The Honorable G. Helen Whitener

Date of Hearing: April 13, 2018
Time of Hearing: 9:00 AM

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' RESPONSE TO SUPPLEMENTAL STATEMENT OF INTEREST OF THE UNITED STATES**

I. Introduction

The United States has filed a Supplemental Statement of Interest in this Public Records Act case, opposing Plaintiffs' request for records related to cell site simulators. The United States has consistently sought to withhold all information related cell site simulators, requiring all law enforcement agencies to sign a non-disclosure agreement prior to acquiring a cell site simulator. But the Public Records Act was enacted precisely to combat this kind of secrecy, to allow the people to "remain[] informed so that they may maintain control over the instruments they have

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created." RCW 42.56.030. The PRA is to be liberally construed and has certain enumerated exemptions to disclosure which are to be narrowly construed. *Id*. The makes, models, and pricing information of cell site simulators do not fall within these exemptions. And though portions of the cell site simulator manual are undoubtedly exempt, Defendant has improperly withheld it in its entirety and should provide Plaintiffs with a redacted copy.

II. Argument

Despite its sweeping non-disclosure agreement with the Tacoma Police Department (TPD), the United States only argues that three types of information relating to cell site simulators are protected from disclosure under the Public Records Act ("PRA").[1] *See* Supplemental Statement of Interest of the United States at 2 ("Suppl. Statement"). For a records to be exempt from disclosure under RCW 42.56.240(1), it must meet four requirements: (1) they must be "[s]pecific intelligence information" or "specific investigative records" (2) "compiled by" (3) "investigative, law enforcement, and penology agencies," (4) "the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy." *See Haines-Marchel v. State, Dep't of Corr.*, 183 Wn. App. 655, 665-66, 334 P.3d 99 (Wash. Ct. App. 2014) (recognizing four elements to RCW 42.56.240(1)). The language of the

[1] While the non-disclosure agreement is relevant to the Tacoma Police Department's obligations to the FBI, it has no bearing on the analysis of whether an exemption to the PRA applies, because entities cannot contract around the statutory requirements of the PRA. *See* RCW 42.56.070 (agencies "shall make available for public inspection and copying *all* public records, *unless* the record falls within the specific exemptions of subsection (8) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records.") (emphasis added). This is analogous to discovery, where confidentiality agreements also do not preclude disclosure. *See, e.g.*, *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Porter Hayden Co.*, No. 03-3408, 2012 WL 628493, at *2 (D. Md. Feb. 24, 2012) ("There is no privilege for documents merely because they are subject to a confidentiality agreement, and confidentiality agreements do not necessarily bar discovery that is otherwise permissible and relevant."); *Zoom Imaging, L.P. v. St. Luke's Hosp. & Health Network*, 513 F. Supp. 2d 411, 417 (E.D. Pa. 2007) (confidentiality agreements do not preclude disclosure for purposes of discovery).

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statute limits the exemption to "specific" information and records. The exemption is further constricted by the Washington Supreme Court's mandate that it be construed narrowly. *Wade's Eastside Gun Shop, Inc., v. Dep't of Labor and Indus.,* 185 Wn.2d 270, 280-281, 372 P.3d 97 (2016).

Plaintiffs do not dispute that the Tacoma Police Department (TPD) is a law enforcement agency or that it compiled the records. However, the United States and the City of Tacoma have failed to show that (1) portions of the withheld and redacted information qualify as "specific intelligence information"[2] and (2) that the information is essential to effective law enforcement. Therefore, they have failed to meet their burden of showing that the documents are exempt.

a. The Withheld Information is Not "Specific Intelligence Information"

The United States argues that the withheld information – model and pricing information and a cell site simulator manual – is "intelligence information." Suppl. Statement at 3. Though the United States consistently refers to the standard as "intelligence information," it is important to note that the exemption is much narrower and exempts only "*[s]pecific* intelligence information." RCW 42.56.240(1) (emphasis added). The United States relies primarily on *Fischer v. Wash. State Dep't of Corr.,* 160 Wn. App. 722, 254 P.3d 824 (2011), to try to shoehorn model and pricing information into the definition of "specific intelligence information." Suppl. Statement at 2. The United States misapplies *Fischer*. The only disputed issue in *Fischer* was whether the nondisclosure of the surveillance videos were "essential to effective law enforcement" – it was undisputed that the surveillance video tapes constituted

[2] The United States correctly does not contend that any of the withheld materials are "specific investigative records." *See* Suppl. Statement at 3; *see also Haines-Marchel,* 183 Wn. App. at 606 (2014) ("Records are specific investigative records if compiled as a result of a specific investigation focusing with special intensity upon a particular party.") (internal citations and quotation marks omitted)).

