No. 43004-5

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

(Supreme Court, No. 85510-2; Pierce County
Superior Court Cause No. 08-2-04312-1)

ARTHUR WEST,

Appellant,

v.

PORT OF TACOMA, et al.,

Respondent

APPELLANT'S SECOND REVISED OPENING BRIEF

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I. SUMMARY OF ARGUMENT

This is a case where the Defendant and Respondent Port of Tacoma, in response to Plaintiff and Appellant Arthur West's public records request, resisted compliance with the Public Records Act, delaying production both of responsive records and also of the required exemption log, and forced Mr. West to file the instant lawsuit where he thrice noted the matter for a show cause hearing. The Trial Court judge erred in not conducting the show cause hearing (declining to even reach the question of whether the Port violated the PRA, even though the Port's violations were apparent from its delayed responses to Mr. West) and in appointing a special discovery master to determine the ultimate issues in the case (by law reserved for the judiciary), and erred in dismissing Mr. West's lawsuit in contravention of CR 41(b)(1) and (2).

When the Port did disclose some records after Mr. West filed this lawsuit, the records showed that the Port had deliberately delayed its responses to PRA requests as a matter of policy, had destroyed records, and had concealed information from the public. Despite the clear evidence of the Port's violation of the PRA (not only the violations spelled out in the records the Port eventually released, but also the late disclosure of records and late release of exemption logs claiming exemptions not supported by law), the Trial Court refused to conduct a review or

determine whether the Port violated the PRA. Instead, the case was delayed by more than a year by the Trial Court's striking and continuing hearings, and then by the unprecedented appointment of a discovery special master to decide the ultimate issues in this, a PRA case. Nor, after the special master released his report, were the records identified by the special master as being improperly withheld ever produced by the Port so that a penalty could be assessed. In the face of all this, Mr. West was seriously in doubt about how to proceed. When he received notice of a status conference in the case, Mr. West believed that the case was finally back on track. Instead, the Trial Court dismissed the case at the status conference in violation of CR 41(b)(1) and (2).

This Court should reverse the Trial Court and remand the case back to superior court, directing the Trial Court to hear and decide whether the Port violated the public records act, directing the Trial Court to review the Port's withheld records in camera, and directing the Trial Court to decide and impose a penalty.

II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

A. The Trial Court erred in conflating CR 41(b)(1) and (2) and in dismissing Mr. West's case in violation of the rule where each separate prong of the rule requires that the case go forward. *Does CR 41(b)(1) require 10 days' notice before a hearing on a party's motion to dismiss?*

Yes. Was there 10 days' notice before the hearing on the Port's motion to dismiss? No. Does CR 41(b)(2) require that a clerk's motion to dismiss give notice that if no action of record is taken within 30 days that the court will dismiss the case? Yes. Did the judicial assistant's notice of a status conference conform with the requirements of CR 41(b)(2)? No. At any rate, did Mr. West take action of record, like appearing at the status conference and noting the matter for hearing, within 30 days of the judicial assistant's notice? Yes. Was there insufficient evidence supporting the Trial Court's findings of fact 7 ("On December 8, 2010, this Court noted a hearing based on the failure to prosecute/ lack of case activity"), 8 ("The parties were provide with more than thirty (30) days advance written notice of the hearing"), and 9 ("Following the Court's Notice, Petitioner Mr. West did not note the matter for trial, show cause hearing, or otherwise take any action on the case")? Yes, there was insufficient evidence.

B. The Trial Court erred in refusing to conduct a show cause hearing and in refusing to determine whether the Port of Tacoma violated the Public Records Act, when the Port's violations were apparent from its responses to Mr. West. *Should the Court have determined whether the Port violated the PRA, when Mr. West thrice noted the matter for a show cause hearing? Yes. Is it a violation of the PRA to fail to respond in a*

reasonable time? Yes. Were the Port's claimed exemptions on its exemption log not supported by law? Yes.

C. The Trial Court erred in appointing a special master pursuant to a discovery rule, CR 53.3, to decide the ultimate issues of the case, a function that is reserved for the judiciary by RCW 42.56.550(3). *Is the appropriate function of a special master pursuant to CR 53.3 to perform the gatekeeping functions of presiding at depositions or adjudicating discovery disputes? Yes. Is it the function of the judiciary to decide the ultimate issues of the case? Yes. Does RCW 42.56.550(3) require judicial review of agency actions? Yes.*

III. STATEMENT OF THE CASE

This case involves a public records request made to defendant and respondent Port of Tacoma, where the plaintiff and appellant Arthur West requested specific identifiable public records concerning the Port's South Sound Logistics Center. CP 14.

The public records request at issue here was emailed by Mr. West to the Port of Tacoma on December 4, 2007. CP 14. Citing to RCW 42.56, Mr. West sought "All records and communications concerning the South Sound Logistics Center, from January 1, 2005 to present," "All correspondence or communication with Diane Sontag," and "Any records

related to potential transport of Uranium Hexaflouride through Thurston County or the SSLC." CP 14.

The South Sound Logistics Center ("SSLC") project was jointly undertaken by the Ports of Tacoma and Olympia, who entered into an Interlocal Agreement on July 18, 2006. CP 69; CP 48. The Port of Tacoma had identified a "need for a rail-served logistics center" (CP 44) within "the greater South Sound region" (CP 45). To that end, the Port of Tacoma had purchased a 745-acre parcel of land in 2006, near Maytown, in Thurston County, quite close to I-5. CP 46-47. However, even though the Port of Tacoma had already bought the land, the Port's project lead for the South Sound Logistics Center Project, Mr. Rob Collins, explained that "The Ports of Olympia and Tacoma have not committed to build the logistics center on this particular site. This location, along with other properties, will be evaluated during an alternative site analysis and as part of the environmental review process. If the Maytown location is not selected, the property will be sold." CP 47.

Mr. Collins also noted that "While there is broad consensus on the need to provide facilities to accommodate projected regional freight transportation demands, questions have been raised regarding possible impacts at a site-specific level." CP 48. The Maytown land that the Port of Tacoma purchased was contaminated, and when the Port bought the

land, it agreed to assume responsibility for completing remediation work required as part of a preexisting Washington Department of Ecology Agreed Order. CP 47. This included clean-up of a former drum burial area, removal of contaminated soils, confirmation of the absence of any residual subsurface explosives-related materials and creation of a DOE-approved long-term plan for ongoing groundwater monitoring at locations throughout the site. CP 47. Mr. West was one of the "community members" (CP 48) that Mr. Collins mentioned who had questions "regarding possible impacts at a site-specific level" (CP 48), and Mr. West's concern sparked his public records request to the Port on December 4, 2007.

After Mr. West made his public records request, the Port responded with the first of a series of estimates for records release that the Port never met. CP 9; CP 11; CP 15; CP 16; CP 17; CP 18. In his Declaration, Mr. Andy Michels, Risk Manager of the Port of Tacoma, stated that "On December 6th, I advised Mr. West that the Port was gathering documents and that the Port expected it would be December 21 before they would be available." CP 9. There is no record of Mr. Michels's response (*see, generally*, CP 14-15), but a December 6 response would have been within five business days of Mr. West's December 4 request.

