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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,

vs.

SEATTLE POLICE DEPARTMENT,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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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 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 requests that the Court deny review.

II. INTRODUCTION

This case primarily involves the well-established interpretation and application of Public Records Act (“PRA”) exemptions that apply to open and active law enforcement investigations. Under RAP 13.4(b), this Court should only accept review if the Court of Appeals decision conflicts with a Supreme Court decision or other decision of the Court of Appeals, is a significant constitutional question of law, or involves an issue of substantial public interest. RAP 13.4(b).

In this case, the Court of Appeals decision properly applies Supreme Court precedent, both legally and factually. The decision does not conflict with any authority. This Court has recognized that the public’s interest in effective law enforcement requires a temporal limitation on the disclosure of records reflecting an open and active law enforcement investigation. Nothing has occurred to lessen the importance of this public interest in police work and the protection of public safety.

In this case, and in reliance on Supreme Court precedent, the Court of Appeals properly concluded that “SPD timely responded” to all of Sargent’s requests and properly asserted exemptions for open and active law enforcement investigative records. *Sargent*, 260 P.3d at 1018. Other than asking the Court to abandon its precedent regarding the scope of the effective law enforcement exemption, Petitioner’s claims are primarily factual. Therefore, there is no issue that warrants review.

III. COUNTERSTATEMENT OF THE CASE

A. **Sargent is taken into custody after taking a check swing with a baseball bat at an off-duty SPD officer.**

This case involves Sargent’s records requests under the PRA, and SPD’s response to those requests. The requested records relate to an altercation between Sargent and an off-duty SPD officer on July 28, 2009. *Sargent*, 260 P.3d at 1009. Many of the facts related to the underlying July 28, 2009 incident as set forth in Sargent’s Petition for Review are disputed and not relevant to this action under the PRA. It should suffice to note that in the complaint initiating this PRA action, Sargent admits that he raised a baseball bat and executed a “partial” or “check” swing directed at an off-duty police officer. CP 4. Sargent was arrested for this conduct. *Sargent*, 260 P.3d at 1009.

Because he remained in custody after being arrested, SPD was required to make a rush filing to the King County Prosecuting Attorney's office ("KCPA") within 48 hours. CP 141-142; *See* CrR 3.2.1. Therefore, the City immediately referred the case to the KCPA on July 30, 2009. *Sargent*, 260 P.3d 1009. Sargent was released pending charges. *Id.* On August 8, 2009 the detective received notification from KCPA that it was declining to file charges at that time, and that it was requesting additional investigative work. *Id.*; CP 142.

B. SPD restarts its investigation after KCPA declines to file charges.

After receiving the KCPA notification, the SPD detective began additional investigative work, including site visits and contact with witnesses. CP 142.

C. Sargent requests the SPD criminal investigative file.

The following is a timeline of the dates relevant to this request:

- September 1, 2009 - while under active investigation by an SPD detective, Sargent submits a request for the criminal investigative file. *Sargent*, 260 P.3d at 1009.
- September 9, 2009 - SPD denies the request, and cites exemption for records of open and active law enforcement investigations. *Id.*

- November 17, 2009 - SPD detective refers the investigative file to the Seattle City Attorney's office for a charging decision. *Id.* at 1010.
- February 5, 2010 – Sargent resubmits his request for the criminal investigative file. *Id.*
- April 5, 2010 - SPD produces the bulk of the criminal investigative file, with selected pages withheld and redactions applied pursuant to specific PRA exemptions. *Id.*

It is undisputed that, after the initial denial of his request for the criminal investigative file, Sargent did not resubmit a request for the records until February 5, 2010. *Id.* Regardless, the trial court held that SPD had to treat this request as a standing request, and therefore once its investigation was complete, SPD was required to supplement its request and produce the records that it had originally properly withheld. The trial court stated that “[o]nce a person has asked that specific items be turned over to them, then it’s the City’s burden to determine when, if ever, it can do that.” RP 29. As Division I stated, “that error affected most of the rulings made below.” *Sargent*, 260 P.3d 1012.

D. Sargent makes an additional request for a separate disciplinary investigative file related to the underlying incident.

