RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
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August 15, 2014

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CASE #: 72159-3-I
Jane Does 1 through 15, Appellant v. King County, Respondent

Counsel:

Enclosed is the ruling of the Commissioner entered today in the above case.

In the event counsel wishes to object, RAP 17.7 provides for review of a ruling of the Commissioner. Please note that a "motion to modify the ruling must be served . . . and filed in the appellate court not later than 30 days after the ruling is filed."

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

ssd

c: Honorable Helen Halpert

enclosure

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

JANE DOES 1 through 15 and JOHN DOES 1 through 15, victims of and witnesses to the June 5, 2014 Seattle Pacific University shooting, and SEATTLE PACIFIC UNIVERSITY, a Washington nonprofit corporation, Appellants, v. KING COUNTY, a legal subdivision of the state of Washington, CITY OF SEATTLE, a Washington municipal corporation, TRIBUNE BROADCASTING SEATTLE, LLC and its affiliates, d/b/a KCPQ-TV and Q13 FOX, a Delaware corporation, KIRO-TV, INC. and its affiliates, d/b/a KIRO NEWS and KIRO TV, a Delaware corporation, SINCLAIR SEATTLE LICENSEE, LLC, and its affiliates, d/b/a KOMO TV and KOMO 4, a Nevada corporation, KING BROADCASTING COMPANY and its affiliates, d/b/a KING 5 TELEVISION, a Washington corporation, ARTHUR WEST, a Washington resident, JOHN DOE MEDIA ORGANIZATIONS 1 through 100, Respondents.	No. 72159-3-I (consol. with 72198-4-I) COMMISSIONER'S RULING EXTENDING STAY PENDING APPEAL AND GRANTING DISCRETIONARY REVIEW

At issue in this matter is release of a videotape of part of the June 5, 2014 tragic fatal shooting on the campus of Seattle Pacific University. The University turned the videotape over to law enforcement for use in its criminal investigation.

Several news organizations seek release of the videotape under the Public Records Act (PRA), chapter 42.56 RCW, from King County and the City of Seattle. Arthur West, an Olympia resident, also seeks release of the videotape. The County and the City provided notice that they intended to release the videotape with faces of the victims and witnesses pixilated. The individual victims and witnesses and the University filed a complaint for a declaratory judgment and injunctive relief precluding release of the videotape. The superior court initially entered a temporary restraining order (TRO). Then on July 22, 2014, the superior court denied a preliminary injunction but left the TRO in place to allow time for plaintiffs to seek review if they chose to do so. Both the individual plaintiffs and the University filed notices of appeal and emergency motions to prevent release of the videotape pending review by this court. On July 23, 2014, I extended the TRO/stay until further order of this court to allow time for prompt but considered review. The parties filed answers to the emergency motion and replies, and I heard oral argument on August 1, 2014. For the reasons stated below, I conclude that the stay precluding release of the videotape shall remain in place until further order of this court.

The standard for reviewing a request for a stay pending appeal is well established. In "other civil cases" not involving money judgments or decisions affecting property, except where prohibited by statute, an appellate court has authority, before or after acceptance of review, to stay enforcement of the trial court decision upon such terms as are just. RAP 8.1(b)(3). In evaluating whether to stay enforcement of such a decision, the court will consider (i)

whether the moving party can demonstrate that debatable issues are presented on appeal, and (ii) compare the injury that would be suffered by the moving party if a stay were not granted with the injury that would be suffered by the nonmoving party if a stay were imposed. RAP 8.1(b)(3). Similarly, under RAP 8.3, unless prohibited by statute, an appellate court has authority to issue orders, before or after acceptance of review, to insure effective and equitable review, including authority to grant injunctive or other relief to a party. In this setting RAP 8.3 involves similar considerations as RAP 8.1(b)(3). Purser v. Rahm, 104 Wn.2d 159, 177, 702 P.2d 1196 (1986) (court considers whether the appeal presents debatable issues, whether a stay is necessary to preserve the fruits of a successful appeal, and the equities of the situation).

Ordinarily, demonstrating a debatable issue is a relatively low threshold. But where a stay on appeal would grant the same injunctive relief denied by the trial court, debatability is considered in the context of the standard of review that will apply on appeal. To obtain a preliminary injunction, a party must show a clear legal or equitable right, a well-grounded fear of immediate invasion of that right, and that the acts complained of will result in actual or substantial injury. Kucera v. Dep't of Transp., 140 Wn.2d 200, 210, 995 P.2d 63 (2000). The criteria are examined in light of equity, including the balancing of the parties' relative interests and the public interest. Rabon v. City of Seattle, 135 Wn.2d 278, 284, 957 P.2d 621 (1998). In deciding whether a party has a clear legal or equitable right, the court examines the likelihood that the moving party will prevail on the merits; the court does not adjudicate the ultimate merits of the case.

