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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 65896-4-I)

EVAN SARGENT,

Petitioner,

v.

SEATTLE POLICE DEPARTMENT,

RESPONDENT.

FILED
SUPREME COURT
STATE OF WASHINGTON
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STATEMENT OF *AMICUS CURIAE* WASHINGTON COALITION
FOR OPEN GOVERNMENT IN SUPPORT OF DIRECT REVIEW

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TABLE OF AUTHORITIES

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I. INTRODUCTION

Amicus curiae Washington Coalition for Open Government¹ (“WCOG”) joins the petition of Evan Sargent (“Sargent” or “Petitioner”) in urging this Court to accept discretionary review of the decision of the Court of Appeals, Division I, in *Sargent v. Seattle Police Department*, 167 Wn. App. 1, 260 P.3d 1006 (2011) under RAP 13.4(b)(1) and (b)(4).

This case arises from the assertion of the Seattle Police Department (“SPD”) of the effective law enforcement exemption in RCW 42.56.240(1) to records requested by Petitioner Sargent. He requested records about his arrest after they had been referred to a prosecutor for a charging decision, and after he had complained to SPD about officer misconduct. The Court of Appeals sustained SPD’s withholding of the records requested by Sargent by misapplying the categorical exemption for police investigation records in *Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712 (1997), as modified by *Cowles Publishing Company v. Spokane Police Department*, 139 Wn.2d 472, 987 P.2d 620 (2000).

Discretionary review is appropriate under RAP 13.4(b)(1) because the Court of Appeals’ ruling conflicts with this Court’s mandate that exemptions to the PRA be construed narrowly, and it misapplied *Newman*

¹ The Appendix to this Statement identifies *Amicus*. A motion for leave to file this Statement has been filed concurrently.

and *Cowles* to hold that police records continue to be exempt after referral to a prosecutor, where prosecution is declined. Because the Court of Appeals erroneously applied the *Newman* exemption in this case it decided an issue it need not have decided, holding that there are no “standing PRA requests” because Sargent had not re-requested police records that SPD claimed were exempt under RCW 42.56.240(1) once that exemption expired. This placed an unwarranted burden on a public requester to renew requests that were denied erroneously in a case where responding would not have unduly burdened the responding agency.

Amicus agrees with the Petitioner that this Court’s direct review is warranted under RAP 13.4(b)(1). Review is also warranted under RAP 13.4(b)(4). The Court of Appeals decision implicates a fundamental and urgent issue of broad public import: the availability of police records to the public, particularly when police misconduct is at issue and the authority of police agencies to withhold or delay their release under the Public Records Act. Prompt access to police records is required to hold those agencies accountable to the public in a timely manner.

II. THE COURT OF APPEAL'S DECISION RAISES URGENT ISSUES OF PUBLIC IMPORT BECAUSE IT EXEMPTS POLICE RECORDS FROM DISCLOSURE, THREATENING THE PUBLIC'S ABILITY TO HOLD ITS POLICE AGENCIES ACCOUNTABLE

This Court should accept review under RAP 13.4(b)(1) and (b)(4) because this case raises timely issues of police responsiveness, particularly the Seattle Police Department ("SPD") to public records requests. The principles behind the PRA are sufficiently important to merit direct review of erroneous decisions. *See, e.g., O'Connor v. Wash. Dep't of Social and Health Serv.*, 143 Wn.2d 895, 898, 25 P.3d 426 (2001). Moreover, police accountability is undeniably an issue of fundamental public import. This Court has accepted direct review in several PRA cases involving police misconduct. *See, e.g., O'Connor v. Wash. Dep't of Social and Health Serv.*, 143 Wn.2d 895, 898, 25 P.3d (2011).

Disclosure of police public records furthers the public interest in police accountability, and in assuring proper functioning of law enforcement agencies. Finally, the Court of Appeals' decision creates profound negative implications for PRA requesters' ability to obtain records exempt under only a temporal PRA exemption in a case which really did not raise the issue of "standing" PRA requests.