The following is a timeline of the dates relevant to this request:

- October 15, 2009 – The SPD Office of Professional Accountability (“OPA”) initiates an investigation of the underlying incident, including the collection of evidence and conducting phone and in person interviews. CP 148-149, CP 278.
- February 5, 2010 - Sargent requests the disciplinary investigative file while under active investigation. *Sargent*, 260 P.3d at 1010.
- March 10, 2010 - SPD denies request, and cites exemption for records of open and active law enforcement investigations. *Id.*
- April 21, 2010 – Sargent sends an information request to the SPD Legal Unit seeking to narrow issues for litigation, requesting “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.” The letter did not include any request for records, only information. CP 135-137.
- April 30, 2010 – The OPA investigation concludes when the Civilian Director issues a final disposition memo. *Sargent*, 260 P.3d at 1010.
- May 26, 2010 – OPA notifies Sargent that the investigation is complete, and Sargent does not resubmit his request. CP 145.

In this litigation, Sargent argued that his February 5, 2010 request for the disciplinary investigative records remained “pending.”¹ CP 184. Throughout this litigation, SPD explained that the PRA did not require an agency to maintain a request as “open,” and that the April 21, 2010 letter was not a records request under the PRA. *City of Seattle’s Response to Plaintiff’s Motion to Show Cause*, page 7 at CP 100-103, *Appellant’s Answer and Reply*, page 26. Sargent did not counter these arguments. The Court of Appeals agreed with SPD. *Sargent*, 260 P.3d 1016.

E. Sargent’s arguments shift as the case progresses.

On a Motion for Reconsideration of the Court of Appeals decision, Sargent set forth a new and strained argument that his April 21, 2010 letter was, in fact, intended to be a records request for the disciplinary investigative file, and further that the investigation was complete at some point before April 30, 2010. The Court of Appeals rejected this new argument when it denied Sargent’s Motion for Reconsideration.

Sargent has not challenged the Court of Appeals ruling that a records request does not remain “pending.” Sargent now claims that the question of a standing request was not even an issue in the litigation. Instead, Sargent’s Petition to this Court raises new arguments.

¹ In its final order to produce records in this case, the trial court affirmatively struck language from a proposed order regarding any obligation to produce the separate disciplinary investigative records. CP 442.

IV. ARGUMENT

- A. The Court of Appeals properly concluded that SPD appropriately denied Sargent's request for an open and active criminal investigative file, in a manner consistent both legally and factually with the Supreme Court precedent established by the *Newman* and *Cowles* cases.

RCW 42.56.240(1) exempts investigative records compiled by law enforcement agencies when nondisclosure "is essential to effective law enforcement." This Court interpreted the effective law enforcement exemption as it applies to ongoing law enforcement investigations in *Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712 (1997). This Court held that this exemption applies categorically to open and active law enforcement investigative files. *Id.* at 574.

In reaching that conclusion, the Court engaged in a two step analysis. First, the records must be "compiled" by law enforcement as part of a law enforcement investigation. *Newman*, 133 Wn.2d at 572. The second step of the analysis is whether nondisclosure is essential to effective law enforcement. To make that second determination with respect to open and active investigative files, the *Newman* court adopted the test set forth by the United States Supreme Court to make a "generic determination" whether an investigative file is exempt from disclosure. *Id.* at 573, citing *National Labor Relations Board v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 223-24, 98 S.Ct. 2311, 2317-18. 57 L.Ed.2d

159 (1978). Under that test, the only relevant inquiries are (1) whether resources are allocated to the investigation and (2) whether enforcement proceedings are contemplated. *Newman*, 133 Wn.2d at 573.

An agency makes that showing by providing affidavits from people with direct knowledge of and responsibility for the investigation. *Id.* Upon that showing, the essential to effective law enforcement exemption applies categorically to the investigative records. *Id.* The Court adopted the blanket exemption in *Newman* because “[t]he determination of sensitive or nonsensitive documents often cannot be made until the case has been solved.” *Id.* at 574.

In this case, the City provided affidavits to establish the fact that when Sargent initially requested the criminal investigative, the KCPA had declined to file charges and requested additional investigatory work from SPD, which is a relatively common occurrence. CP 141-142. The SPD detective had reopened his investigation, and was actively working the case performing site visits, taking photographs and interviewing witnesses. CP 142. At the time of Sargent’s initial request, enforcement proceedings were also contemplated in either King County Superior Court or alternatively the Seattle Municipal Court. *Id.* This evidentiary showing by the City justified the application of the *Newman* categorical exemption.

