

The Honorable G Helen Whitener

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PIERCE COUNTY

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

Plaintiffs,

v.

CITY OF TACOMA, a municipal corporation,

Defendant.

No. 16-2-05416-7

**PLAINTIFFS’ MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

Introduction and Relief Requested

In this Public Records Act (PRA) case, RCW 42.56, Plaintiffs move for partial summary judgment of liability due to Defendant’s failure to provide certain public records responsive to Plaintiffs’ Public Records Act Request (“PRA Request”). This motion asks only that this Court hold that the public records discussed here were wrongfully withheld. The question of appropriate PRA penalties for withholding these public records, we respectfully suggest, should be addressed after all issues have been resolved at trial and the Court can address penalties in the

1 overall context.<sup>1</sup>

2 Plaintiffs sent a request for public records to the Tacoma Police Department (“TPD”)  
3 dated September 2, 2015, asking for 14 categories of public records related to TPD’s acquisition  
4 and use of a cell site simulator. Declaration of John Midgley in Support of Motion for Partial  
5 Summary Judgment (“Midgley Declaration”) and Ex. 1 thereto.<sup>2</sup> TPD provided some records in  
6 an initial response to this request and some additional records in response to further  
7 correspondence from Plaintiffs’ counsel. Exhibits 2 and 3. *See also* Complaint ¶ 4.12-4.14;  
8 Answer ¶ 4.12-4.14. The second disclosure of records from TPD was received by Plaintiffs on or  
9 about December 18, 2015. Midgley Declaration. TPD provided no other records.  
10

11 Subsequent to filing the present case, Plaintiffs have come into possession of additional  
12 public records that, as shown herein, are responsive to the PRA request and should have been  
13 provided by TPD. Plaintiffs first address the applicable law and then identify and discuss the  
14 public records on which partial summary judgment of liability should be granted.  
15

#### 16 Legal Authority

17 The Washington Supreme Court has held that the PRA “is a strongly worded mandate for  
18 broad disclosure of public records.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246  
19 (1978). The Court specifies the legislative purpose of the act as “nothing less than the  
20 preservation of the most central tenets of representative government, namely, the sovereignty of  
21 the people and the accountability to the people of public officials and institutions.” *Progressive*  
22 *Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (“PAWS”).  
23  
24

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25 <sup>1</sup> Plaintiffs will bring on several additional issues at trial that will require factual inquiry, including at least  
26 questions regarding the adequacy of TPD’s records search, responsive records we believe TPD has but  
has not provided, and challenges to TPD’s redactions and withholding of some records.

<sup>2</sup> All numbered exhibits referred to herein are attached to the Midgley Declaration.

1 The PRA must be liberally construed in favor of disclosure and PRA exemptions are  
2 narrowly construed. RCW 42.56.030. “The PRA requires state and local agencies to disclose all  
3 public records upon request, unless the record falls within a PRA exemption or other statutory  
4 exemption.” *Gendler v. Batiste*, 174 Wn.2d 244, 251, 274 P.3d 346 (2012). Upon a finding of  
5 violation of the PRA, the court must award reasonable attorneys’ fees and costs and must  
6 consider imposing a monetary penalty “...for each day that [the requester] was denied the right  
7 to inspect or copy said public record.” RCW 42.56.550(4).

9 “The Public Records Act clearly and emphatically prohibits silent withholding by  
10 agencies of records relevant to a public records request.” *PAWS*, 125 Wn.2d at 270. “An agency  
11 must explain and justify any withholding, in whole or in part, of any requested public  
12 records.” *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 432, 327 P.3d 600  
13 (2013). “Failure to reveal that some records have been withheld in their entirety gives requesters  
14 the misleading impression that all documents relevant to the request have been disclosed.”  
15 *PAWS*, 125 Wn.2d at 270-71.

17 When public records are revealed in the course of PRA litigation, “...the appropriate  
18 inquiry is whether the records are exempt from disclosure. If they are exempt, the agency’s  
19 withholding of them was lawful and its subsequent production of them irrelevant. If they are  
20 nonexempt, the agency wrongfully withheld the records and the appropriate penalty applies for  
21 the numbers of days the record was wrongfully withheld—in other words, until the record was  
22 produced.” *Sanders v. State of Wash.*, 169 Wn.2d 827, 849-850, 240 P.3d 120 (2010).

24 Because this is a motion for partial summary judgment, the standard the Court must apply  
25 is whether, taking all inferences in favor of the nonmoving party, there are no disputed issues of  
26 material fact and Plaintiffs are entitled as a matter of law to a judgment that the records were  
wrongfully withheld. *See PAWS*, 125 Wash.2d at 253. In this PRA case, this standard is applied

1 in the context of the PRA mandate that upon judicial review, “[t]he burden of proof shall be on  
 2 the agency to establish that refusal to permit public inspection and copying is in accordance with  
 3 a statute that exempts or prohibits disclosure in whole or in part of specific information or  
 4 records.” RCW 42.56.550(1). The question before the Court therefore, is whether, as a matter of  
 5 law, Plaintiffs have shown that the City cannot meet its burden with respect to the records  
 6 involved in this motion.

