

THE HONORABLE G. HELEN WHITENER
Hearing: January 6, 2017
9:00 A.M.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

GREGORY CHRISTOPHER, an
individual, ARTHUR C. BANKS, an
individual, TONEY MONTGOMERY,
an individual, WHITNEY BRADY, an
individual,

Plaintiffs,

vs.

CITY OF TACOMA, a municipal
corporation,

Defendant.

NO. 16-2-05416-7

DEFENDANT'S MOTION TO
CONSOLIDATE

I. RELIEF REQUESTED

The City of Tacoma seeks to consolidate the instant matter with Pierce County Superior Court Cause Nos. 15-2-12200-8 and 15-2-12683-6. These three matters concern alleged violations of the Public Records Act (PRA) and all three have the same central issue: whether the City of Tacoma properly claimed the "effective law enforcement" exemption when redacting records concerning Stingray equipment that

1 had been requested by the various plaintiffs, or whether such redactions constitute a
2 violation of the PRA.

3 II. FACTUAL AND PROCEDURAL BACKGROUND

4 The instant matter (hereafter Christopher) involves a Public Records Request
5 made by four plaintiffs, Gregory Christopher, Arthur Banks, Toney Montgomery, and
6 Whitney Brady, and the ACLU on September 2, 2015. The request sought all records
7 related to equipment often referred to as “Stingray” equipment.¹ The City produced
8 responsive documents, some of which were redacted as explained on a privilege log
9 that accompanied the produced records. The exemption claimed for the redactions is
10 the exemption provided by RCW 42.56.240, which exempts documents when non-
11 disclosure is essential to effective law enforcement.

12 The plaintiffs filed the instant lawsuit alleging that the City’s claim of this
13 exemption for Stingray related documents was improper and also that not all
14 documents had been produced. They allege that “defendant did not provide all public
15 records requested . . . and/or improperly redacted these public records.” Complaint, ¶
16 4.17 (on file herein). They allege that the “specific intelligence information exemption
17 does not exempt the withheld and redacted public records.” Id. at ¶ 5.9.

18 Two other lawsuits have been filed against the City and are pending in Pierce
19 County Superior Court (PCSC) that also allege that the City violated the PRA by not
20 producing all requested Stingray related records and by redacting Stingray related
21 documents pursuant to the effective law enforcement exemption contained in RCW
22 42.56.240. Those other two cases are: Arthur West v. City of Tacoma, PCSC No.15-2-
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25 ¹Stingray equipment is equipment that essentially allows the Tacoma Police Department to locate a cell phone by “pinging” it after obtaining a warrant.

1 12683-6 (hereafter West) and Center for Open Policing, et al v. City of Tacoma, PCSC
2 No. 15-2-12200-8 (hereafter COP). Those two cases have already been consolidated
3 for the purposes of discovery though the hearing dates have not necessarily been
4 joined. Elofson Aff. Ex. 1 (Court's Order on Consolidation). In ordering the
5 consolidation, Hon. Frank Cuthbertson reassigned COP to his own department.

6 In West, Mr. West alleges he sought all records related to the Stingray
7 equipment, including a copy of the non-disclosure agreement (NDA) the City was
8 required to sign in order to obtain the equipment.² Elofson Aff., Ex. 2 (West's request
9 for records). In his complaint, Mr. West alleges that the City improperly redacted the
10 NDA and other Stingray documents and improperly claimed the effective law
11 enforcement exemption. See West Complaint, ¶¶ 3.4; 3.5 (on file). Mr. West also
12 alleges that not all documents were produced. Id.

13 In COP, the plaintiffs allege that they also sought all documents related to the
14 Stingray equipment. Elofson Aff., Ex. 3 (COP's request for records). COP's request
15 for documents was almost identical to the requests for records made by Mr. West and
16 by the plaintiffs in Christopher. Elofson Aff., Ex. 4 (Christopher request for records). In
17 response to COP's request, the City provided an almost identical set of documents as
18 were given to plaintiff West and to the plaintiffs in Christopher. Elofson Aff. In COP,
19 the plaintiffs allege that the City improperly redacted the NDA and improperly claimed
20 the effective law enforcement exemption.
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24 ² The equipment can only be obtained with the approval of the FBI after the local
25 agency signs a non-disclosure agreement with the manufacturer of the equipment and
the FBI.

1 The instant case, Christopher, is almost identical to West and COP. While
2 there are some minor differences in the records that were produced, the ultimate issue
3 in Christopher is the same issue in West and COP: Whether the City properly claimed
4 the effective law enforcement exemption when it redacted documents relating to the
5 Stingray equipment.

6 III. ISSUE

7 Should the court consolidate the instant matter with two other matters that have
8 already been consolidated when all three share common questions of law and of fact?
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10 IV. ANALYSIS

11 CR 42(a) provides:

12 When actions involving a common question of law or fact are
13 pending before the court, it may order a joint hearing or trial of
14 any or all the matters in issue in the actions; it may order all the
15 actions consolidated; and it may make such orders concerning
16 proceedings therein as may tend to avoid unnecessary costs or
17 delay.

