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SUPREME COURT
STATE OF WASHINGTON
May 12, 2014, 3:59 pm
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NO. 89648-8

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF LAKEWOOD,
Petitioner

v.

DAVID KOENIG,
Respondent.

Filed 
Washington State Supreme Court

MAY 20 2014

Ronald R. Carpenter 
Clerk

AMICI CURIAE BRIEF OF ALLIED DAILY
NEWSPAPERS OF WASHINGTON, WASHINGTON NEWSPAPER
PUBLISHERS ASSOCIATION, AND THE WASHINGTON
COALITION FOR OPEN GOVERNMENT

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 ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS

Amici curiae are Allied Daily Newspapers of Washington, the Washington Newspaper Publishers Association, and the Washington Coalition for Open Government (“WCOG”), collectively “Amici”. The identity of Amici are further described in the accompanying Motion to File Amici Curiae Brief. This case deals with an agency’s burden when it sues a requestor to block release of agency records and a requestor’s ability to recover fees when the agency fails to provide an adequate response to the request. This Court’s decision will directly impact the Amici, who are frequent users of the PRA to inform their readers and constituents. Amici have a legitimate interest in assuring the Court is adequately informed about the issues and impact its decision will have on all record requestors, not only the parties.

II. ARGUMENT AND AUTHORITY

Amici address the agency’s burden in litigation when it sues a requestor to block release of records, whether the records at issue have been proven exempt, and the right of the requestor to recover fees and costs for receiving an inadequate response whether or not the records are deemed exempt. For the reasons set forth below, this Court should uphold the decision from Division Two and reverse the trial court’s order granting

summary judgment to City of Lakewood (“City”) and denying the Motion for Summary Judgment to Koenig.

A. The City Bears the Burden of Proving Exemption and Need for Injunction.

The City of Lakewood (“City”) brought a preemptive suit against David Koenig to declare that driver’s license numbers were exempt, and sought and obtained summary judgment against Koenig without citing a single applicable exemption. The City and trial court shifted the burden to Koenig to prove the numbers were **not** exempt rather than requiring the agency to prove that they were, and the trial court refused to state the exemption upon which it was relying when it held the numbers exempt. RP at 9. This turns the PRA on its head.

Under RCW 42.56.210(3), an agency has a duty to respond to a PRA request with a **correct** written explanation of why withheld or redacted records are exempt. This means the exemptions cited must actually apply to the withheld or redacted records, and the agency must further explain how those exemptions apply to the records.

In a PRA action, the burden is firmly upon the agency to show that it has complied with the PRA’s provisions and that redacted information is covered by an exemption—not on the requestor to show otherwise. RCW 42.56.550(1); **see also Rental Housing Ass’n of Puget Sound v. City of**

Des Moines, 165 Wn.2d 525, 535, 199 P.3d 393 (2009) (“RHA”);

Brouillet v. Cowles Publ’g Co., 114 Wn.2d 788, 791 P.2d 426 (1990).

An agency must decide whether or not it believes a record is exempt and whether it wants to assert that exemption. If an agency chooses to assert an exemption, as the City has done here in redacting driver’s license numbers, an agency must prove an exemption applies and that disclosure of the requested information “would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.” RCW 42.56.540; **Progressive Animal Welfare Society v. University of Washington**, 125 Wn.2d 243, 257-58, 884 P.2d 592 (1994) (“PAWS II”); **Soter v. Cowles Pub’g**, 162 Wn.2d. 716, 756-57, 174 P.3d 60 (2007) .

The agency must prove both the existence of this specific statutory exemption and the injunction harm set forth above. **PAWS II**, 125 Wn.2d at 257-58.

