

NO. 72159-3-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JANE DOES 1-15, et al.,

Appellants,

v.

KING COUNTY, et al.,

Respondents.

BRIEF OF NEWS MEDIA RESPONDENTS
[CONSOLIDATED RESPONSE TO BOTH APPELLANT BRIEFS]

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Respondent news media entities, defendants below because they made requests under the Public Records Act (“PRA”) for the record at issue, submit this consolidated response to the opening briefs of both the Doe Appellants and Appellant Seattle Pacific University (“SPU”).¹

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This is an action under the PRA. Appellants seek to block public access to a surveillance video that police and prosecutors used in their investigation of a campus shooting. The incident garnered national attention and generated many public records requests – a reflection of the widespread interest in the crime, in the prosecution of the accused perpetrator, and in mass shootings generally.

Under the PRA, Appellants’ burden is steep. To obtain a preliminary injunction against disclosure of a public record, the moving party must show, at the outset and with particularity, that a specific statutory exemption applies to the record. Absent proof of an exemption, the court does not balance the equities and cannot issue the injunction.

Although Appellants cite four PRA exemptions, the trial court correctly found as a matter of law that none applies. Appellants’ arguments stretch the exemptions beyond their plain language and

¹ Respondents are King Broad. Co. (KING-5), KIRO-TV, Inc. (KIRO-7), and Hearst Seattle Media, LLC (seattlepi.com). Hearst was not a party to the injunction proceeding discussed herein but made a later PRA request for the subject record, and is a Respondent in the two appeals that have been consolidated into this one. *See* n.3, *infra*.

precedent, in violation of the PRA's mandate that exemptions be construed narrowly.

First, PRA privacy-based exemptions do not apply if a record is of *any* legitimate public concern. RCW 42.56.050, 240(1). As two Superior Court judges found, the public unquestionably has a legitimate concern in the contents of the surveillance video. Case law recognizes that the public's concern in criminal matters extends to the details of a crime, how it was committed and how it was stopped. *See infra*, § IV.D.2.

Second, an agency may withhold investigative records if "essential to effective law enforcement." RCW 42.56.240(1). But this exemption presumptively does not apply where, as here, the suspect in the underlying crime has already been charged. Overcoming this presumption requires persuasive evidence of an actual threat to a public law enforcement interest. The police and prosecutor in this case agree there is no such threat. Speculation that disclosure will chill future witnesses or undermine private security efforts is insufficient as a matter of law. *See* § IV.D.3

Third, upon timely request, witnesses and victims may have agencies remove their identity from crime records. RCW 42.56.240(2). But the exemption is narrow: it is not a basis for withholding an entire record, and information must be redacted only as needed to keep the record itself from being a direct source of identification. That standard

has been met here by the proposed redactions of the students' faces. *See* § IV.D.1.

Fourth, SPU raises the novel argument that the video is exempt under RCW 42.56.420(1), a rarely invoked exemption for terrorism prevention plans. The video does not fit within the language of the exemption. SPU's broad construction of this provision has no limiting principle; if accepted, it would categorically deny the public access to virtually any image depicting a crime. *See* § IV.D.4

Appellants' threshold procedural arguments fare no better. They contend the trial court secretly held a trial on the merits, failed to treat their motion as preliminary, and failed to give them the equitable benefit of the doubt. But the court did nothing wrong. It recognized its first task was to determine if Appellants had shown an applicable PRA exemption. After finding they had not, the court denied the motions. It would have been reversible error for the court, having found no exemption, to consider other arguments or to proceed further. *See* § IV.B. SPU (but no other party) also argues the video – held and used by police and prosecutors – is not a “public record,” but unquestionably it is. *See* § IV.C.

“[D]etails of the crime,” even uncomfortable ones, “are of legitimate concern to the public and must be disclosed.” *Koenig v. City of Des Moines*, 158 Wn.2d 173, 186-87, 142 P.3d 162 (2006). Surveillance

videos receive no special treatment under the PRA. The video here is not exempt. Thus, consistent with the PRA's mandate of timely access to public records, this Court should expeditiously affirm the trial court.

II. RESTATEMENT OF THE ISSUES

1. Did the trial court err in denying Appellants' motion for a third-party preliminary injunction under RCW 42.56.540, when it found Appellants failed to show any PRA exemption applied?

2. Is a private surveillance video depicting a crime, obtained and used by police and prosecutors to investigate and prosecute the accused perpetrator, a "public record" under RCW 42.56.010(3)?

3. Have Appellants met their burden of establishing that a specific PRA exemption bars release of the redacted video? Specifically:

a. Is pixilation that blurs the faces of those depicted in the video, such that the video itself is not a source of identification, sufficient to comply with RCW 42.56.240(2)'s requirement that "information revealing [their] identity" be redacted?

b. Is a video depicting a high-profile campus shooting exempt under the privacy prong of the PRA's investigative records exemption (RCW 42.56.240(1)) – *i.e.*, is it both of no legitimate public concern, and highly offensive to a reasonable person?

c. Is the video exempt under the “effective law enforcement” prong of the investigative records exemption (*id.*), where the perpetrator has been charged and no threat to the investigation has been shown?

d. Does the PRA’s exemption for terrorism assessments and deployment plans, RCW 42.56.420(1), bar disclosure of a routine surveillance video, where the recording neither constitutes nor is part of such an assessment nor a plan?

III. STATEMENT OF THE CASE

A. Facts Relevant to this Appeal

On June 5, 2014, Aaron Ybarra shot and killed a student on SPU’s campus. He then entered Otto Miller Hall, a busy, 52,600-square-foot campus building, where he shot and wounded two more students and threatened others before an unarmed student monitor tackled and subdued him.² Ybarra was arrested at the scene and admitted to the shooting. CP 211. Prosecutors have charged him with first degree murder, attempted murder and assault, and he has pled not guilty by reason of insanity. CP 215-218.

In the aftermath, numerous parties, including journalists for Respondents, submitted PRA requests to the Seattle Police Department

² CP 2-3, 210-217, 291. See <http://web-apps.spu.edu/roominfo/Building/Details/OMH/> and http://www.spu.edu/depts/facman/proj_mgmt/OttoMillerHallFactSheet.pdf (SPU website describing Otto Miller Hall, accessed January 6, 2015).

(“SPD”) and King County Prosecutor’s Office (“KCPO”), for investigative records related to the incident. CP 4; CP 355.

Among the records responsive to these PRA requests is a surveillance recording, approximately three minutes long, held by both SPD and KCPO. It depicts the activity inside Otto Miller Hall, including Ybarra entering the building, assaulting students, and being subdued and detained. CP 73, 77. SPU had provided this video to SPD in response to a warrant, in order “to aid in the police’s ongoing investigation.” CP 4 ¶ 3.5 (complaint), CP 477 ¶ 6. The video is part of KCPO’s case file and has been provided to Ybarra’s criminal defense counsel. CP 237, 512. The video is the only record at issue in the decision under appeal. CP 562.³

The SPD detective responsible for the shooting investigation, and other SPD and KCPO officials, reviewed the video and determined its disclosure would not threaten the criminal investigation. CP 183, 237, 353. Both agencies recognized the PRA mandates disclosure. CP 73, 77. Both intend to release the video with faces of the depicted individuals (other than Ybarra) blurred through pixilation in order to redact their identities. *Id.*; CP 353 ¶ 13. The trial court, after reviewing the video,

³ Subsequently, SPD and KCPO proposed to release 19 additional videos. On December 15, 2014, the trial court denied Appellants’ motions to enjoin release of those 19 videos. Appellants have now filed separate notices of appeal of that decision (*see* notices of Dec. 22 and 23, 2014). The clerk of this Court advised Respondents on January 6, 2015, that the Court has consolidated those appeals with this one.

found the pixilation was such that “the videotape, itself, is not directly a source of identification.” CP 513.

Respondents have not objected to the proposed pixilation, or to the Doe parties proceeding anonymously in this litigation. But the victims of and key witnesses to the June 5 SPU shooting are not in fact anonymous. They have been widely named in unsealed court documents (including the trial court opinion under review) and other public records, as well by public officials and news reports that also include their photos and descriptions. CP 210-217, 305-316, 510-515; Supplemental Clerk’s Papers (“SCP”),⁴ Sub No. 97 (11/17/14 Stahl Decl.) Exs. G, H.⁵

B. Procedural History

Pursuant to RCW 42.56.540 and an order in Ybarra’s criminal proceeding, SPD and KCPO notified Ybarra, SPU, and counsel for the Doe parties of their intent to disclose the pixilated video as required by the PRA. CP 73-78, 81, 237, 381. Formal notice to Appellants was sent

⁴ Pursuant to RAP 9.6(a), Respondents have filed a supplemental designation of Clerk’s Papers with the trial court. Citations to these SCPs refer to the trial court’s docket.

