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

CENTER FOR OPEN POLICING, a Washington nonprofit corporation, and PHILLIP MOCEK, an individual, Plaintiffs, v. TACOMA POLICE DEPARTMENT AND CITY OF TACOMA, a municipal corporation, Defendants.	COMPLAINT FOR PUBLIC RECORDS ACT VIOLATIONS & PENALTIES REGARDING FAILURE TO DISCLOSE "STINGRAY" NONDISCLOSURE AGREEMENT

COMES NOW plaintiffs Center for Open Policing, and Phillip Mocek, and allege as follows:

I. INTRODUCTION, PARTIES, JURISDICTION, VENUE

1. This is a complaint for the Tacoma Police Department's (TPD's) illegal failure to disclose contents of an agreement it made concerning its "Stingray" equipment, i.e., mobile cell phone tower simulators which TPD uses to secretly pinpoint cell phone handset locations and also (on information and belief), intercept contents of citizens' phone calls, text messages, caller identity and other data. The Stingray does this by emulating a cell phone tower to the nearby cell phones within its coverage area. It is mobile and can cover different areas at different times. In each one, the Stingray picks up data and phone call conversations from everyone in the area, thus most of what it collects is from law abiding citizens not suspects. Because of this broad

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sweeping capability, Stingrays raise important privacy, freedom and liberty concerns.

2. This action seeks disclosure of all contents of an agreement TPD made by Chief Donald Ramsdell, and signed by four TPD detectives. A true and correct copy of the version the City provided -- which is mostly blacked out -- is attached hereto as Exhibit A. This action also seeks penalties and fees under the Washington Public Records Act, where plaintiffs, a citizen and a watchdog group, requested the Stingray non-disclosure agreement the TPD signed to get its Stingrays or Stingray, and where the City and TPD only delivered a nearly-entirely blacked out copy as shown in Exhibit A. Defendants did this to hide disclosable information from the public. While defendant the City cited an alleged excuse that the redacted contents were specific intelligence information, on information and belief, this is both false factually, and legally, the exemption cited does not apply to information in a non-disclosure agreement. It applies to the results of a Stingray targeted investigation and the intelligence gained, but not to the generic terms of an agreement to keep the nature of the Stingray equipment and technology confidential. The cited exemption does not apply to the heavily redacted portions of the letter and on information and belief, defendants know this and claimed the exemption falsely and in bad faith.

3. Plaintiff Center for Open Policing (COP) is a Washington nonprofit corporation, with its principal place of business in Seattle, Washington, in King County, dedicated to educating the public about police and working for transparent and accountable policing.

4. Plaintiff Phillip Mocek is an individual residing in the City of Seattle, in King County, Washington; he advocates for openness in government and law enforcement and is a director of and founding member of COP.

5. On or about September 17, 2015 Mocek assigned to COP 95% of his claims

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described herein against defendant Tacoma Police Department/City of Tacoma for good and valuable consideration. This assignment is legal. (If it is not, Mocek retains all claims herein and has pledged to convey to COP 95% of any penalty recovered herein as well as the public records sought or obtained.)

6. The defendant City of Tacoma (City) is a municipal corporation under State law and is a "public agency" under the Washington Public Records Act (PRA), RCW 42.56.010(1).

7. The City incudes the TPD which holds the records sought in Pierce County.

8. Jurisdiction is proper under RCW 2.08.010. This action is proper under RCW 42.46.550(3) which provides for judicial review of "all agency actions taken or challenged under RCW 42.56.030 through 42.56.520." This section also notes review in court is de novo, *with no deference given* to the agency decision not to disclose.

9. Venue in Pierce County is proper under RCW 42.56.550(1), 4.12.020 and 4.12.025 as defendant the City is a corporation in Pierce County, the wrongs occurred in and the action arose or partly arose in said County and this is an action to recover a statutory penalty.

II. FACTS

10. The TPD or the City have Stingrays or a Stingray (cell phone tower simulators) within the City of Tacoma to listen in on cell phone calls or intercept cell phone call data; on information and belief these were obtained from Harris Corporation.

11. On July 10, 2014, Mocek made a Public Records Act request to the City, to Tacoma Public Disclosure Assistant Lisa Anderson, seeking the nondisclosure agreement and other records as follows:

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Pursuant to RCW Ch. 42.56 (Public Records Act), I hereby request the following records:

Background

Cell site simulators, also known as IMSI catchers, IMEI catchers, GSM interceptors, covert cellular tracking equipment, and digital analyzers, impersonate a wireless service provider's (i.e., mobile phone company's or cellular phone company's) cell tower, prompting mobile phones and other wireless devices to communicate with the simulators instead of with the real cell towers. These devices are often called "Stingrays," the name of one such device produced by Harris Corporation, along with their AmberJack, BlackFin, KingFish, Gossamer, LoggerHead, and TriggerFish devices.