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specific intelligence information and the court did not address that question. *See Fischer*, 160 Wn. App. at 725-26; *see also Gronquist v. State*, 177 Wn. App. 389, 399, 313 P.3d 416 (Wash. Ct. App. 2013) (analyzing whether surveillance tapes were essential to effective law enforcement). The *Haines-Marchel* court also mistakenly describes *Fischer* and *Gronquist* as reaching the issue of whether "how a police agency carries out investigations qualifies as specific intelligence information." 183 Wn. App. at 667 (emphasis omitted).

Before the Court reaches the question of whether the model, price, and operating manual are "essential to effective law enforcement," it must first determine whether such information is "specific intelligence information." *Fischer* and *Gronquist* provide no guidance to that question, and the applicability of *Haines-Marchel* is severely limited due to its misreading of *Fischer* and *Gronquist*. *Id*. at 668 (reasoning that "[i]f the surveillance tapes [in *Fischer* and *Gronquist*] count as specific intelligence information" due to disclosing investigative methods, then so would pre-printed material on the documents at issue). In *King County v. Sheehan*, the court noted the dictionary definition of "intelligence" as "the gathering or distribution of information, especially secret information," or "information about an enemy" or "the evaluated conclusions drawn from such information." 114 Wn. App. 325, 337, 57 P.3d 307 (Wash. Ct. App. 2002). Model and pricing information on an invoice is not "intelligence information," let alone "specific intelligence information" – it is merely information about what item has been purchased and the amount that Accounts Payable must write a check for.

Even applying *Fischer* and *Gronquist* to the "specific intelligence information" prong, the redacted information does not fall within their purview. The plaintiff in *Fischer* argued that the tapes were not essential to law enforcement because inmates were able to view real time footage from thirteen surveillance cameras on a monitor in the prison, and therefore inmates

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could already view the withheld information. *Fischer,* 160 Wn. App. at 726. The *Fischer* Court found the surveillance tapes to be exempt because they would reveal to the inmates which cameras were recording, which cameras were dummies, the timing of the cameras' operation, and the extent to which they were controlled by staff. *Id*. at 727. Such information relates to *how* the equipment is being *deployed* and so *Fischer* does not control the case at hand. The model, pricing, and manual information does not indicate where TPD is using the cell site simulator or the methods of use. Nothing in the *Fischer* opinion suggests that the *Fischer* Court would have found information about camera models or pricing information exempt, or similar identifying information contained in manuals.

Because the withheld information is not "specific intelligence information," it is not exempt under RCW 42.56.240(1).

b. The Withheld Information Is Not Essential to Effective Law Enforcement

The public has a right to understand what equipment is being used to surveil the public, and how the public's money is being used to do so. The Government's argument that disclosure of the price and model of the equipment will reveal information regarding the capabilities of the TPD and resources available to TPD is applicable to *all* technology and equipment in TPD's possession – from radar speed detectors to Tasers to wiretaps to x-ray cameras. Knowing the make and model of TPD's speed detectors reveals TPD's capabilities, but it does not make that information "specific intelligence information" or "essential to effective law enforcement," nor does it diminish the public's right under the PRA to know such information. The United States' broad interpretation of "essential to effective law enforcement" would eviscerate the PRA as applied law enforcement. Section 42.56.240(1) is carefully and precisely worded to carve out a narrow exemption to the PRA – it is not meant to shield every

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"puzzle piece" of information that could potentially reveal capabilities of a law enforcement agency.[3]

The cases the United States cites are of limited utility. For example, in *United States v. Rigmaiden*, the Defendant sought a wide range of information relating to cell site simulators, including schematics, trade secrets, all evidence relating to the real-time and historical geolocation techniques, the identities of the agents who operated the equipment to find him – even the actual physical device itself – in addition to the make and model. 844 F. Supp. 2d 982, 993-94 (D. Ariz. 2012). Given the breadth of information sought, it is not surprising that the court denied disclosure. Given the breadth of information sought, *Rigmaiden* also does little to support the United States' contention that the make and model alone are "essential to effective law enforcement." Furthermore, the court in *Rigmaiden* was not conducting an exemption analysis under a public records statute, but rather was balancing the defendant's right to disclosure against the interests of law enforcement under the *Roviaro* informant privilege. *Id.* at 988.