Next, on December 21, Mr. Michels emailed Mr. West and told him he expected to release records "shortly." CP 15. On December 26, Mr. West contacted Mr. Michels concerning the Port's "privilege log," or exemption log. CP 9. Also on December 26, Mr. Michels sought clarification, and Mr. West replied that same day. CP 9. On December 31, Mr. Michels emailed Mr. West and told him he expected to release the first batch of records by January 10, 2008. On January 10, at 8:38 pm, the Port's attorney, Ms. Carolyn Lake, emailed Mr. West and told him that she expected the Port would release the first batch of records by January 17. CP 17. On January 11, Mr. Michels emailed Mr. West and repeated Ms. Lake's estimate of January 17. CP 18.

Having received only broken promises from the Port with an ever-moving target date for the release of any records, Mr. West filed this lawsuit on January 14, alleging that the Port has "failed to respond with exemptions or disclose records and plaintiff is entitled to the relief requested." CP 1. On that same day, Mr. West filed a Motion for a Show Cause Order, in support of which he declared, "To date the defendant has not released any records whatsoever, and although they have promised to respond with records on three separate occasions, each time they have failed to meet their own deadline" and "I am aware that in response to other requests for these same records by Dianne Sontag, defendants'

counsel has prepared a 41 page log of records it refuses to disclose. However, even these exemptions have not been released to me in response to my request for records to the Port of Tacoma." CP 6.

Mr. West brought his motion before the Trial Court *ex parte*, and obtained a show cause order directing the Port to appear on February 12 and show cause "why the requested records related to the proposed South Sound Logistics Center should not be released as public records." CP 7.

Meanwhile, the Port of Tacoma, backpedaling in light of the "questions" (CP 48) raised by community members "regarding possible impacts at a site-specific level" (CP 48), retained an "independent contractor" to "search, examine, and report on any other feasible site locations for the SSLC." CP 49. The Port of Tacoma also set up its *spin department* (for lack of better word), "currently structuring a process to organize inquiries, develop an efficient way to provide responses to specific questions, and keep the public fully informed about the process and opportunities for public participation and comment at key stages." CP 48.

What this "process to organize inquiries," "efficient way to provide responses," and "keep the public fully informed...at key stages" (CP 48) actually meant at the practical level is nicely set forth in a memorandum dated November 27, 2007:

> When these studies [the Alternative Sites Analysis, the Market Analysis, and the Logistics Center Comparative Analysis – all relating to the SSLC] have been finalized, we [the Ports of Olympia and Tacoma] are committed and prepared to share the results with a number of external groups, including Friends of Rocky Prairie [a group that, like Mr. West, made a PRA request to the Port seeking SSLC records]. However we need to acknowledge two issues:...2) the need to fully brief both Commissions [of the Ports of Olympia and Tacoma] prior to or concurrently with sharing them with external groups.

CP 68. That is, the Ports of Tacoma and Olympia had decided to delay responses to outstanding public records requests until after first sharing the responsive records with both Commissions. CP 68.

Mr. Michels stated in his Declaration that on January 17, after Mr. West filed his lawsuit, the Port told Mr. West that they expected to release the first batch of records on January 24. CP 12. Next, Mr. Michels stated that "thereafter" the Port notified Mr. West that the first five volumes of records would be available on January 28. CP 12. Attached to Mr. Michels's Declaration, dated February 8, is the first privilege log released by the Port. CP 19-41. The privilege log covers four volumes of a projected 47-volume set, volumes 1, 3, 14, and 15. CP 19-41. On January 29, Mr. West reviewed the first set of records that the Port made available, and designated records for copying. CP 13. On January 31, after having seen the records the Port made available, Mr. West served the Port with this lawsuit. CP 694.

Meanwhile, the show cause hearing in Mr. West's case was continued to March 28 (*see, e.g.*, CP 741-42) and Mr. Michels filed a second declaration containing an Index. (CP 708-713). According to the Index, the Port had notified Mr. West that the first five volumes (volume 1, 3, and 13-15) were ready to be reviewed on January 24, and Mr. West reviewed them on January 29, and the Port told Mr. West that the second six volumes (volumes 18-21 and 24-25) were ready to be reviewed on March 6, and Mr. West reviewed them on March 19. CP 712-713.

While all this was going on, Mr. West continued to request a complete set of exemption logs from the Port. CP 739. In an email dated March 14, Mr. West wrote to Ms. Lake, "It is my hope that a complete set of exemption logs will be prepared at this time [for the show cause hearing on March 28] in order to allow the Court to proceed with the case at that time." CP 739. Ms. Lake responded "It will be a close call to get the balance of the logs ready for the 28th, and now I have a...conflict for the 28th. We are now free on April 4th. How about that Friday?" CP 739.

In support of his show cause motion, Mr. West served the Port with a "Response to Defendant Port's Reply to Show Cause" on March 25, 2008. CP 718. The Port moved to have this Response stricken, on the basis that Mr. West failed to properly authenticate attached documents. CP 718. At the show cause hearing, the Trial Court, the Honorable

Frederick W. Fleming, granted that motion to strike as to the attachments; "The Court grants the Port's Motion to Strike unauthenticated attached documents & Plaintiff will refile with proper certification." CP 54. The Trial Court did not strike the Response itself to which the unauthenticated documents were attached. CP 54.

Though this pleading -- Mr. West's Response to which the stricken documents were attached – is missing from the record, the Port quoted from it in its motion to strike and the Port's quotes reflect the arguments Mr. West made (though not the stricken unauthenticated documents). CP 719. According to the Port's quoted material, Mr. West argued in this pleading that the records the Port had allowed him to inspect showed that the Port had improperly deleted other public records responsive to his request, including emails. CP 719. Mr. West also argued that the release of these records to newspapers -- that then printed stories about the records -- resulted in public apologies from the Port of Tacoma for offensive statements made by Port of Tacoma employees about the Port of Olympia (the Port of Tacoma's partner on the SSLC project) and apologies for deleting records. CP 719. Again, the Trial Court struck "the unauthenticated attached documents" (CP 54), not Mr. West's Response to which the documents were attached or the arguments within his response. The arguments themselves were thus considered by the Trial Court.

At the show cause hearing on March 28, the Trial Court initially asked Mr. West if it weren't so that the Port had been gathering information in response to his PRA request and had provided some records already. RP 3/28/08 at p. 3-4; ll. 24-25, 1-2. Mr. West answered that the PRA "requires a certain procedure to be followed in response to a request." RP 3/28/08 at p. 4; ll. 3-6. Mr. West argued:

> I certainly agree with reasonableness, Your Honor. And I agree that we can't proceed today. What I'd be asking for today would be a finding that the agency was in non-compliance with the Act, and a date certain for this production, that they need to provide an index for the records that exist, and they need to provide the exemptions that they are asserting.
>
> Within five business days of a response, or a request, the agency is supposed to respond in a particular manner, saying when the records are going to be available, and asserting exemptions. Okay. In this case, they responded three times, prior to filing the lawsuit, with different dates of when the records were going to be available. Didn't assert any exemptions. Didn't meet any of the three dates. Still, to this day, the Port has not provided an index to what records exist, hasn't filed with this Court exemptions for which records have been withheld.

RP 3/28/08, pp. 4-5; ll. 10-25, 1. At the hearing, the Trial Court declined to find that the Port had violated the PRA, and Mr. West objected. RP 3/28/08, p. 12; ll. 8-10. The Trial Court also ruled that it was "premature" to rule on the issue of the Port's compliance with the PRA, and Mr. West again objected. RP 3/28/08, p. 13, ll. 18-23. Finally, the Court ordered

(with the Port's stipulation) that the "public records and privilege logs for volumes identified as 'final or near release' on the attached index shall be made available by April 15th, and the balance of the SSLC public records and privilege logs subject of Plaintiff's request shall be made available by May 1, 2008." CP 54.

