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PRIVATE RAP SHEET OR PUBLIC RECORD? RECONCILING THE DISCLOSURE OF NONCONVICTION INFORMATION UNDER WASHINGTON'S PUBLIC DISCLOSURE AND CRIMINAL RECORDS PRIVACY ACTS

Lynette Meachum

Abstract: Division I of the Washington State Court of Appeals misapplies Washington's Criminal Records Privacy Act (CRPA) in determining whether entire files of police investigative information should be available for public review. The plain text and legislative history of the CRPA indicate that the Washington State Legislature intended the CRPA to apply only to the disclosure of criminal history record information, or the data that appears on a subject's criminal rap sheet. Washington courts should interpret the CRPA narrowly, as an exemption to the broad policy of disclosure established by the state's Public Disclosure Act (PDA). This approach would reconcile the two statutes in a manner consistent with Washington State Supreme Court precedent. This Comment argues that the Washington State Supreme Court should curtail Division I's improper application of the CRPA. Specifically, the court should declare that for records subject to public disclosure, the overlap between the CRPA and PDA requires agencies to redact nonconviction criminal history record information while disclosing the remaining record.

Late one night, two police officers respond to a 911 call from an off-duty police officer's home in Western Washington.¹ The officer's wife runs outside to meet them, holding her head in obvious pain. Neighbors watching the scene are not surprised at the police's arrival—they have considered calling 911 when they have overheard previous fights between the couple escalate. The neighbors are, however, surprised when the officers depart after a few minutes and leave the couple alone for the night. One neighbor wonders whether the officers mishandled the events of the evening because a fellow law enforcement officer was involved. The neighbor requests the officers' investigative reports from the police department under Washington's Public Disclosure Act (PDA).² The chief of police refuses to release the reports. The chief informs her that the department forwarded the case to the county prosecutor, who declined to charge the suspect, and so the matter is

1. Hypothetical created by the author.

2. WASH. REV. CODE §§ 42.17.250–348 (2000); *see id.* § 42.17.260(1) (“Each agency, in accordance with published rules, shall make available for public inspection and copying all public records . . .”).

closed. Under Washington's Criminal Records Privacy Act (CRPA),³ the chief argues, nonconviction records may not be released to the public.⁴

If the same situation were to play out in Eastern Washington, the opposite result could occur. Instead of relying on the CRPA to deny the request, the chief there might conclude that the PDA requires the disclosure of investigative reports from a closed case. The chief might point to a state court interpretation of the PDA under which a police report does not enjoy a presumption of privacy after the case is referred to the prosecutor's office, regardless of the resolution of the case.⁵

The CRPA and PDA reflect Washington's attempts to satisfy two conflicting principles for the disclosure of publicly held criminal records. When citizens approved the PDA by initiative in 1972, they adopted the philosophy that the public has a right to be fully informed about the actions of its government. The statute's policy statement reflects this approach:

The people of this state . . . do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on *remaining informed* so that they may maintain control over the instruments that they have created.⁶

According to the Washington State Supreme Court, courts should look to this backbone philosophy of disclosure when interpreting other statutes affecting public records.⁷ The PDA's purpose, however, contrasts with that of the CRPA. Passed five years after the PDA in response to a federal mandate, the CRPA declares that it is state policy to protect the "completeness, accuracy, *confidentiality*, and *security* of criminal history record information and victim, witness, and complainant record information."⁸

3. WASH. REV. CODE §§ 10.97.010–140 (2000).

4. See *id.* § 10.97.050; *Beltran v. State Dep't of Soc. & Health Servs.*, 98 Wash. App. 245, 260, 989 P.2d 604, 612 (1999) (determining that plaintiff should not have been able to obtain investigative information from a case that did not yield a conviction), *dismissed upon settlement*, 140 Wash. 2d 1021, 10 P.3d 405 (2000).

5. *Cowles Publ'g Co. v. Spokane Police Dep't*, 139 Wash. 2d 472, 479, 987 P.2d 620, 623 (1999) ("[T]he fact that allegations have not yet been proven is not persuasive of the need to provide blanket protection for purposes of a defendant's privacy.").

6. WASH. REV. CODE § 42.17.251 (emphasis added).

7. See *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 139, 580 P.2d 246, 255 (1978).

8. WASH. REV. CODE § 10.97.010 (emphasis added).

As the above hypothetical illustrates, the PDA and CRPA conflict over the disclosure of information about law enforcement investigations that have failed to yield a conviction. In interpreting the two statutes, Division I of the Washington State Court of Appeals has applied the CRPA to entire bodies of investigative information⁹—potentially allowing the use of the CRPA to exempt all investigative information from disclosure when it concerns a nonconviction.¹⁰ Investigative information can include all records prepared by the police in connection with an investigation, such as arrest reports, patrol reports, officer reports, and citation information.¹¹ Although the Washington State Supreme Court has not ruled on Division I’s approach,¹² its cases can support an alternative construction of the CRPA. Under this alternative construction, the CRPA does not remove entire investigative files from the reach of the PDA; instead, it requires the redaction of a narrow category of protected information before a law enforcement agency (such as a police department) may disclose those records.¹³

This Comment argues that the Washington State Supreme Court should correct Division I’s erroneous application of the CRPA to entire bodies of investigative information.¹⁴ The PDA and its limited privacy rights more appropriately govern the disclosure of investigative records.¹⁵ The CRPA should govern only “criminal history record information”—a narrow category of compiled information typically found on the subject’s rap sheet.¹⁶ Criminal history record information consists only of a name, a notation of that person’s contact with law enforcement, and the disposition of the incident.¹⁷ This approach is consistent with the text of the CRPA.¹⁸ Further, neither federal nor state legislative history suggests that legislators intended the CRPA’s reach to extend to investigative information.¹⁹ Washington State Supreme Court

9. *Beltran*, 98 Wash. App. at 260, 989 P.2d at 612; *Hudgens v. City of Renton*, 49 Wash. App. 842, 843, 746 P.2d 320, 321 (1987), *review denied*, 110 Wash. 2d 1014 (1988).

10. *Beltran*, 98 Wash. App. at 259–60, 989 P.2d at 611.

11. *See Hudgens*, 49 Wash. App. at 843, 746 P.2d at 320.

12. *Limstrom v. Ladenburg*, 136 Wash. 2d 595, 616 n.10, 963 P.2d 869, 880 n.10 (1998).

13. *Barfield v. City of Seattle*, 100 Wash. 2d 878, 885, 676 P.2d 438, 442 (1984).

14. *See infra* Part V.

15. *See* WASH. REV. CODE § 42.17.310(1)(d) (2000).

16. *See id.* § 10.97.030(1).

17. *Id.*

18. *See id.* § 10.97.050.

19. *See infra* Part II.B.

cases recognize the need to exclude information protected by the CRPA from investigative information that is otherwise subject to disclosure under the PDA.²⁰ However, the higher court has not laid to rest Division I's expansive interpretation of the scope of that protection.²¹

Part I of this Comment explores the PDA's governance of public records. Part II addresses the privacy right to criminal history record information created by the CRPA. Part III provides an overview of the Washington State Supreme Court's approach to the disclosure of investigative information, and Part IV discusses the conflicting approach of Division I of the Washington State Court of Appeals. Part V then argues that the Washington State Supreme Court should curtail Division I's inappropriate application of the CRPA to investigative information.

I. THE PDA GOVERNS ACCESS TO PUBLIC RECORDS IN WASHINGTON STATE

Washington's broad PDA allows public access to all records that relate to the conduct of government,²² subject to a list of narrow exemptions.²³ The PDA exempts police investigative reports only when their disclosure would harm effective law enforcement or any person's right to privacy.²⁴ Although the Washington State Legislature can further define privacy rights that exist within the PDA, the Washington State Supreme Court has ruled that the statute's underlying policy of disclosure requires courts to interpret any exemptions to the PDA narrowly.²⁵

20. See *Limstrom v. Ladenburg*, 136 Wash. 2d 595, 616, 963 P.2d 869, 880 (1998); *Barfield v. City of Seattle*, 100 Wash. 2d 878, 885, 676 P.2d 438, 442 (1984).

21. See *Limstrom*, 136 Wash. 2d at 616 n.10, 963 P.2d at 880 n.10 (declining to reconsider *Hudgens* without proper record); *Hudgens v. City of Renton*, 49 Wash. App. 842, 843, 746 P.2d 320, 321 (1987) (applying CRPA to police investigative file), *review denied*, 110 Wash. 2d 1014 (1988).

22. WASH. REV. CODE § 42.17.260(1).

23. *Id.* § 42.17.310.

24. *Id.* § 42.17.310(1)(d).

25. *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 127, 139, 580 P.2d 246, 249, 255 (1978).

