No. 43876-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

(Thurston County Superior Court Cause No. 07-2-01198-3)

ARTHUR WEST and JERRY LEE DIERKER,

Appellants et al.,

v.

PORT OF OLYMPIA, et al.,

Respondents

APPELLANT DIERKER'S CONSOLIDATED REPLY BRIEF IN REPLY TO RESPONDENTS' TWO CONSOLIDATED RESPONSE BRIEFS

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I. INTRODUCTION

Mr. Dierker makes this Consolidated Reply Brief to Respondents' two "consolidated/joined" Response Briefs filed in this appeal, though, as Mr. Dierker's Motion to Strike noted, the 80 pages of the 2 Response Briefs do not appear to comply with CR 8(d) as "responses" to the arguments, errors and issues noted in Appellants' Opening Briefs, but instead appear to constitute Respondents' unlawful, procedurally barred, and improper "Appeals" or "cross-appeals" of portions of these three different major decisions of the Superior Court in this case, concerning the Superior Court's denials of Respondents' lost claims for dismissal for both the PRA and "nonPRA" claims in this case, that are filed in violation of RAP 5. (See Motion to Strike and attached Motion for Leave to File an Overlength Reply Brief).

In general, Mr. Dierker's' Consolidated Reply Brief here joins with Appellant Arthur West's Reply Brief on the claims they have in common, though, where necessary, he will add certain relevant facts and law to make other factual or legal arguments relevant to his claims in this case, to show that the Superior Court and the Port knowingly made numerous erroneous ultra vires actions in this case which were outside of their legal jurisdiction and authority to do, where they had no impartiality and acted prejudicially, and thereby, they were acting without and in abuse of their legal authority and discretion, in violation of the law and the Constitutions of this state and the United States, as the attached Supplemental Authority of the Port's Ms. Lake shows. (July 9, 2013 "Response in Opposition to Notice of Intent for Public Lease to PacifiClean", pages 1-12).

This is an appeal of the Superior Courts July 27, 2012 final Order of Dismissal of all claims in this case for a "want of prosecution" of the public records part of Appellants' SEPA claims made in this Superior Court judicial appeal of a Port SEPA action, et seq., under SEPA (State Environmental Policy Act RCW 43.21C, WAC 197-11) and SEPA's a portion of the statutory scheme at WAC 197-11-504(1) incorporating the Public Records Act (PRA, RCW 42.56, formerly part of RCW 42.17), made under the Administrative Procedures Act. (APA, RCW 34.05), a Statutory Writ of Review, and under Constitutional provisions and other laws, when the record in this case shows that the delays in the Superior Court's hearing the PRA withheld records case were caused by erroneous actions of the Port, Weyerhaeuser and Superior Court, **not** the Appellants. Id.

The PRA, APA, SEPA, the Federal and State Constitutions, discovery rules in the Court Rules, common law, and other laws under which Ms. Lake and the Port had legal duties to disclose

all of this relevant public records requested and necessary for the Port's Administrative Record to be completed in timely manner. Id. However, all of the delays of the hearing of the PRA claims in this case lead as "Fruit of the Poisoned Tree" from: 1) the Port's Attorney's failures to properly and timely disclose to Appellants requested public records relevant to the large Port/Weyerhaeuser project and the claims in this Court lawsuit in this case; 2) the Port's Attorney's ultra vires use of the PRA to withhold these relevant records from Appellants, the public, other agencies with jurisdiction, and the Courts; 3) by the Port's Attorney's ultra vires concealing of relevant public records about the Port's actions complained of here; 4) by the Port's Attorney's ultra vires "piecemealing" of the project as part of her falsification of the Port's "Administrative Records" filed in this and other cases in violation of the APA's RCW 34.05, OPRA's RCW 40.16.010, RCW 40.16.020, and RCW 40.16.030, and RCW 43.21C; and by the Port's and Weyerhaeuser's Attorneys' ultra vires actions and three ultra vires motions to get the Superior Court to also act in an ultra vires manner to improperly bifurcate the hearing of the PRA claims from the hearing of the alleged "nonPRA" claims, when violating Judge Pomerory's Case Scheduling Order to get the Judge Wickham to hear the SEPA claims while he delayed and denied Appellants any hearing the PRA claims in this case for 5 years, until his subordinate, District Court Judge Sam Meyer could act ultra vires to dismiss this case without any any hearing the PRA claims in this case. Thereby, all of the delay in this denied hearing of these public records claims and the ultra vires bifurcation and both ultra vires dismissals in this case, are merely "Poisoned Fruits of a Poisoned Tree" leading from the Port's failure to timely disclose a complete and un-edited public record for the SEPA actions the Port took on this project. (Id.; see Black's Law Dictionary, 5th Ed., pages 603, 1365).

As noted, the Superior Court's granting of the Port's Attorney's motion to dismiss for Appellants' alleged delay of the hearing of the PRA claims causing a "want of prosecution" was ultra vires when Appellants had already "cured" this alleged "want of prosecution" pursuant to CR 41(b)(1) and other law, when both Appellants filed Notices of Issue to set the Show Cause Hearing of their PRA claims and made motions for the Superior Court to set trial dates in this case. (Id.).

The wording of Superior Court's Judge Sam Meyer's July 27, 2012 final Order of Dismissal's Introduction section on the claims for dismissal made in the Port's Motion to Dismiss and the Conclusions of Law section on this Superior Court's Decision in this case show that instead of properly acting under CR 41(b)(1) to deny the motion to dismiss because Appellants had

both cured this "want of prosecution", and instead of the Superior Court stating in the Order's conclusions of law that the Superior Court was granting this dismissal under common law as a "sanction" under the Superior Court's inherent authority as the Respondents' claimed, the Superior Court instead granted the Port's motion to dismiss based upon the Port attorneys' of unsubstantiated and erroneous claim that the Superior Court could grant dismissal as a sanction under the "Agency Penalty" provision of the Public Records Act in RCW 42.56.550, a clearly ulrta vires action. (Id.; see Dierker's Motion to Strike, et al.; see attached supplemental authority)

However, as the record in this case shows, Judge Meyer granted this dismissal covering all of the various claims made by Appellants in this case, without Judge Meyer ever having any of the withheld PRA records about this project and without any of the even incomplete and falsified Port Administrative Record in this case, since the Port's Attorney had not refiled these required records with the Superior Court until 5 months **after this Order of Dismissal was signed,** all while the Port continued to withhold these PRA records from the Port Administrative Record for this case, the Superior Court and Appellants, which the Superior Court was supposed to be completely review before the Superior Court's ultra vires dismissal of the PRA claims in this final dismissal of all claims in this case. (Id., supra; see supplemental authority).

Respondents' new appeal arguments on their lost claims in both the Superior Court PRA and "nonPRA" dismissals in this case, and the unlawful, procedurally barred, and improper "Appeals" or "cross-appeals" without timely filed Notices of Appeal or notice of cross-appeal required by RAP 5, appear to deny this Court of Appeals any legal jurisdiction to consider such an Respondents' "Appeal", appeared to require this Court to "strike" these "Opening Briefs" made for Respondents' "Appeal" of those lost claims that was fraudulently masqueraded and concealed by Respondents as being their two "Response Briefs" for "responding" to Appellants' Opening Briefs filed in this appeal, and requires this Court to grant this appeal, as noted. (Id.; see also Mr. Dierker's Motion to Strike, et al.).

Further, as the record in this case shows, this appeal includes the appeal of Judge Chris Wickham's 4 year earlier dismissal of the misnamed "nonPRA" claims for Appellants ' alleged "lack of standing" in April 25, 2008, with him preventing any prior Show Cause Hearing of the PRA claims for completing the Port Administrative Record required for this case, due to the Respondents' repeated misrepresentations to Judge Wickham of Judge Pomeroy's August 24,

2007 Case Scheduling Order which was part of her Order Granting Respondents' Motion to Bifurcate and denying the Stay the PRA claims in this case, which caused an admittedly prejudiced member of the local Chamber of Commerce promoting this project of these two other members of the local Chamber of Commerce, the Port and Weyerhaeuser Respondents, Judge Chris Wickham, to set hearings for the Motions to Dismiss the "nonPRA" claims, without ever setting any hearing of the PRA claims Show Cause Hearing at all and without setting the PRA claims hearing at least two weeks **before** the "nonPRA" claims hearing, in violation of the prior law of this case in Judge Pomeroy's August 24, 2007 Case Scheduling Order, despite Appellants repeated opposing pleadings and objections, and even Affidavits of Prejudice for Cause against Judge Wickham, which appeared to violate the standards of review, the State Environmental Policy Act (SEPA), the Public Records Act (PRA), the Appearance of Fairness Doctrine, Court Rules, and Constitutional Law. (See CP 2587-2608; CP 2414-2421; CP 2581 -2586; CP 2117, et seq.; see AR 2341).

Also, this appeal includes an appeal of Judge Pomeroy's August 24, 2007 Order Granting Respondents' Motion to Bifurcate the PRA claims from the alleged "nonPRA" claims in this case (CP 71-72), which though it denied the Stay of the PRA claims in this case with her Case Scheduling Order requiring the Court's setting the PRA claims Show Cause hearing at least two weeks **before** the hearing of the motions to dismiss the "nonPRA" claims (CP 69-70; CP 1797-1799), partly based upon Appellants arguments about the Port's withholding of relevant evidence from the Administrative Record, that was in the Port's relevant public records on this project that Respondents withheld from the Superior Court, Appellants, and from this Court of Appeals in this case. This was done by the Port Attorney's known improper habits, customs, procedures, and/or business practices to misuse the PRA's "exemptions to disclosure" and misuse SEPA to improperly "piecemeal" this large project's integral pieces into about twenty separated parts for piecemealed agency SEPA and project review and approval actions, in order for the Respondents' to be able to "compartmentalize" all evidence about this project's review and approvals, in order to for the Respondents' or their Port attorney to fraudulently conceal relevant evidence from Administrative Records, agency SEPA action records, agency project approval actions records, the public, the Courts, other agencies with jurisdiction, and such interested parties like Appellants here, to conceal her clients' improper, unlawful and illegal actions by her falsification of such Administrative Records required for review of her clients improper actions that this same attorney

advised to do in the first place and/or did using her claim of client's legal authority to act, and thereby, ultimately preventing any party, court or agency from being able to see the whole project and all of the related impacts leading from the whole project in one single SEPA and project review case, instead of the almost twenty cases reviewed by agencies and/or the Courts, all done **without any complete agency record about this entire project,** cause by Respondents' "piecemealing" and concealing of these relevant agency records, and thereby, while the PRA claims in this case should be reversed and remanded for proper proceedings for the reasons noted in Mr. West's Reply Brief, Judge Wickham's dismissal of the "nonPRA" claims in this case and Judge Pomeroy's bifurcation of the PRA claims from the so-called "nonPRA" claims in this case, should also be reversed and remanded barring such bifurcation as improper under the law, and requiring the Port's Attorney's preparation of a new "unpiecemealed", completed, and unfalsified Port Administrative Record covering all of the integral parts of this entire project in this case, and requiring a new Superior Court review of the "nonPRA" claims in this case **to be done at least 4 weeks after the Port's disclosure of all withheld public records relevant to this project and its approval** and the Port Attorney's filing of a new corrected, "unpiecemealed" and unfalsified Port Administrative Record covering all of the integral parts of this entire project and all of the agency actions taken to approve all of these parts of this same project in a single Port Administrative Record for review of all of these actions in one single case, as requires for such cases pursuant to SEPA's RCW 43.21C.075 and SEPA's WAC 197-11-504's "incorporation" of the PRA and other laws into SEPA's "statutory scheme" which show that Judge Pomeroy lacked jurisdiction to consider Respondents' motion to bifurcate and stay the PRA claims to allow Judge Wickham's hearing of the motions to dismiss "nonPRA" claims without the evidence withheld by the Port's improper use PRA "exemptions" and SEPA to hide evidence showing the project was much larger and had much impacts than those made Respondents' SEPA and project approval actions taken to approve the project in this case.

II. STATEMENT OF THE CASE IN REPLY

Despite the claims of Respondents, this case is about the Port attorney's improper piecemealing this project its record and its review into numerous integral pieces to fraudulently conceal the Port's agency records on the actual cumulative costs, impacts, and goals relevant to the large Port/Weyerhaeuser project in this case, which the Port's fraudulent, unlawful and criminal

refusals to properly disclose to Appellants requested Port public records relevant to the large Port/Weyerhaeuser project in this case, and the Port's improperly using the PRA to withhold these records from Appellants, the public, other agencies with jurisdiction, and the Courts to prevent any proper review of this project, including the Port's Attorney's falsification of the Port's "Administrative Records" filed in this and other cases in violation of the Administrative Procedures Act RCW 34.05, Public Documents and Records Act RCW 40.16.010, RCW 40.16.020, and RCW 40.16.030, and the State Environmental Policy Act RCW 43.21C, beside violating the PRA. (Supra; see also e.g. - attached copies of Public Documents and Records Act RCW 40.16.010, RCW 40.16.020, and RCW 40.16.030.

The Port's Response Brief, joined by Weyerhaeuser's Response Brief, contains both Respondents' entire appellate argument against Appellants' appeal arguments and claims on the July 27, 2012 Order of Dismissal, and the Port's Response Brief starts at page 1 with the Port's "Restatement of the Issue" in this appeal:

"Whether under common law that establishes a trial court's "unquestionable," discretionary authority to manage its own affairs up to and including **the dismissal of cases for unacceptable litigation practices, did the Trial Court here abuse its discretion when it dismissed a case for litigation abuse** when the Plaintiffs willfully failed to comply with scheduling Order, failed to meet their burden to timely prosecute their case, failed to successfully note a show cause hearing in eight attempts, engaged in unacceptable litigation practices, and filed eight affidavits of prejudice targeting five judges?" (Emphasis added)

However, as shown below, this restated Issue is erroneous and appears to contain the Port's "assignment of error" for the Port's barred, untimely, and improper "cross-appeal" of the Port's **LOST** claim that this case should be dismissed under the Superior Court's "common law" authority to dismiss a case for Plaintiffs' "unacceptable litigation practices" or "litigation abuse" "that went beyond mere activity" where:

"the Port of Olympia also claimed that Plaintiff Arthur West (?Dierker) had engaged in unacceptable litigation practices that went beyond mere inactivity, and moved for dismissal under this Court's independent authority to manage a case;" (See the Superior Court's Judge Sam Meyer's July 27, 2012 Order of Dismissal and Findings of Fact and Conclusions of Law in the summary judgment proceeding held in this case, at Page 2 Lines 3-5-7).

