Hon. Jim Rogers

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

FISHER BROADCASTING – SEATTLE TV L.L.C. dba KOMO 4, Plaintiff, vs. CITY OF SEATTLE, a local agency and the SEATTLE POLICE DEPARTMENT, a local agency, Defendants.	No. 11-2-31920-2 SEA ~~[PROPOSED]~~ ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT (CLERK'S ACTION REQUIRED)

THIS MATTER having come on duly and regularly for hearing before the undersigned judge of the above-entitled Court pursuant to Plaintiff KOMO's Motion for Summary Judgment and Defendant City's Cross- Motion for Summary Judgment. and the Court having heard the argument of counsel submitted in support of and in opposition to said motion, and the Court having read and considered the following herein:

1. KOMO's Motion for Summary Judgment;
2. Declaration of Judith Endejan in Support of KOMO's Motion for Summary Judgment, Exhibits A – R;

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3. Declaration of Tracy Vedder in Support of KOMO's Motion for Summary Judgment, Exhibits A – Y;

4. Declaration of Eric Rachner in Support of KOMO's Motion for Summary Judgment, Exhibits A – R;

5. The City's Cross-Motion for Summary Judgment and Response to KOMO's Motion for Summary Judgment,

6. Declaration of Mary Perry, Exhibits A – G;

7. Declaration of David Strom;

8. Declaration of Toby Baden, Exhibits A – E;

9. Declaration of Mark Knutson, Exhibits A – B;

10. Isabelo Alcayaga, Exhibits A – C;

11. Bruce Hills, Exhibits A- H

12. Declaration of Karim Miller;

13. Declaration of Leo Poort, Exhibit A;

14. KOMO's Response to Defendant's Cross-Motion for Summary Judgment and Reply to Response to Plaintiff's Motion for Summary Judgment;

15. Declaration of James C. Egan, Exhibits A - C;

16. The City's Reply to Plaintiff's Response to Defendant's Cross-Motion for Summary Judgment;

17. Declaration of Mary Perry, Exhibits A –B;

[illegible]

18. All records, documents, and pleadings filed in this action.

The above-entitled Court having heard the motion for summary judgment ~~finds:~~

~~A. Findings of Fact:~~

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Fisher Broadcasting v. City of Seattle et al 11-2-31920-2 SEA

Memorandum and Order

This case concerns Public Records Act ("PRA") requests for documents related to Seattle Police Department in-car videos that were tagged for retention and for the videos themselves. This case involves two distinct issues: Did Seattle Police and/or Seattle Legal Department (here both referenced as the "City") unlawfully withhold documents requested under the Public Records Act ("PRA") for requests dated August 4, 11 or September 1, 2010?

Does RCW 9.73 conflict with RCW 42.56, or, in plain English, does the law that requires delay in disclosure of police in car videos conflict with the Public Records Act?

The first issue is a question of fact. Both parties claim that facts are undisputed. The second is a question of law.

A. Ms. Vedder's[1] PRA Requests

Ms. Vedder/KOMO challenges responses to three PRA requests made 4 and 11 August and 1 September 2010. Ms. Vedder argues that after she communicated to the City that she was seeking database information for SPD's in-car videos, and made specific requests, she was denied, sometimes with little explanation, even though later discovery revealed that more was known. She argues that the City failed to explain, lied, and failed to turn over even partial information responsive to her requests, and this was done, in part, because she works for KOMO. When Vedder and KOMO learned of Mr. Rachner's later request, which information they say was

[1] The Court refers to Ms. Vedder rather than KOMO in many places as she is the citizen who made the request.