⁵ For example, one John Doe plaintiff sat for an on-camera interview with KOMO-TV news. CP 314-316. Jane Doe 1, the female student who was wounded in the shooting, issued a public statement in her own name that was published by news outlets, along with her photograph. CP 2, 515; SCP, Sub No. 97, Ex. D. The name and photo of John Doe 2, who “disarmed and subdued” Ybarra, has been widely publicized. CP 2, 210, 306, 511; http://seattletimes.com/html/localnews/2023849404_spucommencementxml.html (June 14, 2014 Seattle Times article and news photos) (accessed Jan. 6, 2015).

June 24 and 25, 2014 (CP 73, 76), but Appellants were aware of the potential release of the video at least two weeks earlier. CP 60, 64, 372.

On June 30, 2014, Ybarra moved in his criminal case to enjoin SPD and KCPO from releasing the surveillance video and other investigative records. Superior Court Judge Jim Rogers denied the motion July 15. In holding the video was not exempt under RCW 42.56.240(1)'s privacy prong (an exemption also asserted by Appellants), Judge Rogers found the PRA's privacy exemption did not apply in part because of the "large public interest in this case, both in the specifics and in the general issues that it raises."⁶ CP 515; RCW 42.56.050.

On July 2, SPU and the Doe parties filed this action seeking, under RCW 42.56.540, to enjoin the video's release. CP 9. Commissioner Velategui granted a temporary restraining order the next day. CP 133.⁷

After full briefing, Judge Helen Halpert held a half-day hearing on Appellants' motions for a preliminary injunction on July 17, 2014.

⁶ The full text of Judge Rogers July 15 Order was submitted to this Court in connection with motions practice in this appeal. *See* 7/28/14 Decl. of Eric M. Stahl, Ex. D.

⁷ While SPU barely mentions the trial court's thorough opinion (except to misrepresent it as a final ruling, as noted below), it quotes at length from the Commissioner's admittedly speculative comments at the TRO hearing about how media requestors might use the video. SPU Br. 13-14. These comments have no record support and no relevance to any PRA exemption. The PRA admonishes that officials have no "right to decide what is good for the people to know and what is not good for them to know." RCW 42.56.030.

CP 521-22; SCP, Sub No. 43.⁸ She took the matter under advisement and reviewed the redacted video *in camera* multiple times. *Id.*; CP 511, 516. On July 22, Judge Halpert denied the motions in a 15-page opinion and order, holding no PRA exemption applied. CP 509-523. The court found:

- Its first task was to determine if Appellants had demonstrated a specific PRA exemption applies. CP 513 (citing *Yakima Cnty. v. Yakima Herald-Republic*, 170 Wn.2d 775, 807-08, 246 P.3d 768 (2011)). “Without a finding that a requested document falls within a statutory exemption, it is inappropriate to apply the more flexible injunction standards” set out in RCW 42.56.540. CP 513.

- RCW 42.56.240(2), requiring removal of crime victim and witness identifying information, was satisfied because the pixilation by SPD sufficiently obscured the students so that the video itself would not be “a source of identification.” CP 514-515.

- Disclosure of the video posed no danger to the students’ physical safety. The court noted that Ybarra was in custody, and

⁸ Appellants supported their motion with multiple declarations, but the Doe parties chose to withdraw proffered student declarations after Judge Halpert denied their motion to file them under seal (a ruling to which they do not assign error). CP 139, 275, 488.

specifically rejected Appellants' suggestion that disclosure could be barred on the theory that it posed a risk of "copycat" crimes. CP 514.⁹

- Like Judge Rogers, Judge Halpert found the video was not subject to any privacy-based exemption. Among other things, she concluded the pixilated video was "without a doubt" a matter of legitimate public concern. CP 515-516; *see* RCW 42.56.050.

- The court rejected Appellants' argument that non-disclosure was "essential to effective law enforcement" under RCW 42.56.240(1). It found Appellants' generalized concerns that disclosure would chill witnesses' future cooperation with law enforcement "too remote and speculative" to satisfy the exemption. CP 517.

- The court rejected SPU's argument that suppression was required by RCW 42.56.420(1), the PRA's exemption for terrorism

⁹ SPU claims the declaration of psychologist Richard Adler supports a finding that the video will inspire "copycat" crimes. SPU Br. 27-28. But the very academic literature Dr. Adler relies on shows predictions about copycat risks are fatuous. The literature, which the court reviewed (CP 514, 521 n.1), in fact *disclaims* any causal connection between media exposure and the incidence of crime. There is *no* "empirical evidence that viewing violent portrayals causes crime....[S]cientific psychology, albeit noble and earnest in its tireless efforts, has simply not delivered the goods. It asserts the causa nexus but doesn't actually demonstrate it." Helfgott, *The Influence of Technology, Media and Popular Culture on Criminal Behavior*, 10 CRIMINAL BEHAVIOR: THEORIES, TYPOLOGIES AND CRIMINAL JUSTICE (Sage 2008), pp. 375-76. "Conclusions concerning media causality from these present data are not possible." Surette, *Self-Reported Copycat Crime Among a Population of Serious and Violent Juveniles*, CRIME & DELINQUENCY (Sage Jan. 2002) p. 62. Almost all of the cited examples of allegedly media-inspired copycat crimes involve *fictional* works. Helfgott, *supra*, pp. 378-387. And where the literature identifies perpetrators who claim inspiration from earlier crimes, the claims are based on the crime itself, *not* particular public records about it. *Id.* 379 (discussing Columbine). *See* CP 150-151 (Adler declaration citing these sources).

prevention plans, on the ground that (i) the video does not fit within the language of the exemption, and (ii) the possibility that a person viewing the video could learn the capabilities of SPU's cameras and thereby undermine campus security was too speculative. CP 518.

Appellants attack Judge Halpert's ruling as procedurally improper for "consolidating the preliminary injunction hearing with a trial on the merits" (SPU Br. 2) and "failing to provide the parties with any notice that it was skipping the trial and going straight to denying the permanent injunction." *Id.* at 14; Doe Br. 12 n.23. But the trial court did nothing of the sort. The memorandum and opinion do not state or suggest the preliminary injunction hearing was a "consolidation" with trial on the merits. The trial court recognized that the matter was before it on motion for "preliminary injunction." CP 510:1, 519:2, 521:2. The court's order only decides the motions presented by Appellants. CP 519 (court "finds and concludes that plaintiffs are not entitled to a preliminary injunction"); CP 523 (ordering that "Plaintiffs' Motions are denied."). SPU also falsely asserts Judge Halpert "ordered the video clip released." SPU Br. 1, 12. The opinion and order contain *no* directive that the video be released. Quite the opposite: the court stayed release to "permit the Plaintiffs to seek discretionary review." CP 523; CP 519.

This Court subsequently accepted review, and extended the stay preventing the video's disclosure. CP 563. The stay remains in effect.

IV. ARGUMENT

A. Standards of Review

1. Principles Applicable To All Public Records Act Cases

Passed by voter initiative in 1972, the PRA is a “strongly-worded mandate for broad disclosure of public records.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The statute requires public access to “**all** public records,” unless a specific statutory exemption applies to that record. RCW 42.56.070(1) (emphasis added); *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 250-51, 884 P.2d 592 (1994) (“PAWS”). A party seeking to block release of a record must identify the basis for the asserted exemption “with particularity.” 125 Wn.2d at 271; *Franklin Cnty. Sheriff’s Office v. Parmelee*, 175 Wn.2d 476, 480, 285 P.3d 67 (2012); RCW 42.56.210(3), .540.

Appellate courts must “take into account the policy of the PRA” and its rules of construction. *Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011). These include the rule that courts and officials cannot withhold non-exempt public records out of concern that they might be used improperly: “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.” RCW 42.56.030. Absent a specific exemption, disclosure is required even when it may cause “inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3); *Koenig*, 158 Wn.2d at 186-87 (disclosing report detailing child sexual assault).

Even records containing exempt information must be disclosed to the maximum extent possible. Exemptions do not apply if exempt information “can be deleted from the specific records sought.” RCW 42.56.210(1); *see also* RCW 42.56.070(1); *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 432-33, 327 P.3d 600 (2013).

