

Portions of pgs
2, 5, 6, 9, all of 10, 11,
13, 15, 19 + 20 - stricken
by rulings dated 12/18/2012

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Nov 05, 2012, 4:15 pm
BY RONALD R. CARPENTER
CLERK

No. 87417-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

h/h
RECEIVED BY E-MAIL

EVAN SARGENT,

Petitioner,

v.

SEATTLE POLICE DEPARTMENT,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER SARGENT

Patrick J. Preston, WSBA #24361
Thomas M. Brennan, WSBA #30662
Attorneys for Petitioner Evan Sargent
McKay Chadwell, PLLC
600 University Street, Suite 1601
Seattle, WA 98101-4124
(206) 233-2800

 ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR AND ISSUES PRESENTED	4
	A. Assignments of Error	4
	B. Issues Presented	5
III.	STATEMENT OF THE CASE	6
IV.	SUPPLEMENTAL ARGUMENT	11
	A. Standard Of Review	11
	B. Under <i>Cowles</i> , The PRA Exemption For Records Of An Open And Active Investigation Ends When Police Refer An Investigation To A Prosecutor For A Charging Decision	12
	C. A Law Enforcement Agency Violates The PRA Under <i>Neighborhood Alliance</i> By Failing To Respond To A Request For Clarification And Disclosure Of Withheld Records Of Completed Criminal And Police Misconduct Investigations	14
	D. Police Misconduct Investigations Are Not Subject To The <i>Newman</i> Categorical Exemption	15
	E. Collateral Estoppel Bars Relitigation Of A Witness Identity Exemption For Criminal Investigation Records On Remand Where The Agency Presented No Evidence To The Trial Court That A Witness Sought Nondisclosure	17
	F. A Law Enforcement Agency Violates The PRA Under <i>Bainbridge Island</i> By Withholding Nonconviction History Records From The Requestor	17
	G. Aggravating Factors For A PRA Penalty Should Include An Agency's Motivation To	

	Protect An Employee Accused Of Misconduct And Concealment Of Information Relevant To An Appeal Until After The Court Of Appeals Issued An Opinion Terminating Review	18
H.	The Court Of Appeals Erred In Denying Sargent's Two RAP 9.11 Motions Regarding SPD's Violation Of The PRA By Withholding Misconduct Investigation Records	19
V.	CONCLUSION.....	20

TABLE OF CASES, STATUTES & OTHER AUTHORITIES

CASES

Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398 (2011) 16, 17, 18, 19

Brouillet v. Cowles Publ'g Co., 114 Wn.2d 788 (1990)..... 11

Cowles Pub. Co. v. Spokane Police Dept., 139 Wn.2d 472 (1999) passim

EPA v. Mink, 410 U.S. 73 (1973)..... 3

Franklin Co. Sherriff's Office v. Parmelee, __ Wn.2d __, 285 P.3d 67 (2012) 2

Hanson v. City of Snohomish, 121 Wn.2d 552 (1993)..... 17

Newman v. King Co., 133 Wn.2d 565 (1997) passim

Progressive Animal Welfare Soc. v. University of Washington, 125 Wn.2d 243 (1994) 12

