Honorable Dean Lum

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

CITY OF SEATTLE, a Washington municipal corporation Plaintiffs, vs. JAMES EGAN, an individual, Defendant.	Case No. 12-2-00938-4 SEA DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S CLAIM PER RCW 4.24.525 (ANTI-SLAPP)

Defendant James Egan, representing himself, *pro se*, brings this Special Motion to Strike the Plaintiff's Claim under RCW 4.24.525, which governs Strategic Lawsuits Against Public Participation (SLAPPs). The Defendant respectfully requests that this court find that his public records requests on September 23, 2011 and January 10, 2012, constitute public participation under the statute. Moreover, the Plaintiff's Motion for Declaratory Judgment and Preliminary Injunction is misuse of RCW 4.24.525 and constitutes a strategic lawsuit against public participation. Accordingly, this court should strike the Plaintiff's claim and award the Defendant costs, which include a $10,000 penalty in addition to attorney fees.

LAW OFFICES OF JAMES C. EGAN
605 FIRST AVENUE SUITE 400
SEATTLE, WA 98104
(206) 749-0333 / 795-3292
FAX (206) 749-5888

I. STATEMENT OF THE FACTS

In July of 2011, I received three complete files of internal investigations conducted by the Seattle Police Department pursuant to a public disclosure request I had made in May; one of those files referenced a Seattle Police Department (SPD) Officer being reprimanded for, among other things, saying to a detainee "My badge is the only thing preventing me from skull fucking you and dragging you down the street." As a citizen I was curious to see the actual video from the March 2010 incident.

My first public disclosure requests for this video were denied by SPD as it would violate the subject's "right to privacy." The subject (the unknown person arrested) was not identified but I determined who he was through research, and after writing him and his former public defender, he and his passenger agreed to help me obtain the video through my representation of them. In August, 2011 I made a request for the videos as Miguel Oregon's and Hugo Perez' lawyer (I knew there to be two videos) and after "additional time" was needed to respond, I did actually receive the videos on September 9, 2011 (hereinafter called the "Oregon / Perez video(s)").

In comparing the video with the Internal Investigation findings and the police report, it was immediately apparent to me that the officers had not been truthful in their police report or interviews with the Office of Professional Accountability (OPA). For example, an officer said Miguel had not come to a complete stop and that there were "pedestrians near the crosswalk," which was not evident from the video. Also, the internal investigation had officers defending their profanity by claiming Miguel and Hugo identified themselves as gang members from a particularly dangerous El Salvadoran gang (they are of Mexican descent), and yet this was not supported by the video or ever written in the police reports, as it should have been if true. Also, missing from the internal investigation findings were statements made by officers referring to my clients as "homeboy" and saying "Fuck Yakima," both of which raised the question of possible racial animus to me.

LAW OFFICES OF JAMES C. EGAN
605 FIRST AVENUE SUITE 400
SEATTLE, WA 98104
(206) 749-0333 / 795-3292
FAX (206) 749-5888

A colleague of mine Eric Rachner, who had earlier sued the Seattle Police for non-production of video evidence, helped me identify 36 other videos that were reviewed by the OPA in connection with other investigations of the four officers in the Oregon / Perez video. These four officers – Officer Corey Williams, Brett Schoenberg, Casey Steiger and Daniel Auderer – each had only about 2 years on the force at the time of the Miguel Oregon / Hugo Perez encounter, and with an average of 9 misconduct reviews each by OPA, I was curious whether a pattern of misconduct existed in particular with minorities.

For that reason, on September 23, 2011, I made a request for the 36 videos I had identified that were reviewed by the OPA in connection with Internal Investigations of these four officers. Five days later I was informed "it may take up to two months" to respond, specifically to "research this request, collect responsive records, and/or prepare records for dissemination." I was told to expect the response on November 30, 2011.

On November 30, 2011, I finally received a response from the September 23rd request, which denied the request based on a claim that no videos will be produced "until final disposition of any litigation which arises from the incident"— never minding that criminal litigation had surely ended and the actual existence of pending civil litigation was not asserted, and was apparently irrelevant to SPD. Besides this "statutorily prohibited" explanation for refusing the request, the City also stated (without citation) that the production of these videos containing possible misconduct of officers "would violate the subject's right to privacy."

Around the same time, I was contacted by another man who by his account had been subject to profanity and excessive force by *two of the same officers in the Oregon / Perez video.* Like Miguel Oregon, Amanuel Gebreselassie was a minority (African), had also been stopped on questionable grounds, had been the subject of Officer Schoenberg swearing ("roll the fucking window down"), had been manhandled unnecessarily (dragged out of the car and kicked in the groin, possibly by Officer

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605 FIRST AVENUE SUITE 400
SEATTLE, WA 98104
(206) 749-0333 / 795-3292
FAX (206) 749-5888

Casey Steiger) and had been booked in jail where criminal charges against him were also ultimately dropped for lack of evidence. The existence of the Gebreselassie in-car video coupled with the Oregon / Perez video heightened my curiosity of these officers' internal investigations and the 36 videos that also were reviewed for possible internal sanction.