Here, the City has never identified a single statutory exemption that exempts the driver’s license numbers redacted from these records, neither pre-suit, during suit, or on appeal, nor has it proven one applies. It further has not established the **additional** burden it bears of showing substantial and irreparable harm in this case to any person or a vital governmental function. The City concedes there is **not** such exemption, arguing instead

for the courts to infer one based on other irrelevant provisions. Brief of Respondent at 13 (“although the PRA does not contain an express exemption for driver’s license numbers”), 17 (“the PRA itself does not contain a precise exemption for driver’s license numbers”), 17 (“failure to expressly call out and specifically exempt driver’s license numbers may be a textual gap in the PRA.”); Petitioner’s Supp. Brief at 15-19. Courts may not create or infer exemptions that are not explicitly stated in a statute. PAWS II, 125 Wn.2d at 257-58. Koenig asked for records related to the arrest and prosecution of a police officer for patronizing a prostitute, of another for assault, and for a third regarding the investigation of an officer who hit a pedestrian with his patrol car. CP 161-169. The City redacted information from those records including driver’s license numbers and then when Koenig would not confirm he agreed with the redactions, the City sued him seeking summary judgment that the information was exempt. At summary judgment the City did not identify a single relevant exemption that applied, and the trial court refused to state the exemption upon which it relied when it held the records were exempt. RP 9; CP 229. Even though a requestor has no obligation to determine whether records are exempt—that duty is explicitly placed on the agency under RCW 42.56.210(3)—contrary to the City’s representations, Koenig at all times did dispute that driver’s license numbers in these records were exempt,

and repeatedly warned the City that it had violated RCW 42.56.210(3).¹ It was never Koenig's burden as the requestor to prove records were not exempt. It was the agency's obligation to first identify and state an exemption that actually applied and then prove the records were exempt. The agency here failed to identify any statute that exempted the information and failed to prove the records exempt. Having failed in that burden the trial court was obligated to deny the City's motion for summary judgment and grant summary judgment to Koenig. Division Two's decision should be affirmed and the summary judgment orders reversed.

B. Driver's License Numbers in These Records are Not Exempt.

Koenig has thoroughly explained in his briefing why the statutes cited by the City do not and cannot apply to the records at issue here. The City does not even really argue that those exemptions apply. Rather it asks this Court, as it asked Division Two, to create an exemption based on other irrelevant provisions to fill a "gap" it alleges was left by those other provisions, admitting those other provisions do not actually apply to the driver's license numbers in the records here. Br. of Resp. at 13-17; see

¹ See CP 180 line 5 (discovery responses stating no responsive records withheld "in their entirety" but not agreeing responsive records had been improperly redacted); CP 17 ¶ 3.5 (Answer, denying that driver's license numbers are exempt); CP 18 line 1 (Answer prayer for relief, asking court to find "City improperly redacted driver's license numbers"); CP 17 ¶ 4.1 (Answer disputing that City properly redacted driver's license numbers).

also Pet. Supp. Br. at 15-18. The Legislature and the people through the Initiative process create statutory exemptions, not the courts. The Legislature, by the City's own admissions, has not drafted the exemption the City desires. None of the statutes or court rules to which the City alludes apply here.

For example, **Bainbridge Island Police Guild v. City of Puyallup**, 172 Wn.2d 398, 259 P.3d 190 (2011), which the City argues supports redaction of "identifying details" about people generally dealt with a misconduct investigation for which the accused was exonerated and thus his identity was found not to be a matter of legitimate public concern although the details of the investigation were a matter of legitimate public concern. The instant case does not deal with false allegations but rather proven and established allegations, and it does not deal with anonymous accused officers but rather known and named officers whose identity is a matter of public interest. This newly-cited basis for redaction does not support redaction here.

No part of RCW 19.215, related to protections when governmental information is destroyed and disposed of, constitutes an exemption for the information in these records. RCW 42.56.590 does not apply as this is not a security breach of a governmental database, but a selected disclosure of specific records which are not even included in a database. GR 15, 22, 31

and 31.1 do not apply as this is not a court record and the request is governed by the PRA and not a court rule.

Similarly, other provisions cited in the trial court or Division Two and now apparently abandoned as the City fails to mention them, clearly do not apply. For example, RCW 42.56.230(7), the City admitted, applies to information to obtain a driver's license, not the driver's license number actually issued if the application is successful. RCW 42.56.050 is the definition of invasion of privacy to be used in actual exemptions using those terms, not itself an exemption. When the Washington State Supreme Court erroneously attempted to infer a generic privacy exemption in **In re Rosier**, 105 Wn.2d 606, 717 P.2d 1353 (1986), the Legislature immediately stepped in and clarified that exemptions must be stated in a specific statute, and Section .050 was merely introduced as the definition for the privacy right stated in such exemptions, not a stand alone exemption.