In a case decided after *Newman*, the Court sought to help define when a case is no longer active and held that one clear indication was when the matter had been “referred to a prosecutor.” *Cowles Pub. Co. v. Spokane Police Department*, 139 Wn.2d 472, 479, 987 P.2d 620 (1999).

While the “referral” test made sense in the facts of the *Cowles* case, that case did not involve an assertion that the police were still actively building its case. Unlike *Newman* and the present case, the law enforcement agency in *Cowles* did not argue that nondisclosure was necessary to protect an active police investigation. There was no active investigation in *Cowles*. Rather, the agency argued that the *Newman* categorical exemption should apply to the entire investigative file even after referral to a prosecutor for the purpose of protecting the trial process. *Id.* at 478 (emphasis added). The *Cowles* Court rejected that argument because the law enforcement investigation was no longer ongoing, and the essential to effective law enforcement exemption need not apply categorically for the protection of trial preparation. *Id.* at 477-478.

The *Cowles* Court’s decision affirmed the reasoning in *Newman* but held that once the case is being litigated, “courts are as qualified to review the potential affect of disclosure on the trial process as are the police or prosecutor.” *Id.* at 478. The Court reaffirmed *Newman* in *Serko*, noting that when the criminal case was underway, “the prosecutor has

made his charging decisions with respect to the respondents” and “the investigation...is no longer ongoing.” *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 594, 243 P.3d 919 (2010). The *Serko* Court also reaffirmed that during an ongoing investigation, “the decision as to what information may or may not compromise an open investigation is best left to law enforcement, rather than a court reviewing records in camera.” *Id.* at 593.

In this case, the investigation was ongoing and active at the time of the request – SPD was performing active investigatory work to build the case against the suspect. Although there had been a rush filing because Sargent was originally in custody, it had already been referred back to SPD for additional investigation at the time of the request. Thus, this case is distinguishable from *Serko* and *Cowles*, and is controlled by the blanket exemption recognized in *Newman* for active, ongoing investigations.²

Division I’s 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 sends a case back for additional investigative work, the law enforcement agency may engage in the full range of investigative work. CP 142. After reopening an

² Sargent argues that the Court of Appeals decision in this case could be used as authority to “*Newmanize*” a criminal investigative file, even after a charging decision. But categorically withholding a file after a charging decision is contrary to *Newman*, *Cowles* and *Serko*, nor is that what happened in this case.

investigation a detective may decide to pursue a different suspect or additional suspects. *Id.* While Division I's opinion addresses a factual situation that differs from the facts in *Cowles* and *Newman*, its reasoning is wholly consistent with both of those cases and does not change the law or conflict with any prior holding.

Whenever a suspect is arrested, a law enforcement agency is obligated to disclose records to the prosecutor's office as part of an expedited request to make a filing decision. But those records are not necessarily disclosed to the suspect or anyone else unless there is a decision to file charges.

If a court were to accept Sargent's rationale, every in-custody rush filing would preclude an application of the *Newman* categorical exemption, regardless of what happened next. Moreover, courts would be forced back into the position of having 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 and an investigation is reopened. There is no logical distinction between this type of reopened investigation and a "cold case" that is reopened after a new lead is developed. Yet under the rule advocated by Sargent, these two situations would be treated

differently. This would require a rejection of the Court's holding and reasoning in *Newman*.

The *Cowles* case did not involve an open and active police investigation, and the obvious logic of that decision does not support the absurd results of Sargent's arguments. The Court of Appeals decision in this case does not conflict with *Cowles* or any other authority.

B. The Court of Appeals properly determined that Sargent never resubmitted a records request for a separate disciplinary investigative file after the investigation was complete.

The PRA does not require that an agency respond to questions about public records. *Bonamy v. Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998). A communication must be recognizable and provide fair notice that it is intended to be a public disclosure request. *Beal v. City of Seattle*, 150 Wn. App. 865, 876, 209 P.3d 872 (2009). The language used in a communication, and a distinction between a request for records, as opposed to a request for information about records, are significant factors in determining whether the PRA requires a response. *Germeau v. Mason County*, 166 Wn. App. 789, 805-810, 271 P.3d 932 (2012).

As discussed, on reconsideration, the Court of Appeals rejected Sargent's novel argument that his April 21, 2010 letter, drafted by legal counsel, and sent 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, provided fair notice of a request for records under the PRA. Significantly, this communication followed clear requests for records from Sargent’s counsel. *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.