Mr. Dierker was included in this Port claim to the Superior Court of "unacceptable litigation practices", simply by his association with Mr. West in this case, as Mr. Dierker noted then and now, there simply is no evidence, finding or conclusions supported by the record in this case to show that Mr. Dierker was guilty of "unacceptable litigation practices **that went beyond**

mere inactivity" in this case

The other relevant portions of the Port's Motion to Dismiss noted in the Superior Court's July 27, 2012 Order of Dismissal showing the Port's same claim for dismissal, states the Port:

"... sought an award of CR 11 sanctions against Mr. West for improperly naming (certain) Port defendants in the caption of his pleadings;"(specifically denied in this Order at page 7 line 12 and page 8 lines 14-15); and
(2) the Port of Olympia claimed that Plaintiffs Arthur West and Jerry Dierker had failed to note the case for trial for over one year since all issues of law and fact were joined, and moved for dismissal under CR 41(b)(1)"; (the claim for dismissal was not granted under dismissal under CR 41(b)(1)), (See the Superior Court's Judge Sam Meyer's July 27, 2012 Order of Dismissal and Findings of Fact and Conclusions of Law in the summary judgment proceeding held in this case, at Page 1, Line 20, and Page 2 Lines 3-79).

Clearly, while the Order of Dismissal shows the Port's "restated Issue" in Respondents "joined" Response Brief on this final summary judgment dismissal, the Port's motion for final dismissal of all issues in this case "moved for dismissal under this Court's independent authority to manage a case" under common law, based upon the Port's claims that Plaintiffs "had engaged in unacceptable litigation practices that went beyond mere inactivity", when even the Port's own pleadings in this Plaintiffs spent 6 years without success trying to get the Superior Court to properly set and hear a Show Cause Hearing on the Port's withholding of public records about this project in this case under the Public Records Act RCW 42.56, to complete the Port's Administrative Record in the judicial appeal of this Port project action in this case, so that a proper hearing of Appellants' claims in this Superior Court case could be held with the Superior Court having and reviewing this relevant evidence withheld by the Port on this Port project action in this case. (Supra).

Further, the Order of Dismissal shows Judge Sam Meyer **did not** decide to grant the Order of Dismissal "under this Court's independent authority to manage a case under common law" as the Port Response Brief falsely claims, since the entire relevant "decision" part of this final Order of Dismissal states:

"This Court having considered arguments of counsel and of Mr. Dierker and deeming itself fully advised, and this Court having made the above (barred) Findings of Fact and Conclusions of Law, it is hereby:
ORDERED, ADJUDGED AND DECREED at Defendants Galligan, McGregor, Telford, and Van Schoorl are hereby DISMISSED from the above entitled action, and it is further
ORDERED, ADJUDGED AND DECREED that Defendants' request for CR 11 sanctions is denied, and it is further
ORDERED, ADJUDGED AND DECREED that Defendant the Port of Olympia's Motion to Dismiss is GRANTED and the case is DISMISSED WITH PREJUDICE, with no costs or

fees to any party; and it is further

ORDERED, ADJUDGED AND DECREED that Plaintiff West's Motion for Trial Setting and Issuance of a New Case Schedule Order is DENIED; and it is further

ORDERED, ADJUDGED AND DECREED at Plaintiff Dierker's Motion for a Revised Trial Date and a Revised Case Schedule Order is DENIED." (Id, at page 8 lines 10-22).

Clearly, **despite the Port Response Brief's improper, prejudicial, misrepresented and/or false inferences, allegations or claims in Respondents "appeal" of this claim they lost,** the July 27, 2012 Order of Dismissal written, signed and agreed to by the Port's Ms. Lake for the Defendants in this case:

1) **DOES NOT STATE** that this dismissal was **granted** " **under common law** that establishes a trial (sic) court's 'unquestionable,' discretionary authority to manage its own affairs up to an including the **dismissal of cases for unacceptable litigation practices**" ;

2) **DOES NOT STATE** that this Dismissal was **granted "for litigation abuse"**;

3) **DOES NOT STATE** that this Dismissal was **granted** because **"the Plaintiffs willfully failed to comply with scheduling Order"**.

4) **DOES NOT STATE** that this Dismissal was **granted** because **"the Plaintiffs willfully ... failed to successfully note their show cause hearing in eight attempts"**.

Further, the Port's Response Brief also made new claims concerning Mr. Dierker's claims and actions in this case that knowingly conflict with the records of this case in the Superior Court. conflict with the records of the Port still being withheld from this case, where the Port's Response Brief makes the new fraudulent claim that:

1) at page 45, where the Port falsely alleges that Mr. Dierker's pleadings are merely "Naked Castings into (a) Constitutional Sea (that) are Illegal", claiming that Mr. Dierker has acted "illegally" to commit the Port Attorney's alleged "crime" of Mr. Dierker's claims of fundamental constitutional rights to gain disclosure of relevant evidence in these withheld Port public records about this project under the First Amendment's right to petition the courts for redress of grievances where Mr. Dierker cited to State Supreme Court's decision in Fritz v. Gorton, 83 Wn.2d 275 (1974) that cited to New York Times v. Sullivan, 376 US 254, 11 L. Ed. 2d 686 (1964); and

2) in the Port's claim at page 44, that "Mr. Dierker has no valid PRA records claims" in this case, when the Port's claim conflicts with admissions made by the Port's coRespondent Weyerhaeuser's Response Brief, at page 6 and pages 8-9, showing Mr. Dierker has made PRA public record acts requests for the Port's records about this project and showing that Mr. Dierker

had made a valid PRA public records claims in Amended and Second Amended complaints filed in this case. Clearly, not only is this an untimely and unlawful Respondents' "appeal" of claims the Port lost in the Superior Court, but it is also based upon this Respondents' knowingly false and fraudulent claims which are highly prejudicial, as the attached supplemental authority shows. (Id.).

Weyerhaeuser's Response Brief is also an improper, untimely and procedurally barred "appeal" of lost claims for relief in the Superior Court, improperly argues new claims as to why this Court should affirm the Superior Court's order of bifurcation of the PRA and alleged "nonPRA" claims this case and order of dismissal of Appellants' non-PRA claims for reasons other than those stated in those two Superior Court orders, which they lost in the Superior Court.

Consequently, Mr. Dierker also is requesting here that the Court of Appeals grant this appeal reversing these 3 Orders of the Superior Court appealed in this case, to reverse and remand this case with proper instructions for the Court as noted here.

III. ARGUMENT

Standards of Review

Judicial review of the factual claims in this appeal is to be done by the Court's full review of the complete agency record and Superior Court records of the agency's and Superior Court's ultra vires decisions and/or recommendations in this matter under"de novo", "substantial evidence", and "clearly erroneous" standards of review on the case's merits, which were not followed by the Superior Court in this case. (See SEPA's WAC 197-11-504(1) & WAC 197-11-330(2)(a); SEPA's RCW 43.21C.075(3); PCCE, Inc. v. United States, 159 F. 3d 425, 427 (9th Cir. 1998); Marriage of Wolfe, 99 Wn. 2d 531, at 536 663 P. 2d 469 (1983); Weyerhaeuser v. Pierce County, 124 Wn. 2d 26, at 38 (1994); Norway Hill Pres. & Prot. Ass'n v. King County Council, 87 Wn.2d 267, 552 P.2d 674 (1976); see also attached supplemental authority written by Ms. Lake). "This court reviews questions of law and conclusions of law de novo." Weyerhaeuser Co. v. Calloway Ross, Inc., 133 Wn. App. 621, 624, 137 P.3d 879 (2006).

When considering any motion, including the motions to bifurcate or dismiss claims in a case, a Superior Court must consider the pleadings, facts and inferences therefrom in the light most favorable to the non-moving parties, the Appellants in these motions, which did not happen in this case. (Gaines v. Northern Pacific R. Co., 62 Wn.2d 45, 380 P.2d 863 (1963). While this Court

may affirm the Superior Court Orders of Bifurcation and Dismissal in this case as they were written on any basis supported by the record and the law, this Court cannot take an "ultra vires" action to affirm an order for some other alleged reason **not** supported by the record or the law as the Respondents request, as noted. (State v. Kelley, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992).

"When a governmental entity carries out an act unauthorized by - or contrary to - statute, the act is invalid as ultra vires, or exceeding the rules. No later ratification can validate an ultra vires action.

An ultra vires action is one done either without authority or in violation of existing statutes. Dykstra v. Skagit County, 97 Wn. App. 670, 677, 985 P.2d 424 (1999), review denied, 140 Wn.2d 1016 (2000); accord S. Tacoma Way, LLC v. State, 169 Wash. 2d 118, 123, 233 P.3d 87, 874 (2010) ("Ultra vires acts are those performed with no legal authority and are characterized as void on the basis that no power to act existed, even where proper procedural requirements are followed.") Ultra vires acts cannot be validated by later ratification or events. Id.

The ultra vires doctrine may render unauthorized contracts by government entities void. Noel v. Cole, 98 Wn.2d 375, 378, 655 P.d 245 (1980), superseded by statute on other grounds by Snohomish County v. State, 69 Wn.App. 655, 850 P.d 546 (1993), review denied, 13 Wn.2d at 378 (1994). The rationale behind the ultra vires doctrine is 'the protection of those unsuspecting individuals whom the entity represents.' Noel, 98 Wn.2d at 378. A contract that is ultra vires is generally void and unenforceable. See Noel, 98 Wn.2d at 378." Supplemental Authority, page 5.

A. This Court of Appeals lacks jurisdiction to consider Respondents' two untimely "appeals" or "cross-appeals" of their lost requested claims for granting bifurcation and for granting the two dismissals.

This Court of Appeals lacks jurisdiction to consider Respondents two untimely "appeals" or "cross-appeals" of their lost requested claims for granting bifurcation and for granting the two dismissals, which were not granted or were denied by the Superior Court's orders granting bifurcation and the two dismissals in this case, improperly made in Respondents' two alleged Response Briefs, though these "Response Briefs" fail to respond to deny Appellants' claims and arguments made in Appellants' Opening Briefs".

While after a properly filed Notice of Appeal or "cross-appeal" under RAP 5.1, this Court of Appeals may affirm the Superior Court's orders as they are written and signed, on any basis supported by the record and the law (State v. Kelley, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992), this Court of Appeals lacks jurisdiction to consider properly filed Notice of Appeal or "cross-appeal" under RAP 5.1 "appeal" of Respondents' claims for granting bifurcation and for granting the two dismissals that were **not** granted and/or were specifically denied by the Superior Court's orders granting bifurcation and the two dismissals in this case, as those Orders were written and signed, when both Respondents failed to properly file a Notice of Appeal or "cross-appeal" under

RAP 5.1, so that the Court of Appeals would have jurisdiction over Respondents "appeals" in their Response Briefs filed in this case as required by CR 8(d), and consequently, this Court of Appeals is required by RAP 5 and CR 8(d) to strike these improper Response Briefs, and should sanction Respondents for these unlawful "appeal" pleadings, and grant this appeal, reversing and remand this case with instructions for a proper Superior Court review of this case as noted herein. (Id.; see also Motion to Strike, et al.

As noted by the following, the Port Response Brief's single "restated Issue" (at page 1) merely "restates" a part of the Port's requests presented in the Port's motion for dismissal that were **denied** by the Superior Court's July 27, 2012 Order of Dismissal as written and signed, and thereby the Port's Response Brief is actually and untimely and improper "appeal" of the Superior Court's July 27, 2012 Order of Dismissal as written and signed, without a Port "notice of appeal" required under RAP 5.1(a) or "notice of cross-appeal" required under RAP 5.1(d), and required RAP 5.2, RAP 5.3, et seq., and without the Port making any specific "assignment of error" citing to that "appealed" part of the Order of Dismissal, as required by RAP 10.3(g) barring this Court from having jurisdiction to consider this "appeal" or "cross-appeal" made in this Response Brief containing both Respondents' untimely and improper "cross-appeal" of the Superior Court's final Order of Dismissal which **did not** dismiss this case under the "common law" of the Court's inherent powers, despite Ms. Lake's "restatement" of her **lost** request for dismissal under this common law provision in that Order. (See below; see Motion to Strike).

Weyerhaeuser's Response Brief is also an improper, untimely and procedurally barred "appeal" or "cross-appeal" of Respondents' lost claims for relief in the Superior Court improperly argues new claims as to why this Court should affirm the Superior Court's order of bifurcation of the PRA and alleged "nonPRA" claims this case, and improperly argues new claims as to why this Court should affirm the Superior Court's order of dismissal of Appellants' non-PRA claims for reasons other than standing which Respondents previously claimed to the Superior Court but which Respondents' lost when Judge Wickham wrote his simple Order granting dismissal for Appellants' alleged lack of standing, where Weyerhaeuser even claims that these other bases for dismissal Respondents lost were already sufficiently briefed by Respondents' in the Superior Court when this dismissal for lack of standing was made. Thereby, again without any Respondents' "notice of appeal" required under RAP 5.1(a) or "notice of cross-appeal" required

under RAP 5.1(d), also required by RAP 5.2, RAP 5.3, et seq., and without Weyerhaeuser making any specific "assignment of error" as required by RAP 10.3(g) citing to that "appealed" parts of the Order to Bifurcate and the Order of Dismissal for lack of standing, barring this Court from having jurisdiction to consider this "appeal" or "cross-appeal" made in this Response Brief containing both Respondents' untimely and improper "cross-appeal" of the Superior Court, and when Weyerhaeuser's "appeal" claims are absurd or are not supported by the record and are the other grounds Weyerhaeuser urges were simply not fully developed before the Superior Court, and in most cases these claims and arguments are mere "bullet-point" claims without any proper argument nor any proper citation to the record showing application to this case, as required by RAP 10.3 and 10.4. As noted herein, both Respondents' Response Briefs contain untimely and improper "undercover" "appeals" or "cross-appeals" of the claims Respondents' lost in the Superior Court's Orders in this case as they were written and signed by the Judges involved.

Clearly, as noted above and as further noted herein, for Appellants timely filed appeal here, this Court should not consider these pleadings in Respondents' Response Briefs that contain these untimely and improper "undercover" "appeals" or "cross-appeals" of the claims Respondents' lost in the Superior Court's Orders in this case, for when there is no Respondents' Notices of Appeal, etc., filed as required by RAP 5 and 5.1 which could provide this Court with jurisdiction over Respondents' untimely and barred "appeals" made in this case, and since the Respondents' pleadings here are not "response briefs" which comply with the other RAPs and CR 8(d) here.

While this Court may affirm the Superior Court Orders of Dismissal as they were written on any basis supported by the record and the law (Kelley), this Court cannot affirm a Superior Court Order of Dismissal for some other alleged reason for dismissal which are **not** recorded in the Superior Court Orders of Dismissal as they were written.

Further, since Respondents' Response Briefs are merely "appealing" that same Superior Court's final Order of Dismissal with the Port's Response Brief's single "Restated Issue" on the final dismissal in this case only makes an "appeal" of Port claims for dismissal not written in the "Conclusions of Law" section of the Superior Court's final Order of Dismissal of all claims in this case, thereby, through the Port's "joined" Response Brief, both Respondents have fraudulently requested this Court of Appeals to "affirm" the Superior Court's final Order of Dismissal of all claims in this case as it was written -- Respondents' "Appealing" of claims they lost in this same

Superior Court order **cannot** be legally used as "support" for Respondents' request for this Court of Appeals to "affirm" this Superior Court's final Order of Dismissal of all claims in this case as it was written. The Respondents' "appeals" of their lost claims in this order and other orders they appealed, are inconsistent with their request to "affirm" this and other orders in this case.

