests relating to two open and active investigations – one of Sargent’s alleged criminal conduct, the other of alleged misconduct by an off-duty SPD officer. The exemption applies to Sargent’s first request for his own criminal investigative file because the request was made after the King County Prosecuting Attorney (“KCPA”) referred Sargent’s case back to SPD for further investigation. When Sargent made a subsequent request for his criminal investigative file after the investigation was concluded, SPD produced the file. The exemption also applies to Sargent’s single request for the police

¹ RCW 42.56.240(1).

misconduct investigative file because the request was made while the investigation was open and active.

Thus, the Court of Appeals properly concluded that “SPD timely responded” to all of Sargent’s records requests and properly asserted exemptions for open and active law enforcement investigative records. *Sargent v. Seattle Police Dep’t*, 167 Wn. App. 1, 24, 260 P.3d 1006 (2011). Sargent received the investigative file he requested after the investigation concluded and, as a result, prosecutes this appeal to obtain fees and penalties. Sargent has failed to identify any reason for this Court to reject long-standing precedent and allow courts to second guess law enforcement officials to determine what investigative records should be released during an active investigation. The public’s interest is fully protected when the public is allowed broad access to records after a case is closed, as the facts in this case demonstrate. The Court of Appeals should be affirmed.

II. STATEMENT OF THE CASE

A. **Sargent is taken into custody after brandishing a baseball bat at an off-duty SPD officer.**

Sargent’s PRA requests relate to a July 28, 2009, altercation between Sargent and an off-duty SPD officer. *See* CP 111-137. In his complaint initiating this PRA action, Sargent admits that during this

incident he raised a baseball bat and took a “partial” or “check” swing at the officer. CP 4. Sargent was arrested for this conduct. CP 5.²

B. Following Sargent’s arrest, the KCPA refers Sargent’s case back to SPD for additional investigation.

Because Sargent was in custody after his arrest, SPD was required to make a rush filing to the KCPA for a charging decision within 48 hours. *See* CP 141-142. Accordingly, SPD immediately referred the case to the KCPA on July 30, 2009. *Id.* On August 8, 2009, the KCPA declined to file charges at that time, but requested additional investigative work. CP 142. After receiving the KCPA notification, the SPD detective continued the investigation, including site visits and contact with witnesses. *Id.*

C. Sargent requests the SPD criminal investigative file.

Following his arrest, Sargent made two PRA requests for his criminal investigative file. On August 31, 2009, less than a month into the active investigation requested by the KCPA, Sargent submitted a request for the criminal investigative file. CP 111. On September 9, 2009, SPD denied Sargent’s request based on the open and active investigations exemption, but suggested he resubmit the request in six to eight weeks. CP 116-17. On November 17, 2009, the SPD detective referred the investigative file to the Seattle City Attorney’s office for a charging

² Many of the other facts relating to this incident are disputed and are not at issue in this appeal. These issues will be addressed in a civil action Sargent filed against the City. *Sargent v. City of Seattle, et al.*, Case No. 12-CV-01232-TSZ (W. D. Wash. 2012).

decision. CP 142. On February 5, 2010, Sargent made a second request for the criminal investigative file. CP 124-25. Because the criminal investigation was no longer open and active, SPD produced the bulk of the criminal investigative file, with select pages withheld and redactions applied pursuant to other specifically cited PRA exemptions. CP 113-114.

D. Sargent requests the police misconduct investigative file.

On October 15, 2009, the SPD Office of Professional Accountability (“OPA”) initiated an investigation of alleged police misconduct regarding the July 28, 2009 incident, including collecting evidence and conducting phone and in-person interviews. CP 148-149; CP 278.

Sargent made one PRA request for this file. On February 5, 2010, Sargent requested the disciplinary investigative file while the investigation remained open and active. CP 113, 124-25. On March 10, 2010, SPD denied Sargent’s request based on the exemption for records of open and active law enforcement investigations. CP 113-14, 129-30. On April 21, 2010, Sargent sent a letter to the SPD Legal Unit seeking “substantive responses to the following questions for clarification arising from your most recent correspondence so that we may narrow the issues for the most economical litigation.” CP 135-37. The letter did not include any requests for records. *See id.* OPA concluded its investigation on April 30,

2010, when the Civilian Director issued a final disposition memo. CP 145. On May 26, 2010, OPA notified Sargent that the investigation was complete, but Sargent did not resubmit his records request. *See* CP 145.³

E. The trial court determines the records were not exempt, and the Court of Appeals reverses that determination.

Sargent filed a complaint in King County Superior Court alleging that SPD had violated the PRA. CP 1-11. The trial court ruled in favor of Sargent with respect to the request for the criminal investigative file, concluding that SPD improperly asserted the open and active investigation exemption, and that SPD immediately was required to produce records in response to Sargent's first request once the investigation was concluded because that request "continued to be pending." *Sargent*, 167 Wn. App. at 9. The trial court did not order the disciplinary file produced. CP 454. The trial court then awarded a maximum penalty under the PRA for the period between October 24, 2009, and August 20, 2010, and a \$5 per day penalty for the period before that. CP 231. SPD appealed, and Sargent cross appealed primarily as to the disciplinary file. CP 360-61, 444.

The Court of Appeals held that "[t]he PRA does not provide for standing records requests" and the trial court's incorrect determination to

³ As Sargent's counsel acknowledged in a declaration filed at the Court of Appeals, however, Sargent has since received the closed, unsustained disciplinary file following this Court's decision in *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 259 P.3d 190 (2011). *See* Appendix ("App.") A.

the contrary “affected most of the rulings made below.” *Sargent*, 167 Wn. App. at 12. The Court of Appeals then held that the open and active investigation exemption applied to the criminal and disciplinary files until those investigations were complete. *Id.* at 15. The Court of Appeals also affirmed and reversed the trial court on issues related to redactions and other specific records, reversed the penalty award, and remanded for further proceedings. *Id.* at 26-27.

Sargent moved for reconsideration, arguing for the first time that his April 21, 2010 letter was a records request for the disciplinary investigative file and that the investigation was complete at some point before April 30, 2010. App. B at 1-2. The Court of Appeals denied reconsideration. App. C.⁴ Sargent sought review by this Court of six issues, but did not seek review of the Court of Appeals’ holding that the PRA does not allow standing records requests. *See* Pet. for Rev. at 1-3.⁵

⁴ Sargent’s motion for reconsideration also was based on documents outside the record, namely, correspondence discussing the completion of phases of the disciplinary investigation and its forwarding for review by the chain of command and civilian oversight. *See* App. B. The Court of Appeals denied Sargent’s motions under RAP 9.11 to supplement the record with these materials, and notably none of the correspondence undermines the evidence already of record on the review by chain of command and the dates of completion. *See* App. C; CP 144-49.

⁵ Because Sargent did not seek review of that issue in his Petition, it is not before this Court. RAP 13.7(b); *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 859, 281 P.3d 289 (2012). Sargent now states the issue was not whether a request was “standing,” but whether the records were exempt when requested. Pet. for Rev. at 9.

III. COUNTERSTATEMENT OF ISSUES

A. Did the Court of Appeals correctly determine that SPD properly invoked the categorical exemption from the PRA for records relating to open and active law enforcement investigations?

B. Did the Court of Appeals correctly apply this Court's precedent in holding that the categorical exemption from the PRA applies to investigations of police misconduct?

C. Did the Court of Appeals correctly deny reconsideration because Sargent's April 21, 2010 letter did not contain a request for records?

D. Did the Court of Appeals correctly remand for additional fact-finding regarding the disclosure of witness identities?

E. Did the Court of Appeals correctly determine that Sargent failed to make a proper request for his nonconviction records under the Criminal Records Privacy Act?

F. Did the Court of Appeals correctly remand for a hearing to reconsider any penalties, after determining that Sargent failed to make a showing of gross negligence, bad faith, or improper conduct sufficient to justify a maximum penalty award?

IV. ARGUMENT

A. The Court of Appeals correctly applied the established PRA exemption for open and active law enforcement investigations.