The November 30th response gave me 10 days to "appeal" to the police chief if I disagreed with the denial. On December 7, 2011, I wrote a 2-page appeal letter addressing the two pretexts for denying disclosure – that it was "statutorily prohibited" and that it would "violate the subject's right to privacy." I pointed out that the statutory language prohibits disclosure where there exists litigation "which arises," not simply the possibility of litigation. If litigation has not arisen (yet), there is no prohibition of disclosure where the Public Records Act decrees that "exemptions" to the rule in favor of disclosure should be "narrowly construed," I wrote. RCW 42.56.040.

I also pointed out that any conflict with the Privacy Act is resolved by the Public Records Act (PRA, also called Public Disclosure Act) itself, which reads that "in the event of conflict between the provisions of this chapter and any other act, the provisions of this [PRA] chapter shall govern." I pointed out that *Lewis v. State Department of Licensing*, 157 Wn. 2d 446 (2006), of which my law firm is a listed party, holds that "conversations between traffic stop detainees and police officers are not private conversations," so there is no right to privacy in them.

On December 7, 2011, I also emailed SPD Chief John Diaz asking for a personal meeting to discuss the investigation of these four officers and how the officers "were not being truthful" in their investigations, as I had uncovered. I did not get any response from him, but rather an emailed invitation from OPA civilian director Kathryn Olson, to meet with her instead. That meeting never occurred because Ms. Olson postponed it twice, and at that point it seemed not fruitful given the December 16 Department of Justice (DOJ) indictment of SPD.

LAW OFFICES OF JAMES C. EGAN
605 FIRST AVENUE SUITE 400
SEATTLE, WA 98104
(206) 749-0333 / 795-3292
FAX (206) 749-5888

On December 16, 2011, when the DOJ decision was published and made front page news, Chief Diaz made statements that I interpreted as being defensive about the findings. After SPD Chief Diaz's refusal to acknowledge the internal problems at the SPD, I contacted television channels KIRO 7 and KOMO 4 and provided them the videos of the mistreatment of Miguel Oregon and Hugo Perez. I also gave interviews to KING 5 and KCPQ 13 the following day. I also gave interviews to the Stranger and the Seattle Weekly magazines. Each media outlet covered the issue prominently, in some cases as their top story in that night's news. Some of them used the video of the encounter in future stories, and posted it on their websites. I also started posting all the videos and documents from the Oregon / Perez matter on my website, including an analysis which showed how I believed officers lied in their internal investigations, facts that were seemingly ignored by OPA.

The following Monday, December 19, 2011, I was contacted by a national television news organization, "Right This Minute," (RTM) which regularly features "viral videos," and had noticed last Friday's broadcast. I conducted a Skype interview with RTM which was aired as a top story the following Tuesday, December 20 in 48 major cities around the country, including Birmingham, Baltimore, Cincinnati, Cleveland, Memphis, Honolulu, San Francisco, Seattle and forty others. The viewership of that segment was estimated at around half a million people nationwide, and the clip remains online for further viewing and dissemination at www.rightthisminute.com . On that Monday I also gave a live radio interview on KOMO 4 news about how the Oregon / Perez video supported the Department of Justice findings.

On Tuesday, December 27, my other client Amanuel Gebreselassie and I met with reporters from KOMO 4, KING 5 and KIRO 7 to discuss his own experience with two of the four officers, including how they swore at him, dragged him out of his car without giving him a chance to exit the vehicle as commanded, and kicked him unnecessarily after he called 911 on the officers. This story was also run as a top story on these three local television stations.

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605 FIRST AVENUE SUITE 400
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On Wednesday, December 28, I was again contacted by Right this Minute for a second interview, this time regarding the Gebreselassie interview. The story was run nationally the following day.

On all of the media interviews from December 27 and 28, including the national segment, I asked for SPD Police Chief Diaz to step down or be terminated as Chief by Mayor McGinn. This request for Chief Diaz' termination was widely broadcast both on television and also in web and print media.

On December 28, 2011, City Attorney Mary Perry of the Civil Division wrote an email that my December 7 appeal of the denial of the September 23 request for 36 videos had then been referred to her for "review and response," and that a response to the appeal would be provided "on or before January 6, 2012." On January 4, 2011, I learned that I was being sued by the City of Seattle for making the September 23 public records request.

That day, after obtaining and reading the lawsuit, I gave interviews with KOMO 4, KING 5 and KIRO 7, all of which were again run on nightly news, about the lawsuit against me. I told KOMO that "what the police department is saying is if you make a request for public documents [that they don't like] ultimately you will be sued." I was also interviewed by the Seattle Post-Intelligencer and the Seattle Weekly magazine, which had run a series of articles on the issues of the videos I had obtained through public disclosure and given to the media.