A. *The PDA Makes All Public Records Available to the Public, Subject to Certain Narrowly Tailored Exemptions*

With narrow exceptions,²⁶ the PDA declares that any record related to the conduct of government and used by a government agency²⁷ is available to the public.²⁸ The statute defines public records as “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.”²⁹ Agencies cannot use the presence of private information in a record as a justification for refusing to release the entire record.³⁰ Rather, the PDA requires that officials redact private information and release the remainder of the record.³¹

One of the PDA’s limited exemptions addresses law enforcement investigative records.³² Officials may refuse to disclose investigative records if withholding the records is essential to (1) effective law enforcement, or (2) the protection of any person’s right to privacy.³³ The PDA instructs courts to construe this right to privacy narrowly, as with every exemption to the PDA.³⁴ In fact, the Washington State Legislature amended the PDA³⁵ to emphasize that courts are to focus on the statute’s broad mandate for disclosure of public records.³⁶ The PDA’s construction clause highlights the narrow character of its exemptions,

26. Section 42.17.310 of the Revised Code of Washington includes fifty-six separate exemptions. WASH. REV. CODE § 42.17.310(1)(a)–(ggg). Relevant to this Comment are sections 42.17.310(1)(d) (exempting certain investigative records), 42.17.310(1)(c) (exempting taxpayer information when disclosure would violate the taxpayer’s right to privacy), and 42.17.310(1)(j) (exempting work product when sought as part of pretrial discovery). See *id.* § 42.17.310(1); see also *Dawson v. Daly*, 120 Wash. 2d 782, 789–90, 845 P.2d 995, 1000 (1993).

27. WASH. REV. CODE § 42.17.020(36) (defining the term “public records”).

28. *Id.* § 42.17.260(1).

29. *Id.* § 42.17.020(36).

30. *Id.* § 42.17.260(1).

31. *Id.*

32. *Id.* § 42.17.310(1)(d).

33. *Id.*

34. *Id.* § 42.17.251; see also *Amren v. City of Kalama*, 131 Wash. 2d 25, 31, 929 P.2d 389, 392 (1997); *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wash. 2d 243, 251, 884 P.2d 592, 597 (1994).

35. Public Records Disclosure—Revisions, ch. 139, sec. 2, 1992 Wash. Laws 564 (codified at WASH. REV. CODE § 42.17.251).

36. *Id.*

instructing courts to take into account the statute's policy of free and open examination of public records.³⁷

B. Courts Interpret Subsequent Laws Altering Privacy Rights Within the PDA as Subject to the PDA's Broad Policy Favoring Disclosure

The Washington State Supreme Court has established that courts should attempt to reconcile subsequent laws that alter the PDA's disclosure provisions with the PDA's preference for disclosure.³⁸ In *Hearst Corp. v. Hoppe*,³⁹ the court considered whether a 1973 law that specifically exempted certain taxpayer income information from public inspection⁴⁰ amended the PDA.⁴¹ The PDA already protected the release of such data under the provision that exempted disclosure violating a taxpayer's right to privacy.⁴² Relying on a rule to treat statutes dealing with the same subject as parts of "a harmonious total schema,"⁴³ the court held that the later law should be construed as a more specific, supplemental rule to the taxpayer privacy right existing within the PDA.⁴⁴ The court did not find the later law to be a "significant departure" from the PDA, although each involved a different disclosure standard.⁴⁵ Reconciling the two statutes into a single scheme, the court concluded that courts must read the PDA's "strongly-worded mandate for broad disclosure of public records" into the later law.⁴⁶ Relying on the PDA's policy statement, the explanation of the statute from the voter's pamphlet, and analogous disclosure policies at the federal level,

37. WASH. REV. CODE § 42.17.340(3).

38. See *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 127, 139, 580 P.2d 246, 249, 255 (1978).

39. 90 Wash. 2d 123, 580 P.2d 246 (1978).

40. Assessor's Records—Public Inspection, ch. 69, 1973 Wash. Laws 172 (codified at WASH. REV. CODE § 84.40.020). If found to be an amendment to the PDA, the later law would have violated Washington's constitution as a legislative attempt to amend a citizen initiative within two years. See WASH. CONST. art. II, § 1(c). However, in finding no constitutional violation, the *Hearst* court relied on a rule of statutory construction from *Beach v. Board of Adjustment*, 73 Wash. 2d 343, 438 P.2d 617 (1968), a case in which there was no constitutional issue. *Hearst*, 90 Wash. 2d at 138, 580 P.2d at 245.

41. *Hearst*, 90 Wash. 2d at 138, 580 P.2d at 254.

42. WASH. REV. CODE § 42.17.310(1)(c).

43. *Hearst*, 90 Wash. 2d at 138, 580 P.2d at 254 (quoting *Beach*, 73 Wash. 2d at 346, 438 P.2d at 620) (internal quotations omitted).

44. *Id.* at 139, 580 P.2d at 255.

45. *Id.*

46. *Id.* at 127, 580 P.2d at 249.

the court noted that all of these sources pointed to the law's "expansive disclosure requirement" and should serve as a guide for reconciling later laws that affect disclosure.⁴⁷

The *Hearst* court also interpreted the scope of a privacy right within the PDA for the first time, giving it narrow limits⁴⁸ that have since become the standard for interpreting all of the statute's privacy rights.⁴⁹ Because the public records section of the PDA did not initially define the term "privacy,"⁵⁰ the *Hearst* court turned to the common-law test for invasion of privacy.⁵¹ The court adopted the *Restatement (Second) of Torts*' test that information is private only if its disclosure (1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.⁵² Washington lawmakers ultimately codified the *Hearst* court's application of the common-law invasion of privacy test.⁵³

In sum, Washington's PDA requires disclosure of all public records not subject to an exemption.⁵⁴ Agencies and courts must narrowly interpret all exemptions,⁵⁵ including the limited exemption for certain police investigative reports.⁵⁶ Further, the PDA's privacy exemptions extend only to situations where disclosure of the records would be highly offensive to a reasonable person and the information is not of legitimate concern to the public.⁵⁷ Although legislators may make additional information private, courts are to reconcile new exemptions to the PDA with the statute's broad policy favoring disclosure.⁵⁸

47. *See id.* at 128, 438 P.2d at 249.

48. *Id.* at 135–36, 580 P.2d at 253.

49. WASH. REV. CODE § 42.17.255 (2000) (codifying *Hearst*'s application of common law invasion of privacy test); *Cowles v. State Patrol*, 109 Wash. 2d 712, 722, 748 P.2d 597, 603 (1988).

50. Shelby Gilje, *Initiative 276 May Have a 'Sleeper,'* THE SEATTLE TIMES, Nov. 3, 1972, at A8–A9.

51. *Hearst*, 90 Wash. 2d at 135–36, 580 P.2d at 253; RESTATEMENT (SECOND) OF TORTS § 652D (1976).

52. *Hearst*, 90 Wash. 2d at 135–36, 580 P.2d at 253; RESTATEMENT (SECOND) OF TORTS § 652D.

53. WASH. REV. CODE § 42.17.255.

54. *Id.* § 42.17.260(1).

55. *Id.* § 42.17.251.

56. *Id.* § 42.17.310(1)(d).

57. *Id.* § 42.17.255; *see also Hearst*, 90 Wash. 2d at 135–36, 580 P.2d at 253.

58. *Hearst*, 90 Wash. 2d at 128, 138–39, 580 P.2d at 249, 255.

II. THE CRPA GOVERNS THE RELEASE OF CRIMINAL HISTORY RECORD INFORMATION

The CRPA restricts the circumstances in which criminal-justice agencies may disseminate criminal history record information.⁵⁹ The CRPA defines criminal history record information to include the combination of data typically contained in a person's rap sheet: a name, contacts with law enforcement, and the disposition of such incidents.⁶⁰ The statute places the most restrictions on dissemination of information not involving a conviction.⁶¹ Passed in response to a federal mandate, the CRPA closely resembles the model federal law.⁶²

A. *The CRPA Prevents Disclosure of Nonconviction Information Contained in a Subject's Criminal History*

The CRPA contains regulations for disseminating criminal history record information.⁶³ The statute defines criminal history record information as the combination of three necessary elements: (1) identifiable descriptions of a person, (2) notations of arrests or formal criminal charges, and (3) the dispositions of such charges.⁶⁴ Law enforcement agencies across the country compile this information about individual suspects and exchange the compilations with other agencies in response to criminal background checks.⁶⁵ Agencies typically refer to these compilations as "rap sheets."⁶⁶ The same criminal history record information may also appear in other documents, such as investigative reports.⁶⁷ The CRPA specifically excludes wanted posters, records of minor traffic violations, and other police records maintained chronologically rather than by name (such as the daily jail log) from the definition of criminal history record information.⁶⁸

59. WASH. REV. CODE § 10.97.050.

60. *Id.* § 10.97.030(1).

61. *Id.* § 10.97.050(3)-(5).

62. *See id.* §§ 10.97.010-.140; Criminal Justice Information Systems, 28 C.F.R. pt. 20 (2002).

63. WASH. REV. CODE § 10.97.050.

64. *Id.* § 10.97.030(1).

