

CASE REPORT

PUBLIC RECORDS ACT - EFFECTIVE LAW ENFORCEMENT EXEMPTION - CRIMINAL INVESTIGATIONS - REFERRAL TO PROSECUTOR - INTERNAL INVESTIGATIONS - REDACTION OF WITNESS IDENTITIES - PENALTIES.

Criminal investigative records may be categorically withheld only until the matter is referred to the prosecuting attorney. Internal investigation materials are not necessarily categorically exempt from disclosure; the agency must determine whether the withholding is necessary for effective law enforcement. Witness identities may only be redacted if there exists a risk to life, physical safety or safety of property of witness, or if witness requests non-disclosure. *Sargent v. City of Seattle*, ___ Wn.2d ___ (December 19, 2013).

I. Facts. Evan Sargent was arrested after an altercation with an off-duty Seattle police officer. The police department (“SPD”) referred the matter to the King County Prosecuting Attorney’s office, where the prosecutor declined to file charges and referred the matter back to SPD for further investigation. Mr. Sargent later requested records of the incident, the name and badge number of the off-duty officer, and copies of 911 recordings and the dispatch (CAD) logs. SPD released the name of the officer and denied the remaining records on the basis of RCW 42.56.240(1), which allows the withholding of records when necessary for effective law enforcement (the “effective law enforcement exemption”). SPD later referred the matter back to the prosecutor’s office and again the prosecutor declined to prosecute. SPD closed the criminal investigation file. Mr. Sargent renewed his earlier request and also requested communications regarding the pending internal investigation of the involved officer. SPD released the 911 recordings and CAD log with all witness names redacted, but withheld the internal investigation file citing the effective law enforcement exemption. SPD also released materials from the criminal investigation file but redacted names of witnesses. Mr. Sargent filed a complaint for relief under the Public Records Act and the King County Superior Court ordered production of unredacted documents and assessed a \$30,270 penalty. SPD appealed. The Court of Appeals held that the effective law enforcement exemption did not end when the case was referred to the prosecuting attorney for filing, but continued to apply categorically until the matter was referred back to the prosecutor and the investigation closed. The Court of Appeals further held the trial court abused its discretion when awarding the maximum penalty possible. The Supreme Court accepted review.

II. Applicable Law and Analysis. On review, the Supreme Court held that the effective law enforcement exemption does not apply categorically to block production of the criminal investigation materials Sargent had requested. The court considered the *Newman* case which

allowed categorical withholding of investigative records for an open and ongoing investigation, and further considered the *Cowles* case which established a bright line rule that when a suspect has been arrested and the matter referred to the prosecutor, nondisclosure is not categorical and automatic. Instead, records must be considered on a record-by-record basis to determine whether withholding is necessary for effective law enforcement. Here, the court found that Sargent's request did not fall into the categorical exemption created in the *Newman* case. Once the matter was turned over to the prosecutor, the categorical exemption terminated, even though the prosecutor requested further investigation. The court clarified that termination of the categorical exemption did not mean all records must be released, but that SPD had the burden to go through each record to determine whether nondisclosure was essential for effective law enforcement.

As for the internal investigation records, the court stated that the *Newman* categorical exemption applies to active criminal investigations and held it did not apply to internal investigations. Again the court clarified that not all records had to be released, but that the department needed to parse through the records to determine which must be withheld for effective law enforcement purposes.

Next, the court considered the redaction of witness names throughout the records. SPD argued that withholding of witness names was necessary in order to avoid a situation where witnesses are afraid to come forward knowing their names will be released (the "chilling effect"). The court found that withholding names to prevent a chilling effect was not enough, and looked to the plain language of RCW 42.56.240(2) which provides that witness names can be redacted only if the life, physical safety or property of the witness was at risk, or if the witness specifically requested non-disclosure.

Finally, the court considered the penalties that were awarded by the trial court. In 2010 the Supreme Court established a framework to guide trial courts' determination of penalties using a set of aggravating and mitigating factors to assess culpability. Here, the court found that the trial court abused its discretion because it failed to follow the prescribed framework for establishing the penalty. As such, the issue of penalty was remanded for proper review.

III. Conclusion. The categorical exemption for criminal investigative files only applies to open and active investigations. Once the investigation is closed and the matter referred to the prosecutor, that categorical exemption terminates, even if the prosecutor returns the matter for further investigation. For internal investigations, agencies must go through each record to determine whether withholding is essential for effective law enforcement purposes. If you have any questions relating to release of investigative records, please contact your city attorney.