RCW 42.56.240(1) exempts from public inspection investigative records compiled by law enforcement agencies when nondisclosure “is essential to effective law enforcement.” In *Newman v. King Cnty.*, 133 Wn.2d 565, 575, 947 P.2d 712 (1997), this Court held that the effective law enforcement exemption applies categorically to open and active law enforcement investigative files.

Under *Newman*, exempt records must first be “compiled” by law enforcement as part of a law enforcement investigation. *Id.* at 572-73 (“[A]ny documents placed in the investigation file satisfy the requirement that the information is compiled by law enforcement.”). Second, nondisclosure must be essential to effective law enforcement. *Id.* at 573. To determine whether nondisclosure of open and active investigative files is essential to effective law enforcement, *Newman* adopted the test set forth by the United States Supreme Court to make a “generic determination” whether an investigative file is exempt from disclosure under the Freedom of Information Act (“FOIA”). *Id.* (citing *Nat’l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 223-24, 98 S. Ct. 2311, 57 L. Ed. 2d 159 (1978) (“*NLRB*”)).

As the U.S. Supreme Court recognized, the analogous FOIA exemption was intended to prevent release of investigatory files prior to an enforcement proceeding, because that release “necessarily” would interfere with law enforcement. *NLRB*, 437 U.S. at 243. Thus, under the FOIA test, as adopted in *Newman*, courts consider: (1) “affidavits by people with direct knowledge of and responsibility for the investigation ...”; (2) whether resources are allocated to the investigation, and (3) whether enforcement proceedings are contemplated. *Newman*, 133 Wn.2d at 573 (citing *Dickerson v. Dep’t of Justice*, 992 F.2d 1426, 1431-32 (6th Cir. 1993)). Where an agency provides this evidence, as SPD did below, investigative records are categorically exempt. *Newman*, 133 Wn.2d at 573-74.

1. SPD’s criminal investigation file was exempt under *Newman v. King County*.

When Sargent initially requested the criminal investigative file, the file remained exempt because the KCPA had requested additional investigatory work from SPD, which SPD undertook. *See* CP 141-142. The SPD detective testified that he had reopened his investigation and was actively performing site visits, taking photographs, and interviewing witnesses at the time the request was made. CP 142. The detective also testified that, following his investigation, he referred the case to the Seattle City Attorney’s office to pursue enforcement proceedings. *Id.*

The Court of Appeals properly rejected Sargent's argument that SPD's rush filing to the KCPA, within 48 hours of Sargent's arrest, "terminated" the criminal investigation for purposes of the open and active investigation exemption. The Court noted that Sargent's argument "would be true had nothing else occurred, but it ignores the subsequent events." *Sargent*, 167 Wn. App. at 14. Before Sargent's first records request, the KCPA had returned the case for further work and SPD had resumed its investigation. *Id.* SPD was required to make a rush filing because Sargent was taken into custody. *See* CP 141-42; *see also* CrR 3.2.1 (requiring a judicial determination of probable cause within 48 hours after arrest, unless probable cause was determined prior to arrest). The record confirms that, after the initial rush filing, the KCPA requested additional information and that the investigation did in fact continue. *See* CP 141-42.

Sargent contends that the exemption ends once a case has been "referred to a prosecutor," citing *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 594, 243 P.3d 919 (2010), and *Cowles Publ'g Co. v. Spokane Police Dep't*, 139 Wn.2d 472, 477-78, 987 P.2d 620 (1999). Both *Cowles* and *Serko* are distinguishable, however, because the investigations in those cases had concluded at the time of the records requests.

Specifically, in *Cowles*, the law enforcement agency "tacitly admitted" that its investigation was no longer active. *Id.* at 478. Instead,

the agency argued that the *Newman* exemption should apply to the entire investigative file even after referral to a prosecutor for the purpose of protecting the trial process. *Id.* (emphasis added). *Cowles* rejected that argument because the law enforcement investigation had ended, and the police had failed to establish why nondisclosure was necessary or how the case fell “within the scope of *Newman*.” *Id.* Likewise, in *Serko*, this Court observed that “[t]here is no question here that the prosecutor has made his charging decisions with respect to the respondents, and that the investigation . . . is no longer ongoing.” 170 Wn.2d at 594. By contrast, in this case, no final charging decision had been made, the investigation was ongoing and active at the time of Sargent’s records request, and there was a need to ensure non-disclosure of the investigative records.⁶

The Court of Appeals’ conclusion that SPD properly applied the *Newman* exemption also makes sense from a practical perspective. As in this case, once a prosecutor declines to file charges and returns a case to a law enforcement agency with a request for more information, the agency may engage in the full range of investigative work and “may decide to file again for felony charges with the KCPA, file for misdemeanor charges

⁶ Sargent speculates that the Court of Appeals’ decision could be used to “*Newmanize*” a criminal investigative file, even after a charging decision. Pet. for Rev. at 10. But categorically withholding a file after a charging decision is contrary to *Newman*, *Cowles*, and *Serko*, and that is not what occurred in this case. To the contrary, SPD suggested that Sargent resubmit his requests when the investigations at issue were expected to be completed. See CP 117, 130.

with the Seattle law department or file for felony charges with the US Attorneys.” CP 142. After reopening an investigation, a detective also may pursue different or additional suspects. *Id.*

If this Court were to accept Sargent’s rationale, every in-custody rush filing would forever preclude an application of the *Newman* categorical exemption, regardless of what happened next. Moreover, any suspect subject to further investigation could obtain easy access to a roadmap of the ongoing investigation. At the same time, courts would be forced to second guess police determinations about when confidentiality is essential for effective law enforcement during active police investigations in any case where a prosecutor declines to file charges immediately and an investigation is reopened. This was the scenario *Newman* guarded against.

In sum, the Court of Appeals properly applied the reasoning for the categorical exemption adopted in *Newman* and held that Sargent’s first request was made during an active and open investigation.

2. RCW 42.56.240(1) applies to internal disciplinary investigations of police officers.

The Court of Appeals also properly applied the *Newman* exemption to Sargent’s request for an open and active disciplinary investigation file. The exemption is not limited to criminal investigations, but includes those designed “to shed light on some other allegation of

malfeasance.” *Koenig v. Thurston Cnty.*, Case No. 84940-4, 2012 WL 4458400, at *2 (Wash. Sept. 27, 2012) (internal quotation omitted).

As a result, this Court has determined that a record relating to the internal disciplinary investigation of a police officer is a law enforcement investigative record within the exemption. *Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712, 728-29, 748 P.2d 597 (1988);⁷ see also *Newman*, 133 Wn.2d at 573 (citing *State Patrol*, and observing that an internal police investigation is subject to the PRA exemption); *Prison Legal News v. Dep't of Corr.*, 154 Wn.2d 628, 642 n.14, 115 P.3d 316 (2005) (citing *State Patrol* for the proposition that, unlike an investigation of prison staff, “the investigation of police performing the functions of their jobs is an investigation of law enforcement”); *Bainbridge Island Police Guild*. 172 Wn.2d at 419 (reiterating that a disciplinary investigation of police is a law enforcement investigation).⁸

This proposition remains unquestioned because a disciplinary investigation of a police officer is assigned to a sworn officer who interviews witnesses and gathers evidence in the same manner as an officer investigating any other law enforcement matter. See CP 148-49.

⁷ This case is distinct from the previously discussed *Cowles Publ'g Co. v. Spokane Police Dep't*, 139 Wn.2d 472, 987 P.2d 620 (1999). To distinguish the two, the 1988 case is referenced as “*State Patrol*.”

⁸ In contrast to the open and active investigation in this case, the *Bainbridge Island Police Guild* case involved the required disclosure of a closed law enforcement internal disciplinary investigation.

The investigation may itself evolve into a pursuit of criminal charges. CP 278. “[D]isclosure of the records while the investigation is underway could compromise both the investigation and any subsequent actions.” *Sargent*, 167 Wn. App. at 22; *see also State Patrol*, 109 Wn.2d at 729 (citing the need for a “workable reliable procedure for accepting and investigating complaints against law enforcement officers”). This was confirmed by the record below, which established an active investigation including numerous witness interviews, followed by review and oversight of the proposed conclusions. *See* CP 144-49. As such, the Court of Appeals correctly concluded that “[t]he *Newman* court’s reasoning [in establishing the categorical exemption] applies equally to disciplinary investigations” of law enforcement officers. *Sargent*, 167 Wn. App. at 22.

