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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.

WASHINGTON COALITION FOR OPEN GOVERNMENT AMICUS
CURIAE BRIEF

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I. IDENTITY AND INTEREST OF AMICUS

The Washington Coalition for Open Government (“WCOG”) is an independent, nonpartisan, nonprofit organization dedicated to promoting and defending the public’s right to know in matters of interest and in the conduct of government in the state of Washington. It represents a cross-section of public, press and government. WCOG has long been an advocate for open government as envisioned by the state’s Public Records Act (“PRA”), chapter 42.56 RCW.

WCOG’s interest in this case is to protect the rights granted to citizens under the PRA. This interest stems from the public’s need to receive full access to information regarding conduct of the people’s business through their government. The public can only ensure that the government is complying with its obligations to act in the public interest and to do so in a transparent and ethical manner if such information is made available. This is particularly true for the actions of police agencies, such as the Seattle Police Department (“SPD”), who must be fully accountable to the public for their actions.

WCOG promotes the public good through open government and increased awareness of issues important to the public welfare. WCOG advocates for transparent government and the free flow of discussion regarding government actions through the promotion of the PRA and other

open-government laws. WCOG's experience in promoting open government will assist the Court by providing an important perspective on the broader public policy impacts of the case that the individual parties cannot provide.

II. STATEMENT OF THE CASE

WCOG adopts and incorporates the Statement of the Case presented in Evan Sargent's Petition for Review at pages 3 through 7 and Sargent's Supplemental Brief at pages 6 through 11 and the record citations contained in both pleadings.

III. ARGUMENT

A. Summary of Argument

The key issue in this case is whether the records initially requested by Sargent were exempt under RCW 42.56.240(1) when first requested. The SPD denied Sargent's first request under that statute, which contains the "essential to effective law enforcement" exemption, withholding public records – i.e. the initial police incident report – routinely made available to the public. SPD justified its actions claiming that because these records were in an "open" investigative file they were categorically exempt under *Newman v. King Cnty*, 133 Wn.2d 565, 947 P.2d 712 (1997) because the King County Prosecutor's Office ("KCPO") declined to charge Sargent after the initial referral. Sargent's case highlights the problems

caused by the *Newman* “categorical exemption.” *Id.* at 574. *Newman* was decided 5-4 with a vigorous dissent from Justice Alexander who foresaw the threat to the PRA by allowing police agencies to withhold broadly all police records from public scrutiny simply because they relate to an “open” investigation, irrespective of whether they truly are “essential to effective law enforcement” as required by RCW 42.56.240(1). *Id.* at 577. The *Newman* categorical exemption addressed a unique police investigation – a decades-old, unsolved murder – and this Court’s primary concern was that release of investigative records might harm police ability to identify and apprehend the suspect. However, most police records, as in this case, deal with identified suspects, and contain a simple recitation of facts (i.e., incident reports) or recorded events such as 911 calls, the disclosure of which should not be **assumed** to impede police investigations which is the result of application of the *Newman* categorical exemption. Such an assumption, without any showing from police that nondisclosure is “essential to effective law enforcement,” is anathema to the PRA. The PRA **assumes** that all public records are disclosable unless proven otherwise.

As this Court has recognized many times, the PRA is “a strongly worded mandate for broad disclosure of public records.” *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 408, 259 P.3d

190 (2011), quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). Courts must construe the PRA liberally and construe exemptions narrowly “to assure that the public interest will be fully protected.” RCW 42.56.030. The party trying to block access must cite specific statutory exemptions and bears the burden of proving that a statute prohibits disclosure. RCW 42.56.210(3), RCW 42.56.550(1).

SPD’s actions in this case exemplify an abuse of the *Newman* “categorical exemption.” Perhaps the time has come to reconsider *Newman*’s broad sweep, which is at odds with the bedrock principles of the PRA discussed above. This Court’s analysis in *Cowles Publ’g Co. v. Spokane Police Dep’t*, 139 Wn.2d 472, 987 P.2d 620 (2000) is more consistent with these principles. *Cowles* properly rejected the dangerous, sweeping “categorical exemption” where factors exist to show minimal damage to effective law enforcement, such as where a suspect is identified and police have made a prosecutorial referral. *Id.* at 481. *Cowles* requires police agencies to show why release of police records would be harmful to a police investigation and places an important check on potential police abuse through *in camera* judicial review and oversight. *Id.* at 479-80. Such an approach eminently makes more sense for most police records, and should be applied for the type of records at issue in the *Sargent* case.

