

WASHINGTON SUPREME COURT

Fisher Broadcasting-Seattle TV LLC v. City of Seattle

180 Wash. 2d 515 (2014) · Decided June 12, 2014

SUMMARY

The Washington Supreme Court considered whether the Seattle Police Department violated the Public Records Act by denying requests for records concerning retained police dash-camera recordings. The court held that the department properly denied the request for officers' log sheets but violated the Act by failing to produce a partially responsive list of retained videos. It further held that the privacy statute provides only a limited exemption for videos relating to actual, pending litigation, and remanded for further proceedings.

OPINION

GONZÁLEZ, J.

González, J. ¶1 KOMO news reporter Tracy Vedder made three unsuccessful public records requests to the Seattle Police Department (SPD) relating to “dash-cam” videos taken by SPD officers. We conclude that two of the requests should have been granted. Facts ¶2 Since 2007, SPD’s entire patrol fleet has been equipped with in-car video and sound recording equipment.

SPD’s recording system was manufactured by COBAN Technologies, a private company that provides both the recording equipment and the computer system that manages at least the initial video storage and retrieval. The COBAN system was not integrated into SPD’s records management system or its computer aided dispatch system, and at least at the time this case arose, recordings could be searched only by “officer’s name, serial number, date and time.” Clerk’s Papers (CP) at 403, 440, 454. ¶3 SPD’s written policy directs officers to use their in-car video recorders to “document all traffic stops, pursuits, vehicle searches and citizen contacts when occurring within camera range.” CP at 88 (SPD Policies and Procedures ch. 17.260).

Under this written policy, videos are kept for 90 days unless an officer tags an individual video as “required for case investigation/prosecution,” in which case they are kept for at least three years. Id. Under SPD policy, videos needed longer than three years should be burned onto a DVD (digital video disc) and stored in a relevant case file. Otherwise, videos are scheduled to be destroyed after three years. ¶4 In 2010, Vedder made both informal requests for information and a series of formal Public Records Act *519(PRA), chapter 42.56 RCW, requests.

On August 3, 2010 she asked for user and training manuals on the dash-cam video system. SPD denied this request on the grounds the materials were protected under federal copyright law and

RCW 42.56.240(1)'s exception for materials essential to effective law enforcement. ¶5 On August 4, 2010, Vedder requested "a copy of any and all Seattle police officer's log sheets that correspond to any and all in-car video/audio records which have been tagged for retention by officers.

This request is for such records dating from January 1, 2005 to the present." CP at 96.1 On August 10, 2010, SPD's public record's officer, Sheila Friend Gray, responded that no relevant records existed. ¶6 The next day, Vedder requested "a list of any and all digital in-car video/audio recordings that have been tagged for retention by Seattle Police Officers from January 1, 2005 to the present.

This list should include, but not be limited to, the officer's name, badge number, date, time and location when the video was tagged for retention and any other notation that accompanied the retention tag." CP at 98.

On August 18, SPD denied the request on the grounds that "SPD is unable to query the system in the way you have requested. We can search by individual officer name, date, and time only. We cannot generate mass retention reports due to system limitations.

Thus we do not have any responsive records." CP at 99. ¶7 On September 1, 2010, Vedder requested "copies of any and all digital, in-car video/audio recordings from the Seattle Police Department that have been tagged for retention by anyone from January 2007 to the present.

The recordings should also include, but not be limited to, corresponding identifying information such as the date, time, *520location, and officer(s) connected to each unique recording." CP at 110. SPD contacted COBAN for help with this request. COBAN told SPD that such a list could be generated by running a computer script that COBAN was willing to provide for free, but coding the program to enable mass copying of the videos "will take some real programming" and would cost at least \$1,500.

CP at 239. SPD denied Vedder's third request on October 1, 2010, telling her, " 'SPD is unable to query the system to generate a retention report that would provide a list of the retained videos.' Without this capability we are unable to respond to your request.