On January 10, 2012, I made an additional, separate public disclosure request where I requested the same 36 videos in question but asked that the audio in the video be redacted. Since I was not requesting the audio portion of the video, no portion of RCW 9.73 should apply because that chapter, the Privacy Act, only applies to private oral communications between two parties. On January 11, 2012, this second request was denied and City Attorney Mary Perry amended her civil complaint against me to include that I made another Public Records Request for "silent videos."

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605 FIRST AVENUE SUITE 400
SEATTLE, WA 98104
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FAX (206) 749-5888

On January 18, 2012, I appealed this denial to SPD Chief Diaz, per procedure.

Since the lawsuit was filed, I determined that just in the years 2008 and 2009, there were at least 80 denials of Public Records Requests sent by the Seattle Police Department to various citizens and lawyers who made requests. Several involved denied requests for in-car videos. I also requested and received a "first installment" of appeals of public disclosure requests (letters to the Chief after requests had been denied) through a separate public request. To my knowledge, none of the 80 people who were denied requests, nor the four whom I am aware appealed, were sued by the City of Seattle for those requests.

II. ARGUMENT

Strategic Lawsuits Against Public Participation (SLAPPs) are defined by RCW 4.24.525. RCW 4.24.525(4)(a) states that "[a] party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in subsection (2) of this section." RCW 4.24.525(4) states that, in relevant part:

> "(b) A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.
>
> (c) In making a determination under (b) of this subsection, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.
>
> (d) If the court determines that the responding party has established a probability of prevailing on the claim:
>
> (i) The fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and
>
> (ii) The determination does not affect the burden of proof or standard of proof that is applied in the underlying proceeding."

1. The Defendant's public records request on September 23, 2011, and January 10, 2012, are both actions involving public participation and petition under RCW 4.24.525

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605 FIRST AVENUE SUITE 400
SEATTLE, WA 98104
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When determining if the Anti-SLAPP law applies to the current matter, the court must first examine whether the Defendant's actions constitute "public participation and petition under RCW 4.24.525." RCW 4.24.525(2) states that:

> "This section applies to any claim, *however characterized*, that is based on an action involving public participation and petition. As used in this section, an "action involving public participation and petition" includes:
>
> (a) Any oral statement made, or *written statement* or other document submitted, in a legislative, executive, or judicial proceeding or *other governmental proceeding* authorized by law;
>
> (b) Any oral statement made, or *written statement* or other document submitted, in connection *with an issue under consideration or review by a* legislative, executive, or judicial proceeding or *other governmental proceeding* authorized by law;
>
> (c) *Any oral statement made, or written statement or other document submitted,* that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or *other governmental proceeding* authorized by law;
>
> (d) *Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern*; or
>
> (e) *Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.*" (*emphasis added*)

The Defendant contends that subsection (e) applies, as well as subsection (c) and (d), and to an extent (b) and (a), and that his public records request on September 23, 2011, and January 10, 2012, constitute lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, and/or in furtherance of the exercise of the constitutional right of petition. These records requests were lawful and are obviously a matter of utmost public concern. The DOJ's examination of the SPD has received national media attention. The Defendant made the records requests with the intention of petitioning Chief Diaz to make sweeping changes, and

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605 FIRST AVENUE SUITE 400
SEATTLE, WA 98104
(206) 749-0333 / 795-3292
FAX (206) 749-5888

when that proved not fruitful in the wake of the DOJ findings, the requests became relevant to the public outcry for transparency and accountability of the SPD. *See* Declaration of James Egan. The officers in the requested videos were the same officers who allegedly violated the civil rights of the Defendant's clients, Mr. Oregon, Mr. Perez, and Mr. Gebreselassie. Another reason the Defendant requested the videos was so that he could determine whether these particular officers had engaged in pattern and practice of violating citizens' civil rights, particular when those citizens are persons of color. *Id.* And finally, as a resident and taxpayer of Seattle, the Defendant personally wanted to know whether the SPD officers acted appropriately in the encounters documented by the in car videos. *Id.*

Prior to making the 36 video requests in this case, the Defendant had obtained the in car videos for Mr. Oregon, Mr. Perez, and Mr. Gebreselassie. With the permission of his clients, the Defendant made these videos available to the public by posting the video on youtube.com and his web site, and by providing them to the media. *Id.* The Defendant did this so that the public could view actual instances where SPD officers acted improperly, rather than just learn generally about the pattern of excessive force or possible biased policing, as noted in the DOJ report . By the time Defendant was sued, the public records appeal for 36 videos had been provided to the media and for nearly 3 weeks was available on a popular "police misconduct" section of the Defendant's website. The fact that the Defendant had previously made in car videos available to the public demonstrates his intent to do the same for the 36 videos in question here. This supports the notion that the public records request, itself, is an act in furtherance of the exercise of the constitutional right of free speech. Accordingly, the Defendant's public records request on September 23, 2011 and January 10, 2012 are both actions involving public participation and petition under RCW 4.24.525.