The Court of Appeals' failure to resolve correctly the core issue of whether SPD improperly withheld the records first requested led it to insert a new issue—whether Sargent's first request was a "standing request" to which SPD had to respond. *Sargent v. Seattle Police Dep't*, 167 Wn. App. 1, 11, 260 P.3d 1006 (2011). The Court of Appeals decided this newly-invented issue incorrectly by relieving the agency of an obligation to provide records in response to a PRA request that existed, but are allegedly exempt, at the time of that request. If the Court of Appeals "holding" on this issue is not set aside future public requesters will face Sargent's dilemma; to wit—they will have to repeatedly ask for records that they should have been given in the first place because the records were not exempt, hoping to hit within the nonexempt time frame. WCOG urges this Court to reverse this ruling and place an obligation on agencies to disclose public records that may have been exempt under a temporal exemption once that exemption lapses. The agency, and not the requester, has both the knowledge of, and control as to, when this lapse occurs.

B. The Court of Appeals Erroneously Concluded the Records Sargent First Requested Were Exempt.

The Court of Appeals failed to consider the nature of the documents that were the subject of Sargent's first August 31, 2009 denied

request (CP 16-18), accepting SPD's characterization of the request as seeking the "criminal investigative file."¹ This is not correct. That first request sought only the incident report, 911 tapes and computer-aided dispatch ("CAD") log for SPD Incident #09-264202 on a SPD public information request form that shows that such records are routinely provided to victims, drivers, complainants, witnesses, citizens and suspects (CP 16-18). Sargent's first request did not ask for the "criminal investigative file" or for the investigative records submitted to the KCPO for a filing decision. It sought records that any member of the public can access. Indeed, SPD's website states that the public can request incident reports and 9-1-1 tapes, and provides a means to do so, with no caveat that they are exempt if a criminal investigation is connected with such records.² Incident reports simply are not records essential to law enforcement as even *Newman* reveals. In *Newman*, the law enforcement agency initially disclosed the incident report which was not included in the records battle at issue there. 133 Wn.2d at 568-69. In *Cowles* this Court found that the "incident report," which "contained only a basic factual description of events" was disclosable as not "essential to effective law enforcement." 139 Wn.2d at 480.

¹ See, e.g., SPD Supplemental Brief, p.3.

² <http://www.seattle.gov/police/contact/publicrequestunit.htm> (last visited Dec. 17, 2012)

The fact that Sargent was summarily denied a normally disclosable “incident report” highlights the harm that can be caused by rote application of the *Newman* categorical exemption. SPD was able to prevent disclosure of routine police records (incident report, 911 tape) that clearly are not essential to effective law enforcement simply by placing them in an “open” investigation file. Sargent, 167 Wn. App. at 14. The Court of Appeals applied *Newman* much too literally, without consideration of the lessons from *Cowles*, when it concluded that SPD had no duty to disclose any record in an “open” investigation file. *Cowles* clarified that the close majority in *Newman* was primarily concerned about judicial interference with law enforcement’s effort in an unsolved murder case. See *Cowles, Id.* at 479-80. *Cowles* then said that “categorical nondisclosure of all records in the police investigative file” does not apply where the facts show that a suspect has been identified and there is minimal “potential danger to effective law enforcement.” 139 Wn.2d at 480. *Cowles* found that such a circumstance exists when police refer a case to a prosecutor for a charging decision, but did not say that this is the only circumstance. In this case Sargent was clearly identified as the suspect and his case was referred to the KCPO. Yet, the Court of Appeals erroneously concluded the fact that the KCPO sent the file back for further

investigation restored the full *Newman* categorical exemption for all records in that file because it was “open” with no analysis of whether disclosure of the incident report, 911 tapes regarding Sargent – the identified suspect – would endanger effective law enforcement. Sargent, 167 Wn. App. at 14. In this appeal, SPD goes even further to argue that police records should not be disclosed until the case is closed.³ This extreme position goes far beyond the language of RCW 42.56.240(1) and would deny access to essential police records for an indeterminate period of time.