Rabon, 135 Wn.2d at 285-86. An appellate court reviews a trial court decision granting or denying a preliminary injunction for an abuse of discretion, i.e. whether it was based on untenable grounds, or is manifestly unreasonable, or is arbitrary. Washington Fed'n of State Employees, Council 28 v. State, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983).

The PRA mandates broad public disclosure of public records to safeguard the peoples' right to insist on remaining informed so that they may maintain control over the instruments of government they have created. RCW 42.56.030. The PRA requires state and local agencies to disclose public records upon request unless the record falls within a PRA exemption or other statutory exemption. Gendler v. Batiste, 174 Wn.2d 244, 251, 274 P.3d 346 (2012). Accordingly, the PRA is liberally construed and its exemptions narrowly construed to assure that the public interest is fully protected. Fisher Broadcasting-Seattle TV LLC v. City of Seattle, 180 Wn.2d 515, 326 P.3d 688, 691-92 (2014). The PRA specifically provides that examination of any public record may be enjoined if the superior court finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person or vital governmental functions. RCW 42.56.540. This provision is not an exemption; rather it is a procedural mechanism for seeking to enjoin release of a public record if it falls within a specific exemption found elsewhere in the PRA. Yakima County v. Yakima Herald-Republic, 170 Wn.2d 775, 808, 246 P.3d 768 (2011). It is premature for a court to consider the public interest and substantial/irreparable damage factors before determining whether

an exemption applies. Franklin County Sheriff's Office v. Parmelee, 175 Wn.2d 476, 480-81, 285 P.3d 67 (2012). An appellate court's review of a superior court's PRA decision is de novo. Fisher Broadcasting, 326 P.3d at 692; Gendler, 174 Wn.2d at 251.

The PRA provides that a person's privacy is invaded or violated only if the 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. The victims and witnesses of the shooting seek to prevent release of the videotape to protect this right to privacy, relying on the exemption in RCW 42.56.240, which protects crime victim and witness identities in two instances: (1) specific intelligence information and specific investigative records complied by law enforcement, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy; and (2) information revealing the identity of witnesses or victims of crime if disclosure would endanger any person's life, physical safety, or property. Under (2), if a victim or witness indicates a desire for disclosure or nondisclosure, such desire shall govern. Sargent v. Seattle Police Dep't, 179 Wn.2d 376, 395, 314 P.3d 1093 (2013).

The University seeks to prevent release of the videotape based on the exemption in RCW 42.56.420(1)(a) for records assembled, prepared or maintained to prevent, mitigate, or respond to criminal terrorist acts, "which are acts that significantly disrupt the conduct of government or of the general civilian population . . . and that manifest an extreme indifference to human life, the public

disclosure of which would have a substantial likelihood of threatening public safety, consisting of: (a) Specific and unique vulnerability assessments or . . . deployment plans . . . ." The University argues that disclosure of the videotape would result in disclosure of the location and capability of its surveillance camera and would serve as a link in a chain that a wrongdoer could use in determining, among other things, the University's vulnerability to attack.

The only reported case addressing this exemption is Northwest Gas Ass'n v. Washington Utilities and Transp. Comm'n, 141 Wn. App. 98, 168 P.3d 443 (2007). In Northwest Gas, in response to proposed legislation, news media filed public records requests with the Washington Utility and Transportation Commissioner (WUTC) for access to and a copy of all geographic information system data regarding hazardous liquid and gas pipelines in Whatcom County, as well as underground location information, maps, and other information. The gas association maintained two tiers of information; Tier One consisted of maps of pipelines on a larger scale, and Tier Two consisted of "shapefile" or "attribute level data" amounting to a virtual blueprint of the pipeline system. The gas association made Tier One information available to the public; Tier Two information was available only to first responders. The court in Northwest Gas concluded that the trial court erred in denying the pipeline companies' request for a preliminary injunction and ordering the WUTC to disclose the highly specialized and detailed Tier Two data. The court reasoned in part that once released, the data could not be retrieved to protect it from pranksters, saboteurs, terrorists and others who might seek to use the pipeline specifications for disastrous purposes.

Here, the University also argues that ordering disclosure of the surveillance tape will chill its willingness to turn evidence over to law enforcement in the future for fear of its ultimate disclosure under the PRA.