Finally, the PRA mandates that it “shall be liberally construed” in favor of disclosure “and its exemptions narrowly construed[.]” RCW 42.56.030; *King Cnty. v. Sheehan*, 114 Wn. App. 325, 338, 57 P.3d 307 (2002). Courts “view with caution any interpretation of the statute that would frustrate its purpose.” *ACLU v. Blaine Sch. Dist. No. 503*, 86 Wn. App. 688, 693, 937 P.2d 1176 (1997); *Mechling v. City of Monroe*, 152 Wn. App. 830, 845, 222 P.3d 808 (2009).

2. Standard For Obtaining A PRA Injunction

A third party’s (or agency’s) right to seek a judicial order blocking release of a public record arises under RCW 42.56.540. *See, e.g., Dragonslayer, Inc. v. Wash. State Gambling Comm’n*, 139 Wn. App. 433,

440-41, 161 P.3d 428 (2007)). Section 540 is the statutory basis that “grant[s] the trial court the authority to enjoin the release of a specific record if it falls within a specific exemption found elsewhere in the [PRA].” *Yakima Cnty.*, 170 Wn.2d at 807-08. See CP 3, 6, 9 (complaint, citing RCW 42.56.540).

A party or agency seeking an injunction under RCW 42.56.540 must show “with particularity” a specific statutory exemption applies. *PAWS*, 125 Wn.2d at 271. It is not enough to merely allege an exemption. Rather, the objector must establish that “the information involved *is in fact* within one of the act’s exemptions[.]” *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 36, 769 P.2d 283 (1989) (emphasis added). The Supreme Court has admonished repeatedly that courts *cannot* enjoin release of a public record unless the objector *first* establishes an applicable PRA exemption. *Id.* (“in an action brought pursuant to the injunction statute (RCW 42.17.330 [later recodified as RCW 42.56.540]), the *initial determination* will ordinarily be” whether the record is exempt) (emphasis added); *PAWS*, 125 Wn.2d at 257-61 (discussing history of PRA injunction provision); *Soter v. Cowles Publ’g Co.*, 162 Wn.2d 716, 757, 174 P.3d 60 (2007) (“to impose the injunction contemplated by

RCW 42.56.540, the trial court must find that a specific exemption applies”).¹⁰

Significantly, these requirements *apply to preliminary injunctions*. In *Franklin County* – an interlocutory appeal from a decision granting a temporary injunction under RCW 42.56.540 – the Court held the objector first “must *show* that the specific records are specifically exempt under the PRA” before the court considers other injunction elements. 175 Wn.2d at 480 (emphasis added). The moving party cannot raise equitable arguments in favor of an injunction (such as Section 540’s additional requirements that disclosure must cause irreparable damage and “clearly not be in the public interest”) “before showing that the specific records were not subject to production under a specific exemption in the PRA.” *Id.*

3. Appellate Standard of Review

Appellants assert the standard of review in cases arising under the PRA is de novo. Respondents acknowledge that is usually the case, with this Court standing in the same position as the trial court with respect to documentary evidence and issues of law. *PAWS*, 125 Wn.2d at 252-53.

¹⁰ See also *Morgan v. City of Federal Way*, 166 Wn.2d 747, 756-57, 213 P.3d 596 (2009); *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 596, 243 P.3d 919 (2010); *Yakima Cnty.*, 170 Wn.2d at 807-08; *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 726, 328 P.3d 905 (2014) (where third party failed to show exemption, “we need not decide whether the PRA injunction standard, RCW 42.56.540, must also be met.”).

But Appellants selectively disregard the showing they must make. Before this Court, they assert that their entitlement to an injunction arises under CR 65 and equitable principles governing injunctions. Indeed, their briefs barely acknowledge Section 540 or the cases applying it.¹¹ They ignore the requirement that a court may not engage in equitable balancing to determine whether a PRA injunction is appropriate, unless and until it first finds a statutory exemption in fact applies.

To the extent Appellants seek reversal on grounds other than the existence of a specific PRA exemption, the standard of review is abuse of discretion, which applies to the grant or denial of a preliminary injunction generally. *Wash. Fed'n of State Emps. v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983). Thus, this Court must affirm the trial court's decision unless "it is based on untenable grounds, or is manifestly unreasonable, or is arbitrary." *Id.*; *In re Dependency of Q.L.M. v. State*, 105 Wn. App. 532, 538, 20 P.3d 465 (2001) ("whether or not to grant an injunction is addressed to the discretion of the trial court"). Even in PRA cases, this standard applies to injunction elements not arising under the statute itself. *See Resident Action Council*, 177 Wn.2d at 428 (PRA case applying abuse of discretion standard to trial court's injunction governing manner agency

¹¹ The Doe parties restate, multiple times, the injunction elements set out in *Tyler Pipe Industries Inc. v. State, Department of Revenue*, 96 Wn.2d 785, 793, 638 P.2d 1213 (1982). Yet they do not even cite RCW 42.56.540. *See also* SPU Br. 16.

was to respond to request). *Cf. Belo Mgmt. Servs., Inc. v. Click! Network*, __ Wn. App. __, 2014 WL 6806880, at *3 n.4 (Div. II Nov. 25, 2014) (explaining abuse of discretion applied in *Resident Action Council* because injunction did not arise under RCW 42.56.540). To the extent Appellants claim general preliminary injunction standards supersede the PRA’s requirements, review must be for abuse of discretion.

B. The Trial Court Did Not Hold A “Trial on the Merits”

SPU argues the trial court must be reversed because it improperly “consolidated the preliminary injunction hearing with a trial on the merits without giving the required notice under CR 65(a)(1).” SPU Br. 17; *see also* Doe Br. 12 n.23. This argument has at least four fatal flaws.

First, Appellants’ argument is factually baseless. SPU faults Judge Halpert for “consolidating” the proceedings, “skipping the trial and going straight to denying the permanent injunction,” and “precipitously order[ing] release of the video.” SPU Br. 2, 12, 14. SPU offers no record citations for these claims, because the trial court in fact did none of this. Rather, as the court’s ruling makes plain, Appellants moved for a preliminary injunction and the court did no more than deny these motions. SCP, Sub No. 43; CP 519, 523.

Second, the fact that the trial court did *not* order release of the video (but instead stayed release to permit appellate review) readily

distinguishes this case from the two Division II opinions relied on by Appellants. In *Northwest Gas Ass'n v. Wash. Utilits. & Transp. Comm'n*, 141 Wn. App. 98, 168 P.3d 443 (2007), the trial court had not only denied the third parties' motion for preliminary injunction, but expressly "**ordered** the WUTC to **disclose** the requested" records. *Id.* at 110 (emphasis added). It was the disclosure order that led Division II to conclude the preliminary injunction hearing was essentially a trial on the merits. *Id.* at 114. The same is true of *Ameriquest Mortg. Co. v. State Atty. Gen.*, 148 Wn. App. 145, 156, 199 P.3d 468 (2009) ("the trial court ordered... release of documents the Intervener sought"), *aff'd on other grounds*, 170 Wn.2d 418 (2010). Moreover, the CR 65 discussion is dicta: both cases go on to hold the injunctions were wrongfully denied because the records at issue were not subject to disclosure. *Id.* at 158 (PRA preempted); *Northwest Gas*, 141 Wn. App. at 120 (records exempt).¹²

Appellants may argue that denial of their preliminary injunction motions amounts to an order of disclosure, because under the PRA an agency cannot withhold a nonexempt record absent a court order. But any

¹² In *Ameriquest*, the Supreme Court affirmed the Court of Appeals on grounds entirely unrelated to the injunction standard or the trial court's alleged "final" disposition of the case. 170 Wn.2d 418. Neither the Supreme Court, nor this Division, has followed *Northwest Gas* or *Ameriquest* on the CR 65 issue. Respondents urge this Court not to do so here, both because this case is distinguishable and because the opinions conflict with *Franklin County* and other decisions (discussed above) regarding proper evaluation of a motion for an injunction under RCW 42.56.540.

obligation the agencies have to disclose the video arises not from the court's order or some imagined violation of CR 65; rather, it arises from the PRA itself. *See* RCW 42.56.070(1). Appellants in effect seek to turn the PRA's presumption of access into a requirement that courts grant preliminary injunctions any time a third party challenges release of a public record. Moreover, Appellants ignore the fact that the video is currently *not* subject to disclosure. Again, the trial court stayed its release pending appellate review, and this Court has extended the stay. CP 562.