On April 15, Ms. Lake notified Mr. West that the volumes of records (that were either complete or near completion at the time of the show cause hearing) were ready for Mr. West's review, as well as the privilege logs (exemption logs). CP 770. When Mr. West tried to make appointments to view, Ms. Lake failed to respond to Mr. West's requests for appointment times and failed to confirm proposed appointment times and dates (CP 770-82; *see also* "At first I [Mr. West] was told to make appointments with Lake. She refused to respond to confirm any appointment until it was past the point where I could re-schedule. Then she required me to contact you [Hillary Hunt of the Port], who also completely refused to confirm any appointment. Now I am told that there were appointments scheduled without anyone informing me. This is a complete and unreasonable run-around." CP 781), but Mr. West was finally allowed to review the records on April 24. CP 764.

Frustrated by the Port's and Ms. Lake's failure to confirm or make appointments and by their refusal to provide electronic copies of the

records or of the exemption logs (Mr. West wrote, on April 23, "...there is the matter of the complete refusal of each one of you to comply with the Court's March 28th order and make available a complete copy of all released records and a copy of all exemptions claimed. I have been requesting these in electronic format for over a week with absolutely no response or even acknowledgement of the request." CP 778), Mr. West filed another Motion for Show Cause Order on April 24, noting the hearing for May 2. CP 57.

In his Declaration in support of his motion for show cause,[1] Mr. West stated: "Without the filing of the lists of the exemptions claimed, (properly certified according to counsel's overly technical demands) and the submission of the exempted documents for in camera review the Court cannot proceed with this Case." CP 59. On the same day that Mr. West filed his second motion to show cause, April 24, the Port finally provided him with the privilege logs (exemption logs) that had been due on April 15 for 25 out of the 47 volumes of records. CP 764; *cf.* CP 783.

After reviewing the exemption logs, Mr. West argued to the Trial Court that "[t]he exemptions that have so far been provided contain such irregularities as 'preliminary' exemptions, 'copyright' exemptions, and

[1] Mr. West's show cause motion also sought to consolidate his case in Thurston County against the Port of Olympia, the Port of Tacoma's partner on the SSLC. The Trial Court denied this motion. CP 70.

overly broad and erroneous applications of the attorney client and deliberative process exemptions which fail to meet established standards under the PRA. A full consideration by the Court of all claimed exemptions and in camera review is necessary for the Court to proceed in this matter." CP 65.

Mr. West also attached a copy of a record he had obtained from the Port, and argued to the Trial Court that "this record demonstrates (in paragraph 4) that the withholding of public inspection of records related to the SSLC was a strategy deliberately chosen by the Goodstein Law Group [Ms. Lake's, the Port's counsel's, firm], Foster Pepper, and the Ports of Tacoma and Olympia." CP 64-65. This record, a memo dated November 27, 2007, states:

> When these studies [the Alternative Sites Analysis, the Market Analysis, and the Logistics Center Comparative Analysis – all relating to the SSLC] have been finalized, we are committed and prepared to share the results with a number of external groups, including Friends of Rocky Prairie [a group that, like Mr. West, made a PRA request to the Port seeking SSLC records]. However, we need to acknowledge two issues:...2) the need to fully brief both Commissions on the results of these studies prior to or concurrently with sharing them with external groups.
>
> At this point, our intent is to schedule a joint Commission study session on January 25, 2008. The sole purpose of the study session will be to brief Commissioners on the results of the work done to date on the proposed project and the results of the studies. ....

> Following this timetable will allow staff time during January to ...prepare an effective briefing for Commissioners and interested external groups. Both our legal counselors at Foster Pepper and our general counsel Bob Goodstein [at Goodstein Law Group, Ms. Lake's firm] agree that this is an appropriate course of action conditioned on the premise that no one involved with the project at either port has made other specific commitments or promises that would be at conflict.

CP 68. When the Port was making its promises to Mr. West that it would release records by December 21, January 10, January 17, and January 24, it knew that it would not be releasing records on those dates. CP 68. Rather, both the Ports of Tacoma and Olympia had already decided to withhold records until at least January 25, 2008, the tentatively-scheduled date for the joint Commission study session, so that they could brief the Commissioners on the studies they had commissioned, presumably so that the Commissioners would be able to make their decisions in a vacuum, without input from members of the public. CP 68. In fact, the Port did not release records to Mr. West until January 29. CP 13.

At the hearing on May 2 on Mr. West's motion to show cause, the Trial Court did not reach the issue of whether the Port had violated the PRA by not disclosing records or exemption logs in a timely fashion, by deliberately delaying the disclosure of records, or by destroying records. CP 70. The Trial Court declined to find the Port in contempt for violating

the March 28 order. CP 70. The Trial Court also ordered the Port to provide Mr. West with the exemption logs. CP 823.

Next, on May 8, Mr. West filed a Note of Issue for a hearing on May 16 of a Motion for Reconsideration (of the May 2 order) and for a Show Cause hearing. *See, e.g.*, CP 72. On May 15, Mr. West filed his motion. CP 71-83. In his motion, he requested:

> 2. That the Court actually commence enforcement of the Public Records Act, as required by law, and issue an order requiring the port to produce all records withheld for in camera review, or order disclosure if any asserted exemptions are not filed by 9:00 A.M. on May 16, 2008.
>
> 3. That an order issue finding defendants in noncompliance with the PRA for failing to disclose records or make exemptions in response to the original request prior to the filing of this suit, and due to defendants' continuing misrepresentations and manifest bad faith, their destruction of records, and the deliberate policy of concealment of records evidenced in document No. 002579.

CP 71-72. In support for his motion, Mr. West argued, citing to bates stamps for individual records, that the records released by the Port showed:

> the admitted concealment of records and shortcutting of environmental procedures, and a stated policy of delaying disclosure of records. (See Farrel Apology, and document No. 002579).
>
> It is apparent from the records that have been reviewed that the delay and obstruction of public access is a deliberate port strategy, not a result of administrative difficulty in reviewing records as counsel has falsely maintained. Significantly, document No. 002579

> demonstrates (in paragraph 4) that the withholding of public inspection of and delay in release of records related to the SSLC was a strategy deliberately chosen by the Goodstein Law Group, Foster Pepper, and the Ports of Tacoma and Olympia.

CP 76.

Finally, on May 21, the Port – in response to this, Mr. West's *third* motion for a show cause hearing – provided working copies of the records it was withholding with the Trial Court for in camera review and also filed a copy of its exemption log with the Trial Court. CP 84-376. (This exemption logs contains duplications; CP 88-153 are exact copies of CP 157-222 and CP 154-156 are exact copies of CP 225-227). This filing was more than five months after Mr. West's December 4 public records request and more than three months after the public meeting originally tentatively scheduled for January 25 (*see* CP 68) where the Port released the Logistics Center Comparative Analysis, the Preliminary Market Assessment, and the Alternative Sites Analysis to the public.