Hon. Jim Rogers
King County Superior Court
Dept. 45
516 3rd Avenue
KCC-SC-0203
Seattle, Washington 98104

1 directly responsive to Ms. Vedder's earlier request, this lawsuit followed. Vedder and KOMO
2 argue that the lesson of Vedder's and Rachner's several requests is that if a citizen knows exactly
3 what record to ask for, then the citizen can get the information; if the citizen does not know
4 exactly what to ask for, they may get denied. This, argues Vedder, defeats the policy of the PRA.
5
6 The City argues that the records requested did not exist when requested, and the City went
7 above and beyond the PRA requirements by creating records to respond. They also dispute that
8 Rachner's and Vedder's requests are in any way similar, as one is for data and the other for
9 information.
10 1. 4 August 2010
11 The 4 August 2010 PRA request was for log sheets for in-car videos. SPD interpreted it
12 literally, i.e., "log sheets" a technical term, records which were used for a limited purpose and
13 which had been located at the precinct level but were no longer in existence at the time requested.
14 This was a defined term in the SPD manuals that Ms. Vedder had just received.
15
16 There was no violation of the PRA.
17 2. 11 August 2010
18 The 11 August PRA request was for a list of any and all digital in-car recordings tagged for
19 retention, including certain information such as date, badge number and other information.
20 PRA requests must be for an identifiable record (RCW 42.56.080) or class of records
21 (RCW 42.46.550(1)). The record must be reasonably identifiable but need not specify the exact
22 name of the record. There is no duty to create a record to respond.
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Hon. Jim Rogers
King County Superior Court
Dept. 45
516 3rd Avenue
KCC-SC-0203
Seattle, Washington 98104

The City responds that Vedder's requests were vague and "unmanageable from a technical perspective." The evidence is clear that there was no single record or database responsive to Vedder's entire 11 August request. Such a record would have had to be created by a combination of two non-communicating computer systems, COBAN and CAD (computer aided dispatch, a system often in evidence in King County Courts, which contains most of the information about specific incidents). The City did not have the capability to correlate some of the data from her request with other data in her request. It also appears to be true that the City did not fully understand the capabilities of its own COBAN program. The City needed to ask the manufacturer questions in September about the PRA request. Their questions can be interpreted as inquiries about whether the City possessed a public record in the system or would need to create a record to respond.

Nevertheless, when Eric Rachner, a software engineer with an understanding of the COBAN system, made a request for specific data, and when additional City technical employees were brought in to examine and redact the data, the evidence is that the responsible employees then knew that the COBAN database had the information partly responsive to Ms. Vedder. The database Mr. Rachner received was searchable and listed all in-car videos, which is broader than Ms. Vedder's request. From the database, one can search for and find retained in-car videos, which was Ms. Vedder's request. In fact, in the same month, the City gave Ms. Vedder some SQL printouts from the same database.

The City had a responsibility to give Ms. Vedder the database information in partial response to her PRA request. It did so in September 2011. The City is liable for the failure to respond to Ms. Vedder during this time period.

The City may view this ruling as "no good deed goes unpunished." In the fall of 2010, the City gave specifics to Ms. Vedder about the limits of its ability to query the COBAN system. It also contacted COBAN. Finally, the City gave KOMO information about how to contact COBAN, create documents and download in-car videos, at KOMO's expense, in December 2010. All of this was in compliance with, or beyond the City's responsibility under, the Public Records Act. Also, during the March-June time period, the City made efforts, after Mr. Conlin intervened, in making documents and videos available and creating documents which the City was not legally required to create. Finally, the Court appreciates and understands the workload involved: that there are thousands of public records act requests that come in every day to public agencies and that often, agencies are underfunded for responding to these requests.

But the evidence here is that the City very strictly interpreted the records request from Ms. Vedder, looking to see if one record or set of records or database existed with all of the information requested, rather than whether some partial response could be given. A citizen should not be forced to continually reformulate requests to capture all of the information sought to get any answer, if part of the request is accessible. By way of illustration, one of the City witnesses testified: "[a]s an IT professional, I would say that Mr. Rachner was assuming full responsibility for whatever data he requested . . . Ms. Vedder's request . . assumed that SPD had internal knowledge of the database and the meaning of the tables that had been vendor created."

