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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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CITY OF LAKEWOOD,

*Petitioner,*

v.

DAVID KOENIG,

*Respondent.*

Filed *g*  
Washington State Supreme Court

MAY 20 2014

Ronald R. Carpenter  
Clerk *hjh*

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BRIEF OF AMICUS CURIAE ON BEHALF OF THE WASHINGTON  
STATE ASSOCIATION OF MUNICIPAL ATTORNEYS, IN  
SUPPORT OF PETITIONER CITY OF LAKEWOOD.

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Table of Contents

- I. INTRODUCTION ..... 1
- II. STATEMENT OF THE CASE ..... 1
- III. ARGUMENT ..... 2
  - A. **Driver’s license numbers, along with other personal identifiers like financial account numbers, are exempt from disclosure.** .....2
    - 1. The PRA promotes the transparency of government, not the invasion of individual privacy..... 3
    - 2. Driver’s license numbers contained in law enforcement records are exempt from disclosure..... 4
  - B. **Lakewood’s explanation, while not perfect, was adequate. ..6**
    - 1. Lakewood provided enough explanation to inform the requestor of what was redacted and the basis for the redaction, ..... 6
    - 2. Lakewood did not commit “silent withholding.” ..... 8
  - C. **Requiring detailed explanations would impose an unnecessary burden in cases where the redactions are obvious.** ..... 11
- IV. CONCLUSION ..... 14

## Table of Authorities

### Cases

<i>Forbes v. City of Gold Bar</i> , 171 Wn. App. 857, 288 P.3d 384 (2012) .....	11
<i>Progressive Animal Welfare Soc. v. Univ. of Wash.</i> , 125 Wn.2d 243 , 884 P.2d 592 (1994) ( <i>PAWS II</i> ).....	9
<i>Rental Housing Assoc. v. City of Des Moines</i> , 165 Wn.2d 525, 199 P.3d 393 (2009).....	6, 9
<i>Resident Action Council v. Seattle Hous. Auth.</i> , 177 Wn.2d 417, 300 P.3d 376 (2013) .....	3
<i>Sanders v. State</i> , 169 Wn.2d 827, 240 P.3d 120 (2010).....	passim
<i>West v. Washington State Dep't of Natural Resources</i> , 163 Wn. App. 235, 256 P.3d 78 (2011) .....	11

### Statutes

18 U.S.C. § 2725(3) .....	5
RCW 42.56.....	1
RCW 42.56.010(3) .....	3
RCW 42.56.030.....	3
RCW 42.56.050.....	passim
RCW 42.56.070.....	13
RCW 42.56.070(1) .....	3, 4, 7
RCW 42.56.210(3) .....	12
RCW 42.56.230(1)-(3) .....	3
RCW 42.56.230(5) .....	3, 13
RCW 42.56.240 .....	1, 6, 7
RCW 42.56.240(1) .....	3, 4, 7, 13
RCW 42.56.250(3) .....	3, 13
RCW 42.56.420(4) .....	3
RCW 42.56.550(4) .....	1
RCW 42.56.590.....	4
RCW 42.56.590(5)(b) .....	5
RCW 7.69A.030(4) .....	13
RCW 70.48.100(2).....	13
WAC 44.14.040004(4)(b)(ii).....	6

## I. INTRODUCTION

The Washington State Association of Municipal Attorneys (WSAMA) joins in and fully supports the arguments raised by the City of Lakewood. WSAMA urges this Court to reverse the Court of Appeals' Opinion ("Opinion"), in which the Court finds the City liable for a violation of the Public Records Act ("PRA"), Chapter 42.56 RCW.

## II. STATEMENT OF THE CASE

The Opinion finds that Lakewood failed to provide requestor David Koenig with an appropriate response to his public records requests, and therefore is liable for the requestor's attorney fees under RCW 42.56.550(4) and *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010). The Opinion bases this holding on the premise that Lakewood failed to provide a "brief explanation" of why driver's license numbers are exempt. However, Lakewood's response, while perhaps not perfect, was sufficient to comply with the PRA because it gave the requestor notice that driver's license numbers had been redacted, as well as the statutes supporting the redaction, RCW 42.56.240 and 42.56.050. This was enough information to allow the requestor to perform a preliminary assessment of whether the claim of exemption was valid.