65. 28 C.F.R. §§ 20.3(l)-(p), 20.33.

66. *Id.* § 20.3(l).

67. *Id.* pt. 20 app. (explaining the definition of criminal history record information contained in § 20.3(d)).

68. WASH. REV. CODE § 10.97.030(1).

Whether the public may access criminal history record information depends on its classification. The information can take one of three forms: conviction records,⁶⁹ information on current investigations,⁷⁰ and nonconviction data.⁷¹ Conviction records relate to incidents with a disposition adverse to the suspect,⁷² such as a conviction, a guilty plea, or a dismissal after a period of probation or deferral of sentence.⁷³ The CRPA gives agencies permission to disseminate conviction records without restriction.⁷⁴ The CRPA also allows law enforcement agencies to disseminate information on current investigations as they see fit.⁷⁵ The final category, nonconviction data, includes criminal history record information that has not led to a disposition adverse to the suspect and for which proceedings are no longer actively pending.⁷⁶

The CRPA places the most restrictions on the disclosure of nonconviction data.⁷⁷ If a case is closed without a conviction, an agency may disclose the criminal history record information only if disclosure is (1) specified by other statutes;⁷⁸ (2) necessary for the provision of criminal justice services;⁷⁹ or (3) related to research, evaluative, or statistical purposes.⁸⁰ The CRPA does not specifically prohibit the dissemination of nonconviction data in other circumstances. However, its provisions allowing dissemination of conviction records and information from current investigations “without restriction”⁸¹ precede the list of circumstances in which nonconviction information may be disclosed. The list therefore defines the parameters of disclosure of nonconviction data.⁸²

69. *Id.* § 10.97.030(3).

70. *Id.* § 10.97.050(2).

71. *Id.* § 10.97.030(2).

72. *Id.* § 10.97.030(3).

73. *Id.* § 10.97.030(4).

74. *Id.* § 10.97.050(1).

75. *Id.* § 10.97.050(2).

76. *Id.* § 10.97.030(2). There is a rebuttable presumption that proceedings are no longer actively pending when a case remains open for a year without a disposition. *Id.*

77. *Id.* § 10.97.050.

78. *Id.* § 10.97.050(4).

79. *Id.* § 10.97.050(3), (5).

80. *Id.* § 10.97.050(6).

81. *Id.* § 10.97.050(1)–(2).

82. John R. Wasberg, *Laws Affecting Police Records*, in INFO. BULL. No. 397, at 90, 97 (Mun. Research & Servs. Ctr. 1979); see also *Jones v. Sisters of Providence* in Wash., 140 Wash. 2d 112, 116, 994 P.2d 838, 841 (2000) (“[S]tatutes should be read reasonably and as a whole.”); Wash.

Individuals have the right to view their own criminal history record information,⁸³ regardless of whether that information concerns current investigations, convictions, or nonconviction incidents.⁸⁴ However, individuals may reproduce their own records only to challenge the accuracy of the information.⁸⁵ Furthermore, the inspection right does not include access to investigative files or any information other than criminal history record information.⁸⁶ In other words, although an agency must allow individuals to view their nonconviction criminal history record information, this right of access does not extend beyond the three components of the CRPA's definition of criminal history record information.

B. The CRPA Closely Parallels the Federal Regulations That Mandated Its Passage

Washington legislators adopted the CRPA in response to a federal mandate.⁸⁷ Reacting to privacy concerns, particularly in light of the increasing use of computers to share criminal justice information,⁸⁸ the U.S. Department of Justice in 1975 issued rules requiring states that received certain federal funding⁸⁹ to adopt plans to ensure the accuracy of criminal history record information and to limit its dissemination.⁹⁰ The federal government supplied a set of model regulations for this purpose⁹¹ and threatened states with fines for noncompliance, as well as the loss of federal funds.⁹² The funding at issue supported the record-keeping systems that local law enforcement agencies used to share information.⁹³

Water Power Co. v. Wash. State Human Rights Comm'n, 91 Wash. 2d 62, 71, 586 P.2d 1149, 1154 (1978) (noting that the court's duty in interpreting a statute is to make it "purposeful and effective").

83. WASH. REV. CODE § 10.97.080.

84. *Id.*

85. *Id.*

86. *Id.*

87. STAFF OF SENATE JUDICIARY COMM., ANALYSIS OF SB 2608, 45th Leg., 1st Ex. Sess., at 1 (Wash. 1977) (analyzing the bill as of March 22, 1977).

88. TOM DALTON, ANALYSIS OF SB 2608, 45th Leg., 1st Ex. Sess., at 1 (Wash. 1977) (analyzing the bill as of April 11, 1977).

89. Criminal Justice Information Systems, 28 C.F.R. § 20.20 (2002).

90. *Id.* § 20.21.

91. *Id.* pt. 20.

92. *Id.* § 20.25.

93. *Id.*

In response to this mandate, Washington passed the CRPA.⁹⁴ During the legislative process, the Senate Judiciary Committee expressly eliminated provisions that exceeded the mandate of the federal regulations.⁹⁵ Washington's CRPA parallels the model federal regulations more closely than analogous laws passed in other states.⁹⁶ In particular, state legislators adopted the definition of criminal history record information found within the federal regulations.⁹⁷ The CRPA also limited privacy protections to those in the federal model.⁹⁸

C. *The CRPA Affects Information Already Governed by the PDA*

The text of the CRPA indicates that it applies to information that may already be subject to disclosure under the PDA.⁹⁹ Although the PDA permits copying of public records for any purpose,¹⁰⁰ the CRPA specifically states that individuals inspecting their own criminal history records cannot rely on the PDA to copy those records for any purpose other than to challenge the records' accuracy.¹⁰¹ The CRPA also expressly trumps the PDA in its construction clause¹⁰²—nothing in the PDA's list of exemptions¹⁰³ may preclude dissemination of criminal

94. STAFF OF SENATE JUDICIARY COMM., *supra* note 87, at 1 (“Senate Bill 2608 has been drafted by the advisory committee to implement the state plan in order to bring the state into conformance with the requirements of the federal regulations.”).

95. STAFF OF SENATE JUDICIARY COMM., ANALYSIS OF SB 2608, 45th Leg., 1st Ex. Sess., at 1 (Wash. 1977) (analyzing the bill as of May 3, 1977).

96. Wasberg, *supra* note 82, at 90, 93. Compare WASH. REV. CODE §§ 10.97.010–.140 (2000) with IDAHO CODE §§ 67-3001 to -3011 (Michie 2003), and MONT. CODE ANN. §§ 44-5-101 to -602 (2003).

97. Compare WASH. REV. CODE § 10.97.030(1) (“‘Criminal history record information’ means information contained in records collected by criminal justice agencies, other than courts, on individuals, consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom”) with 28 C.F.R. § 20.3(d) (“*Criminal history record information* means information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom”).

98. Compare WASH. REV. CODE §§ 10.97.010–.140 with 28 C.F.R. pt. 20.

99. See WASH. REV. CODE §§ 10.97.080, .140.

100. See *id.* §§ 42.17.260(1), .270.

101. *Id.* § 10.97.080.

102. *Id.* § 10.97.140.

103. *Id.* § 42.17.310.

history record information when it is permitted by the CRPA.¹⁰⁴ This provision indicates that the CRPA is applicable even when it would allow more disclosure than permitted under the PDA.¹⁰⁵

D. Several Interpretations of the CRPA Distinguish Investigative Information from the Criminal History Record Information Protected by the CRPA

While the text of the CRPA does not draw a specific distinction between the criminal history record information that constitutes a rap sheet and the broader information compiled by law enforcement officials in the course of an investigation, its federal predecessor and other authorities have distinguished between the two. Information from Washington's Municipal Research & Services Center indicates that although some interpretations apply the CRPA to entire police reports, the "common interpretation of the [CRPA] is that it applies to criminal histories."¹⁰⁶ The Washington State Office of the Attorney General has also indicated that the release of police investigative information is governed only by the PDA, noting in its *Open Records & Open Meetings* deskbook that "[i]nvestigative information does not fall within the definition of 'criminal history record information'" as addressed by the CRPA.¹⁰⁷ The comments to the federal regulations on which the CRPA is based also specify that the regulations do not extend to investigative information in police reports.¹⁰⁸

The U.S. Supreme Court has distinguished a rap sheet's compilation of criminal history from other investigative information when

104. *Id.* § 10.97.140. Conviction records, for example, are subject to disclosure without restriction under the CRPA. *Id.* § 10.97.030(1).

105. The CRPA's construction clause was added in 1999, within a bill that also required permanent retention of investigative records relating to sex offenders. See Sexually Violent Offenses—Records, ch. 326, sec. 4, 1999 Wash. Laws 1696. The bill created a new exemption to the PDA for these records, and also amended the CRPA to indicate that criminal history record information appearing in such records is still subject to disclosure when the CRPA requires it. *Id.*

106. Heidi Ann Horst, *Defensive Driving Through the Intersection of the Public Disclosure Act and the Criminal Records Privacy Act*, in INFO. BULL. No. 512, at 5-1, 5-3 n.1 (Mun. Research & Servs. Ctr. 2002).

