

**AMERICAN ARBITRATION ASSOCIATION  
BEFORE ARBITRATOR PAUL M. GRACE  
Case No. 75 390 00332-09**

In the Matter of the Arbitration )

Between )

Seattle Police Officers' Guild )

And )

City of Seattle )

Public Disclosure / Release of Names )

**ARBITRATOR'S  
DECISION AND AWARD**

**For the Seattle Police Officers' Guild:**

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**For the City of Seattle:**

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## I. INTRODUCTION

Commissioned police officers and sergeants of the City of Seattle (the "City") are represented for the purposes of collective bargaining by the Seattle Police Officers' Guild (the "Guild"). The City and the Guild have been parties to collective bargaining agreements for many years, most recently for agreements effective through 2006 (Ex 2) and 2010 (Ex 1). Those agreements describe the investigatory procedures followed by the City when it is required to respond to public disclosure requests under the State's Public Records Act (the "PRA"). As an established part of that procedure, the City redacted officers' names and serial numbers from requests concerning sustained violations.

In 2007, while negotiating the negotiating the collective bargaining agreement that expired at the end of 2010 (the "Agreement"), there was a much-publicized incident in which Seattle police officers were accused of misconduct. In response to community concern, Mayor Greg Nickels convened the Police Accountability Review Panel (the "PARP") of prominent community members to assess the Seattle Police Department's (the "SPD") accountability system. The PARP issued a final report in early 2008 in which it made 29 recommendations "for enhancing and strengthening the police accountability system," including reforms of the SPD's Office of Professional Accountability (the "OPA"). (Ex 3)

After being contacted by the Mayor's office in early 2008, the Guild agreed to consider incorporating some of the recommendations into the negotiations in progress. The recommendation relevant for this proceeding is number 24:

24. The OPA should adopt a policy that requires public disclosure of all OPA records to the maximum extent allowed by law. Records of all sustained complaints, including the punishment imposed, should be made public in a format designed to protect the privacy of the officers and complainants to the extent required by law.

The parties agreed to make several changes to Article 3.6(K) of the Agreement to reflect the PARP recommendation including the following: "It is understood that an officer's personal identifying information shall be redacted from all records released."

The parties signed the Agreement in July 2008, and the City continued its practice of redacting officers' personal information in requests about sustained violations until the

spring of 2009. At that time, at the direction of Assistant Police Chief Dick Reed, the OPA began notifying affected officers that it would release names and serial numbers on public disclosure requests relating to sustained complaints. (Ex 6)

When the Guild was informed of the release of information from its members, it sought relief from the City. When there was no informal resolution to the dispute, the Guild filed grievances according to the parties' Grievance Procedure, including a demand for arbitration at Step 4.

At an arbitration hearing on the merits of the grievance on February 3 and 4, 2011 at the Employer's offices in Seattle, Washington, the City and the Guild had the opportunity to make opening statements, submit evidence, examine and cross-examine affirmed witnesses, and argue the issues in dispute. At the hearing, the parties stipulated to the issue before the Arbitrator and that he had jurisdiction to issue a final and binding award. After submittal of post hearing briefs by both parties, the hearing was declared closed, and the case stood fully submitted for decision.

## **II. STATEMENT OF THE ISSUE**

The parties agreed to the following stipulation:

1. Prior to 2009, when Seattle Police Department (SPD) received requests under the Public Disclosure Act for internal investigation files that led to sustained findings, SPD would typically respond by providing a summary of the investigation with the personal identifying information about the officer redacted. SPD asserted the "essential to effective law enforcement" exemption as the basis for these redactions. The personal identifying information that was redacted included the officer's name and serial number.
2. Beginning in 2009, SPD began releasing larger portions of internal investigation files that led to sustained findings. While certain information is now redacted or withheld pursuant to the "essential to effective law enforcement" exemption, SPD does not redact the name of the officer subject to the sustained complaint.

The issue before the Arbitrator is:

Did the City violate Article 3.6(K) of the Agreement beginning in early 2009 when it ceased the redaction of officers' names and serial numbers from public records requests involving sustained complaints?  
If so, what is an appropriate remedy?