The trial court's decision that driver's license numbers are exempt was correct and is not challenged on appeal. Driver's license numbers are not of legitimate concern to the public; rather, their unfettered disclosure would be highly offensive to a reasonable person by creating opportunities for identity theft and other crimes.

Whatever this Court determines with regard to Lakewood's response, WSAMA respectfully requests that the Court carefully craft its ruling so as not to add unnecessary burdens to already overburdened public agencies. Agencies need realistic expectations for the content and quality of their responses. Requiring public records officers, who are already pressed to make timely responses, to provide elaborate explanations of why they redacted information that is unequivocally protected under state law is not a realistic, fair, or necessary expectation. WSAMA urges this Court not to send public agencies down the slippery slope of explaining the obvious in order to avoid being penalized.

### III. ARGUMENT

- A. **Driver's license numbers, along with other personal identifiers like financial account numbers, are exempt from disclosure.**

1. **The PRA promotes the transparency of government, not the invasion of individual privacy.**

Fundamentally, the PRA exists to promote transparency by allowing citizens to monitor the conduct of government. RCW 42.56.030 (“The people . . . 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.”); RCW 42.56.010(3) (defining “public record” as “any writing containing information relating to the conduct of government . . .”). The PRA, by contrast, does not seek to violate the privacy rights of individuals. Several of its subsections create express protections for privacy. *See* RCW 42.56.050; 42.56.070(1); 42.56.230(1)-(3); 42.56.240(1); *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 432, 300 P.3d 376 (2013) (the “PRA’s exemptions are provided solely to protect relevant privacy rights or vital governmental interests that sometimes outweigh the PRA’s broad policy in favor of disclosing public records.”).

In fact, the PRA actively seeks to avoid disclosure of personal details that could lead to identify theft, fraud, hacking, and security breaches. *See* RCW 42.56.230(5) (exempting financial account numbers); 42.56.250(3) (exempting employee social security numbers) 42.56.420(4)

(exempting computer passwords and access codes); 42.56.590 (requiring notification of security breaches resulting in disclosure of personal and financial identifiers, including driver's license numbers). The PRA *requires* agencies to redact personal information from records before making them available for inspection. RCW 42.56.070(1) (“To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record.”).

**2. Driver's license numbers contained in law enforcement records are exempt from disclosure.**

Because of individual privacy concerns, state laws explicitly exempt personal details when they are contained within law enforcement investigative records—the types of records at issue in this case. *See* CP 10-14 (requesting documents within law enforcement investigative files); RCW 42.56.240(1) (exempting law enforcement investigative records when necessary for the “protection of any person's right to privacy”); RCW 42.56.050 (right to privacy applies when “disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.”).

There is no authority supporting the proposition that the driver's license numbers of individual citizens in any way relate to the conduct of government. Disclosing these numbers gives requestors no information whatsoever that would be helpful in monitoring the actions of government. At the same time, the average citizen would be highly offended by disclosure of his or her driver's license number for fear of identity theft. *See* Opinion at FN 3 ("Allowing the release of a private citizen's personal identifying information exposes private citizens to the risk of harm such as identity theft."). Federal and State law both define driver's license numbers as personal, private information. *See* 18 U.S.C. § 2725(3) (defining protected "personal information" to include driver identification numbers); RCW 42.56.590(5)(b) (requiring notification of security breaches disclosing, among other things, driver identification numbers).

Because the driver's license numbers at issue were contained in law enforcement records, it is beyond reasonable dispute that Lakewood properly redacted them. The only question, then, is whether Lakewood's brief explanation to the requestor was sufficient under the PRA.

**B. Lakewood’s explanation, while not perfect, was adequate.**

**1. Lakewood provided enough explanation to inform the requestor of what was redacted and the basis for the redaction.**

Lakewood did not offer an elaborate explanation or legal argument why driver’s license numbers are exempt; however, Lakewood: (1) notified the requestor that it had redacted driver’s license numbers; (2) noted the specific places in the records where the numbers had been redacted; and (3) cited both RCW 42.56.240 and 42.56.050, the correct statutes supporting the exemption. *See* CP 75-76. Given the context, Lakewood’s response should be found to be sufficient enough to avoid subjecting Lakewood to penalties.

