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Court of Appeals No. 65896-4-I

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SUPREME COURT OF THE STATE OF WASHINGTON

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EVAN SARGENT,

*Petitioner,*

vs.

SEATTLE POLICE DEPARTMENT,

*Respondent.*

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**RESPONDENT'S ANSWER TO MOTION OF *AMICUS CURIAE*  
WASHINGTON COALITION FOR OPEN GOVERNMENT IN  
SUPPORT OF DISCRETIONARY REVIEW**

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## I. IDENTITY OF RESPONDENT & RELIEF REQUESTED

The City of Seattle Police Department (“SPD”) was the Appellant and Cross-Respondent in the Court of Appeals. SPD files this answer to the Statement of *Amicus Curiae* Washington Coalition for Open Government (“WCOG”) in Support of Sargent’s Petition for Review of the Court of Appeals published decision in *Sargent v. Seattle Police Department*, 260 P.3d 1006, 167 Wn. App. 1 (2011) and SPD requests that the Court deny review.

## II. INTRODUCTION

This Court should decline review under RAP 13.4(b), because the Court of Appeals decision follows Supreme Court precedent, involves the application of existing law to the facts in this case, does not raise constitutional issues, and does not raise issues of substantial public interest. RAP 13.4(b).

In arguing for Supreme Court review, WCOG requests this Court to overturn the clear precedent that controls Public Records Act (“PRA”) requests for open and active police investigations. The Court of Appeals properly applied Supreme Court precedent, both legally and factually. There is no substantial public interest in revisiting that precedent.

Moreover, WCOG improperly raises a new issue that Sargent abandoned in his Petition for Review. Even if it were properly before this

Court, there is no authority, and no reasonable rationale, for WCOG's assertion that the PRA requires an agency to maintain a records request as "active" in perpetuity. There is no issue that warrants review in this case.

### III. ARGUMENT

#### A. **WCOG improperly seeks to raise a new issue that is not before the Court.**

It is well-established that appellate courts will not consider points raised only by amicus. *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962). In its Statement in Support of [Discretionary]<sup>1</sup> Review, WCOG proactively raises and includes argument on the issue of whether the PRA requires that a public agency maintain a request as "open" and "active" in perpetuity. See WCOG's Statement in Support of Direct Review ("WCOG brief"), Section B, page 8. In his Petition for Review, Sargent did not assign error to the portion of the Court of Appeals decision holding that there is no such requirement, and Sargent abandoned any argument on this issue. See Sargent's *Petition for Review*, pages 1-3.

An appellate case must be made by the named parties, and "the issues involved cannot be changed or added to by friends of the court." *Building Industry Ass'n of Washington v. McCarthy*, 152 Wn. App. 720, fn. 12, 218 P.3d 196 (2009) citing *Long v. Odell*, 60 Wn.2d at 154. SPD

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<sup>1</sup> Although WCOG's motion references a Petition for Direct Review, the issue for the Court's consideration in this case is a Petition for Discretionary Review.

respectfully requests that this Court strike Section B of WCOG's brief, and not consider argument on an issue that is not properly before it.

**B. Even if it were properly before the Court, the PRA does not require that a records request be held open and active in perpetuity.**

Upon receipt of a records request for identifiable documents, the PRA requires that those records be provided for inspection or copying. RCW 42.56.080. There is nothing in the PRA that requires an agency to maintain a request as "standing." *Sargent*, 260 P.3d at 1011.

The PRA does not include any obligation to produce records that do not exist at the time a request is received. *Smith v. Okanogan County*, 100 Wn. App. 7, 14, 994 P.2d 857 (2000). "[N]ewly created documents are indistinguishable from newly nonexempt documents." *Sargent*, 260 P.3d at 1011.

This is not new law. In *Spokane Research v. City of Spokane*, this Court held that determining whether records were properly withheld under the PRA depends only on whether they were properly withheld at the time the public disclosure request is received. *Spokane Research v. City of Spokane*, 155 Wn.2d 89, 103-104, 117 P.3d 1117 (2005). If an agency properly withholds records in response to a request, subsequent events do not affect a justified claim of an exemption.

