

No. 65896-4-I

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

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EVAN SARGENT,

*Respondent,*

vs.

SEATTLE POLICE DEPARTMENT,

*Petitioner.*

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

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**APPELLANT'S OPENING BRIEF**

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**ORIGINAL**

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**I. ASSIGNMENTS OF ERROR**

- A. The trial court erred in holding that the “essential to effective law enforcement” categorical exemption for open law enforcement investigations does not apply to a criminal investigative record while the investigation is open and active.
  
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## II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Where the Washington Supreme Court's holding in the *Newman* case applies a categorical exemption to records of open and active police records of criminal investigations, should the court find a violation of the Public Records Act when the City denied a public records request for a criminal investigative file when the investigation was open and active?
- B. Where a public agency denies a public records request pursuant to a Public Records Act exemption, does an agency have an obligation to keep the request pending and subsequently produce later created records, and produce the records withheld based upon a change in their status as exempt, even if a records requester does not resubmit the request?
- C. The Public Records Act includes an exemption for information revealing the identity of individuals who are witnesses to and victims of a crime if disclosure would endanger any person's physical safety or property. The criminal investigative record at issue relates to an investigation of an alleged violent assault and the undisputed facts show that the suspect evidenced a predilection towards violence. Should an agency be held in violation of the Public Records Act if it withholds the identity of witnesses to this alleged violent crime in response to a records request?
- D. Once a law enforcement investigation is completed, the Public Records Act exemption for records the nondisclosure of which is essential to effective law enforcement may still apply to portions of the investigative file. Whether nondisclosure is necessary for effective law enforcement is a question of fact. Should the court find a violation of the Public Records Act when the City provided evidence to support the application of the effective law enforcement exemption to portions of the closed criminal investigative file (Assignments of Error C and D)?

- E. Specific Washington statutes prohibit disclosure of jail records and records that include nonconviction data. Should an agency be required to distinguish between individuals requesting records and provide records to specific individuals based solely on their identity?
  
- F. The Washington Supreme Court has held that, in determining the appropriate level of per day penalties assessed for a violation of the Public Records Act, a court should consider a list of sixteen nonexclusive factors. The highest penalties in the range are reserved for the most egregious violations of the Act. Should an agency be assessed the maximum per day penalties when it makes a good faith effort to apply the provisions of the Act and selectively redact or withhold minimal records?
  
- G. The Public Records Act authorizes an award of reasonable attorney's fees expended in connection with successful claims in litigation. Should the court award attorney's fees for non-legal work performed prior to actual litigation, and otherwise duplicative and excessive time expended?

### III. STATEMENT OF THE CASE

#### A. Standard of Review

The case below was decided upon Plaintiff's Motion for An Order to Show Cause under the Public Records Act ("PRA") pursuant to RCW 42.56.550. Judicial review of all agency actions under the PRA is de novo. RCW 42.56.550(3); *Soter v. Cowles Publishing Co.* 162 Wn.2d 716, 731, 174 P.3d 60 (2007). The court will review issues of statutory meaning de novo. *Id.* citing *State v. Schultz*, 146 Wn.2d 540, 544, 48 P.3d 301 (2002).

## **B. Introduction**

The trial court's ruling in this case fundamentally abrogates the well-established principle that records of open and active police investigations are categorically exempt from disclosure under the Public Records Act ("PRA") until the investigation is complete. Further, the trial court imposed the novel and unprecedented burden on a public agency to keep a public records request "pending" and continue to produce records created after receipt of the request. In addition, the trial court held that the identity of witnesses who provide information to law enforcement in conjunction with an investigation of a violent crime are presumed subject to disclosure, even when the PRA exempts witness identity if disclosure would endanger their safety. Finally, the trial court assessed the statutory maximum per day penalties against the City of Seattle in the complete absence of bad faith.

In this litigation, Plaintiff has consistently set forth unsupported accusations and hyperbole in support of an incorrect and unreasonable interpretation of the PRA. In reality, his records requests involved a legitimate law enforcement investigation into an alleged violent assault with a weapon, and a law enforcement agency's application of PRA exemptions during that ongoing investigation to ensure effective law enforcement.

### C. Facts

This case arose from an incident on July 28, 2009 where several witnesses stated that Plaintiff drove his vehicle into the path of an off duty police officer, nearly pinning the individual against a concrete wall. CP 161. According to witnesses, Plaintiff then exited his vehicle brandishing a baseball bat, charged at the person, and directed two full swings of the bat at the individual. *Id.* Based upon these witness statements, Plaintiff was arrested and a detective with the Seattle Police Department (“SPD”) initiated an investigation. CP 141.

Based on the witness statements and patrol reports, the SPD detective prepared the case for an in custody rush filing with the King County Prosecuting Attorney’s office (“KCPA”) on July 30, 2009. CP 141-142. On August 8, 2009 the detective received notification from KCPA that they were declining to file charges at that time, and further requesting additional investigative work. *Id.* ¶ 2. After the decline decision, the detective began additional investigative work, including site visits and contact with witnesses. *Id.* ¶ 5.

On September 1, 2009, after the KCPA decline decision, and while the case was under active investigation by the SPD detective, Plaintiff’s attorney submitted a public disclosure request to SPD seeking records contained in SPD investigative file No. 09-264202 which was related to

the July 28, 2009 incident. CP 111-112. On September 9, 2009, by letter citing the PRA exemption that applies categorically to records of open and active police investigations, SPD denied Plaintiff's records request. *Id.* In that letter SPD explained that the case was still under investigation, and asked that Plaintiff resubmit his records request in four to six weeks. *Id.*

By letters to SPD Interim Police Chief John Diaz, Plaintiff requested further review of the decision to deny his public disclosure request. *Id.* On September 29, 2009, by letter to Plaintiff, the SPD Legal Unit affirmed the denial of Plaintiff's request for criminal investigative records related to an open and active investigation. *Id.* Although not obligated to do so, SPD provided the name and badge number of the off duty officer involved in the incident. *Id.*

As late as October 23, 2009, the SPD detective investigating SPD Incident No. 09-264202 continued to locate and interview additional witnesses. CP 142. On November 17, 2009 the SPD detective referred the investigative file to the Seattle City Attorney's office ("CAO") for a charging decision. *Id.*

On February 5, 2010 Plaintiff resubmitted his public disclosure request for the criminal investigative file related to SPD related to Incident No. 09-264202. At that point, the CAO had determined not to file charges and the SPD detective had closed the investigation. CP 167.

SPD acknowledged receipt of the February 5, 2010 request and began the collection and review of responsive records for production. CP 113-114. SPD produced records in two installments, with the final production of records on April 7, 2010. CP 114. In total, SPD produced approximately one hundred (110) pages of responsive records with minimal redactions applied, almost exclusively for the purpose of protecting the identity of witnesses and the alleged victim of a violent crime. *Id.*; Documents submitted under seal as Exhibit 1 (hereinafter “SEALED RECORDS”) at 1-111.<sup>1</sup> SPD identified a total of ten (10) pages withheld in their entirety pursuant to PRA exemptions, and other statutory preclusions to disclosure such as RCW 70.48.100 that prohibits disclosure of jail records. SEALED RECORDS at 112-121. A complete description of the redactions applied, and records withheld, with citation to the corresponding exemptions or preclusions to disclosure is attached hereto as Appendix A.

On August 10, 2010 Plaintiff filed this lawsuit alleging that SPD violated the PRA by failing to produce all records related to the criminal investigative file in response to his “pending” public disclosure requests

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<sup>1</sup> Exhibit 1 was originally filed in the trial court under seal as an attachment to the Corrected Declaration of Gary T. Smith Submitting Records Under Seal Per September 30, 2010 Court Order. See Section III(E).

and failing to adequately respond to an additional records request for separate disciplinary investigative records. CP 1-11.