Therefore, this Court should reverse and remand the Superior Court's final Order of Dismissal of all claims in this case for Appellants' alleged failure to prosecute the PRA claims, and also reverse and remand the 2 other orders Appellants' appealed in this case.

B. This Court Should Reverse and Remand the Superior Court's final Order of Dismissal of all claims in this case.

This Court should reverse and remand the Superior Court's final Order of Dismissal of all claims in this case, for Appellants' alleged failure to prosecute the PRA Show Cause hearing in this case, since, as the Superior Court's final Order of Dismissal of all claims in this case as it was written and signed shows, this is a "failure to prosecute" case that should be review by the Superior Court under only CR 41(b)(1) and both Appellants cured any failure to prosecute in the manner required by CR 41(b)(1), as follows, and since, while this Court may affirm the Superior Court Orders of Dismissal as they were written and signed by the Judge on any basis supported by the record and the law (State v. Kelley, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992), this Court cannot affirm a Superior Court Order of Dismissal for some other alleged reason for dismissal which are **not** recorded in the Superior Court Orders of Dismissal as they were written and signed by the Judges of the Superior Court in this case.

1. Washington Superior Courts' Vested Inherent Authority to Dismiss Cases is Limited.

Mr. Dierker joins with Mr. West's Reply Brief for this argument, except as follows.

The Superior Court and the Port Respondents are required to follow court rule, statutory and constitutional legal processes, since:

> [A] governmental entity's powers are limited to those conferred in express terms or those necessarily implied. In re Seattle, 96 Wash.2d 66, 69, 638 P.2d 549 (1981). As the Court stated in Hillis: "[i]f the Legislature has not authorized the action in question, it is invalid no matter how necessary it might be. [Emphasis added.] Chemical Bank v. WPPSS, 99 Wn.2d 772, 792, 666 P.2d 329, quoting Hillis Homes, Inc. v. Snohomish Cy., 97 Wash.2d 804, 808, 650 P.2d 193 (1982).
>
> "[W]here a person or board is charged by law with a specific duty and the means for its performance are appointed by law, there is no room for implied powers, and the means appointed must be followed..." [Emphasis in original.] State ex. rel Eastvold v. Maybury, 49 Wn.2d 533,

539, 304 P.2d 663 (1956).

Here, as Appellant Dierker's Opening Brief argued, the Superior Court and the Port Respondents had repeatedly failed to properly perform numerous required legal processes, where the Superior Court and the Port Respondents were "charged by law with a specific duty (to do) and the means for its performance are appointed by law, there is no room for implied powers, and the means appointed must be followed... and the means for its performance are appointed by law, there is no room for implied powers, and the means appointed must be followed...". (Id., supra).

Further, the Port's "appeal" appears to claim that Washington Superior Courts have virtually unlimited discretion and inherent authority to dismiss cases, like it did here. However, this Superior Court's inherent authority to dismiss cases is limited, not limitless. (See State v. Gilkinson, 57 Wn. App. 861, 865, 790 P.2d 1247 (1990) (a trial court's powers are limited to those essential to the existence of the court and necessary to the exercise of its jurisdiction; trial court lacked power to expunge record); City of Fircrest v. Jensen, 158 Wn.2d 384, 395, 143 P.3d 776 (2006) (the constitution gives the Supreme Court authority to adopt rules of procedure); In re Mowery, 141 Wn. App. 263, 281, 169 P.3d 835 (2007) (court lacked inherent power to impose criminal contempt sanction in excess of that provided for by law); Servs. of Am. II. Inc. v WaferTech LLC, 174 Wn.2d 304, 312, 274 P.3d 1025 (2012) (where CR 41(b)(1) applies, a trial court has no discretion to dismiss a case where the plaintiff has noted the case for trial before the motion to dismiss is heard); Snohomish County v. Thorpe Meats, 110 Wn.2d 163, 166, 750 P.2d 1252 (1988) (dismissal for lack of prosecution was precluded due to fact that case was noted for trial before motion to dismiss for lack of prosecution was heard); and Wallace v. Evans, 131 Wn 2d 572, 577-78, 934 P.2d 662 (1997) (where CR 41(b)(1) applies, the rule prevents dismissal pursuant to the trial court's inherent authority).

Here, because this case is at its heart a "failure to prosecute" the improperly PRA part of the SEPA case as the Port's AR and Superior Court record shows, CR 41(b)(1) applies and this rule prevents dismissal pursuant to the Superior Court's inherent authority, and the clearly erroneous standard of review applies, and this rule prevents dismissal.

"The dismissal of an action for want of prosecution, in the absence of statute or rule of court creating the power and guiding its action, is in the discretion of the court." Gott v. Woody, 11 Wn. App. 504, at 506-507, 524 P.2d 452 (1974), emphasis added.

Here, Mr. Dierker's Opening Brief noted that for the 2 dismissals, the bifurcation and delay cause by the Superior Court's or the Respondents' erroneous, unlawful, illegal, fraudulent, and unconstitutional actions, the Superior Court failed to follow common law, the Federal and State Constitutions, the PRA's statutory "Judicial review of agency actions" RCW 42.56.550(1), (2), and (3), et seq., SEPA's WAC 107-11-504(1) incorporating the PRA, SEPA's WAC 107-11-680, and RCW 43.21C.075 on SEPA "Appeals", and violated Administrative Procedures Acts' (APA) RCW 34.05.566 & 34.05.570, which create the Superior Court's powers to act here.

These laws require the Superior Court to consider a complete, unfalsified and filed Port Administrative Record (AR) for its hearing these Motions to Dismiss the PRA claims and "nonPRA" SEPA claims on the Port's continued withholding of requested relevant public records about this Port/Weyerhaeuser project from the Port's Administrative Record (AR), Appellants, the public, other agencies with jurisdiction, and the various Courts in this case, which the Superior Court failed to do all three decisions reviewed in this appeal requiring overturning of these three ultra vires orders. (Supra; see also attached supplemental authority written by Ms. Lake).

Further, as Appellant Dierker's Opening Brief argued, the final Order of Dismissal states in the Conclusions of Law section that the case's final dismissal was based upon Ms. Lake' improper misrepresentation of the "agency daily penalty" portion of the Public Records Act (PRA) RCW 42.56.550(4), where the Superior Court Judge who stated he knew nothing about the PRA at the beginning of the hearing, went ahead and followed Ms. Lake's misrepresentation of the "agency daily penalty" portion of the Public Records Act (PRA) RCW 42.56.550(4) to dismissed this case without ever granting a hearing of the PRA claims, though he lacked authority to do so and though he and Ms. Lake violated the PRA, SEPA, other statutes, the court rules, court orders and the Constitutions to do so, while he ignored that the PRA's RCW 42.56.550 did not have any wording in it to grant him such jurisdiction to dismiss this case as a sanction under the PRA, and thereby, under Gott, et al, he was prohibited from basing his dismissal on the PRA's RCW 42.56.550.

The Superior Court also ignored the PRA's RCW 42.56.550(1), (2) & (3), where the Superior Court is required to conduct a show cause hearing of any PRA claims in a case **before** hearing claims based upon relevant evidence in the withheld public records, which thereby prohibits the Superior Court from dismissing PRA claims without conducting any show cause hearing of those PRA claims. (Fritz; Sullivan; Fisons; Kelley; Gott; Norway Hill; WAC 197-11-504(1).

These are just two of Mr. Dierker's appeal claims which Respondents failed to properly respond to, as if ignoring a claim makes its go away, and thereby Respondents have admitted to this claim under CR 8(d). For this reason alone, this Court of Appeals should overturn this dismissal.

The Port's argument improperly cites two cases that are not on point. Hiller Corp. v. Port of Port Angeles, 96 Wn. App. 918, 928, 982 P.2d 131 (1999) (cited by the Port as "Rogerson Hiller Corp.") concerned a trial court's imposition of a sanction of attorney fees, not dismissal. Dismissal is a more stringent sanction than a mere award of fees. Johnson v. Horizon Fisheries LLC, 148 Wn. App. 628, 639, 201 P.3d 346 (2009) concerned an appellant who disobeyed the scheduling order in the case. Here, Appellants disobeyed no such order and while this Court may affirm the Superior Court Orders of Dismissal as they were written, on any basis supported by the record and the law (State v. Kelley, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992), this Court cannot take an ultra vires actions to affirm a Superior Court Order of Dismissal for an alleged reason for dismissal based upon a false claim not supported by evidence in the Superior Court record, and when that reason is **not** recorded in the Superior Court Orders of Dismissal as written.

Therefore, this element necessary for such a dismissal is not met, and it must be overturned.

Further, as one of Appellant Dierker's claim that Respondents failed to respond to in this Appeal, and, which under CR 8(d), has thereby been admitted by Respondents, and as citations to the record in this case does show, **Respondents** and **the later Judges of the Superior Court did violate Judge Pomeroys'** August 24, 2007 Case Scheduling Order (CP ???), which shows the PRA show cause hearing being procedurally set by Judge Pomerory **two weeks BEFORE** the hearings of Respondents' Motions to Dismiss the "nonPRA" claims in this case, so as to allow the Court and the parties to have all relevant evidence about this case two weeks before the hearings of Respondents' Motions to Dismiss the "nonPRA" claims in this case.

Clearly, **Respondents** and **the later Judges of the Superior Court** should have been barred by **Judge Pomeroys'** August 24, 2007 Case Scheduling Order from preventing the Show Cause hearing of the PRA claims **two weeks BEFORE** the hearings of Respondents' Motions to Dismiss the "nonPRA" claims in this case, and, thereby, this Court of Appeals should overturn this dismissal for this reason alone, and his Court of Appeal should sanction Respondents for this action to delay the PRA hearing and for making this false appeal claim, under Ms. Lake's own case law. (See also sanctions section below).

2. Substantial Evidence Does Not Support any Superfluous Findings that all of the Port's Claimed Criteria for Dismissal Were Met.

Even if CR 41(b)(1) did not apply, precluding dismissal pursuant to the Superior Court's inherent authority, substantial evidence in this case does not support the superfluous findings that these restrictive criteria for sanction of dismissal were met.

Though the Port argued that Will v. Frontier Contractors. Inc.,121 Wn. App. 119, 129, 89 P.3d 242 (2004) "requires explicit findings regarding the abusive plaintiff." Port's Response at 19, n. 17. However, Appellants cannot see that Will requires such findings, especially in a "summary judgment" dismissal like this one, Will requires only that the record show that the trial court explicitly considered whether lesser sanctions would have sufficed, which the record shows Judge Meyer did not do in Appellants' case here. Will, 121 Wn. App. at 129.

This and the following shows that substantial evidence in this case does not support the superfluous findings that these restrictive criteria for sanction of dismissal were met, as Appellants' Reply Briefs noted.

a. Appellants' Did Not Disobey A Superior Court Scheduling Order

Substantial evidence does not support the superfluous finding that either Appellant disobeyed any court order. The Port Response Brief has no citation to "conclusion of law" in any Superior Court Order, finding that Appellants' disobeyed a Superior Court Order of any kind, and certainly none showing Appellants' violated any case scheduling order, like the Respondents and the later Judge's of the Superior Court did when ignoring Judge Pomeroy's Aug. 24, 2007 case scheduling order in this case, as noted in Dierker's Motion to Strike and Opening Brief.

Substantial evidence does not support the superfluous finding that Appellants disobeyed any court order. The record does not show that Appellants disobeyed any court order, though it shows Respondents and the Superior Court later did.

The Port also argued that this Court must review the entire spectrum of Appellants' conduct, citing to Anderson v. Mohundro, 24 Wn. App. 569, 575, 604 P.2d 181 (1979) and Woodhead v. Discount Waterbeds. Inc., 78 Wn. App. 125, 129, 896 P.2d 66 (1995). But in Anderson and Woodhead, the plaintiffs disobeyed court orders and the courts dismissed the cases for disobedience of the court orders, even while they reviewed the entire spectrum of plaintiffs' conduct. Here, again, Appellants have disobeyed no court order. The law explicitly requires that the party

have willfully and deliberately refused to obey a court order. Will, 121 Wn. App. at 129. This prong fails, and this ultra vires dismissal must be overturned.

Further, as noted herein, it clearly appeared then that the Respondents and the later Superior Court Judges in this case after Judge Pomeroy have disobeyed a Superior Court scheduling order of Judge Pomeroy, and under the "Clean Hands Doctrine" of common law, the "unclean hands" of Respondents would have been barred from making this similar claim against Appellants, especially when it was false, and this dismissal must be overturned. (See attached supplemental authority written by Ms. Lake; Black's Law Dictionary (9th ed. 2009) page 1299).

b. The Delays Did not Prejudice the Port

The Port argues that Appellants disobeyed a Superior Court "case scheduling" order and that the delays they caused prejudiced the Port, causing the Port to spend more money defending this lawsuit, subjecting the Port to more days for which a per diem penalty under the PRA could be awarded (were Appellants to prevail), and that the passage of time impacts the Port's witnesses.

As to the costs of defending this lawsuit and the risk of more days for which a per diem penalty could be awarded, these are not prejudicial. " 'Prejudice' means a damage or detriment to one's legal claims. Black's Law Dictionary 1299 (9th ed. 2009)." Nat'l Sur. Corp. v. Immunex Corp., 176 Wn.2d 872, 890, 297 P.3d 688 (2013).

Further, the Port is in control of its own response to Appellants' PRA requests and if it does not wish to incur an increased monetary per diem penalty under RCW 42.56.550(4), it could have timely, fully and completely responded to these PRA requests, which the Port failed to do.

The Port attorney's claims that the passage of time impacts the memories of the Port's Staff witnesses for such a mere Show Cause hearing of these PRA claims are clearly erroneous, since a mere Show Cause hearing of these PRA claims is done on the Ports' agency record showing Appellants' PRA requests, the Port's receiving date of Appellants' PRA requests, and the dates and extent of the Port's PRA responses, disclosures and exemptions logs sent to Appellants, which is not a normal "trial-like" Court procedure where witnesses testimony is taken in any case, and thereby, the "memories" of the Port's staff who could be witnesses to these PRA requests, etc., is irrelevant and superfluous, and does not rise to a level of "prejudicing" the Respondents.

Further, the Port attorney's claims that the passage of time impacts the memories of the Port's staff who could be witnesses to these PRA requests, etc., is clearly erroneous, since in Sept.

2012, the Port Staff promptly disclosed these Port "withheld" records to Mr. Dierker, just after the Superior Court's dismissal, when, pursuant to that dismissal, he again requested these, and the Port staff had no problem with identifying these withheld records he requested by in Jan. and Feb. 2006, and the Port staff had no problems providing at least part of them to Mr. Dierker within a month of the date of his 2012 PRA request for these same records withheld in this case, despite the Port Attorney's frivolous claims the Port staff "memories" about these records were lost due to the 6 year delay of the PRA hearing in this case, which still has not happened. (Supra).