Sanders v. State of Washington, 169 Wn.2d 827 (2010) 15

Sargent v. Seattle Police Department, 167 Wn. App. 1 (2011) passim

Seattle Times Co. v. Serko, 170 Wn.2d 581 (2010) 13, 16

Violante v. King Co. Fire Dist. No. 20, 114 Wn. App. 565 (2002) 13

Yousoufian v. Office of Ron Sims, 168 Wn.2d 444 (2010) 12, 18, 20

STATUTES

5 USC 552 3

RCW 10.97.080 17

RCW 42.56.030 3, 15

RCW 42.56.080 9, 13

RCW 42.56.100 9, 13

RCW 42.56.210(1) 18

RCW 42.56.240(1) 12, 15

RCW 42.56.520 13

RCW 42.56.540.....	2
RCW 42.56.550(1)	1, 17
RCW 42.56.550(3)	11, 12, 16
RCW 42.56.550(4)	18, 20

RULES

CrRLJ 3.2.1	7
RAP 13.4(b).....	3
RAP 18.1	20
RAP 9.11	passim

I. INTRODUCTION

Evan Sargent's long road to obtain records from the Seattle Police Department (SPD) of a criminal investigation that never supported charges against him, and a misconduct investigation of the off-duty officer who threatened his life at gunpoint, was paved with SPD's multiple violations of the Public Records Act (PRA), RCW 42.56. At every turn, SPD blocked Sargent's right of access by withholding records under inapplicable exemptions, unlawfully redacting information, failing to comply with self-imposed deadlines, and ultimately ignoring Sargent's final repeated PRA requests. By doing so, SPD hid information about officer misconduct from public scrutiny while denying Sargent critical information to clear his name, to participate meaningfully in the misconduct investigation, and to investigate the violation of his civil rights.

Faced with SPD's violations, Sargent filed an enforcement action under RCW 42.56.550(1). The trial court correctly ruled that SPD violated the PRA and did not act in good faith. RP 28. The court ordered SPD to produce unredacted records "posthaste" and imposed a graduated per day penalty that reflected SPD's rising culpability over time. RP 27; CP 218. Rather than comply,

however, SPD continued to withhold records and appealed.¹ Relying on SPD's inaccurate characterizations of the record, the Court of Appeals published a flawed decision affirming and reversing in part. See *Sargent v. Seattle Police Department*, 167 Wn. App. 1, 260 P.3d 1006 (2011).

[REDACTED]

[REDACTED]

[REDACTED] SPD abandoned the exemptions it had claimed previously to withhold the records for over two years, e.g., that nondisclosure was "essential" to effective law enforcement.

[REDACTED]

[REDACTED]

[REDACTED] Sargent moved for reconsideration based on the failure of the Court of Appeals to weigh key parts of the record, misapplication of controlling precedent, intervening Supreme Court decisions, and the newly produced records Sargent cited in two RAP 9.11 motions. The Court of Appeals summarily

¹ Prior to Sargent's PRA action, SPD also never pursued a judicial determination under RCW 42.56.540 that these records were not subject to disclosure, but instead deliberately withheld the records indefinitely. See, e.g., *Franklin Co. Sheriff's Office v. Parmelee*, __ Wn.2d __, 285 P.3d 67, 69 (2012) ("Because agencies are penalized on a per-day basis for improperly denying a records request, an agency's option to quickly seek a judicial determination that the requested records are not subject to disclosure is an important one.").

denied Sargent's motions. On September 5, 2012, the Supreme Court accepted review under RAP 13.4(b).²

In the simplest terms, this case is about a recalcitrant agency, not bureaucratic difficulty. SPD's misapplication of the PRA signals other police agencies to broadly misconstrue exemptions to categorically withhold public records, even for the purpose of hindering access to information on police misconduct. In effect, SPD would convert the PRA into "a withholding statute rather than a disclosure statute." See *EPA v. Mink*, 410 U.S. 73, 79 (1973) (describing impetus for enactment of the analogous Freedom of Information Act, 5 USC 552). This Court's precedent, however, gives force to the express legislative intent under RCW 42.56.030 to construe exemptions narrowly to promote the strong policy of governmental accountability through broad dissemination of information to the public.

The Supreme Court should affirm the trial court's rulings that SPD violated the PRA by withholding and redacting the criminal investigation file, hold that SPD additionally violated the PRA by withholding misconduct investigation and other records, and

² SPD did not seek discretionary review of the portions of the Court of Appeals' decision affirming the trial court in part (regarding PRA violations, see *Sargent*, 167 Wn. App. at 26) and granting Sargent's cross-appeal in part (regarding an additional award of fees and costs, *id.* at 25-26).

remand the case to the trial court for recalculation of the PRA penalty and reimbursement of fees and costs incurred on appeal.