Next, the United States relies on *Olson v. City of Long Beach* for the redaction of make and model information. Suppl. Statement at 8 (citing *Olson v. City of Long Beach*, No. BS158621 at 25-29 (Sup. Ct., Cnty of Los Angeles, Nov. 21, 2017). But *Olson* does not help the

[3] While a piece of information not itself of obvious importance can aid in piecing together other information, this does not mean that every piece of information which could lead to more information is therefore exempt. The cases cited by the United States in support of the "mosaic theory" all involve information that has a very clear, direct, and likely connection to revealing exempt information, and therefore are easily distinguished from the United States' nebulous, attenuated claims of harm. *See* Suppl. Statement at 7 n.4, discussing *CIA v. Sims*, 471 U.S. 159 (1985) (disclosure of institutional affiliations of intelligence sources likely to lead to revelation of their identity), *Berman v. CIA*, 501 F.3d 1136 (9th Cir. 2007) (disclosure of President's daily briefings could reveal sources and methods), *Timken Co. v. U.S. Customs Serv.*, 491 F. Supp. 557 (D.D.C. 1980) (disclosure of unit price likely to reveal cost margin), and *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003) (list of suspects detained in September 11th investigation and their attorneys would reveal path of the investigation).

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United States' claims. The *Olson* court found that pricing information for cell site simulators was *not* exempt from disclosure and did not exempt make and model information as law enforcement intelligence, contrary to the United States' assertions otherwise. *See Olson* at 24. *Olson* dealt with the California Public Records Act and analyzed the propriety of redactions under two exemptions: Cal. Gov't Code § 6254(f)[4] (intelligence information) and Cal. Gov't Code § 6255 (public interest of disclosure outweighed by public interest of non-disclosure). *Olson* at 15. The *Olson* court did not analyze the withholding of make and model information under Section 6254(f), and it does not appear that the City of Long Beach withheld such information under Section 6254(f) nor did it claim that make and model was intelligence information. Instead, the court conducted a balancing test under Section 6255, which is a catch-all provision that allows an agency to "justify withholding any record by demonstrating that . . . on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." Cal. Gov't Code § 6255; *Olson* at 28. No such exemption exists under Washington's PRA, and *Olson* does not suggest that the law enforcement exemption would have exempted make and model information.[5]

i. The Operating Manual

Plaintiffs do not claim that the operating manual must be produced in its entirety; rather, Plaintiffs argue that it should not have been withheld in its entirety and that a redacted version can and should be produced. "In general, the Public Records Act does not allow withholding of

[4] Section 6254(f), unlike its Washington analogue, RCW 42.56.240(1), does not have an "essential for effective law enforcement" requirement.

[5] Notably, the *Olson* court found that the Hansen Declaration that is also before this Court lacked specifics as to the redactions at issue and that particularized explanations were not provided supporting each redaction, and therefore *in camera* review was necessary. *Olson* at 22-23. The United States' submissions in this case suffer from the same defect.

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records in their entirety." *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 261, 884 P.2d 592 (1994).

The United States makes only two arguments against TPD's obligation to provide a redacted copy of the manual. The first is a single conclusory sentence that the manual is exempt under RCW 42.56.240(1). *See* Suppl. Statement at 8. The United States cites to the Hansen Declaration, which states that disclosure of the makes and models would be harmful to TPD because "criminals and terrorists" would know the resources available to TPD. *Id*. (citing Hansen Decl. ¶ 19c) This generic statement fails to explain why this is harmful or to provide anything other than generalized fears of harm. *See Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 395, 314 P.3d 1093 (2013) (agency required to provide "specific evidence of chilled witnesses or other evidence of impeded law enforcement" to show nondisclosure essential to effective law enforcement); *City of Fife v. Hicks*, 186 Wn. App. 122, 138, 345 P.3d 1 (2015) ("generalized concerns . . . were insufficient to establish that nondisclosure was essential to effective law enforcement").