Therefore we have no documents responsive to your request." CP at 254. After Vedder pressed the matter, SPD's attorney told her that the privacy act prevented release of the videos that were less than three years old. ¶8 Meanwhile, in February 2011, Eric Rachner requested "a copy of the full and complete database of all Coban D [igital] V[ideo] M[anagment] S[y]stem (DVMS)] activity logs in electronic form." CP at 40.

He suggested since "Coban DVMS system's database runs on [a] Microsoft SQL [(structured query language)] server,... it should be convenient to provide the logs, in electronic form, in their original Microsoft SQL Server format.

The responsive records will include all rows of all columns of all tables related to the logging of video-related activity within the Coban DVMS.” Id. After working closely with Rachner, SPD began to provide the records in June. That summer, Rachner showed Vedder what he had received from SPD. According to Vedder, “I was amazed because the COBAN DVMS database provided to Mr. Rachner was exactly the sort of list of videos in electronic format that I had requested on August 11, 2010.” CP at 81. ¶9 On September 19, 2011, KOMO sued SPD under the PRA for failing to timely produce records in response to Vedder’s August 4, August 11, and September 1, 2010 requests, among other things.

The next day the SPD gave Vedder a copy of materials it had produced for Rachner. *521Early in 2012, both parties moved for summary judgment. Judge Rogers found that SPD properly denied Vedder’s request for police officer’s log sheets and for the videos themselves.

However, he found SPD had improperly rejected Vedder’s request for the list of videos. The court initially levied a “\$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,” plus fees and costs. CP at 540.2 ¶10 We granted direct review. SPD is supported on review by the Washington State Association of Municipal Attorneys and the Washington Association of Sheriffs and Police Chiefs.

KOMO is supported on review by the Washington Association of Criminal Defense Lawyers, the Washington Defender Association and the Defender Association, and the News Media Entities and Washington Coalition for Open Government. Analysis ¶11 “The PRA mandates broad public disclosure.” *Sargent v. Seattle Police Dep’t*, 179 Wn.2d 376, 385, 314 P.3d 1093 (2013) (citing RCW 42.56.030); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978).

It declares that “[t]he people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.” RCW 42.56.030.

The PRA is “liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.” Id. To that end, State and local agencies are required to disclose their *522records upon request, unless the record falls within an exception.

Gendler v. Batiste, 174 Wn.2d 244, 251, 274 P.3d 346 (2012) (citing RCW 42.56.070(1)). The agency refusing to release records bears the burden of showing secrecy is lawful. *Sargent*, 179 Wn.2d at 385-86 (citing *Newman v. King County*, 133 Wn.2d 565, 571, 947 P.2d 712 (1997)).

The PRA does not, however, require agencies to “ ‘create or produce a record that is nonexistent.’ ” *Gendler*, 174 Wn.2d at 252 (quoting *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004)). ¶12 Agencies must make a sincere and adequate search for records. RCW

42.56.100; Neigh. All. of Spokane County v. Spokane County, 172 Wn.2d 702, 720, 723, 261 P.3d 119 (2011).

When an agency denies a public records request on the grounds that no responsive records exist, its response should show at least some evidence that it sincerely attempted to be helpful. See, e.g., Neigh. All., 172 Wn.2d at 722. ¶13 Our review of both the agency action and the court opinions below is de novo. Gendler, 174 Wn.2d at 251 (citing RCW 42.56.550(3)).

1. “Officers’ Log Sheets” ¶14 Vedder requested “a copy of any and all Seattle police officers’ log sheets that correspond to any and all in-car video/audio records which have been tagged for retention by officers. This request is for such records dating from January 1, 2005 to the present.” CP at 96.

The department responded that it had no relevant records. Judge Rogers found this did not violate the PRA. We agree. ¶15 Records requestors are not required to use the exact name of the record, but requests must be for identifiable records or class of records. Wash. State Bar Ass’n, Public Records Act Deskbook: Washington’s Public Disclosure and Open Public Meetings Laws § 4.1(1)-(2) (2006 ed. & 2010 Supp.).