### **III. RELEVANT CONTRACT PROVISIONS**

#### **Article 3 Disciplinary, Complaint Hearing, and Internal Investigation Procedures**

K. To the extent allowable by law at the time of the request, the City will consider application of relevant exemptions to the public disclosure law set forth in RCW 42.17.310 with respect to personally identifying information in internal disciplinary proceedings files and OPA files, the nondisclosure of which is essential to effective law enforcement. At least five (5) business days prior to release of information by the City, the City shall notify an employee by mail at their last designated home address, with a copy to the Guild, of requests for access to internal disciplinary proceedings files and OPA files concerning the employee made by other than the individuals identified in 3.6H. It is understood that an officer's personal identifying information shall be redacted from all records released.

Records of all sustained complaints, including the punishment imposed, should be made public in a format designed to protect the privacy of the officers and complainants, consistent with the provisions of Section 3.6K.

#### **Article 18 Subordination of Agreement**

18.1 It is understood that the parties hereto and the employees of the City are governed by the provisions of applicable Federal and State law. When any provisions thereof are in conflict with or are different from the provisions of this Agreement, the provisions of said Federal Law and State Law are paramount and shall prevail.

18.2 It is also understood that the parties hereto and the employees of the City are governed by applicable City Ordinances, and said Ordinances are paramount except where they conflict with the express provisions of this Agreement.

#### **Article 19 Savings Clause**

19.1 If any Article of this Agreement or any Addendum hereto should be held invalid by operation of law or by any tribunal of competent jurisdiction, or if complaints with or enforcement of any Article should be restrained by such tribunal, the remainder of this Agreement and Addendums shall into be affected thereby, and the parties shall enter into immediate collective bargaining negotiations for the purpose of arriving at a mutually satisfactory replacement of such Article.

#### **Article 20 Entire Agreement**

20.2 The parties acknowledge that each has had the unlimited right and opportunity to make demands and proposals with respect to any matter deemed a proper subject for collective bargaining. The results of the exercise of that right are set forth in this Agreement. Therefore, except as otherwise provided in this Agreement, the Employer and the Guild for the duration of this Agreement, each voluntarily and unqualifiedly, agree to waive the right to oblige the other party to bargain with respect to any subject or matter whether or not specially referred to or covered in this Agreement.

#### **IV. POSITION OF THE PARTIES**

The Guild makes four arguments in support of its claim that the City violated the Agreement when it ceased redacting officers' personal information on sustained complaints. First, it cites what it believes to be the unambiguous language of Article 3.6(K) that mandates that "an officer's personal identifying information shall be redacted from all records released." It also notes that this was the City's practice for decades until early 2009 when the City ceased the redaction.

Next, the Guild refers to the history of bargaining relating to Article 3.6(K). It notes that when the parties began negotiations in 2006, neither party proposed to change the relevant provisions. The change was the result of the public incident and the PARP report. The Guild argues that the City negotiated with the Guild on changes to the Agreement to allow more disclosure and the insertion of the new final sentence to Article 3.6(K) requiring redaction.

Next, the Guild argues that other relevant contract provisions were added to the Agreement to protect officers' identities, notably in Article 3.5(G), which reads in part: "The explanation shall make no reference to the officer's name or any personally identifying information in providing the explanation."

Lastly, the Guild argues that under the 2006 collective bargaining agreement, the City asserted the "essential to law enforcement" exemption as a basis for redacting officers' personal information and continued doing so for almost a year under the Agreement. The Guild also argues that if the City believed that it was prohibited by law from redacting the personal information, it could have called for negotiations with the Guild over the invalid provision under Article 19 of the Agreement.

In sum, the Guild argues that this established practice, along with the parties' bargaining history and overall contract provisions support its claim that the City violated the Agreement.

The City begins its argument with a review of the legal history of the "essential law enforcement" exemption to the State's Public Records Act. It notes that the State Supreme Court and subsequent appeals court decisions have found that if a party wishes

to claim this exemption and avoid disclosure, it must “present evidence sufficient to establish a prima facie case that nondisclosure was essential to effective law enforcement.” *Amer v. City of Fircrest*, 71Wn.296, 857 P.2d 1083

The City notes that neither the SPD’s Chief nor Assistant Chief consider withholding names of officers in sustained complaints as essential to law enforcement, and therefore the City cannot assert this exemption.