As the Court of Appeals recognized, the principle that an agency is not required to supplement responses is a “sensible, bright-line rule.” *Sargent*, 260 P.3d at 1011. That principle is well-established in Washington. The Attorney General model rules state that “[a]n agency is not obligated to supplement responses [to records requests].” WAC 44-14-04004(4)(a). The Washington State Public Records Act Deskbook states that “[t]he Public Records Act does not provide for ‘continuing’ or ‘standing’ requests.” Public Records Act Deskbook § 5.3, at 5–31.

WCOG’s argument also fails from a practical perspective. Any time an agency claimed an exemption, it would be required to periodically review the records withheld to determine whether there was a change in their exempt status. If there was a change in status, an agency would be required to track down the requester and produce the documents, no matter how much time had elapsed since the request, and even if the requester was no longer interested in the records or no longer even existed.

Under the PRA, if a requester would like to inquire about the current status of records, he may simply resend an email with a records request. That is a well-established principle that does not warrant review.

**C. Division I applied the PRA to the facts in this case in a manner wholly consistent with existing precedent.**

WCOG seeks to replace clear legal precedent with its own view of how police investigations should work. The *Newman* Court recognized the PRA's general requirement to construe exemptions narrowly, but held that in the context of active law enforcement investigations, "[t]he ongoing nature of the investigation naturally provides no basis to decide what is important" to withhold. *Newman v. King County*, 133 Wn.2d 565, 574, 947 P.2d 712 (1997). In regard to active investigative files, the only relevant inquiries are (1) whether resources are allocated to the investigation; and (2) whether enforcement proceedings are contemplated. *Id.* citing *Dickerson v. Department of Justice*, 992 F.2d 1426, 1431-32 (6th Cir. 1993).

WCOG asserts that the adopted test should only apply where the suspect is unknown. That is not an element of the test adopted by the *Newman* court. The *Cowles* case did seek to help define when a case is no longer active, but that is a different question from whether a suspect is unknown. *Cowles Pub. Co. v. Spokane Police Department*, 139 Wn.2d 472, 987 P.2d 620 (1999). The police in that case "tacitly admitted" that their investigation was no longer active, and therefore failed to establish

how non-disclosure was necessary, or how the case fell “within the scope of *Newman*.” *Id.* at 478.

The *Cowles* Court concluded that non-disclosure under RCW 42.56.240(1) was not necessary to protect the trial process, under a set of facts where the suspect had been arrested and the matter referred to a prosecutor. *Id.* at 478-479. The case did not purport to add any new elements to the *Newman* test. The *Newman* test for non-disclosure of active law enforcement investigative files remains the same.

WCOG ignores the complexity of active law enforcement investigations by simply asserting that there is little risk that a crime will not be solved if a potential suspect has been identified. *See* WCOG brief, page 5. WCOG further dismisses the statutory requirement of a “rush filing” when a suspect is in custody, arguing instead that such filings indicate the police must have concluded they had solved the crime. *Id.* Moreover, WCOG ignores the facts here, where the case was returned to police and under active investigation. Under those facts, there could be additional suspects, additional evidence, or additional witnesses identified as part of the ongoing investigation. CP 142.

As the *Newman* Court understood, if the categorical exemption did not exist in that circumstance, then the potential suspect would have access to a roadmap of the ongoing investigation. The resulting potential

for interference with that investigation, such as destruction of evidence and witness tampering, is a dangerous reality.

WCOG also claims that a potential suspect should have access under the PRA to records that happen to be shared with a prosecutor at some point in time. But that is not the case if no charges are filed. And for forty years, the criminal discovery rules have provided full protection of a defendant's rights. Absent charges, a potential suspect has no greater right to the prosecutor's work product, or active law enforcement investigatory files, than anyone else.