The superior court considered the individuals' and the University's arguments and concluded that the exemptions do not apply. As a general matter, the court ruled that no case has determined that a document from a private source is less subject to disclosure than a document initially created by a governmental actor, and the public interest in learning how materials in a government file are used is the same whether the documents were created by a private or public person or entity. As to .240(2), which prohibits disclosure of the identity of victims and witnesses who request nondisclosure, the court reasoned: that their faces will be obscured; that the statute prohibits only direct release of identity and does not prohibit release of images or information that might lead to identification; that the identities of most of the victims and witnesses have been disclosed in other arenas; that there is no evidence disclosure will make them a target of future attacks; and that the "copycat" literature cited by the University's expert does not indicate a past victim is a likely target of any future copycats. As to the victims and witnesses right to privacy, the court ruled that the first required prong, that disclosure would be highly offensive to a reasonable person, is met as to the victim shown being shot but is not met as to the students who subdued the shooter, one previously named and one to date unnamed. The court also ruled that under case law, the details of the crime are of legitimate public interest. As to .420(1), the security-terrorism exemption, the court ruled that the possibility

a person viewing the videotape could ascertain the capability and location of a surveillance camera is insufficient to establish that disclosure would implicate .420(1). Having made this determination, the court declined to apply the more flexible statutory injunction standards of RCW 42.56.540. Memorandum Opinion at 5. The individual victims and witnesses to the shooting and the University seek review of the trial court's decision that the exemptions do not apply and that the videotape must be released.

Before me are the plaintiffs' motions to stay release of the surveillance video pending review by this court. As noted above, I must consider whether the plaintiffs have demonstrated that their appeal presents debatable issues, compare the injury they would suffer if a stay were not imposed with the injury the news media and public would be suffer if a stay were imposed, and consider whether a stay is necessary to preserve the fruits of a successful appeal.

The first issue is whether the victims and witnesses of the shooting and/or the University have raised one or more debatable issues. The City of Seattle and King County take no position on the merits of the trial court's decision, but assert that this case raises issues of first impression.

The plaintiffs argue that the trial court erred in ruling the exemptions under RCW 42.56.240(1) (effective law enforcement), RCW 42.56.240(2) (identity of crime victim or witness), and RCW 42.56.420(1) (security – terrorism prevention), do not apply. They also argue that disclosure of the videotape, which shows a student being threatened, another student being shot, and then two students subduing and disarming the shooter, but does not show law enforcement's

response or other governmental acts, violates their right to privacy as codified in RCW 42.56.050 because its release would be highly offensive to a reasonable person and is not of legitimate concern to the public.[1]

The plaintiffs also argue that the trial court applied the incorrect standard to their motion for a preliminary injunction. They argue that instead of considering the likelihood that they would prevail on the merits, the court required them to prove that an exemption applies, improperly consolidating the preliminary injunction hearing with a trial on the merits without providing them notice it would do so, as required by CR 65(a)(2).[2] In support of this argument, the plaintiffs cite two PRA cases where Washington appellate courts have held that the trial court improperly conflated the preliminary injunction hearing with the permanent injunction trial on the merits. See Ameriquest Mortg. Co. v. State Atty. Gen., 148 Wn. App. 145, 199 P.3d 468 (2009) (appears trial court erred in conflating preliminary injunction hearing with a full hearing on the merits without providing notice to the parties; court applied the wrong standard of proof and instead of requiring plaintiff to show the *likelihood* of success on the merits, court applied the permanent injunction standard; court also entered what amounted to a final

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[1] At oral argument counsel for the victims and witnesses argued that RCW 42.56.050 provides a privacy exemption to the PRA. Counsel for the University argued that while the section does not provide a separate exemption, it does provide a privacy overlay to other exemptions. The trial court treated RCW 42.56.050 as a statutory exemption, but concluded the videotape is subject to disclosure, with faces pixilated. Memorandum opinion at 8.

[2] CR 65(a)(2) provides in part:
Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. . . .

order on the disclosure issue) rev. granted, affirmed on other grounds, 170 Wn.2d 418, 241 P.3d 1245 (2010); Northwest Gas Ass'n, 141 Wn. App. 98, 114-15 (trial court erred when it conflated the permanent injunction trial into the preliminary injunction hearing without notice to the parties, contrary to CR 65, and issued a final order on the merits only four days after allowing new parties to intervene, without giving the original parties a full opportunity to present evidence and to prove their respective positions at a trial on the merits).[3] I conclude that the individual plaintiffs and the University have raised debatable issues.

I further conclude that balancing the relative harm with and without a stay weighs in favor of a stay pending appeal, and a stay is necessary to preserve the fruits of a successful appeal. If a stay pending appeal is granted, the news media's and the public's interest in a prompt release of the videotape is delayed. In light of the broad public disclosure policy of the PRA, this interest is important, but it is temporal. Without a stay pending appeal, the harm the individual victims and witnesses and the University seek to avoid, release of the surveillance video, will occur, leaving them without a remedy if they prevail on appeal. Balancing these interests, a stay is warranted to preserve to the plaintiffs the fruits of a successful appeal.

[3] In both Ameriquest and Northwest Gas, Division Two reasoned that in light of this error, the court could end its analysis and remand to the trial court to reconsider the request for a preliminary injunction in accordance with CR 65. But in both cases, to conserve the parties' and the courts' resources and in light of the de novo standard of review, the court went on and addressed the merits.