RCW 4.24.525(1)(a) states that a "claim" as used in the section "includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief." The Plaintiff's Motion for Declaratory Judgment and Preliminary Injunction is a "claim" under RCW

LAW OFFICES OF JAMES C. EGAN
605 FIRST AVENUE SUITE 400
SEATTLE, WA 98104
(206) 749-0333 / 795-3292
FAX (206) 749-5888

4.24.525(1)(a). This claim was filed to pre-empt the Defendant's ability to seek relief from a court (or petition) at a time of his own choosing. Rather than be free to contemplate whether or not to pursue legal action over SPD's denial of the request, the Defendant is forced to immediately defend against the suit, or simply not respond to the lawsuit and lose by default. This creates an undue burden on the Defendant that he did not anticipate when making the initial citizen request. Furthermore, the fact that the Plaintiff has filed a law suit against the Defendant for making a public records request creates a chilling effect on all citizens who are contemplating making a public records request to the SPD. What citizen would dare appeal a denial of a video request from the SPD when there is a possibility they will be served with a lawsuit by doing so?

a. The Plaintiff chose to sue the Defendant based on the Defendant's comments to the media and the disclosure of previous videos to the public

As noted above, the Defendant had previously obtained in car videos from the SPD and made these videos available to the public. However, the Defendant is certainly not the only citizen to request in car videos from the SPD. Between 2009 and 2010, at least eighty public records requests were denied by the SPD. *See* Declaration of James Egan. As with any public records denial by the SPD, that person then has the option to follow up with a written appeal to SPD Chief Diaz. This appeal has no legal significance, but it is a governmental proceeding that is recognized as such by the SPD, the City Attorney and this Court. Unlike claims for damages, it is not a pre-requisite to file a claim under the Public Records Act. A small number of citizens denied a public records request by the SPD chose to file this appeal, which is simply a letter addressed directly to the Chief. The Plaintiff seems to think that the Defendant's language in his own appeal justifies the need for this legal action. However, other citizens have used similar language in their appeal and yet the Plaintiff has not filed a law suit against them. For instance, in a December 16, 2011 appeal from Attorney Joann Francis to SPD Chief Diaz, she demanded the "requested information be provided immediately" and that the "delay is

LAW OFFICES OF JAMES C. EGAN
605 FIRST AVENUE SUITE 400
SEATTLE, WA 98104
(206) 749-0333 / 795-3292
FAX (206) 749-5888

unreasonable." *See* Declaration of James Egan. On January 12, 2012, Laurie Morris, an Investigation Supervisor for the (Public) Defender Association, submitted an appeal arguing that even if RCW 9.73.090(1)(c) prevents SPD from duplicating the video, she should at least be allowed to come in and view the video in person. *See* Declaration of James Egan. Ms. Morris argued (correctly) that under any interpretation of RCW 9.73.090(1)(c), viewing the video in person at SPD's headquarters would not be duplication and should be permitted. Even though Ms. Morris's request contains an identical legal issue presented in the current matter, to the Defendant's knowledge, the Plaintiff has not chosen to file a law suit against Ms. Morris.[1] The primary difference between the Defendant and these other requesters is that the Defendant had previously disclosed lawfully obtained in car videos very broadly to the public. The Defendant also requested that SPD Chief Diaz should resign or be terminated by Mayor McGinn, a widely recognized request, a week before the lawsuit was filed. The Defendant's past actions and statements should not be a basis to seek a protective order preventing future disclosure of public records.

The Plaintiff claims that the Defendant's statement that he would seek maximum penalties for failure to provide the records justifies this law suit. This statement, written in the Defendant's appeal to SPD Chief Diaz, has no legal significance. If the Defendant failed to include the statement in his appeal letter, he still would be free to seek damages for the non-disclosure under the Public Records Act, as anyone could. The Defendant has explained that he included that particular statement to insure that his request was addressed completely and timely, due to past experiences of delay and undelivered correspondence from SPD. *See* Declaration of James Egan.

RCW 4.24.525 (2)(d) also defines public participation as "any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection

[1] There may be other examples similar to the Ms. Morris's claim. However, the Defendant is still waiting for the SPD to provide the additional public record appeals that he is requested. The next installment of these letters is scheduled to be provided on February 29, 2012.