II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

A. Assignments of Error

1. The trial court correctly held, under *Cowles*, that SPD violated the PRA when it denied Sargent's request for the incident report and 911 records a month after the King County prosecutor declined SPD's referral investigation for charging. The Court of Appeals' reversal of the trial court's determination was error.
2. The trial court correctly held, under *Cowles*, that SPD violated the PRA when it withheld, then produced with unlawful redactions, criminal investigation records requested by Sargent a month after the Seattle City Attorney declined SPD's second investigation referral for charging. The Court of Appeal's reversal of the trial court's determination was error.
3. The Court of Appeals' failure to apply *Neighborhood Alliance* to Sargent's unanswered written and telephonic requests for clarification and disclosure of withheld records of completed criminal and police misconduct investigations was error. Had the Court of Appeals' applied *Neighborhood Alliance*, it would have been required to hold SPD violated the PRA.
4. The Court of Appeals' expansion of the *Newman* exemption for records of an open and active criminal investigation to a police misconduct investigation was error.
5. The Court of Appeals' failure to apply the *Cowles* limitation of the *Newman* exemption to its holding that records of the police misconduct investigation were categorically exempt from disclosure was error.

6. The Court of Appeals erred by remanding the case for additional proceedings on the witness identity exemption where SPD presented no evidence that any witness requested non-disclosure during the fully litigated proceedings before the trial court.
7. The Court of Appeals' failure to apply *Bainbridge Island* to the facts of this case was error. Had the Court of Appeals correctly applied *Bainbridge Island*, it would have been required to hold that SPD unlawfully withheld nonconviction history records requested by Sargent.
8. The Court of Appeals erred by failing to weigh two aggravating factors in reviewing the PRA penalty: (a) SPD's motivation to deny Sargent prompt access to records to protect SPD's employee; [REDACTED]

B. Issues Presented

1. Does a law enforcement agency violate the PRA under *Cowles* by: (a) withholding an incident report and 911 records after referring the investigation to a prosecutor's office for a charging decision; and (b), by withholding the complete investigative file after referring the investigation a second time to a prosecutor's office for a charging decision?
2. Does a law enforcement agency violate the PRA under *Neighborhood Alliance* by failing to respond to a request for clarification and disclosure of withheld records for completed criminal and police misconduct investigations?
3. Does the *Newman* exemption for open and active criminal investigations apply to the records of a police misconduct investigation; and if so, does *Cowles* limit this exemption to the period before the investigation is referred to the agency's

disciplinary authority for a decision regarding whether misconduct occurred?

4. Does collateral estoppel bar relitigation of a witness identity exemption for criminal investigation records on remand where the agency presented no evidence to the trial court that a witness sought nondisclosure of his/her identity?
5. Does a law enforcement agency violate the PRA under *Bainbridge Island* by withholding nonconviction history records from the requestor?
6. Should PRA penalty analysis include as aggravating factors: (a) an agency's motivation to protect an employee accused of misconduct and (b) an agency's motivation to conceal information relevant to an appeal until after the Court of Appeals issues an opinion terminating review?

III. STATEMENT OF THE CASE

Sargent repeatedly requested SPD produce records of an incident where an off-duty officer confronted him for parking in an alley and threatened his life at gunpoint before reporting a felony assault to fellow officers, resulting in Sargent's arrest and incarceration. CP 1-94. Two prosecuting authorities, however, declined to charge Sargent with an assault or any crime. CP 7.

Sargent disputes the conflicting facts in the Court of Appeals' decision, which arose from SPD's inaccurate characterizations of the record. The Court of Appeals also misapprehended, or failed to

address, key facts and circumstances. The “chief issue” below was not “whether a request for public records has indefinite effect,” *Sargent*, 167 Wn. App. at 6, but rather the duration of SPD’s PRA violation for withholding unredacted records of the closed investigations through its appeal. The trial court never used the term “standing request” in its oral or written rulings, nor did Sargent in his arguments. Instead, the trial court ruled correctly, as Sargent argued, the records were not exempt when requested.⁴

In his initial PRA request a month after his arrest and the King County prosecutor’s charging decline, Sargent sought a copy of the “incident report”⁵ from his arrest and 911 call records. The trial court relied on *Cowles Pub. Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 987 P.2d 620 (1999), to correctly rule these basic records were not exempt because SPD had referred the criminal investigation to the King County prosecutor for a charging decision; thus, the PRA required production “long ago, at first request.” RP

⁴ Prior to the filing of SPD’s opening appellate brief, SPD’s September 10, 2010 motion to file records under seal for appellate review correctly characterized the trial court’s ruling that the investigation records were not exempt when requested, making no reference to “standing” PRA requests: “In this case, the trial court reviewed all of the criminal investigative records provided for in camera review and essentially held that the PRA exemptions did not apply.” CP 349.