B. Sargent was not entitled to reconsideration on the exemption of the disciplinary file.

After the Court of Appeals affirmed the trial court’s decision that the disciplinary file was exempt at the only time Sargent requested it (February 5, 2010), Sargent asserted for the first time on reconsideration that the disciplinary investigation was complete when referred up the chain of command for a “charging decision” at some unspecified point before April 30, 2010. App. B at 15-16. But as the Court of Appeals recognized, “whether to investigate further or whether the file is ready for referral to a prosecuting agency will often be a collective or command

decision and not solely the judgment of the officer who happens to collect the last piece of evidence.” *Sargent*, 167 Wn. App. at 15. The record here showed that that the disciplinary disposition decision was not final until April 30, 2010, and that before a decision becomes final it is often necessary to conduct additional investigative work, such as witness interviews, or to engage in additional fact-finding. CP 144-49.⁹

The Court of Appeals also rejected another argument made by Sargent for the first time on reconsideration – that an April 21, 2010 letter from his counsel to the SPD Legal Unit requesting “substantive responses to the following questions for clarification so that we may narrow the issues for the most economical litigation” and an alleged voice mail “following up” on the letter were separate records requests. CP 135.

The PRA does not require that an agency respond to requests for information, only requests for records. *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998). A records request must be recognizable and provide fair notice that it is intended to be a public

⁹ For this reason, the Court of Appeals also properly denied Sargent’s motions under RAP 9.11 to introduce materials outside the record in support of reconsideration. RAP 9.11 is an extraordinary remedy. WASHINGTON STATE BAR ASS’N, WASHINGTON APPELLATE PRACTICE DESKBOOK § 15.13 (3d ed. 1998). Sargent failed to establish the six required elements of the rule, and most significantly failed to demonstrate that the admission of evidence outside the record was essential to the Court of Appeals’ disposition of his motion for reconsideration and would change the result on review. See *In re Adoption of B.T.*, 150 Wn.2d 409, 414, 78 P.3d 634 (2003). If anything, the additional evidence only buttressed the testimony already of record and supported the Court of Appeals’ opinion. See *supra*, n.4.

records request. *Beal v. City of Seattle*, 150 Wn. App. 865, 876, 209 P.3d 872 (2009). Courts look to the language used in the communication to see if records are requested. *Germeau v. Mason Cnty.*, 166 Wn. App. 789, 805-810, 271 P.3d 932 (2012) (rejecting claim that a letter was a PRA request, in part because prior PRA requests from the plaintiff specifically invoked the PRA, but letter at issue did not). In contrast to the express language of earlier letters from Sargent's counsel, the April 21 letter did not request records.¹⁰

Sargent relies on *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 261 P.3d 119 (2011), but that case involved a clear request for records under the PRA. *Id.* at 710; *Neighborhood Alliance* Brief of Petitioner/Appellant¹¹ at 22 (stating the following request: "I am writing to request the opportunity to review public records...that record the following information..."). Moreover, *Neighborhood Alliance* distinguishes between a request for records and a request for explanations, holding that the requester in that case "sought public records, not explanations." *Id.* at 727.

¹⁰ See August 31, 2009, records request form, CP 61; see also September 1, 2009, written "request for a copy" of records, CP 64; see also February 5, 2010, written "request for the following [public records]," CP 124.

¹¹ Available on the Washington Supreme Court's website at the following link: <http://www.courts.wa.gov/content/Briefs/A08/841080%20appellant%20br.pdf>.

Because Sargent's April 21, 2010, letter did not request records, the Court of Appeals' denial of his Motion for Reconsideration is consistent with *Neighborhood Alliance*, and should be affirmed.

C. The Court of Appeals correctly remanded for additional fact-finding relating to the disclosure of witness identities.

When SPD produced the criminal investigative file to Sargent on March 10, 2010, it redacted the names of witnesses for their safety, citing RCW 42.56.240(2) ("the identity of persons who are witnesses to or victims of crime" is exempt from disclosure if certain criteria are met). Before the trial court, SPD argued that the prospect of disclosure would have a chilling effect on witnesses who would not come forward for fear of retaliation, thus impeding the ability of law enforcement to gather first-hand accounts of an incident. *Sargent*, 167 Wn. App. at 17.

Although the Court of Appeals determined witness identities are not exempt from disclosure because of a potential chilling effect, it observed that SPD "may reasonably have relied" on "strong language" in prior case law suggesting such an exemption existed. *Id.* at 19.

Accordingly, consistent with precedent,¹² the Court of Appeals correctly remanded for additional fact-finding relating to whether disclosure of

¹² See *Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1 of Clark Cnty.*, 138 Wn.2d 950, 964, 983 P.2d 635 (1999) (remanding for further fact-finding to determine whether a specific exemption applied); see also *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 154, 240 P.3d 1149 (2010) (remanding for further fact-finding regarding what specific records existed that may not have been produced).

witness identities would endanger any person or property. SPD should, therefore, be allowed an opportunity to present this evidence on remand.

D. The Court of Appeals correctly held that Sargent failed to make a proper request for his nonconviction records under the Criminal Records Privacy Act.

Pursuant to the Criminal Records Privacy Act (“CRPA”), SPD withheld production of Sargent’s Washington State Patrol and Department of Licensing nonconviction records, or “rap sheets.” As the Court of Appeals recognized, the CRPA permits the subject of such records to inspect the records “in person at the agency but prohibits retention or reproduction unless for the purpose of a challenge or correction, in which case the subject of the records must assert in writing that information is inaccurate or incomplete.” *Sargent*, 167 Wn. App. at 20-21; *see also* former RCW 10.97.080 (2010)¹³ (“[t]he provisions of [the PRA] shall not be construed to require or authorize copying of nonconviction data for any other purpose.”). The Court of Appeals held that, because Sargent did not assert that the data was inaccurate or incomplete, SPD properly withheld the nonconviction records. *See Sargent*, 167 Wn. App. at 21.

This Court’s decision in *Bainbridge Island Police Guild* does not require a different result. In that case, this Court held that where records contain a mix of data that is subject to the CRPA and data that is not, the

¹³ RCW 10.97.080 was amended to alter this provision. *See* Laws of 2012, ch. 125, § 3.

data subject to the CRPA must be redacted. *Bainbridge Island Police Guild*, 172 Wn.2d at 423. Here, Sargent's nonconviction records consisted entirely of information subject to the CRPA.¹⁴ The Court of Appeals correctly determined that those records should be withheld.

E. The Court of Appeals correctly determined that the record did not support a maximum penalty award.

Finally, the Court of Appeals rightly reversed the trial court's imposition of penalties under the PRA because the maximum penalty "is not appropriate where there is no showing of gross negligence, bad faith, or other improper conduct." *Sargent*, 167 Wn. App. at 6; *see also Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 459-63, 229 P.3d 735 (2010). Here, nothing in the record supports gross negligence, bad faith, or improper conduct on the part of SPD. When Sargent resubmitted his request for the closed criminal investigative file, SPD produced the records. CP 113-114. When SPD completed the separate disciplinary investigation, it notified Sargent in writing, and Sargent chose not to resubmit his request for that file. *See* CP 145.

In light of this record, and the now unchallenged trial court error as to standing requests, the Court of Appeals properly remanded to the trial court for reconsideration of what, if any, penalties should be imposed. *See*

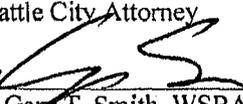
¹⁴ *See* Appellant's Opening Brief, Exhibit A, describing the non-conviction records and citing to the original pagination of records submitted under seal.

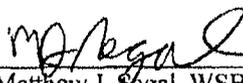
Sargent, 167 Wn. App. at 27. On remand, the trial court will apply the factors set forth in *Yousoufian*, 168 Wn.2d at 467-468, to determine any applicable penalty. *Sargent* has failed to identify any error with respect to the remand, and the Court of Appeals should be affirmed.