**D. Procedural History**

On August 20, 2010 the trial court held a hearing on Plaintiff's Motion to Show Cause. At the conclusion of that hearing, the trial court issued an oral ruling that SPD violated the PRA by relying on the categorical exemption that applies to records of open and active police investigations and not producing the criminal investigative file related to SPD Incident No. 09-264202 in response to Plaintiff's original September 2009 records requests. RP 21-22. Further, the trial court held that SPD should have produced the entire criminal investigative file related to SPD Incident No. 09-264202 at the conclusion of the last witness interview, and without any records withheld or redacted, even in the absence of an additional records request from Plaintiff. RP 23-27.

In addition, the trial court assessed per day penalties authorized under the PRA at the minimum five dollars (\$5.00) per day for the time period from SPD's response to Plaintiff's initial September 2009 request to the date of the last witness interview reflected in the criminal investigative file, and at the maximum one hundred dollar (\$100.00) per day for failing to produce the complete and unredacted criminal

investigative file for the time period between the last witness interview and the hearing date. RP 27-28.

After receiving separate versions of a proposed order from the parties, the trial court issued a final written order memorializing its oral ruling to produce the complete and unredacted criminal investigative file related to SPD Incident No. 09-264202, assessing per day penalties as described, and awarding attorney's fees under the PRA.<sup>2</sup> CP 172.

On September 1, 2010 Plaintiff filed a "Motion for Clarification" of the trial court's August 26, 2010 order, arguing that the trial court also should have ordered the production of separate disciplinary investigative records. CP 184. On October 1, 2010 the trial court issued a written "Order On Plaintiff Evan Sargent's Motion for Clarification" reiterating that the written order to produce records was limited to the criminal investigative file related to the investigation of SPD Incident No. 09-264202, and specifically excluded any obligation to produce separate disciplinary investigative records. CP 363-366. The City's appeal is

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<sup>2</sup> In regard to attorney's fees, the trial court requested a declaration from Plaintiff's counsel to substantiate fees and a response from the City. On September 2, 2010 Plaintiff submitted a declaration claiming approximately one hundred and eighty (180) hours and forty-eight thousand eight hundred and thirteen dollars (\$48,813.00) in billed attorney work. CP 233-254. The City filed a response arguing that the fees included non-attorney work and were otherwise excessive. CP 255-259. The trial court reduced the awarded fees by approximately nine thousand dollars (\$9,000) without additional explanation. CP 357-359.

limited to the trial court's order to produce the complete contents of the criminal investigative file related to SPD Incident No. 09-264202 and assessment of attorney's fees and penalties.

**E. Records Submitted Under Seal**

The unredacted criminal investigative file related to SPD Incident No. 09-264202, including the ten pages withheld in their entirety, were submitted to the trial court for review *in camera* in conjunction with the August 20, 2010 hearing on Plaintiff's Motion to Show Cause. On September 20, 2010 the City filed a Motion for an Order to File Records Under Seal Pending Appellate Review in order to complete the record for appellate review. CP 345-353.<sup>3</sup>

Plaintiff did not oppose the City's Motion. On September 30, 2010 the trial court issued an Order to File Records Under Seal Pending Appellate Review. The Order is attached as Appendix B. The City respectfully requests that the records remain under seal in the Court of Appeals until the resolution of the appellate process.

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<sup>3</sup> The City's Motion argued that one of the primary reasons for this appeal is the justification for redacting and withholding the records, thus the records at issue should be filed under seal to ensure a complete record for appellate review, and to ensure that the appeal would not be rendered moot. *Id.*

#### IV. ARGUMENT

##### A. The Public Records Act Exemption For Records Of Open And Active Law Enforcement Investigations Is Categorical.

RCW 42.56.240(1) exempts investigative records compiled by law enforcement agencies when nondisclosure “is essential to effective law enforcement.” The Washington Supreme 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). In *Newman*, the Court held that this exemption applies categorically to open and active criminal investigative files. *Newman*, 133 Wn.2d at 574.<sup>4</sup> In establishing the categorical exemption, the Court recognized that during an ongoing investigation it is not possible to determine what records are sensitive and therefore the “exemption allows the law enforcement agency, not the courts, to determine what information, if any, is essential to solve a case.” *Id.* The *Newman* Court held that a law enforcement agency “has no duty to disclose any information contained in an open investigation file because the [records]

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<sup>4</sup> As further discussed in Section D, *infra*, although the categorical exemption for open investigative files no longer applies after the investigation is complete, the essential to effective law enforcement exemption may still apply to portions of an investigative file. *Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, 732-733, 748 P.2d 597 (1988).

are exempt under RCW 42.17.310(1)(d) [currently RCW 42.56.240(1)].”  
*Id.* at 575 (emphasis added).

In reaching that conclusion, the Court engaged in a two step analysis. First, the records must be “compiled” by law enforcement. *Newman*, 133 Wn.2d at 575. The Court explicitly held that records “compiled” meant any records placed in the investigative file, even though they may have been originally created for another purpose, and even though the requester may be able to gain access to the records by other means. *Id.* at 572-573. Thus, even newspaper articles compiled in an investigative capacity were appropriately withheld as part of an investigative file. *Id.* at 573.

The second step of the analysis is whether nondisclosure is essential to effective law enforcement. To make that determination, 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.*, 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 whether resources are allocated to the investigation and 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 *Newman* court concluded that “[t]he language of the [PRA] provides for a categorical exemption for all records and information in these [open and active] files. *Id.* at 574. Further, the *Newman* court held that “[n]o segregation of the documents is provided for under the language of the exemption.” *Id.* at 575.

In a later case, the Court did hold that the *Newman* categorical exemption no longer applied 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). 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. Rather, the agency in the *Cowles* case argued that the categorical exemption established by the *Newman* court 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 based on the fact that the law enforcement investigation was no longer ongoing, and that the essential to effective law enforcement exemption need not apply categorically for the protection of trial preparation.

The *Cowles* court reiterated the *Newman* court's concern with the potential for the disclosure of sensitive information if law enforcement agencies were required to segregate documents in open investigative files, and the propriety of making courts responsible for determining whether nondisclosure of records related to active investigations was essential to solve a case. *Id.* at 477. But in *Cowles*, because there was no ongoing investigation, and because the case had advanced to the trial phase, the Court held that "courts are as qualified to review the potential affect of disclosure on the trial process as are the police or prosecutor." *Id.* at 478.

In this case, the City provided affidavits to establish the fact that when Plaintiff initially requested the criminal investigative file regarding SPD case No. 09-264202, the KCPA had declined to file charges and requested additional investigatory work from an SPD detective, which is a relatively common occurrence. CP 141-142. The SPD detective had reopened investigation, and was actively working the case performing site visits, taking photographs and interviewing witnesses. CP 142. Further, at the time of Plaintiff's initial request, enforcement proceedings were 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 to an open and active law enforcement investigative file.

Here, the trial court fundamentally misapplied the *Cowles* court's holding by finding that because some portion of an investigative file was revealed to the King County Prosecutor's Office as part of a rush filing, the categorical exemption could no longer apply, even though the investigation was reopened and active before receipt of the initial records request from Plaintiff. The trial court also mistakenly concluded that the categorical exemption did not apply because a suspect was known at the outset. RP 22-23. Finally, the trial court arbitrarily determined that the investigation was no longer ongoing after the assigned detective conducted the last witness interview. RP 23. None of these findings is a relevant inquiry under the *Newman* analysis.

In the present case, after the rush filing and the transfer of some records to the prosecutor, but before the records were requested by the Plaintiff, the prosecutor had declined charges and requested additional investigative work. CP 141-142. That is not a rare occurrence, and at that point, a detective is free to pursue all avenues of investigation and filing decisions. CP 142. In fact, the SPD detective had reopened the investigation and was actively working the case. *Id.* Under the *Newman* court's holding, the fact that some records contained within the investigative file had been disclosed to the prosecutor before reopening the investigation has no bearing on the application of the categorical

exemption. The only relevant inquiry is whether the investigation was open and active at the time of the request.