⁵ The incident report contained the same basic investigation allegations SPD publicly disclosed in its Superform report at Sargent’s July 29, 2009 initial court appearance for a probable cause determination under CrRLJ 3.2.1, after which Sargent was released from custody. CP 5, 805-06.

22; CP 213.⁶

The trial court also properly exercised discretion to rely on the October 23, 2009 date of the detective's last interview of a defense witness identified by Sargent, long after SPD's investigation referral to the King County prosecutor on July 29, 2009 for a charging decision, as an aggravating factor to increase the PRA penalty for SPD's withholding the incident report and 911 call records without good faith. RP 22, 28.⁷ Thus, the trial court's reference to the "pending" nature of Sargent's unfulfilled requests for non-exempt records was not a finding that Sargent made any stand-alone request for exempt or non-existent records.

Sargent's February 5, 2010 letter to SPD repeated his initial unfulfilled request and expanded it to the complete criminal

⁶ Contrary to SPD's assertion, "enforcement proceedings" were not alternatively contemplated in Seattle Municipal Court at the time of Sargent's initial PRA request. See Answer To Petition For Review at 8. The assigned detective did not devise a plan to refer his investigation of the same alleged assault for review by the Seattle City Attorney until September 29, 2009. CP 813.

⁷ Sargent's September 10, 2009 letter to SPD reiterated his PRA requests, asked SPD to specify exemptions it was relying on to withhold records, and cited the controlling *Cowles* holding that investigative records were "presumptively disclosable" after arrest and referral to a prosecutor for a charging decision. CP 20-22. Four days later, the assigned detective's chronological notes state that by September 14, 2009, he had "formally" withdrawn his investigation referral from the King County prosecutor. CP 812. No enforcement proceedings were contemplated. Only after Sargent again wrote to SPD regarding these issues in a letter dated September 18, 2009 did the detective devise a plan on September 29, 2009 to "Newmanize" the deficient investigation by referring it to the Seattle City Attorney. He thus received an assurance that the "legal unit" would not release "the rest of the case" to Sargent's counsel. CP 813.

investigation file, including electronic communications, as well as the separate misconduct investigation file. CP 8, 41-42.⁸ In holding SPD “properly” responded to Sargent’s second PRA request, *Sargent*, 167 Wn. App. at 24, the Court of Appeals failed to weigh the extensive follow-up communications SPD required Sargent to make on February 25, 2010 (CP 24-25), March 8, 2010 (CP 27-28), March 9, 2010 (CP 30-31) and March 25, 2010 (CP 33-36) to repeatedly seek records responsive to both of his PRA requests.

[REDACTED]

⁸ Sargent’s February 5, 2010 letter expressly requested copies of electronic records such as email and text message records, but never sought the “metadata” for such records and no such argument was presented by Sargent to the trial court. The Court of Appeals nonetheless devoted a portion of its decision to SPD’s irrelevant discussion of metadata. See *Sargent*, 167 Wn. App. at 21. Obviously, Sargent raises no metadata issue for this Court’s review.

[REDACTED]

[REDACTED]

In sum, the Court of Appeals' decision terminating review contains an erroneous analysis that conflicts with controlling law and neglected dispositive facts from the record.

IV. SUPPLEMENTAL ARGUMENT

A. Standard Of Review

Review of whether an agency proved the applicability of a PRA exemption is de novo. RCW 42.56.550(3); *Neighborhood Alliance*, 172 Wn.2d 702; *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 794, 791 P.2d 526 (1990) ("The agency must shoulder the burden of proving that one of the act's narrow exemptions shields the records it wishes to keep confidential."). The appellate court

"stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence." *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). Courts must weigh the PRA's policy that free and open examination of public records is in the public interest, even if this may cause inconvenience or embarrassment. RCW 42.56.550(3). A PRA penalty is reviewed for an abuse of discretion. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010).