V. CONCLUSION

Sargent has offered no reason why this Court should abandon its long-standing recognition of the exemption for open and active investigative records under the PRA. *Sargent* proposes a change in the law that will compel trial courts to second guess law enforcement determinations regarding what records are essential to effective law enforcement during active investigations. There is no public interest in abrogating a narrowly tailored and limited in time restriction that balances the protection of police investigations and public safety with disclosure following completion of an investigation. This case provides an example of the exemptions working as intended. SPD respectfully requests that this Court affirm the Court of Appeals.

DATED this 5th day of November, 2012.

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CERTIFICATE OF SERVICE

I certify that on the 5th day of November, 2012, I caused a true and correct copy of the foregoing Seattle Police Department's Supplemental Brief to be served on the following in the manner indicated below:

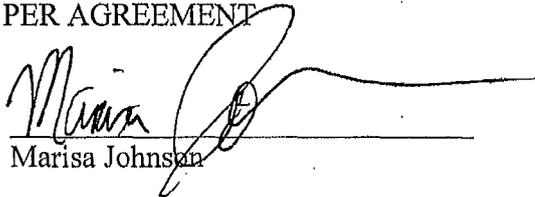
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Marisa Johnson

APPENDIX A

COURT OF APPEALS
DIVISION ONE

No. 65896-4-1

NOV 04 2011

**COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON**

EVAN SARGENT,

Respondent

vs.

SEATTLE POLICE DEPARTMENT,

Petitioner.

SEATTLE CITY ATTORNEY
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COURT RECEIVED

**ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Catherine Shaffer)**

**DECLARATION OF PATRICK J. PRESTON IN SUPPORT OF
RESPONDENT/CROSS APPELLANT SARGENT'S SECOND
MOTION TO PRESENT ADDITIONAL EVIDENCE ON THE
MERITS UNDER RAP 9.11**

Patrick J. Preston
Thomas M. Brennan
McKay Chadwell, PLLC
600 University Street, Suite 1601
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I, Patrick J. Preston, attest as follows:

1. I am licensed to practice law in the State of Washington and a member of the Washington State Bar Association in good standing. I am an attorney at the law firm of McKay Chadwell, PLLC, representing plaintiff Evan Sargent in this action and appeal. The facts set out in this declaration are based upon my personal knowledge.
2. On November 3, 2011, I received from the Seattle Police Department (SPD) through counsel 198 pages of previously withheld disciplinary investigation records of SPD's investigation of SPD Officer Donald Waters for alleged misconduct against my client, Evan Sargent, under Office of Professional Accountability (OPA) Investigation Section (IS) File Number 09-0395. This production includes records responsive to requests that Sargent made to SPD under the Public Records Act (PRA) through repeated communications from February 5, 2010 through May 14, 2010, and includes records that Sargent filed the underlying PRA enforcement action in King County Superior Court to obtain.
3. A true and correct copy of the "Investigation Section Office of Professional Accountability Case Summary," for OPA-IS disciplinary investigation File Number 09-0395, dated March 5, 2010, which I received on November 3, 2011 from SPD, is attached as Exhibit A.

4. A true and correct copy of a SPD Memorandum stating that "The attached OPA-IS investigation has been completed," dated April 2, 2010, which I received on November 3, 2011 from SPD, is attached as Exhibit B.

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

DATED November 4, 2011, in Seattle, King County, Washington.

A handwritten signature in black ink, appearing to read 'PJP', written over a horizontal line.

Patrick J. Preston

APPENDIX B

RECEIVED
COURT OF APPEALS
DIVISION ONE

OCT 1 11 2011

No. 65896-4-1

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

EVAN SARGENT, Respondent / Cross Appellant,

v.

SEATTLE POLICE DEPARTMENT, Appellant / Cross Respondent.

**ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Catherine Shaffer)**

**RESPONDENT / CROSS APPELLANT SARGENT'S MOTION
FOR RECONSIDERATION**

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A. Identify Of Moving Party

Respondent and Cross Appellant Evan Sargent moves for reconsideration of the Court's September 19, 2011 opinion reviewing the trial court's rulings in this Public Records Act (PRA) enforcement action against the Seattle Police Department (SPD).

B. Statement Of Relief Sought

Reconsideration under RAP 12.4 of the following issues raised by this Court's September 19, 2011 opinion:

(1) Whether the Court's failure to "address what disclosure would have been called for had a request been submitted after the investigation closed" (see Op. at 19 n.53) overlooked Sargent's unanswered April 21, 2010 written (CP 44-46) and May 14, 2010 verbal (CP 58; 242) communications to SPD renewing his request for disciplinary investigation and electronic records;¹ and whether SPD's failure to respond to these communications violated the PRA under *Neighborhood Alliance Of Spokane Co. v. County of Spokane*, Op. No. 84108-0, 2011 WL 4485941, at *11 (*en banc*, Sept. 29, 2011) and other provisions;

¹ The opinion contains no reference to these critical post-investigation renewal communications. Additionally, Sargent's August 10, 2010 PRA complaint attached the prior written requests for disciplinary and electronic records in the prayer for relief. (See CP 8-11/374-77; 41-42/407-08; 44-46/410-12). Sargent's August 10, 2010 PRA motion to show cause likewise provided SPD with notice of these requests, and attached the prior requests. (See CP 51, 55; 80-81; 92-94). In response, SPD's deficient production after the trial court's show cause hearing of a redacted OPA disciplinary investigation summary implicitly acknowledged that Sargent timely renewed his request after completion of the disciplinary investigation. (See CP 886-88). To date, however, SPD's continued withholding of the remainder of the disciplinary investigation file can only be explained as gross negligence, bad faith or other agency impropriety constituting aggravating PRA penalty factors.

(2) Whether the following acts by SPD are substantial evidence of gross negligence, bad faith or other improper conduct for the PRA penalty under *Neighborhood Alliance*: (a) SPD's failure to respond to Sargent's April 21, 2010 written and May 14, 2010 verbal communications renewing his request for disciplinary investigation, electronic and investigation records; (b) failure to promptly "disclose" an itemization of withheld records in response to these communications; (c) failure to state the precise exemption asserted for each withheld record; and (d) continued withholding of requested non-exempt disciplinary records through the present;

(3) Under the PRA and *Neighborhood Alliance*, whether Sargent's renewal of his request for disciplinary investigation and electronic records in his unanswered April 21, 2010 letter causes the PRA penalty to run from the date SPD completed the disciplinary investigation and referred it for disposition decision through the present;² and whether remand is necessary to determine the exact date of completion and referral;³

² As noted, SPD continues to withhold disciplinary records identified in its "redaction" log (CP 890-91) filed in the August 2010 trial court proceeding, arguing there is no effective request. SPD maintains this position despite Sargent's April 21, 2010 letter seeking these records, May 14, 2010 follow-up verbal communication, and Sargent's undisputed demand for these records contained in the prayer for relief of his August 10, 2010 PRA complaint (CP 11). SPD is fully on notice that the PRA penalty may continue to accrue, but has chosen to withhold the complete records listed in the log, including records vital to the preparation of Sargent's civil rights claim such as the statement of Officer Waters to OPA.

³ As discussed below, the record does not establish that SPD completed the disciplinary investigation on April 30, 2010. Rather, the opinion correctly noted OPA only made a disposition decision regarding the completed investigation on that date. See *Op.* at 4. Sargent has filed contemporaneously with this motion for reconsideration a motion to supplement the record with a letter from SPD dated April 8, 2010 stating that the disciplinary investigation had been completed and forwarded to chain of command for disposition. It is within this Court's discretion under RAP 9.11 to consider this letter for judicial economy and to spare unnecessary expense to the parties in litigating this issue on remand. Discovery authorized by *Neighborhood Alliance*, however, may be necessary to determine the exact date before the April 8, 2010 letter that the disciplinary

(4) Whether SPD's withholding of both incident and disciplinary investigation records in their entirety for "privacy" under RCW 42.56.240(1), and redactions of Officer Waters' name in later produced records, violated the PRA under *Bainbridge Island Police Guild v. City of Puyallup*, No. 82374-0, 2011 WL 3612247 (Wash. Aug. 18, 2011); whether this exemption lacked a factual basis because the record contained no evidence that Officer Waters asserted privacy rights or sought nondisclosure;⁴ and whether SPD's lack of factual and legal bases for this exemption are aggravating factors for the PRA penalty;

(5) Whether SPD's two-month delay in producing on April 7, 2010 incident investigation records previously identified and gathered for a disciplinary investigation was proper in light of the PRA's mandate of promptness under RCW 42.56.080 and for the "fullest assistance" to requestors under RCW 42.56.100.⁵

(6) Whether this Court's modification of the bright line rule in *Cowles*, which held that investigation records already referred to a prosecutor for a charging decision are not subject to the *Newman* "open and active investigation" exemption, overlooks the fundamental reason for the *Newman* exemption, i.e., preservation of "sensitive information in unsolved cases"⁶ prior to presentation of the investigation to the prosecutor; and whether SPD's disclosure of all the sensitive facts of the Incident Report in the Superform reviewed at Sargent's preliminary appearance on July

Investigation was completed.