107. WASH. STATE OFFICE OF THE ATTORNEY GEN., OPEN RECORDS & OPEN MEETINGS: A CITIZEN'S GUIDE TO OPEN GOVERNMENT § 5.3 (1998), <http://www.atg.wa.gov/records/chapter5.shtml>.

108. Criminal Justice Information Systems, 28 C.F.R. pt. 20 app. (2002) (discussing § 20.3(d) and further explaining the definition of criminal history record information).

interpreting federal public disclosure requirements.¹⁰⁹ In *United States Department of Justice v. Reporters Committee for Freedom of the Press*,¹¹⁰ the Court noted that rap sheets contain accumulated private information about individuals but reveal little or nothing about the conduct of a government agency.¹¹¹ They therefore differ from reports that detail agency conduct,¹¹² such as police reports that show actions taken by law enforcement officers in the course of an investigation. The Court recognized the difference between the scattered disclosure of information within investigative reports and court records, and the disclosure of a compiled rap sheet.¹¹³ The Court held that rap sheets were private information outside the purview of the federal Freedom of Information Act.¹¹⁴ The Washington State Supreme Court has held that such judicial interpretations of the federal Freedom of Information Act are helpful in construing the State's PDA.¹¹⁵

In sum, the CRPA regulates the disclosure of criminal history record information, regardless of whether that information is subject to disclosure under the PDA.¹¹⁶ The text of the CRPA and the federal regulations that mandated it indicate that the CRPA applies only to the combination of information that would appear on a rap sheet: name, arrest information, and the disposition of that arrest.¹¹⁷ Washington state officials and commentators¹¹⁸ and the U.S. Supreme Court¹¹⁹ have also drawn a distinction between police reports, which are investigative information, and the brief criminal histories compiled on rap sheets.

109. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989).

110. 489 U.S. 749 (1989).

111. *Id.* at 773–74 (holding that disclosure of an FBI rap sheet constituted an unwarranted invasion of privacy because it did not involve information about a government agency, but records about a private citizen).

112. *Id.*

113. *Id.* at 764.

114. *Id.*

115. *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 128, 580 P.2d 246, 249 (1978) (“The state act closely parallels the federal Freedom of Information Act . . . , and thus judicial interpretations of that act are particularly helpful in construing our own.”).

116. *See supra* Part II.C.

117. WASH. REV. CODE § 10.97.030(1) (2000); Criminal Justice Information Systems, 28 C.F.R. § 20.3(d) (2002).

118. *See* WASH. STATE OFFICE OF THE ATTORNEY GEN., *supra* note 107, § 5.3; Horst, *supra* note 106, at 5–3 n.1.

119. *Reporters Comm. for Freedom of the Press*, 489 U.S. at 764.

Although individuals may view their criminal history record information on rap sheets,¹²⁰ the CRPA prohibits the release of that information to the general public when it concerns a contact with law enforcement that fails to yield a conviction.¹²¹

III. BOTH THE PDA AND CRPA AFFECT THE RELEASE OF POLICE INVESTIGATIVE INFORMATION

The Washington State Supreme Court applies the PDA broadly to police investigative information.¹²² The court has indicated that the PDA allows the release of investigative information once the investigation is complete.¹²³ The court has also affirmed the application of the CRPA to differentiate protected information from investigative information which is otherwise subject to disclosure under the PDA.¹²⁴

A. The Washington State Supreme Court Has Held That Investigative Information Does Not Enjoy a Presumption of Privacy Once It Has Been Submitted for Charging

Under the PDA, investigative records do not enjoy a presumption of privacy once the investigation is complete, regardless of its ultimate disposition. Although the Washington State Supreme Court initially extended a categorical exemption from disclosure to the records of all active cases,¹²⁵ the court has since held that this categorical exemption ends when a case is referred for prosecution.¹²⁶ In doing so, the court

120. See *supra* notes 83–86 and accompanying text.

121. See *supra* notes 77–82 and accompanying text.

122. *Cowles Publ'g Co. v. Spokane Police Dep't*, 139 Wash. 2d 472, 476, 987 P.2d 620, 622 (1999).

123. *Id.* at 479, 987 P.2d at 623.

124. See *Limstrom v. Ladenburg*, 136 Wash. 2d 595, 616, 963 P.2d 869, 880 (1998); *Barfield v. City of Seattle*, 100 Wash. 2d 878, 885, 676 P.2d 438, 442 (1984).

125. *Newman v. King County*, 133 Wash. 2d 565, 574, 947 P.2d 712, 716 (1997) (“We hold the broad language of the statutory exemption requires the nondisclosure of information compiled by law enforcement and contained in an open and active police investigation file because it is essential for effective law enforcement.”).

126. *Cowles*, 139 Wash. 2d at 479–80, 987 P.2d at 623 (“[W]e hold in cases where the suspect has been arrested and the matter referred to the prosecutor, any potential danger to effective law enforcement is not such as to warrant categorical nondisclosure of all records in the police investigative file.”).

indicated that an unresolved investigation is not itself persuasive of a right to privacy in the investigative information.¹²⁷

For a short period in the 1990s, a Washington State Supreme Court decision severely limited public access to investigative records. In *Newman v. King County*,¹²⁸ the court held that the PDA categorically exempted from disclosure all investigative information pertaining to open cases.¹²⁹ The *Newman* case involved a reporter's request for access to the King County Department of Public Safety file on the twenty-five-year-old, unsolved murder of civil rights leader Edwin Pratt.¹³⁰ The county declined to release anything beyond the initial incident report, citing the PDA exemption for records essential to effective law enforcement.¹³¹ The county also argued that disclosure would violate the privacy rights of witnesses, suspects, and defendants.¹³²

The Washington State Supreme Court agreed with the county and established a categorical exemption from the PDA for disclosure of "open and active" police files.¹³³ The court based its holding on the PDA's effective law enforcement exemption, however, and did not address the county's privacy argument under the PDA.¹³⁴ In addition, the court did not address whether the CRPA would affect the privacy of the investigative information.

Two years later, the Washington State Supreme Court held that the *Newman* decision's categorical exemption for effective law enforcement ends when a case is referred to the prosecutor for a charging decision.¹³⁵ The newspaper plaintiff in *Cowles Publishing Co. v. Spokane Police Department*¹³⁶ requested the incident report and booking photo from the DWI arrest of an assistant city attorney.¹³⁷ On the same day as the arrest,

127. *Id.* at 479, 987 P.2d at 623 ("[T]o the extent protection of the trial process or the privacy rights of a suspect are essential in any given case, the trial court should make that factual determination on a case-by-case basis.").

128. 133 Wash. 2d 565, 947 P.2d 712 (1997).

129. *Id.* at 574, 947 P.2d at 716.

130. *Id.* at 568, 947 P.2d at 713.

131. *Id.* at 570, 947 P.2d at 714 (citing WASH. REV. CODE § 42.17.310(1)(d) (2000)).

132. *Id.* at 572, 947 P.2d at 715.

133. *Id.* at 574, 947 P.2d at 716.

134. *See id.* at 571–74, 947 P.2d at 715–16.

135. *Cowles Publ'g Co. v. Spokane Police Dep't*, 139 Wash. 2d 472, 477–78, 987 P.2d 620, 622 (1999).

136. 139 Wash. 2d 472, 987 P.2d 620 (1999).

137. *Id.* at 474–75, 987 P.2d at 621.

the police department referred the case to the prosecutor and requested that charges be filed.¹³⁸ The court held that once investigators submit a case for a charging decision, withholding disclosure of the investigation is no longer essential to effective law enforcement.¹³⁹ The court noted that “[i]n such circumstances, the risk of inadvertently disclosing sensitive information that might impede apprehension of the perpetrator no longer exists.”¹⁴⁰

Unlike the *Newman* decision, the court in *Cowles* also directly addressed the suspect’s privacy interest in criminal investigative information, though only with respect to the PDA.¹⁴¹ The court held that nothing in the police report implicated the privacy prong of the PDA’s investigative records exemption.¹⁴² Emphasizing that the public is “well aware” of the presumption of innocence, the court stated that the fact that allegations are unproven does not alone justify a blanket protection for privacy.¹⁴³

The *Cowles* decision did not discuss the CRPA. Although the CRPA may implicate the privacy of criminal history record information contained within investigative records, the trial court had held that the CRPA did not prevent the release of the records,¹⁴⁴ and the city did not appeal that issue.¹⁴⁵ However, the court’s interpretation of the PDA shows the limited nature of a person’s right to privacy in any investigative information.

138. *Id.* at 475, 987 P.2d at 621.

139. *Id.* at 479–80, 987 P.2d at 623.

140. *Id.* at 477–78, 987 P.2d at 622.

141. *Id.* at 479, 987 P.2d at 623.