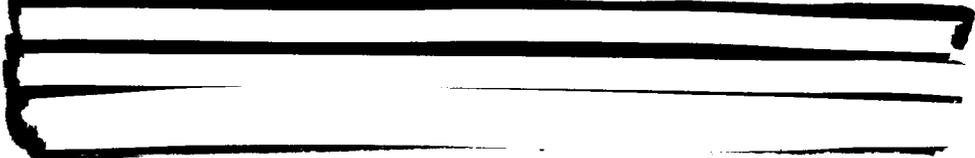
B. Under *Cowles*, The PRA Exemption For Records Of An Open And Active Investigation Ends When Police Refer An Investigation To A Prosecutor For A Charging Decision

In *Cowles*, the Court balanced the public interest in access to criminal investigation records against law enforcement priorities: "[W]here the suspect has already been arrested and the matter referred to the prosecutor for a charging decision . . . the risk of inadvertently disclosing sensitive information that might impede apprehension of the perpetrator no longer exists." *Cowles*, 139 Wn.2d at 477-78. An investigation referral by police for a charging decision ends the exemption of such records under RCW 42.56.240(1) and as discussed in *Newman*, 133 Wn.2d at 565. See also *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 594, 243

P.3d 919 (2010). Thus, an incident report is “presumptively disclosable upon request” after referral to a prosecutor for a charging decision, unless another exemption applies. *Cowles*, 139 Wn.2d at 481.

The trial court correctly ruled under *Cowles* that the incident report and 911 call records were non-exempt when requested because SPD had referred its investigation to the King County prosecutor for a charging decision a month earlier.⁹ The court succinctly distinguished these circumstances from *Newman*, involving the unsolved murder of a Seattle civil rights leader, noting that Sargent’s investigation was not a “whodunit.” RP 22. Sargent’s February 5, 2010 request, which repeated his unfulfilled initial request and expanded it to include the complete criminal investigation file, was not satisfied by SPD’s partial and delayed production of redacted criminal investigation records in March and April 2010. Thus, the trial court correctly ruled that SPD’s

⁹ Because the record shows that SPD failed its burden to prove that any 911 caller requested non-disclosure of their identity, or that non-disclosure of information contained in 911 call records was essential to effective law enforcement, SPD’s withholding of 911 records under the *Newman* categorical exemption violated the PRA under *Cowles*.



violation of the PRA ran from Sargent's initial request through its August 20, 2010 ruling for the per day penalty.

This Court should affirm the trial court's ruling that SPD violated the PRA under *Cowles*, and remand to determine the end date of SPD's violation of the PRA for recalculation of the penalty.

C. A Law Enforcement Agency Violates The PRA Under *Neighborhood Alliance* By Failing To Respond To A Request For Clarification And Disclosure Of Withheld Records Of Completed Criminal And Police Misconduct Investigations

SPD violated the PRA by not responding to Sargent's renewed written (CP 44-46) and telephonic (CP 58) requests for records of completed incident and police misconduct investigations where Sargent also sought clarification and disclosure of the withheld records. *Neighborhood Alliance* held that a requestor's communication for clarification of withheld records is a valid PRA request requiring a response:

In this instance, the agency refused to produce anything at all for Item # 2, saying instead that the PRA "does not require agencies to explain public records. As such, no response is required." CP at 54. This violates the PRA. The request sought public records, not explanations, and if the agency was unclear about what was requested, it was required to seek clarification.

Instead, SPD's productions coincided with completion of the active misconduct investigation, thereby depriving Sargent information for timely review and input.

Neighborhood Alliance, 172 Wn.2d at 728.

The Court of Appeals failed to discuss Sargent's renewed April 21, 2010 written and May 14, 2010 verbal communications repeating his PRA requests. At the time of these requests, SPD's criminal and misconduct investigations were complete and no other exemption applied. Had the Court of Appeals applied *Neighborhood Alliance*, as argued in Sargent's motion for reconsideration, it would have been required to hold that SPD violated the PRA by ignoring these requests. This Court should hold the same as an additional ground to affirm the trial court.