Third, Appellants' argument that the trial court improperly considered the "merits" of their PRA exemption claims disregards the substantial authority, cited above, confirming that courts *cannot* enjoin release of a public record unless the objector first establishes a specific PRA exemption applies. *See supra*, § IV.A.2. As the trial court recognized here, its first task was to determine whether Appellants had met their burden to show a specific exemption applied. CP 513. It proceeded to find as a matter of law that they had not, and thus it denied the motion. CP 513-518. This was not error.¹³

¹³ Appellants (particularly the Doe parties) argue throughout their briefs that the trial court should have granted the injunction anyway, in order to preserve the status quo or balance the equities. It would have been reversible error for the court to do so, without first determining that they had shown an applicable PRA exemption. *Franklin Cnty.*, 175 Wn.2d at 480; *supra*, § IV.A.2. Moreover, to the extent Appellants claim the trial court should have ruled in their favor under such general rules governing preliminary injunctions, the decision below must be affirmed as a proper exercise of the trial court's discretion. *See supra*, § IV.A.3.

Fourth, to the extent Appellants assert that the proceedings below occurred too quickly for them to make their case, they are mistaken. The PRA contemplates *timely* access to public records. RCW 42.56.100. Thus, the statute authorizes speedy judicial review via motion and affidavit, through a statutory show-cause process, to avoid expensive and prolonged litigation that could impede citizens' use of the act. RCW 42.56.550(1); *see O'Neill v. City of Shoreline*, 170 Wn.2d 138, 154-57, 240 P.3d 1149 (2010). For example, Respondents here could have cross-claimed against the agencies, moved for an order to show cause and sought a resolution of the exemption issues in this case on as little as six court days' notice. *See* King County LCR 7(b)(4)(A).

Additionally, while Appellants no doubt had to marshal their opposition to disclosure quickly (as objectors under the PRA always must), they exaggerate the time pressure they faced. *See* SPU Br. 18-19. The agencies formally notified Appellants of their intent to release the video on June 24, 2014 – over three weeks before the preliminary injunction hearing – and they in fact knew about the video's possible release by June 10, five days after the shooting. CR 237, 372. Correspondence between the Doe parties' counsel and agencies further shows that Appellants had already fully developed their legal arguments by June 19, two weeks before filing their complaint and TRO. CP 64-71.

In sum, the trial court in this case did nothing procedurally improper in denying Appellants' motion for a preliminary injunction. Their claim – that an order simply denying a preliminary injunction motion is the same as an improper consolidation with a trial on the merits – would, if accepted, mean that trial courts could *never* deny preliminary relief to third-party objectors in public records cases. That is contrary to the PRA and common sense. Nothing in CR 65 suggests otherwise.

C. The Video Is A Public Record

SPU argues the video, as used and retained by SPD in its investigation and KCPO in prosecuting Ybarra, falls outside the PRA's definition of a "public record." SPU Br. 22-25. SPU did not raise this argument when it moved to suppress the three-minute video (*see* CP 89-101), and the Doe parties admit it is a public record. Doe Br. 13. SPU's current position cannot be squared with the statutory definition, nor with the mandate that the PRA be construed liberally in favor of disclosure.

The term "public record" is defined "very broadly, encompassing virtually any record related to the conduct of government." *O'Neill*, 170 Wn.2d at 147. The PRA's rule of broad construction in favor of disclosure applies to the definition. *See Dragonslayer*, 139 Wn. App. at 444. The statutory definition includes:

any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

RCW 42.56.010(3). Thus, the definition has three elements: (1) a “writing” (*see* RCW 42.56.010(4)); (2) containing information relating to the conduct of government or performance of any governmental or proprietary function; (3) prepared, owned, used, or retained by an agency. *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 746, 958 P.2d 260 (1998). All three elements are met here.

First, SPU concedes a video is a “writing.” SPU Br. 22 n.5.

Second, the surveillance video contains “information” (the actual depiction of Ybarra’s activities and how the shooting was perpetrated and thwarted) “relating to” SPD’s and KCPO’s conduct and performance as the agencies responsible for investigating and prosecuting the crime at SPU. *See* CP 77 (content of video); CP 4 (complaint, admitting SPU provided the video to SPD “to aid in the police’s ongoing investigation”); CP 237 (video is part of criminal case file).

SPU argues this element turns on the content of the video, as if a record can never be a “public record” unless it depicts government actors engaged in government conduct. SPU Br. 22, 23. That is wrong, both generally and in the specific context of investigative records held by

police and prosecutors. As a general proposition, the content of a record is not determinative of whether it contains information “relating to the conduct of government”; what matters is “the role the documents play in the system[.]” *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 711-12, 780 P.2d 272 (1989). Thus, records involving only private actors or private activity, when held by public agencies, are routinely treated as “public records” under the PRA.¹⁴

In the specific case of law enforcement agencies like SPD, investigative records “relate to” governmental functions if the records were obtained by police in the investigation of a crime, even if they do not depict government action. *Comaroto v. Pierce Cty. Med. Exam’r’s Office*, 111 Wn. App. 69, 74, 43 P.3d 539 (2002) (private suicide note in sheriff’s file). Indeed, police incident reports typically contain accounts of private actions by private individuals, yet they are public records. *See, e.g., Koenig*, 158 Wn.2d at 186-87. In the case of prosecuting attorney agencies, the definition of “public records” encompasses the prosecutor’s criminal investigative files, *Limstrom v. Ladenburg*, 85 Wn. App. 524,

¹⁴ *See, e.g., Ameriquest Mortg. Co. v. Office of Attorney General*, 177 Wn.2d 467, 474, 485-86, 300 P.3d 799 (2013) (“public records” at issue were emails generated by private mortgage company in processing consumer loans, obtained by Attorney General in investigation); *Lindeman v. Kelso School Dist.*, 162 Wn.2d 196, 172 P.3d 329 (2007) (disclosing school bus surveillance video showing students fighting); *Fisher Broad.-Seattle TV LLC v. Seattle*, 180 Wn.2d 515, 326 P.3d 688 (2014) (police dash-cam videos generally subject to PRA disclosure); *Serko*, 170 Wn.2d at 585 (“public records” at issue was Pierce County Sheriff’s Office entire investigative file, including surveillance photos showing shooting inside private coffee shop).

529, 933 P.2d 1055 (1997), *rev'd on other grounds*, 136 Wn.2d 595 (1998), and records otherwise “relating to the performance of prosecutorial functions[.]” *Dawson v. Daly*, 120 Wn.2d 782, 789, 845 P.2d 995 (1993).

SPU relies on Division II’s recent decision in *Nissen v. Pierce Cnty.*, ___ Wn. App. ___, 333 P.3d 577 (Div. 2 Sept. 9, 2014), *pet. for review filed* (Oct. 6 and 13, 2014), to argue that records relating solely to personal conduct are not public records. SPU Br. 22-23. *Nissen* is inapposite. It involves text messages sent to and from the private phone of an elected official – some related to his public function and some not. The court effectively treated each text as a separate “writing,” and held the purely personal texts were not “public records” but those related to his public office were. 333 P.3d at 582-83. Unlike the video here, the texts as a whole were not obtained by a public agency for any investigation.¹⁵

Here, the video held by SPD and KCPO relates to those agencies’ governmental functions. Again, Appellants admit it was produced to SPD to aid its investigation, and it is part of the prosecutor’s file. CP 4 ¶ 3.5,

¹⁵ *Nissen* is in tension with this Court’s decision in *Mechling*, which rejected the view that “private information” contained within an otherwise public record may be withheld on the ground that it does not meet the PRA’s definition of a “public record.” 152 Wn. App. at 854-55. The private information may be redacted, if it is exempt, but such a record cannot be segregated into separate public and private records: “Once documents are determined to be within the scope of the [Act], disclosure is required unless a specific statutory exemption is applicable.” *Id.* at 854.

237; Doe Br. 24 (video “was placed in the investigative files pertaining to the alleged criminal activity of Mr. Ybarra”). Nothing more is required to satisfy the second element of the broad definition of “public record.”

Third, the record has been “used” and “retained” by the agencies. *See* CP 512. “Retain” means simply that the agencies “hold or continue to hold in possession or use” the record at issue. *West v. Thurston Cnty.*, 168 Wn. App. 162, 186, 275 P.3d 1200 (2012). SPD and KCPO hold the video in their possession, as shown by the fact that they intend to release it. They also “used” it, as noted above. This satisfies the third element.¹⁶

D. The Redacted Video Cannot Be Withheld Under Any Of The Cited PRA Exemptions

The trial court correctly found Appellants failed to meet their initial burden to show the pixilated video “is in fact within one of the act’s exemptions[.]” *Spokane Police Guild*, 112 Wn.2d at 36; *Franklin Cnty.*, 175 Wn.2d at 480-81. This Court should affirm.