In this exemption log, the Port claimed exemptions that were not supported by law. For example, out of the more 345 separate records for which the Port claimed exemptions, the Port included the following:

1. The Port claimed the deliberative process exemption for drafts of 49 records that it had already released to the public or implemented into a record released to the public, including the SSLC Site Analysis that it presented at the study session originally tentatively scheduled for January

25. *See* CP 157, 176, 182, 184-85, 193, 196, 198, 106, 207, 208, 209, 210, 211, 217, 228, 229, 231, 232, 233, 236, 237, 239, 240, 242, 244, 246, 248, 249, 251, 289, 347, 353, 367, 368, 371, 372, and 374. For at least 13 of those records, the Port stated, on the exemption log, that the final version of the record had already been made public. *See* CP 184, 185, 196, 198, 206, 207, 208, 209, 210, and 211.

2. The Port claimed the deliberative process exemption for emails containing staff feedback on qualifications for candidates for the Port's consultant positions. *See* CP 256, 257, 258, 259, 260, 261, 262, 263, 264, 266, 267, 269, 271, 273, and 275. The Port had already hired the consultants by the time the Port claimed the exemption. *See* CP 48: "In August 27, the team of staff and consultants required to complete early feasibility work was put in place."

3. The Port claimed the research data exemption for a number of records, but did not attempt to separate out the non-exempt portions from the exempt portions and produce the non-exempt portions. *See* CP 159, 224, 225, 355, and 486.

On May 30, the Trial Court heard Mr. West's motion, which was set as a motion for reconsideration and for a show cause hearing on whether the Port violated the PRA. *See* CP 71. The Trial Court denied the motion for reconsideration and did not reach the question of whether the Port violated the PRA. *See* RP 05/30/08; CP 866-867. Taking the suggestion made by the Port that the Trial Court appoint a special master (CP 859), the Trial Court announced that it would appoint a special master pursuant to CR 53.3, appointment of masters in discovery matters. RP 05/30/08, p. 6, ll. 6-12. The Trial Court set a hearing for the appointment of the special master. RP 05/30/08, p. 8, ll. 7-16.

The hearing was set for June 13. CP 388. But the judge, the Honorable Frederick Fleming, fell ill, and the court continued the matter for a month, to July 18.[2] CP 388. Mr. West submitted a suggestion for a special master, the attorney Gregg Overstreet. CP 389. Mr. West also filed a notice of issue motion for transfer of the matter to a new judge (owing to the judge's illness), and his motion was likewise set over by the court. CP 390; CP 391. The judge still being ill, the court set over the matter another month, to August 22, and then another month, to September 26. CP 392-393; CP 394-395.

Mr. West filed a motion objecting to the appointment of a discovery special master in a public records case, and argued that the delays occasioned by the Trial Court's failure to hold a show cause hearing (that Mr. West had noted for hearing multiple times) and also by the judge's illness, were essentially serving as "prior restraints." CP 396-410. (Recall that our Supreme Court held "We accept as self-evident the suggestion...that the right to receive information is the fundamental counterpart of the right of free speech." Fritz v. Gorton, 83 Wn.2d 275, 296-97, 517 P.2d 911 (1974)). In this pleading, dated August 20, Mr. West noted that the Port had already made its decision to not pursue

[2] This was the first of four hearings stricken by the Trial Court for illness. In addition, there were three hearings stricken by the Trial Court because Judge Fleming was on the criminal calendar, or for judicial recess.

development of the SSLC, "even long after the decisions about the SSLC have been made." CP 399.[3] Mr. West moved again for a change of judge, owing to the judge's illness. CP 411-13.

The judge was still unwell, and the court again set over the hearings another month, to October 17, 2008. CP 414-16. Judge Fleming, on medical leave, referred the case to Court Administration for reassignment. CP 418. The case was temporarily reassigned for hearing to the Honorable Judge Sergio Armijo. CP 418.

After the case was reassigned for hearing to Judge Armijo, on October 14, months after the Port had announced it was not pursuing the development of the SSLC, the Port released some of the records for which it was earlier claiming exemptions. CP 876-77. Significantly, even though the Port had made the policy decision to not develop the SSLC on the Maytown site, the Port still claimed the deliberative process exemption for certain of the records. CP 880. Mr. John Wolfe, the Deputy Executive Director for the Port of Tacoma, declared that the Port "has abandoned plans to further investigate feasibility and re-development of the site, and now plans to sell the site." CP 419-20. However, even though the Port

[3] Two months after Mr. West filed his motion where he informed the Court that the Port had made its decision not to develop the SSLC on the Maytown site, Mr. John Wolfe, the Deputy Executive Director of the Port of Tacoma, confirmed to the Court that the Port had indeed abandoned plans for the SSLC at Maytown. CP 419.

itself declared that it had abandoned its plans, the Port still claimed exemptions for "draft documents for which no final action was taken." CP 420. The Port continued to claim exemptions for fully 175 separate records, and redactions on another 97. CP 424-581. The Port filed a Suggestion for Special Master, suggesting the Honorable Terry Lukens (Ret.). CP 844. The Port also responded to Mr. West's arguments. CP 878-900.

At the hearing on October 17, Mr. West argued in favor of transfer of the case to a judge who was not on medical leave and who could hear the matter. RP 10/17/08. Mr. West also objected to the appointment of a special master. RP 10/17/08. The Trial Court, Judge Armijo, denied Mr. West's motion. CP 582.

On February 20, 2009, the Port filed a motion for the appointment of a special master, again suggesting Judge Lukens, or, alternatively, Dale Carlisle. CP 903-923. Mr. West objected to the appointment of a special master, CP 584, and the Port moved to strike Mr. West's objection. CP 924-932. At the hearing on March 20, 2009, the Trial Court – Judge Fleming – appointed Judge Lukens as special master over Mr. West's objections. RP 03/20/09; CP 585-87. Mr. West had argued "The Public Records Act requires a judge to review things. I have never seen a case that's been referred to a special master." RP 03/20/09, p. 2, ll. 21-23.

Judge Lukens, the special master, began his review of the records that the Port had filed with the Trial Court a year previous, on May 21, 2008 (CP 84; this itself was over five months after Mr. West had filed suit and over six months after the public records request). During his review, on May 26, 2009, Judge Lukens wrote an email to counsel for the Port and cc'd Mr. West, seeking clarification of the identities of individuals and their relationships to the Port, who were either authors or recipients of records for which the Port was claiming attorney-client privilege. CP 951. The Port responded. CP 947-971.

On July 24, Judge Lukens filed his report. CP 972-980. He recommended the affirmation of every single one of the deliberative process and research data exemptions claimed by the Port, and most of the attorney-client privilege exemptions (denying only those where the communication was sent to an outside consultant hired by the Port on a date before the effective date of the contract between the consultant and the Port). CP 977.

The Port filed a request to modify Judge Lukens' report, and Mr. West responded in opposition. CP 981-88; CP 599-600. Thereafter, Judge Lukens, in a letter dated September 16, 2009, informed the Port and Mr. West that he declined to entertain the Port's request. CP 601.

What happened next is hard to understand. The undersigned has tremendous respect for Mr. West's public records act activism and his abilities as a pro se litigant, but Mr. West engaged in what can be described as "flailing around." CP 1236-1246. It appears that Mr. West, frustrated by the lengthy delays in this – a public records act case – grasped at straws and filed multiple attempts in multiple fora to try to compel some kind of a final, appealable order in this case, or, alternatively, a ruling on Mr. West's public record acts claims.[4] CP 1236-1246.