⁴ To the contrary, SPD's identification of Officer Waters in a September 29, 2009 letter to Sargent (CP 68) undermined the factual basis for later redactions of his name in investigation records produced in March and April 2010.

⁵ See, e.g., *Violante v. King Co. Fire Dist. No. 20*, 114 Wn. App. 565, 570-71, 59 P.3d 109 (2002) (agency's failure to produce records 14 days after estimate time elapsed violated PRA, making requestor "prevailing party").

⁶ *Cowles Pub'g Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 477, 987 P.2d 620 (1999) (modifying *Newman v. King Co.*, 133 Wn.2d 565, 947 P.2d 712 (1997)).

29, 2009 further shows that the *Newman* analogy lacks vitality as relevant authority;

(7) Under *Bainbridge Island Police Guild v. City of Puyallup*, 2011 WL 3612247, *10 (Wash., Aug. 18, 2011), whether withholding Sargent's non-conviction data records in their entirety under the CRPA violates the PRA. Whether in the alternative, the PRA requires SPD to allow Sargent to inspect these records under the PRA and *Bainbridge Island*, 2011 WL 3612247, *9 (citing *Hudgens v. City of Renton*, 49 Wn. App. 842, 844-45, 746 P.2d 320 (1987)).

(8) Whether the doctrine of collateral estoppel⁷ bars SPD from relitigating on remand its failure to present evidence of witness privacy when SPD did not do so when it had a full and fair opportunity in the trial court proceedings, given SPD's statutory burden of proof under RCW 42.56.550(1), and the PRA's policy favoring prompt and open examination of records.

C. Relevant Facts

This case involves Sargent's PRA requests to SPD for records related to alleged civil right violations arising from his July 28, 2009 arrest at gunpoint by an off-duty SPD officer and SPD's subsequent disciplinary investigation, which did not exonerate the officer of misconduct. The trial court ruled that SPD violated the PRA by withholding and redacting investigation records under

⁷ See, e.g., *Hanson v. City of Snohomish*, 121 Wn.2d 552, 852 P.2d 295 (1993) (doctrine of collateral estoppel, which prevents relitigation of an issue after party has had full and fair opportunity to present its case, barred plaintiff's relitigation in civil action of issue regarding impropriety of police identification procedures).

inapplicable exemptions, but it made no findings of fact or conclusions of law regarding requested disciplinary and electronic records. The court imposed a PRA penalty that increased from the minimum to the maximum in correlation to SPD's rising culpability for withholding records of an investigation that did not support charging, and it found that SPD's PRA violations were not in good faith. Mandatory fees and costs were awarded to Sargent as prevailing PRA plaintiff.

Following the trial court proceedings, SPD continued to withhold records it had been ordered to produce without redactions. SPD instead appealed, raising issues over the PRA exemptions it unsuccessfully argued, the penalty amount (although SPD did not assign error to the trial court's finding that the agency had acted in bad faith), and the amount of fees and costs. Sargent cross appealed on whether the record showed SPD violated the PRA by withholding disciplinary and electronic records and for an award of fees and costs incurred after the trial court's hearing.

On September 19, 2011, this Court issued an opinion affirming and reversing in part, and remanding to the trial court for further proceedings. The Court advised Sargent under RAP

12.4(b) of his right to move for reconsideration within 20 days.

Sargent timely moves for reconsideration of the following issues.

D. Grounds For Relief And Supporting Argument

The PRA's *de novo* standard of review requires this Court to review the entire record before the trial court. RCW 42.56.550(3); *Neighborhood Alliance*, 2011 WL 4485941, at *4; *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). This Court further must take into account the policy of the PRA that free and open examination of public records is in the public interest, even if examination may cause inconvenience or embarrassment. 42.56.550(3).

The chief issue of this appeal was not whether a records request has "indefinite effect." The Court's holding that "there is no standing request under the PRA" solved a problem that existed only in SPD's mischaracterizations on appeal and the rhetoric of amicus briefing, but not in the trial court's ruling on the merits of Sargent's PRA claim. The trial court plainly ruled that the basic incident records requested by Sargent were not exempt when requested⁸

⁸ Prior to the filing of SPD's opening appellate brief, SPD's September 10, 2010 motion to file records under seal pending appellate review properly characterized the nature of the trial court's ruling that the investigation records were not exempt when requested, making no reference to "standing" PRA requests: "In this case, the trial court reviewed all of the criminal investigative records provided for in

and used the date of the detective's last witness interview after referral of the investigation to the prosecutor as an aggravating factor for increasing the penalty of SPD's existing PRA violation. RP 22, 28. The trial court never used the term "standing request" in its oral or written rulings. The court's reference to the pending nature of Sargent's unfulfilled and timely requests for non-exempt records was not a finding that Sargent made a stand-alone request for exempt or non-existent records. After ruling on the merits, the court's dictum for SPD's "edification" fairly addressed SPD's belabored arguments of administrative inconvenience in responding to thousands of other PRA requests. RP 28-30.

Only the PRA penalty has a "standing" nature, because it "will continue to accrue" if a record is not produced. See *Neighborhood Alliance*, 2011 WL 4485941, at *__. As such, the chief issue of this case should be the amount of SPD's accruing penalty for continuing to withhold 175 pages of disciplinary records (see CP 890-91) the past 538 days, despite PRA's broad mandate of disclosure, the Supreme Court's holding in *Bainbridge Island*

camera review and essentially held that the PRA exemptions did not apply." CP 349.

Police Guild, and SPD's refusal to acknowledge Sargent's repeated and unfulfilled requests for these records.⁹

Because the Court's opinion overlooked key facts in the record showing SPD violated the PRA in multiple ways, relevant authority, and proof of multiple aggravating factors regarding the PRA penalty, it should reconsider the following issues:

1. SPD's Failure To Respond To Sargent's April 21, 2010 And May 14, 2010 Communications Renewing His Request For Disciplinary Investigation, Electronic And Additional Investigation Records Violated The PRA Under *Neighborhood Alliance*

In *Neighborhood Alliance*, the Supreme Court held that the agency violated the PRA by refusing to disclose or produce records cited in a requestor's inquiry for the agency to "identify any record covered by the above requests that is being withheld as exempt, and provide a summary of the record's content and the specific reason for the exemption." *Neighborhood Alliance*, 2011 WL 4485941, at *2. The agency responded, "that the PRA 'does not require agencies to explain public records. As such, no response is required.'" *Id.* After discussing the PRA's broad mandate in favor

⁹ Sargent agrees with the Court's opinion that to the extent his February 5, 2010 request for disciplinary records occurred while the disciplinary investigation was "open and active," a renewed request was necessary under the PRA to obtain these records. As discussed below, Sargent twice renewed this request after the disciplinary investigation had been completed.

of disclosure regarding an adequate search, and that "records are never exempt from disclosure, only production" under the PRA, the *Neighborhood Alliance* Court concluded that the agency's response "violates the PRA. The request sought public records, not explanations, and if the agency was unclear about what was requested, it was required to seek clarification." *Id.* at *8, 11.

The only difference between the agency's PRA violation in *Neighborhood Alliance* and the present case is that the County of Spokane actually responded to the requestor, but SPD never bothered – for clarification, to indicate that the disciplinary investigation had been completed, or otherwise.