Justice Alexander’s dissent in *Newman* cogently explains why disclosure of police records under the PRA should “turn on whether nondisclosure is either essential to effective law enforcement⁴ or to protect privacy rights, not on whether the records are contained in an open file.” 133 Wn.2d at 577. To do otherwise violates the PRA’s command to construe exemptions narrowly. RCW 42.56.030. Further, law enforcement agencies should not be given unbridled discretion to withhold entire files of police records for “open investigations,” according to Justice Alexander, because the “effective law enforcement” exemption in RCW 42.56.240(1) only exempts “records” and not “files” and portions of

³ SPD Supplemental Brief, p.2.

⁴ The statutory exemption, RCW 42.56.240(1) contains the “essential to effective law enforcement” language, but says nothing about open investigation files.

records which do not come under a specific exemption must be disclosed. 133 Wn.2d at 578-79. Justice Alexander also pointed out the distinction between federal law, which the *Newman* majority relied upon, and state PRA law regarding law enforcement exemptions. Under the former, the exemption depends upon “the status of the file” and the latter depends upon the “nature of the records within the file.” *Id.* at 581. Thus, federal law should not control state PRA determinations regarding police public record exemptions.

Finally Justice Alexander best captured *Newman*'s conflict with the PRA:

Under its holding [Newman majority], a law enforcement agency need only allege that a file is open in order to shield its entire contents from *in camera* review by the courts and prevent its disclosure to the public. The agency need not, the majority concludes, make any individualized showing that the records within the file are essential to effective law enforcement in order to justify its nondisclosure. Unfortunately, excusing law enforcement agencies from having to make such a showing upon a mere declaration that a file is open provides an incentive to such agencies to keep investigative files open merely to frustrate a citizen's request for disclosure or to avoid the administrative burden that may accompany disclosure.

...

The majority fails to realize that leaving the interpretation and enforcement of the PDA's requirements to the very agencies it was designed to regulate is the 'most direct course to [the PDA's] devitalization.' *Hearst Corp. v. Hoppe*, 90 Wash.2d at 131.

Id. at 577, 580.

Cowles holds that nondisclosure be necessary only “under specific circumstances” (i.e., unsolved crimes with no identified suspects). 139 Wn.2d at 478. More important, *Cowles* holds that courts – not law enforcement agencies – should make the nondisclosure determination after an *in camera* review of the police records, and receipt of input from the police, when there is no issue as to the identity of the alleged criminal. *Id.* at 479-80.

In this case the categorical *Newman* exemption does not, and should not, apply because Sargent was an identified suspect, his case was referred to a prosecutor and the basic police records, such as the incident report were not “essential to effective law enforcement.” This Court should take this opportunity to revisit *Newman* and the conflict it poses with the bedrock principles of openness and government accountability that are at the heart of the PRA. *Newman* creates an unwarranted overly broad exemption for “open” files of police, who then control the file’s status.

The Court of Appeals misapplied *Newman* to allow the SPD, an agency with a recent history of a lack of public accountability⁵ to withhold basic police records (incident report, 911 report) for six months from Sargent, a man SPD wanted to criminally charge for an alleged assault on one of its officers, a man who then complained to SPD's Office of Professional Accountability ("OPA") and filed a civil rights case against SPD.

Investigating Detective Janes' notes reveal that he knew SPD could not make felony charges stick because he withdrew the case from the KCPO on September 14, 2009, but decided to press for misdemeanor charges with the Seattle City Attorney, after internal SPD consultation on September 29, 2009 (CP 813). Detective Janes knew that no police records would be released until he decided to send the case to the prosecutor (CP 813). His declaration states that he referred the case to the Seattle City Attorney on November 17, 2009 (CP 142). Detective Janes' notes also state that SPD would release his file once the charging referral occurred (CP 813). Thus, at the very least, SPD should have disclosed these records to Sargent when Detective Janes referred Sargent's case on

⁵ The SPD has been subject to significant criticism in recent years as evidenced by the U.S. Department of Justice investigation in 2011. 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/sp1/documents/spd_findletter_12-16-11.pdf at p.2.

November 17, 2009 but SPD did not do so, delaying release for no reason until March 10, 2010, after Sargent “re-requested” his first request.⁶ Sargent should not have had to submit such a re-request, if the SPD would have released the records, as they should have, on November 17, 2009.