For example, Mr. West filed an action on October 6, 2009, in Pierce County Superior Court, Cause No. 09-2-14216-1, where the relief that he sought included a "Writ of Quo Warranto" in regard to the "clear and undeniable forfeiture of the office of Pierce County judge by Frederick Fleming due to his failing and refusing to issue a determination in Pierce County Cause No. 08-2-043121-1, where plaintiff is seeking disclosure of public records related to the SSLC fiasco." CP 1236. Likewise, on April 7, 2009, Mr. West composed a letter to Pierce County

[4] While Mr. West's tactics may have been overly confrontational, he was frustrated at the delay of the adjudication of his case resulting from the refusal of the Trial Court to follow RCW 42.56.550(3) and decide whether the Port had violated the PRA at any one of the show cause hearings noted by Mr. West, from the many stricken hearings and the unavailability of the Trial Court.

Prosecuting Attorney Gerald Horne, complaining "the Honorable Judge Fleming has refused to issue a decision [in] a case within 90 days, and has allowed nearly a year to pass without a final determination. Under the express terms of RCW 2.08.240 and Article IV, section 20, such conduct automatically creates a forfeiture of the office." CP 1241.

Mr. West also, on August 9, 2010, filed an action in the U.S. District Court for the Western District of Washington, case no. 10-5547 RJB, making civil rights claims and alleging that the Port and Pierce County stifled his PRA action and "refused to institute a quo warranto against Judge Fleming or transfer the case for prompt adjudication despite a request from plaintiff and Fleming's refusal to enter an order subject to appellate review for over two years." CP 1246. None of these attempts worked, and likely hindered Mr. West rather than helped him.

On December 8, 2010, Judge Fleming's judicial assistant sent a letter to both Mr. West and counsel for the Port. CP 603. The letter informed them of a status conference and stated:

> You are hereby Ordered to appear for a hearing on the above time and date before the undersigned Judge ...on Friday January 7th, 2011 at 9:30AM to determine the status of this case. If no one appears on the above date and time the Court will dismiss this matter on its own motion.

CP 603. On January 7, the date of the status conference, the Port filed a Reply, or Memorandum, in support of dismissal of the case. CP 989-

1002. The Port argued that Mr. West had abandoned the litigation by failing to take any action for more than one year prior to the Trial Court's setting of the "show cause" hearing. CP 1002. The Port also argued that Mr. West had failed to cure his non-action in the 30 days after the Trial Court's notice was sent, and argued that the Trial Court must dismiss the action pursuant to CR 41(b)(1) or (2). CP 1002.

Also on January 7, the Port filed a Memorandum arguing that the Port had complied in full with the PRA and that if the Trial Court did not dismiss the case under CR 41(b)(1) or (2), that the Trial Court should dismiss Mr. West's action on the merits. CP 1003-1037. Finally, on January 7, the counsel for the Port, Ms. Carolyn Lake, filed a declaration in support of dismissal of the case. CP 1043-1292. The declaration included the three pleadings quoted above, from the period (April 7, 2009 – August 9, 2010) when Mr. West was flailing about, grasping at straws and attempting to seek aid in other fora. CP 1235-1276. The Port and the Trial Court knew that Mr. West had been flailing about in other fora. attempting to compel some kind of a final, appealable order in this case, or, alternatively, a ruling in his PRA claims. CP 1235-1276.

The Declarations of Service for the Port's January 7 pleadings show that the Port sent out the Reply and the Declaration by legal messenger on January 7, to be served on Mr. West, and also that the Port

personally delivered the Reply alone to Mr. West, also on January 7. CP 1352-53. There is no indication that the Port served its Memorandum on Mr. West, and *no indication that the Port served anything on Mr. West* ten judicial days before the status conference, in accordance with CR 41. *See, e.g.*, CP 1 – CP 1355.

At the status conference, after Mr. West objected to the late service of the Port's pleadings, the Port argued that the Trial Court should dismiss the matter under CR 41. RP 01/07/11, p. 2, ll. 8-12; 19-20. Mr. West, in response, argued:

> There's no further hearings to schedule in this case, Your Honor. This matter has been awaiting a ruling from the Court. As you may be aware, the Public Records Act was originally adopted by the people of the State of Washington to provide an expedited process for these types of disputes to be resolved. I've brought numerous hearings on show cause. At the last one the Court deferred this matter to a special master and it was supposed to issue a ruling pursuant to that. That hasn't happened. I've done everything possible to try to get this Court to proceed.

RP 01/07/11, p. 3, ll. 12-21. In reply the Port argued, "Here we are in 2011 and Mr. West has not done the one thing that he's been required to do as the plaintiff, which is to file one slip of paper to bring it back before the Court." RP 01/07/11, p. 4, ll. 22-25.

> THE COURT: Do you have an order?
> MS. LAKE: No.

> THE COURT: I'll grant your order. Make sure counsel has a copy. Maybe you'll have to note it up for presentation.
>
> MR. WEST: I respectfully object, Your Honor. This is a travesty of justice. I've never seen such an affront of the democratic rights of the people.

RP 01/07/10, p. 5, ll. 2-9.

That same day, January 7, the date of the status conference, Mr. West filed a Note for Motion Docket, for the presentation of the order. CP 604. Mr. West also filed a notice of appeal to the Supreme Court and a note of issue with the Trial Court for hearing (the remaining issues in the case) for January 21. CP 606-607. Not quite a week later, the Port filed its Notice of Issue for presentation of order. CP 608. Then on January 14, the court sent a letter to Mr. West and the Port's counsel, informing them that Judge Fleming was on the criminal calendar and setting over the matter to January 25. CP 609. Mr. West then filed a (second) Note for Trial, his Declaration, and his Objection to dismissal under CR 41, noting the matter for January 28. CP 610-623.

Mr. West argued that his case should not have been dismissed pursuant to CR 41 without adequately and timely notice, and that the notice issued by the clerk for the January 7 status conference "was in no way, shape, or form a Clerk's motion to dismiss for failure to prosecute under CR 41." CP 612. "As the letter from the clerk clearly states on its

face, it was a letter for a status conference, not a motion to dismiss under CR 41." CP 612. "This understanding was expressly confirmed by both the Pierce County Clerk when plaintiff called to inquire as to the basis for the letter, and Judge Fleming's Clerk, who, on January 7, 2011, prior to the hearing, stated that the purpose of the status conference was to arrange for and schedule further proceedings in what had become a "Black Hole" case." CP 612.

Mr. West further argued: "Plaintiff has not failed to prosecute this case, and has repeatedly noted this matter for hearing or "trial" as this term applies to the PRA. In repeated pleadings the issue of disclosure of the Port's records has been set for "trial" and several issues issued compelling disclosure by the Port of Tacoma. Following the last Show cause hearing this matter was referred to a special master, and to the best of plaintiff's knowledge all that was remaining was the entry of an order by the Court, which the Court refused to enter. In fact, the failure of the Court to act to enter a ruling on the previous order to show cause within 90 days has been the subject of repeated successive complaints and proceedings by plaintiff in numerous other courts and administrative Boards." CP 613.

> Plaintiff has done everything possible and practical to attempt to induce the Honorable Judge Fleming to proceed in this case, in two ancillary proceedings as well as the three successive judicial conduct commission complaints objecting to the failure of the Court to rule

> within 90 days of the case having been set for trial. Plaintiff has also attempted to submit notices of issue to the Clerk of the Court, but these have been disregarded or returned unfilled, as have numerous other pleadings sent to the Pierce County Court.