Instead, the record shows that SPD did not answer Sargent's April 21, 2010 written (CP 44-46) or May 14, 2010 verbal (CP 58; 242) communications renewing his February 5, 2010 request for disciplinary investigation, electronic and additional investigation records. As in *Neighborhood Alliance*, Sargent's April 21, 2010 letter asked SPD to identify "any records responsive to our request for [a]ll information regarding any disciplinary investigation of Officer Donald Waters #6287 and/or any other SPD personnel arising from the investigation of SPD Incident #09-264202," quoting Sargent's February 5, 2010 request, and to

"describe the records (including any page and/or line count) and identify the precise statutory exemption and factual basis asserted by SPD to withhold such records." CP 45. SPD's failure to respond violated the PRA.¹⁰

- a. Under The PRA And *Neighborhood Alliance*, SPD's Failure To Respond To Sargent's Communications Proves Gross Negligence, Bad Faith Or Other Improper Conduct For the PRA Penalty

The Court's opinion states that SPD "properly" responded to Sargent's PRA requests, including his February 5, 2010 request for disciplinary, electronic and investigation records. The record does not support this conclusion. Rather, SPD's repeated delays without cause, and failures to promptly produce non-exempt records, prove gross negligence, bad faith or other improper conduct for the PRA penalty under *Neighborhood Alliance* and *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 468, 229 P.3d 735 (2010).

¹⁰ Four months later, SPD's explanation before the trial court for not responding to Sargent's April 21, 2010 letter was virtually the same as the agency's response in *Neighborhood Alliance*, which was held to violate the PRA: "The PRA does not require that an agency respond to such questions." CP 102. SPD further asserted that Sargent's May 14, 2010 voice message was "inherently unrecognizable as a new public disclosure request." CP 103. Putting aside whether this assertion is hyperbole, SPD at a minimum had a duty under the PRA and *Neighborhood Alliance* to seek clarification from Sargent, given "Plaintiff's history of communication with SPD related to this specific request." See *Neighborhood Alliance*, 2011 WL 4485941, at *11; CP 103; RCW 42.56.100.

On February 5, 2010, Sargent requested in writing disciplinary, electronic and other investigation records from SPD while renewing his request for basic investigation records that been withheld under disputed exemptions since August 31, 2009.¹¹ CP 80-81. In response, SPD neither disclosed an itemization of such records, nor made records "promptly available," even on an installment basis, as required by RCW 42.56.080. Instead, SPD's staff attorney indicated that the agency would "respond" by February 24, 2010, and then failed to do so. CP 24-25; 171.

On February 25, 2010, Sargent learned the same staff attorney overseeing SPD's response was out of the office until March 2, 2010, and that "no further information was available." CP 24. On the same date, Sargent sent a letter to the Chief of Police complaining of SPD's delays and lack of PRA compliance, and citing the urgent nature of his records request, lack of applicable exemptions, and accruing potential maximum PRA penalty. CP 24-25. SPD again did not bother to respond.

¹¹ In September 2009, Sargent repeatedly notified SPD of its unlawful failure to specify applicable PRA exemptions (CP 20, 38), misinterpretation of the PRA, citing *Cowles* (CP 21), the urgent nature of his request for the basic investigation records (Incident Report, 911 recording, and CAD log) in view of potentially ongoing police misconduct and public safety concerns (CP21-22; 848-850), and the accruing maximum PRA penalty (CP 39). These circumstances are aggravating penalty factors because SPD's subsequent delays leading to SPD's deficient production of unlawfully redacted investigative records in March and April 2010 were improper under the PRA.

On March 3, 2010, the staff attorney left a message requesting to "talk" before "having folks pull information that looks like it's been requested." CP 27. Sargent's attorney returned the call and left a message, but again received no response.

On March 8, 2010 Sargent sent a letter to SPD objecting to SPD's failure to timely gather the records and repeated the February 5, 2010 requests, citing urgent issues of public safety requiring prompt production and warning that Sargent would seek the maximum PRA penalty for violations. CP 27-28. The redacted investigation records SPD produced on March 10, 2010 (Incident Report, 911 recording, CAD log) were responsive only to Sargent's six-month-old original request. CP 70-71. SPD claimed it needed "[a]dditional time" to review additional investigation records and "to research" the electronic records. CP 71. But, SPD made no attempt to disclose withheld records in an itemized log.

Regarding Sargent's request for disciplinary records, SPD asked Sargent to "[p]lease resubmit your request in four to six weeks as the investigation is still open." CP 71. Five weeks later, Sargent did precisely that in his letter dated April 21, 2010. CP 44-46. The letter unequivocally renewed and quoted his February 5, 2010 request for disciplinary, electronic and additional investigation

records, and warned of anticipated litigation for refusal to provide unredacted and non-exempt responsive records. CP 44-45. Sargent again emphasized that production of the records "bears upon the fitness of Seattle Police Officer Donald Waters to perform public duty and, therefore, is of significant and urgent public concern." CP 45. SPD again did not respond.

On May 14, 2010, Sargent's counsel called SPD's staff attorney to follow up on the unanswered letter and unfulfilled records requests and left a voice message requesting a response to these issues. CP 58. This communication was memorialized in Sargent's attorney fees exhibit, upon which the trial court awarded fees. CP 242. As with the written April 21, 2010 communication, SPD's staff attorney did not respond.¹² CP 58.

Neighborhood Alliance makes clear that the PRA imposes a duty on an agency to timely respond to such communications by a records requestor. In discussing bad faith agency action under the *Yousoufian* factors, an example cited by the Supreme Court is instructive: "An agency that sought clarification of a confusing

¹² Although SPD does not dispute not responding to Sargent's April 21, 2010 letter, the staff attorney disputes receiving the May 14, 2010 follow-up communication. Under these circumstances, discovery authorized by *Neighborhood Alliance* may be required on remand on this issue and other issues involving SPD's "motivation for falling to disclose or withholding documents." See *Neighborhood Alliance*, 2011 WL 4485941, at *5.

request and in all respects timely compiled but mistakenly overlooked a responsive document should be sanctioned less severely than an agency that intentionally withheld known records and then lied in its response to avoid embarrassment."

Neighborhood Alliance, 2011 WL 4485941, at *6. SPD did not seek clarification, but instead intentionally withheld identifiable records. The trial court appropriately cited the intentional nature of SPD's withholding as an aggravating factor. CP 173. Accordingly, SPD's actions were not proper, demonstrate a lack of accountability,¹³ and constitute aggravating PRA penalty factors.

b. Under The PRA And *Neighborhood Alliance*, Sargent's April 21, 2010 Renewal Of His Request For Disciplinary Records Causes The PRA Penalty To Run Through Present

To apply the Court's analogy to the "open and active investigation" exemption in *Newman v. King Co.*, 133 Wn.2d 565, 947 P.2d 712 (1997) under RCW 42.56.240(1) to SPD's disciplinary investigation logically requires a determination of the date the assigned Investigator for SPD's Office of Professional Accountability (OPA) completed his investigation and forwarded it to the chain of command for a disciplinary disposition decision. See

¹³ See *Bricker v. Dept. of L&I*, No. 40064-2, 2011 WL 4357760 at *4-6 (Div. II, Sept. 20, 2011) (affirming \$90 *per diem* penalty under *Yousouffian* based in part on agency's "absence of accountability that is fundamental to the PRA").

Op. at 19. This event was the functional equivalent of a detective's completion of a criminal investigation and referral to a prosecutor for charging review, as discussed in *Cowles Pub'g Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 477, 987 P.2d 620 (1999), ending the *Newman* "categorical" exemption.¹⁴

Under this analogy, the Court held that the disciplinary records sought by Sargent were "categorically exempt when Sargent made his request," relying on "April 30, 2010" as the date that OPA's investigation "concluded." See Op. at 18. But the record does not show that April 30, 2010 was the date the OPA investigation was completed and referred for a disciplinary disposition decision.¹⁵ Instead, the record shows only that OPA

¹⁴ Under *Bainbridge Island Police Guild* and other authorities cited in Sargent's appellate briefing, police disciplinary investigation records are subject to the PRA's broad mandate of disclosure and cannot be withheld for investigations resulting in no finding of misconduct or otherwise, in their entirety.