Cell site simulators are commonly used in several ways: to collect unique numeric identifiers associated with each mobile phone in a given geographic area, to determine the precise location of a mobile phone when numbers associated with it are known but only a rough idea of its location is known, or to intercept phone calls and SMS messages.

Each of these uses raises privacy concerns, the most obvious of which is presented by the interception of voice and SMS messages. Collecting unique identifiers of all phones in a particular area inevitably collects location data on many innocent people who are suspected of no crime. Determination of the precise location of a specific phone can reveal that the phone, and thus the person who operates it, is in a constitutionally-protected place, such as a home, that has traditionally been immune from search without judicial approval via search warrant. The locations of people's mobile phones reveal a variety of personal information, such as: with whom they associate, where they assemble, where they spend their days, where they spend their nights, when they are home alone, where they protest, where they worship, and health care providers they visit.

It has been widely reported in recent months that law enforcement agencies use these devices while hiding their use from the public and from the courts. [Emphasis added.]

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> Despite widespread public interest in the use and misuse of cell site simulators, the public lack information about your agency's use of these devices or about your agency's policy for such use. Information is needed so the public can determine whether use of cell site simulators by your agency **complies with the Fourth Amendment to the U.S. Constitution and with Washington law**. [Emphasis added.]
>
> ## Request ##
>
> Pursuant to Chapter 42.56 RCW, the Public Records Act, I request:
>
> **. . . 3. All nondisclosure agreements with Harris Corporation, Digital Receiver Technology (DRT, formerly Utica Systems, now a subsidiary of Boeing Corporation), Septier Communication Limited, Proximus LLC, any other corporation, and any state or federal agencies, regarding your agency's actual or potential possession or use of cell site simulators** (emphasis in original).
>
> ….Thank you in advance for your anticipated cooperation in this matter. I look forward to receiving your response to this request within 5 business days, as the statute requires.
>
> Sincerely,
>
> Phil Mocek

12. Anderson delayed until August to forward the request to the TPD. In late August, Anderson e mailed to Mocek that "Unfortunately, records responsive to items #2 and #3 of your request are still in review. It is now anticipated records should be available by September 16, 2014." On August 27, Mocek responded that "I do not believe this is reasonable delay. You acknowledged the existence of records responsive to sections #2 and #3 of my request, claim that someone or some people is or are reviewing those records, but refuse to say who is doing so or how much time they are spending on it. . . . I believe your stalling is a violation of the Public Records Act. Please provide the records I requested in accordance with the law." Anderson

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responded repeating that TPD was reviewing the records but failed to identify who at TPD was doing the review. On Sept. 16 she e mailed again saying records would be available on September 26. Mocek again asked who was reviewing the records and why was there delay. Anderson did not respond to that query, again hiding who was doing the alleged "review."

13. On September 19, 2014, Anderson e mailed Mocek saying "The remaining records to your public disclosure request are now available. Please find the attached records and privilege log associated with these records. This request is now considered closed."

14. A true and correct copy of what she enclosed is in **Exhibit A**.

15. The enclosure contained the Dec. 19, 2012 six page letter to and signed by Chief Ramsdell.

16. Five of the six pages were and are completely or partially blacked out. At no time has this redacted information been disclosed by the City, to plaintiffs.

17. Also enclosed in this e mail was a so called privilege log sheet stating the redactions in the letter agreement are based on "specific intelligence information" and non-disclosure of said information is essential for effective law enforcement; and that "Specific technology details and the prices of the equipment in question is confidential and if released would allow the identification of confidential pieces of technology." These statements on information and belief were false and or as a matter of law the specific intelligence information exemption does not apply to the redacted material or part of it.

18. The enclosure also stated that "The identification of the components and the prices of the technology would allow adversaries to create countermeasures preventing the effective use of this technology for law enforcement purposes and have been redacted [sic] based

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on the following authority: RCW 42.56.240(1) Investigative, law enforcement and crime victims. 'Specific intelligence information and specific investigative records complied by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.'"

19. On information and belief, the redacted information is not identification of the components or prices of the technology but even if it were this is not specific intelligence information justifying nondisclosure.

20. At a minimum, the cited exemption does not apply to all portions of the redacted information.

21. The redacted information is not "specific intelligence information" because nothing in the letter is the results of intelligence gathering in a specific case, as the letter was prepared, written and signed before TPD got the Stingray(s) or used them in a specific intelligence gathering effort. The redacted information is not within this exemption, as it is not intelligence gathered, nor results of intelligence gathering, nor intelligence gathered in a specific case, and is not specific intelligence information. "Specific intelligence information" refers to facts gathered about specific targets of actual, specific investigations. The information in the agreement in Exhibit A was *created before there was any investigation at all conducted with the Stingray equipment*, and before any specific intelligence information was gathered with it.