Knutson Declaration at 6. Noting that Rachner "assumed full responsibility" or considering the responsibility of a requestor betrays a mindset that is not helpful to fulfilling responsibilities under the PRA. Ms. Vedder's request did make an unwarranted assumption, and the City properly informed her of that fact. But later, when the City gained an understanding that it possessed a record was partially responsive during this period, even if employees did not grasp that fact initially,[2] it had a duty to respond.

The Court does not rule that an agency has to read the mind of the requestor. That is not the law. But when it knows that information that is partially responsive exists, it must turn it over. In this case, the Court concludes based upon this evidence that the City knew that the database produced to Mr. Rachner was partially responsive to Ms. Vedder's requests.

3. 1 September 2010 Request

For reasons discussed at the end of this Memorandum, the Court concludes that the City had no legal responsibility to turn over in-car videos before three years had elapsed.

B. Sanctions

At the outset of any penalty determination, a trial court must consider the entire penalty range established by the legislature. Trial courts may exercise their considerable discretion under the PRA's penalty provisions in deciding where to begin a penalty determination. RCW 42.56.550(4); Yousoufian v. Office of Ron Sims, 168 Wash.2d 444 (2010).

[2] The evidence is that the first employees to respond understood little about certain capabilities of the COBAN database, but made inquiries directly to the manufacturer. The IT employees who assisted later did or must have known, as they were printing out information from it to give to Vedder and were analyzing it to redact for Rachner. The record is conflicting and incomplete as to timing on this issue.

Hon. Jim Rogers
King County Superior Court
Dept. 45
516 3rd Avenue
KCC-SC-0203
Seattle, Washington 98104

Mitigating factors that may serve to decrease the penalty are (1) a lack of clarity in the PRA request, (2) the agency's prompt response or legitimate follow-up inquiry for clarification (3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions, (4) proper training and supervision of the agency's personnel, (5) the reasonableness of any explanation for noncompliance by the agency, (6) the helpfulness of the agency to the requestor, and (7) the existence of agency systems to track and retrieve public records. Yousoufian.

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

The Court considered all factors. The Court concludes that there was no reckless, wanton or bad faith noncompliance. The request did ask for what were initially believed to be nonexistent documents in any form. The City made some preliminary inquiries to COBAN. The work done by the City displayed a lack of knowledge about how its own system worked. After intervention

Hon. Jim Rogers
King County Superior Court
Dept. 45
516 3rd Avenue
KCC-SC-0203
Seattle, Washington 98104

by the City Council, the City actively assisted KOMO beginning in March of 2011, and while this may have been very late, the fact that the City created some documents and assisted KOMO must be weighed in their favor. Finally, KOMO suffered no economic loss.

On the other hand, the response of the City was too rigid in its view of how to respond and slow to respond. This issue of the videos is of great importance to the City (though no specific video has been identified). Finally, the Court is not inclined to believe heavy sanctions are necessary to deter future conduct. Sometimes the City denied requests, sometimes gave information, and other times actually created records for KOMO.

The Court levies $25.00 a day fine from the day Mr. Rachner received his first batch of COBAN files to the day Ms. Vedder received her COBAN files. KOMO is also awarded its attorneys fees and costs, to be decided through a petition for same to be filed within 21 days on a 28 day dispositive motion schedule.

C. Interpretation of RCW 9.73.090 and RCW 42.56

The Court is obliged to give effect to the language of RCW 9.73.090, if possible. RCW 42.56.030 is the Legislature's policy pronouncement for the Public Records Act. It requires courts to liberally interpret the PRA and enforce it against any conflicting statutes.