The record establishes that “log sheets” specifically *523referred to paper forms that had not been used since 2002 and that these forms had been destroyed in 2004. Among other things, David Strom, senior warehouse of archival records for the SPD, testified that “log sheets” were “paper forms that officers filled out during their patrols.

The log sheets’ contained areas in which officers entered information regarding calls dispatched via radio, location, clearance code, notes, mileage and vehicle condition.” CP at 399. Friend Gray looked for responsive records, was told definitively that “officer’s log sheets” referred to a specific class of documents that no longer existed, and communicated her finding to Vedder.

We find SPD’s response complied with the PRA and affirm Judge Rogers’ denial of this claim. 2. “List of All Retained Videos” ¶ 16 We turn now to Vedder’s request for “a list of any and all digital in-car video/audio recordings that have been tagged for retention by Seattle Police Officers from January 1,2005 [, including] officer’s name, badge number, date, time and location when the video was tagged for retention and any other notation that accompanied the retention tag.” CP at 98.

Judge Rogers found SPD violated the PRA when it told Vedder it had no responsive records. We agree. ¶17 SPD contends that Vedder was asking it to create a new record. This is clearly true to some extent; producing a document that would correlate all of the information Vedder requested would have required mining data from two distinct systems and creating a new document.

This is more than the PRA requires. *Citizens for Fair Share v. Dep't of Corr*, 117 Wn. App. 411, 435, 72 P.3d 206 (2003) (citing *Smith v. Okanogan County*, 100 Wn. App. 7, 13-14, 994 P.2d 857 (2000)). However, as SPD's later response to Rachner demonstrated, it did have the capacity to produce a partially responsive record at the time it denied her request. It should have done so. ¶18 We recognize that neither the PRA itself nor our case law have clearly defined the difference between creation and production of public records, likely because this question did not arise before the widespread use of electronically stored data.

Given the way public records are now stored (and, in many cases, initially generated), there will not always be a simple dichotomy between producing an existing record and creating a new one. But "public record" is broadly defined and includes "existing data compilations from which information may be obtained" "regardless of physical form or characteristics." RCW 42.56.010(4), (3).

This broad definition includes electronic information in a database. *Id.*; see also WAC 44-14-04001. Merely because information is in a database designed for a different purpose does not exempt it from disclosure. Nor does it necessarily make the production of information a "creation" of a record. ¶19 Whether a particular public records request asks an agency to produce or create a record will likely often turn on the specific facts of the case and thus may not always be resolved at summary judgment.

But for SPD's response to Rachner's request, this might well have been such a case. However, the uncontroverted evidence presented showed that a partial response could have been produced at the time of the original denial.

The failure to do so violated the PRA. ¶20 In the alternative, SPD argues that Vedder was requesting metadata and that while metadata is subject to the PRA, it must be specifically requested. *Br. of Resp't* at 33 (citing *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 151-52, 240 P.3d 1149 (2010)).

In *O'Neill*, we defined "metadata" as " 'data about data' or hidden information about electronic documents created by software programs." 170 Wn.2d at 143 (quoting Jembaa Cole, *When Invisible Electronic Ink Leaves Red Faces: Tactical, Legal and Ethical Consequences of the Failure to Remove Metadata*, 1 *Shidler J.L. Com. & Tech.* 8, ¶ 7 (Feb. 2, 2005)). But Vedder was not seeking to peer beneath some text in an electronic database.

She was not requesting metadata in any meaningful sense. *525¶21 We find the rest of SPD's arguments unavailing. We hold that SPD violated the PRA when it incorrectly told Vedder it had no responsive records and affirm. 3.

The Videos and the Privacy Act ¶22 We turn now to Vedder's request for "copies of any and all digital, in-car video/audio recordings from the Seattle Police Department that have been tagged

for retention by anyone from January 2007 to the present.” CP at 110.