In finding that the initial disclosure to the KCPA affected the categorical exemption, the trial court also ignored the *Newman* court's holding that records compiled by law enforcement and subject to the categorical exemption include any records contained within the investigative file, even though they may have been created for other purposes or available to the requester by other means. *Newman*, 133 Wn.2d at 572-573.<sup>5</sup>

Similarly, the fact that a potential suspect has been identified does not affect the *Newman* categorical exemption. The very definition of "investigative records" applied by the courts assumes that a potential suspect has been identified. *King County v. Sheehan*, 114 Wn.App. 325, 337 57 P.3d 307 (2002), citing *Dawson v. Daly*, 120 Wn.2d 782, 792-793, 845 P.2d 995 (1993) (defining "investigative records" as "compiled as a result of a specific investigation focusing with special intensity upon a particular party").

As the SPD detective stated in this case, after reopening an investigation a detective may decide to pursue a different suspect or

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<sup>5</sup> In fact, the *Newman* court held that even newspaper articles in the investigative file were properly withheld. *Id.* at 573.

additional suspects. CP 142. In many police investigations a potential suspect has been identified at the outset of the investigation. But this has no bearing on the crux of the *Newman* court's analysis, which was the necessity of police officers to be able to determine, in their professional judgment, how and when information related to an active investigation may be released without negatively affecting the investigation. Moreover, identification of a potential suspect does not necessarily mean that the correct individual has been identified, or that other perpetrators will not be identified. Whether or not a suspect has been identified has no relevance to the concern regarding the release of sensitive information, and accordingly is not an element of the test employed by the *Newman* court to determine the applicability of the categorical exemption for open and active law enforcement investigative records.

Finally the trial court's arbitrary determination that the investigation was over after the last witness interview is not the test applied by any court, and such a ruling holds agencies to an impossible standard. The correct standard applied by the courts to determine when the categorical exemption no longer applies is whether an investigative file has been referred to a prosecutor for a charging decision and is no longer under active investigation. *Cowles Pub. Co.*, 139 Wn.2d at 477-478.

It cannot be disputed that a law enforcement investigation involves activity other than witness interviews. After a witness interview, a detective might inspect a crime scene, consult with experts in a certain scientific field, or review prior witness statements for consistency. All of that activity potentially involves the creation or collection of additional records, and the identification of additional witnesses. Even in this case, the record shows that the detective continued to locate and interview witnesses many weeks after beginning the initial investigation. CP 142. But under the standard applied by the trial court, a detective must constantly be cognizant of the possibility that the last witness has been interviewed and therefore the investigative record is no longer categorically exempt from disclosure.

The *Newman* court's primary concern was the potential for the disclosure of sensitive information if law enforcement agencies were obligated to segregate documents in open investigative files, and the propriety of charging courts with the responsibility of determining the disclosability of active investigative records. But by holding that the date of the last witness interview ends the categorical exemption, the trial court here essentially imposed that obligation to segregate documents on SPD, while wrongfully making its own determination as to when it believed

disclosure would cease to have a negative effect on essential law enforcement investigative functions.

The trial court's misapplication and abrogation of the *Newman* categorical exemption for open and active police investigations introduces great uncertainty into the conduct of any law enforcement investigation. Under the trial court's holding, a law enforcement agency likely will never have the ability to rely on the categorical exemption. Before any assertion of the *Newman* exemption, the law enforcement agency will be required to engage in analysis of the requested records and determine whether any portions of an investigative file have been disclosed, and to whom the disclosure was made. Further, during the conduct of the investigation, a law enforcement agency will constantly be faced with the possibility that a court may make its own determination as to the date when the particular investigation was "closed" and accordingly require disclosure and impose liability under the PRA. That is precisely the sort of uncertainty and interference with active law enforcement that justifies a proper application of the categorical exemption in this case, and any active law enforcement investigation.

**B. By Its Terms The Public Records Act Does Not Require That An Agency Produce Records Created After Receipt Of A Public Disclosure Request Or Otherwise Keep A Request Ongoing And Pending.**

Upon receipt of a public disclosure request for identifiable documents, the PRA requires that those records be provided for inspection. RCW 42.56.080. 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). Thus, in response to a public disclosure request, the PRA requires the production of existing and identifiable records. There is no ongoing duty to provide updated responses to a request, or to provide documents created after a request is received. WAC 44-14-04004(4)(a).

This principle is well established in Washington, as recognized by the Washington Attorney General, Washington public agencies and Washington attorneys who specialize in public records law representing both requestors and public agencies. For example, at the direction of the legislature, the Washington Attorney General promulgated Model Rules to guide state agencies in complying with the PRA. WAC 44-14-00001. The PRA Model Rules were the product of an extensive outreach project, involving public forums across the state to obtain the views of requestors and public agencies for state agencies. *Id.* Although not binding on the

City, the PRA Model Rules recognize that an agency is only obligated to provide existing documents in response to a request and explicitly state that “[a]n agency is not obligated to supplement responses” to requests. WAC 44-14-04004(4)(a). Further, the Model Rules recognize that “if a public record is created or comes into the possession of the agency after the request is received by the agency, it is not responsive to the request and need not be provided. *Id.*

The Washington State Bar Association has published the *Public Records Act Deskbook* as a resource on the topic of PRA compliance. The editors of that publication include prominent lawyers who represent both requesters and public agencies. As described in the *Deskbook*, an agency should treat a request for records existing as of the date of the request. CP 286. The PRA does not provide for “continuing” or “standing” requests. *Id.* A requester may make a “refresher” request for records created between the date of the first request and the refresher request. *Id.* Such a request should be treated as a new and separate request. *Id.*

The legal standard that applies to determine whether an agency violated the PRA provides additional support for the principle that an agency is not required to maintain a request as “pending.” When a court is analyzing whether a public agency violated the PRA by withholding records, the legal question is whether records were properly withheld at

the time a public disclosure request is received. *Spokane Research v. City of Spokane*, 155 Wn.2d 89, 103-104, 117 P.3d 1117 (2005). For example, in the *Spokane Research* case, an agency withheld a record and the requester filed suit under the PRA. *Id.* After the requester filed suit, the agency disclosed the record in conjunction with a separate lawsuit. *Id.* Because of the subsequent disclosure, the agency argued that the PRA case was rendered moot. *Id.* The *Spokane Research* court rejected that argument and held that the proper inquiry is whether records were properly withheld at the time of the request. *Id.* at 103-104. In so doing, the court stated that subsequent events do not affect the wrongfulness of an agency's initial action to withhold records if the records were wrongfully withheld at that time. *Id.*

Clearly, that same standard must apply when an agency properly asserts an exemption. Thus, if an agency properly withholds records in response to a public disclosure request, subsequent events do not affect a justified claim of an exemption. Essentially, unlike discovery requests pursuant to court rules, a request for records under the PRA is a snapshot in time. There is no ongoing duty to provide updated responses to a request, or to provide documents created after a request is received.

In this case, the Plaintiff submitted public disclosure requests for records related to an open and active police investigation in September

2009, and SPD justifiably denied the request by citing the categorical exemption for records the non-disclosure of which is essential for effective law enforcement. CP 111-112. In addition, SPD's response to Plaintiff suggested that he resubmit the request at a later date. CP 112. SPD did not receive any further communication from Plaintiff until he resubmitted his request for the investigative file in February 2010. Upon receipt of Plaintiff's new and distinct February 2010 request, the criminal investigation had been completed and SPD produced the investigative file with minimal redactions. CP 113-114.