This Court has held that brief explanations need not be “elaborate”; rather, they may be truly “brief.” *Rental Housing Assoc. v. City of Des Moines*, 165 Wn.2d 525, 538-39, 199 P.3d 393 (2009), citing WAC 44.14.040004(4)(b)(ii). Brief explanations are sufficient if they “cite the statute the agency claims grants an exemption from disclosure” and “provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper.” *Id.*

In this case, Lakewood provided sufficient information from which the requestor could make such a threshold determination. The requestor

knew all along that among the statutes Lakewood believed supported the exemption were RCW 42.56.240 and 42.56.050, and that Lakewood's fundamental concern was individual privacy. *See* CP 17 (acknowledging in the Answer that Lakewood cited both RCW 42.56.240 and RCW 42.56.050 in support of its redaction of driver's license numbers). With regard to Lakewood's redaction of other personal details—dates of birth—the requestor was able to draw a parallel between the privacy right contained in RCW 42.56.240(1) and defined in RCW 42.56.050. *See* CP 81 (“Your citation to RCW 42.56.050 suggests that the City asserts that dates of birth are exempt under the privacy prong of RCW 42.56.240(1)”). Thus, while the requestor faulted Lakewood for not citing to a specific subsection of RCW 42.56.240, the requestor could easily discern that Lakewood was applying subsection (1) (right to privacy). This deduction was even simpler to make once Lakewood cited RCW 42.56.070(1)—which requires the redaction of personal details when necessary *to prevent violation of the right to privacy*.

Moreover, the requestor accepted without challenge other redactions by Lakewood that relied upon individual privacy under RCW 42.56.240 and RCW 42.56.050, including Lakewood's redaction of the social security numbers of the victims and witnesses. CP 82-83. The

requestor did not challenge these exemptions even though Lakewood provided a similarly perfunctory explanation for the redactions. Why the requestor had enough information to assess the validity of one set of redactions, while simultaneously lacking sufficient information to assess the validity of the other set, is a mystery.

Lakewood's brief explanation, while not elaborate and perhaps not perfect, provided sufficient information to the requestor. Mr. Koenig knew, without a doubt, what was redacted. He knew, without a doubt, that Lakewood believed driver's license numbers were private details not subject to public disclosure. Through his competent legal counsel he has been perfectly able to both vet the exemption and argue it. Therefore, the requestor's arguments that Lakewood provided an insufficient response should be rejected.

**2. Lakewood did not commit "silent withholding."**

The PRA prohibits "silent withholding"—where an agency has withheld records but failed to provide sufficient information to allow the requestor to "vet" the claimed exemptions. *Sanders*, 169 Wn.2d at 846 ("Claimed exemptions cannot be vetted for validity if they are unexplained."), citing *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125

Wn.2d 243, 269-71, 884 P.2d 592 (1994) (*PAWS II*). Unlike the agencies in *Rental Housing* and *Sanders*, Lakewood did not commit silent withholding.

In *Rental Housing*, the City of Des Moines was found to have committed silent withholding when it made broad assertions of work product as the basis for withholding documents, without identifying the individual documents or explaining how or why they were exempt. *Rental Housing*, 165 Wn.2d at 528-29. On those facts, the Court held that the city had provided insufficient information to start the running of the statute of limitations. *Id.* at 541.

In *Sanders*, the agency omitted the brief explanation entirely while claiming that documents it withheld were subject to the work product and attorney/client privileges. *Sanders*, 169 Wn.2d at 837, 840. Only when moving for summary judgment on the requestor's PRA claims did the agency explain how the claimed exemptions applied to the documents that had been withheld. *Id.* at 838.

The withholding of materials claimed as work product or attorney/client privileged is distinguishable from the straight-forward redaction of a driver's license number. With a driver's license number, it may be immediately obvious, depending on the context, what was redacted and that it is a private identifier; indeed, the requestor in this case was able

to discern those two facts. By contrast, with work product and attorney/client privilege, it may not be obvious what has been redacted or why. *Sanders*, 169 Wn.2d at 846, (“The identifying information about a given document does not explain, for example, why it is work product under the PRA’s “controversy” exemption.”).

In other words, with work product and attorney/client privilege, the applicability of the exemptions depends upon the contents of the documents and the underlying facts. *See Sanders*, 169 Wn.2d at 852-53 (assuming, without deciding, that attorney/client privilege applies only to communications pertaining to legal advice, rather than to all communications between a lawyer and client); *Id.* at 854-55 (requiring record to show relationship between attorney/client communication and “controversy”). To justify these exemptions, the agency must be able to answer a number of questions. Is litigation ongoing or reasonably expected? Was the record prepared in preparation for or anticipation of litigation? Did a client seek legal advice from a lawyer? Did a lawyer provide legal advice to a client? Any exemption log claiming work product or attorney/client privilege must generally establish that the documents relate to litigation and/or legal advice; it may not be sufficient simply to cite the statute and claim a privilege applies.