7 Partial Summary Judgment Should Be Granted

8 The public records for which Plaintiffs claim liability under the Public Records Act are  
 9 Exhibits 4 – 15 to the Midgley Declaration. TPD did not provide any of these records in response  
 10 to the PRA request, nor did it identify them as exempt from the PRA, and Plaintiffs obtained  
 11 them in various ways as described in the Midgley Declaration. Those records, along with the  
 12 PRA Request category to which each is responsive, are as follows:

<b>Exhibit No(s)</b>	<b>Description of Document</b>	<b>Relevant PRA Request Paragraph(s)</b>	<b>Received from TPD</b>
4	Pages dated 9/25/2014 to 12/29/2015 of spreadsheet “Use Log” that reveals usage of cell site simulator.	1 – “All records regarding TPD’s acquisition, use, or lease of Cell Site Simulators...”	6/28/16
5	Email dated February 28, 2014, with attached letter from the FBI “RE: Washington Public Records Act access request for records about cell site simulator technology.”	4- “All nondisclosure agreements...memorandums of understanding, or agreements concerning acquisition or use of Cell Site Simulators.” 8 – “All communications regarding Cell Site Simulators, including ... communications between Tacoma Police Department and any other local, state, or federal agency or person.”	6/28/16
6-9	6- Email chain with email at the top dated June 27, 2014, from Bradley S. Morrison of the FBI, top line “For Official Use Only –	4- “All nondisclosure agreements...memorandums of understanding, or agreements concerning acquisition or use of	6/28/16

Exhibit No(s)	Description of Document	Relevant PRA Request Paragraph(s)	Received from TPD
	<p>Deliberative – Property of the FBI, not for public disclosure.”</p> <p><b>7</b>- Email chain with email at the top dated June 10, 2014 from Bradley S. Morrison of the FBI, subject line “Re: PDR 14-7167 Associated Press.”</p> <p><b>8</b> -Email chain with email at the top dated July 22, 2014, from Bradley S. Morrison of the FBI, subject line “Re: New Public Disclosure Request for Harris Corp. Purchase Agreement.”</p> <p><b>9</b>-Email chain with email at the top dated October 30, 2013, from Bradley S. Morrison of the FBI, subject line “RE: FBI NDA Tacoma Police Department / PDR 13-6356 Associated Press.”</p>	<p>Cell Site Simulators.”</p> <p>8 – “All communications regarding Cell Site Simulators, including ... communications between Tacoma Police Department and any other local, state, or federal agency or person.”</p>	
<b>10</b>	<p>Cover email and cover letter along with templates for: order authorizing pen, trap and trace law enforcement activities, including use of CSS; application for such an order; and order sealing documents.</p>	<p>1 – “All records regarding TPD’s acquisition, use or lease of Cell Site Simulators, including ...invoices...”</p> <p>10 – “All applications submitted to state or federal courts for warrants, orders, or other authorization for use of Cell Site Simulators in criminal investigations, as well as any warrants, orders, authorizations, denials of warrants, denials of orders, denials of authorization, and returns of warrants associated with those applications.”</p>	6/30/17
<b>11-13</b>	<p><b>11</b> - City of Tacoma Citizen Review Panel Minutes dated April 13, 2015, including discussion of cell site simulator with TPD representatives.</p> <p><b>12</b> - City of Tacoma Citizen Review Panel Agenda dated May 11, 2015, including item “Panel</p>	<p>8 – “All communications regarding Cell Site Simulators, including ... communications between Tacoma Police Department and any other local, state, or federal agency or person.”</p>	Never

Exhibit No(s)	Description of Document	Relevant PRA Request Paragraph(s)	Received from TPD
	Recommendations for Mobile Cell Site Simulator.” 13 - City of Tacoma Citizen Review Panel Minutes dated October 6, 2104, including discussion of cell site simulator with TPD Chief and others.		
14	Tacoma Police Department Legal Directive LD 12-002 “Subject: Geo-Location Data” dated June 1, 2012 and including directives about “geo-location data for cell phones.”	6 – “All training materials, guidelines, and procedural requirements regarding the use and maintenance of Cell Site Simulators...”	Never
15	Harris Company invoice dated May 21, 2013.	1 – “All records regarding TPD’s acquisition, use or lease of Cell Site Simulators, including...invoices...”	Never

Exhibits 4 - 9 were not included in TPD’s responses to the PRA Request. Plaintiffs received them in response to Requests for Production of Documents in the present case. Midgley Declaration. Exhibit 4 is part of a spreadsheet that includes information about when the TPD cell site simulator has been used.<sup>3</sup> In its responses to the PRA Request, TPD included part of the spreadsheet but omitted the parts included in Exhibit 4. The other exhibits in this group are communications between TPD and the FBI about cell site simulators and disclosure of information about them.