LAW OFFICES OF JAMES C. EGAN
605 FIRST AVENUE SUITE 400
SEATTLE, WA 98104
(206) 749-0333 / 795-3292
FAX (206) 749-5888

with an issue of public concern." As noted above, the Defendant made a series of oral statements to the media, including the request that SPD Chief Diaz resign or face termination. The Defendant posted the in car videos for his clients on his own business website, which included written analyses of the videos. The Defendant also made written statements to SPD Chief Diaz that the officers involved in these particular cases were less than truthful in their investigation and should be fired. Declaration of James Egan. The Plaintiff chose to file this law suit against the Defendant several days after the Defendant disclosed these videos to the media. The Plaintiff claims that they needed to file this suit to get judicial clarification of RCW 9.73.090(c). However, if this really was their intention, why not wait until the outcome of *Fisher Broadcasting –KOMO 4 vs. City of Seattle, SPD, King County Superior Court cause number 11-2-31920-2 SEA* case. That case addresses the same legal issue and is set for summary judgment motion before King County Superior Court Judge Rogers in March of 2012. Moreover, the *KOMO* case was pending at the time the Plaintiff chose to bring this action against the Defendant. There is no legitimate explanation for filing a lawsuit against Defendant and then speeding up that lawsuit with an injunction that forces Defendant to argue the matter almost a month before the issue is resolved by another court.

Besides RCW 4.24.525(2) (c), (d) and (e) bases for finding the lawsuit was based on Defendant's "public participation," Defendant also proposes that the same section (a) and (b) also apply. Defendant herein argues that the claim is based upon a "written statement, or other document submitted, in a... judicial proceeding or other governmental proceeding authorized by law," and also is based upon a "written statement or other document submitted, in connection with an issue under consideration of review by a ... judicial proceeding or governmental proceeding authorized by law." Since the Plaintiff's brief cites the "appeal" which involves a letter to the Chief, as directed by denied disclosure requests, that is reasonably regarded as a "governmental proceeding authorized by law." Therefore, the written documents of public disclosure requests filed by Defendant are plainly written

LAW OFFICES OF JAMES C. EGAN
605 FIRST AVENUE SUITE 400
SEATTLE, WA 98104
(206) 749-0333 / 795-3292
FAX (206) 749-5888

statements submitted in a governmental proceeding, and when provided to the media, are also submitted in connection with an issue under consideration of review by a governmental proceeding. This especially applies to the January 10 request for "silent videos," as this issue is in connection with an issue already under consideration by the KOMO 4 lawsuit against the SPD in a judicial proceeding, and yet nonetheless resulted in an amendment to the lawsuit against Defendant.

The Plaintiff may seek to claim Defendant has not met this low burden of establishing that the claim was based on "public participation," but rather should be characterized as based on public disclosure requests. However, the Anti-SLAPP statute does not encourage the distinction the Plaintiff may try to draw. "This section applies to any claim, *however characterized*, that is based on an action involving public participation and petition." (*see* RCW 4.24.525(2), *emphasis added*) The language, "however characterized," establishes the legislature understood that Strategic Lawsuits Against Public Participation may be characterized as not just about statements made, but may include claims about "documents submitted" or "other lawful conduct... in furtherance of the exercise of the right of free speech in connection with an issue of public concern, or in furtherance of the constitutional right of petition." RCW 4.24.525(2)(d) and (e). The legislature's mandate against SLAPP suits is deliberately broad. Whether characterized as not a claim involving First Amendment rights exercised by Defendant, but characterized as merely resolving an issue of documents submitted, the Plaintiff cannot be seen to have filed the claim against Defendant in a vacuum, and the Defendant has plainly established more likely than not that Plaintiff's claim is based on Defendant's public participation, "however characterized" by the Plaintiff.

2. The Plaintiff has failed to show by clear and convincing evidence a probability of prevailing on the claim.

The Defendant has fulfilled his burden by demonstrating by a preponderance of the evidence how his requests for the videos constitute public participation under the statute. Under RCW

LAW OFFICES OF JAMES C. EGAN
605 FIRST AVENUE SUITE 400
SEATTLE, WA 98104
(206) 749-0333 / 795-3292
FAX (206) 749-5888

4.24.525(4)(b), after the Defendant has met this burden, "the burden shifts to the [Plaintiff] to establish by clear and convincing evidence a probability of prevailing on the claim."

a. The Plaintiff's use of RCW 42.56.540 is inapplicable to the current matter

RCW 42.56.540 allows a court to issue an injunction prohibiting the release of public records if the court finds "that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions." The Defendant contends releasing the videos in question is clearly in the public interests because it highlights the need for greater transparency and accountability of the SPD. The Plaintiff has failed to put forth any facts to dispute the public interest in examining potential police officer misconduct. Furthermore, the Plaintiff has offered no evidence to show how releasing the videos would substantially and irreparably damage any person.