CP 613. "In any event, Plaintiff appeared as directed at the status conference on January 7 and was astounded to be served with a motion to dismiss from counsel. As plaintiff filed a notice of issue on January 7...for any further proceedings that are necessary in this case, and has filed this pleading as a second, more specific notice for "Trial", no possible interpretation of CR 41 allows for the entry of an order of dismissal for failure to prosecute, since there has been no such failure, and the plaintiff's notice of issue was served the same day that counsel notified plaintiff of their motion to dismiss." CP 615.

After Mr. West filed this pleading, the clerk sent him a notice informing him that Judge Fleming was at recess on January 28, the noted date, and set over the motion for more than a month, to March 4. CP 623. Meanwhile, on January 25, the Trial Court signed the Port's Order of Dismissal. CP 626-29. In the order, the Trial Court found "On December 8, 2010, this Court noted a hearing based on the failure to prosecute /lack of case activity" and "The parties were provide with more than thirty (3) days advance written notice of the hearing." CP 627. The Trial Court also found that "Following the Court's Notice, Petitioner Mr. West did not note

the matter for trial, show cause hearing or otherwise take any action on the case." CP 627.

Next, Mr. West filed a Motion to Vacate, noting it for February 25. CP 630-652; CP 653. Mr. West argued that the notice he got from the clerk was, on its face, a notice of a status conference, and was not a clerk's motion to dismiss. CP 632. In the event that there was a clerk's motion to dismiss, Mr. West did not receive it. "As a party who never received any proper notice from the clerk prior to January 7, and who promptly noted the matter from trial, West is expressly entitled to reinstatement under CR 41(2)(b)." CP 633. After filing his motion to vacate, Mr. West received another notice from the court, stating that Judge Fleming was at recess and setting over the matter to March 18. CP 654.

Thereafter, believing Judge Fleming to be at recess, Mr. West did not appear on March 4, thinking the hearing to have been set over to March 18. CP 672. Counsel for the Port attended the hearing on March 4 and the Trial Court signed the Port's proposed order denying Mr. West's motion to vacate. CP 657-CP 661. Mr. West timely appealed.

IV. ARGUMENT

"Our broad PRA exists to ensure that the public maintains control over their government, and we will not deny our citizenry access to a whole class of possibly important government information." O'Neill v.

City of Shoreline, 170 Wn.2d 138, 147 240 P.3d 1149 (2010). In dismissing Mr. West's case without proper notice the Trial Court denied Mr. West access to a whole class of possibly important government information.

> The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. [RCW 42.56.030]. Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." Letter to W.T. Barry, Aug. 4, 1822, 9 *The Writings of James Madison* 103 (Gaillard Hunt, ed. 1910).

Progressive Animal Welfare Soc. v. Univ. of Washington, 125 Wn.2d 243, 241, 884 P.2d 592 (1994) ("PAWS"). This Court should reverse the Trial Court's dismissal and remand Mr. West's case back to the superior court.

Nor was the dismissal the only error the Trial Court made; the Trial Court repeatedly declined to conduct a show cause hearing and determine whether the Port violated the Public Records Act in responding to Mr. West's request and the Trial Court erred in appointing a discovery master to decide the ultimate issues in the case. Upon remand, this Court should direct the Trial Court to conduct the show cause hearing, determine

whether a violation occurred, and review in camera the records reviewed by the special master.

A. Standard of Review

Where the Trial Court has jurisdiction over the parties and the subject matter, a mistaken belief that an action should be dismissed for want of prosecution would be an error of law. State ex rel. Heyes v. Superior Court, 12 Wn.2d 430, 433, 121 P.2d 960 (1942). This Court reviews questions of law de novo. Likewise, judicial review of all agency actions under the Public Records Act chapter is de novo (and the Trial Court did not review the Port's actions below), as is the question of construction and interpretation of statutes. RCW 42.56.550(3); State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 777, 380 P.2d 735 (1963). Finally, while the Trial Court erred in making findings of fact 7, 8, and 9 in the Order of Dismissal, this Court is not bound by those findings of fact, since the record here consists solely of affidavits, memoranda of law, and other documentary evidence, nor did the Trial Court see or hear testimony requiring it to assess credibility or competency of witnesses, or to weigh evidence. PAWS, 125 Wn.2d at 252-53. This Court should review all issues de novo.

B. The Trial Court Erred in Dismissing Mr. West's Case

CR 41(b) provides for involuntary dismissal of a case in two separate and distinct circumstances. Each has different procedural rules. The Trial Court erred in conflating the two.

CR 41(b)(1) provides that a party may move for dismissal for want of prosecution. That is what the Port did when it filed its "Reply" arguing for dismissal under CR 41(b)(1) or (2), and when it supported its Reply with the Declaration of Carolyn Lake. However, CR 41(b)(1) requires that "Such motion to dismiss shall come on for hearing only after 10 days' notice to the adverse party." Here, the Port's Declarations of Service, as well as Mr. West's objection at the outset of the status conference, show that Mr. West was served with the Port's motion on the morning of the status conference. Mr. West did not get the 10 days' notice before the Trial Court dismissed the action. And it is quite clear that the Trial Court dismissed the action pursuant to CR 41(b)(1); the Order of Dismissal signed by the Trial Court cites to CR 41(b)(1) and the transcript shows the Trial Court saying to Ms. Lake, "I'll grant your order." CP 628; RP 01/07/11, p. 5, l. 4.

CR 41(b)(1) further provides that "If the case is noted for trial before the hearing on the motion, the action shall not be dismissed." The ten days should have started running when Mr. West was served with the

Port's "Reply," that is, with the Port's motion. Mr. West noted the action for trial the same day that Mr. West was served with the Port's "Reply." Mr. West's noting the case for trial then was timely under CR 41(b)(1), since the "hearing" on January 7 was not a hearing on the Port's motion, lacking the 10 days required by the rule. In the case of Wallace v. Evans, 131 Wn.2d 572, 574, 934 P.2d 662 (1997), the Supreme Court affirmed a trial court who declined to dismiss a case concluding that under CR 41(b)(1), the court had no authority to dismiss the case after respondents had noted the matter for trial following the petitioners' motion to dismiss for want of prosecution.

On the other hand, CR 41(b)(2) provides for dismissal on the clerk's motion. This specifically provides that "the clerk of the superior court shall notify the attorneys of records by mail that the court will dismiss the case for want of prosecution unless, within 30 days following the mailing of such notice, a party takes action of record or files a status report with the court indicating the reason for inactivity and projecting future activity and a case completion date." Here, the notice sent by Judge Fleming's judicial assistant, a *notice of a status conference*, did not comply with the requirements of CR 41(b)(2).

> This is to confirm the following status conference:...The court requires all parties to be personally present unless excused by the Judge. You are hereby Ordered to appear

> for a hearing on the above time and date before the undersigned Judge in Courtroom 533 of the County City Building, 930 Tacoma Avenue, Tacoma, Washington 98402 on Friday January 7th, 2011 at 9:30AM to determine the status of this case. If no one appears on the above date and time the Court will dismiss this matter on its own motion.

CP 603. Mr. West was on notice, from this letter from the judicial assistant, that the Trial Court would dismiss the matter on its own motion *unless* Mr. West appeared at the *status conference*. The Trial Court erred in making finding of fact number 7, "On December 8, 2010, this Court noted a hearing based on the failure to prosecute /lack of case activity." CP 627. Instead, the Court should have found that on December 8, it scheduled a status conference.