In his Petition for Review, Sargent argues that the *Neighborhood Alliance* case mandates a different factual determination regarding the April 21, 2010 letter. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 261 P.3d 119 (2011). But *Neighborhood Alliance* involved a clear request for records under the PRA. *Id.* at 710. This is made clear when the actual request in *Neighborhood Alliance* is considered – the request provided: “I am writing to request the opportunity to review public records...that record the following information...” *Neighborhood Alliance’s Brief of Petitioner/Appellant*, page 22 (citing the full language of the request at issue in that case).³

³Available on the Washington Supreme Court’s website at the following link: <http://www.courts.wa.gov/content/Briefs/A08/841080%20appellant%20br.pdf>

In concluding that the PRA required a response, this Court in *Neighborhood Alliance* made a clear distinction between a request for records and a request for explanations, holding that the requester in that case “sought public records, not explanations.” *Id.* at 132. The Court did not abandon prior case law that held information requests are not PRA request – rather it substantiates that line of PRA cases establishing clear standards to determine what constitutes a records request that triggers any obligations under the PRA. Division I’s factual determination in this case does not conflict with *Neighborhood Alliance*.

- C. The Court of Appeals properly upheld the application of the *Newman* categorical exemption to records of open and active internal law enforcement disciplinary investigations of police officers.

The “essential to effective law enforcement” exemption applies categorically to records of open and active law enforcement investigations. *Newman*, 133 Wn.2d 565. An internal investigation of a law enforcement officer by a law enforcement agency is a law enforcement investigation. *Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, 728-729, 748 P.2d 597 (1988).⁴ In making that conclusion, the *Cowles* court relied upon the function of the internal investigative process and the necessity of a

⁴ 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).

“workable reliable procedure for accepting and investigating complaints against law enforcement officers.” *Id.* at 729. *Newman* itself cites to the holding in *Cowles* and acknowledges that an internal police investigation is a law enforcement proceeding to which the categorical exemption applies. *Newman*, 133 Wn.2d at 573.

As first acknowledged in *Cowles*, and later reiterated by this Court in *Newman*, *Prison Legal News* and most recently *Bainbridge Island*, an internal investigation of police officers is a law enforcement investigation. *See Prison Legal News v. Department of Corrections*, 154 Wn.2d 628, 642, fn. 14, 115 P.3d 316 (2005) (holding that the investigation of prison medical staff is not a law enforcement investigation, but citing to *Cowles* and acknowledging that, unlike an investigation of prison staff, “the investigation of police performing the functions of their jobs is an investigation of law enforcement.”) *See also Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 419, 259 P.3d 190 (2011) (citing to *Cowles* and reiterating that a disciplinary investigation of police officers is a law enforcement investigation).⁵ The Court of Appeals decision is consistent with this line of Supreme Court precedent.

⁵ The *Bainbridge Island* case involved the required disclosure of a closed law enforcement internal disciplinary investigation, unlike an open and active investigation that was at issue in this case.

Moreover, as the Court of Appeals noted, the reasoning of *Newman* in establishing the categorical exemption is directly applicable to the records of internal law enforcement investigations. An internal investigation is assigned to a sworn officer who interviews witnesses and gathers evidence in the same manner as an officer investigating any other matter. CP 149. Further, the investigation may evolve into a pursuit of criminal charges. CP 278. As in *Newman*, the same concern exists with the release of sensitive information during an ongoing investigation.

Citing facts outside of the record, Sargent attempts to interpret language in OPA communications and asserts that this evidence demonstrates that the OPA investigation was complete when referred for a “charging decision” at some ambiguous point before April 30, 2010. There are at least two problems with Sargent’s argument. First, his request was made on February 5, 2010, before the date of the OPA communications. But second, and more importantly, the facts presented to the trial court demonstrate that investigation and review within OPA involves, “at a minimum, a Sergeant, Lieutenant, Civilian OPA Auditor, and the Civilian Director of OPA.” CP 145. At any point before a final disposition decision, it may be necessary to conduct additional investigative work such as witness interviews, or engage in additional fact finding. CP 145, 149.

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*, 260 P.3d at 1013. The Court of Appeals applied a bright line test to conclude that SPD correctly denied Sargent’s request for the open and active disciplinary investigative file.