In this case, this Court concludes that it is the government's interpretation of the Privacy Act, not the statute itself, which is in partial conflict with the PRA. A provision of the PRA, RCW 42.56.070, allows an "other statute" to prohibit disclosure of certain records. RCW 9.73.090(1)(c)[3]

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[3] While RCW 9.73 is in the Privacy Act, these in car videos are often not private at all. This section of the law concerns timing of the release of videos, not privacy. There is no privacy issue in this case. As the Lewis case

Hon. Jim Rogers
King County Superior Court
Dept. 45
516 3rd Avenue
KCC-SC-0203
Seattle, Washington 98104

is an "other statute" in this case. There is precedent for other statutes to govern the release of documents otherwise covered by the PRA, see Deer v. DSHS, 122 Wn.App. 84 (2004); In re the Dependency of KB, 150 Wn.App. 912 (2009). This Court does not read PAWS v. UW, 125 Wn.2d 243, 262 (1994) as conflicting with these cases. Rather, PAWS should be read as meaning that exemptions must be explicitly identified by statute and may not be implied. Id.

The statute at issue, RCW 9.73.090 does not exempt any records from public disclosure, it merely delays disclosure:

> No sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until final disposition of any criminal or civil litigation which arises from the event or events which were recorded.

Under the language of the statute and case law, these governmental entities are required to strictly comply with the procedure under RCW 9.73.090(1)(c). See Lewis v. Dep't of Licensing, 157 Wn.2d 446, 465 (2006). The brief note in the statute reads:

> **Intent--2000 c 195:** "The legislature intends, by the enactment of this act, to provide a very limited exception to the restrictions on disclosure of intercepted communications." [2000 c 195 § 1.]

The statute is ambiguous as what is meant by "until final disposition of any criminal or civil litigation which arises from the event or events which were recorded." The City had to promulgate a policy to interpret this language. The City stated that its policy defines "final disposition" to be three years, which is the statute of limitations for tort actions. In addition, SPD releases in car videos to persons in the videos and through discovery process, that is, civil and

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makes clear, RCW 9.73 governs matters beyond the issue of privacy, see Lewis v. Dept. of Licensing, 157 Wn.2d 446, 465 (2006)(9.73.090 requires strict compliance for police to advice motorists they are recorded even in public

Hon. Jim Rogers
King County Superior Court
Dept. 45
516 3rd Avenue
KCC-SC-0203
Seattle, Washington 98104

criminal cases in court. Finally, for all videos "tagged for retention" SPD has a three year record retention policy, that is, it destroys all in car videos after three years. The evidence over how this was done was in conflict-KOMO argue that it is done automatically by the software, the City argue that they did not destroy any videos and still retained all tagged videos (with the exception of several "crashes").

Is it unreasonable and contrary to law to have a three year records retention policy while interpreting RCW 9.73.090 to require records requestors to wait three years period for videos? The PRA, at RCW 42.56.100, provides that if a record request is made at a time when a record exists but is slated for destruction in the near future, the agency shall retain the record until the request is resolved. The Assistant City Attorney noted in argument that no videos had been destroyed, yet the policy exists. Vedder and KOMO argue that the policy is a "Catch-22,"[4] and they are correct.

Moreover, the facts of this case illustrate how long it may take to resolve PRA requests, which can be far longer than three years plus one day. Requestors may not have enough information to find the specific video at issue, and may need time to request other documents from Seattle Police to request the video. Citizens must be allowed a reasonable time to make their requests, receive their responses and complete the inquiry. The three year records retention policy is contrary to the PRA as regards to in-car videos. The Court does not specific herein what the policy should be.

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conversations)

[4] "It's the best catch there is." Apologies to the late Joseph Heller.