This case demonstrates that the “bright line” test for police record disclosability need not depend upon referral to a prosecutor. Rather, the proper test should be whether the records are essential to effective law enforcement. The only way to interpret RCW 42.56.240(1), consistent with the PRA’s mandate regarding narrow construction, is to require the police agency to justify why nondisclosure is essential to effective law enforcement. If the records relate to unsolved crimes, as in *Newman* this burden should not be difficult. If the records are basic factual records, like incident reports, and the suspect is known the agency should be required to justify withholding police records. *In camera* review by a court may be necessary. Nothing in the factual record in this case justifies withholding Sargent’s incident report or 911 tapes as essential to effective law enforcement. Their placement in an “open” file is not, by itself, sufficient justification. The Court of Appeals erred and this Court should find that

⁶ As previously discussed, the records initially requested by Sargent on September 1, 2009 should have been immediately disclosed. That SPD did not disclose them in November, as required by a strict *Cowles* application, shows deliberate disregard of SPD’s PRA obligations.

SPD violated the PRA when it denied Sargent's September 1, 2009 request.

Further, this Court should find that SPD violated the PRA by denying Sargent's February 5, 2010 request, which sought all of Sargent's investigation records and records of the disciplinary investigation of Officer Waters. There is no question that records of internal police investigations are disclosable public records to be provided, consistent with *Bainbridge Island*, 172 Wn.2d at 416. In that case, this Court held that internal investigations into alleged police misconduct must be disclosed, but the officer's name must be redacted, if the allegations are unsubstantiated, to protect his privacy interests. *Id.* at 415. In *Bainbridge Island* the officer argued that internal investigation records were exempt under RCW 42.56.240(1) on privacy grounds, not because they are essential to effective law enforcement. *Id.* at 433.

With respect to the internal investigation records in this case, this Court should also follow *Cowles*. SPD should have to justify why nondisclosure of such records is essential to effective law enforcement to a court, based upon an *in camera* review.

In sum, the Court of Appeals erred in its interpretation and analysis of RCW 42.56.240(1) and misapplied *Cowles* and *Newman*, issuing a troubling decision that gives police carte blanche authority to withhold

indefinitely disclosable public records merely by asserting they are in an “open” file.

C. The Court of Appeals’ Failure to Find the Documents Requested on September 1, 2009 to be Nonexempt at that Time Led to its Erroneous Holding that Sargent’s Requests were “Standing Requests” that Needed No Response.

As discussed above, the incident report, 911 tapes and CAD reports were not exempt at the time Sargent requested them on September 1, 2009. The Court of Appeals’ error on this point caused it to insert a new issue about “standing requests” which it then elevated to primary status, calling it the “chief issue,” “overriding question” or “controlling issue.” *Sargent*, 167 Wn. App. at 11. This issue was never present in Sargent’s case⁷ and it should not have been resolved, let alone as the Court of Appeals held “that there is no standing request under the PRA.” *Id.* at 6.

WCOG urges this court to correct this unnecessary, erroneous holding, which should never have been reached, and reserve this issue for a future case because neither the facts of this case, nor the law, warrant a blanket holding that there are no standing PRA requests. WCOG is concerned that such a holding, if left intact, would allow agencies to not

⁷ WCOG raised the issue of “standing requests” in its Statement in Support of Direct Review because it is inextricably linked to the error the court caused by failing to properly apply *Newman* and *Cowles*. The SPD moved to strike this discussion, which was denied by this court.

disclose public records by asserting a temporal exemption, with no obligation to provide records once the temporal condition lapses. Only the agency knows, and can control, the timing of such exemptions. WCOG contends that requested records that are subject to temporary exemptions such as RCW 42.56.240(1), RCW 42.56.210 (“deliberative process exemption”) or RCW 42.56.260 (“real estate appraisals”) must be provided once the exemption lapses. Otherwise, requesters will be forced to resubmit identical PRA requests repeatedly, hoping to fall between the time when a temporary exemption lapses and when the desired records are to be destroyed under the record retention schedules under RCW 40.14.050, *et seq.*, which of course depends upon the agency.⁸

The Court of Appeals based its “standing” request holding on speculation that Sargent’s requests would “impose on agencies an endless monitoring of old requests, or to require updated responses indefinitely to people who may have long since lost interest.” *Sargent*, 167 Wn. App. at 11. These factors did not exist in Sargent’s case. The record shows that SPD was monitoring, without difficulty, Sargent’s request and knew that it should disclose his requested records once the case was referred to the Seattle City Attorney (CP 813). Further, the record shows ongoing