18 “CR 42(a) confers substantial discretion on trial courts with respect to
19 consolidation of common questions of law or fact.” W.R. Grace & Co. v. Dept. of
20 Revenue, 137 Wn.2d 580, 590, 973 P.2d 1011 (1999). The “virtue of consolidation is
21 that it increases the productivity of the judicial system by arranging for the
22 simultaneous resolution of issues or entire actions.” See KARL B. TEGLAND, 4
23 WASHINGTON PRACTICE, RULES PRACTICE, p. 89 (6th ed. 2013).

24 Judicial economy generally favors consolidation. Switzenbaum v. Orbital
25 Sciences Corp., 187 FRD 246 (E.D. Va. 1999). Consolidation is particularly
appropriate where substantially the same witnesses will testify in both cases and both

1 cases arise from the same set of operative facts. DeFigueiredo v. Trans World
2 Airlines, Inc., 55 FRD 44 (S.D. NY 1971). Consolidation allows separate cases to be
3 joined but it does not affect the substantive rights of the parties. J.G. Link & Co. v.
4 Continental Casualty Co., 470 F.2d 1133 (9th Cir. 1972), cert. denied, 414 U.S. 829,
5 94 S. Ct. 55, 38 L. Ed. 2d 63 (1973).³

6 Consolidation “may be ordered on motion of a party, or on the court’s own
7 motion, even without the consent of the parties.” Id., (citing 4 WASH. PRAC. at 89
8 (citing CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND
9 PROCEDURE, Civil §§ 2381 et. seq)). Consolidation is within the discretion of the trial
10 court and will be reversed only upon a showing of abuse of discretion. Leader Nat’l
11 Ins. Co. v. Torres, 51 Wn. App. 136, 142, 751 P.2d 1252 (1988).

12 In this case, consolidation is appropriate. As stated above, the central issue in
13 each case is identical and it makes sense that the decision is rendered by a single
14 decision-maker, rather than having two courts review almost identical evidence, hold
15 almost identical hearings, and render separate decisions on a single issue. There is
16 also a risk of inconsistent decisions by different court; all three will be decided by the
17 court because there is no right to a jury trial under the PRA. Consolidation eliminates
18 the risk of inconsistent rulings.

19 Consolidation also provides for more efficient discovery. The parties in all three
20 cases are currently sharing written discovery. Affidavit of Margaret Elofson. For
21 example, counsel in COP possesses and is utilizing at depositions the documents the
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24 ³ Consolidation may also refer to “when all except one of several actions are stayed until one is tried, in which case
25 the judgment in the one trial is conclusive as to all others.” In re Marriage of Angelo, 142 Wn. App. 622, 175 P.3d
1096 (2008)(quoting 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND
PROCEDURE § 2382, AT 8-9 (3d ed. 2008). Defendant City is not opposed to consolidation that takes the form of
staying any of the three matters while the central common issue is decided in another of the three matters.

1 City produced in response to discovery requests propounded by the plaintiffs in
2 Christopher. In addition, counsel for COP and West recently attended and participated
3 in a deposition noted by the plaintiffs in Christopher. This sharing of discovery
4 underscores the extent to which the ultimate issue in each is identical and the extent
5 to which the discovery in the cases has overlapped or been identical. Consolidation
6 ensures that discovery continues to proceed efficiently.

7 In addition, out-of-state entities such as the Department of Justice and the FBI,
8 will be participating in all three matters. Elofson Aff. The out-of-state entities should
9 not be required to make multiple trips to Pierce County to address the same issue in
10 different cases.

11 Moreover, consolidation of these matters will not result in prejudice to any
12 party. As outlined above, consolidation does not change the substantive rights of any
13 party and does not merge the two actions into one. All parties remain free to pursue
14 their own claims and their own relief.

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16 Finally, the timing of this requested consolidation is appropriate. The instant
17 matter, Christopher, has just recently been reassigned to Judge Whitener and Judge
18 Whitener has not made any rulings in Christopher.

19 V. CONCLUSION

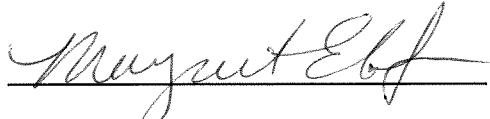
20 The three cases easily satisfy CR 42's standard of a common question of law
21 or fact. Two of the cases have already been consolidated and the basis for
22 consolidating those two is also present in the instant case. The risk of conflicting
23 judgments is high if the three cases proceed separately. In addition, three separate
24 cases will create unnecessary duplication of effort and expense by the Superior Court,
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1 by the parties, and by the witnesses. Thus, the City respectfully requests that the
2 Court order consolidation in these matters.

3 DATED this 22nd day of December, 2016.

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5 ELIZABETH A. PAULI, City Attorney

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9 By:



10 MARGARET A. ELOFSON

11 WSBA #23038

12 Deputy City Attorney

13 Attorney for Defendant

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DECLARATION OF SERVICE

I hereby certify that on December 22, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and served a true and correct copy of the foregoing on the following:

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DATED: December 22, 2016

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