Substantial evidence does not support the Superior Court's superfluous finding that Appellant Dierker's or Mr. West's alleged delays of the PRA claims caused prejudice to the Port.

c. The Superior Court Did Not Explicitly Consider Lesser Sanctions

The Port argues without support in the record that somehow the Superior Court's final Order of Dismissal in this case "explicitly" considered whether lesser sanctions than dismissal would suffice, simply because the Port pointed out to the Superior Court that other courts had imposed monetary sanctions on Mr. West, and that these monetary sanctions against Mr. West had not curbed both Mr. West's **and** Mr. Dierker's "disruption and delay" of this case (Port Response at 28). But the record does not support this argument. (See above). The Order of Dismissal states:

> "This Court concludes that lesser sanctions than dismissal will not suffice, since a court would have no discretion to reduce the number of days for which the Port of Olympia would be subject to a daily penalty." CP 938.

The record and this Order of Dismissal does not show that the Superior Court considered and found persuasive the Port's argument that monetary sanction imposed on Mr. West in another case did nothing to curb Mr. West's and Mr. Dierker's delays in this case. And again, it does not make sense that dismissal is the only sanction that would suffice in this case, simply because the Port might be at risk of a higher total monetary penalty, because the Port's attorney failed to legally act under the PRA to properly and timely release certain requested public records about this project actions to the Appellant, and because the erroneous and/or improper actions of the Respondents and the Superior Court prevented any PRA Show Cause Hearing from being conducted. If the harm can be measured in dollars and cents, it only follows that an appropriate sanction could be as well.

Substantial evidence does not support the Superior Court's superfluous finding that no lesser sanction than dismissal would suffice, especially in light of the Superior Court's denial of the Port's requests for CR 11 monetary sanctions in this final Order of Dismissal noted below.

d. The Superior Court Denied the Port's claims for CR 11 Sanctions.

The record does not show that the Superior Court considered any sanction other than dismissal, and the Superior Court's Order of Dismissal even denied Port's similar requests for CR 11 sanctions for Appellants' same actions the Port complained of here again.

Substantial evidence does not support the Superior Court's superfluous finding that no lesser sanction than dismissal would suffice, and does not support the Port's claims in this appeal for "sanctions", especially in light of the Superior Court's denial of the Port's requests for CR 11 monetary sanctions in this final Order of Dismissal.

e. The Superior Court Denied the Port's requests for Costs, Fees and Attorney's fees

As Mr. Dierker noted, the Superior Court's final Order of Dismissal also denied the Port's requests for costs, fees and Attorney's fees, and this Court should also deny them in this appeal.

Substantial evidence does not support the Superior Court's superfluous finding that no lesser sanction than dismissal would suffice, especially in light of the Superior Court's denial of the Port's costs and fees in this final Order of Dismissal.

3. The Sanction of Dismissal is Not Warranted nor allowed in this case.

In arguing that the sanction of dismissal was warranted, the Port cites to a list of cases involving a court's inherent authority to dismiss cases for want of prosecution, most of which precede the 1967 amendment of CR 41(b)(1) that severely limited this inherent authority under common law which is Respondents' entire untimely "cross-appeal" argument of this dismissal.

These cases range in dates from 1892 to 1950: McDaniel v. Pressler, 3 Wash. 636, 29 P. 209 (1892); Plummer v. Weill, 15 Wash. 427, 46 P. 648 (1896); State ex rel. Clark v. Hogan, 49 Wn.2d 457, 303 P.2d 290 (1956); State ex rel. Washington Water and Power Co. v. Superior Court for Chelan County, 41 Wn.2d 484, 250 P.2d 536 (1953); National City Bank of Seattle v. International Trading Co. of America, 167 Wash. 311, 9 P.2d 81 (1932); and Stickney v. Port of Olympia, 35 Wn.2d 239, 212 P.2d 821 (1950). This is no longer the law. In construing the post-1967 CR 41(b)(1), the Supreme Court held:

"it would be anomalous if we were to now hold that a trial court may exercise discretion when faced with circumstances requiring that an action under CR 41(b)(1) not be dismissed. Before 1967, the only way to avoid dismissal for want of prosecution under the predecessor of CR 41 (b)(1) was to note the action for trial within 1 year after issues were joined. In 1967, CR 41(b)(1) was adopted, however, and this critical sentence was added to the rule: *If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.* (Italics ours.) Thorpe Meats, 110 Wn.2d at 167-68.

The same argument holds true for the Supreme Court authority cited by the Port in Link v. Wabash R. Co. 370 U.S. 626, 82 S. Ct. 1386, 8 L.Ed. 2d 734 (1962) **before** there was no such rule as CR 41(b)(1). This dismissal was ultra vires. (See attached supplemental authority of Ms. Lake.).

Appellants are not asking that this Court of Appeals substitute its judgment for the Superior Court's Order of Dismissal as it was written -- it is the **Respondents in their** untimely and barred "cross-appeal?" Response Briefs filed in this Court who are asking that this Court of Appeals substitute its judgment for the Superior Court's Order of Dismissal as it was written.

Appellants **are** asking this Court to look at the facts and the law and conclude that the Superior Court lacked discretion to dismiss the case because CR 41 (b)(l) applied and Appellants had cured their "want of prosecution", or, alternatively, that even if CR 41(b)(1) did not apply, that the Superior Court erred in dismissing the case because substantial evidence did not support the findings on which the dismissal was based. The Port did not respond to Appellants ' arguments that the Superior Court erred in not applying CR 41 (b)(l) to the case. All of the delays that the Port complains of ultimately add up to a failure to prosecute, requiring the Superior Court to use CR 41 (b)(1) when considering this Port motion to dismiss, and even the Port's Attorney's own E-mails to and from the Superior Court she filed in this case and the Superior Court Docket entries and the Superior Court's Clerk's Notes in this case show that delay of the PRA claims hearing was almost all the fault of the Respondents' improper motion to bifurcate and/or the "mistakes" of the Superior Court itself to set the PRA show cause hearing after the bifurcation and Judge Pomeroy's removal from the case Appellants objected to, as Mr. Dierker's Opening Brief noted. (Supra).

In 2012 there was no "absence" of statute or rule of court, as there was in all the pre-1967 cases cited by the Port, this case falls within the purview of CR 41(b)(1), thereby it applies to this dismissal, limiting this Superior Court's "common law" inherent discretionary power, since:

> "The dismissal of an action for want of prosecution, in the absence of statute or rule of court creating the power and guiding its action, is in the discretion of the court."... "It is our view that when in 1967 the Supreme Court revised the rules adding to CR 41(b)(1) mandatory language of nondismissal under certain circumstances, that change assumes significance in light of this long-standing construction. The predecessors to CR 41(b)(1) did not contain the mandatory language of nondismissal later added to the rule. In our opinion, the 1967 revision contemplates a limitation upon the otherwise inherent discretionary power of the court to dismiss, upon the motion of a party, for failure to bring a case on for trial in a timely fashion." Gott v. Woody, 11 Wn. App. 504, at 506-507, 524 P.2d 452 (1974), emphasis added.

Here, there is no "absence" of statute or rule of court, as there is in all the pre-1967 case law

cited by the Port. CR 41 (b)(l) exists and it applies. The Superior Court improperly exercised discretion when CR 41(b)(1) mandated that the Superior Court deny the Port's motion to dismiss.

Mr. Dierker agrees with the Port that the case of Bus. Servs., 174 Wn.2d at 311, is on point:

> "The behavior engaged in by [Appellants] here does not rise to the level of "unacceptable litigation practices other than mere inaction." Wallace, 131 Wn.2d at 577. [Failure to get a matter heard on show cause, despite eight attempts to do so, or filing multiple ineffective affidavits of prejudice] is not equivalent to a failure to appear at a court proceeding or noncompliance with a court order or ruling." Bus. Servs., 174 Wn.2d at 311-12.

Appellants' behavior in this case simply does not rise to the level of "an unacceptable litigation practice that is a basis for an exception to CR 41(b)(1)." Bus. Servs., 174 Wn.2d at 312.

The Superior Court even denied the Port's similar requests for CR 11 sanctions, costs, and fees for the same erroneous claims of Appellants' "unacceptable litigation practices" that she again erroneously claims in this Court of Appeal here, and like the Superior Court this Court of Appeals should deny the Port's same clearly erroneous claims of Appellants' "unacceptable litigation practices" and should deny the Port's requests to dismiss this Appeal and for sanctions, costs, and fees.

This Court should reverse and remand the Superior Court's final July 2012 Order of Dismissal of all claims in this case as it was written and signed for a failure to prosecute the PRA claims in a Show Cause Hearing against the Port of Olympia.

C. This Court Should Reverse and Remand the Superior Court's Order of Dismissal of Appellants' "nonPRA" Claims for "Lack of Standing" as it was written and signed.

This Court should reverse and remand the Superior Court's Order of Dismissal of Appellants' alleged "non-PRA" (*sic*) claims including those under SEPA, for Appellants' alleged "lack of standing" as it was written and signed, since both Appellants made the required showing sufficient to withstand a CR 12(b) motion to dismiss, and this dismissal was ultra vires. (Supra).

As Appellants pleadings in this case have repeatedly noted SEPA is primarily a procedural statute that requires the full disclosure of all environmental information relevant to an agency's actions, which is done to reflect SEPA' public policy to ensure that environmental values are given appropriate consideration in governmental decision making. (Glasser v. City of Seattle 139 Wn.App. 728, 162 P.3d 1134, review denied 163 Wn.2d 1033, 187 P.3d 286; Norway Hill Preservation and Protection Ass'n. v, King County, 87 Wn. 2d 267, 552 P.2d 674 (1976); Swift v. Island County, 87 Wn. 2d 348, 552 P.2d 175 (1976); Words and Phrases, Environmental Law Key

577; see also attached supplemental authority written by Ms. Lake).

However, as noted in this case, instead of following the law, the Port and its attorney refused to fully disclose all of the Port's all environmental information relevant to the Port's actions on this project to any person, agency with jurisdiction, or any Court reviewing this project, and in fact, the Port and its attorney withheld records and falsified records in this case, where the Port even knowingly filed an incomplete and falsified Port Administrative Record on the Port's actions in this case with the Superior Court, thereby denying Appellants any meaningful access to justice in the Superior Court and this Court for these SEPA claims by the Port's fraudulent concealment of much of the key evidence from the record in this case, and this dismissal must be reversed for this reason alone. (See Doctrine of Fraudulent Concealment; Doctrine of Fruits of a Poisonous Tree; see Clean Hands Doctrine; see also attached supplemental authority written by Ms. Lake).

> Further, while each element of these allegations of injury in fact for standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." ... "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L. Ed. 2d 351 (1992), quoting Lujan v. National Wildlife Federation, 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L. Ed. 2d 695 (1990).

Even with the Port's criminal withholding of relevant evidence from the Administrative Record in this case, Appellants' pleadings still made sufficient allegations of injury in fact in their Complaints and Declarations on Standing and in oral argument, even citing to the Port's own evidence which was in or should have been in the Port's unlawful, illegal incomplete, piecemealed, and falsified Administrative Record concerning the Port's actions taken to this Port/Weyerhaeuser project, filed by the Port's Attorney in June 2007, and the non-PRA claims were dismissed at the pleading stage of the litigation, on Respondents' summary judgment motions to dismiss, without taking testimony of witnesses with cross-examination or any other "trial-like" procedures, by and Order granted by an admitted member of the prejudicial Chamber of Commerce supporting this project of their other members the Port and Weyerhaeuser here. These pleadings and claims have never been heard by an impartial judge on the actual relevant evidence some of which is in the Port's records withheld about this project and the Port's Attorney's improper actions, and most have not been denied here.

In responding to Appellants' arguments, the Port only looked at the allegations in the

Complaints filed in this case, and failed to consider Appellants' pleadings and Declarations on Standing or Appellants' citations to relevant evidence about this project and the Port and Appellants' actions in the Port's incomplete Administrative Record filed in this case. (See e.g.- Opening Brief at pp. 48-49, compare it to Port's Response at pp. 39-40).

Weyerhaeuser only argued that **Appellants' Complaints'** made factual allegations that were insufficient for meeting the "standing" requirements necessary for gaining review of this case by the Superior Court, without addressing Appellants' arguments that they were sufficient for that stage of the litigation; i.e., at the summary motion to dismiss pleading stage of this case. (See Weyerhaeuser Response at pp. 20-21).

Respondents also "ignored" or "dismissed" Mr. Dierker's numerous pleadings and Declarations on Standing as if they also did not provide him with "standing", even ignoring that this Port Motion to Dismiss the "nonPRA" claims for lack of standing, was legally barred under collateral estoppel and res judicata of the Port's SEPA Appeal decision, since Appellants had been met the "standing" requirements under the "standing" provisions of Port's SEPA Policy necessary for prosecution of this Superior Court judicial review by Appellants' prosecution of their Port SEPA appeal under the "standing" provisions of Port's SEPA Policy and under the Port's Denial of Appellants' SEPA Appeal that was written by the Port's Attorney, Ms. Lake here, and thereby, Appellants met all "standing" requirements for review of that Port SEPA appeal they prosecuted and lost. (Supra).

Respondents Response Briefs' pleadings here also failed to a consider that a prior decision of the Federal Court Ninth Circuit Court of Appeals that Mr. Dierker won against the Port through EPA and the Army Corps of Engineers in different case filed by Mr. Dierker on the Corps' improper NEPA review conducted on the Port's Clean Water Act Permits needed for the Port's environmental cleanup and dredging project of the Cascade Pole Industrial Hazardous Waste Site conducted in the early-2000's on part of this 2007 Port/Weyerhaeuser project's site, as noted in Mr. Dierker's pleadings about "standing". Clearly, this Federal Court decision shows that Mr. Dierker has been found to have "standing" to make claims to a Court for judicial review of the Port's and other agencies actions **on this specific Port property** which could be affecting the environment of this area, and the Port clearly knows this, despite the Port Attorney's unreasonable, fraudulent, and contrary to fact and law actions and pleadings made in this case.

As Mr. Dierker also noted in his pleadings on Standing, Respondents Response Briefs' pleadings here also failed to a consider a prior published decision of the Federal Court Ninth Circuit Court of Appeals on a similar governmental NEPA action taken for allowing a Weyerhaeuser project on a similar South Puget Sound port site in the Nisqually Reach in the nearby Port of Dupont, Washington, that Mr. West won against the Department of Transportation to stop a Weyerhaeuser project at the time, and this case has even become a "precedent" setting case on the Federal Government's misuse of NEPA's "Categorical Exemptions" to allow the Feds to approve project permits **without** doing any environmental review of the impacts of a project or action. (Supra). Clearly, this Federal Court decision shows that Mr. West has been found to have "standing" to make claims to a Court for judicial review of even the Federal Government's agencies' environmental review actions necessary for Weyerhaeuser's projects on port property in this area of the State of Washington, and Weyerhaeuser clearly knows this, despite Weyerhaeuser Attorney's unreasonable pleadings made in this case which are contrary to facts in the record and the controlling law in this case.