RCW 42.56.070(1), belatedly stated in Division Two by the City as a purported basis for this implied/created exemption, is not a stand alone basis for exemption, but rather a provision requiring redaction, as opposed to complete withholding, when exempt information is contained within a record. Again, the exempt information must be based on an actual exemption statute, not .050 or .070(1).

RCW 42.56.240(1) does not apply, as these records cannot constitute investigative records under the terms of that exemption, and the City has failed to prove the information is highly offensive to a reasonable person and of no legitimate concern to the public in this specific context or that it was essential to effective law enforcement to withhold this information in this specific context.

RCW 9A.56.330, which criminalizes possessing someone else's driver's license card itself, does not make knowing the number of such card a crime or the information exempt. The fact that concealed pistol permits are exempt, and that those permits contain a driver's license number, does not mean the driver's license number is exempt. Concealed pistol permits are exempt in their entirety and are so for a variety of reasons, such as preventing prospective criminals from knowing who is and is not legally armed, reasons that have nothing to do with the need for secrecy of all of the specific information on the application for the conceal permit.

Finally, the City belatedly asserts as a new basis the Federal Driver's Privacy Protection Act of 1994 ("FDPPA), 18 U.S.C. § 2721 "et seq." as a basis for exemption (See Pet. Supp. Brief at 18) but fails to explain in the few sentences devoted to it how it (a) applies to these records and (b) why production would not fall within one of the authorized purposes if it did

apply. The FDPPA is not a blanket exemption for driver's license numbers wherever located; it applies to specific information in driver license records, including information the City did not redact, such as addresses and names, illustrating the City did not and does not believe FDPPA applies here.

The City has engaged in a scattershot approach to its duties under the PRA: throwing irrelevant and inapplicable provisions at the wall to see if anything sticks. The City bore the burden below, at Division Two, and here, to prove a specific statute was an exemption that required the redaction of the information from these records in this specific context. The City failed in that burden, and this Court cannot grant the City its wish and create an exemption where none exists.

C. The City Violated the PRA By Failing to Provide an Adequate Exemption Statement.

The PRA requires an agency, when it withholds a requested public record, to do two things: (1) cite an applicable exemption, and (2) provide a brief explanation of how that exemption applies to the records withheld or redacted. See RCW 42.56.210(3) ("Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record

withheld.”). See RHA, 165 Wn.2d at 539 (discussing withholding index requirement); see also WAC 44-14-04004(4)(b) (discussing the two requirements of a proper withholding index (citing exemption and brief explanation)). The PRA is supposed to provide the people access to public records. To that end RCW 42.56.210(3) gives the requestor the right to be informed by the agency, before he or she is sued or has to sue, why requested records are exempt. That right is meaningless unless the exemption statement provided by the agency is both legally correct—citing exemptions that actually apply to the records at issue—and their application to the record sufficiently explained. An agency must provide a brief explanation of “each” withheld record—blanket explanations for entire categories of records are improper. See Sanders v. State, 169 Wn.2d 827, 240 P.3d 120 (2010). An agency’s failure to provide a proper withholding index is a per se violation of the PRA. See Sanders, 169 Wn.2d 827; Citizens For Fair Share v. State Dept. of Corrections, 117 Wn. App. 411, 431, 72 P.3d 206 (2003) (holding agency “violated the [PRA] by failing to name and recite to [requestor] its justification for withholding” portions of records and therefore finding requestor to be prevailing party).

Here, the City failed to cite any statute that actually applied to the driver’s license numbers in these records, belatedly added others as

claimed exemptions in the trial court and appellate litigations it failed to cite at the time of denials, and it failed to explain how any of the exemptions it cited at any time applied to the records redacted. This is a violation of the PRA. The City concedes on appeal none of the cited exemptions actually apply to these records and that they were just illustrations for its argument why a new unwritten provision should be created to cover the redaction.