After consulting with COBAN, SPD denied this request based on the grounds that it was “ ‘unable to query the system to generate a report that would provide a list of retained videos.’ Without this capability we are unable to respond to your request.” CP at 254. But SPD had the capability to produce the list, so to the extent that its ability to produce the videos was contingent on its ability to produce the list, its initial response violated the PRA. ¶23 SPD also argues it is barred from releasing the videos by RCW 9.73.090(1)(c) of the privacy act.

Under the PRA, “other statutes” may exempt or prohibit disclosure of certain records or information. See *Ameriquist Mortg. Co. v. Office of Att’y Gen.*, 170 Wn.2d 418, 440, 241 P.3d 1245 (2010) (quoting RCW 42.56.070(1)). All exceptions, including “other statute” exceptions, are construed narrowly. *Hearst*, 90 Wn.2d at 138-39. Generally, Washington’s privacy act requires all parties to a private communication to consent to any recording.

RCW 9.73.030. However, some recordings made by police are exempted from disclosure whether or not they record private conversations. Relevantly: The provisions of RCW 9.73.030 through 9.73.080[3] shall not apply to police... in the following instances: *526(c) Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles.

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. RCW 9.73.090(1). SPD argues that this statute functions as an “other statute” exception to the PRA.

We agree in part, but given the general rule that exemptions are to be interpreted narrowly, RCW 42.56.030, we find this exemption is limited to cases where the videos relate to actual, pending litigation.⁴ ¶24 The legislature added RCW 9.73.090(1)(c) in 2000. Laws of 2000, ch. 195, § 2. It stated that its intent was “to provide a very limited exception to the restrictions on disclosure of intercepted communications.” Laws of 2000, ch. 195, § 1.

Prior to that time, RCW 9.73.090 had authorized certain law enforcement and emergency recordings and restricted their use to “valid police or court activities.” *Id.* § 2. This amendment and the statement of legislative intent strongly suggest that the legislature intended to provide greater guidance on the use of these authorized recordings. It does not suggest the legislature intended to create a broad categorical exception to the PRA.

We note that neither the statute nor even the bill reports mention the PRA or its predecessor. See, e.g., H.B. Rep. on H.B. 2876, 59th Leg., Reg. Sess. (Wash. 2006); H.B. Rep. on H.B. 2903, 56th Leg., Reg. Sess. (Wash. 2000); RCW 42.56.050, .240. Indeed, exempting recordings from

disclosure “until final disposition of any criminal or civil litigation which arises from the event,” RCW 9.73.090(1)(c), would be a strange way to protect privacy.

Privacy does not evaporate when litigation ends. ¶25 Of course, we turn to extrinsic evidence of legislative intent only when the plain language of the statute does not answer the question. *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

In determining the plain meaning of a statute, we consider “all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Id.* at 11. In this case, the statute as a whole suggests the legislative goal was neither to instill categorical delay nor protect personal privacy. Instead, the statute as a whole provides a limited exception to the rules against recording and the rules requiring disclosure to protect the integrity of law enforcement investigations and court proceedings.

In authorizing “[s]ound recordings that correspond to video images recorded [without all parties’ consent] by video cameras mounted in law enforcement vehicles,” RCW 9.73.090(1)(c), our legislature built on an exception to the privacy act that had for decades permitted recording of emergency calls and interviews of persons in custody. Laws of 1970, 1st Ex. Sess., ch. 48; Laws of 2000, ch. 195.

For decades the privacy act has admonished that these “recordings shall only be used for valid police or court activities.” Laws of 1970, 1st Ex. Sess., ch. 48, § 1(2)(d) (codified at RCW 9.73.090(1)(b)(iv)). Context suggests that the legislature’s intent in providing that “[n]o 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” is to give more guidance to agencies attempting to limit their use of these recordings to “valid police or court activities,” RCW 9.73.090(1)(b)(iv).