Clearly, the record and the controlling law shows both Respondents' Response Briefs on this "standing" claims do not properly respond to Appellants' pleadings supported by the record in this case that the had standing to make a judicial appeal of the Port's Denial of Appellants' SEPA Appeal on this project in this case, and this appeal should be granted since this Court cannot affirm Judge Wickham's Order of Dismissal for lack of standing as written and signed.

Further, Weyerhaeuser also argues that this Court should affirm the Superior Court's dismissal of Mr. West's non-PRA claims on grounds other than for lack of standing, stating that other bases for dismissal were already sufficiently briefed before the Superior Court.

While this Court may affirm the Superior Court Orders of Dismissal as they were written and signed by the Judge on any basis supported by the record and the law (State v. Kelley, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992), this Court cannot affirm a Superior Court Order of Dismissal for some other alleged reason for dismissal which are **not** recorded in the Superior Court Orders of Dismissal as they were written and signed by the Judge of the Superior Court, like those here which the record in this case shows were not even properly argued in the Superior Court.

Besides this being an untimely and barred by collateral estoppel and res judicata "appeal" of Respondents' **lost** claims for this dismissal in the Superior Court, the problem here is that these

other "appeal" grounds for affirming the Superior Court's Order here, Weyerhaeuser's pleadings were simply not fully developed before the Superior Court nor have they been properly plead in this Court of Appeals action.

For example, Weyerhaeuser argues that the "nonPRA" claims were barred by collateral estoppel. But in Weyerhaeuser's own argument to the Superior Court, Weyerhaeuser simply incorporated by reference the Port's arguments on collateral estoppel. See CP 2135-3150. And the Port argued that Mr. West and Mr. Dierker were collaterally estopped in making SEPA challenges in only two respects: whether or not the Port was compelled by law to provide a verbatim transcript where no hearing occurred, and as to the validity of the Port's reconsideration process. CP 2152-2175.

However, Weyerhaeuser Response Brief's shows that the many SEPA and other non-PRA claims in Mr. West's and Mr. Dierker's Second Amended Complaint were far more numerous than those few issues argued by the Port for Judge Wickhams' dismissal of the "nonPRA" claims. CP 33-48. This Court should not affirm the Superior Court on the grounds urged by Weyerhaeuser because the record is insufficiently developed, especially when their Response pleadings here are no more than barred and frivolous "appeal" pleadings of claims Respondents' lost in the Superior Court.

This Court should reverse and remand the dismissal of Appellants' non-PRA claims on the basis of standing.

D. This Court Should Reverse and Remand the Superior Court's Order of Bifurcation of Appellants' PRA and "nonPRA" Claims.

Judge Pomeroy's August 24, 2007 Order of Bifurcation of the PRA claims from the so-called "nonPRA" claims in this case, should also be reversed and remanded barring such bifurcation as improper under the laws controlling the review of such claims in the Superior Court, which do not grant jurisdiction to the Superior Court to separate the evidence claims in the PRA claims from the "nonPRA" claims in this case under the APA, SEPA, constitutional writs, et al., requiring that evidence withheld by the Port in these PRA claims in this case.

Again, while this Court may affirm the Superior Court on any basis supported by the record and the law (State v. Kelley, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992), or which "in the absence of statute or rule of court creating the power and guiding its action, is in the discretion of

the court" (Gott, 11 Wn. App. at 506), the problem here is that there are several legal prohibitions in SEPA, the PRA, the APA, and the standards of discovery in the Court Rules and common law barring this Bifurcation of the PRA claims on the evidence withheld from the Port's Administrative Record required for review of this case, to separate it from and prevent this evidence from being considered when the Superior Court "reviewed" by summary dismissal Appellants' so-called "nonPRA" claims in this case without this key evidence in the PRA records never released by the Port in this case at all, as noted by Mr. Dierker's appeal pleadings against the Superior Court's "poisoned tree" of bifurcation and its 2 "poisoned fruits" of the summary dismissals of both sets of claims in this case, and as noted by Mr. Dierker's appeal pleadings against the Respondents' Motion filed in this Court of Appeals to Dismiss the nonPRA claims appeal, and as noted by Mr. Dierker's appeal pleadings against the Motion for Bifurcation filed in this Court of Appeals. (Supra; see the Motion to Strike; see also attached supplemental authority written by Ms. Lake).

As Appellants pleadings in this case have repeatedly noted, SEPA is primarily a procedural statute that requires the full disclosure of all environmental information relevant to an agency's actions, which is done to reflect SEPA' public policy to ensure that environmental values are given appropriate consideration in governmental decision making. (Glasser v. City of Seattle 139 Wn.App. 728, 162 P.3d 1134, review denied 163 Wn.2d 1033, 187 P.3d 286; Norway Hill Preservation and Protection Ass'n. v, King County, 87 Wn. 2d 267, 552 P.2d 674 (1976); Swift v. Island County, 87 Wn. 2d 348, 552 P.2d 175 (1976); Words and Phrases, Environmental Law Key 577; see also attached supplemental authority written by Ms. Lake).

SEPA's requirements prohibit such a bifurcation by denying the Superior Court any discretion or jurisdiction to bifurcate these the PRA claims from the so-called "nonPRA" claims in this case. (See SEPA's WAC 197-11-504(1) & WAC 197-11-330(2)(a); SEPA's RCW 43.21C.075(3); PCCE, Inc. v. United States, 159 F. 3d 425, 427 (9th Cir. 1998); Marriage of Wolfe, 99 Wn. 2d 531, at 536 663 P. 2d 469 (1983); Weyerhaeuser v. Pierce County, 124 Wn. 2d 26, at 38 (1994); Norway Hill Pres. & Prot. Ass'n v. King County Council, 87 Wn.2d 267, 552 P.2d 674 (1976); et seq.).

Respondents did not argue against nor deny Appellants' issue that claims the Superior Court in erred when granting the order of bifurcation since SEPA statutory scheme incorporates the PRA public records provisions in the SEPA regulations at WAC 197-11-504(1) prohibits such a

bifurcation by denying the Superior Court any discretion or jurisdiction to bifurcate these the PRA claims from the so-called "nonPRA" claims in this case.

Under Kelley, supra, the PRA, the State and Federal Constitutions, and the Court Rules all prohibit such a "bifurcation" by denying the Superior Court any discretion, authority or jurisdiction to act to prevent disclosure of the withheld evidence in the PRA claims from the so-called "nonPRA" claims in this case by the Superior Court's "bifurcating" these the PRA claims from being heard at the same time as the "nonPRA" SEPA and other claims. (Fritz; Sullivan; Fisons; Kelley; Gott; Norway Hill; WAC 197-11-504(1); PCCE, Inc. v. United States; Marriage of Wolfe; Weyerhaeuser v. Pierce County, 124 Wn. 2d 26, at 38 (1994); Norway Hill Pres. & Prot. Ass'n v. King County Council, 87 Wn.2d 267, 552 P.2d 674 (1976); et seq.).

On bifurcation, Respondents also did not argue against nor deny Appellants' issue that claimed the Superior Court later erred when not following the provisions of the accompanying August 24, 2007 Bifurcated Case Scheduling Order accompanying the August 24, 2007 Order of Granting Bifurcation but denying the Stay, as noted in the August 24, 2007 Clerk's Note's on this hearing setting date of the PRA hearing two weeks before the date for the hearings of Respondents' numerous dispositive motions.

Respondents also did not argue against nor deny Appellants' issues and argument that the Superior Court later erred in construing the order of bifurcation in such a fashion that the Thurston County Superior Court administration thought Appellants' PRA claims had been stayed, or, alternatively, dismissed, effectively barring Appellants from proceeding, nor whether was it an error of the Superior Court to later conclude that the entire case had been dismissed and to refuse to allow Appellants to file pleadings in the case, when in fact the order of bifurcation only bifurcated the case not "Stay" the PRA claims, or when the orders of dismissal in question only dismissed Appellants' non-PRA claims or any PRA claims as to Weyerhaeuser, not as to the Port, especially in light of the declaration at CP 369, "When plaintiff (West) attempted to set a hearing he was informed by the Superior Court's private ex officio legal counsel that the case had been dismissed. Intervention by the Office of the prosecuting Attorney was required to have the case reactivated", and the fact that Mr. West, upon hearing Judge Thomas McPhee 's statement that the "stay" in the case would have to be lifted before the case could proceed, filed a motion to lift the "stay " (CP 533-538), which demonstrated that the practical effect of the bifurcation order was in fact to prevent the

PRA case from going forward ever so as to conceal key evidence of the improper unlawful and criminal actions of the Port in this case. (See RCW 34.04.476; Mr. Dierker's Opening Brief).

However, as noted in this case, instead of following the law, the Port and its attorney refused to fully disclose all of the Port's all environmental information relevant to the Port's actions on this project to any person, agency with jurisdiction, or any Court reviewing this project, and in fact, the Port and its attorney withheld records and falsified records in this case, where the Port even knowingly filed an incomplete and falsified Port Administrative Record on the Port's actions in this case with the Superior Court, thereby denying Appellants any meaningful access to justice in the Superior Court and this Court for these SEPA claims by the Port's fraudulent concealment of much of the key evidence from the record in this case, and this dismissal must be reversed for this reason alone. RCW 40.16; RCW 42.56.510; RCW 34.04.476; RCW 43.21C.075; WAC 197-11-504(1); Doctrine of Fraudulent Concealment, Black's Law Dictionary 5th Ed., page 596; Discovery Rule Doctrine, Black's 5th Ed., page 419; Fruit of a Poisonous Tree Doctrine, Black's 5th Ed., page 602; Clean Hands Doctrine, Black's 5th Ed., page 227; see attached supplemental authority.

Under the "Discovery Rule" doctrine, a statute of limitations on a claim does not begin to run until a plaintiff or appellant "discovers" or reasonably should have discovered the cause of an action. (Barrent v. U.S., 689 F. 2d 324 (1981); Ruth v. Dight, 75 Wn. 2d 660, 453 P. 2d 631 (1969); Tyson v. Tyson, 727 P. 2d 226 (1986); see Black's Law Dictionary Fifth Edition, page 419). Under the "Doctrine of Fraudulent Concealment", a statute of limitations on a claim will be tolled when the defendant or respondent concealed material facts or provided misrepresentations concerning a cause of action. (Blank v. McKeen, 707 F. 2d 817 (9th Cir. 1983); Briley v. California, 564 F. 2d 849 (9th Cir. 1977); Stuekler v. Sceve Steel, 1 Wash. App. 391. 461 P. 2d 555 (1969); see also Physicians Insurance Exchange v. Fisons Corporation, 122 Wn. 2d 299, 858 P. 2d 1054 (1993); Oates v. Taylor, 31 Wn. 2d 898 (1948); see Black's Law Dictionary Fifth Edition, page 596); see also attached supplemental authority written by Ms. Lake.

Since, due in part to the irregular proceeding of this Court which allowed the hearing of the SEPA and other issues of this case to be done before the issues on the PRA were considered, and due in part to the Port's failure to provide a complete copy of all of the agency records considered by the Port for their decision on the Marine Terminal/ Weyerhaeuser project, which would have included page 49 of the Port's Lease of part of this property to Weyerhaeuser and this Lease's

"incorporated documents" which included but is not limited to the Floyd/Snyder Environmental Site Assessment which showed that Plaintiffs' claims that the Port's actions reviewed in this case violated SEPA, and other laws were correct, it is clearly improper for the Court to grant these Motions to Dismiss to further prevent Plaintiffs from being able to obtain a complete copy of all of the agency records considered by the Port for their decision on the Marine Terminal/ Weyerhaeuser project to be able to have the evidence to properly present their case to obtain a meaningful opportunity to be heard by this Court. Id.; see attached supplemental authority written by Ms. Lake.

However, as noted herein, due to the bifurcation and Judge Wickham's refusals to follow Judge Pomeroy's case scheduling order on the bifurcated issues, the two later Orders of Dismissal in this case failed to have and consider a complete record for review, and failed to follow these and other such legal standards of review. Id.; see attached supplemental authority written by Ms. Lake.

Clearly, the Superior Court was prohibited by law from bifurcating these the PRA claims from the supposed "nonPRA" claims under SEPA, et al, which, due to later Judge's "mistaken" errors, effectively granted the denied "stay" and allowed the Port to continue to improperly and illegally withhold this relevant evidence in the Port public records about the project in this case and prevented Appellants' discovery of this withheld relevant evidence, which Mr. Dierker has shown clearly supported the Appellants' claims concerning the Port actions in this case. (See copies of the Port's withheld public records later disclosed to Mr. Dierker attached to Appellant's Motion to Supplement Port Administrative Record; see attached supplemental authority written by Ms. Lake.).

Further, this lack of a proper record for review bars all further legal proceedings in this matter, as shown by the newly discovered attached "supplemental authority" and evidence attached to the Motion to Strike, et al., that was newly made by the Port's Attorney's in a July 9, 2013 "Response in Opposition to Notice of Intent for Public Lease to PacifiClean" to a SEPA action and land use action of Kittitas County Board of County Commissioners (KBCC) in another development case concerning Kittitas County's concealing of certain portions of a County lease and other evidence from the public and Kittitas County's Administrative Record (AR) on the SEPA actions on that project complained of in that case, the attached new "supplemental legal authority" recently filed by the Port's attorney in another matter which appears to "parrot" or copy many of Mr. Dierker's and Mr. West's arguments that such concealing of such evidence in such cases violates SEPA, due process, discovery rules and the right to gain redress of grievances without the

abridgment of those due process rights by such governmental agencies' illegal, unlawful and unconstitutional withholding of such evidence from consideration by the adjudicative agencies and the Courts during all meaningful due process hearings of the evidence in the matter. Id., pg. 1-12.

Ms. Lake's own legal citations and authority on similar claims made in this supplemental authority, clearly show that the claims about records on a SEPA action and project are part of the SEPA claims in case and therefore the PRA claims cannot be legally "bifurcate" or separated from the SEPA claims, just as Appellants have argued under SEPA, and doing so is an abuse of SEPA's restrictions on a judge's discretion, for which this Court should overturned the Bifurcation decision. (Id.).

Clearly, based upon only Ms. Lake's own legal citations and authority on similar claims made in this July 9, 2013 Response in Opposition to Notice of Intent for Public Lease to PacifiClean", pages 1-12, this Court will be acting improperly if this Court bases its decision in this appeal on the Port's incomplete Administrative Record filed in this case about Appellants' SEPA claims in this case in this case, including the public records claims that Respondents in this case have tried to term "PRA claims" to illegally "piecemeal" this case's integral claims by the improper bifurcation and stay of the PRA claims from the SEPA claims in this case, to allow the SEPA claims to again be considered without "full disclose" as required by SEPA, the PRA and the APA for such judicial appeals. (Id.).