RCW 42.56.540 also states "[a]n agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested." To the Defendant's knowledge, and despite a request in the appeal of the January 10, 2012, denial of his "silent videos" request, the Plaintiff has not made any attempt to contact the persons in the requested 36 videos and alert them that the Defendant has requested their video. If they had done so, the Plaintiff would likely find that the vast majority of the citizens on these videos would have no objection to their video being made available to the public. This is especially since these citizens initiated and participated in the governmental procedure of an OPA investigation, wherein those videos were expected to be reviewed by a series of strangers. Furthermore, even if these citizens objected to the release, the only way the court can intervene under RCW 42.56.540 was if the court found those unnamed and uncontacted citizens "*would* be substantially and irreparably" damaged by their release[2].

[2] The videos themselves do not necessarily reveal the identity of the person arrested or abused by a police officer, and the names of those persons are redacted on other public documents; often the

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605 FIRST AVENUE SUITE 400
SEATTLE, WA 98104
(206) 749-0333 / 795-3292
FAX (206) 749-5888

In other words, mere possibility of substantial and irreparable damage is not enough. And finally, the statute uses the word "and" between "public interest" and "would substantially and irreparably damage any person," meaning the court must find *both* to intervene. Accordingly, even if the court found that releasing the videos *would substantially and irreparably* damage any person, this alone, would not be enough for the court to issue an injunction because the court would have to find that releasing the videos is also not in the public interest, which it clearly is.

Under RCW 42.56.540, the only other way the court would have the authority to issue the injunction would be if the Plaintiff could show that the release of the videos would "substantially and irreparably damage vital governmental functions." Again, the Plaintiff has failed to put forth any facts that would demonstrate how this would occur. For all the videos that were requested the criminal case has already been closed, or criminal charges were never filed. Therefore, the SPD cannot claim that the release of the videos would in some way hamper their ability to investigate a case. There is no vital governmental function that permits police excessive force from being exposed to the public. If the public police official acted improperly on these videos, the taxpaying public has an absolute right to know about it.

After close examination RCW 42.56.540, it becomes apparent the Plaintiff has attempted to use this statute as a way to prevent the Defendant from ever filing his own suit against them. A failure to timely or fully respond to Plaintiff's voluminous motions will mean a loss by default, and potential precedent against other requesters, to possibly include KOMO's own pending lawsuit. This is not a proper use of the statute. The statute was intended to provide a very limited avenue for the courts to prevent very sensitive, damaging, and personal information from being made available to public, where

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images of faces are hard to identify as any particular person, and full names are rarely revealed in audio. A further request for these 36 videos with "faces blurred" was also denied by the SPD on February 22, 2012, as "no sound or video recording may be duplicated," regardless of editing to protect revealing any identities.

LAW OFFICES OF JAMES C. EGAN
605 FIRST AVENUE SUITE 400
SEATTLE, WA 98104
(206) 749-0333 / 795-3292
FAX (206) 749-5888

the information is of no public interest whatsoever. The Plaintiff cites *Soter v. Cowles Pub. Co.*, to argue that the government facing a public records request can seek a declaratory judgment from the court. 162 Wn.2d 716, 174 P.3d 60 (2007). However, the facts of that case are starkly different from the current matter. In *Soter* a nine year old student, who was allergic to peanuts, died after eating a peanut butter cookie the Spokane school had given him. *See id.* In connection with a wrongful death claim against the school district, the student's estate and the school district entered into an agreement where they would agree to not make any statements to the public, apparently in large part for the grieving parents. *Id.* The local newspaper made a public records request for documents concerning the student's death and the agreement that was reached with the school district. *Id.* The school district provided most of the documents. However, the school district *and* the student's estate together joined in a declaratory judgment request from the court under RCW 42.56.540. *Id.* The school was in a precarious position because while the newspaper was arguing they were entitled to the documents under the PRA, the student's estate was arguing that the information was protected under the Federal Family Educational Rights and Privacy Act. *Id.* A violation of this act would affect the school district's $26 million they receive in Federal funding. *Id.* The court ultimately held that in this particular situation, RCW 42.56.540 did allow the school district and the student's estate to seek a declaratory judgment against the release of documents. *Id.* This *Soter* case is an excellent example of what must be at stake in order for RCW 42.56.540 to apply. After all, the court found that irreparable harm would be caused to any person or vital government functions (the grieving parents, and $26 million in FERPA school funding) and the release of the few remaining undisclosed documents served no public interest. Those similar facts are hardly argued nor supported in Plaintiff's matter against Defendant.

In *Soter*, the issue of whether RCW 42.56.540 permitted an agency to seek a declaratory judgment was actually moot because the newspaper had filed their own motion to compel against the school district. *Id.* Nonetheless, the court felt the need to address the issue since it was likely to reoccur.