So long as “police or court activities” are ongoing, RCW 9.73.090(1)(c) restricts disclosure — most likely to protect those very “police or court activities” recited by the statute. Accord *Sargent*, 179 Wn.2d at 395. Neither the statutory text nor the legislative history suggests that categorical delay was legislative purpose. Delay was simply the means to an end — likely to avoid tainting pending litigation. ¶26 KOMO contends that RCW 9.73.090(1)(c) is not an “other statute” exception to the PRA because it does not provide an alternative method of obtaining public records.

Br. of Appellant at 34 (citing *Deer v. Dep’t of Soc. & Health Serv.*, 122 Wn. App. 84, 93 P.3d 195 (2004); *In re Dependency of KB.*, 150 Wn. App. 912, 210 P.3d 330 (2009)). But while it was true that in both *Deer* and *KB.* there was an alternative statutory procedure to obtain records, neither case held that was a necessary factor.⁵ ¶27 We hold that RCW 9.73.090(1)(c) is a limited

exception to immediate disclosure under the PRA, but it is one that applies only where there is actual, pending litigation.

We reverse and remand for further proceedings on this claim as well.⁶ *529 Conclusion ¶28 We hold that SPD complied with the PRA when it declined Vedder's request for officer log sheets. We hold that SPD did not comply with the PRA when it failed to produce a list of retained videos.

We hold that RCW 9.73.090(1)(c) may exempt specific videos from public disclosure during the pendency of litigation but does not create a blanket exemption for any video that might be the subject of litigation. KOMO is entitled to attorney fees on the claims it prevailed on.

We remand to the trial court for further proceedings consistent with this opinion. C. Johnson, Stephens, and Gordon McCloud, JJ., and J.M. Johnson, J. Pro Tem., concur. Vedder's declaration in support of KOMO's motion for summary judgment states that the request was submitted on August 4, 2010, as does Judge Rogers' order on cross motions for summary judgment.

CP at 75, 535. The request was sent to SPD by e-mail late afternoon on August 3, 2010. CP at 95-96. Later, Judge Rogers clarified the penalty would accrue from the date the request was denied, not the date the materials were provided to Rachner. CP at 840-41. These provisions make intercepting, recording, or divulging private communications unlawful, RCW 9.73.030; establish grounds for an ex parte court order authorizing interception, RCW 9.73.040; make unlawfully intercepted communications generally inadmissible in court, RCW 9.73.050; create a civil action for damages, RCW 9.73.060; exempt certain common carriers and 911 calls, RCW 9.73.070; and make violation of the act a gross misdemeanor, RCW 9.73.080.

We note that RCW 9.73.090(1)(c) is not a complete bar to release of videos pertaining to ongoing litigation. It does not bar release of videos to all parties involved in that litigation and may not be a bar to release pursuant to a court order. KOMO also contends that RCW 9.73.090(1)(e) does not qualify as an "other statute exception" because such other statutes "must exempt or prohibit disclosure of specific public records in their entirety." Br. of Appellant at 30 (citing *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994) (PAWS)).

This is based on a widespread, but mistaken, reading of that passage in PAWS. In that passage, we considered the University of Washington's contention that several other statutes exempted unfunded grant proposals from disclosure in their entirety, rather than merely allowed their redaction to protect specific information. PAWS, 125 Wn.2d at 261-62.

We articulated a test to determine when that was so. *Id.* That test is not helpful for determining whether a specific statute creates any exception under the PRA but only for determining whether it exempts a record in its entirety. Notably, PAWS itself did not apply that test to determine whether the Uniform Trade Secrets Act, chapter 19.108 RCW, or an antiharassment statute, RCW 4.24.580, applied but simply looked to their plain language.

125 Wn.2d at 262-63. KOMO also argues that SPD violated the PRA by not providing a privilege log on the videos it did not disclose. Reply Br. of Appellant at 9 (citing RCW 42.56.210(3)). KOMO raised this in its complaint and summary judgment motion but did not assign error to the trial court's failure to reach it or otherwise address the issue in its opening brief.

Given that, we decline to reach it. For similar reasons, we decline to reach whether SPD showed undue favoritism toward Rachner.