¹⁵ The Court appears to have relied on SPD's mischaracterization that "[a]t the time of Sargent's April 21, 2010 letter, the disciplinary investigation remained open and active." See Answer and Reply at 27. In support, SPD cited CP 145, but the Declaration of Kathryn Olson, civilian Director of OPA, only indicates that she set forth her "disposition decision" on April 30, 2010. There is no reference to when Sergeant Brett Rogers completed his active investigation, or any indication that OPA ever reopened the investigation. SPD also cited CP 278, a second declaration of Kathryn Olson that suffers from the same evidentiary deficiencies. SPD's most glaring mischaracterization of the date OPA completed its investigation and forwarded it for a disciplinary disposition decision appears in the Response to Plaintiff's Motion to Show Cause, which states: "The disciplinary investigation was not completed until April 30, 2010. Declaration of Kathryn Olson (Olson Decl.) ¶ 4." CP 100. This troubling mischaracterization should be weighed as an aggravating factor for the PRA penalty. See *Neighborhood Alliance*, 2011 WL 4485941, at *6.

made a disciplinary disposition decision on April 30, 2010 based upon the completed investigation of Officer Waters. See Op. at 4. The declaration of Brett Rogers, "the Sergeant assigned to investigate OPA-IS No. 09-0395," contained no reference to the date Rogers completed his investigation and forwarded it to the chain of command for a decision. CP 148-49.

If Sargent's unanswered April 21, 2010 written and May 14, 2010 oral communications renewing his request for disciplinary records followed completion of OPA's investigation, the Court's holding and analogy to *Newman* and *Cowles* compels the finding that SPD violated the PRA by not promptly disclosing or producing disciplinary investigation records following Sargent's earliest renewal request after completion of the OPA investigation, which presumably was April 21, 2010.¹⁶ Under such circumstances, the PRA penalty for SPD's wrongful withholding of these records should run from April 21, 2010 through present.¹⁷

¹⁶ In addition to the relevant *Neighborhood Alliance* holding, RCW 42.56.520 requires a response within five business days of receiving a records request.

¹⁷ In *Neighborhood Alliance*, the Supreme Court discussed the agency's concern "about a daily-penalty award stretching to the final judgment date of this court." The Court noted that an agency has the ability to limit its liability for this penalty: "Penalties will not continue to accrue after a document is produced, and daily penalties will not accrue at all if the agency carries its burden of showing an adequate search." *Neighborhood Alliance*, 2011 WL 4485941, at *10. SPD's decision to withhold the majority of disciplinary records requested by Sargent through the present shows that the agency lacks concern about the potentially

2. SPD's Withholding Of Both Incident And Disciplinary Investigation Records For "Privacy" Under RCW 42.56.240(1), And Redactions Of Officer Waters' Name In Later Produced Records, Violated The PRA Under *Bainbridge Island Police Guild*

SPD argued at length before the trial court and on appeal that the privacy exemption under RCW 42.56.240(1) justified withholding and redacting requested records from OPA's disciplinary investigation of Officer Waters. CP 268-71; Answer and Reply at 38-46. SPD made these arguments categorically, without any showing that Officer Waters requested nondisclosure under the standard for privacy (see RCW 42.56.050), or sought to intervene in litigation to enjoin disclosure as did the officer in *Bainbridge Island Police Guild* and the intervening teachers in *Bellevue John Does 1-11 v. Bellevue School District #405*, 164 Wn.2d 199, 189 P.3d 139 (2007). The Supreme Court's decision in *Bainbridge Island Police Guild* rendered SPD's exemption assertion meritless. Thus, Sargent is entitled on remand to proportional award of fees and costs for prevailing on this issue on appeal. *Sanders v. State*, 169 Wn.2d 827, 868, 240 P.3d 120 (2010). Under *Bainbridge Island*, the Court further should direct SPD to promptly produce disciplinary records without redactions.

accruing PRA penalty, and should constitute a further aggravating factor.

3. SPD's Delayed April 7, 2010 Production Two Months After Sargent's February 5, 2010 Request Was Proper Given The PRA's Mandate Of Promptness

The PRA repeatedly references the requirement of prompt agency action in responding to requestors. RCW 42.56.080; 42.56.100; 42.56.520. This Court has found that an agency delay of as a little as 14 days violated the PRA requirement of promptness. *Violante v. King Co. Fire Dist. No. 20*, 114 Wn. App. 565, 570-71, 59 P.3d 109 (2002).

The Court's opinion states that "SPD timely responded to Sargent's requests." See Op. at 21. As set forth above, however, the record shows that SPD's repeated delays without cause, and failures to promptly produce non-exempt records, were neither timely nor proper.

The non-exempt July 28, 2009 incident investigation records SPD produced on April 7, 2010 had been identified and gathered for OPA's disciplinary investigation long before Sargent's February 5, 2010 request. No additional time was necessary to identify, gather or review this set of records. The Court, therefore, should find that SPD's delay in producing records on April 7, 2010 (with unlawful redactions) in response to Sargent's February 5, 2010 request violated the PRA.

4. The Bright Line *Cowles* Rule That Records Of An Investigation Referred To The Prosecutor For Charging Review Are Not Subject To The *Newman* Exemption Is Dispositive

The Court should reconsider its expansion of the *Newman* "open and active investigation" to exempt the records Sargent requested on August 31, 2009 and September 1, 2009, despite SPD's prior investigation referral to the King County Prosecuting Attorney for a charging decision. See Op. at 5-11. Those basic records were the Incident Report,¹⁸ 911 recording and CAD log of the recording. CP 13-14, 16.

This Court's opinion overlooks the bright line rule set forth in *Cowles*, which modified *Newman* by holding that "in cases where the suspect has been arrested and the matter referred to the prosecutor, any potential danger to effective law enforcement is not such as to warrant categorical nondisclosure of all records in the police investigative file." *Cowles*, 139 Wn.2d at 479. Thus, under *Cowles*, the act of referral ends the *Newman* exemption, not the prosecutor's response regarding investigation of the "suspect."¹⁹

¹⁸ SPD appears to use the term "Incident Report" interchangeably with the "General Offense Report." In a redaction log, SPD indicated that the Incident Report was 20 pages in length. CP 890. SPD produced the General Offense Report with redactions to Sargent on March 10, 2010, over six months after his request. CP 71.

¹⁹ The September 19, 2011 opinion is unworkable because it allows law

The *Cowles* bright line rule, consistent with *Newman*, leaves the decision of when to disclose potentially sensitive investigation records solely to the law enforcement agency. The agency retains complete control and discretion over when to disclose otherwise categorically exempt records. It is the reduced risk of disclosing potentially sensitive information after referral that provided the rationale for the *Cowles* rule: "[W]here the suspect has already been arrested and the matter referred to the prosecutor for a charging decision . . . the risk of inadvertently disclosing sensitive information that might impede apprehension of the perpetrator no longer exists." *Cowles*, 139 Wn.2d at 477-78.²⁰

Moreover, after referral, no issue exists regarding a court's ability to review investigation records *in camera* to determine whether the PRA requires production of requested investigative records. Courts are well "equipped" to review law investigation

enforcement to circumvent the PRA's broad mandate of disclosure by invoking the "open and active investigation" exemption to "*Newmanize*" the entire investigation file based on any follow-up action, no matter how trivial, even after the filing of charges and potentially through the statute of limitations for the investigated offense; of more concern, police could *Newmanize* the investigation file to avoid disclosure of records to a potential civil rights plaintiff, like Sargent, following an unconstitutional arrest.

²⁰ In simpler terms, "the cat is out of the bag." See *Pickard v. Dept. of Justice*, 2011 WL 3134505 (9th Cir., July 27, 2011) (holding under federal Freedom of Information Act, that agency's intentional disclosure of confidential informant information to prosecutor and court "officially confirmed" the information and thereby ended statutory protection allowing agency to refuse to confirm or deny the existence of records regarding informant).

information prior to a charging decision and routinely do for arrest and search warrant affidavits. Most importantly, courts also review sworn statements of previously sensitive investigation facts to determine probable cause at preliminary appearance hearings.