Mr. West had no notice – pursuant to CR 41(b)(2)(A) – that he had to take an action of record or file a status report with the Trial Court within 30 days of the mailing of the notice, or the Trial Court would dismiss the case. Mr. West did not have the notice required by the rule. It was also error for the Trial Court to make finding of fact number 8, "The parties were provided with more than thirty (30) days advance written notice of the hearing." The parties had exactly 30 days notice of the status conference, not more.

At any rate, Mr. West – even supposing the notice to be adequate – did take "action of record." It was error for the Trial Court to make

finding of fact number 9, "Following the Court's notice, Petitioner Mr. West did not note the matter for trial, show cause hearing or otherwise take any action on the case." He appeared at the status conference as directed by the judicial assistant *and* he noted the matter for trial, both on January 7, within 30 days of the notice date. "We hold that the applicable notice date to compute the starting time of the 30 days under CR 41(b)(2)(A) is the date by which all parties' counsel had been notified. [The party] noted the case for trial within 30 days of this date. Therefore, it was improper for the court to order dismissal under CR 41(b)(2)." Kirschner v. Worden Orchard Corp., 48 Wn. App. 506, 510, 739 P.2d 119 (1987). CR 41(b)(2) does not require action of record to take place before hearing, only within 30 days of the notice date. By requiring Mr. West to have taken his action of record before the "hearing" on the status conference, the Trial Court impermissibly conflated CR 41(b)(1) and CR 41(b)(2), even supposing the notice to Mr. West to have been adequate. And since the notice to Mr. West was inadequate, Mr. West was entitled to reinstatement under CR 41(b)(2)(B) ("A party who does not receive the clerk's notice [of impending dismissal for want of prosecution] shall be entitled to reinstatement of the case, without cost, upon motion brought within a reasonable time after learning of the dismissal"), which the Trial Court erred in not granting him.

The Trial Court did not dismiss the action pursuant to CR 41(b)(2)(D) ("This rule is not a limitation upon any other power that the court may have to dismiss or reinstate any action upon motion or otherwise"); that provision is entirely absent from the order of dismissal. CP 628. But even if the Trial Court had done so, that would have been error. "A court of general jurisdiction has the inherent power to dismiss actions for lack of prosecution, but only when no court rule or statute governs the circumstances presented." Snohomish County v. Thorp Meats, 110 Wn.2d 163, 166-67, 750 P.2d 1251 (1988) (internal footnote omitted). Here, Mr. West had taken no action of record *in this case* (in contrast to his attempts in other fora) for more than a year, so CR 41(b)(1) and (2)(A) govern, not CR 41(b)(2)(D).

C. The Trial Court Erred in Refusing to Conduct a Show Cause Hearing and Determine if the Port Violated the PRA

Mr. West noted the case for a show cause hearing multiple times. A show cause hearing is appropriate in the PRA context. RCW 42.56.550(1) and (2) provide for a show cause hearing on why a public agency has refused to allow inspection or copying of a specific public record or class of records, and whether the estimated time it provided for response was reasonable. RCW 42.56.550(3) allows for a hearing based solely on affidavits. But the Trial Court refused to consider whether the

Port had violated the PRA, even though the Port's violations were apparent at the times that Mr. West noted up the show cause hearings.

For example, the Port responded to Mr. West by giving him an expanding series of promised dates by which it would provide the first installment of the records, none of which promises it kept. Nor did the Port provide a complete exemption log until five months after Mr. West's request.

> The act sets forth strict standards for administrators to meet. "Responses to requests for public records shall be made promptly by agencies.[....] Denials of requests must be accompanied by a written statement of the specific reasons therefor." [RCW 42.56.520]. This statement "shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." [RCW 42.56.210(3)]. If the agency fails to provide the required written statement by the end of the second business day following denial of inspection, review of the records in question can be submitted directly to the superior court. [RCW 42.56.520] and [RCW 42.56.550(2)].

Hearst Corp. v. Hoppe, 90 Wn.2d 123, 139, 580 P.2d 246 (1978). "Strict enforcement of these provisions where warranted should discourage improper denial of access to public records and adherence to the goals and procedures dictated by the statute." Hearst Corp., 90 Wn.2d at 140.

The Port continually argued to the Trial Court that it had properly and completely responded to Mr. West's request. The Port is wrong. It

did not produce the records in a timely fashion, nor did it timely disclose the privilege log of the withheld records. "[T]he remedial provisions of the PRA are triggered when an agency fails to properly disclose and produce records, and any intervening disclosure serves only to stop the clock on daily penalties, rather than to eviscerate the remedial provisions altogether." Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 727, 261 P.3d 119 (2011). Further, the Port's own records showed that the Port destroyed responsive records to Mr. West's request and that the Port deliberately delayed its response to PRA requesters like Mr. West as a matter of policy. ("When these studies have been finalized, we are committed and prepared to share the results with a number of external groups, including Friends of Rocky Prairie. However, we need to acknowledge...the need to fully brief both Commissions on the results of these studies prior to or concurrently with sharing them with external groups." CP 68). *See also* CP 76.

The Port also continually argued to the Trial Court that Mr. West prematurely filed suit. This is not correct, either. "Whether suit is reasonably regarded as necessary must be objectively determined, from the point of view of the requesting party. We agree with the [responding agency] that a history of prompt responses to previous requests may be relevant. But after four attempts to obtain the same information, the

likelihood of inadvertent agency error was obviously low, the likelihood of a timely response was obviously nil, and there was nothing to indicate the [requestor's] request would ever be honored. Viewed objectively from the [requestor's] point of view, this lawsuit was reasonably regarded as necessary." Violante v. King County Fire Dist. No. 20, 114 Wn. App. 565, 571, 59 P.3d 109 (2002).

Here, the Port made three failed promises to produce records; the likelihood of a timely response was obviously nil and there was nothing to indicate that Mr. West's request would ever be honored. Moreover, a record that the Port did produce to Mr. West showed that this failure to respond promptly to Mr. West was the result of a deliberate policy decision by the Port, to withhold public records from the public until the Port had its chance to put its own spin on the records when it released them at the study session originally tentatively scheduled for January 25. ("When these studies have been finalized, we are committed and prepared to share the results with a number of external groups, including Friends of Rocky Prairie. However, we need to acknowledge...the need to fully brief both Commissions on the results of these studies prior to or concurrently with sharing them with external groups." CP 68).

Violante was partially abrogated by Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 103-04, 117 P.3d 1117 (2005);

Spokane Research stands for the proposition that a requestor's lawsuit does not have to *cause* the release of the records in order for the requestor to be the prevailing party, instead, "prevailing" relates to the legal question of whether the records should have been disclosed on request. 155 Wn.2d at 103. Here, of course, Mr. West's lawsuit actually *did* cause the release of the records, even though all he must show to prevail is whether the records should have been disclosed on request.

Not only can Mr. West show that the records should have been disclosed on request, but he can also show that the Port's exemption log was lacking. "In order to ensure compliance with the statute and to create an adequate record for a reviewing court, an agency's response to a requester must include specific means of identifying any individual records which are being withheld in their entirety." PAWS, 125 Wn.2d at 271. "The identifying information need not be elaborate, but should include the type of record, its date and number of pages, and unless otherwise protected, the author and recipient...." PAWS, 125 Wn.2d at 271, n. 18. The Port did not include dates, page numbers, and the names of authors and recipients in its exemption logs. *See* CP 88-376; CP 430-581.