Regardless of these facts, and without citing any authority, the trial court in this case held that the Plaintiff's original September 2009 request remained "pending," and further held that a requester has no obligation to renew a public disclosure request. RP 28-29. As stated by the trial court "[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 discussed, the trial court also held that the categorical exemption no longer applied after the date of what ultimately happened to be the last witness interview. Thus, the trial court held that the records, including records created after the date of the original request, should have been produced to Plaintiff immediately after that witness interview, and imposed penalties on the City for SPD's failure to do so.

This ruling is contrary to the clear terms of the PRA, case law interpreting the PRA, and any common understanding of the PRA's requirements. According to the trial court's rationale, Plaintiff's September 2009 public disclosure request obligated SPD to produce records that did not even exist at the time of the request. That rationale directly contradicts the terms of the PRA as interpreted by case law. *Smith v. Okanogan County*, 100 Wn. App. at 14. Moreover, while SPD's denial of the request in September 2009 may have been proper, the trial court imposed a burden on SPD to produce records based on a later change in the status of the records, but absent any resubmittal of an actual records request. That burden is not set forth in the PRA itself, and directly contradicts the standard for determining PRA compliance as adopted by the Washington Supreme Court in the *Spokane Research* case.

The trial court applied a standard and held SPD to a burden that the PRA has never been understood to impose. Considering the practical realities of such a standard highlights its absurdity. Upon receipt of any request for an open and investigative file that was denied pursuant to the *Newman* categorical exemption, a law enforcement agency would be required to maintain the request as "pending" until the completion of the investigation. Upon the completion of the investigation, and no matter how much time had elapsed since receipt of the request, an agency would

be required to conduct a full review of the file, apply redactions, track down the requester and produce the documents. Of course, the requester may no longer be interested in the records, or may no longer even exist, but the law enforcement agency would still be under an obligation to complete its work responding to the request as though it were received on the date the investigation ended.<sup>6</sup>

In fact, the trial court's misinterpretation of the PRA's requirements would apply any time an agency claimed an exemption. Thus, any time a public disclosure request was denied, an agency would be under an obligation to monitor the status of documents to ensure that, for example, a claim of attorney-client privilege had not been waived at some point after the initial receipt of the request.

The status of documents may change with time, but the legal and reasonable approach to ensure that records requesters receive updated responses is to place the burden upon the requester to simply resubmit a records request at a later date. In this case, even though not obligated to do so, SPD suggested that Plaintiff resubmit his request at a later date. The trial court should not have imposed a novel, unprecedented and

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<sup>6</sup> Moreover, as discussed earlier in Section A, if the trial court's holding stands, then every time a law enforcement agency denies a request per the *Newman* exemption, that agency will have to conduct the investigation with a consideration of whether it may be considered "complete" at every step along the way.

heightened burden on SPD.

**C. The Public Records Act Specifically Exempts The Identity Of Witnesses And Victims Of Crime When Disclosure Would Endanger Their Safety Or Harm Effective Law Enforcement.**

The PRA contains the following exemption for the protection of witnesses and victims of crime:

Information revealing the identity of persons who are witnesses to or victims of crime or who file complaints with investigative, law enforcement, or penology agencies, other than the commission, if disclosure would endanger any person's life, physical safety, or property. If at the time a complaint is filed the complainant, victim, or witness indicates a desire for disclosure or nondisclosure, such desire shall govern.

RCW 42.56.240(2). SPD Incident No. 09-264202 involved an investigation of an alleged violent assault where the suspect allegedly drove a vehicle into a person's path and aggressively swung a baseball bat at the individual. SEALED RECORDS at 4-5. The criminal investigative file reflecting the investigation of the incident includes the identity of witnesses and the alleged victim, including names and addresses. *Id.*

Before releasing the completed investigative record, SPD redacted the names and identifying information of the witnesses and the victim involved in order to protect their safety.

The trial court held that the identifying information of the victim and every witness who provided their recollection of the alleged violence

must be publicly disclosed. According to the trial court, a public agency must make an affirmative showing that disclosure entails a potential threat to safety or property. RP 25-26. But as argued by the City, and supported by the declaration of an SPD detective, in this investigation that involved a suspect who has already shown a predilection towards violence, there is concern with witness and victim safety and security when those individuals identify themselves and provide information that may lead to the prosecution of a violent person. RP 13, CP 143.

The only feasible way to make an additional affirmative showing with regard to specific witnesses is to gather a statement from the individual confirming that if their identity were disclosed with respect to a criminal investigation, they will be in fear for their safety and security. But a clear interpretation of the RCW 42.56.240(2) exemption does not require such an individualized showing. The second sentence of the section states that if the witness or victim “indicates a desire for disclosure or nondisclosure, such desire shall govern.” In contrast, the first sentence of the section simply states that the identifying information is exempt “if disclosure would endanger any person's life, physical safety, or property.” The statute does not require an affirmative showing. A reasonable interpretation of the statute is that the law enforcement agency, and

individuals familiar with the investigation, should make a determination regarding witness safety.

Moreover, the clear legislative intent of the section is to provide protection and an incentive for individuals to come forward and provide information regarding possible crime to law enforcement. It goes against a plain interpretation of the statute, and against that legislative intent, to impose a default rule that witness names in conjunction with violent crime investigations are presumed disclosable.

**D. The City Made The Requisite Factual Showing That Portions Of A Criminal Investigative File Were Appropriately Withheld To Protect Essential Law Enforcement Functions.**

The courts have recognized that the essential to effective law enforcement exemption may still apply to portions of investigative records, even after the investigation is complete. *Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, 732-733, 748 P.2d 597 (1988). Whether nondisclosure of a particular record is essential to effective law enforcement is an issue of fact. *Koenig v. Thurston Co.*, 155 Wn.App. 398, 407, 229 P.3d 910 (2010). Courts may consider declarations from those with direct knowledge of and responsibility for the investigation to determine whether its nondisclosure is essential to effective law enforcement. *Id.*

Before releasing the closed criminal investigative file in 2010, SPD applied limited redactions, and withheld selected pages based upon the essential to effective law enforcement exemption. In the City's response to Plaintiff's Motion to Show Cause, SPD provided supporting declarations from the detective in charge of the investigation that described how the information withheld was necessary for effective law enforcement. CP 143.

First, even if victim and witness names were not exempt under RCW 42.56.240(2), the detective's declaration described how disclosing witness names at the close of an investigation of a violent assault would have a chilling effect on the willingness of individuals to come forward in the future with information related to crime because of fears of retaliation, and thus impede SPD's ability to gather first-hand accounts of an incident. CP 143.

Further, the detective's declaration described how other information in an investigative file could negatively affect future law enforcement investigations. For example, selected content in the investigative file contained a "detailed analysis of how any suspect could avoid an investigation and prosecution." CP 143. Specifically, the detective identified one log entry that, in his professional opinion, contained that very type of information. *Id.*; See SEALED RECORDS at

40. Moreover the detective described how the detailed analysis contained in a prosecutor's decline decision "essentially would provide a roadmap to potential criminals describing how to avoid prosecution."<sup>7</sup> *Id.*; See SEALED RECORDS at 42, 112-113.