The need for an accurate and correct citation of exemption in an initial response and an adequate explanation for how they apply to the records at the outset is clear. Requestors require information about the agency's claims of exemption to understand why their government is denying them records and decide whether or not to pursue the request or litigation stemming from the denial. This interest was recognized by the Supreme Court in RHA stating:

Our analysis in PAWS II, however, underscores we were concerned with the need for sufficient identifying information about withheld documents in order to effectuate the goals of the PRA. To sever this important concern from the statute of limitations would undermine the PRA by creating an incentive for agencies to provide as little information as possible in claiming an exemption and encouraging requesters to seek litigation first and cooperation later.

RHA, 165 Wn.2d at 538 n.2 (emphasis added).

The Supreme Court went on in Sanders v. State to find a PRA violation for an inadequate explanation of how a cited exemption applied to withheld or redacted records. Sanders, 169 Wn.2d 827.

This Court realized the need for an adequate explanation of how an exemption applies so those exemptions could be “vetted for validity” by the requestor. Id. at 846. Here, the City—utilizing its throw-it-at-the-wall approach—pre-litigation cited irrelevant statutes as a basis for exemption and failed to explain how they applied to the redacted information. The City at times cited to entire chapters of laws without subparts, and laws seeming to have no relevance to these records, all without any explanation regarding the application or any of the cited exemptions. The City concedes that many of those cited exemptions, upon further examination, did not apply and could not have applied. The City has gathered more irrelevant and inapplicable exemptions in the litigation below and on appeal throwing them at the wall and asking the courts to create an exemption based upon them, still failing to explain how they actually relate to the redacted information here. The City’s behavior here prevented the requestor from knowing what exemptions were being asserted and any means to vet them for validity.

Although the City has the right to cite new exemptions to the courts at trial or on appeal as a basis for affirming an exemption finding, the City cannot avoid liability for its failure to cite those exemptions originally prior to suit. So the fact that the City has cited new statutes on appeal and at trial that it did not cite to Koenig pre-lawsuit is proof of a PRA violation for a failure to cite all exemptions and to explain how they apply. There are many such examples of those newly-claimed statutes, as Koenig's briefs illustrate. The City failed below and on appeal to explain how any of its cited statutes, both original and new, applied to the records here, thus establishing a violation of the PRA for a failure to explain how alleged exemptions apply to the records at issue. The City sought and obtained summary judgment finding the redacted information exempt without stating exactly which exemptions applied to the records or how they applied. The City now concedes none of the cited provisions really apply and that it is using them as ammunition for its request that the courts create one for it to fill what it contends is a "gap" left by the Legislature. The record is clear the City violated the PRA by failing to identify any actual exemption, failing to identify in its initial response even all of the incorrect exemptions the City belatedly raised, and failing to explain how any of the exemptions applied to

these records. Summary judgment should have been granted to Koenig and denied to the City as a result.

D. Koenig Must be Awarded Fees for the City's Provision of an Inadequate Response.

The City's interpretation of Sanders has changed dramatically from its Division Two briefs to its briefing before this Court. Sanders makes clear that there are two distinct wrongs for which one can recover under the PRA. The first is the wrong of providing an inadequate response. The second is the wrong of being denied access to a responsive non-exempt record or part of a record. As the Sanders opinion and the clear language of RCW 42.56.550(4) make clear, fees and costs are to be awarded to requestors who prevail against the agency in an action related to an inadequate response. In contrast, penalties (in addition to fees and costs) are only awarded to the requestor when he or she prevails in an action related to the denial of a record in whole or in part. Here, Koenig was denied an adequate response. The City failed to cite all applicable exemptions it contended applied, the City cited exemptions having no application to the records, and the City persists through this appeal in making up new exemption claims as it goes. The City has never explained how those alleged exemptions actually apply, and now in its briefing concedes many provisions do not actually apply and that it really just asks

this court to create one to fill a gap it alleges was left by the Legislature. Whereas the City originally disputed that Sanders allowed for fees and costs unless a record was proven to have been denied. The City now concedes Sanders allows for fees and costs when an explanation is not provided, but it argues that an explanation must be completely omitted, not merely insufficient or patently erroneous, for a fee award. The clear language of the PRA and Sanders show the City is wrong.