142. *Id.* at 480, 987 P.2d at 624.

143. *Id.*

144. *Cowles Publ’g Co. v. Spokane Police Dep’t*, No. 97-2-03783-7 (Super. Ct. Spokane County Aug. 25, 1997) (judgment and order requiring disclosure of public records).

145. See Appellant’s Brief, *Cowles Publ’g Co. v. Spokane Police Dep’t*, 92 Wash. App. 1018 (1998) (No. 16870-1-III). Because the CRPA permits law enforcement agencies to disclose information about current investigations at their discretion, the privacy right created by the CRPA would not affect records of an open investigation, such as in *Cowles*. See WASH. REV. CODE § 10.97.050(2) (2000).

B. *The Washington State Supreme Court Has Peripherally Addressed the CRPA's Construction, Leaving the Extent of Its Right to Privacy Unclear*

The Washington State Supreme Court has indicated that the CRPA affects the release of investigative information under the PDA, but has not clarified the limits of the CRPA's right to privacy. In *Barfield v. City of Seattle*,¹⁴⁶ the court held that police internal investigation files were not privileged from disclosure under the PDA.¹⁴⁷ The defendants sought the files during discovery in two civil suits against police officers.¹⁴⁸ In both cases, the court determined that the police department had not shown that disclosure of the files would violate anyone's right to privacy under the PDA's investigative records exemption.¹⁴⁹ In addition, the court cited the CRPA in affirming the trial court's decision to delete from the files "all criminal records."¹⁵⁰

In short, the court interpreted the CRPA to provide a right to privacy that exempted information otherwise subject to disclosure under the PDA. However, the court did not clarify whether it considered "all criminal records" to include any information related to a criminal case, or only criminal history record information as defined by the CRPA.¹⁵¹ The decision did recognize that the PDA and CRPA impose different requirements on investigative information.¹⁵² Although the *Barfield* court failed to explain precisely what type of information agencies should withhold, the case establishes that agencies can reconcile the two statutes by separating information that fits under the CRPA's narrower privacy right from information that does not.¹⁵³

The court has also affirmed a similar interpretation of the CRPA by Division II of the Washington State Court of Appeals, but again the high court left the extent of the CRPA's protection unclear.¹⁵⁴ In *Limstrom v.*

146. 100 Wash. 2d 878, 676 P.2d 438 (1984).

147. *Id.* at 885, 676 P.2d at 442 (noting that the files were, however, subject to a protective order by the court).

148. *Id.*

149. *Id.*

150. *Id.*

151. *See id.*

152. *Id.*

153. *See id.*

154. *See Limstrom v. Ladenburg*, 85 Wash. App. 524, 532-33, 933 P.2d 1055, 1059 (1997), *rev'd on other grounds*, 136 Wash. 2d 595, 617, 963 P.2d 869, 880 (1998).

Ladenburg,¹⁵⁵ a defense attorney sought prosecution files that contained investigative records involving a certain sheriff's deputy.¹⁵⁶ Division II reversed a trial court's decision that the PDA's work-product exemption protected the records from disclosure.¹⁵⁷ The appellate court also noted that it was improper for the prosecutor's office to make a blanket claim of exemption for the records under the CRPA because the office made no attempt to withhold only nonconviction information.¹⁵⁸ On appeal, the Washington State Supreme Court agreed.¹⁵⁹ The court remanded the case with instructions for the trial court to determine whether the CRPA protected some of the information from disclosure.¹⁶⁰ While indicating that the CRPA protected the nonconviction information among the requested records,¹⁶¹ the court again failed to specify whether that protected information included investigative records, or merely rap sheet information.

The Washington State Supreme Court's holdings in both *Barfield* and *Limstrom* support the conclusion that data protected by the CRPA should not be disclosed along with other public records. However, the court has left the scope of the information protected by the CRPA unclear. In a footnote to its *Limstrom* opinion, the court recognized that it has not yet considered the interpretation of the CRPA adopted by Division I of the Washington State Court of Appeals.¹⁶² Stating that the *Limstrom* case presented an insufficient record, the Washington State Supreme Court refused to address the issue.¹⁶³

IV. DIVISION I HAS RELIED ON THE CRPA TO GOVERN DISCLOSURE OF ENTIRE INVESTIGATIVE FILES

Division I of the Washington State Court of Appeals has applied the CRPA not only to criminal history record information as defined by the

155. 85 Wash. App. 524, 933 P.2d 1055 (1997), *rev'd on other grounds*, 136 Wash. 2d 595, 963 P.2d 869 (1998).

156. *Id.* at 528, 933 P.2d at 1057.

157. *Id.* at 532, 933 P.2d at 1059.

158. *Id.* at 532-33, 933 P.2d at 1059.

159. *Limstrom v. Ladenburg*, 136 Wash. 2d 595, 615, 963 P.2d 869, 879 (1998).

160. *Id.* at 615-16, 963 P.2d at 879-80.

161. *Id.* at 616, 963 P.2d at 880.

162. *Id.* at 616 n.10, 963 P.2d at 880 n.10.

163. *Id.*

statute,¹⁶⁴ but also to entire bodies of investigative information.¹⁶⁵ This approach differs from that set forth by the Washington State Supreme Court in the *Barfield* and *Limstrom* decisions. In those cases, the court affirmed the exclusion of information protected by the CRPA from otherwise public investigative information.¹⁶⁶ The higher court, however, has not reviewed the cases in which Division I interpreted the CRPA.¹⁶⁷

A. *Division I Applied the CRPA to an Entire Investigative File in Hudgens v. City of Renton*

In *Hudgens v. City of Renton*,¹⁶⁸ Division I of the Washington State Court of Appeals determined that the CRPA's provisions applied to an entire investigative file.¹⁶⁹ "Free-lance newsman" Harley Hudgens requested access to every record prepared by the Renton Police Department in connection with the DWI arrest of a suspect who had been tried and found not guilty.¹⁷⁰ Because of the acquittal,¹⁷¹ criminal history record information about the case fit the CRPA's definition of nonconviction information.¹⁷² Division I's holding, however, extended the CRPA's protection to the entire investigative file,¹⁷³ not just the three elements of criminal history record information.¹⁷⁴

The *Hudgens* court, however, limited the reach of the CRPA in one important respect. The court held that the CRPA prevented the *copying* of the documents, but did not prohibit their inspection by a third party.¹⁷⁵

164. WASH. REV. CODE § 10.97.030(1) (2000).

165. *Beltran v. State Dep't of Soc. & Health Servs.*, 98 Wash. App. 245, 260, 989 P.2d 604, 612 (1999), *dismissed upon settlement*, 140 Wash. 2d 1021, 10 P.3d 405 (2000); *Hudgens v. City of Renton*, 49 Wash. App. 842, 844–45, 746 P.2d 320, 321–22 (1987), *review denied*, 110 Wash. 2d 1014 (1988).

166. *See Barfield v. City of Seattle*, 100 Wash. 2d 878, 885, 676 P.2d 438, 442 (1984); *Limstrom*, 136 Wash. 2d at 616, 963 P.2d at 880.

167. *Beltran v. State Dep't of Soc. & Health Servs.*, 140 Wash. 2d 1021, 10 P.3d 405 (2000) (*dismissing upon settlement*); *Hudgens v. City of Renton*, 110 Wash. 2d 1014 (1988) (*denying review*).

168. 49 Wash. App. 842, 746 P.2d 320 (1987), *review denied*, 110 Wash. 2d 1014 (1988).

169. *Id.* at 843, 746 P.2d at 321–22.

170. *Id.* at 843, 746 P.2d at 321.

171. *Id.*

172. *See* WASH. REV. CODE § 10.97.030(2) (2000).

173. *See Hudgens*, 49 Wash. App. at 844, 746 P.2d at 321.

174. *See* WASH. REV. CODE § 10.97.030(1).

175. *Hudgens*, 49 Wash. App. at 844–45, 746 P.2d at 321–22.

The court's analysis relied on a close reading of the CRPA's "Inspection of Information by Subject" provision,¹⁷⁶ which specifies that "[n]o person shall be allowed to retain or mechanically reproduce any nonconviction data."¹⁷⁷ Based on this provision, the court concluded that "nothing in the statute prohibits the *viewing* or inspection of nonconviction information."¹⁷⁸

Although the investigative file received protection from copying under the CRPA, the court held that the PDA's investigative records exemption did not provide any supplemental privacy.¹⁷⁹ The court stated that because the city had not met its burden of showing that release of the file would be highly offensive and outweigh the public's interest in disclosure, the information was not exempt from disclosure.¹⁸⁰ The court therefore held that all of the information in the investigative file should be accessible for viewing under the PDA, but could not be reproduced under the CRPA.¹⁸¹

Thus, the *Hudgens* decision expanded the scope of information covered by the CRPA while simultaneously decreasing the level of protection it provides. The decision broadened the application of the CRPA to entire investigative files,¹⁸² but limited its protection to preventing only physical retention or copying of protected information.¹⁸³ By applying the PDA's privacy standard, the court preserved the PDA's broad mandate for access to public records.¹⁸⁴ In the wake of *Hudgens*, a Seattle assistant city attorney opined that cities can "skip analysis under CRPA and analyze a request for non-conviction data under the provisions of the PDA."¹⁸⁵ The Washington State Supreme Court denied review of the *Hudgens* decision,¹⁸⁶ but has

176. *Id.* at 844, 746 P.2d at 321.