In Sargent's case, SPD intentionally disclosed investigation information from otherwise categorically exempt records even before referring the investigation for a charging decision. Sargent's CrRLJ 3.2.1 probable cause hearing on July 29, 2009 within 24 hours of his arrest required judicial review of SPD's statement regarding facts in the Superform (CP 805-06), which resulted in Sargent's release from the King County Jail (CP 5). On its face, SPD's two-page Superform shows that SPD authorized disclosure of this investigation information to multiple third parties for this public proceeding. The "Statement of Probable Cause" seeks to provide the court with sufficient "facts showing probable cause," to avoid the suspect being "automatically released." CP 806. A portion of the same page is devoted to law enforcement stating any objection if the court releases the defendant "on bail or recognizance." *Id.* A section allows the prosecutor to supply the "preliminary appearance date," the judge, bail, the return date and conditions of release. *Id.* Lastly, the Superform also disclosed this

information to Sargent for the hearing. Defense counsel later challenged the veracity of this Superform information. CP 849-50.

On July 30, 2009, SPD referred its investigation "[b]ased on patrol reports" to the King County Prosecuting Attorney for a charging decision. CP 141-42; 162. Under *Cowles*, this referral ended the *Newman* exemption. Moreover, SPD already had disclosed the basic investigation facts in court in the Superform, as seen by comparing the Statement of Probable Cause (CP 806) to the Incident Report case narrative (CP 776-77).

Sargent, like the records requestor in *Cowles*, sought the "Incident Report," which the Supreme Court held was non-exempt because "this case does not present a circumstance in which the police are institutionally better suited to determine whether nondisclosure is essential to effective law enforcement." *Cowles*, 139 Wn.2d at 478. The Incident Report "contained only a basic factual description of events," and the police could not prove that "nondisclosure of the incident report was essential to effective law enforcement in this case." *Id.* at 479. Likewise, SPD failed its burden of proof before the trial court to show that nondisclosure of this basic record, as well as the 911 recording and CAD log, was essential to effective law enforcement.

Newman, on the other hand, is factually distinguishable because the investigation remains "open and active" to this day, the suspect was never identified, and law enforcement never referred the investigation for a charging decision by the prosecutor. See *Newman*, 133 Wn.2d at 568, 575. Thus, the risk of disclosure of sensitive information remains, as does the categorical exemption.

For these reasons, the trial court correctly applied *Cowles* to rule that the basic records sought by Sargent's initial PRA requests were not exempt, and SPD violated the PRA by withholding them.

5. SPD's Withholding Of Sargent's Non-Conviction Records In Their Entirety Violates The PRA Under *Bainbridge Island Police Guild*

This Court should reconsider its holding under the Criminal Records Privacy Act (CRPA) that SPD properly withheld records containing Sargent's nonconviction data in their entirety. This holding conflicts with *Bainbridge Island Police Guild*, 2011 WL 3612247, at *10 (rejecting argument that CRPA "exempts an entire record . . . from production if it contains any criminal history," and holding that "RCW 10.97.080 requires redaction of only criminal history record information"). The Court's holding further conflicts with RCW 42.56.210(1), which states that no PRA exemption applies if redactions can be made to protect privacy rights. Since

Sargent seeks records from SPD containing his own non-conviction data, no privacy rights are implicated.

6. The Doctrine Of Collateral Estoppel Bars SPD's Relitigation Of Witness Privacy Issues On Remand

The Court's opinion properly rejected SPD's assertion of a "categorical exemption" for redacting "witness identification under the effective law enforcement prong of RCW 42.56.240(1), noting that the applicability of this exemption instead turns on the "agency's showing." SPD had a full and fair opportunity to present evidence of that specific witnesses asserted privacy concerns consistent with its burden of proof under RCW 42.56.550(1), but did not do so, presumably because no such evidence existed. The trial court plainly noted that SPD failed its burden of proof, which SPD did challenge in a motion for reconsideration or to reopen the proceedings. RP 25-26.

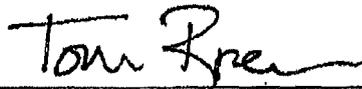
Under these circumstances, the doctrine of collateral estoppel bars SPD from relitigating on remand its failure to present evidence of witness privacy. See, e.g., *Hanson v. City of Snohomish*, 121 Wn.2d 552, , 852 P.2d 295 (1993) (doctrine of collateral estoppel, which prevents relitigation of an issue after party has had full and fair opportunity to present its case, barred

plaintiff's relitigation in civil action of issue regarding impropriety of police identification procedures). Accordingly, the Court should reconsider allowing "for an opportunity for SPD to justify redaction of witness identifying information here" on remand. See Op. at 15. Instead, the PRA's policy that free and open examination of public records is in the public interest controls. See RCW 42.56.550(3).

E. Conclusion

For these reasons, the Court should reconsider its opinion and reverse the challenged findings and conclusions.

DATED this 10th day of October, 2011.



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CERTIFICATE OF SERVICE

I, Helena Rizo, hereby certify that on the 10th day of October, 2011, I filed Respondent / Cross Appellant Sargent's Motion For Reconsideration and this Certificate of Service with the Court of Appeals, Division I, in Seattle, Washington, and caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

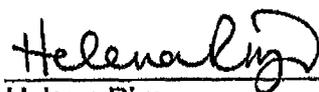
VIA EMAIL AND LEGAL MESSENGER

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DATED October 10, 2011 in Seattle, King County,
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APPENDIX C

FILED
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STATE OF WASHINGTON

2012 APR 17 AM 11:07

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

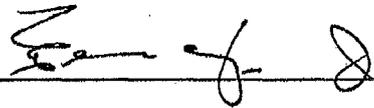
EVAN SARGENT,)	No. 65896-4-I
)	
Respondent/Cross Appellant,)	
)	
v.)	
)	
SEATTLE POLICE DEPARTMENT,)	ORDER DENYING MOTION
)	FOR RECONSIDERATION
Appellant/Cross Respondent.)	

Respondent/cross appellant Sargent filed a motion for reconsideration of the court's opinion filed September 19, 2011. The panel, having considered the motion, has determined it should be denied. Now, therefore, it is hereby

ORDERED that respondent/cross appellant's motion for reconsideration is denied.

Done this 17th day of April, 2012.

FOR THE PANEL:



FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2012 APR 17 AM 11:07

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

EVAN SARGENT,
Respondent/Cross Appellant,
v.
SEATTLE POLICE DEPARTMENT,
Appellant/Cross Respondent.

No. 65896-4-1

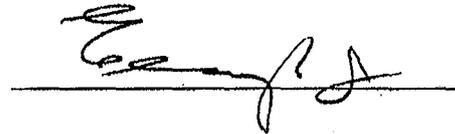
ORDER DENYING MOTIONS
TO PRESENT ADDITIONAL
EVIDENCE

Respondent/cross appellant Sargent filed two motions to present additional evidence on the merits under RAP 9.11. The panel, having considered both motions and appellant/cross respondent's response thereto, has determined they should be denied. Now, therefore, it is hereby

ORDERED that respondent/cross appellant's motions to present additional evidence are denied.

Done this 17th day of April, 2012.

FOR THE PANEL:



OFFICE RECEPTIONIST, CLERK

To: Johnson, Marisa
Cc: 'pjp@mckay-chadwell.com'; 'jendejan@grahamdunn.com';
'matthew.segal@pacificlawgroup.com'; Smith, Gary; 'RRamerman@ci.Everett.wa.us'
Subject: RE: Sargent v Seattle Police Department 65896-4-I

Rec'd 11/5/2012

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

From: Johnson, Marisa [<mailto:Marisa.Johnson@seattle.gov>]
Sent: Monday, November 05, 2012 3:49 PM
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Cc: 'pjp@mckay-chadwell.com'; 'jendejan@grahamdunn.com'; 'matthew.segal@pacificlawgroup.com'; Smith, Gary; 'RRamerman@ci.Everett.wa.us'
Subject: Sargent v Seattle Police Department 65896-4-I

Attached please find Seattle Police Department's Supplemental Brief regarding the following case and from the below listed attorney:

Evan Sargent v Seattle Police Department
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