Requestors are entitled to a correct and honest explanation from an agency at the time their requests are denied as to all exemptions the agency contends apply and how those exemptions apply to the records. A requestor is not obligated to prove the agency wrong—the agency bears the burden of proof at all times—but a requestor is entitled to know the basis up front of the agency’s claims so he or she can decide whether or not to pursue litigation stemming from the denial. When a requestor is forced to litigate, as Koenig was here, to obtain an adequate response, the requestor must be compensated his reasonable fees and costs. The statute does not require he or she prove a record was actually withheld that was not exempt to be mandatorily entitled to this fee and cost award. As Division Two correctly held, the trial court erroneously denied Koenig his fees and costs stemming from the fact that the City did not provide an adequate response.

E. The City Violated the PRA by Redacting Non-Exempt Information, Entitling Koenig to Fees, Costs and Penalties.

The City asks this Court to rule the driver's license numbers are exempt and reach the exemption issue. The City bore the burden of proving an exemption applied that mandated redaction of the driver's license numbers in these records. It has failed to so prove. Thus, the City has withheld responsive information in a record that the City has not proven is exempt. No exemption covers the redacted information. The City has violated the PRA by withholding non-exempt information in a record. Koenig thus is entitled not just to fees and costs but also an award of statutory penalties under RCW 42.56.550. The fact that the agency also failed to provide an adequate exemption explanation is, under Sanders, an aggravating factor increasing the amount of penalties to be awarded. So while Koenig must be awarded his fees and costs whether or not the driver's license numbers in these documents are held to be exempt, if the issue of the exempt status of the records is also reached then Koenig must also be awarded penalties as the numbers are not exempt.

F. More is at Stake Here than Just the Impact on Koenig.

This appeal will no doubt decide whether or not Koenig obtains an award of attorney's fees and costs stemming from his trial court and appellate battle of this lawsuit filed against him by the City of Lakewood. This appeal will also likely decide whether or not driver's license numbers

in these specific records have been proven exempt by the City of Lakewood. This Court will also answer questions that will have far reaching impact on every requestor in this state going forward including amici and their members. This Court will decide whether or not it has the power, contrary to binding statutes and decisions, to create an exemption that does not currently exist. It will confirm whether or not a requestor who receives an inadequate response can obtain his fees and costs if he or she is forced to litigate to obtain an adequate one. It will decide whether or not agencies may without risk or consequence hold back exemptions and explanations or make them up as litigation goes along likely forcing lawsuits into courts that would not otherwise have been filed. And finally this Court will send a message to the people of Washington whether or not this Court supports the PRA and its mandate as stated in RCW 42.56.030:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

The PRA and this Court have already held that for information to be withheld a specific statute must require its exemption. Our PRA and this Court have already held that an agency bears the burden of proving records are exempt based on such specific statute, and further proving the injunction harm stated in RCW 42.56.540, to block release of records. Our PRA and this Court have already held that a requestor is entitled to his or her fees and costs in PRA litigation if he or she was not provided an adequate exemption statement and explanation, whether or not records are ultimately established to be exempt or not. This Court cannot rule for the City in this case without contradicting its own binding and relevant authority and contradicting clear language in the PRA related to the above issues.

III. CONCLUSION

For the above reasons, Amici Curiae Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association and the Washington Coalition for Open Government urge this Court to (1) affirm the Opinion of Division Two, (2) reverse both the trial court's granting of summary judgment to the City and the denial of summary judgment to Koenig and (3) award Koenig his fees and costs for the trial court litigation and this appeal.

Respectfully submitted this 12th day of May, 2014.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on May 12th, 2014, I delivered a copy of the foregoing Amici Curiae Brief Of Allied Daily Newspapers Of Washington, Washington Newspaper Publishers Association, And The Washington Coalition For Open Government via email pursuant to agreement to:

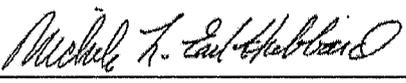
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Re: City of Lakewood v. David Koenig
Supreme Court No. 89648-8

Attached for filing is the

1. Motion for Leave to File Brief of Amici Curiae on Behalf of Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association, and the Washington Coalition for Open Government, in support of Respondent; and
2. Brief of Amici Curiae Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association, and the Washington Coalition for Open Government, in support of Respondent.

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