Finally, WCOG alleges that police will falsely claim that an investigation is ongoing and wrongfully withhold records. But that assertion ignores the existence of the *Newman* test, which requires a police agency to show, as it did in this case, that resources are allocated to an investigation and enforcement proceedings are contemplated. That test has functioned successfully in the federal system, and it has functioned successfully in Washington.

The well-established *Newman* exemption serves to protect the effectiveness of law enforcement investigations and therefore the safety and security of the public. The facts in this case fall squarely within the scope of that exemption. There is no conflict with existing precedent. Moreover, there is no substantial public interest in revisiting a well-

established principle with respect to open and active police investigations, or abrogating that exemption to the detriment of the public's safety.

When interpreting the PRA, the 1972 initiative instructed that courts should be "mindful ... of the desirability of the efficient administration of government[.]" I-276 §1(11), codified at RCW 42.17.010(11). Having a court determine what is, and what is not, sensitive information in an active investigation, with the price being public safety, is not a cost the PRA was intended to impose.

**D. It is well-established that RCW 42.56.240(1) applies to an internal disciplinary investigation of police officers.**

As discussed, it is clear that RCW 42.56.240(1) applies categorically to active law enforcement investigative files because non-disclosure is essential to effective law enforcement. *Newman*, 133 Wn.2d at 574. It is also clear that an internal disciplinary investigation of a police officer is a law enforcement investigative record. *Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, 728-729, 748 P.2d 597 (1988).<sup>2</sup>

WCOG's brief fails to address a single case from the clear line of existing authority holding that internal police disciplinary investigative records are law enforcement investigative records. As previously discussed in SPD's Answer to the Petition for Review, that principle was

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<sup>2</sup> This case should not be confused with the previously discussed *Cowles Pub. Co. v. Spokane Police Department*, 139 Wn.2d 472, 479, 987 P.2d 620 (1999).

first acknowledged in *Cowles Pub. Co. v. State Patrol*, and later reiterated by this Court in *Newman*, *Prison Legal News* and most recently *Bainbridge Island*. The Court of Appeals decision is consistent with this authority.

Moreover, the concern for confidentiality during an active internal police disciplinary investigation that may lead to criminal charges is the same as any other police investigation. In addition, there is a substantial public interest in an effective internal investigative process for ferreting out police misconduct. See *Cowles Pub. Co.*, 109 Wn.2d at 729.

WCOG implies that, because an alleged victim of police misconduct seeking civil redress may have an individual interest in the records of an active internal investigation, the *Newman* exemption should not apply. But that ignores the fact that the full spectrum of discovery is available to a civil litigant. That also ignores the overall public's interest in an effective internal investigative process. In any event, the records of the internal investigation would be available to any interested person after the investigation was concluded. There is no substantial public interest in interference with an active case, particularly when the records will be available for inspection after the investigation is complete.

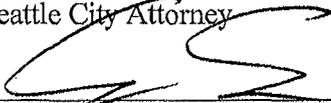
IV. CONCLUSION

Because Sargent's Petition for Review does not establish any of the elements of RAP 13.4(b) (1)-(4), review should not be granted.

DATED this 14<sup>th</sup> day of August, 2012.

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**CERTIFICATE OF SERVICE**

I certify that on the 14 day of August, 2012, I caused a true and correct copy of the foregoing Respondent's Answer to Amicus Curiae Washington Coalition for Open Government to be served on the following in the manner indicated below:

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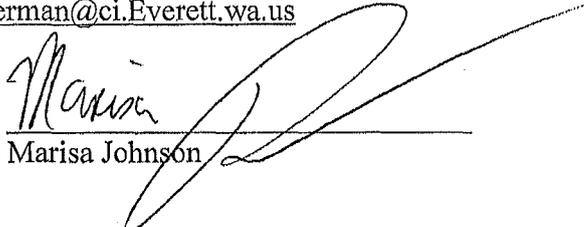
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Attached please find a copy of Respondent's Answer to Motion of Amicus Curiae Washington Coalition for Open Government in Support of Discretionary Review for the attorney and case listed below:

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