1. The Redacted Video Satisfies RCW 42.56.240(2)’s Required Removal Of Identifying Information

The first exemption relied on by the Doe Appellants is RCW 42.56.240(2), which in relevant part exempts:

¹⁶ SPU currently does not appear to dispute this element. It has argued elsewhere that “possession” of a record is not determinative of whether the agency “used” it, relying on *Concerned Ratepayers Ass’n v. Pub. Util. Dist. No. 1*, 138 Wn.2d 950, 983 P.2d 635 (1999). But that case holds an agency may be found to “use” a record even if it never possessed it. *Id.* at 958. SPU’s reading turned the case on its head. In any event, here the agencies do have possession of the video, and also “used” it. Both acts independently satisfy the third element of the definition of “public record.”

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... 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).

a. The Court Need Not Reach Appellants' Argument

As a threshold matter, this Court should reject Appellants' request for reversal under Section 240(2), for three reasons.

First, the party asserting the exemption must come forward with evidence that disclosure poses a danger or that the witness or victim timely requested nondisclosure. *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 395, 314 P.3d 1093 (2013). The record here contains no evidence that requests for non-disclosure were made "at the time a complaint was filed," as required by the law. Nor do Appellants claim a threat to physical safety.

Second, to the extent Appellants rely on Section 240(2) as a ground for categorical suppression of the video, the claim fails on its face. RCW 42.56.240(2) does not, as they assert "prevent government agencies from *disclosing a record* that contains information revealing the identity of a crime victim or witness[.]" Doe Br. 13 (emphasis added). By its terms, Section 240(2) exempts only the *portion* of the record containing

“information revealing [their] identity”; it does not allow blanket non-disclosure of the entire record. Such exemptions require disclosure of the record, with *only* the identity of the protected individual redacted.

Washington courts reject attempts to use such identity-specific exemptions to withhold entire records. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 416, 259 P.3d 190 (2011) (“*BIPG*”) (“court erred by exempting the entire [record], rather than producing the report with only Officer Cain’s identity redacted”); *Sargent*, 179 Wn.2d at 395 (Section 240(2) only exempts “witness identities”).

In moving to enjoin release of the three-minute video, the Doe Appellants ignored the redaction requirement and instead argued to the trial court that RCW 42.56.240(2) required total suppression of the video. *See* CP 20, 427-28. The trial court was right to reject Appellant’s overly broad reading of the exemption, and this Court should affirm on this point.

Third, to the extent the Doe parties now rely on Section 240(2) to challenge only the scope of the redaction of the three-minute video, they have waived the argument because they did not present it to the trial court. In a tacit acknowledgment that Section 240(2) does not exempt the entire video, they have changed gears, and now ask this Court to find that pixilation of their faces insufficiently obscures their identity, and that the students be entirely redacted “with a large black box.” Doe Br. 18. They

did not make this request to the trial court. CP 20, 427. This Court should not address this Section 240(2) argument regarding the three-minute video, as it is being raised for the first time on appeal. RAP 2.5.

b. The Proposed Pixilation Is Sufficient

If the Court does consider Appellants' new argument that Section 240(2) requires greater redaction of the three-minute video, it should reject it and hold that the proposed facial pixilation satisfies the statute.

First, PRA exemptions must be construed narrowly in favor of disclosure. RCW 42.56.030. Appellants' proposed "black box" redaction, obscuring even the presence of an individual, plainly withholds more of the record than necessary to redact only their "identity." Construing the exemption narrowly means that the identifying information should be redacted only to the extent necessary to serve the exemption's purpose – which, as indicated in the statute itself, is to protect life, physical safety or property. RCW 42.56.240(2). Here, there is no evidence the Doe parties face any such threat from disclosure. As the trial court noted, they have no reason to fear for their safety, particularly given that the perpetrator of the shooting has been identified and incarcerated. CP 514.

Second, the determination of "identity" under Section 240(2) and similar PRA exemptions is made solely with reference to the four corners of the record itself. As the trial court aptly noted, "RCW 42.56.240(2)

prohibits only direct release of identification. It does not prohibit release of information or images that ultimately might lead to identification.” CP 514 (citing *Koenig*, 158 Wn.2d 173). Looking beyond the actual content of the record sought in order to determine whether disclosure would reveal an individual’s identity would put courts and agencies in an untenable position. Their ability to determine if a record was exempt, or even to explain the basis for an exemption, would depend on the particular requestor’s knowledge and would require a potentially endless inquiry into external information about the subject of the record. Accordingly, this court and others have rejected arguments that the identity of an individual may be withheld based on concerns that disclosure could “allow someone to track down” other information about them. *Sheehan*, 114 Wn. App. at 344-46; *Koenig*, 158 Wn.2d at 183-84.

In this case, the trial court viewed the redacted video multiple times, and found the pixilation blurred the faces to the point that “the videotape, itself, is not directly a source of identification.” CP 513. Appellants offer no basis to dispute that finding.

Instead, they rely on professional police investigators to make the general point that individuals can be identified through attributes other than their faces. Doe Br. 17. But the PRA’s standard for redacting identifying information is not whether a professional investigator could

piece together someone's identity; "the outside knowledge of third parties will *always* allow some individuals to fill in the blanks." *BIPG*, 172 Wn.2d at 414. Indeed, the standard is not even whether people who already know the individual might recognize them. *Id.* at 417-18; *Koenig*, 158 Wn.2d at 181-82. The only workable, PRA-compliant standard is the one Washington courts have already adopted and long applied: redacting only those aspects of the record that directly identify the protected individual in the record itself. Again, the trial court found pixilation of the faces in the recording at issue here meets that standard.

Third, Appellants' request for black-box redaction amounts to an argument that when Section 240(2) applies, *all* photographic evidence of the subject is categorically exempt as identifying information. The Supreme Court has soundly rejected such attempts to creatively evade the PRA's redaction requirements. *See Resident Action Council*, 177 Wn.2d at 441-42 (listing seven distinct reasons why records at issue were subject to narrow redaction requirement). Moreover, Appellants' position is untenable under basic canons of statutory interpretation. When the Legislature intends to categorically exempt photos as identifying information, it says so expressly. In 1992 – the same year it enacted the statute now codified as RCW 42.56.240(2) – the Legislature also enacted what is now RCW 42.56.240(5), the PRA's exemption for disclosure of

“[i]nformation revealing the identity of child victims of sexual assault.”¹⁷ Section 240(5) specifically defines “information revealing the identity of” such victims to include their “name, address, location, *photograph*, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship[.]” RCW 42.56.240(5) (emphasis added). But the Legislature did *not* specify those identifiers when it adopted the exemption for crime witnesses and victims. RCW 42.56.240(2). The fact the Legislature exempted disclosure of photos in public records involving child victims of assault, but not for other crime victims, was intentional.¹⁸

Finally, Appellants argue that redaction of more than the students’ faces is supported by the reversed Division II opinion in *Lindeman v. Kelso School Dist.*, 127 Wn. App. 526 (2005), *rev’d*, 162 Wn.2d 196, 172 P.3d 329 (2007). That case is inapposite based on both its facts and the exemption at issue. It involved a video that would have been redacted into oblivion to comply with the blanket student file “personal information” exemption at issue – unlike the digital recording here, which can be finely

¹⁷ LAWS OF 1992, ch. 139, § 5 (predecessor to RCW 42.56.240(2)); LAWS OF 1992, ch. 188, § 1 (predecessor to RCW 42.56.240(5)).

¹⁸ “Exclusion of language from one statute when included in others indicates an intent to do so.” *State v. Cromwell*, 157 Wn.2d 529, 540, 140 P.3d 593 (2006), citing *City of Seattle v. Parker*, 2 Wn. App. 331, 335, 467 P.2d 858 (1970) (“Expressio unis est exclusio alterius. The expression of one thing is the exclusion of another.”); *State v. Delgado*, 148 Wn.2d 723, 728-29, 63 P.3d 792 (2003).

pixilated. Moreover, in reversing Division II, the Supreme Court ordered the *entire video released*. 162 Wn.2d 196. The case provides no support for Appellants.