The United States' example of criminal organizations being able to compile a "heat map" of where cell site simulators are present is a red herring. The United States argues that the harm extends beyond Tacoma because criminals will be able to buy or build a device that detects cell site simulators, and then build a heat map of cities and jurisdictions that have cell site simulators. Suppl. Statement at 6 n. 3 (citing Hansen Decl. ¶ 19). But it is already known that Tacoma, as well as scores of other cities,[6] have cell site simulators, and TPD has not tried in this case to shield from public knowledge the existence of TPD's cell site simulators. The United States' hypothetical is tenuous at best, but more to the point, mere knowledge of the fact that a city or

[6] *Stingray Tracking Devices: Who's Got Them?*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/issues/privacy-technology/surveillance-technologies/stingray-tracking-devices-whos-got-them (last visited Apr. 9, 2018).

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state has a cell site simulator is not a harm, let alone a harm that rises to the level of meeting the PRA exemption standard of "essential to effective law enforcement."

The United States' second argument attempts to differentiate this case from the FCC's September 29, 2016 opinion regarding a redacted version of a cell site simulator manual. *See* Suppl. Statement at 8-9; *see also* Exhibit J ("FCC Opinion") to Plaintiffs' Opposition to Defendant's Motion for Summary Judgment ("Pls.' Opp'n"). The crux of the United States' argument is that the manual in this case is in the possession of a particular law enforcement agency, rather than the FCC, and therefore disclosure is more harmful. *See* Suppl. Statement at 8-9. Plaintiffs disagree that who possesses the manual is sufficient to distinguish the case at hand from the FCC case such that the manual in this instance is "essential for effective law enforcement," whereas it was not in the FCC case. The same principles underlying the FCC Opinion are applicable here. Indeed, the FCC considered the fact that disclosure of some of the information could be harmful to law enforcement, and still affirmed disclosure of the manual, with redactions. FCC Opinion at 4-5.

In any event, the manuals do not appear to be limited to one model of cell site simulator and are in fact applicable to multiple models. *See* FCC Opinion at 1-2 & n.7 (noting that the single user manual produced is associated with StingRay, StingRay II, and KingFish); Suppl. Sowles Decl. Ex. 2 at page x (Harris Corp. manual applicable to StingRay, StingRay II, KingFish, and potentially an additional redacted model); Exhibit E to Pls.' Opp'n, at Exhibit 7 to Expert Report pages 15-21 (submitted with Motion to Seal) (manual applicable to StingRay I, StingRay II, KingFish, HailStorm, HailStorm AmberJack, and HailStorm ArrowHead models/setups). Plaintiffs maintain that the make and model is not essential to effective law enforcement, but even so, given the breadth of models covered by a single manual, disclosure of

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the manual would not reveal the particular make and model possessed by TPD, or anything more specific about how cell site simulators work than has already been revealed by the decision of the FCC.

For the reasons stated in Plaintiffs' Opposition to Defendant's Motion for Summary Judgment and the reasoning of the court in the FCC Opinion, the manual is not exempt in its entirety and TPD should have produced a redacted copy.

III. Conclusion

For the foregoing reasons, and the reasons given in connection with Plaintiffs' Opposition to Defendant's Motion for Summary Judgment, the Court should deny Defendant's Motion for Summary Judgment and find that TPD improperly redacted and withheld records responsive to Plaintiffs' PRA Request. In the alternative, the Court should review the manuals and the redacted material *in camera* and determine the issue after that review.

Respectfully submitted this 9th day of April 2018.

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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 **CERTIFICATE OF SERVICE**

I, Kaya McRuer, am a legal assistant for the American Civil Liberties Union of Washington Foundation, 901 Fifth Avenue, Suite 630, Seattle, WA 98164. I hereby certify that on the date indicated below, I caused to be served via e-service through the LINX system and email a true and correct copy of the ***Plaintiffs' Response to Supplemental Statement of the United States*** and this ***Certificate of Service*** on the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9th day of April 2018 at Seattle, Washington.

Kaya McRuer
Legal Assistant

Certificate of Service

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