D. Police Misconduct Investigations Are Not Subject To The Newman Categorical Exemption

The Court of Appeals' expansion of the *Newman* investigatory records exemption under RCW 42.56.240(1) to police misconduct investigations was unnecessary and conflicts with the PRA's narrow construction of exemptions under RCW 42.56.030. See *Newman*, 133 Wn.2d at 574. By the time of Sargent's April 21 and May 14, 2010 renewed PRA requests, SPD's misconduct investigation was completed for a determination. Under *Bainbridge*



Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 259 P.3d 190 (2011), the records were subject to disclosure and production. The Court of Appeals did not need to apply a *Newman* analysis and this Court should reject expansion of *Newman* to police misconduct investigations.¹² The public interest in access to investigations of misconduct by armed law enforcement officers, who patrol neighborhoods and interact daily with citizens, is distinguishable from the *Newman* rationale of protecting sensitive information police use to investigate unsolved crimes and to apprehend criminals. The expansion of *Newman* also conflicts with the PRA's policy that free and open examination of public records is in the public interest, even if this may cause inconvenience or embarrassment. See RCW 42.56.550(3).

Lastly, even if *Newman* applied, *Cowles* logically ended the exemption at the investigator's referral to SPD's disciplinary authority for a misconduct determination. See *Serko*, 170 Wn.2d at 594 (holding error to apply *Newman* without *Cowles* limitation). For

¹² SPD argues unpersuasively that because a police misconduct investigation "may evolve into pursuit of criminal charges," the same concerns must exist as in an actual criminal investigation. See Answer To Petition For Review at 16. But any agency audit or internal investigation *might* uncover criminal acts. The primary justification for the categorical *Newman* exemption, however, is "the risk of inadvertently disclosing sensitive information that might impede apprehension of the perpetrator," a concern not present when an agency investigates its own employee. See *Cowles*, 139 Wn.2d at 477-78.

all of these reasons, the Court of Appeals erred by not finding a PRA violation for SPD's nondisclosure of the misconduct file.

E. Collateral Estoppel Bars Relitigation Of A Witness Identity Exemption For Criminal Investigation Records On Remand Where The Agency Presented No Evidence To The Trial Court That A Witness Sought Nondisclosure

SPD failed its burden to prove that an exemption applied under RCW 42.56.550(1) for redaction of witness information. The longstanding doctrine of collateral estoppel bars relitigation of this issue and remand by the Court of Appeals is improper. See, e.g., *Hanson v. City of Snohomish*, 121 Wn.2d 552, 560, 852 P.2d 295 (1993) (collateral estoppel barred relitigation of issue regarding impropriety of police identification procedures).

F. A Law Enforcement Agency Violates The PRA Under Bainbridge Island By Withholding Nonconviction History Records From The Requestor

In *Bainbridge Island*, the Court rejected the argument that the Criminal Records Privacy Act (CRPA) "exempts an entire record . . . from production if it contains any criminal history," and instead held that in response to a PRA request, "RCW 10.97.080 requires redaction of only criminal history record information." See *Bainbridge Island*, 172 Wn.2d at 422-23. Since Sargent sought records from SPD containing his own non-conviction data to challenge his arrest through a civil rights claim, no cognizable

privacy rights existed. Under *Bainbridge Island*, therefore, SPD violated the PRA by categorically withholding records containing Sargent's nonconviction data and the Court of Appeals should be reversed. See also RCW 42.56.210(1) (no PRA exemption applies if redactions can be made to protect privacy rights).

G. Aggravating Factors For A PRA Penalty Should Include An Agency's Motivation To Protect An Employee Accused Of Misconduct And Concealment Of Information Relevant To An Appeal Until After The Court Of Appeals Issued An Opinion Terminating Review

Yousoufian provides a non-exclusive list of aggravating and mitigating factors for imposition of the per day penalty under RCW 42.56.550(4). See *Yousoufian*, 168 Wn.2d at 459-63. Because the trial court did not apply these factors, remand is appropriate. The Court of Appeals' holding that the trial court's penalty was an abuse of discretion, however, was erroneous under *Neighborhood Alliance* and *Bainbridge Island* because of its failure to weigh as aggravating circumstances SPD's repeated delays, which necessitated Sargent's multiple communications on his unfulfilled requests for criminal and misconduct investigation records.

The Court should hold that SPD's motivation to protect the off-duty officer accused of misconduct is an additional aggravating factor supporting a higher PRA penalty. Lastly, SPD's withholding

of unredacted records as "essential" until after the Court of Appeals' decision should be held to constitute gross negligence, bad faith or other improper conduct, consistent with the trial court's finding of bad faith for which SPD did not assign error on appeal. See *Sargent*, 167 Wn. App. at 25 n. 60.