In sum, as a matter of law Section 240(2) only protects the students' identities as they appear in the video itself. The identities have been protected, by pixilating individual faces to the point that they cannot be a source of identification in the video itself. Any other solution impermissibly fails to construe the exemption narrowly.

2. The Video Is Not Exempt Under The Privacy Prong Of The PRA's Investigative Records Exemption

The Doe parties next argue the redacted video may be suppressed under the privacy prong of the PRA's "investigative records" exemption, which exempts "specific investigative records" compiled by investigative agencies, "the nondisclosure of which is essential... for the protection of any person's right to privacy." RCW 42.56.240(1). It is not disputed that the video is a qualifying "investigative record." The question is whether nondisclosure is essential to protect the Doe parties' "right to privacy," as defined in the PRA. It is not.

A party asserting any privacy-based PRA exemption must prove disclosure is *both* "highly offensive to a reasonable person" and "not of legitimate concern to the public." RCW 42.56.050. This is not a

balancing test; the standard does not weigh the individual's privacy interest against the public concern. *Id.*; LAWS OF 1987 ch. 403, §1.

Unless both elements are present, the exemption does not apply. *Dawson*, 120 Wn.2d at 795. Respondents address the second requirement (public concern) first.

a. The Redacted Video Is Of Legitimate Public Concern

Whether a matter is of “public concern” is a question of law for the court. *Harrell v. State ex rel. DSHS*, 170 Wn. App. 386, 406, 285 P.3d 159 (2012).

As the U.S. Supreme Court has stated, “commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions... are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.” *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975). PRA cases likewise hold that the public concern in a criminal investigation extends to the sometimes uncomfortable details of the crime itself, even in such sensitive contexts as child sexual assault. Disclosure “educates members of the public as to how they might prevent other children from falling prey to sexual assaults[.]” *Koenig v. City of Des Moines*, 123 Wn. App. 285, 300, 95 P.3d 777 (2004), *aff'd in part*, 158

Wn.2d 173, 142 P.3d 162 (2006). This Court in *Koenig* recognized that the public interest was served by access to police incident reports containing “a wealth of detail about the circumstances surrounding the assault, *including where, when, and how the assaults occurred, and the methods the perpetrator used* to commit the crime.” 123 Wn. App. at 300 (emphasis added). This Court nonetheless found the reports should be redacted to remove explicit details of the crime because disclosure might discourage reporting of assaults (*id.* at 301) – but the Supreme Court *reversed* on this point. It held “details of the crime, including the sexually explicit information redacted by the Court of Appeals, *are of legitimate concern to the public and must be disclosed.*” 158 Wn.2d at 186-87 (emphasis added). The Court ordered the record released, redacting only the victim identifiers specified in RCW 42.56.240(5). *Id.* at 182-83.

Significantly, the PRA’s privacy test, RCW 42.56.050, is taken directly from the Restatement (Second) of Torts § 652D, the common law standard for the “public disclosure of private facts” tort. *BIPG*, 172 Wn.2d at 410 n.6 (“right to privacy” under the PRA is “interpreted according to the common law as enumerated in” Restatement § 652D).¹⁹

¹⁹ The statute’s intent section unequivocally states: “‘Privacy’ as used in section 2 of this 1987 act [later codified as RCW 42.56.050] is intended to have the same meaning as the definition given that word by the Supreme Court in ‘Hearst v. Hoppe,’ 90 Wn.2d 123, 135 (1978).” LAWS OF 1987 ch. 403 § 1. *Hearst* adopted “the standard and analysis of” Restatement § 652D as the correct PRA privacy definition. 90 Wn.2d at 135, 136.

Section 652D, in turn, specifically recognizes that an individual may become the subject of “legitimate public concern” involuntarily, including under the *precise* circumstances here:

There are other individuals who have not sought publicity or consented to it, but... have become a legitimate subject of public interest. They have, in other words, become “news.” Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed. ***The same is true as to those who are the victims of crime or are so unfortunate as to be present when it is committed...*** These persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims, and those who are closely associated with them.

Restatement, § 652D cmt. f (emphasis added).²⁰ Under this rule,

disclosures and depictions of crimes are not privacy invasions.

“Authorized publicity includes publications concerning homicide and other crimes, arrests, police raids, suicides, marriages and divorces... and many other similar matters of genuine, even if more or less deplorable, popular appeal.” *Id.* cmt. g.

The rule applies even where disclosure is “traumatic and profoundly disturbing” to an innocent crime victim. *Romaine v.*

Kallinger, 537 A.2d 284, 298 (N.J. 1988) (book about hostages terrorized

²⁰ For example: “While A is walking along the street with her husband, he is set upon by thugs and murdered in her presence. B Newspaper publishes an account of this event, with a picture of A. This is not an invasion of A’s privacy.” *Id.*, Illustration 16; *see id.* Illustration 14 (same result for picture of victim).

by psychotic did not intrude on privacy, because facts were of legitimate public concern). Visual images – even disturbing ones – of a newsworthy crime are themselves of legitimate public concern. *See Anderson v. Suiter*, 499 F.3d 1228, 1235-37 (10th Cir. 2007) (video showing alleged rape of plaintiff by husband, though “highly distressing” to plaintiff, was matter of legitimate public concern, as it related to husband’s prosecution); *Cinel v. Connick*, 15 F.3d 1338, 1346 (5th Cir. 1994) (as matter of law, video of plaintiff engaging in sex acts was of public concern because it was related to news investigation, even though images “added nothing” to the topic and video’s use “reflected the media’s insensitivity”).

As two Superior Court judges recognized, the public unquestionably has a legitimate concern in video of the SPU shooting. There can be no dispute that a mass shooting on a local college campus is of extreme public concern. The public has a concern in the perpetrator and in details shown in the redacted video, including “how the assaults occurred, and the methods the perpetrator used to commit the crime.” *Koenig*, 123 Wn. App. at 300. Such “details of the crime... are of legitimate concern to the public and must be disclosed.” *Koenig*, 158 Wn.2d at 187. The public has a specific interest in seeing exactly how a perpetrator with a gun was thwarted by a student without a gun.

Further, and contrary to Appellants' bald assertion that the video "does not allow public scrutiny of government," (Doe Br. 28), the public has a direct and legitimate concern in seeing the evidence used by authorities to investigate such a crime, and to prosecute its perpetrator. Under the PRA, the public need not rely solely on the official summary of events, but instead is entitled to inspect "all" public records. The contrary rule – that individuals can be arrested and charged with serious crimes but the evidence relied on by the authorities is of no public concern – is completely at odds with the principles of self-government the PRA is intended to preserve. *PAWS*, 125 Wn.2d at 251. Such "[s]ecrecy fosters mistrust." *Dreiling v. Jain*, 151 Wn.2d 900, 903, 93 P.3d 861 (2004).

Appellants' argument that the video is of no public concern because it does not depict any government conduct (Doe Br. 27-28) sweeps far too broadly. If that were the standard for "legitimate public concern" under the PRA, disclosure of the incident report in *Koenig*, the video crime evidence in cases like *Anderson* and *Cinel*, and surveillance photos in *Serko*, among others, would have been privacy invasions; the courts consistently hold otherwise. Indeed, investigative records frequently show no official action, but simply reflect events reported to police. Such records of the "commission of crime" are "without question" matters of legitimate concern to the public (*Cox*, 420 U.S. at 492), and are

routinely released under the PRA. While the three-minute video may not depict police activity, it plainly relates to the government’s law enforcement function.

Appellants’ argument to the contrary (Doe Br. 27) rests on *Cowles Pub. Co. v. Pierce Cty. Prosecutor’s Office*, 111 Wn. App. 502 (2002), a Division II case that is readily distinguishable as it did not involve direct evidence of the commission of a crime but rather “personal information about the defendant’s family” in death penalty cases. *Id.* at 509, 510. The Supreme Court has twice declined to extend *Cowles* beyond its limited facts. *See Serko*, 170 Wn.2d at 594 n.3; *Koenig v. Thurston Cty.*, 175 Wn.2d 837, 845-47, 287 P.3d 523 (2012).²¹

b. The Redacted Video Discloses No Offensive Facts

If the Court finds it necessary to reach the other requirement of the PRA’s privacy test, it should hold Appellants have not shown disclosure of the pixilated video would be “highly offensive” within the meaning of the law. RCW 42.56.050(1). This is so for three distinct reasons.