The trial court ordered the release of the criminal investigative file virtually without redaction, and including witness names, the name of a crime victim, and all content previously redacted or withheld as essential to effective law enforcement. In ordering release of this content, the trial court issued no findings with respect to the order, other than a general statement that "based on the evidence presented, the effective law enforcement exemption to the Public Records Act (RCW 42.56.240) does not apply, and this finding is consistent with *Newman v. King County*, 133

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<sup>7</sup> A public agency is not limited to asserting only those reasons for denying disclosure that are cited in its initial response to a request. *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994). In regard to the decline memo and its content, although not originally cited by SPD in response to Plaintiff's request, those records also would be exempt from disclosure as attorney work product pursuant to RCW 42.56.290. The work product exemption applies to documents and other tangible things that (1) show legal research and opinion; (2) are notes or memoranda of factual statements or investigation; and (3) are written statements of fact, or other tangible facts, gathered in anticipation of litigation. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 611, 963 P.2d 869 (1998); See also *Soter v. Cowles Publishing*, 162 Wn.2d 716, 731, 174 P.3d 60 (2008). The first category, deemed "opinion work product" includes the "notes or memoranda of factual statements or investigation." *Limstrom*, 136 Wn.2d at 611. Opinion work product is absolutely protected from disclosure because it reveals the thoughts and mental impressions of an attorney. *Id.* Here, the decline memo sets forth the thoughts and mental impressions of a prosecutor in the Seattle City Attorney's office regarding his legal analysis of a decision not to file charges. SEALED RECORDS 112-113. As such, the memo falls squarely within the definition of attorney opinion work product and is absolutely protected from disclosure.

Wn.2d 565 (1997) and *Cowles v. Spokane Police Department*, 139 Wn.2d 472 (1999).” CP 364. But the trial court received no evidence to contradict the City’s assertion of the essential to effective law enforcement exemption for this content, other than an assertion at oral argument by Plaintiff’s counsel that he was the source of some witness names provided to the investigating detective. RP 17. But even if that is correct, the possibility that a suspect has knowledge of some witness identities, does not abrogate SPD’s extremely important interest in protecting crime victim and witness identity in documents available to the general public. Moreover, that fact has no affect on SPD’s interest in protecting information where disclosure would have a detrimental effect on future investigations.

By declarations from those with direct knowledge of the investigation, the City made the requisite factual showing that nondisclosure of this content is essential to effective law enforcement. Thus, consistent with *Koenig v. Thurston Co.*, the trial court should not have ordered the information to be publicly disclosed.

**E. The City Appropriately Applied Washington Law That Prohibits Disclosure Of Certain Records Regardless Of The Requester’s Identity.**

Before releasing the closed criminal investigative file, the City withheld certain records based on RCW 70.48.100 which precludes

disclosure of jail records. Other selected pages were withheld based on the RCW 42.56.240(1) exemption for the protection of individual privacy, and alternatively RCW Chapter 10.97 that precludes disclosure of records reflecting nonconviction data. In fact, SPD justifiably could have withheld the entire criminal investigative file as nonconviction data.

**1. The Criminal Records Privacy Act Precludes Disclosure Of An Entire Criminal Investigative File Reflecting Nonconviction Records, But Provides An Agency With The Discretion To Release Records Under Specific Circumstances.**

SPD withheld selected pages of the criminal investigative file consisting of nonconviction criminal history information based upon both RCW 42.56.240(1) which exempts information in law enforcement investigative records in order to protect the privacy of any individual, and the Criminal Records Privacy Act, (CRPA), RCW Chapter 10.97.

The CRPA protects the confidentiality of criminal history record information that reflects nonconviction data maintained in the files of criminal justice agencies. The Act defines criminal history record information to mean any information “collected by criminal justice agencies, other than courts, on individuals, consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges” and “records [that] provide individual identification of a person together with any portion of

the individual's record of involvement in the criminal justice system as an alleged or convicted offender.” RCW 10.97.030(1).

Nonconviction data means “all criminal history record information relating to an incident which has not led to a conviction or other disposition adverse to the subject.” RCW 10.97.030(2). The statute prohibits the dissemination of nonconviction data and clearly states that “[n]o person shall be allowed to retain or mechanically reproduce any nonconviction data except 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. Further, the statute states that “[t]he provisions of chapter 42.56 RCW shall not be construed to require or authorize copying of nonconviction data for any other purpose.” *Id.* Violation of the CRPA by any person or municipality may result in civil penalties, and also constitutes a criminal misdemeanor. RCW 10.97.110 and RCW 10.97.120.

In the two reported appellate court decisions analyzing the CRPA in the context of the disclosability of a criminal investigative file consisting of nonconviction records, the courts held that the CRPA precludes disclosure of the entire investigative file. In *Hudgens v. City of Renton*, Division I analyzed the denial of a public disclosure request for

copies of the “arrest report, citation, patrol report, officer's report, and any other record prepared by Renton police” in connection with the arrest of an individual for a DWI offense, which later resulted in a determination of not guilty. *Hudgens v. City of Renton*, 49 Wn.App. 842, 746 P.2d 320 (1987). In that case, the court quoted RCW 10.97.080 and held that the section clearly applied and authorized the denial of a public disclosure request for copies of the documents in the police department file. *Id.* at 844-845.<sup>8</sup>

Similarly, in *Beltran v. Department of Social and Health Services*, Division I analyzed a trial court's order to strike and seal nonconviction data that included documents related to a domestic violence arrest where charges were ultimately dismissed. *Beltran v. Department of Social and Health Services*, 98 Wn.App. 245, 989 P.2d 604 (1999). Relying on RCW 10.97, the court upheld the decision to strike and seal the file as nonconviction data.

The CRPA's provisions do allow for the individual who is the subject of nonconviction records to inspect the records, but only for the purpose of challenging or correcting the records, and only when the person

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<sup>8</sup> Although not relevant to this case, the *Hudgens* court did find that RCW 10.97 may allow the actual inspection of the documents, but in any case, the court did not allow the production of copies. *Hudgens* at 845.

asserts a belief in writing that the information is inaccurate or incomplete. RCW 10.97.080. But that specific provision addresses disclosure under the CRPA in that specific circumstance and does not affect disclosure pursuant to the PRA.

The CRPA also provides that criminal justice agencies may, in their discretion, disclose to persons who have suffered possible loss compensable through civil action any portions of nonconviction records that the law enforcement agency believes may assist the victim in pursuit of civil redress. RCW 10.97.070. But that section gives the law enforcement agency full discretion to determine when disclosure is appropriate, and in no way mandates disclosure under the PRA. Moreover, the PRA itself states that “[a]gencies shall not distinguish among persons requesting records.” RCW 42.56.080.

In the absence of a request pursuant to the specific provisions of the CRPA, or in the absence of a law enforcement agency’s exercise of its discretion to release nonconviction data to an individual who may have suffered loss, the CRPA is an absolute prohibition on the disclosure of nonconviction records in response to a request under the PRA.

In this case, the criminal investigative file at issue consists of criminal history record information detailing an individual’s involvement in the criminal justice system as an alleged offender that did not result in a

finding of guilt or other disposition adverse to the subject. As such, the entire criminal investigative file falls squarely within the statutory prohibition to disclosure, as interpreted by case law.

Regardless, as allowed under the CRPA, SPD did produce the bulk of the criminal investigative file to an individual who may be seeking civil redress. The only specific records withheld in this case for the protection of an individual's privacy in accordance with the CRPA detail specific criminal history information provided by the Washington State Patrol in conjunction with an SPD investigation related to a suspect that did not result in charges being filed. SEALED RECORDS 116-121. As such, the selected pages also fall within the definition of nonconviction data contained within the CRPA. In this case, there was no request to inspect the information based on a written claim that nonconviction data was inaccurate, and SPD determined not to exercise its discretion under the CRPA to release the selected pages.

The trial court made no specific findings in regard to these selected pages of the investigative file, but the court's oral ruling did state that certain statutory prohibitions do not apply when the subject of the records was also the requester. RP 26-27. The trial court ordered the production of these records and imposed penalties for SPD's failure to do so. In so doing, the trial court ignored SPD's reliance on a statute that prohibits

disclosure, and in fact imposes potential civil and criminal penalties for failure to protect nonconviction data. Further, the trial court failed to consider the mandate in the PRA itself that “[a]gencies shall not distinguish among persons requesting records.” RCW 42.56.080. SPD’s reliance on these statutory mandates was appropriate and the trial court should not have ordered disclosure and imposed corresponding penalties.