Not so with driver's license numbers. With a driver's license number, the content of the documents and the underlying facts are irrelevant. When contained in law enforcement records, they are exempt private information protected by State law regardless of the underlying facts or circumstances.

In this case, Lakewood did not commit silent withholding. While it did not provide an elaborate rationale, it did disclose to the requestor that driver's license numbers had been redacted and cite the statutes supporting these redactions. Given the type of redaction at issue, this was sufficient information to allow a preliminary determination on the validity of the exemption.

**C. Requiring detailed explanations would impose an unnecessary burden in cases where the redactions are obvious.**

Public agencies are increasingly besieged with voluminous and multiple records requests. *See, e.g., Forbes v. City of Gold Bar*, 171 Wn. App. 857, 288 P.3d 384 (2012), review denied, 177 Wn.2d 1002 (2013) (describing struggle by tiny city of Gold Bar to respond to 82 records requests); *West v. Washington State Dep't of Natural Resources*, 163 Wn. App. 235, 256 P.3d 78 (2011) (DNR legitimately took a year to respond to requestor's voluminous and extremely broad requests). Agencies must continually look for ways to process these requests within ever-shrinking budgets. Adding an

unnecessary requirement for agencies to explain the self-explanatory will not help this process.

Whatever the result in the instant case, WSAMA respectfully requests that this Court not add unnecessary burdens to the tasks of already-overburdened agencies. WSAMA does not dispute that all claims of exemption require a “brief explanation.” RCW 42.56.210(3); *Sanders*, 169 Wn.2d at 846. However, in cases involving very simple and obvious redactions, WSAMA prays this Court to clarify that the brief explanation *can truly be brief*.

Among the high volume of records requests handled by cities, especially municipal police departments, are many straightforward requests—for example, a request for a police file on a particular incident, or request for personnel and disciplinary files on a specific employee. Within these records are numerous examples of simple, obvious, straight-forward redactions that—in the interest of keeping up with the volume of requests—the public agency must be able to make without a great investment of time and energy.

Examples of cases in which an agency should be able to satisfy the “brief explanation” requirement with very little explanation include:

- A disciplinary letter addressed to an employee, with the employee's home address redacted under RCW 42.56.250(3);
- A volunteer roster with the personal phone numbers of volunteers redacted under RCW 42.56.250(3);
- A fill-in-the-blanks employee benefits form with the names of emergency contacts redacted under RCW 42.56.230(5);
- A police report where the name, address, or photograph of a child victim or witness has been redacted under RCW 42.56.070 ("other statutes") and RCW 7.69A.030(4).
- Records of people confined in jail, exempted under RCW 42.56.070 ("other statutes) and RCW 70.48.100(2);
- Employee records with financial account numbers and social security numbers redacted under RCW 42.56.230(5);
- Police investigative records where the social security numbers of victims and witnesses have been redacted under RCW 42.56.240(1).

In all the above cases, and many other scenarios, if the agency simply identifies the material or record redacted (*e.g.*, employee address, jail record, etc.) and cites the statute that provides the categorical exemption,

the requestor has all the information he or she needs to know. In such cases, the agency should not be held liable because the agency did not explain why a categorical statutory exemption applies to the very materials it explicitly covers.

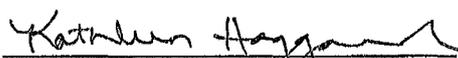
For these reasons, whatever the outcome of the instant case, WSAMA respectfully requests that this Court give the PRA a rational, common-sense interpretation, and articulate an approach that requires more in-depth explanations where explanations are needed, while not requiring public agencies to explain what does not truly require explanation.

#### IV. CONCLUSION

On behalf of the City of Lakewood and the Washington cities for which it speaks, WSAMA respectfully requests that this Court reverse the Opinion of the Court of Appeals.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of May, 2014.

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Attached for filing is the Motion for Leave to File Brief of Amicus Curiae on Behalf of the Washington State Association of Municipal Attorneys, in Support of Petitioner and Brief of Amicus Curiae on Behalf of the Washington State Association of Municipal Attorneys, in Support of Petitioner.

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