**III. THE COURT OF APPEALS' RULING CONFLICTS WITH
THIS COURT'S DECISIONS REGARDING CONSTRUCTION OF
THE PUBLIC RECORDS ACT**

**A. The Court of Appeals Failed To Narrowly Construe RCW
42.56.240(1) Exemption To Disclosure When It Misapplied
Newman and *Cowles***

The Legislature requires that the PRA “be liberally construed and its exemptions narrowly construed.” RCW 42.56.030. In *Progressive Animal Welfare Soc’y v. University of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994), for example, this Court rejected numerous exemptions claimed by the University of Washington to bar disclosure of an unfunded grant proposal. Doing otherwise, it noted, would “contradict[] the Legislature’s command to construe the exemptions narrowly.” *Id.* at 261.

The Court of Appeals disregarded this legislative command in several respects. First, the Court of Appeals misapplied *Newman* and *Cowles* in concluding that police agencies, not courts, are to determine when records are “essential to law enforcement,” when police reports have been submitted to a prosecutor for a charging decision and in allowing such agency to broadly construe the “essential to law enforcement exemption.” Second, the Court of Appeals extended the “essential to law enforcement” exemption to apply to records of police misconduct investigations until conclusion.

In *Newman* this Court explained that its categorical exemption under the “essential to law enforcement” exemption is to apply **only** in circumstances where the crime is unsolved and disclosure would have impeded apprehension of a suspect. 133 Wn.2d at 574. *Cowles* held that disclosure of police reports should occur when the suspect has been arrested and a “matter referred to the prosecutor for a charging decision.” 139 Wn.2d at 477. The reasoning in *Cowles* is obvious. If the suspect is identified, i.e. by arrest like Sargent, there is little risk that the crime will not be solved. Further, the fact of a “rush filing” is irrelevant because the police must have concluded they had solved the crime or they would not have referred the case to a prosecutor. In sum, release of the police report of an arrested suspect subject to criminal charges will not harm law enforcement efforts, this Court has concluded. This holds true even if the prosecutor declines to charge the suspect.

Cowles explains that the categorical exemption of *Newman* no longer applies to requests for police reports when they have been referred to a prosecutor. This indicates the bright-line cutoff and there is no basis to withhold reports until a charging decision has been made. Thus, under *Cowles*, Sargent was entitled to the police reports submitted to the King County Prosecuting Attorney’s Office two days after his arrest. CP 141-

42.

The Court of Appeals erroneously ruled that the declination decision somehow re-instated the categorical exemption under *Newman*. It reasoned that because the investigation was incomplete judges could not determine that “disclosure would not have interfered with the remaining investigation.” *Sargent v. Seattle Police Department*, 16 Wn. App. 1, 14, 260 P.3d 1006 (2012). Internal investigations can drag on and nondisclosure could harm a requester, such as Sargent, by denying information critical to his civil rights case.

The consequences of upholding the Court of Appeals’ ruling are serious because the public would be denied access to police reports sent to a prosecutor who declines charging. The prosecutor declines to prosecute in many cases involving “rush filings.” *Sargent* will allow police agencies to determine when, and for how long, to delay release of police reports, which do not result in a charge because police will claim they will need more time to come up with “more” evidence to convince a prosecutor to charge the arrested suspect. Clearly, the arrestee is entitled to see what went to a prosecutor to the point of the declination decision, even if subsequent investigation occurs. Otherwise, arrestees who claim civil rights violations, like *Sargent* will be deprived of information critical to their claims.

The Court of Appeals' decision is contrary to the essence of the PRA, which mandates the broadest disclosure of information to promote transparency and accountability of government. *Progressive Animal Welfare Soc'y*, 125 Wn.2d at 251.