From Ms. Lake's own Letter here, it therefore appears that Ms. Lake knew she was improperly acting in this case to withhold evidence from the agency and court records in this case that was absolutely necessary for the Appellants to be able to have a meaningful due process access to redress of grievances in the agency and court venues for this case and other cases on this project they had to proceed in due to Ms. Lake and the Port's "piecemealing" of this one project's review by the Port, the Courts and other agencies with jurisdiction over these various piecemealed actions of the Port where Ms. Lake acted to conceal relevant evidence, in violation of law and the standards of due process. (Id.; see attached supplemental authority written by Ms. Lake).

This Court should reverse this bifurcation and both dismissals leading from it, and remand this case back, with instructions that include the Port's Attorney's preparation of a new "unpiecemealed", completed, and unfalsified Port Administrative Record covering all of the integral parts of this entire project in this case, and requiring a new Superior Court review of the

"nonPRA" claims in this case **to be done at least 4 weeks after the Port's disclosure of all withheld public records relevant to this project and its approval** and the Port Attorney's filing of a new corrected, "unpiecemealed" and unfalsified Port Administrative Record covering all of the integral parts of this entire project and all of the agency actions taken to approve all of these parts of this same project in a single Port Administrative Record for review of all of these actions in one single case, as requires for such cases pursuant to SEPA's RCW 43.21C.075 and SEPA's WAC 197-11-504(1)'s "incorporation" of the PRA and other laws into SEPA's "statutory scheme" which show that Judge Pomeroy lacked jurisdiction to consider Respondents' motion to bifurcate and stay the PRA claims to allow Judge Wickham's hearing of the motions to dismiss "nonPRA" claims without the evidence withheld by the Port's improper use PRA "exemptions" and SEPA to hide evidence showing the project was much larger and had much impacts than those made Respondents' SEPA and project approval actions taken to approve the project in this case.

Further, as noted by Weyerhaeuser's Letter Response concerning the Port's Administrative Record filed in this case, a review of the provisions for required disclosure of evidence in a Court case under SEPA has to be done under the Administrative Procedures Act RCW 34.05, which requires that Port disclosure of evidence to be filed with the Superior Court in a completed and unfalsified Port's Administrative Record filed in this case pursuant to the Official Public Records Act (OPRA) RCW 40.16, et seq. (See RCW 40.16. 010, .020, & .030).

As also noted, a review of the provisions for required disclosure of evidence in a Court case under both the discovery rules and the PRA clearly require disclosure of evidence in a Court case **before** a Court considers any other of the claims in a case, and the Superior Court lacked jurisdiction to even consider the dismissal of the claims in this case without this disclosure of evidence improperly withheld by the Port attorney's illegal use of the records disclosure requirements of the APA, PRA, SEPA and OPRA to illegally falsify and file an incomplete Port Administrative Record. (Id.; see also attached supplemental authority written by Ms. Lake).

Clearly, since under the controlling law, the Superior Court lacked discretion and jurisdiction to "bifurcate" the PRA claims from the "nonPRA" claims, this Court of Appeals should overturn and reverse the Superior Court's "poisoned tree" of bifurcation and its 2 "poisoned fruits" of the summary dismissals of both sets of claims in this case, granting this appeal and remanding this case for further proceeding consistent with the law and actual evidence

shows all of the facts in this case.

E. Mr. Dierker has valid PRA records claims in this case.

The Port Response Brief falsely claims at page 44, that "Mr. Dierker has no valid PRA records claims" in this case, though there is no such Superior Court finding or conclusion of law .

However, there is no Superior Court finding or conclusion of law which conflicts with admissions made by the Port's Co-Respondent Weyerhaeuser's Response Brief, at page 6 and pages 8-9, the Port's Response Brief "joined", where Weyerhaeuser admitted Mr. Dierker has made PRA public record acts requests for the Port's records about this project in this case, and showing that Weyerhaeuser admitted that Mr. Dierker had made a valid PRA public records claim in the CoPlaintiffs' Amended Complaint and in their Second Amended Complaint filed in this case.

Ms. Lake falsely claims in her Port Response Brief that Mr. Dierker has no valid public record claim in this case, since she made sure is no record of Mr. Dierker's public record claim in the case file of this case, due to her failure to properly include both Mr. Dierker's and Mr. West's requests for these public records about this project in the Port's Administrative Record filed in this case, and due to her actions to prevent any hearing of the both Appellants Public Records Act claims against the Port in this case.

However, Weyerhaeuser's Response Brief directly contradicts this claim by stating:

> "Later joined by Mr. Dierker, Mr. West sought Port records pertaining to the Port-Weyerhaeuser lease under the PRA and challenged the port's SEPA review for the lease project". (Id., at page 6, emphasis added).
> "... Again joined by Mr. Dierker, Mr. West filed an Amended Complaint on July 6, 2007, and a Second Amended Complaint on July 13, 2007. In the Second Amended Complaint, Mr. West and Mr. Dierker alleged, inter alia, that the defendants had (1) denied access to public records contrary to the PRA; (2) violated the terms of a December 19, 2006 City of Olympia Hearings Examiner ruling addressing different aspects of the log yard project; (3) violated the Harbor Improvements Act (RCW 53.20.010); and (4) failed to comply with SEPA. CP 33-50." (Id, at pages 8 - 9, emphasis added).

Clearly, even the Port's Co-Respondent Weyerhaeuser's Response Brief clearly shows that Mr. Dierker has valid PRA public records claim in this case along with Mr. West, despite Ms. Lake's repeated false claims about Mr. Dierker to the contrary.

Consequently, even **if** this Court had jurisdiction to consider the Port's "appeal" pleadings here, this false Port claim should be denied, and the Port's Attorney should be sanctioned for making such a false claim.

F. Dierker's pleadings are not "Illegal" or "Naked Castings into Constitutional Sea".

The Port's Response Brief, at page 45, makes a new fraudulent "appeal" claim, where the Port falsely alleges that Mr. Dierker's pleadings are merely "Naked Castings into (a) Constitutional Sea (that) are Illegal", claiming that Mr. Dierker has acted "illegally" to commit the Port Attorney's alleged "crime" of Mr. Dierker making claims he has certain fundamental constitutional rights to gain disclosure of relevant evidence in these withheld Port public records about this project under the First Amendment's right to petition the courts for redress of grievances where Mr. Dierker cited to State Supreme Court's decision in Fritz v. Gorton, 83 Wn.2d 275 (1974), which cited to New York Times v. Sullivan, 376 US 254, 11 L. Ed. 2d 686 (1964).

Clearly, Mr. Dierker's pleadings are not "naked" as the Port falsely claims, since Mr. Dierker's pleadings are well supported where they claim and argue this constitutional right to have all disclosure of all of Respondents' relevant evidence about this case in the Port's single, complete, un-piecemealed, and unfalsified Port Administrative Record on all of the integral parts of this entire project, and on all of actions taken by the Port and other agencies with jurisdictions actions to approve this project, **before** the Superior Court even starts to consider Appellants' claims in this case, and this new Port claim is clearly erroneous, fraudulent, and is illegal under this State's "libel" laws, and under protections against such violations of Mr. Dierker's civil and constitutional rights under the First Amendment to the U.S. Constitution, the U.S. Civil Rights Act, Title 42 USC § 1983, 1985, 1988, et seq., and Title 18 § 241 and 242, under the Americans with Disabilities Act, Title 42 USC § 12101, 12131, 12132, 12133, et seq., and the Washington State Blind Disabled and Handicapped Act, among other laws. Id.; see attached supplemental authority written by Ms. Lake.

Mr. Dierker's "castings into the constitutional sea" to make constitutional claims in this appeal are not "naked" or "illegal" as Ms. Lake improperly claimed here, since he made specific citations to the issues, to the rules, laws, constitutional amendments and case law controlling such claims, showed their application to this case by citation to the Administrative and Court records, and which made a proper conclusion for each and every on of his constitutional claims in his appeal in this Court of Appeals, and since Appellants can bring forth such "constitutional" claims at any time during a case, and thereby, Ms. Lake's claims against Mr. Dierker here are again improper.

Further, while Mr. Dierker's "castings into the constitutional sea" to make constitutional claims in this appeal are not "naked" or illegal as Ms. Lake improperly claimed, as noted herein

and in the "supplemental authority" of Ms. Lake's July 9, 2013 Response to Kitittas County noted above (supra), Ms. Lake's knows her actions in this case where improper, illegal and unconstitutional when she withheld these relevant Port public records about this project from this "piecemealed" case's Administrative Record she filed, and that she also withheld from the other numerous Administrative Records she filed in various other "piecemealed" cases when Ms. Lake was "piecemealing" the various other integral parts of this one Port/Weyerhaeuser project action appealed here, as even Respondents "Introductions" in both Response Briefs admitted here. (Id.).

Further, it would be a violation of equal protection of the law to **not** consider Mr. Dierker's well argued constitutional claims if Ms. Lake's "inherent authority" constitutional or common law claims, especially since her claims are false and/or have no basis in law, as noted here.

It would not be equitable or constitutional for this Court to consider this appeal "de novo" without this Court or any other court ever hearing or considering this key evidence in the relevant withheld Port records about this Port actions complained of in this case, since the withheld evidence concerns the Port's actions and/or failures of to properly and legally act to protect the public's interests here to prevent the Port's subsequent unlawful use of millions of dollars in public funds and resources for this project, clearly shows that the Port and Weyerhaeuser were significantly involved in this specific matter as "partners" on the project, and shows Weyerhaeuser aided, encouraged, and/or connoted approval of the Port's unreasonable withholding of public records from the Appellants here. (Long v. Chiropractic Society, 93 Wn.2d 757, 761–762, 613 P.2d 124 (1980); see also attached supplemental authority written by the Port's Ms. Lake).

Any other finding would violate PRA's (RCW 42.56) requirement for all courts to liberally construe the Act to promote disclosure and narrowly construe the acts exemptions to disclosure, and would violate Appellants' rights to equal protection of the law under the Fourteenth Amendment to the U.S. Constitution. (Long, supra; Kuzinich v. Santa Clara, 689 F.2d 1345, 1349 (9th Cir. 1982); and Yick Wo v. Hopkins, 6 S. Ct. 1064 (1886); Fritz, supra; Sullivan, supra).

These withheld records concern Appellants' claims made in this case and involve violations of Plaintiffs' rights to equal protection, due process, and liberty interests containing legal questions for these members of the public to try to get the Courts to control the excesses of government here. (Id.; see Kuzinich v. County of Santa Clara, 689 F. 2d 1345 (9th Cir. 1982); referring to Yick Wo v. Hopkins, 118 US 356, 6 S. Ct. 1064, 30 l. Ed. 220 (1886); Halperin v. Kissinger, 606 F. 2d

1192 (DC Cir. 1979); Hill v. Tennessee Valley Authority, 549 F. 2d 1064 (1977), affirmed 98 S. Ct. 2279 (1978); Haygood v. Younger, 769 F. 2d 1350 (9th Cir. 1985).

Prior restraints of first amendment rights, like the Port's piecesmealing, the delays of this case, the delays and denials of public records hearings for Appellants to obtain disclosure relevant evidence by the Port's before the Court's hearing of other claims in this case based upon the concealed evidence, and the Port's silently concealing of relevant evidence from the Appellants and Courts when it is necessary for petitioning the Courts for redress of grievances Appellants have against the Port, "must be narrowly drawn" or are prohibited. (See Broderick v. Oklahoma, 413 US 601, 37 L. Ed. 2d 830 (1973); see also Fritz; Sullivan; Fisons; Kelley; Gott; Norway Hill; the First Amendment to the U.S. Constitution; the discovery rules; and common due process law).

However, this Court could make the same erroneous decision that the Superior Court made in dismissing this case, without this Court being able to consider the key evidence in the Port's 2005 Lease's incorporated terms of the Environmental Site Assessment (ESA) and without page 49 being in the copy of the Port's 2005 Lease of this property and facilities to Weyerhaeuser, both of which the Port's Attorney edited out of the Port's Administrative Record filed in this case, that Mr. Dierker was requesting be added to the Port's Administrative Record in this case, as these records should have been had the Port not improperly withheld them from the Appellants, the Courts, and other agencies with jurisdiction or approval powers for this Port/Weyerhaeuser project.

Here, Ms. Lake has clearly violated the Official Public Records Act's (OPRA) "Penal Provisions" RCW 40.16.010, .020, & .030, which is illegal, and since she continued to withhold discovery of this relevant evidence throughout the Superior Court case and she continues to do so to this day, with the Superior Court's erroneous help, to violate Appellants' fundamental constitutional due process rights to meaningful access to the courts for redress of grievances under the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and Fourteenth Amendments to the U.S. Constitution, and Article I of the Washington State Constitution, et seq., and has thereby acted illegally under Title 18 USC § 241 and/or Title 18 USC § 242 to violate Appellants' civil rights and unlawfully under Title 42 USC § 1983, 1985, 1988 to violate Appellants' civil rights, and, for Mr. Dierker who is a severely disabled Veteran, under Title 42 USC § 12101, 12131, 12132, 12133, et seq., Ms. Lake has acted unlawfully to violate his' fundamental due process civil rights as noted in this case. (Supra).

Here, reviewing the record of this case in light of Ms. Lake's own supplemental authority shows that her, the Port's and the Superior Court's actions taken in this case were ultra vires, since they were knowingly done without or in direct violation of the laws controlling their legal authorities to act in this case, that denied and violated Appellants' fundamental due process rights to have all relevant evidence on the Port's actions complained of in this case, so that Appellants could make proper pleadings for obtaining meaningful opportunity to be heard by the Port and the Courts for redress of their grievances against Respondents here, and Ms. Lake's own supplemental authority showed the Port's and Superior Court's actions also violated SEPA and the Appearance of Fairness Doctrine, as Appellants claimed happened repeatedly in this case. (See Ms. Lake's own supplemental authority).

The State Supreme Court has held the provisions of the "Appearance of Fairness Doctrine":

> "require a sensitive balance between individual rights and the public welfare"; and require that "the process by which such decisions are made must not only be fair but must appear to be fair to insure public confidence therein." (Fleming v. City of Tacoma, 81 Wn. 2d 292, 502 P. 2d 327 (1972), Smith v. Skagit County, 75 Wn. 2d 715, 453 P. 2d 832 (1969); Buell v. Bremerton, 80 Wn. 2d 518, at 523, 495 P. 2d 1358 (1972); Chrobuck v. Snohomish County, 78 Wn. 2d 858, 480 P. 2d 489 (1971).