**2. SPD Appropriately Applied Another Specific Statute That Precludes Disclosure of Jail Records.**

RCW 70.48.100 states that, except for certain specific and limited exceptions set forth in the statute, the records of a person confined in jail “shall be held in confidence and shall be made available only to criminal justice agencies.” RCW 70.48.100(2). This preclusion to disclosure is recognized in case law holding that RCW 70.48.100(2) limits disclosure of jail records for “legitimate law enforcement purposes only.” *Cowles Pub. Co. v. Spokane Police Department*, 139 Wn.2d 472, 481, 987 P.2d 620 (1999). In rejecting an argument that the statute does not apply when the defendant is longer in jail, the *Cowles* court held that the statutory language was clear, and that jail records do not fall within the purview of the PRA’s disclosure provisions. *Id.*

Here, the trial court acknowledged RCW 70.48.100(2), and even the case law interpreting that section, but stated that the court was unaware

of anything in the law that prohibits the release of jail records to the person who is the subject of the records. RP 27. In so doing, the court ignored the plain terms of the statute that prohibit disclosure, and case law confirming that jail records are not subject to disclosure under the PRA. Jail records may be available to a suspect or person charged with a crime through the discovery process, or even pursuant to the terms of RCW 70.48.100(2) if the person provides written consent. But here, in the context of a request under the PRA, SPD was correct in relying on the plain terms of the statute that prohibit disclosure of jail records, and the general terms of the PRA which state that “[a]gencies shall not distinguish among persons requesting records.” RCW 42.56.080. The trial court should not have ordered disclosure and imposed corresponding penalties for SPD’s application of these clear statutory mandates regarding jail records and the PRA.

**F. The Trial Court Abused Its Discretion With Its Award Of The Maximum Per Day Penalties Under The Public Records Act.**

Upon finding a violation of the PRA, RCW 42.56.550(4) requires an award of per day penalties, but provides that it “shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day.” RCW 42.56.550(4). Thus, a trial court’s imposition of per day penalties is

properly reviewed under an abuse of discretion standard. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.* citing *Mayer v. Sto Indust., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2010). A trial court’s decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that “no reasonable person would take.” *Id.*

Although the determination of the appropriate per day penalty is within the discretion of the trial court, the Washington Supreme Court has provided guidance to trial courts in the exercise of that discretion. First, there should not be any presumptive “starting point” in a consideration of the appropriate penalty. *Id.* at 466. The trial court must consider the full range of potential penalties, from five (\$5.00) to one hundred dollars (\$100.00) per day. *Id.* Further, the Supreme Court provided a list of sixteen non-exclusive factors for consideration regarding the imposition of penalties in the trial court in order to provide more predictability to parties, and to provide a framework for meaningful appellate review.<sup>9</sup> *Id.*

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<sup>9</sup> Mitigating factors that serve to decrease the penalties are (1) a lack of clarity in the PRA request, (2) the agency's prompt response or legitimate follow-up inquiry for clarification, (3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions, (4) proper training and supervision of the agency's

at 468. The *Yousoufian* court recognized that the factors may overlap, and may not apply equally or at all in every case. *Id.*

In the *Yousoufian* case, the court applied the factors to a case involving the largest county in the state and an egregious set of facts where “over a period of several years the county repeatedly failed to meet its obligations under the PRA” including “years of delay and misrepresentation on the part of the county.” *Id.* at 456. The Supreme Court stressed the county’s “grossly negligent compliance” with the PRA in response to requests for records related to a three hundred million dollar public project of extreme public importance subject to impending referendum at the time of the requests. *Id.* at 462-463. Applying the factors, the Supreme Court itself determined that a per day penalty of

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personnel, (5) the reasonableness of any explanation for noncompliance by the agency, (6) the helpfulness of the agency to the requestor, and (7) the existence of agency systems to track and retrieve public records.

Aggravating factors that serve to increase the penalty are (1) a delayed response by the agency, especially in circumstances making time of the essence, (2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions, (3) lack of proper training and supervision of the agency's personnel, (4) unreasonableness of any explanation for noncompliance by the agency, (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency, (6) agency dishonesty, (7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency, (8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency, and (9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case. *Id.* at 467.

forty-five dollars (\$45.00) per day was a sufficient penalty under the facts of that case. *Id.* at 470.

In this case, the trial court provided no analysis or application of the sixteen nonexclusive factors provided as guidance by the Supreme Court. Instead, the trial court imposed a penalty of five dollars (\$5.00) per day for the time period from the Plaintiff's initial public disclosure request in September of 2009 to the date of the last witness interview, which the trial court considered the date the investigation was completed. From the date of the last witness interview until the date of the trial court's ruling on Plaintiff's motion for an order to show cause, the trial court imposed the maximum one hundred dollar (\$100.00) per day penalty. In so doing, the court stated that "[w]hen the withholding has been intentional, then the court, I think, must go to the maximum penalty under the PRA." RP 27.

The trial court abused its discretion in failing to even consider or apply the correct legal standard for guiding the determination of per day penalties. Rather than complying with the holding in the *Yousoufian* case, the trial court did in fact begin with a "starting point" at the top of the statutory range in its determination of the appropriate penalty.

Most importantly, the trial court imposed the maximum per day penalties based on a completely untenable interpretation of the PRA's penalty provisions that finds no support in case law. For example, in

every instance where an agency applies an interpretation of a PRA exemption to redact or withhold a record in response to a PRA request, the agency's action is "intentional." Thus, under the trial court's rationale, whenever a court determines that an agency improperly redacted or withheld a record, the court must impose the maximum per day penalty. Applying that reasoning, the imposition of a penalty is completely mechanical and a trial court effectively exercises no discretion at all.

There is nothing to support the trial court's rationale in imposing maximum per day penalties. In fact, in a recent decision dealing with the amount of per day penalties, the Washington Supreme Court upheld a penalty of eight (\$8.00) dollars per day in a case where an agency intentionally and wrongfully withheld records. *Sanders v. State*, \_\_\_ P.3d \_\_\_, 2010 WL 3584463 (2010). In that case, the court held that records were improperly withheld as attorney-client privileged communication, but found nothing to indicate that the agency had acted in bad faith. *Id.* at 17. Thus, even though the withholding was "intentional," an award of penalties at almost the statutory minimum was not an abuse of discretion.

In this case, the City has shown that SPD acted in compliance with a correct interpretation of the law, and that all of the redactions applied and records withheld were justified pursuant to exemptions and

preclusions to disclosure under the PRA. Thus, no per day penalties are warranted in this case.

But even assuming per day penalties were warranted, by applying the proper test, as set forth in the *Yousoufian* decision, the trial court should have considered the full range of penalties and considered the factors set forth in that case. The primary *Yousoufian* factors that apply with respect to the records withheld in this case are whether SPD's actions were in good faith, and the reasonableness of SPD's application of exemptions. Here, the record shows that, in applying minimal redactions and withholding selected records, SPD acted in compliance with statutory prohibitions to disclosure, and applied other exemptions for the sole purpose of protecting essential law enforcement investigative functions to protect the safety of the general public and the identity of innocent individuals. In prior decisions, courts have concluded that an agency's application of exemptions for the purpose of protecting third parties justifies minimum per day penalties. *ACLU v. Blaine School District*, 95 Wn.App. 106, 114, 975 P.2d 536 (1999).