Further, there was no basis for the Court of Appeals to find that a court could not conclude whether the requested records (the police reports submitted to the prosecutor) should have been disclosed under these circumstances. The burden is on the SPD to justify continued exemption of the submitted records as necessary to effective law enforcement irrespective of future investigation, under RCW 42.56.550(1) and (2). Under the circumstances of this case the SPD should have been required to justify to a court why continued withholding was necessary when the suspect was identified and arrested. Judicial oversight in these circumstances is necessary to prevent police abuse, and is consistent with the underlying principle of *Cowles*, which is that police must identify a specific need for nondisclosure of the **referred documents**.

The Court of Appeals also erred by broadening the "essential to law enforcement" categorical exemption of *Newman* to records of police misconduct investigations. The Court incorrectly found that until the investigation is concluded investigative records need not be disclosed. This goes far beyond *Newman* and, at the very least, the records should

have been disclosed once the matter was referred to investigation, just as police reports should be disclosed when referred to a prosecutor under *Cowles*.

B. The Court of Appeals Erroneously Held the PRA Prohibits Standing Requests Under the PRA

In this case, the Court of Appeals did not need to issue a holding “that there is no standing request under the PRA” factually and legally. Had this Court found, as it should have, that Sargent was entitled to the records he first requested which had first been referred to a prosecutor the issue of standing requests would not have come up because the issue would be whether SPD properly denied the request and not whether Sargent had to keep “renewing it.”

Second, under the facts of this case the agency would not have been burdened to disclose the police misconduct investigation records when it had ongoing contact with Sargent and his lawyer. The SPD knew of Sargent’s request because Sargent had initiated the complaint. The SPD wrote Sargent as the conclusion of the investigation and could have sent the records.

This case does not present a case where a requester unreasonably claims an agency should track and provide newly created, supplemental records in response to a closed request. This case presents *improperly*

closed requests and did not properly raise the standing request issue, which was not essential to the Court of Appeals' holding.

To properly address this issue the appellate court will have to consider and weigh the impacts of denying "standing requests" under temporal exemptions like RCW 42.56.240(1) or the deliberative process exemption. How is a requester to know when an exemption expires? The records are under control of the public agency, which should be required to track or have the burden of disclosing formerly exempt documents. Otherwise, requesters will be forced to repeatedly send in requests, which would be at least as time consuming to handle than to track exemption expirations. In any event, there was no need for the Court of Appeals to issue its "standing request" holding and this court should correct that decision.

IV. CONCLUSION

The Court of Appeals' ruling erroneously interprets the PRA, raises issues of fundamental public importance requiring immediate review, and hampers the delivery of essential information to the public. For the foregoing reasons, *amicus* urges the court to grant direct review.

Respectfully submitted this 16th day of July, 2012.

GRAHAM & DUNN PC

By 
Judith A. Endejan, WSBA# 11016
Attorneys for Washington Coalition
for
Open Government

Appendix

Washington Coalition for Open Government, an independent, nonprofit, nonpartisan organization dedicated to promoting and defending the public's right to know in matters of public interest and in the conduct of the public's business. WCOG's mission is to help foster open government processes, supervised by an informed and engaged citizenry, which is the cornerstone of democracy. WCOG represents a cross-section of the Washington public, press, and government.

DECLARATION OF SERVICE

Donna Cauthorn declares and states as follows:

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

On the 16th day of July, 2012, I caused to be served, via hand-delivery by Washington Legal Messengers service, a true and correct copy of the document to which this declaration is attached, **Statement of Amicus Curiae Washington Coalition For Open Government In Support of Direct Review**, addressed and delivered as follows:

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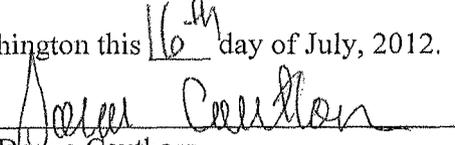
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Seattle, Washington this 16th day of July, 2012.



Donna Cauthorn
Legal Secretary to Judith A. Endejan

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Clerk,

Attached are the Motion of Amicus Curiae WA Coalition for Open Government and Statement of Amicus Curiae Washington Coalition For Open Government In Support of Direct Review, submitted by Judith A. Endejan, WSBA 11016, Attorney for Washington Coalition For Open Government.

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