177. WASH. REV. CODE § 10.97.080.

178. *Hudgens*, 49 Wash. App. at 845, 746 P.2d at 321.

179. *Id.* at 846, 746 P.2d at 322.

180. *Id.*

181. *Id.* at 844–46, 746 P.2d at 321–22.

182. *Id.* at 843–44, 746 P.2d at 321.

183. *Id.* at 844–45, 746 P.2d at 321.

184. *See id.* at 845–46, 746 P.2d at 322; *see also* WASH. REV. CODE § 42.17.010(11) (2000).

185. James Pidduck, *Confidentiality of Police Personnel Records and Other Police Records Under the Public Disclosure Act (ch. 42.17 RCW) and the Washington State Criminal Records Privacy Act (ch. 10.97 RCW)*, in INFO. BULL. No. 458, at 18, 20 (Mun. Research & Servs. Ctr. 1989).

186. *Hudgens v. City of Renton*, 110 Wash. 2d 1014 (1988).

indicated that it may reconsider the appellate court's interpretation of the CRPA if provided with a sufficient record.¹⁸⁷

B. Applying the CRPA in Beltran v. State Department of Social and Health Services, Division I Left It Unclear Whether Access to Nonconviction Investigative Information Is Ever Permissible

Division I of the Washington State Court of Appeals has since followed the *Hudgens* decision by applying the CRPA to investigative information.¹⁸⁸ However, in doing so, the court has sealed this kind of information instead of making it accessible.¹⁸⁹ In *Beltran v. State Department of Social and Health Services*,¹⁹⁰ the plaintiff sought to use investigative information about nonconviction criminal activity in a foster home to show that the state was negligent in licensing the foster parent.¹⁹¹ The court held that the dissemination of such information by the Department of Social and Health Services to a third party would violate the foster parent's privacy right under the CRPA.¹⁹² The court affirmed the trial court's order to seal the investigative information and strike it from the trial record.¹⁹³

The court's decision in *Beltran* left it uncertain whether the CRPA permits the public to access nonconviction investigative information at all.¹⁹⁴ Noting that the *Hudgens* decision prohibited the reproduction of investigative information, the court held that the *Beltran* plaintiff's reproduction for evidentiary purposes was improper.¹⁹⁵ However, the court's language did not clarify whether the plaintiff, a third party not involved in the police investigation, should even have been allowed to view the investigative information.¹⁹⁶ "Beltran does not fall within any

187. *Limstrom v. Ladenburg*, 136 Wash. 2d 595, 616 n.10, 963 P.2d 869, 880 n.10 (1998) ("Without a sufficient record, we decline to consider whether we agree with the interpretation of [the CRPA] as articulated in *Hudgens* . . .").

188. *Beltran v. State Dep't of Soc. & Health Servs.*, 98 Wash. App. 245, 259–60, 989 P.2d 604, 611–12 (1999), *dismissed upon settlement*, 140 Wash. 2d 1021, 10 P.3d 405 (2000).

189. *Id.*

190. 98 Wash. App. 245, 989 P.2d 604 (1999), *dismissed upon settlement*, 140 Wash. 2d 1021, 10 P.3d 405 (2000).

191. *Id.* at 259, 989 P.2d at 611.

192. *Id.* at 259–60, 989 P.2d at 612.

193. *Id.* at 260, 989 P.2d at 612.

194. *See id.* at 259, 989 P.2d at 612.

195. *Id.* at 260, 989 P.2d at 612.

196. *See id.*

of the exceptions provided in the Act for those who are allowed access to this type of information,” the court wrote.¹⁹⁷ The court held that dissemination of the information was therefore unlawful, and that the trial court properly ordered it stricken from the record and sealed.¹⁹⁸ The language of the opinion was ambiguous as to whether the sealing pertained to the record in the case at bar or to all future public access.¹⁹⁹ Although the Washington State Supreme Court granted review of *Beltran*, the parties settled, and the higher court never heard the case.²⁰⁰

In sum, Division I’s interpretation of the CRPA could prevent access to investigative information.²⁰¹ Further application of the CRPA in this manner could make all investigative information resulting in a nonconviction inaccessible to the public, not just the criminal history record information about the incident.²⁰² Although the Washington State Supreme Court did not review the cases establishing this precedent,²⁰³ the court has shown the willingness to reconsider Division I’s interpretation of the CRPA.²⁰⁴

197. *Id.* at 259, 989 P.2d at 612.

198. *Id.*

199. *See id.* (“*Beltran* was not authorized to obtain the information and the trial court properly remedied the unlawful dissemination of the information by ordering it to be stricken from the record and sealed.”). Division I has applied the CRPA to records beyond the statute’s definition of criminal history record information in two unpublished opinions since *Beltran*. *State v. Soliz (In re Detention of Soliz)*, No. 44127-2-1, 2000 WL 965007, at *2, *9 (Wash. Ct. App. Div. I July 3, 2000); *In re Detention of Thorell*, No. 42237-5-1, 2000 WL 222815, at *7 (Wash. Ct. App. Div. I Feb. 22, 2000). In both cases, however, the court held disclosure to be permissible based on another statute requiring the Department of Corrections to disclose certain information about sexually violent predators to prosecutors. *See Soliz*, 2000 WL 965007, at *2, *9 (holding that release of police reports, Department of Corrections files, and mental health reports to psychologist was permissible under Washington Revised Code § 10.97.050(4)); *Thorell*, 2000 WL 222815, at *7 (holding that the same statutory provision permitted dissemination of Department of Corrections file). Since *Beltran*, the court has not considered the CRPA in a case where only the PDA supports disclosure.

200. *Beltran v. State Dep’t of Soc. & Health Servs.*, 140 Wash. 2d 1021, 10 P.3d 405 (2000).

201. *See Beltran*, 98 Wash. App. at 259–60, 989 P.2d at 611–12; *see also supra* notes 194–99 and accompanying text.

202. *See Beltran*, 98 Wash. App. at 259–60, 989 P.2d at 611–12; *see also supra* notes 194–99 and accompanying text.

203. *Beltran*, 140 Wash. 2d at 1021, 10 P.3d at 405 (dismissing upon settlement); *Hudgens v. City of Renton*, 110 Wash. 2d 1014 (1988) (denying review).

204. *See Limstrom v. Ladenburg*, 136 Wash. 2d 595, 616 n.10, 963 P.2d 869, 880 n.10 (1998).

V. THE WASHINGTON STATE SUPREME COURT SHOULD CURTAIL DIVISION I'S APPLICATION OF THE CRPA

Division I of the Washington State Court of Appeals has inappropriately extended the reach of the CRPA to entire bodies of investigative information.²⁰⁵ The Washington State Supreme Court could more appropriately reconcile the PDA and CRPA by redacting the narrow area of criminal history record information protected by the CRPA from investigative information that is otherwise publicly available under the PDA.²⁰⁶ This interpretation is supported by the text of the CRPA, which indicates that protected criminal history record information consists strictly of the three components of a rap sheet.²⁰⁷ Further, the federal regulations that mandated the CRPA are explicitly inapplicable to investigative information. The intended construction of the CRPA is to regulate the disclosure of rap sheet information only.²⁰⁸ Division I's interpretation is also inconsistent with the Washington State Supreme Court's narrowing of the privacy of investigative information under the PDA.²⁰⁹ The higher court has drawn a distinction between information that is private under the CRPA and information available under the PDA; this distinction is consistent with redacting CRPA-protected information from otherwise public records.²¹⁰

A. *Division I's Broad Use of the CRPA To Address Entire Records of Nonconviction Investigations Conflicts with the Plain Text of the Statute*

By applying the CRPA to all investigative information, Division I has expanded the statute's narrow definition of criminal history record information. While Division I originally allowed the public to view investigative information held to be otherwise protected by the CRPA,²¹¹ the court has since indicated that the CRPA may prevent all access to

205. See *supra* Part IV.

206. See *infra* Part V.D.

207. See *infra* Part V.A.

208. See *infra* Part V.B.

209. See *infra* Part V.C.

210. See *infra* Part V.D.

211. *Hudgens v. City of Renton*, 49 Wash. App. 842, 844-45, 746 P.2d 320, 321-22 (1987), *review denied*, 110 Wash. 2d 1014 (1988).