Rather than consider the full range of penalties, the trial essentially started and ended its consideration of per day penalties at the upper end of the statutory range. Further, the trial court presumably believed that SPD acted in bad faith by "intentionally" withholding records. But the proper

test is not whether the records were intentionally withheld, rather the proper test is whether there is any indication of bad faith. Bad faith is defined in *Black's Law Dictionary* as “[d]ishonesty of belief or purpose.” *Black's Law Dictionary* (9<sup>th</sup> ed. 2009). Here, SPD applied a correct interpretation of the law, and carefully applied limited redactions to over one hundred pages of responsive records in order to protect the public. SEALED RECORDS pages 1-111. There is nothing in the record to indicate SPD acted in bad faith. The upper end of the penalty range must be reserved for the most egregious instances of intentional non-compliance with clear evidence of bad faith. In this case, if any penalty is imposed, award of a penalty other than the minimum authorized is an abuse of discretion.

**G. The Trial Court Abused Its Discretion In Its Award Of Attorney Fees That Included Non-legal Work Performed Prior To Actual Litigation, And Otherwise Excessive Time Spent On Successful Claims.**

A party who “prevails against an agency” is entitled to “reasonable” attorney’s fees “incurred in connection” with litigation enforcing the provisions of the PRA. RCW 42.56.550(4). A trial court’s ruling on the amount of attorney fees will be reviewed for an abuse of discretion. *Kitsap County Prosecuting Attorney’s Guild v. Kitsap County*, 156 Wn.App. 110, 120, 231 P.3d 219 (2010). In the recent *Sanders*

decision the Supreme Court confirmed that, where PRA litigation involves several disputed issues, and an agency ultimately prevails on some of those issues, the court should award attorney's fees only with respect to the portion of Plaintiff's attorney work devoted to the successful issues. *Sanders v. State, supra* at ¶ 77. Similarly, if an agency successfully litigates the application of exemptions with respect to some records, any award of fees and costs to a Plaintiff must be discounted accordingly. *Id.*, citing *Limstrom v. Ladenburg*, 136 Wn.2d 595, 616, 963 P.2d 869 (1998).

**1. If This Court Finds In The City's Favor On Any Issues Presented, It Should Reduce An Award Of Attorney Fees Accordingly.**

In this appeal, the City argues that the trial court erred in its application of the law with respect to multiple issues. If this Court holds in favor of the City on any of those issues, it should order a reduction of attorney's fees accordingly. For example, in the *Sanders* case, the Supreme Court affirmed the trial court's award of only a percentage of the requested fees. *Sanders v. State, supra* at ¶ 77. In that case, because the Plaintiff prevailed on only one of three secondary legal issues, the Supreme Court upheld an award of only 37.5 percent of the requested fees. *Id.* The Court also held that, because the agency appropriately claimed exemptions for 95 percent of the records at issue, any fees and costs should be "deeply discounted." *Id.*

The City assigns error to several legal issues included in the trial court's decision. In addition, the City argues that exemptions apply to multiple portions of the criminal investigative file, which the trial court nevertheless ordered released essentially without redaction. Under the *Sanders* decision, even if this Court finds a PRA violation, a ruling in favor of the City on any of the legal issues, or a ruling that any exemptions were justified, requires that this Court order fees reduced accordingly.

**2. Awarding Attorney's Fees For Non-Legal Work Performed Prior To Litigation Is Not Justified Under the PRA.**

The trial court issued an order with findings stating that Plaintiff should receive a fee award that included payment for work on the initial public disclosure requests at issue and subsequent correspondence, all of which occurred prior to actual litigation. CP 342-344. But Washington case law on this issue, in the context of the PRA, found such fees to be improperly awarded. *Yacobellis v. City of Bellingham*, 64 Wn.App. 295, 825 P.2d 324 (1992). In the *Yacobellis* case, the appellate court upheld a trial court's reasoning that, because the PRA permits only those costs and fees "incurred in connection" with the litigation, no fees should be awarded for a period of over one year spent in preparation for, but prior to, the commencement of the original civil action. *Id.* at 298. Accordingly, the *Yacobellis* court concluded that attorney fees not covered by the

attorney fees provision itself should not be permitted to bootstrap their way into the PRA's statutory award. *Id.* at 304. Moreover, in any calculation of fees, the court should consider the type of work performed by the attorney. *ACLU v. Blaine School District*, 95 Wn.App. 106, 118, 975 P.2d 536 (1999)(emphasis added).

The City acknowledges that a litigant may have a right to reimbursement for reasonable and successful PRA litigation costs. But it is not legally justified, and it does not further the public purpose of the PRA, to award City taxpayer funds under the PRA to subsidize an attorney's representation of a criminal defendant, or to subsidize the defendant's use of an attorney to make a public disclosure request.

The billing records submitted by Plaintiff contain multiple entries describing work that consists of drafting and reviewing emails and letters related to public disclosure requests submitted to SPD. This litigation did not commence until August of 2010. But from August 28, 2009 through May 14, 2010, virtually every billing entry submitted in support of a fee award is related to either drafting and reviewing correspondence with SPD or reviewing records provided. CP 237-242. The total billed amount during that timeframe is approximately eleven thousand five hundred (\$11,500). *Id.* Clearly, that work is not "in connection" with PRA litigation and should not be subsidized by City taxpayers.

**3. The Trial Court Abused Its Discretion By Awarding Excessive Attorney Fees.**

The lodestar method is appropriate for calculating attorney's fees under the PRA. *West v. Port of Olympia*, 146 Wn.App. 108, 123, 192 P.3d 926 (2008). Applying this method, a court must determine the reasonableness of the hourly rate and number of hours, and then exclude any unnecessary or duplicative hours. *Id.* at 122 (citing *Mahler v. Szucs*, 135 Wn.2d 398, 433-434, 957 P.2d 632 (1998)).

In the trial court, Plaintiff claimed an hourly rate of two hundred and ninety-five dollars (\$295.00) for the primary attorney assigned to the case, and up to four hundred and seventy five (\$475.00) per hour for the work of other attorneys at the firm. CP 237-254. Plaintiff's attorneys claimed a total amount of approximately one hundred and eighty (180) hours expended in this limited litigation. CP 237-254. Plaintiff's attorneys claimed a total of approximately fifty thousand dollars (\$50,000) in total fees, which the trial court reduced by only nine thousand dollars (\$9,000) without any explanation. CP 342-344.

Plaintiff's attorneys did not submit any evidence that two hundred and ninety-five dollars (\$295.00) to four hundred and seventy five (\$475.00) is in line with the prevailing market rate for public records representation in Seattle. In fact, in a recent public records case involving the Uniform Trade Secrets Act, State Environmental Policy Act, and

attorney client communications, the Court affirmed the trial court's holding that "\$300 per hour is not reasonable for a case of this nature" and reduction of the hourly fee to what the court considered a reasonable hourly rate of two hundred and fifty dollars (\$250.00). *West v. Olympia*, 146 Wn. App. at 123.

In determining whether the number of hours expended is reasonable, a court should exclude wasteful, duplicative time, in addition to hours spent on unsuccessful theories or claims. *Mahler*, 135 Wn.2d at 434. When considering the limited amount of briefing and one court hearing involved in this case, seeking reimbursement for a total of approximately one hundred and eighty (180) hours is excessive on its face, and includes the unnecessarily duplicative work of four separate attorneys.

There were no depositions or discovery requests in this case. Plaintiff's legal work consisted of drafting a complaint, a nine-page motion to show cause, and a five-page reply brief. The only court hearing in this matter lasted less than one hour.

In one case dealing with PRA litigation, the appellate court upheld the trial court's determination that that a total of thirty six and one half (36.5) hours was "a liberal amount of time" for all attorney work at the trial court level. *ACLU v. Blaine School Dist. No. 503*, 95 Wn.App. 106, 975 P.2d 536 (1999). It is inconceivable that one hundred and eighty

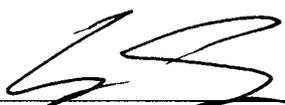
hours (180) is justified and reasonable for the limited legal work involved in this expedited case. If this Court upholds a finding of a PRA violation, it should order that the total number of hours billed be reduced to account for unnecessary and duplicative work.