Exhibit 10 is a template for warrants (often referred to as “pen, trap and trace orders”) and applications for warrants for obtaining the location of cell phones, including through use of

<sup>3</sup> The spreadsheet is what TPD employees call a “billing log” or “use log” that TPD asserts includes all attempts by TPD to locate a cell phone or a person using a cell phone number, including but not limited to use of the cell site simulator. See excerpt of deposition of Detective Terry Krause attached to this motion, lines 83:14 – 84:8.

1 the cell site simulator. The existence of this record was revealed during depositions in this case  
2 and later forwarded to Plaintiffs' counsel by counsel for defendant.<sup>4</sup>

3 Exhibits 11-15 are additional public records that Plaintiffs have obtained from sources  
4 other than TPD or opposing counsel. Opposing counsel has been made aware of Plaintiffs'  
5 possession of them, and several of them have been the subject of depositions of TPD employees.  
6  
7 Midgley Declaration.

8 As is shown in the chart above, all of these public records are responsive to the PRA  
9 Request yet none were provided by TPD. Nor can Defendant possibly meet its burden to show  
10 withholding was "in accordance with a statute that exempts or prohibits disclosure in whole or in  
11 part of specific information or records." RCW 42.56.550(1)(pertinent part). None were the  
12 subject of a claim of exemption or privilege. Midgley Declaration and Exhibits 16 and 17 (TPD  
13 privilege logs from the PRA disclosures). Indeed, most were "silently withheld"—  
14  
15 contrary to black-letter PRA principles—because they were not even disclosed in the privilege  
16 logs. These records were wrongfully withheld. *PAWS*, 125 Wn.2d at 270-71; *Sanders*, 169  
17 Wn.2d at 849-850.

18 It is clear on this record that TPD wrongfully withheld the records. There is no issue of  
19 material fact on this point. The Court should grant partial summary judgment.

20 Respectfully Submitted this 16<sup>th</sup> day of February, 2018.

21  
22 By:

23 /s/John Midgley  
24 John Midgley, WSBA #6511  
25 Lisa Nowlin, WSBA #51512  
AMERICAN CIVIL LIBERTIES UNION OF

26 <sup>4</sup> For completeness, the cover email and transmittal letter from opposing counsel are included in Exhibit  
10. We do not agree with opposing counsel's assertion that Exhibit 10 is not responsive to the PRA  
Request.

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

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

vs. )

No. 16-2-05416-7

CITY OF TACOMA, a municipal )  
corporation, )  
Defendant. )

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DEPOSITION UPON ORAL EXAMINATION  
OF  
DETECTIVE TERRY KRAUSE

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10:05 a.m.  
June 28, 2017

747 Market Street  
Tacoma, Washington

REPORTED BY: JACQUELINE L. BELLOWS, CCR 2297

1 to a deployment of the cell-site simulator. So all  
2 those Pens that are in there that we just located the  
3 phone, either found the guy another way or the phone was  
4 accurate enough, the pings from the phone company were  
5 accurate enough that we didn't need to deploy the  
6 equipment, those were all stripped out of there.

7 Then I think on this one, in an abundance of  
8 caution, we went ahead and just put them all in there.  
9 The reason I did that I think was: Well, you've got  
10 them. You've got them all. We didn't deploy the  
11 equipment on there. There's no indication that we did.  
12 But you have all Pen, Trap, and Trace orders. So here.  
13 That's the difference between the two.

14 Q. Is there a use log that only lists the when  
15 Tacoma Police Department utilized a cell-site simulator?

16 A. No. That was the one I am saying: Jeff must  
17 have gotten with Mike. And what we have is one  
18 spreadsheet per year. That's why you'll notice that  
19 they're beginning with the date. But one spreadsheet  
20 per year, that spreadsheet is all the Pen, Trap, and  
21 Trace. So I think Jeff and Mike probably got that. And  
22 then, based on the language of the request, I think for  
23 each one of these releases of these spreadsheets that we  
24 did, there was some variation in the language of the  
25 request that caused the change in how Mike did the

1 redactions. But again, I'll leave that to Mike to  
2 explain.

3 But there's only one spreadsheet per year.  
4 That's the spreadsheet of Pen, Trap, and Trace. The  
5 only reference to the cell-site simulator is column --  
6 the 12th column or whatever over where it says "E911  
7 located results," whether or not you capture the phone  
8 or whatever.

9 Q. When you made the revisions to the use log,  
10 did you use any documents than the original spreadsheet?

11 A. No.

12 Q. When you were maintaining this log, earlier  
13 you indicated that requests from other agencies aren't  
14 done in writing. I think you also indicated that  
15 they're done in writing in as much as there's a warrant.  
16 Is that correct?

17 A. Right. I'm not saying that there was never an  
18 email request for help. But usually, if you want get  
19 ahold me, you don't email me. You call me. Everybody  
20 that works with me knows that. I mean email, I mean, I  
21 get to it every three or four days. So typically it's a  
22 phone call. But yeah, typically somebody's got to drop  
23 off a signed warrant. And I don't remember if any of  
24 those were ever sent as a scanned pdf or not. Usually  
25 it's gotten to me by hand.