Next, the City argues that the whole of Article 3.6(K) is best read as being subject to its opening clause:

To the extent allowable by law at the time of the request, the City will consider application of relevant exemptions to the public disclosure law set forth in RCW 42.17.310 with respect to personally identifying information in internal disciplinary proceedings files and OPA files, the nondisclosure of which is essential to effective law enforcement. (Emphasis added.)

The City will “consider” exemptions, not necessarily assert them. Once it asserts an exemption, it will redact “an officer’s personal identifying information.” It argues that the redaction of personal identifying information is sustainable only when allowable under State law.

Lastly, the City argues that the Guild’s position would require the City to assert a position in court that is not allowed by the PRA, namely that the “essential to law enforcement” exemption permits the redactions that are the subject of this grievance.

## V. DECISION

The facts in this case are largely undisputed. For many years before the spring of 2009, the City redacted personal identifying information from responses to public disclosure requests relating to sustained violations by police officers who were members of the Guild. That changed in early 2009 when Assistant Chief Dick Reed instructed the staff of the OPA to include officers’ names and serial numbers in public disclosure requests relating to sustained violations. The issue before the Arbitrator is whether the City had the right to cease the redaction under the terms of the Agreement.

### **Negotiating History**

The history of the 2006 and 2010 collective bargaining agreements relating to nondisclosure of officers' personal information is undisputed. There were no proposals by either party to change the provisions of Article 3.6(K) in either negotiation until the PARP recommendations were made public in January 2008. (Ex3). The testimony and evidence surrounding the incorporation of certain PARP recommendations demonstrates that the Guild and the City were in agreement about the continuation of the redaction. According to testimony by City negotiator Fields, the goal for the City and the Guild "... was to come to an agreement that would vindicate the City's interests for more disclosure ... and it would still work for the [Guild]." (Tr, Vol. I, 112) Fields testified that the City did not "express to the Guild that it wanted to release officer's [sic] names and other personal identifying information." (Tr, Vol. I, 113)

At no time during the discussions about incorporating the PARP recommendations into the Agreement did the City's negotiators or SPD command staff propose that the long-standing practice of redaction should cease. On the contrary, the parties seems to have been most compatible in arriving at the changes. The City gained an ability to disclose more information, and the Guild protected one of its primary interests, the privacy of its members.

Guild President O'Neill testified that there would not have been an agreement without the insertion of the final sentence in Article 3.6(K). With the last sentence included, the Guild agreed to the changes to the first sentence from "shall assert" in the 2006 collective bargaining agreement to "will consider" in the Agreement. With those changes, the essence of the PARP's recommendation #24 was incorporated in the Agreement. O'Neill testified that no one on the City's side said "That's going to create a legal problem for us. ... we had no idea that they were about to change their decades old policy of redacting." (Tr Vol. I, 56-57) The City's practice of redacting the information continued unabated until the spring of 2009 when SPD command staff instructed OPA staff to not redact officers' names in sustained complaints. As SPD manager Friend-Gray testified, all complaints that came out of OPA prior to 2009 asserted the essential to effective law

enforcement exemptions. (Tr Vol. II, p. 16) The change in the City's practice resulted in a grievance by the Guild.

In discussions at the Joint Labor Management Committee in an attempt to resolve the grievance over the matter, Guild officials asked City staff if new case law caused the City's change in policy. The City official responded that there was no new case law, that "[i]t was just the City's interpretation of existing case law had changed." (Tr. Vol. I, 64) Similarly, the City's expert on public disclosure could not cite a recent appeals court or Supreme Court decision on the subject. All cited cases were from the 1980's and 1990's. (Tr Vol. I, 136)

In conclusion, through the process of collective bargaining in 2008, the parties arrived at mutually agreeable changes to their Agreement that continued the City's long-standing practice of redacting personal identifying information.