⁸ Sometimes requests involve discrete identifiable records that an agency has not yet finalized for release (i.e., anticipated rulings, SEPA decisions). WCOG contends that a requester should be able to receive such records that might be requested in advance so long as the agency can identify the requested record.

communications between SPD and Sargent's counsel that demonstrated Sargent's continuing interest in the records. (CP 809-813). SPD was tracking Sargent's case because it notified Sargent when prosecution was declined and that the internal investigation was concluded. All of these facts prove that SPD knew that Sargent requested police records about him and the OPA investigation initiated by Sargent. SPD easily could have sent the responsive records but chose not to do so. These circumstances do not prove burdensomeness to an agency. Rather, it shows an agency's recalcitrance in violation of its obligation to provide "fullest assistance" to requesters. RCW 42.56.100.

The Court of Appeals also misread the Washington State Bar Association's PUBLIC RECORDS ACT DESKBOOK §5.3 to support its illogical conclusion that "newly created documents are indistinguishable from newly nonexempt documents." *Sargent*, 167 Wn. App. at 11. In fact, that Deskbook, §5.3(3)(d), points out that an agency is obligated to produce additional, responsive records that exist as of the date of the request, but were not located until after a portion of the responsive records were made available to the requesters. An agency must follow up to produce responsive records that existed as of the date of the PRA request but were not disclosed.

The Deskbook notes that this obligation does not exist if records were created after the date of public records request. Thus, there is a significant distinction between an agency's obligations to disclose newly created records as opposed to newly nonexempt documents because the latter existed at the time of the request.

With no evidence in this case to support the Court of Appeals' hypothesis that requiring agencies to turn over newly-exempt documents would pose an unreasonable burden there is no justification for the "standing request" holding and it must be set aside. This would further the PRA's purpose and emphasize an agency's responsibility under the PRA to provide the "fullest assistance" to requesters. RCW 42.56.100. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 132, 580 P.2d 246 (1978) (costs and disruption to the agency are "of insignificant impact compared with the stated purpose of the act.")

D. The PRA Requires Transparency and Presumes Disclosure.

"The people insist on remaining informed so that they may maintain control over the instruments that they have created." RCW 42.56.030. Those words from the PRA embody the fundamental principles at issue on this appeal. Because transparency is essential to good government, "[t]he people, in delegating authority, do not give their

public servants the right to decide what is good for the people to know and what is not good for them to know.” Id.

Unless an exemption applies, the agency must produce records, even if disclosure “may cause inconvenience or embarrassment.” RCW 42.56.550(3). If the statute exempts portions of a document, the agency may redact those exempt portions but must release the remainder of the record. RCW 42.56.210(3); *see also Bainbridge Island Police Guild*, 172 Wn.2d at 413-16. *Newman* produces a result that contradicts all of these well-developed principles. It gives police the ability to withhold records critical to public accountability simply by placement in an “open” file, with no judicial oversight. 133 Wn.2d at 576. The time has come to fix this serious threat to the PRA.

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IV. CONCLUSION

The Court of Appeals decision should be reversed for failing to find that the SPD violated the PRA by denying Sargent's August 31, 2009 request and by its unnecessary, erroneous "standing request" ruling.

DATED this 17th day of December, 2012.

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DECLARATION OF SERVICE

Darlyne De Mars 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 this action.

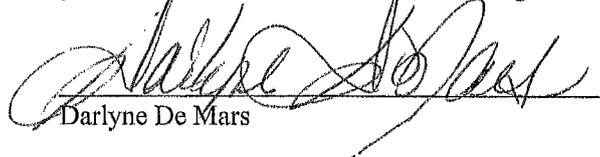
On December 17, 2012, I caused to be served a true and correct copy of Washington Coalition for Open Government Amicus Curiae Brief, and addressed to each of the following:

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I declare under penalty of perjury under the laws of the United States of America and the State of Washington, that the foregoing is true and correct to the best of my knowledge.

EXECUTED this 17th day of December, 2012, in Seattle, Washington.


Darlyne De Mars

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Rec'd 12-17-12

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Subject: 87417-4 - Evan Sargent v. Seattle Police Department

Attached please find the following documents which are being submitted on behalf of Washington Coalition for Open Government (WCOG):

- (1) Motion of Amicus Curiae WCOG to File Amicus Curiae Brief; and
- (2) [Proposed] Amicus Brief filed by WCOG.

Please feel free to contact our office with any questions you may have. Thank you.

Darlyne T. De Mars

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