In Smith, the State Supreme Court was "particularly disturbed" by Skagit County's violation of the Appearance of Fairness Doctrine by Skagit County's "refusal to allow opponents to present their views on certain occasions", finding that justice had not been done. (See Smith v. Skagit County, supra). In Buell, the State Supreme Court stated that under the Appearance of Fairness Doctrine, the person and/or agency making such decisions must be "capable of hearing the weak voices as well as the strong", since "it is important not only that justice be done but that it also appears to be done...". (Buell v. Bremerton, supra).

Judge Wickham, according to the Thurston County Website, is a member of the Thurston County Chamber of Commerce. This organization was the creator of the Port of Olympia and actively supports the particular projects at issue in this case. Such a conflict of interest is directly contrary to the clearly established precedent in SAVE v. Bothel, where a hearing officer's involvement with the Chamber of Commerce was seen as an impermissible conflict and violation of

the appearance of fairness. Significantly, and even more troubling, Judge Wickham failed to disclose this conflict in a previous case where he ruled in favor of the Port of Olympia in another apparent violation of the doctrine of the Appearance of Fairness and his impartiality in the Court. (SAVE v. Bothel, 89 Wn. 2d 862, 574 P. 2d 401 (1978).

However, as noted in the record of this case, the "weak voices" of the none agency Appellants, at least one of whom is pro se and disabled,:

a) were refused a proper hearing of their issues on the merits of their claims in this case due to the Superior Court's appointment of Judge Wickham to this case, who acknowledged that he was a member of the local Chamber of Commerce, which was promoting this project of its two members,the Port and Weyerhaeuser, and thereby he was prejudiced as Appellants complained of in this case;

b) were refused a proper hearing of their issues on the merits of their PRA claims at a proper and timely Show Cause hearing where witnesses could testify and evidence could be produced, **before the Superior Court's hearing of the Motions to Dismiss the "nonPRA" claims, and were finally denied any hearing of their PRA claims**;

b) were refused the opportunity to gain discovery of evidence necessary for completion of the Port's Administrative Record which is necessary for a just adjudication of this case;

c) were refused the opportunity to have the Port's complete Administrative Record and other public records on this project and actions that is necessary for a just adjudication of this case;

d) were refused the opportunity to present certain of their evidence, pleadings and claims by the unreasonable, prejudicial, arbitrary and capricious actions and/or omissions to properly acts of Judge Wickham and Meyer and/or others of this Superior Court which allowed a prejudiced Judge Wickham to hear and make decisions on this case, and which allowed an overworked underqualified District Court Judge Meyer to hear this complicated Public Records Act case when he stated he knew nothing about the PRA of Superior Court procedures since this was his first Superior Court PRA case, by hearing only Respondents' Motions to Dismiss filed and noted **after** Plaintiff West's Notice of Issue for a Show Cause hearing was filed and noted, and their actions and/or omissions to properly act to ignore, misrepresent, misinterpret, and mischaracterize the agency record and Petitioners' pleadings and evidence in this case, to dismiss the PRA claims in this case, which followed blindly the Port Attorney's unreasonable, arbitrary and capricious

actions to ignore, misrepresent, misinterpret, and mischaracterize the agency record and Petitioners' pleadings and evidence in this case;

e) were refused the opportunity to have adequate time to to present certain of their evidence, pleadings and claims made in this case, by the arbitrary and capricious actions of Judge Meyer and this Court to **not** properly consider Plaintiffs' pleadings against this Motion; and/or

f) were refused the opportunity to present their views in other ways enumerated herein and in their prior pleadings on these matters, etc.

Consequently, even if this Court did have jurisdiction to consider the Port's "appeal" pleadings here, this Port claim should be denied and the Port's Attorney should be sanctioned for making such a false claim, especially when she has acted illegally and unconstitutionally in this case, and thereby, she does not have "clean hands" necessary to make such a claim though she has grown a "poisoned tree" from her "dirt" on her "unclean hands", and the "Clean Hands Doctrine" of common law, the "unclean hands" of Respondents would have been barred from making this similar claim against Appellants, especially when it was false, and this dismissal must be overturned. (See Black's Law Dictionary (9th ed. 2009) and (5th Ed. 1979).

G. This Court Should Deny the Port's Request for Sanctions, Cost and Fees, and instead this Court should Sanction the Port and Weyerhaeuser.

While the Port argued that this appeal is frivolous, and seeks an award of sanctions, fees and costs, like Mr. West, Mr. Dierker also believes this appeal is meritorious, and respectfully requests as follows that this Court reverse and remand his case back to the Superior Court, who also did not award fees and costs to the Port in that Order of Dismissal. (Supra).

However, even in the event that this Court affirms the dismissal as it was written and signed, an award of fees and costs are not warranted.

The Port argues that an appeal is without merit if the issues on review (1) are clearly controlled by settled law; (2) are factual and supported by the evidence; or (3) are matters of judicial discretion and the decision was clearly within the discretion of the Superior Court. State v. Rolax, 104 Wn.2d 129, 132, 70 P.2d 1185 (1985).

Here, as noted above, the Superior Court's final Order of Dismissal as it was written and signed shows, the Superior Court did not dismiss the case pursuant to its inherent authority at all, when the Superior Court improperly exercised its discretion to dismiss this case as a sanction under

the Public Records Act's agency penalty provision for Appellants' alleged "willful" delay of the PRA Show Cause hearing in this case, which the record shows was not Appellants fault, and that the Superior Court's dismissal was based upon clearly barred, erroneous, and superfluous findings of fact and conclusions of law, when as noted above, actually the Superior Court Rule of CR 41(b)(1) applied to this case and this dismissal for lack of prosecution was barred since Plaintiffs both had cured the failure to prosecute by filing notices and motions to set the trial and the PRA Show Cause hearing in this case. Alternatively, even if CR 41(b)(1) did not apply, substantial evidence did not support the Superior Court's findings of fact upon which it based the dismissal as noted, and the Port's Motion to Dismiss should have been denied by the Superior Court.

In order to award fees and costs, this Court must find that the appeal is frivolous. Kearney v. Kearney. 95 Wn. App. 405, 417, 974 P.2d 872 (1999). And an appeal is frivolous if it is both without merit, and if there are no debatable issues upon which reasonable minds might differ." In re Recall of Feetham, 149 Wn.2d 860, 872, 72 P 3d 741 (2003).

In Kearney, the Court found that there were no debatable issues upon which reasonable minds might differ, noting that the appellant had presented the exact same arguments twice before in petitions for discretionary review to the Court of Appeals and the Supreme Court, and then again to the Court of Appeals when the underlying action became final and he appealed directly.

While it may be true that Mr. West has made arguments in this case which are similar to his arguments to this Court of Appeals in other cases these case have not yet been finally ruled upon, and there is no evidence or allegation by the Port that Mr. Dierker has made arguments in this case which are similar to his arguments to this Court of Appeals in other cases since Mr. Dierker has not been making any such arguments to this Court.

Unlike as there was in Kearney, there is **no** history of final decisions on barring Appellants' arguments in this appeal review in this case even in the cases Mr. West has appealed in this Court in others case, **without Mr. Dierker**, and therefore, reasonable minds might well differ, at a minimum, as to: 1) whether CR 41(b)(1) applied in this case to preclude the Superior Court's exercise of discretion to dismiss all claims in this case for Appellants' alleged lack of prosecution of the PRA show cause hearing, especially in light of Ms. Lake's own E-mails back and forth between the Court, and in light of Judge McPhee's June 2012 finding that even after almost 5 years of the Respondents' and Superior Court's delay of this PRA Show Cause hearing, Judge McPhee

believed could not hear the "Stayed" PRA Show Cause hearing, though no "Stay" of the PRA claims hearing was ever granted, which appears to show it was **no** Appellants who "willfully delayed" this PRA Show Cause Hearing, it was the actions of the Respondent and the Superior Court who by their errors "willfully delayed" this PRA Show Cause Hearing;

2) whether Appellants' pleadings met their light burden of proof in opposing the CR 12(b) motion to dismiss Appellants' SEPA and other non-PRA claims for lack of standing, and whether the Port was barred from making this "standing" argument for dismissal under the Port's own SEPA Policy and the Port Commissioners' Denial of the the SEPA Appeal both written by the Port's Attorney pleading this case during that dismissal and in this Appeal, Ms. Lake; and

3) whether the Superior Court was barred for any consideration or granting of the Motion to Bifurcate and (effectively) Stay and denial of a hearing of the PRA claims until after the SEPA and other "nonPRA" claims had been heard without this missing relevant evidence, in light of SEPA's incorporation of the PRA's records disclosure provisions into SEPA statutory scheme for disclosure of records related to this Port project, its related impacts, and related to Respondents' actions taken to approve and operate it, and in light of Appellants' statutory and fundamental constitutional rights to receive all relevant evidence for prosecution of the case in a completed unfalsified Port Administrative Record record for review by the Superior Court and this Court of Appeals in this appeal, which this Court cannot review due to the Port Attorney's repeated actions to conceal most of the relevant evidence from the record in this case.

Further, under Kearney's findings, it appears that the Port should be sanctioned for making a "frivolous" request for sanctions against Appellants in this case, since the Superior Court denied the Port's similar allegations when denying the Port's similar CR 11 sanction requests against Plaintiffs in the Superior Court case, and the Superior Court denied the Port's requests for an award of costs, fees, and attorney fees against Plaintiffs when it dismissed this case. (Supra).

Also, this Court should note that Weyerhaeuser' Response Brief does not make a request for any "sanction" or award of costs, fees, or attorney fees against Appellants, as the Port's frivolously does, and also did not make such a claim to the Superior Court, and thereby, it appears that despite the Port CoRespondent's Attorney's prejudicial and erroneous claims, Weyerhaeuser does not support the Port's Attorney's prejudicial and erroneous claims that Appellants have acted so "frivolously" in this case that they should be "sanctioned" and should be required to pay

costs, fees and attorney fees, **IF** Appellants did loose this Appeal.

In fact, under Kearney's findings, the Port's and Weyerhaeuser's Response Briefs in this appeal are both "frivolous" and the Port's request for sanctions here is "frivolous", since as noted in the Motion to Strike, Respondents violated CR 8(d) by failing to deny or failing to properly respond to most of Appellants' claims and arguments made in this appeal, and since instead of making Response Briefs, both Respondents unreasonably and unlawfully filed 2 pleadings constituting untimely "appeals" or "cross-appeals" of claims that the Respondents' lost in the Superior Court, without Respondents ever filing a "Notice of Appeal" or of "cross-appeal" required under RAP 5.1 to give this Court of Appeals jurisdiction to consider Respondents' two "appeals" or "cross-appeals" of Respondents' claims lost in the Superior Court decisions reviewed in this case.

Consequently, under Kearney's findings, Appellants' appeal **is not** frivolous, but the Port's request for sanctions here **is** frivolous and both Co-Respondents' Response Briefs in this appeal are also frivolous since they constitute 2 "undercover" "appeals" of Respondents' **lost** claims for dismissal in this Superior Court's two Order dismissing Plaintiffs claims in this case, and thereby, this Court should sanction the two Respondents for these improper and barred pleadings.

H. Request for Fees and Costs

Appellants repeats his requests for fees and costs that he made in his Opening Brief.

IV. CONCLUSION

For the foregoing reasons, this Court of Appeals must reverse the ultra vires order on bifurcation and the 2 ultra vires orders of dismissal as written, and must remand the case for further proceedings consistent with the laws controlling such actions which were not followed in this case. Respectfully submitted this 12th Day of October, 2013.

I certify the foregoing to be true and correct to the best of my knowledge, beliefs and/or abilities, under penalty of perjury of the laws of the State of Washington and the United States of America, this 12th day of October, 2013 in Olympia, Washington.

Jerry Lee Dierker Jr., Appellant
2826 Cooper Point Road NW
Olympia, WA 98502
Ph. 360-866-5287

34.05.476 Agency record. (1) An agency shall maintain an official record of each adjudicative proceeding under this chapter.

(2) The agency record shall include:

(a) Notices of all proceedings;

(b) Any prehearing order;

(c) Any motions, pleadings, briefs, petitions, requests, and intermediate rulings;

(d) Evidence received or considered;

(e) A statement of matters officially noticed;

(f) Proffers of proof and objections and rulings thereon;

(g) Proposed findings, requested orders, and exceptions;

(h) The recording prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding;

(i) Any final order, initial order, or order on reconsideration;

(j) Staff memoranda or data submitted to the presiding officer, unless prepared and submitted by personal assistants and not inconsistent with RCW 34.05.455; and

(k) Matters placed on the record after an ex parte communication.

(3) Except to the extent that this chapter or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in adjudicative proceedings under this chapter and for judicial review of adjudicative proceedings. [1988 c 288 § 423.]

34.05.479 Emergency adjudicative proceedings. (1) Unless otherwise provided by law, an agency may use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action.

(2) The agency may take only such action as is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare that justifies use of emergency adjudication.

(3) The agency shall enter an order, including a brief statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the determination of an immediate danger and the agency's decision to take the specific action.

(4) The agency shall give such notice as is practicable to persons who are required to comply with the order. The order is effective when entered.

(5) After entering an order under this section, the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

(6) The agency record consists of any documents regarding the matter that were considered or prepared by the agency. The agency shall maintain these documents as its official record.

(7) Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for agency action in emergency adjudicative proceedings or for judicial review thereof.

(8) This section shall not apply to agency action taken pursuant to a provision of law that expressly authorizes the agency to issue a cease and desist order. The agency may proceed, alternatively, under that independent authority. [1988 c 288 § 424.]

Designation of persons for emergency adjudications by utilities and transportation commission: RCW 80.01.060.

34.05.4791 Secure community transition facility—Proceeding concerning public safety measures. A petition brought pursuant to RCW 71.09.342(5) shall be heard under the provisions of RCW 34.05.479 except that the decision of the governor's designee shall be final and is not subject to judicial review. [2002 c 68 § 10.]

Purpose—Severability—Effective date—2002 c 68: See notes following RCW 36.70A.200.

34.05.482 Brief adjudicative proceedings—Applicability. (1) An agency may use brief adjudicative proceedings if:

(a) The use of those proceedings in the circumstances does not violate any provision of law;

(b) The protection of the public interest does not require the agency to give notice and an opportunity to participate to persons other than the parties;

(c) The matter is entirely within one or more categories for which the agency by rule has adopted this section and RCW 34.05.485 through 34.05.494; and

(d) The issue and interests involved in the controversy do not warrant use of the procedures of RCW 34.05.413 through 34.05.479.

(2) Brief adjudicative proceedings are not authorized for public assistance and food stamp or benefit programs provided for in Title 74 RCW, including but not limited to public assistance as defined in *RCW 74.04.005(1). [1998 c 79 § 3; 1988 c 288 § 425.]

***Reviser's note:** RCW 74.04.005 was alphabetized pursuant to RCW 1.08.015(2)(k), changing subsection (1) to subsection (11).

34.05.485 Brief adjudicative proceedings—Procedure. (1) If not specifically prohibited by law, the following persons may be designated as the presiding officer of a brief adjudicative proceeding:

(a) The agency head;

(b) One or more members of the agency head;

(c) One or more administrative law judges; or

(d) One or more other persons designated by the agency head.