investigative records about a nonconviction incident.²¹² The plain text of the CRPA does not protect investigative records, but instead protects a narrowly defined category of criminal history record information.²¹³ The CRPA explicitly defines criminal history record information as the combination of three pieces of data: (1) identifiable descriptions of a person, (2) notations of arrests or formal criminal charges, and (3) the dispositions of those charges.²¹⁴ Only when this information relates to a nonconviction incident does it have the potential to be private under the CRPA.²¹⁵ The statute does not protect information outside this definition.²¹⁶

The CRPA's "Inspection of Information by Subject" provision further demonstrates the statute's distinction between criminal history record information and other investigative information.²¹⁷ This provision explicitly grants individuals the right to review their own criminal history record information.²¹⁸ However, the provision also indicates that the personal right of access extends only to criminal history record information, and not to investigative files.²¹⁹ By distinguishing protected criminal history record information from unprotected investigative information, the CRPA indicates that investigative data falling outside of the three-part definition of criminal history record information is not addressed by the statute.²²⁰

In line with such textual indications, state officials and commentators have interpreted the CRPA as inapplicable to investigative information.²²¹ The Washington Attorney General's Office *Open Records & Open Meetings* deskbook specifies that "[i]nvestigative information does not fall within the definition of 'criminal history record information.'"²²² The deskbook further specifies that the release of

212. See *Beltran v. State Dep't of Soc. & Health Servs.*, 98 Wash. App. 245, 259, 989 P.2d 604, 611-12 (1999), *dismissed upon settlement*, 140 Wash. 2d 1021, 10 P.3d 405 (2000).

213. WASH. REV. CODE § 10.97.030(1) (2000).

214. *Id.*

215. See *id.* § 10.97.050.

216. See *id.*

217. See *id.* § 10.97.080.

218. *Id.*

219. *Id.*

220. See *id.*

221. See WASH. STATE OFFICE OF THE ATTORNEY GEN., *supra* note 107, § 5.3; Horst, *supra* note 106, at 5-3 n.1.

222. WASH. STATE OFFICE OF THE ATTORNEY GEN., *supra* note 107, § 5.3.

police investigative information is governed by the PDA.²²³ Information from the library of Washington's Municipal Research & Services Center indicates that although agencies apply the CRPA on a case-by-case basis, they commonly interpret the statute to cover criminal histories only.²²⁴ This predominant interpretation reflects the CRPA's plain definition of criminal history record information as inclusive only of rap sheet information rather than entire investigative files. In applying the CRPA to protect investigative information from disclosure, Division I therefore broadens the scope of the CRPA's text beyond common usage and understanding.

In addition, Division I's interpretation of the CRPA undermines the PDA. The PDA states that courts are to promote its policy of disclosure by narrowly construing its exemptions.²²⁵ As the Washington State Supreme Court has indicated, courts should also follow this policy in interpreting exemptions passed more recently than the PDA.²²⁶ In *Hearst Corp. v. Hoppe*, the court held that a law passed after the PDA, which independently exempted "confidential income data" from disclosure, supplemented and defined the PDA's existing right of privacy for taxpayers.²²⁷ This interpretation reconciled the two statutes and permitted the *Hearst* court to construe them as part of a harmonious scheme, as mandated by the principle of statutory construction on which the court relied.²²⁸ The *Hearst* court established that it is appropriate to reconcile the PDA with its exemptions by broadly construing the PDA's disclosure policy and narrowly construing its exemptions.²²⁹

In a manner similar to the income data exemption addressed in *Hearst*,²³⁰ the CRPA clarifies an existing exemption by explicitly designating certain types of private information²³¹ within the context of investigative records.²³² Addressing only the narrow category of criminal history record information,²³³ the CRPA is not a significant departure

223. *Id.*

224. *See* Horst, *supra* note 106, at 5-3 n.1.

225. *See* WASH. REV. CODE § 42.17.340(3).

226. *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 139, 580 P.2d 246, 255 (1978).

227. *Id.* at 138-39, 580 P.2d at 254-55.

228. *See id.*

229. *See id.*

230. *Id.* at 138, 580 P.2d at 254.

231. *See* WASH. REV. CODE § 10.97.050.

232. *Id.* § 42.17.310(1)(d).

233. *Id.* § 10.97.030(1).

from the public disclosure mandate of the PDA. Courts should therefore interpret the CRPA as a later exemption to the PDA. Thus, courts should read the CRPA in concert with the PDA's "strongly worded mandate for broad disclosure of public records."²³⁴ This interpretation reconciles and gives effect to both statutes, in line with the *Hearst* decision.²³⁵

In sum, Division I is not interpreting the CRPA in accord with its intended construction. The statute's exemption for nonconviction criminal history record information²³⁶ is a specific and supplemental rule that defines the PDA's privacy right in investigative records. When Division I applies the CRPA not only to criminal history record information, but also to entire investigative files that contain that data,²³⁷ it employs an inappropriately broad reading that contravenes the Washington State Supreme Court's approach of reconciling the PDA and its later exemptions.²³⁸

B. The Federal Regulations Mandating Washington's CRPA Provide Guidance for Judicial Interpretation of the Statute

The federal regulations that served as a model for the CRPA also indicate that Division I has misapplied the statute. The Washington State Supreme Court has shown its willingness to look to federal disclosure law by using interpretations of the federal Freedom of Information Act for guidance in construing the PDA.²³⁹ The text of the CRPA closely parallels the U.S. Department of Justice regulations that mandate it.²⁴⁰ The Department of Justice intended those regulations to protect the privacy of the rap sheet information shared between law enforcement agencies, not investigative information that is the work product of law enforcement officers.²⁴¹

234. *Hearst*, 90 Wash. 2d at 127, 580 P.2d at 249.

235. *See id.* at 138, 580 P.2d at 254–55.

236. WASH. REV. CODE § 10.97.030(2).

237. *See Beltran v. State Dep't of Soc. & Health Servs.*, 98 Wash. App. 245, 259–60, 989 P.2d 604, 612 (1999), *dismissed upon settlement*, 140 Wash. 2d 1021, 10 P.3d 405 (2000); *Hudgens v. City of Renton*, 49 Wash. App. 842, 843–46, 746 P.2d 320, 321–22 (1987), *review denied*, 110 Wash. 2d 1014 (1988).

238. *Hearst*, 90 Wash. 2d at 139, 580 P.2d at 254–55.

239. *Id.* at 128, 580 P.2d at 249.

240. Compare WASH. REV. CODE §§ 10.97.010–.140 with Criminal Justice Information Systems, 28 C.F.R. pt. 20 (2002).

241. *See* 28 C.F.R. §§ 20.3(l)–(p), 20.33; *see also id.* pt. 20 app. (discussing the definition of criminal history record information contained in 28 C.F.R. § 20.3(d)).

The drafters of the federal regulations specified in their appendix that investigative information, or all other information contained in criminal justice agency reports, is not criminal history record information,²⁴² and is thus beyond the scope of the model regulations. In text essentially identical to the federal regulations, Washington's CRPA also defines criminal history record information to consist of the three basic components of a rap sheet.²⁴³ By not changing the language of the federal model law, Washington legislators implicitly adopted the appendix that came with the federal rules. Further, the legislative history behind the statute indicates that the state merely responded to the federal mandate, and did not expand upon it.²⁴⁴ If the legislature had an independent, broader interest in concealing investigative information, that interest is reflected neither in the text of the statute nor in the statute's legislative history.

Division I's application of the CRPA to investigative information is similarly misaligned with the purpose of the federal mandate as shown in additional legislative history. The federal mandate that inspired the CRPA was a response to the increasing use of computers by criminal justice agencies.²⁴⁵ As an incentive to those states that passed the requested legislation, the federal government promised funds for local record-keeping systems used to share information between agencies.²⁴⁶ This indicates that the chief federal concern was the accuracy and privacy of the rap sheet information shared electronically in response to requests for criminal histories.²⁴⁷ Rap sheets only include names paired with notations of arrests and their dispositions²⁴⁸—the criminal history record information the CRPA purports to regulate.²⁴⁹

The U.S. Supreme Court's analysis in *United States Department of Justice v. Reporters Committee for Freedom of the Press* provides further guidance as to the difference between rap sheets and

242. 28 C.F.R. §§ 20.3(l)–(p), 20.33; *see also id.* pt. 20 app. (discussing the definition of criminal history record information contained in 28 C.F.R. § 20.3(d)).

243. *See* WASH. REV. CODE § 10.97.030(1).

244. STAFF OF SENATE JUDICIARY COMM., *supra* note 95, at 1; *see also* text accompanying *supra* note 95.

245. DALTON, *supra* note 88, at 1.

246. *Id.*

247. *Id.*

248. *Id.*; *see also* Criminal Justice Information Systems, 28 C.F.R. § 20.3(l) (2002).