LAW OFFICES OF JAMES C. EGAN
605 FIRST AVENUE SUITE 400
SEATTLE, WA 98104
(206) 749-0333 / 795-3292
FAX (206) 749-5888

Id. at 749. The Court of Appeals believed that if an exemption to the Public Records Act applies, the remaining portion of RCW 42.56.540 was superfluous and need not be addressed. *Id.* at 748. The Washington Supreme Court directly overruled this notion and stated "[w]e therefore clarify that to impose the injunction contemplated by RCW 42.56.540, the trial court *must* find that a specific exemption applies and that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital government interest." *Id.* at 757, emphasis added. The Plaintiff cites RCW 42.56.540 with the notion that the court has the power to enter a preliminary injunction in this matter. But following the holding in *Soter*, the court must make very specific findings to enter that injunction, to include substantial harm to persons or government functions *and* no public interest in the documents requested.

Finally, as noted above, the issue of whether RCW 9.73.090(1)(c) prevents the SPD from releasing in car videos until at least three years has passed is currently being litigated in the *KOMO* case cited above. The Plaintiff claims that they filed the suit against the Defendant because the statute is ambiguous and that they need a court to help them clarify the true intentions of the statute. However, if this is the case, why not wait until the outcome of the *KOMO* case and use that decision as precedent? Why recently rush-file an injunction that forces Defendant to argue the matter before the *KOMO* summary judgment argument is heard? The Defendant in this case should not be forced to choose between defending his public records claim and withdrawing his claim.

b. The Plaintiff's claim that RCW 9.73.090(c) prevents the release of the videos is incorrect

As stated above, for the Plaintiff to prevail on the Anti-SLAPP claim, they must first show by clear and convincing evidence that RCW 42.56.540 applies. They have failed to meet this burden, by not showing both actual irreparable harm to agencies or persons and an absence of public interest in the requested documents. However, even if the court feels the Plaintiff has met this burden, they still have

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failed to show by clear and convincing evidence that RCW 9.73.090(c) prevents them from releasing the videos, as an underlying issue in their claim.

i. RCW 9.73.090(c) only prevents the videos' release if there is active litigation

RCW 9.73.090(c) states 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." (*emphasis added*) The Plaintiff interprets this statute broadly to mean that the videos shall not be released to the public until after at least three years has passed and there is no longer a risk that the SPD may be sued for wrongdoing that may occurred, which the video evidence may show. However, the statute states "until final disposition of any criminal or civil litigation *which arises.*" (emphasis added). If the legislature wanted to prevent the release of the video until the risk of all criminal and civil claims have extinguished, they would have phrased it, "which arises or *which may arise*." The fact that the legislature chose to use the active term, "which arises" suggests that they intended the videos not be released if there is active, pending criminal or civil litigation. But under the plain language of the statue, and coupled with the PRA's broad mandate for disclosure, the mere possibility of litigation is not enough to prevent the release of the video.

ii. Conversations recorded during routine traffic stops are not private and therefore the exemption contained in RCW 9.73.090(c) should not apply

In *Lewis v. State Department of Licensing*, the Washington Supreme Court held that "conversations between traffic stop detainees and police officers are not private conversations." 157 Wn. 2d 446 (2006). The court went on to note that although these conversations are not private, officers must still inform these individuals that they are being audio and video recorded if a prosecutor intends to use these videos in criminal trial. *Id.* RCW 9.73 can be called the Privacy Act and applies to all private communications. While it was not specifically addressed in the *Lewis* case, if the

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conversations between citizens and officers that are recorded by the in car videos are not private conversations, then the exemption the Plaintiff claims in RCW 9.73.090(c) should not apply.

iii. The SPD records custodians will not be prosecuted for a gross misdemeanor if they release the videos

The Plaintiff claims that SPD records custodians are at risk of being charged with a crime if they were to release the videos before three years has passed under RCW 9.73.080. RCW 9.73.080(2) states that "[a]ny person who knowingly alters, erases, or wrongfully discloses any recording in violation of 9.73.090(1)(c) is guilty of a gross misdemeanor." Accordingly, only "wrongfully" releasing the videos would be a crime. Moreover, RCW 42.56.060 states that "no public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee or custodian acted in good faith in attempting to comply with the provisions of this chapter." Therefore, so long as the records custodian releases the videos in a good faith attempt to comply with RCW 9.73.090(1)(c), that person would be immune from all criminal and civil liability.