The parties also dispute whether the trial court order is appealable as of right under RAP 2.2(a)(1) (final judgment) or (a)(3) (any written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action), or whether the trial court order is reviewable only if the plaintiffs meet the strict criteria for discretionary review under RAP 2.3(b).[4]

To the extent the plaintiffs argue the trial court erred in conflating the preliminary and permanent injunction hearings, I conclude that discretionary review is warranted. The parties are entitled to the opportunity to fully brief all the important issues raised in this matter, including whether the videotape is exempt from disclosure under RCW 42.56.240, 42.56.420, and 42.56.050, and appealability. The panel that considers the appeal on the merits will be in the best position to determine the issues it will address.

Therefore, it is

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[4] RAP 2.3(b)(2), which permits discretionary review of a trial court decision constituting probable error that substantially alters the status quo or substantially limits a party's freedom to act, was designed to draw into the ambit of discretionary review a number of determinations that previously were appealable as of right under former CAROA 14, including decisions on temporary injunctions. See 2A KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE RAP 2.3 at 164-65 (6th Ed. 2004 (task force comment). But plaintiffs argue that in the situation presented here, review is available by appeal under RAP 2.2(a)(3) because the trial court order affects a substantial right, in effect determines the action, and discontinues the action. There is some force to this argument. If all that remains for finality is pro forma entry of the same decision as a final judgment, it appears that as a practical matter the trial court's decision determined and discontinued the action.

ORDERED the temporary stay preventing release of the three-minute surveillance videotape at issue in this matter shall remain in place until further order of this court.[5] And it is further

ORDERED that discretionary review is granted, and the clerk will set a perfection schedule.

Done this 15th day of August, 2014.

Mary S. Neel
Court Commissioner

[5] The trial court ruled that the only matter before it was release of the three-minute video described above. The University argues that the trial court erred in this regard, noting that it moved for an injunction preventing the release of multiple surveillance videos. The University argues that a stay should be granted so that the inevitable action against release of the other videos can be consolidated with this appeal. Any ruling to this effect would be premature. The only matter before me at this time is the three-minute surveillance video the trial court considered.

RICHARD D. JOHNSON,
Court Administrator/Clerk

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August 15, 2014

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CASE # 72159-3
Jane Does 1 through 15, Appellant v. King County, Respondent

KING COUNTY SUPERIOR COURT No. 14-2-18514-6 SEA

This may be the only notice you will receive concerning due dates. A document filed prior to or after its due date may affect all subsequent due dates. The parties are responsible for determining adjusted due dates by reviewing the appropriate rules of appellate procedure. Failure to comply with the provision of the rules may result in the imposition of sanctions pursuant to RAP 18.9.

Dear Counsel/Others:

A notice of appeal, filed in the KING COUNTY SUPERIOR COURT on July 23, 2014 was received in this court on July 22, 2014 and was assigned case number 72159-3. **Use this appellate court case number on all correspondence and filings.**

The time periods for compliance with the Rules of Appellate Procedure are as follows:

1. The **designation of clerk's papers** is due to be filed and served with the trial court, with a copy filed in this court, by September 15, 2014. RAP 9.6(a).

2. The party seeking review must timely arrange for transcription of the report of proceedings and must file a **statement of arrangements** in this court by September 15, 2014. To comply with RAP 9.2(a), the statement should include the name of each court reporter, the hearing dates, and the trial court judge. Serve each court reporter and all counsel of record with a copy of the statement of arrangements, and provide this court with proof of service.

If the party seeking review arranges for less than all of the report of proceedings, all parties must comply with RAP 9.2(c).

If a verbatim report of proceedings will not be filed, you must notify this court, in writing, by September 15, 2014. RAP 9.2(a).

3. The **verbatim report of proceedings** must be filed with the clerk of the trial court no later than 60 days after service of the statement of arrangements. The court reporter's notice of filing and proof of service must be filed in this court the same day. RAP 9.5(a).

4. **Appellant's brief** is due in this court 45 days after the report of proceedings is filed in the trial court. RAP 10.2(a).

Appellant should serve one copy of the brief on every other party and on any amicus curiae and should file proof of service with this court. RAP 10.2(h).

If the record on review does not include a report of proceedings, the appellant's brief is due 45 days after the designation of clerk's papers has been filed. RAP 10.2(a).

5. **Respondent's brief** is due in this court 30 days after service of the appellant's brief. RAP 10.2(c).

Respondent should serve one copy of the brief on every other party and on any amicus curiae and should file proof of service with this court. RAP 10.2(h).

6. A **reply brief**, if any, is due 30 days after service of respondent's brief. RAP 10.2(d).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

ssd