[REDACTED]

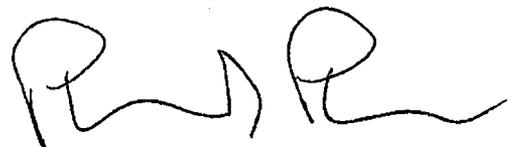
¹³ SPD makes the misleading assertion that its delayed production was a "proactive disclosure of records after the *Bainbridge Island* case," but SPD waited until over a month after the Court of Appeals issued its decision on September 19, 2011 to produce these records. See Answer To Petition For Review at 18. *Bainbridge Island* was issued on August 18, 2011.

[REDACTED]

V. CONCLUSION

This Court should affirm the trial court's ruling that SPD violated the PRA by withholding criminal investigation records and remand for further proceedings, including consideration of aggravating factors for the PRA penalty. In addition, the Court should reverse the Court of Appeals to hold that SPD violated the PRA by failing to disclose and withholding misconduct investigation records. Lastly, Sargent respectfully requests an award of fees and costs on appeal under RAP 18.1 and RCW 42.56.550(4).

DATED this 5th day of November, 2012.



Patrick J. Preston, WSBA No. 24361
Thomas M. Brennan, WSBA No. 30662
McKay Chadwell, PLLC
Attorneys for Petitioner Evan Sargent

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of November, I electronically filed the Supplemental Brief of Petitioner Sargent and this Certificate of Service with the Supreme Court of the State of Washington, in Olympia, Washington, and caused a true and correct copy of the foregoing document to be served via electronic correspondence on the following:

Gary T. Smith
Seattle City Attorney's Office
600 4th Avenue, 4th floor
Seattle, WA 98124-4769
Phone: 206-733-9318
gary.smith@seattle.gov

Ramsey Ramerman
City of Everett
2930 Wetmore Ave.
Everett, WA 98201
Phone 425-257-7000
RRamerman@ci.Everett.wa.us

Judith A. Endejan
Graham & Dunn PC | Pier 70
2801 Alaskan Way - Suite 300
Seattle, WA 98121-1128
Phone 206.624.8300
jendejan@grahamdunn.com

DATED this 5th day of November, 2012 in Seattle, King County, Washington.



Dariene Castro
Legal Assistant
McKay Chadwell, PLLC
600 University Street, Suite 1601
Seattle, WA 98101 4124
Phone: (206) 233-2800
Facsimile: (206) 233-2809
E-mail: ddc@mckaychadwell.com

OFFICE RECEPTIONIST, CLERK

To: Dariene Castro
Cc: gary.smith@seattle.gov; RRamerman@ci.Everett.wa.us; jendejan@grahamdunn.com;
Thomas Brennan; Patrick Preston
Subject: RE: Evan Sargent v. Seattle Police Department -- 87417-4

Rec'd 11/5/2012

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Dariene Castro [<mailto:ddc@mckay-chadwell.com>]
Sent: Monday, November 05, 2012 4:13 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: gary.smith@seattle.gov; RRamerman@ci.Everett.wa.us; jendejan@grahamdunn.com; Thomas Brennan; Patrick Preston
Subject: Evan Sargent v. Seattle Police Department -- 87417-4

Please see attached Petitioner Evan Sargent's Supplemental Brief in regards to:

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

Filed by:

Patrick J. Preston, WSBA #24361
Thomas M. Brennan, WSBA #30662
pjp@mckay-chadwell.com
tmb@mckay-chadwell.com
(206) 233-2800

Dariene Castro
Legal Assistant
(206) 233-2807 Direct | ddc@mckay-chadwell.com



MCKAY CHADWELL, PLLC

1601 One Union Square | 600 University Street | Seattle, WA 98101
www.mckay-chadwell.com | (206) 233-2800 | (206) 233-2809 Fax

PRIVILEGED AND CONFIDENTIAL

This message is private and privileged. If you are not the person for whom this message is intended, please delete it and notify me immediately. Please do not copy or send this message to anyone else.