Hon. Jim Rogers
King County Superior Court
Dept. 45
516 3rd Avenue
KCC-SC-0203
Seattle, Washington 98104

1 Next, is the policy delaying release for three years lawful in light of the exceptions of
2 disclosure to litigants in civil cases and criminal cases, and to persons actually in the videos?
3 While not directly at issue with Vedder and KOMO, it is important to address the entire City
4 policy to see if it can be reconciled with the PRA. For civil cases, the purpose behind the policy of
5 three year delayed disclosure is to correspond to the statute of limitations of tort cases. The policy
6 in this regard is overbroad. Lawyers who may file claims on behalf of their clients are required to
7 conduct a CR11 investigation before the claim is filed. Lawyers should not be in the position of
8 being required to file a claim just to see the video, or failing to file within the statute of limitations
9 for lack of access to a video that might have led to a filing. For this reason, the policy is
10 overbroad for those who are investigating a potential claim. This Court does not define what may
11 be someone who has a potential claim against the City, or what threshold may need to be met, but
12 leaves it to the City to arrive at a lawful and more reasonable procedure.
13
14 Is a three year time period a narrow and reasonable interpretation of the statute, or as
15 Vedder and KOMO argue, is the City required to examine each in-car video tagged for retention,
16 and if there is no current litigation, disclose them? The statute RCW 9.73.090 must be interpreted
17 narrowly to effectuate the PRA. The City argued (and provided evidence, by way of declaration)
18 that most tort cases are not filed against the City until shortly before the statute of limitations
19 period expires. This Court's experience is similar, that it is the rare tort case filed until just before
20 the three year period is up and service may be effected. For this reason, a case by case review of
21 videos prior to three years would not effectuate the intent of the legislature. In fact, some claims
22 and criminal charges have a much longer statute of limitations. In striking a balance, the City has
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Hon. Jim Rogers
King County Superior Court
Dept. 45
516 3rd Avenue
KCC-SC-0203
Seattle, Washington 98104

reasonably interpreted the statute at issue, as long as it is carried out within the parameters of this decision.

Ms. Vedder and KOMO are not prospective criminal or civil case litigants. Under the PRA, Ms. Vedder is exercising her right as a citizen to request public records, regardless of what she does for a living, and regardless of what purpose she intends. This Court has decided that RCW 9.73.090 is an "other statute" which means that in this Court's view, the Legislature deliberately decided to delay the release of in-car videos to citizens making such requests to the "until final disposition of any criminal or civil litigation which arises from the event or events which were recorded." The policy behind deciding to delay release of these records is not entirely clear, but the language is clear. The policy is consistent with a narrow application of the statute within the confines of the ruling herein. This ruling only applies to the in car videos themselves, not the records related to them.

Finally, Ms. Vedder and KOMO argue that the policy is a sham, not announced until late in the PRA request process. Whenever the policy was announced, it is in compliance with an interpretation of the law. The statute itself, RCW 9.73.090, clearly does require some delay before the disclosure of in-car videos. Also, the parties have asked this Court to decide this case upon sworn statements of witnesses. A determination of whether witnesses are lying about the timing of the creation of the policy would require live testimony and frankly, include the lawyers for both sides as witnesses. This Court has decided to proceed forward and decide this case on the assumption that there was such a policy. Looking at all of the evidence, the fact that it was not

mentioned earlier appears to be more consistent with ineptitude and less with devious intent, but a fact finder with a full hearing might reach other conclusions.

This Court does not comment on the wisdom of the intent of the Legislature in deciding to delay release for all videos tagged for retention as outlined in RCW 9.73.090. Ms. Vedder's requests were part of her investigative work. Investigations of our private and public institutions by journalists are vital to our public life, and the issues raised by some in-car videos are currently important and prominent in our City. But this Court is not in the position of second-guessing the will of the Legislature absent a clear constitutional or statutory conflict.

IT IS ORDERED:

Sanctions, fees and costs for the 11 August 2010 PRA request are awarded.; Sanctions are denied for all other requests; The City's Motion on RCW 9.73.090 is Granted in Part as noted.

April 6, 2012

Hon. James E. Rogers
King County Superior Court

Hon. Jim Rogers
King County Superior Court
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KCC-SC-0203
Seattle, Washington 98104