22. On information and belief the NDA contains only generic information about not disclosing Stingray technology and equipment, and does not actually contain descriptions of the

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Stingray technology and equipment. The letter agreement is just a nondisclosure agreement, it is not an engineering guide or handbook or description of how the Stingray works or the like.

23. The information redacted is not any record "compiled by" TPD while conducting an investigation. The redacted information is not any type of investigative record compiled by TPD or any agency. The information redacted was prior to any investigation by TPD and is not part of any information from an investigation, complied by any agency.

24. Besides the cited exemption being inapplicable, and or false factually, the premise of TPD's feigned fear is silly -- any "adversary" who could learn anything useful from the NDA information would already know how to avoid detection by a Stingray simply by the TV show level "tradecraft" of not using a cell phone; it is generally known, that cell phone data or calls, can be intercepted. The agency excuse is pretextual and nondisclosure of the redacted information is not essential to effective law enforcement or any right to privacy. The agency, TPD, is simply keeping disclosable information secret from the public, contrary to the public records act, thwarting the purpose of the Act that the people retain their sovereignty over public agencies and as RCW 42.56.550(3) states, "free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." On information and belief, the real reason disclosure was denied, is that the Tacoma Police Department would be inconvenienced and embarrassed by disclosure.

III. LEGAL CLAIMS

25. All other allegations of this pleading are incorporated under this caption.

26. RCW 42.56.010(3) defines "public record" to include "[A]ny writing containing information relating to the conduct of government or the performance of any governmental or

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proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." The redacted information is a public record.

27. Mocek sought an identifiable public record on July 10, 2014, in requesting "3. All nondisclosure agreements with Harris Corporation, Digital Receiver Technology (DRT, formerly Utica Systems, now a subsidiary of Boeing Corporation), Septier Communication Limited, Proximus LLC, any other corporation, and any state or federal agencies, regarding your agency's actual or potential possession or use of cell site simulators."

28. RCW 42.56.080 requires that "Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person including, if applicable, on a partial or installment basis"; and RCW 42.56.070(1) provides in part: "Each agency . . . shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records."

29. The redacted information and on information and belief, other information concerning the NDA was illegally not disclosed in response to the request.

30. No exemption applies to the redacted material or most or all of it.

31. RCW 42.56.100 requires an agency to provide "the most timely possible action on requests for information." TPD stalled disclosure and to date has not made timely disclosure.

32. Disclosure of the disclosable portion of the redacted material, and the entire letter, should have been made by on or about August 10, 2014. The redacted information has not been disclosed to date. Item #2 in Mocek's request was specific, and very clear, and the letter that

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was responsive should not have taken until September 19, 2014 to disclose. These failures to disclose and delays in reasonable disclosure violated the PRA.

33. Plaintiffs Mocek and COP are entitled to an order and judgment requiring TPD/the City of Tacoma to disclose the full unredacted letter in Exhibit A.

34. They are also entitled to an order and judgment imposing attorneys fees and costs and civil penalties of $100 per day under RCW 42.56.550(4) which provides a remedy that any person who prevails against an agency in any action seeking the right to inspect or copy shall be awarded all costs, including reasonable attorney fees, and, in addition, may be awarded up to "one hundred dollars for each day that he or she was denied the right to inspect or copy said public record."

35. At $100 per day the penalty owing to date (from August 11, 2014 to September 17, 2015) is $100 times about 395 days or about $39,500 plus additional penalties for additional days until the records are disclosed.

36. The highest penalties possible are proper.

37. TPD is a large agency with an adequate budget and staff, to have properly reviewed the letter more timely.

38. There is no intelligence information from a specific investigation in the letter, and on information and belief, no list of components and prices, and or the reliance on the cited exemption is false, in bad faith, and highly culpable.

39. Plaintiffs claim the highest penalty because it is needed to fulfill the purpose of the PRA to let the people retain sovereignty over state and local agencies. The highest penalty is needed as a reminder to the City, and TPD, to obey the PRA where the City, Pierce County and

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other local agencies have been found violating the PRA in numerous cases.

PRAYER FOR RELIEF

NOW, THEREFORE, plaintiffs pray for a judgment:

1. Declaring that defendants violated the PRA and ordering that the full letter contents sought be produced forthwith and awarding costs and attorney fees to plaintiffs under the PRA and awarding plaintiffs penalties at the level of $100 per day from August 11, 2014 to the date of disclosure, estimated as over $39,500 to date and increasing by $100 daily until full unredacted disclosure is made;

2. Providing to plaintiffs prejudgment and post judgment interest on such amounts;

3. Providing all punitive damages to the extent allowed by law; and

4. Providing such other relief as the Court may deem just, equitable or proper.

DATED this 17th day of September, 2015.

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