249. *See* WASH. REV. CODE §§ 10.97.030(1), .050 (2000).

investigative information.²⁵⁰ The decision confirmed that very different privacy considerations affect the release of rap sheets and the release of investigative information.²⁵¹ The Court stated that rap sheets contain accumulated private information that does not reflect on the conduct of government.²⁵² Thus, the combined elements of criminal history record information that would appear on a rap sheet are different from records such as police reports. Investigative reports are generally public under federal disclosure law, even when those reports contain information that could be compiled onto a rap sheet.²⁵³ Including investigative information within the CRPA's coverage similarly conceals from public view not only criminal history record information about an individual, but also the work product of law enforcement officers.²⁵⁴ This interpretation expands the effect of the CRPA beyond individual privacy to the conduct of public agencies and the behavior of their employees—precisely the information the PDA was intended to bring into public view.²⁵⁵

The Washington State Supreme Court has looked to interpretations of federal public records law to understand the meaning of Washington's PDA.²⁵⁶ The court should likewise look to the U.S. Supreme Court's analysis of rap sheet information and prevent Division I from subverting the PDA's purpose with an overbroad application of the CRPA. The federal judicial interpretation, as well as the federal legislative history of the model law, demonstrates the distinction between the privacy of rap sheet information and the disclosure of investigative information. This distinction supports the use of the CRPA to redact rap sheet information from investigative information that is otherwise public.

250. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773–74 (1989).

251. *Id.*

252. *Id.* at 773.

253. See *id.* at 764.

254. See WASH. REV. CODE § 42.17.020(36) (applying to “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function”); *Reporters Comm. for Freedom of the Press*, 489 U.S. at 773.

255. WASH. REV. CODE § 42.17.260(1).

256. *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 128, 580 P.2d 246, 249 (1978).

C. *Cowles Publishing Co. v. Spokane Police Department Supports Access to Investigative Records over Privacy*

Division I's narrowing of the public's right to access investigative information is contrary to the Washington State Supreme Court's holding in *Cowles Publishing Co. v. Spokane Police Department*, which expanded the circumstances when agencies must release that information.²⁵⁷ Although the CRPA was not a factor in the case, *Cowles* broadened the public's right to access investigative records under the PDA.²⁵⁸ In limiting the *Newman* prohibition on disclosure of all open and active case records,²⁵⁹ the *Cowles* court rejected the idea that the defendant possessed an absolute right to privacy in the particulars of his arrest after his case had been referred to the prosecutor.²⁶⁰

The *Cowles* decision established a presumption that all information is subject to disclosure once a case is submitted for a prosecution decision, even if the information may later become nonconviction information protected by the CRPA.²⁶¹ The court also presented a rationale for this result, noting that the public is generally aware of the presumption of innocence before adjudication.²⁶² By establishing that investigative information is not generally private *before* it becomes nonconviction information,²⁶³ the *Cowles* court indicated that the PDA provides no reason why it should become private *after* a failure to convict.²⁶⁴ Therefore, the narrower right to privacy within the CRPA²⁶⁵ should not be applied to contravene the PDA by preventing disclosure of such investigative information across the board.

257. *Cowles Publ'g Co. v. Spokane Police Dep't*, 139 Wash. 2d 472, 477–78, 987 P.2d 620, 622 (1999).

258. *Id.* at 479–80, 987 P.2d at 623–24.

259. *Id.* at 477–79, 987 P.2d at 622–23.

260. *Id.*

261. *Id.* at 481, 987 P.2d at 624.

262. *Id.* at 479, 987 P.2d at 623.

263. *Id.* at 481, 987 P.2d at 624.

264. *See id.*

265. *See supra* Part V.A–B.

D. The Washington State Supreme Court Can Best Reconcile the CRPA and PDA by Redacting Protected Criminal History Record Information from Investigative Records That Are Otherwise Public

Redacting information protected by the CRPA from information that is public under the PDA satisfies both statutes. The PDA requires redaction when private information appears in an otherwise public record.²⁶⁶ This approach is consistent with Washington State Supreme Court precedent that acknowledges a distinction between the information protected by the two statutes.²⁶⁷ Redaction is also the solution that best applies the two statutes as a harmonious scheme, in accord with the Washington State Supreme Court's approach of reconciling the PDA's mandate for disclosure with later exemptions to the law.²⁶⁸

The text of the PDA supports the solution of redacting protected nonconviction criminal history record information from public files, permitting access to the remaining information.²⁶⁹ The presence of a piece of private information in an otherwise public record is not a justification for withholding the entire record²⁷⁰ in the manner that Division I has suggested that entire investigative records may be withheld.²⁷¹ Rather, the PDA requires that officials redact private information and release the remainder of the record.²⁷² The CRPA governs only the disclosure of criminal history record information.²⁷³ The statute prohibits the disclosure of criminal history record information only when it concerns a nonconviction.²⁷⁴ When nonconviction criminal history record information appears in investigative records that are public under the PDA, agencies should therefore redact it. Under this approach, the information protected by the CRPA remains private, while remaining investigative information is available to the public.

266. WASH. REV. CODE § 42.17.260(1) (2000).

267. See *Limstrom v. Ladenburg*, 136 Wash. 2d 595, 615–16, 963 P.2d 869, 879–80 (1998); *Barfield v. City of Seattle*, 100 Wash. 2d 878, 885, 676 P.2d 438, 442 (1984).

268. *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 138–39, 580 P.2d 246, 254–55 (1978).

269. See WASH. REV. CODE § 42.17.260(1).

270. See *id.*

271. See *Beltran v. State Dep't of Soc. & Health Servs.*, 98 Wash. App. 245, 259–60, 989 P.2d 604, 612 (1999), *dismissed upon settlement*, 140 Wash. 2d 1021, 10 P.3d 405 (2000).

272. WASH. REV. CODE § 42.17.260(1).

273. See *id.* § 10.97.050.

274. See *id.*

Redaction is consistent with the Washington State Supreme Court's acknowledgment that the CRPA protects a smaller measure of police information than the PDA does.²⁷⁵ In *Barfield*, the court affirmed the release of investigative records from which "criminal records" had been deleted under the CRPA.²⁷⁶ As the *Limstrom* case progressed through the court system, opinions consistently referred to the possibility of *some* of the requested information receiving protection under the CRPA.²⁷⁷ This shows recognition by the court that protected data could be removed from files that would otherwise have to be disclosed. The court, however, has not clarified what information is protected by the CRPA.²⁷⁸ The text and history of the CRPA suggest that the statute addresses only criminal history record information—the three components that appear on a rap sheet.²⁷⁹ Therefore, redacting this information from otherwise public records when it concerns a nonconviction would reconcile the CRPA and PDA in a logical extension of Washington State Supreme Court precedent.

Redaction also treats the PDA and CRPA as part of a single statutory scheme. The Washington State Supreme Court has indicated that the PDA and other laws that create exemptions to it should be reconciled into a harmonious scheme whenever possible.²⁸⁰ The court accomplishes this goal by reading the PDA's broad policy of disclosure into later-created exemptions.²⁸¹ Redaction of information protected by the CRPA would enable the disclosure of the underlying investigative information—consistent with the PDA's policy and the court's conclusion in *Hearst Corp. v. Hoppe*.²⁸² At the same time, redaction would protect the nonconviction criminal history record information that the CRPA exempts from disclosure.²⁸³

275. See *Limstrom v. Ladenburg*, 136 Wash. 2d 595, 615–16, 963 P.2d 869, 879–80 (1998); *Barfield v. City of Seattle*, 100 Wash. 2d 878, 885, 676 P.2d 438, 442 (1984).

276. *Barfield*, 100 Wash. 2d at 885, 676 P.2d at 442.

277. See *Limstrom*, 136 Wash. 2d at 615, 963 P.2d at 879; *Limstrom v. Ladenburg*, 110 Wash. App. 133, 136 n.2, 39 P.3d 351, 353 n.2 (2002) (appeal after remand).

278. See *Limstrom*, 136 Wash. 2d at 616, 963 P.2d at 880; *Barfield*, 100 Wash. 2d at 885, 676 P.2d at 442.

279. See *supra* Part V.A–B.

280. See *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 138–39, 580 P.2d 246, 254–55 (1978).

281. *Id.*

282. See WASH. REV. CODE § 42.17.340(3) (2000); *Hearst*, 90 Wash. 2d at 139, 580 P.2d at 255.

283. See WASH. REV. CODE § 10.97.050.

VI. CONCLUSION

The Washington State Supreme Court should end Division I's overbroad application of the CRPA, and instead hold that the CRPA requires redaction of nonconviction criminal history record information from otherwise public documents. Redaction is consistent with the CRPA's definition of criminal history record information and the PDA's mandate that exemptions shall be interpreted narrowly. Neither the federal nor the state legislative history of the CRPA indicates an intention to include investigative information within the statute's exemptions to the PDA. The *Barfield* and *Limstrom* decisions suggest a better approach to the CRPA by separating protected criminal history record information from documents not otherwise exempt from disclosure. The Washington State Supreme Court should therefore act to end Division I's incorrect application of the CRPA that exempts investigative information from disclosure. Except for the redaction of nonconviction criminal history record information, courts should not apply the CRPA to investigative files.