Further, RCW 9.73.090(1) states that:

"the provisions of RCW 9.73.030 through 9.73.080 [the statute that makes wrongful disclosure a crime] *shall not apply to police*, fire, emergency medical service, emergency communication center, and poison center *personnel* in the following instances:

a) Recording incoming telephone calls to police and fire stations . . .

b) Video and/or sound recordings ... made of arrested persons by police officers responsible for making arrests . . .

c) Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles . . ." (emphasis added)

By extension, the public records officer who works for the police department is a member of "police personnel" exempt from criminal prosecution contemplated by RCW 9.73.080. Moreover, a recent KOMO News report from February 15, 2012, reported that two officers showed their in car

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video to a citizen's boss, jeopardizing the citizen's employment. *See* Declaration of James Egan. The citizen, Keiwuan Miller was stopped by an SPD officer for not wearing his seat belt, and was agitated to the point he got out of his car. *Id.* Days later, the officer reportedly drove to Mr. Miller's school, where he worked as a security guard, and showed Mr. Miller's boss the in car video from the earlier incident to demonstrate how rude he was with her. *Id.* While the officers were reprimanded, there is no indication misdemeanor charges would be filed against the officers. *Id.* The SPD and the Plaintiff seem to pick and choose who they release the in car videos to, and do not operate with concern of being charged with crimes for doing so.

iv. The strong language in favor of disclosure contained in the Public Records Act trumps any conflict with RCW 9.73.090(1)(c)

RCW 42.56.030, the preamble to the Public Records Act, states that:

> "The 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. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be 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."* (emphasis added)

Therefore, even if the court agrees the Plaintiff has correctly interpreted RCW 9.73.090(1)(c), that interpretation would directly conflict with the Public Records Act. RCW 42.56.030 makes it clear that should this occur, the provisions of the Public Records Act control. Further, "[a] person's 'right to privacy,' 'right of privacy,' 'privacy' or 'personal privacy' as these terms are used in [the Public Records Act], is invaded only if disclosure of information about the person: (1) would be highly offensive to a reasonable person and (2) is not of legitimate concern to the public." RCW 42.56.050.

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When trying to decipher the meaning of *RCW 9.73.090(1)(c)* this court should look to the Public Records Act to define "privacy" and rule that there are no exemptions that prevent the release of the in car videos requested in this case.

3. The Defendant's motion to strike under RCW 4.24.525 is timely. The court should set a hearing on the issue within 30 days and render a decision within 7 days of the hearing.

RCW 4.24.525(5) states:

> (a) The special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not later than thirty days after the service of the motion unless the docket conditions of the court require a later hearing. Notwithstanding this subsection, the court is directed to hold a hearing with all due speed and such hearings should receive priority.
>
> (b) The court shall render its decision as soon as possible but no later than seven days after the hearing is held.
>
> (c) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.
>
> (d) Every party has a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

The Defendant has filed this special motion to strike within sixty days of service of the Plaintiff's Amended Complaint for Declaratory and Injunctive Relief, which was filed on January 11, 2012. The Defendant requests that the court schedule a hearing on the special motion to strike the Plaintiff's Motion for Declaratory Judgment and Preliminary Injunction within 30 days of the service of this motion unless the docket conditions of the court require a later hearing. The Defendant also requests that the court render a decision on the special motion to strike within seven days of the hearing.

4. The Defendant is entitled to a monetary award of $10,000 plus reasonable attorney fees.

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RCW 4.24.525(6)(a) states that:

> (a) The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:
>
> (i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;
>
> (ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and
>
> (iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

The Defendant requests damages in the statutory amount of $10,000, plus reasonable attorney fees, for violation of RCW 4.24.525. Not only is this award reasonable under the applicable statutes, the award and penalty is necessary to prevent the Plaintiff from filing a similar Motions for Declaratory and Injunctive Relief against other citizens who may be also brazen enough to request an in car video from SPD.

5. RCW 4.24.525(3) does not apply.

RCW 4.24.525(3) states that "[t]his section does not apply to any action brought by the attorney general, prosecuting attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection." This exception does not apply because the Plaintiff's claim was not brought as a public prosecutor pursuant to a criminal proceeding.

III. RELIEF REQUESTED

The Defendant requests the following relief:

1. An order striking the Plaintiff's Motion for Declaratory and Injunctive Relief under RCW 4.24.525.

2. An award of all costs and reasonable attorneys' fees incurred in connection with this action pursuant to RCW 4.24.525(6)(a), including the statutory amount of $10,000, which does not include attorney fees.

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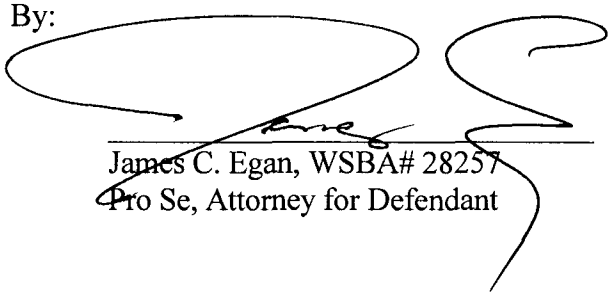
3. For such other and further relief as the Court deems appropriate.

DATED this 22nd day of February, 2012.

By: 

James C. Egan, WSBA# 28257
Pro Se, Attorney for Defendant

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605 FIRST AVENUE SUITE 400
SEATTLE, WA 98104
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