D. The Court of Appeals properly exercised its authority to remand the case to the trial court for additional factual findings.

SPD did not present evidence of an individualized concern for witness safety, and thus the issue was not before the trial court. As the Court of Appeals recognized, SPD reasonably relied upon the “strong language” in prior case law. *Sargent*, 260 P.3d at 1015. Thus, the Court justifiably remanded for the presentation of additional facts. This remedy follows long-standing precedent. *See Concerned Ratepayers Ass'n v. Public Utility Dist. No. 1 of Clark County*, 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, 152, 240 P.3d 1149 (2010) (remanding for further fact-finding regarding what specific records existed that may not have been produced).

E. The Court of Appeals properly upheld SPD's application of the Criminal Records Privacy Act based upon the context of Sargent's request for records.

The Criminal Records Privacy Act ("CRPA") prohibits disclosure of criminal history records that include non-conviction data. RCW 10.97.080. Here, the relevant records are Washington State Patrol and Department of Licensing printouts that directly relate to an individual's arrest and involvement with the criminal justice system.⁶ Although located in an investigative file, these are not the type of records that the Court in *Bainbridge Island* held are not subject to CRPA. Instead of an investigative record, this is a "rap sheet" and the exact type of records covered in the RCW 10.97.030(1) definition of criminal history records.

Moreover, Sargent was only entitled to copies of this rap sheet data if he requested it "for the purpose of challenge or correction when the person who is the subject of the record asserts the belief in writing that the information regarding such person is inaccurate or incomplete." RCW 10.97.080. Sargent asks this Court to ignore this language, making it meaningless, and to hold that any time an individual requests that individual's own "non-conviction data" as part of a PRA request, it should be produced. The Court should not accept review of this claim.

⁶ See *Appellant's Opening Brief, Exhibit A*, describing records withheld and citing to the original pagination of records submitted under seal.

F. The Court of Appeals properly remanded this case for an appropriate determination of any per day penalty amount.

While the trial court will consider what evidence it determines is relevant to set penalties according the factors and test provided in *Yousoufian v. Office of Ron Sims*, two points are worth noting in response to Sargent's petition. See *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 466-468, 229 P.3d 735 (2010).

First, as the Court of Appeals noted, there is no basis for the trial court's issuance of a \$100 per day penalty – SPD's actions, even when in error, were guided by reasonable interpretations of existing law. Second, SPD's subsequent production of records demonstrate SPD's compliance with the Court of Appeals decision, and its proactive disclosure of records after the *Bainbridge Island* case, even though there was no new, pending request and the investigative records had been properly withheld during an active investigation when first requested.

G. The Court of Appeals decision is consistent with Supreme Court precedent, and does not require review.

Well-established Supreme Court precedent balances the public's interest in the operation of government, with the public's interest in effective law enforcement. The Court of Appeals holding is guided by the Court's earlier reasoning in *Newman* and *Cowles*, merely applying that

reasoning to a new factual situation. This factual application is not an issue of statewide interest that would justify review by the Supreme Court.

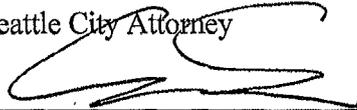
Review would only be warranted if the Court intended to abandon *Newman* and *Cowles* and insert trial courts into the position of second guessing determinations by law enforcement about what records are and are not essential to effective law enforcement during active investigations. Sargent's remaining allegations are also factual and do not warrant Supreme Court review. There is no substantial public interest in abrogating a temporal restriction on the public's right to access records of open and active law enforcement investigations.

V. 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 15th day of June, 2012.

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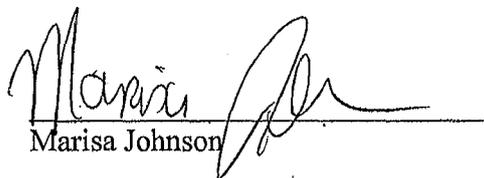
CERTIFICATE OF SERVICE

I certify that on the 18 day of June, 2012, I caused a true and correct copy of the foregoing Respondent's Answer to Petition for Review to be served on the following in the manner indicated below:

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Cc: Smith, Gary
Subject: Evan Sargent v Seattle Police Department 87417-4

Attached please find the Respondent's Answer to Petition for Review for the following case:

Evan Sargent v Seattle Police Department
Supreme Court No. 87417-4

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