

CASE REPORT

PUBLIC RECORDS ACT — CREATION OF RECORDS - POLICE IN-CAR VIDEOS.

Exception to production under the Public Records Act (PRA) for police in-car videos is limited to cases where the videos relate to actual, pending litigation. Further, where a partially responsive record may be produced in response to a public records request without creating a record, the partially responsive record must be produced. *Fisher Broadcasting v. City of Seattle*, No. 87271-6, Wash. Supreme Ct. (June 12, 2014).

I. Facts. Since 2007, the Seattle Police Department's (SPD) entire patrol fleet has been equipped with in-car video and sound recording equipment. SPD's recording system was manufactured by a private company, COBAN Technologies, which provided both the recording equipment and the computer system managing video storage and retrieval. In 2010, a KOMO news reporter made two relevant public records requests: (1) for a list of all digital in-car video/audio recordings tagged for retention by SPD officers; and (2) for copies of the in-car video/audio recordings tagged for retention. SPD denied the first request, stating that SPD could not query the system in the manner requested. Videos saved for retention could only be searched by individual officer name, date, and time. SPD also denied the second request, stating SPD could not query the system to generate a retention report that would provide a list of the retained videos. Therefore, they could not produce copies of the retained videos themselves. SPD's attorney later told the reporter that the Privacy Act further prevented release of videos that were less than three years old. In the meantime, another request was received from Eric Rachner for a "copy of the full and complete database of all Coban Digital Video Management System activity logs in electronic form." SPD provided the records with Rachner, who shared them with the reporter. KOMO news sued SPD under the PRA for failing to timely produce records.

II. Applicable Law and Analysis. The Supreme Court initially examined KOMO's PRA request for a list of the retained videos and concluded that SPD violated the PRA when it denied the request. SPD contended that the request asked it to create a new record. The Supreme Court acknowledged that this was true to some extent; producing a document that would correlate all of the information the reporter had requested (officer name, badge number, date, time, and location when the video was tagged for retention, and any other notation accompanying the tag) would have required mining data from two distinct systems and creating a new document. However, because SPD later provided Rachner with activity logs relating to the videos, the Court concluded that SPD had the capacity to produce a partially responsive record at the time it denied the reporter's request. Expanding on the concept of creation of a public record, the Court recognized that "[g]iven the way public records are now stored (and, in many cases, initially generated), there will not always be a simple dichotomy between producing an existing record and creating a new one." Thus, whether a particular public records request asks an agency to

produce or create a record will often turn on the specific facts of the case and may not always be resolved at summary judgment before trial.

With respect to the videos themselves, the Court initially noted that because SPD had the capability to produce a list of retained videos via the activity log, SPD's denial on that basis violated the PRA. SPD also argued that it was barred from releasing the videos under RCW 9.73.090(1)(c) of the Privacy Act, an "other statute", under the PRA. Generally, the Privacy Act requires all parties to a private communication to consent to any recording. However, some recordings made by police are exempted from disclosure, namely: "sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles . . ." The statute further provides that no such sound/video recordings "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."

The Court rejected SPD's argument that the statute prohibited production of any videos less than three years old and held that the statute "is limited to cases where the videos relate to actual, pending litigation." The Court reasoned that the legislature's goal was neither to establish a categorical delay in releasing videos nor to protect personal privacy, but was rather to protect the integrity of law enforcement investigations and court proceedings.

III. Conclusion. This case establishes that in-car or dash-cam police videos are not necessarily exempt from inspection and copying, unless the videos relate to "actual, pending litigation." There may be many reasonable interpretations relating to when "final disposition" of "acting, pending litigation" occurs. The dissent offers several suggestions, such as entry of final judgment by a trial court or exhaustion of appellate remedies. It might also be when the possibility of litigation is foreclosed by a statute of limitations or other procedural mechanism. The majority also suggests that this phrase would protect videos where police or court activities, including police investigations, are ongoing. Further, the Supreme Court has made it clear that factual disputes relating to the creation or production of an existing record may prevent early resolution of PRA disputes. If partially responsive records can be produced without having to create a new record, the partially responsive record must be produced.