²¹ The Supreme Court’s reluctance to adopt *Cowles* may rest in part on the fact that the case “weighed” the privacy interest of family members against the public interest, 111 Wn. App. at 510, which is plainly improper. *Dawson*, 120 Wn.2d at 795; *Koenig*, 158 Wn.2d at 182. Appellants also cite *Tiberino v. Spokane Cnty.*, 103 Wn. App. 680, 13 P.3d 1104 (2000), but there, the court found disclosure of a public employee’s personal emails would violate her privacy because the asserted public concern was in the *volume* of the emails, not their contents. *Id.* at 691. Here, concern is in the video’s content.

First, under the PRA/Restatement privacy standard, it is no invasion of privacy to “merely give[] further publicity to information about the plaintiff that is already public.” Restatement § 652D, cmt. b. *See Paige v. U.S. Drug Enforcement Admin.*, 818 F. Supp. 2d 4, 16 (D.D.C. 2010) (disclosure of video showing shooting was not intrusive, as incident was already matter of public record), *aff’d*, 665 F.3d 1355, 1362-63 (D.C. Cir. 2012); *Jones v. Taibbi*, 512 N.E.2d 260, 270 (Mass. 1987). Here, the facts shown in the redacted video have already been widely discussed publicly. *See, e.g.*, CP 210-217, 305-316, 510-515; *supra*, n.5.

Second, the video does not disclose the sort of intimate or private activity protected by the PRA’s privacy test. As Appellants note (Doe Br. 24), the Restatement illustrates the type of “highly offensive” facts protected from disclosure: sexual relations, family quarrels, “humiliating illnesses,” intimate correspondence and “details of a man’s life in his home.” Restatement § 652D, cmt. b (quoted in *Hearst*, 90 Wn. 2d at 136). The fact that one is a victim or witness to a high-profile, widely reported crime is unlike such private events.

Appellants rely on a trio of Division II and III cases where a privacy intrusion was found, but none resemble this case at all. Doe Br.

26. In each one, the records at issue disclosed *private communications* with or about immediate family members.²² That is not the case here.

Third, the concept of privacy codified in the PRA requires a reasonable expectation that the matter at issue is “private.” Events in places where large numbers of people congregate are not private. This determination does not turn on whether the location is a public facility. For example, disclosure of a conduct of police officers at a bachelor party at a private club was not private because it occurred in front of 40 people. *Spokane Police Guild*, 112 Wn.2d at 38; *Harris v. City of Seattle*, 2003 WL 1045718, at *5 (W.D. Wash. Mar. 3, 2003) (no intrusion in recording at private casino; “any person...would expect to be filmed and observed by the establishment’s security”) (Nevada law); *cf. State v. Clark*, 129 Wn.2d 211, 225-26, 916 P.2d 384 (1996) (whether conversation is “private” depends in part on location and “potential presence of a third party”). Here, the shooting occurred mid-afternoon in the foyer of a busy, campus building housing 24 classrooms and five academic departments – not a place a reasonable person would expect privacy.²³

²² *Comaroto*, 111 Wn. App. 69, involved a suicide note to the deceased’s family. The court found it would be highly offensive to disclose the deceased’s final personal thoughts to her loved ones. 111 Wn. App. at 77-78. *Cowles v. Pierce Cnty.* concerned personal family information and relatives’ “feelings” about a defendant. 111 Wn. App. at 509. *Tiberino*, 103 Wn. App. at 685, involved personal emails a woman sent to her mother and sister about her alleged rape.

²³ *See supra*, n.2.

3. The Video Cannot Be Withheld As “Essential To Effective Law Enforcement”

Both Appellants argue the video must be entirely withheld under the investigative records exemption’s “effective law enforcement” prong. Doe Br. 31; SPU Br. 29. In relevant part, this exempts from disclosure “specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies” when nondisclosure is “essential to effective law enforcement[.]” RCW 42.56.240(1). Again, Respondents agree that the video, in the possession of SPD and KCPO, is a “specific investigative record.”²⁴

The question here is whether Appellants have met their burden to show nondisclosure is “essential to effective law enforcement.” Courts construe this phrase narrowly in favor of disclosure. *Prison Legal News, Inc. v. Dep’t of Corr.*, 154 Wn.2d 628, 640, 115 P.3d 316 (2005). And, records related to crime investigations are “presumptively disclosable upon request” where, as here, a suspect has been referred for prosecution. *Cowles Pub. Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 481, 987 P.2d

²⁴ Although not necessary to decide any issue in this appeal, SPU argues the video also qualifies as a “specific intelligence record” compiled by an agency. Respondents disagree. For PRA purposes, “intelligence” is narrowly construed to mean “gathering or distribution of information, especially secret information,” or “information about an enemy” or “the evaluated conclusions drawn from such information.” *King Cnty. v. Sheehan*, 114 Wn. App. 325, 337, 57 P.3d 307 (2002) (citation omitted). The video does not fit any of these definitions. In particular, it does not qualify as “intelligence” because it was not gathered by a law enforcement agency. But the video was an “investigative record” once SPD and KCPO obtained it. See *Dawson*, 120 Wn.2d at 792–93.

620 (1999); *Sargent*, 179 Wn.2d at 389-90. Overcoming this presumption requires specific evidence of an alleged threat to effective law enforcement that is “truly persuasive.” *Ameriquest*, 177 Wn.2d at 492.

No such showing has been made here. Significantly, SPD and KCPO agree disclosure of the video poses *no* threat to their investigation or the prosecution of the accused perpetrator. CP 73, 77, 183, 237, 353, 517. Appellants offer no evidence to refute that conclusion.

SPU argues that nondisclosure is “essential to effective law enforcement” because dissemination would impair the “law enforcement value for SPU” of its private video monitoring system. SPU Br. 30. This argument fails for at least three reasons.

First, as a private institution, SPU’s activities are not “law enforcement” under the PRA. For purposes of this exemption, “law enforcement” means “the act of putting... law into effect,” or “imposition of sanctions for illegal conduct,” such as a fine or a prison term. *Brouillet v. Cowles Publ’g Co.*, 114 Wn.2d 788, 795-96, 791 P.2d 526 (1990). SPU has no authority to effectuate the law or impose legal sanctions. The exemption requires the party asserting it to establish disclosure threatens an *agency’s* law enforcement activities. *Ameriquest*, 177 Wn.2d at 492 (objector must show “why disclosure would harm *the AGO’s* future law enforcement efforts”) (emphasis added). SPU is not an “agency,” RCW

42.56.010(1) (PRA definition of “agency”). No authority supports applying the PRA’s “essential to effective law enforcement” exemption to protect an alleged threat to a private institution’s enforcement capabilities.

Second, SPU’s argument rests entirely on *Fischer v. State Dept. of Corrections*, 160 Wn. App. 722, 254 P.3d 824 (2011), but that case fully supports Respondents’ position. SPU Br. 30. *Fischer* involved the public agency operating the Monroe prison. Nondisclosure of prison surveillance videos was found “essential to effective law enforcement” because concealing the security system was “critical to its effectiveness *in the specific setting of a prison.*” 160 Wn. App. at 728 (emphasis added); *id.* at 726 (noting system secured “a population that is 100% criminal in its composition and is accustomed to evading detection and exploiting the absence of authority, monitoring, and accountability.”). *Fischer*’s prison-specific rationale provides no support for the notion that disclosure of a surveillance video generally – much less one from a private institution – threatens a law enforcement interest.

Third, SPU has failed to provide evidence, “truly persuasive” or otherwise, that disclosure of this particular video will pose any sort of threat. *Ameriquest*, 177 Wn.2d at 492. While SPU expresses concern about the confidentiality of its security camera capabilities, no one is seeking that information. Speculation that footage from a security camera

could “arm[] criminals with the information they need to defeat the surveillance” (SPU Br. 31) falls short of the evidence required to withhold a “specific investigative record.” *See Sargent*, 179 Wn.2d at 390.

In asserting that disclosure of *any* video footage compromises its *entire* system, SPU is arguing for a categorical exemption for surveillance video. That is not the law. *Fischer* does not support such a finding, and *Sargent* precludes interpreting Section 240(1) in such a blanket fashion.