Finally, Mr. West can show that the Port's claimed exemptions were not supported by law. For example, the Port claimed the research

data exemption for a number of records, (RCW 42.56.270(1)), but the Port did not attempt to separate and produce any non-exempt portion of any of the studies for which it was claiming the exemption, in contravention of Servais v. Port of Bellingham, 127 Wn.2d 820, 833, 904 P.2d 1124 (1995). *See* CP 159, 224, 225, 355, and 486.

Many of the Port's claimed exemptions were for deliberative process (RCW 42.56.280), but the Port claimed exemptions for draft versions of records that it had already released in their final form to the public, that is, the Port was claiming the deliberative process exemption for records that it had already implemented as policy. This is prohibited, even by the case upon which the Port places the most reliance, Am. Civil Liberties Union of Washington v. City of Seattle, 121 Wn. App. 544, 554, 89 P.3d 295 (2004) ("ACLU") (even in the context of ongoing labor negotiations, records where opinions are expressed or policies are formulated are only protected up until the moment when they are presented to the agency in question for adoption). *See also* West v. Port of Olympia, 146 Wn. App. at 116-118; PAWS, 125 Wn.2d at 256-57.

Likewise, after the Port decided to abandon its plans to develop the SSLC at the Maytown site, it should have released *all* the records for which it had claimed the deliberative process exemption (that did not also fall under another exemption), because the Maytown site had been

presented to the two Port Commissions for adoption and they had rejected it. Instead, however, the Port continued to claim the deliberative process exemption, even to the special master Judge Lukens.

One of the most troubling aspects of the Port's exemption log is its parroting of a phrase taken out of context from the ACLU opinion for each time it cites the deliberative process exemption: "This ongoing process involves negotiators and City officials in what is the essence of the deliberative process. Until the results of this policy-making process are presented to the city council for adoption, politicization and media comments will by definition inhibit the delicate balance – the give-and-take of the City's positions on issues concerning the police department." ACLU, 121 Wn. App. at 554.

The Port quotes this line as if media attention and public scrutiny of a public agency are by definition an evil to be guarded against, and have no benefit in our open democratic society. But there is a balance to be struck, and the Port fails to realize that the sensitive negotiations in ACLU are factually different from the case of the SSLC, which was a poorly-planned, ham-handedly implemented, environmentally questionable, and outrageously expensive boondoggle that quite frankly could benefit from the glare of a little media attention and public scrutiny.

> Achieving an informed citizenry is a goal sometimes counterpoised against other important societal aims. Indeed, as the act recognizes, society's interest in an open government can conflict with its interest in protecting personal privacy rights and with the public need for preserving the confidentiality of criminal investigatory matters, among other concerns. Though tensions among these competing interests are characteristic of a democratic society, their resolution lies in providing a workable formula which encompasses, balances and appropriately protects all interests, while placing emphasis on responsible disclosure. It is this task of accommodating opposing concerns, with disclosure as the primary objective, that the state freedom of information act seeks to accomplish.

Spokane Police Guild v. Washington State Liquor Control Bd., 112 Wn.2d 30, 33-34, 769 P.2d 283 (1989).

The Trial Court could have and should have conducted a show cause hearing, as thrice noted by Mr. West, and could have and should have found that the Port was in violation of the PRA, both in the inadequacy and tardiness of its response, and in its overreaching claiming of exemptions contrary to caselaw. This Court should remand the case back to the superior court for a show cause hearing.

D. The Trial Court Erred in Appointing a Special Master

The Trial Court erred in appointing a special master under CR 53.3, a discovery rule. This rule provides: "The court in which any action is pending may appoint a special master either to preside at depositions or to adjudicate discovery disputes, or both. Such appointment may be made,

for good cause shown, upon the request of any party in pending litigation or upon the court's own motion." CR 53.3(a).

There is a difference between discovery requests and requests made to public agencies for public records. For one, "We agree that the public records act was not intended to be used as a tool for pretrial discovery. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n. 10, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975) (FOIA "is fundamentally designed to inform the public about agency action and not to benefit private litigants")." Limstrom v. Ladenburg, 136 Wn.2d 595, 614 n. 9, 963 P.2d 869 (1998). And there is a difference between a special master resolving a discovery dispute and a judge deciding a public record act case. When a special master resolves a discovery dispute, the master is making a preliminary determination – serving a gatekeeper function – about what evidence the trial court is going to consider when it decides the ultimate issues in the case.

In contrast, when a judge decides a public record act case, the judge is not serving as a gatekeeper; the judge is actually deciding the ultimate issues in the case as required by RCW 42.56.550(3). "The statutory scheme establishes a positive duty to disclose public records unless they fall within the specific exemptions. Whether or not they do is a function reserved for the judiciary by the act. The court is the proper

body to determine the construction and interpretation of statutes. State ex rel. O'Connell v. Slavin, 75 Wn.2d 554, 452 P.2d 943 (1969); Humiston, 61 Wn.2d at 777." Hearst Corp., 90 Wn.2d at 130.

Moreover, CR 53.3 provides that a special master may be, at the direction of the Court, compensated by the parties. This could be cost prohibitive to public records requestors and could have a chilling effect on their willingness to enforce the PRA in the courts.

In this case, the Trial Court erred in appointing a special master to decide the ultimate issues in the case, a function reserved for the judiciary by the PRA (it is immaterial that the discovery master here is actually a retired judge; Judge Lukens was not the judge of the case). And the special master erred in affirming all the deliberative process claims and research data claims of the Port, without, it appears, considering whether the Port could have disclosed any non-exempt portion of the research data (under Servais, 127 Wn.2d at 833) or whether the Port had implemented any of the opinions into policy by presenting them to the Port Commission for adoption (under ACLU, 121 Wn. App. at 554). This Court should remand the case back to the superior court for the Trial Court to review the claimed exemptions *in camera*.

E. Request for Attorney Fees

Mr. West was representing himself pro se below. He properly did not request attorney fees and costs in his complaint. Now Mr. West is represented by counsel, and requests attorney fees on appeal pursuant to RAP 18.1 and RCW 42.56.550(4), and upon remand to the Trial Court.

V. CONCLUSION

This is a case about delay. The Port deliberately delayed in its response to Mr. West's public records request and in its production of the exemption log to Mr. West and to the Trial Court. The Trial Court – due in part to unavoidable illness and in part due to error (it was error to not conduct the show cause hearing and to determine whether the Port violated the PRA) – delayed in its adjudication of the case and in its appointment of the special master, which in and of itself was another error. Then, frustrated with the delays in the case, Mr. West attempted to seek aid in other fora, which attempts were unsuccessful. Meanwhile, the Trial Court scheduled a status conference at which the Trial Court erred in dismissing Mr. West's case for want of prosecution.

This Court should reverse the Trial Court's dismissal and remand the case back to superior court for determination, by the Trial Court, of the ultimate issues in the case: whether the Port violated the Public Records

Act and whether it properly claimed exemptions, and for determination of penalties and fees.

RESPECTFULLY submitted this 8th day of November, 2012.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury as follows:

On November 8, 2012, I caused a copy of the foregoing document to be filed with the Court of Appeals, Division II and to be sent electronically and hard copy delivered to the party as listed below:

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