### **Contractual Protections**

The parties have several "fail-safe" provisions to address changes in circumstances during the term of a collective bargaining agreement. However, none was invoked by the City. In Article 18, Subordination of Agreement, the parties agree that they are subject to State law, the PRA being the law at issue in this grievance. At no time during negotiations or subsequently did the City assert that provisions of the PRA are "in conflict with or different from" provisions of the Agreement. When questioned directly, Assistant Chief Reed could not point to "a law or a case that ... [he] used in that policy decision in 2009 to make that change from not releasing employee's names to releasing employee's names in sustained complaints." (Tr Vol. I, 187)

Under Article 19, Savings Clause, if "any tribunal of competent jurisdiction" would find an article invalid, the parties agreed that they would "enter into immediate collective bargaining negotiations for the purpose of arriving at a mutually satisfactory replacement of such Article." In early 2009 when Assistant Chief Reed instructed OPA staff to cease the redaction of personal identifying information, he did not cite a court ruling or legal finding regarding Article 3.6(K) that necessitated the City's change in practice. His reasoning for the change centered on the increase in the volume of public disclosure requests and SPD command staff's belief that the information should be made public. He



testified that disclosing officers' names in sustained violations is the "expectation of the community that we serve ... that we're open, accountable and transparent." He testified that it was "the collective judgment of command staff" that "it is not essential to effective law enforcement to redact the names of officers subject to sustained complaints." (Tr Vol. I, 173)

Guild president O'Neill testified that the Guild was aware that if a new court decision were issued that ordered "release of all sustained names, well, officers live with court cases all the time." (Tr Vol. I, 57) No request for bargaining was made. In its notification to affected officers, the SPD's letter stated that:

In compliance with the Police Department's obligations under the law, the Police Department intends to release requested disclosable records including your identity, if there is a sustained case, in response to this request. (Ex 6; Tr Vol. I, 165-166)

Finally, under Article 30, Entire Agreement, the parties agreed that "each has had the unlimited right and opportunity to make demands and proposals with respect to any matter deemed a proper subject for collective bargaining." Further, they agreed that:

for the duration of this Agreement, each voluntarily and unqualifiedly, agree to waive the right to oblige the other party to bargain with respect to any subject or matter whether or not specially referred to or covered in this Agreement.

Clearly, the City had the right to propose changes to Article 3.6(K) in 2006 and in 2008 even without the PARRP report. Assistant Chief Reed said that he and command staff had believed for years that the personal information should have been supplied, but the City made no such proposals in either negotiation.

In sum, there was no evidence that the disclosure provision in Article 3.6(K) violated State law, no "tribunal of competent jurisdiction" had found the provision invalid, and the City waived its right to negotiate changes by not putting forward proposals in either the 2006 or 2010 negotiations.

**Exhibits**

1. 2007-2010 Collective Bargaining Agreement
2. 2006 Collective Bargaining Agreement
3. Professional Accountability Review Panel (PARP) Final Report
4. Mayor Greg Nickels' Plan
5. PARP Recommendations – For Discussion Purposes Only
6. Third Party Notification Document
7. Guild Step 1 Grievance Letter
8. City Response to Guild Step 2 Grievance
9. Guild Step 2 Grievance Letter
10. City Response to Guild Step 3 Grievance
11. Guild Step 3 Grievance Letter
12. Matthew J. Segal Resume
13. Declaration of Dick Reed, *Sargent v. Seattle Police Department*
14. Declaration of John Diaz and accompanying exhibits, *Sargent v. Seattle Police Department*
15. Response to public disclosure request for unsustained OPA file, 2010
16. Third party notification letters to SPD officers regarding public records disclosures
17. Response to public disclosure request for sustained OPA file, 2010
18. Response to public disclosure request for sustained OPA file, 2007
19. Municipal Research & Services Center of Washington (MRSC) Web inquiry re: redaction of officers' names
20. Chapter 42.56 RCW / Public Records Act

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And	)	
	)	
City of Seattle	)	
	)	
Public Disclosure / Release of Names	)	
	)	
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Having carefully considered the evidence and arguments, I render the following  
**AWARD:**

1. The City violated Article 3.6(K) of the Agreement when it ceased the redaction of officers' names and serial numbers from public disclosure requests concerning sustained violations.
2. The grievance is sustained.
3. As of the date of this Award, the City shall comply with the Agreement and redact officers' names and serial numbers from all public records disclosure requests for sustained findings per Article 3.6(K) of the Agreement.
4. Consistent with the terms of the Agreement, Appendix A, Step 4(C), the City shall bear the cost of the arbitration as the non-prevailing party,

May 18, 2011



Paul M. Grace  
Labor Arbitrator