Separately, the Doe Appellants argue that disclosure of the video threatens “effective law enforcement” by “making victims and witnesses less willing to come forward or cooperate with law enforcement officers.” Doe Br. 32. This argument is foreclosed by *Sargent*, which holds “[a] general contention of chilling future witnesses is not enough to exempt disclosure” under Section 240(1). *Sargent*, 179 Wn.2d at 395. Instead, this exemption requires the opponent of disclosure to “come forward with specific evidence of chilled witnesses” that threaten “effective law enforcement in this particular case.” *Id.* That has not been shown here.²⁵

²⁵ *Cowles v. Pierce Cty. Prosecutor’s Office*, 111 Wn. App. 502 (2002), relied on by the Doe parties, is factually distinguishable. The “effective law enforcement” interest there did not involve crime reporting (where police have the power to compel evidence) but solicitation of “personal information about the defendant’s family” to support death penalty mitigation presentations. 111 Wn. App. Id. at 509, 510. In addition, the case is inconsistent with the Supreme Court’s later decisions in both *Sargent* and *Koenig*, 158 Wn.2d at 186-87 (rejecting similar “chilling” rationale in case involving sexual assault).

The Doe parties also cite *Haines-Marchel v. State Dep't of Corr.*, ___ Wn. App. ___, 334 P.3d 99 (Div. II Sept. 16, 2014), but that case also does not support finding a “chilling effect” here. Like *Fischer*, *Haines-Marchel* rests on a prison-specific rationale – that “effective law enforcement” required nondisclosure of a report about confidential prison informants, given the particular risks of “serious attacks against inmates suspected of providing tips to authorities” and “false reports intended to induce authorities to take action against other inmates.” *Id.* at 101, 106. There is no such danger that the pixilated video here will expose any “confidential” witness, given the publicity the students have already received. See *Ames v. City of Fircrest*, 71 Wn. App. 284, 296, 857 P.2d 1083 (1993) (where target of investigation was previously named in press release, disclosure of name would threaten no law enforcement interest).

4. The Video Is Not Exempt As A Terrorism-Related Plan or Assessment Under RCW 42.56.420

As its final argument, SPU attempts to shoehorn the contents of a routine surveillance video into the PRA’s exemption for terrorism assessments and response plans. SPU Br. 25. This rarely invoked exemption, RCW 42.56.420(1)(a), cannot be stretched so far without ignoring its plain language and the PRA’s mandate to read exemptions narrowly. RCW 42.56.030. The exemption applies to:

Those portions of records assembled, prepared, or maintained to prevent, mitigate, or respond to criminal terrorist acts, which are acts that significantly disrupt the conduct of government or of the general civilian population of the state or the United States and that manifest an extreme indifference to human life, the public disclosure of which would have a substantial likelihood of threatening public safety, consisting of:

(a) Specific and unique vulnerability assessments or specific and unique response or deployment plans, including compiled underlying data collected in preparation of or essential to the assessments, or to the response or deployment plans[.]

RCW 42.56.420(1)(a). The statute was passed in 2002, in response to heightened security concerns after 9/11. See LAWS OF 2002, ch. 335, §1.

By its plain language, the statute has at least three elements that are not present here.

First, the video was not “assembled, prepared or maintained” by SPD to “prevent, mitigate or respond” to terrorism. The agencies acquired it as part of a criminal investigation and prosecution (CP 4), purposes that fall outside Section 420’s reach.²⁶ SPU focuses on its own purpose for maintaining the surveillance footage. SPU Br. 27. But the PRA applies only to public “agencies,” and SPU is not an agency. RCW 42.56.010. The relevant question is why SPD and KCPO acquired the video. *See Northwest Gas*, 141 Wn. App. at 119 (applying Section 420(1) based on

²⁶ The video plainly qualifies as an “investigative record” under RCW 42.56.240(1). *See Dawson*, 120 Wn.2d at 792-93 (investigative records are those “compiled as a result of a specific investigation focusing with special intensity upon a particular party”). Its status under the PRA is thus properly evaluated under Section 240(1), as noted above.

how “WUTC currently ‘maintains’” the records and discussing *agency’s* use of them). In any case, SPU assembled and prepared the record as part of routine security surveillance, not as part of any specific and unique terrorism assessment or response plan. CP 110 ¶ 5.

Second, SPU has not shown public disclosure of the video “would have a substantial likelihood of threatening public safety.” The video’s general contents are widely known. CP 77, 210. The perpetrator has been identified, acted alone, and is in custody. *Id.*; CP 216-218, 514. No public agency has joined SPU’s suggestion that release would threaten public safety. This element, too, is absent.

SPU speculates that disclosure of the video could reveal, and allow future perpetrators to evade, its camera’s capabilities. The trial court properly rejected this argument as “insufficient” to meet the statute’s “substantial likelihood” requirement. CP 518. Otherwise, this argument would categorically exempt routine crime records from disclosure. For example, Seattle police use a dashboard camera system to record traffic stops. These recordings reveal details of SPD’s surveillance capabilities in no less a fashion than SPU claims the video here reveals information about SPU’s capabilities. Yet dash-cam videos are generally subject to disclosure under the PRA. *Fisher Broad.-Seattle TV LLC v. Seattle*, 180

Wn.2d 515, 326 P.3d 688 (2014); *see also Serko*, 170 Wn.2d at 585 (crime surveillance photos disclosed).

SPU's argument regarding "copycat crimes" (SPU 27-28) is baseless, is undermined by the very expert declaration it cites, and does not come close to suggesting a "substantial likelihood" that the video's release poses a public safety threat. *See supra*, n. 9.

Third, SPU is not seeking to protect "specific and unique vulnerability assessments" or "specific and unique response or deployment plans," which is all the statute exempts. SPU has such plans, SPU Br. 8-9, but no one has requested them. Rather, SPU is seeking to protect the contents of a surveillance video. SPU Br. 10. The video is not an assessment or plan, and was not created or prepared for such a plan. Again, it was recorded as part of routine security surveillance. CP 110.

SPU relies on *Northwest Gas*, the only case to construe Section 420(1)(a). But the records in that case are readily distinguishable from the video here. *Northwest Gas* concerned the first-ever PRA requests for pipeline "shapefile data" held by WUTC. 141 Wn. App. at 106 n.3, 108. Responsive records included "private, individual highly detailed gas pipeline structural and location information and underlying data," including "exact geographic positioning system coordinates for the pipelines and terminals, locations and types of metering facilities, taps,

mileposts, cathodic protection test sites, and valves, plus information about the diameter of the pipeline, depth, and commodities transported.” *Id.* at 101, 105-06 (emphasis added). Division II found the records exempt under RCW 42.56.420(1), because WUTC “ ‘maintains’ the pipeline shapefile data to assist in responding to terrorist attack,” and “keeping this shapefile data out of the hands of potential pranksters and terrorists is also critical to providing for the public safety[.]” *Id.* at 120.

Northwest Gas might be remotely analogous to this case if SPD possessed, and requestors were seeking, blueprints and specifications of SPU’s surveillance system and the location and capabilities of each component. But they are not. The case is also distinguishable, again, on the ground that the agencies here are not maintaining the record in connection with any terrorism plan or assessment. For all of these reasons, Section 420(1) does not apply.

E. The 19 Additional Videos Were Not Part Of This Appeal

SPU assigns error to the trial court’s decision not to rule on the 19 additional videos the agencies proposed to release in October 2014, after this appeal had been perfected. SPU Br. 4; Doe Br. 9. It is difficult to see what the trial court did wrong: at the time the preliminary injunction motion was heard in July 2014, the agencies had yet to review the 19 disks “to determine whether and to what extent redaction will be necessary.”

CP 353. The videos were not presented for in camera review to the trial court at the time it ruled on the preliminary injunction motion²⁷ CP 510. In any case, this “issue” appears to be moot now. The 19 videos have been addressed by the trial court in a December 15, 2014, order denying Appellants’ second preliminary injunction motions. That ruling was appealed to this Court after Appellants’ opening briefs were filed in this appeal.²⁸

Notably, even *after* considering Appellants’ additional declarations and argument, the trial court again found they had failed to show an applicable exemption. While denying the motion as to the 19 videos, the court again stayed its order pending appeal.

V. CONCLUSION

The video at issue is not exempt from disclosure under the PRA. Accordingly, the trial court was entirely correct to deny Appellants’ injunction motion, and this Court should affirm.

²⁷ SPU couches this as a “due process” argument. SPU Br. 20. But it has no cause to complain. The only video it sought to enjoin in its original complaint was the three-minute “Otto Miller Hall” video. CP 4 ¶ 3.5; CP 6 ¶ 4.7.

²⁸ *See supra*, n. 3.

RESPECTFULLY SUBMITTED this 7th day of January, 2015.

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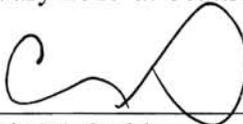
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