#### V. CONCLUSION

SPD acted in full compliance with the PRA in its response to Plaintiff's public disclosure request. By incorrectly interpreting the PRA's provisions, the trial court's decision in this case fundamentally conflicts with well-established Washington law and introduces novel and unprecedented burdens on public agencies. This court should reverse the trial court and order the trial court to enter judgment for the City.

DATED this 15<sup>th</sup> day of October, 2010

PETER S. HOLMES  
Seattle City Attorney

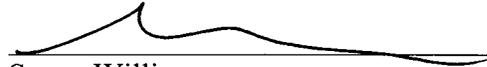
By:   
\_\_\_\_\_  
Gary Smith, WSBA # 29718  
Attorneys for Appellant  
City of Seattle Police Department

**CERTIFICATE OF SERVICE**

I, certify that on this date I caused a copy of Appellant's Opening Brief to be filed with the court and served by legal messenger on:

Patrick Preston  
McKAY CHADWELL, PLLC  
600 University Street, Suite 1601  
Seattle, WA 98101

Signed at Seattle, Washington, this 15<sup>th</sup> day of October, 2010.

  
Susan Williams

COURT OF APPEALS  
STATE OF WASHINGTON  
2010 OCT 15 PM 5:02

## **APPENDIX A**

## Description of Exemptions and Preclusions to Disclosure That Apply to SEALED RECORDS

<p>Pages 1-111</p>	<p>Witness and victim names and identifying information related to a criminal investigation of an alleged violent assault redacted pursuant to RCW 42.56.240(2) to protect their safety. See Appellant's Opening Brief at IV(C).</p> <p>Alternatively, witness and victim names and identifying information related to a criminal investigation of an alleged violent assault redacted pursuant to RCW 42.56.240(1) as essential to effective law enforcement. See Appellant's Opening Brief at IV(D).</p>
<p>Pages 112-113</p>	<p>January 13, 2010 Decline Memo from Marc Mayo, Assistant City Attorney with the Seattle City Attorney's Office regarding SPD Incident No. 09-264202 setting forth analysis regarding decision not to file criminal charges.</p> <p>Document withheld pursuant to RCW 42.56.240(1) as essential to effective law enforcement as it provides a detailed analysis of how a suspect may avoid an investigation and prosecution. See Appellant's Opening Brief at IV(D).</p> <p>Alternatively, document withheld pursuant to RCW 42.56.290 as attorney work product as it sets forth the thoughts and mental impressions of an attorney regarding his legal analysis of decision not to file charges. See Appellant's Opening Brief at IV(D).</p>
<p>Page 42 (portion of log entry 012010 1400)</p>	<p>Quoted content of January 13, 2010 Decline Memo from Marc Mayo, Assistant City Attorney with the Seattle City Attorney's Office regarding SPD Incident No. 09-264202 redacted pursuant to RCW 42.56.240(1), and alternatively RCW 42.56.290 (See Pages 112-113 above).</p>
<p>Pages 114-115</p>	<p>King County Jail records of a person held in custody withheld pursuant to RCW 70.48.100(2). See Appellant's Opening Brief at IV(E)(2).</p>
<p>Pages 116-121</p>	<p>Washington State Patrol and Washington Department of Licensing criminal history record information provided to SPD in conjunction with an investigation of SPD Incident No. 09-264202. See Appellant's Opening Brief at IV(E)(1).</p>

Page 40 (log entry  
091509 1500)

Content redacted pursuant to RCW 42.56.240(1) as essential to effective law enforcement as it provides a detailed analysis of how a suspect may avoid an investigation and prosecution. See Appellant's Opening Brief at IV(D).

## **APPENDIX B**

CONFIDENTIAL

Honorable Catherine Shaffer

2010 OCT -4 AM 10:30

SEATTLE CITY ATTORNEY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

EVAN SARGENT,

Plaintiff,

vs.

SEATTLE POLICE DEPARTMENT,

Defendant.

No. 10-2-28605-5 SEA

ORDER TO FILE RECORDS UNDER  
SEAL PENDING APPELLATE REVIEW

[Proposed]

THIS MATTER has come before the Court on Defendant's Motion for Order to File Records Under Seal Pending Appellate Review, and the Court having read and considered the following herein:

1. Defendant's Motion for Order to File Records Under Seal Pending Appellate Review;

2. *Absence of any* Plaintiff's Response to City's Motion for Order to File Records Under Seal ~~(if any)~~;

3. ~~Defendant's Reply to Plaintiff's Response (if any)~~

4. ~~All records, documents and pleadings filed in this action;~~

5. \_\_\_\_\_

ORDER TO FILE RECORDS UNDER SEAL PENDING APPELLATE  
REVIEW - 1

Peter S. Holmes  
Seattle City Attorney  
600 Fourth Avenue, 4th Floor  
P.O. Box 94769  
Seattle, WA 98124-4769  
(206) 684-8200

1  
2 A. Findings of Fact:

- 3 1. The City submitted records as Exhibits A, B, C and D attached to the  
4 Declaration of Gary T. Smith in Support of Defendant's Response to  
5 Plaintiff's Motion for Order to Show Cause;
- 6 2. The City submitted records as Exhibits E and F attached to the Declaration of  
7 Gary T. Smith in Support of Defendant's Response to Plaintiff's Motion for  
8 Reconsideration of the Court's August 26, 2010 Order;
- 9 3. The City has timely appealed the Court's August 26, 2010 Order to Produce  
10 Records;
- 11 4. To ensure a complete record and an effective appellate review of the Court's  
12 August 26, 2010 Order, all records that the City submitted for review *in*  
13 *camera* should be filed with the Clerk of the Court under seal pending the  
14 resolution of the appellate review process.

15 NOW THEREFORE,

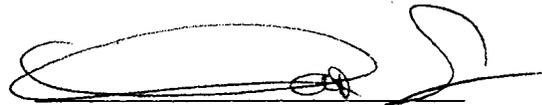
16 It is ORDERED:

- 17 1. The City's Motion for Order Sealing Court Records Pending Appellate Review is  
18 GRANTED.
- 19 2. The following documents are sealed pursuant to GR 15(c)(2) and LR 26(c) upon the  
20 Defendant's submission of the documents to the Clerk of the Court in compliance with  
21 LR 79(d)(6) and until such time as the appellate review process is complete:  
22  
23

- 1 (a) Exhibits A, B, C and D attached to the Declaration of Gary T. Smith in  
2 Support of Defendant's Response to Plaintiff's Motion for Order to Show  
3 Cause;  
4 (b) Exhibits E and F attached to the Declaration of Gary T. Smith in Support  
5 of Defendant's Response to Plaintiff's Motion for Reconsideration of the  
6 Court's August 26, 2010 Order;

7 3. \_\_\_\_\_  
8 \_\_\_\_\_  
9

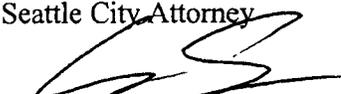
10 DATED this 30 day of September, 2010

11 

12 Judge Catherine Shaffer  
13 King County Superior Court Judge

14 Presented by:

15 PETER S. HOLMES  
16 Seattle City Attorney

17 By: 

18 Gary T. Smith, WSBA # 29718  
19 Assistant City Attorney  
20 Attorneys for Defendant City of Seattle

21 Copies Received, Notice of Presentation Waived:

22 By: \_\_\_\_\_

23 Patrick J. Preston, WSBA # 24361  
McCay Chadwell, PLLC  
Attorney for Plaintiff

ORDER TO FILE RECORDS UNDER SEAL PENDING APPELLATE  
REVIEW - 3

**Peter S. Holmes**  
Seattle City Attorney  
600 Fourth Avenue, 4th Floor  
P.O. Box 94769  
Seattle, WA 98124-4769  
(206) 684-8200