(2) Before taking action, the presiding officer shall give each party an opportunity to be informed of the agency's view of the matter and to explain the party's view of the matter.

(3) At the time any unfavorable action is taken the presiding officer shall serve upon each party a brief statement of the reasons for the decision. Within ten days, the presiding officer shall give the parties a brief written statement of the reasons for the decision and information about any internal administrative review available.

(4) The brief written statement is an initial order. If no review is taken of the initial order as authorized by RCW 34.05.488 and 34.05.491, the initial order shall be the final order. [1989 c 175 § 23; 1988 c 288 § 426.]

Additional notes found at www.leg.wa.gov

Reviser's note: *(1) RCW 81.34.070 was repealed by 1991 c 49 § 1.
**(2) RCW 43.07.360 expired December 31, 2000, pursuant to 1996 c 253 § 502.

42.56.510 Duty to disclose or withhold information—Otherwise provided. Nothing in RCW 42.56.250 and 42.56.330 shall affect a positive duty of an agency to disclose or a positive duty to withhold information which duty to disclose or withhold is contained in any other law. [2005 c 274 § 287; 1991 c 23 § 11; 1990 c 256 § 2; 1987 c 404 § 3. Formerly RCW 42.17.311.]

42.56.520 Prompt responses required. Responses to requests for public records shall be made promptly by agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives. Within five business days of receiving a public record request, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives must respond by either (1) providing the record; (2) providing an internet address and link on the agency's web site to the specific records requested, except that if the requester notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record or allow the requester to view copies using an agency computer; (3) acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and providing a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request; or (4) denying the public record request. Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request. In acknowledging receipt of a public record request that is unclear, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives may ask the requestor to clarify what information the requestor is seeking. If the requestor fails to clarify the request, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives need not respond to it. Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action or final action by the office of the secretary of the senate or the office of the chief clerk of the house of representatives for the purposes of judicial review. [2010 c 69 § 2; 1995 c 397 § 15; 1992 c 139 § 6; 1975 1st ex.s. c 294 § 18; 1973 c 1 § 32 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.320.]

Finding—2010 c 69: "The internet provides for instant access to public records at a significantly reduced cost to the agency and the public. Agencies are encouraged to make commonly requested records available on agency web sites. When an agency has made records available on its web site, members of the public with computer access should be encouraged to preserve taxpayer resources by accessing those records online." [2010 c 69 § 1.]

42.56.530 Review of agency denial. Whenever a state agency concludes that a public record is exempt from disclosure and denies a person opportunity to inspect or copy a public record for that reason, the person may request the attorney general to review the matter. The attorney general shall provide the person with his or her written opinion on whether the record is exempt.

Nothing in this section shall be deemed to establish an attorney-client relationship between the attorney general and a person making a request under this section. [1992 c 139 § 10. Formerly RCW 42.17.325.]

42.56.540 Court protection of public records. The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions. An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested. However, this option does not exist where the agency is required by law to provide such notice. [1992 c 139 § 7; 1975 1st ex.s. c 294 § 19; 1973 c 1 § 33 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.330.]

42.56.550 Judicial review of agency actions. (1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

(2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

(3) Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

(4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

(5) For actions under this section against counties, the venue provisions of RCW 36.01.050 apply.

(6) Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis. [2011 c 273 § 1. Prior: 2005 c 483 § 5; 2005 c 274 § 288; 1992 c 139 § 8; 1987 c 403 § 5; 1975 1st ex.s. c 294 § 20; 1973 c 1 § 34 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.340.]

Intent—Severability—1987 c 403: See notes following RCW 42.56.050.

Application of chapter 300, Laws of 2011: See note following RCW 42.56.565.

42.56.560 Application of RCW 42.56.550. The procedures in RCW 42.56.550 govern denials of an opportunity to inspect or copy a public record by the office of the secretary of the senate or the office of the chief clerk of the house of representatives. [2005 c 274 § 289; 1995 c 397 § 16. Formerly RCW 42.17.341.]

42.56.565 Inspection or copying by persons serving criminal sentences—Injunction. (1) A court shall not award penalties under RCW 42.56.550(4) to a person who was serving a criminal sentence in a state, local, or privately operated correctional facility on the date the request for public records was made, unless the court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record.

(2) The inspection or copying of any nonexempt public record by persons serving criminal sentences in state, local, or privately operated correctional facilities may be enjoined pursuant to this section.

(a) The injunction may be requested by: (i) An agency or its representative; (ii) a person named in the record or his or her representative; or (iii) a person to whom the requests specifically pertains or his or her representative.

(b) The request must be filed in: (i) The superior court in which the movant resides; or (ii) the superior court in the county in which the record is maintained.

(c) In order to issue an injunction, the court must find that:

(i) The request was made to harass or intimidate the agency or its employees;

(ii) Fulfilling the request would likely threaten the security of correctional facilities;

(iii) Fulfilling the request would likely threaten the safety or security of staff, inmates, family members of staff, family members of other inmates, or any other person; or

(iv) Fulfilling the request may assist criminal activity.

(3) In deciding whether to enjoin a request under subsection (2) of this section, the court may consider all relevant factors including, but not limited to:

(a) Other requests by the requestor;

(b) The type of record or records sought;

(c) Statements offered by the requestor concerning the purpose for the request;

(d) Whether disclosure of the requested records would likely harm any person or vital government interest;

(e) Whether the request seeks a significant and burdensome number of documents;

(f) The impact of disclosure on correctional facility security and order, the safety or security of correctional facility staff, inmates, or others; and

(g) The deterrence of criminal activity.

(4) The motion proceeding described in this section shall be a summary proceeding based on affidavits or declarations, unless the court orders otherwise. Upon a showing by a preponderance of the evidence, the court may enjoin all or any part of a request or requests. Based on the evidence, the court may also enjoin, for a period of time the court deems reasonable, future requests by:

(a) The same requestor; or

(b) An entity owned or controlled in whole or in part by the same requestor.

(5) An agency shall not be liable for penalties under RCW 42.56.550(4) for any period during which an order under this section is in effect, including during an appeal of an order under this section, regardless of the outcome of the appeal. [2011 c 300 § 1; 2009 c 10 § 1.]

Application—2011 c 300: "This act applies to all actions brought under RCW 42.56.550 in which final judgment has not been entered as of July 22, 2011." [2011 c 300 § 2.]

Effective date—2009 c 10: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 20, 2009]." [2009 c 10 § 2.]

42.56.570 Explanatory pamphlet. (1) The attorney general's office shall publish, and update when appropriate, a pamphlet, written in plain language, explaining this chapter.

(2) The attorney general, by February 1, 2006, shall adopt by rule an advisory model rule for state and local agencies, as defined in RCW 42.56.010, addressing the following subjects:

(a) Providing fullest assistance to requestors;

(b) Fulfilling large requests in the most efficient manner;

(c) Fulfilling requests for electronic records; and

(d) Any other issues pertaining to public disclosure as determined by the attorney general.

(3) The attorney general, in his or her discretion, may from time to time revise the model rule. [2007 c 197 § 8. Prior: 2005 c 483 § 4; 2005 c 274 § 290; 1992 c 139 § 9. Formerly RCW 42.17.348.]

42.56.580 Public records officers. (1) Each state and local agency shall appoint and publicly identify a public records officer whose responsibility is to serve as a point of contact for members of the public in requesting disclosure of public records and to oversee the agency's compliance with the public records disclosure requirements of this chapter. A state or local agency's public records officer may appoint an

34.05.558 Judicial review of facts confined to record. Judicial review of disputed issues of fact shall be conducted by the court without a jury and must be confined to the agency record for judicial review as defined by this chapter, supplemented by additional evidence taken pursuant to this chapter. [1988 c 288 § 513.]

34.05.562 New evidence taken by court or agency. (1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

(a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;

(b) Unlawfulness of procedure or of decision-making process; or

(c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

(2) The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:

(a) The agency was required by this chapter or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record;

(b) The court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action, and (ii) the interests of justice would be served by remand to the agency;

(c) The agency improperly excluded or omitted evidence from the record; or

(d) A relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome. [1988 c 288 § 514.]

34.05.566 Agency record for review—Costs. (1) Within thirty days after service of the petition for judicial review, or within further time allowed by the court or by other provision of law, the agency shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action. The record shall consist of any agency documents expressing the agency action, other documents identified by the agency as having been considered by it before its action and used as a basis for its action, and any other material described in this chapter as the agency record for the type of agency action at issue, subject to the provisions of this section.

(2) If part of the record has been preserved without a transcript, the agency shall prepare a transcript for inclusion in the record transmitted to the court, except for portions that the parties stipulate to omit in accordance with subsection (4) of this section.

(3) The agency may charge a nonindigent petitioner with the reasonable costs of preparing any necessary copies and transcripts for transmittal to the court. A failure by the petitioner to pay any of this cost to the agency relieves the agency from the responsibility for preparation of the record and transmittal to the court.

(4) The record may be shortened, summarized, or organized temporarily or, by stipulation of all parties, permanently.

(5) The court may tax the cost of preparing transcripts and copies of the record:

(a) Against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(b) In accordance with any provision of law.

(6) Additions to the record pursuant to RCW 34.05.562 must be made as ordered by the court.

(7) The court may require or permit subsequent corrections or additions to the record. [1989 c 175 § 26; 1988 c 288 § 515.]

Additional notes found at www.leg.wa.gov

34.05.570 Judicial review. (1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

(b)(i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(ii) From June 10, 2004, until July 1, 2008:

(A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW 2.06.020(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and

(B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW 2.06.020(1), the petition may be filed in the superior court of Whatcom or Thurston county.

(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without

to the attorney general, and to each person against whom the petitioner seeks civil enforcement;

(b) If the agency has filed and is diligently prosecuting a petition for civil enforcement of the same order against the same person; or

(c) If a petition for review of the same order has been filed and a stay is in effect.

(2) The petition shall name, as respondents, the agency whose order is sought to be enforced and each person against whom the petitioner seeks civil enforcement.

(3) The agency whose order is sought to be enforced may move to dismiss the petition on the grounds that it fails to qualify under this section or that the enforcement would be contrary to the policy of the agency. The court shall grant the motion to dismiss the petition unless the petitioner demonstrates that (a) the petition qualifies under this section and (b) the agency's failure to enforce its order is based on an exercise of discretion that is arbitrary or capricious.

(4) Except to the extent expressly authorized by law, a petition for civil enforcement may not request, and the court may not grant, any monetary payment apart from taxable costs. [1988 c 288 § 519.]

34.05.586 Defenses, limitations on. (1) Except as expressly provided in this section, a respondent may not assert as a defense in a proceeding for civil enforcement any fact or issue that the respondent had an opportunity to assert before the agency or a reviewing court and did not, or upon which the final determination of the agency or a reviewing court was adverse to the respondent. A respondent may assert as a defense only the following:

(a) That the rule or order is invalid under RCW 34.05.570(3) (a), (b), (c), (d), (g), or (h), but only when the respondent did not know and was under no duty to discover, or could not reasonably have discovered, facts giving rise to this issue;

(b) That the interest of justice would be served by resolution of an issue arising from:

(i) A change in controlling law occurring after the agency action; or

(ii) Agency action after the respondent has exhausted the last foreseeable opportunity for seeking relief from the agency or from a reviewing court;

(c) That the order does not apply to the respondent or that the respondent has not violated the order; or

(d) A defense specifically authorized by statute to be raised in a civil enforcement proceeding.

(2) The limitations of subsection (1) of this section do not apply to the extent that:

(a) The agency action sought to be enforced is a rule and the respondent has not been a party in an adjudicative proceeding that provided an adequate opportunity to raise the issue; or

(b) The agency action sought to be enforced is an order and the respondent was not notified actually or constructively of the related adjudicative proceeding in substantial compliance with this chapter.

(3) The court, to the extent necessary for the determination of the matter, may take new evidence. [1989 c 175 § 29; 1988 c 288 § 520.]

Additional notes found at www.leg.wa.gov

34.05.588 Enforcement of agency subpoena. (1) If a person fails to obey an agency subpoena issued in an adjudicative proceeding, or obeys the subpoena but refuses to testify or produce documents when requested concerning a matter under examination, the agency or attorney issuing the subpoena may petition the superior court of any county where the hearing is being conducted, where the subpoenaed person resides or is found, or where subpoenaed documents are located, for enforcement of the subpoena. The petition shall be accompanied by a copy of the subpoena and proof of service, shall set forth in what specific manner the subpoena has not been complied with, and shall request an order of the court to compel compliance. Upon such petition, the court shall enter an order directing the person to appear before the court at a time and place fixed in the order to show cause why the person has not obeyed the subpoena or has refused to testify or produce documents. A copy of the court's show cause order shall be served upon the person. If it appears to the court that the subpoena was properly issued, and that the particular questions the person refused to answer or the requests for production of documents were reasonable and relevant, the court shall enter an order that the person appear before the agency at the time and place fixed in the order and testify or produce the required documents, and on failing to obey this order the person shall be dealt with as for contempt of court.

(2) Agencies with statutory authority to issue investigative subpoenas may petition for enforcement of such subpoenas in accordance with subsection (1) of this section. The agency may petition the superior court of any county where the subpoenaed person resides or is found, or where subpoenaed documents are located. If it appears to the court that the subpoena was properly issued, that the investigation is being conducted for a lawfully authorized purpose, and that the testimony or documents required to be produced are adequately specified and relevant to the investigation, the court shall enter an order that the person appear before the agency at the time and place fixed in the order and testify or produce the required documents, and failing to obey this order the person shall be dealt with as for contempt of court.

(3) Petitions for enforcement of agency subpoenas are not subject to RCW 34.05.578 through 34.05.590. [1989 c 175 § 30.]

Additional notes found at www.leg.wa.gov

34.05.590 Incorporation of other judicial review provisions. Proceedings for civil enforcement are governed by the following provisions of this chapter on judicial review, as modified where necessary to adapt them to those proceedings:

(1) RCW 34.05.510(2) (ancillary procedural matters); and

(2) RCW 34.05.566 (agency record for judicial review). [1988 c 288 § 521.]

34.05.594 Review by higher court. Decisions on petitions for civil enforcement are reviewable as in other civil cases. [1988 c 288 § 522.]

34.05.598 Frivolous petitions. The provisions of RCW 4.84.185 relating to civil actions that are frivolous and

such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.070(9) or other statute which exempts or prohibits disclosure of specific information or records to certain persons. Agency facilities shall be made available to any person for the copying of public records except when and to the extent that this would unreasonably disrupt the operations of the agency. Agencies shall honor requests received by mail for identifiable public records unless exempted by provisions of this chapter. [2005 c 483 § 1; 2005 c 274 § 285; 1987 c 403 § 4; 1975 1st ex.s. c 294 § 15; 1973 c 1 § 27 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.270.]

Reviser's note: This section was amended by 2005 c 274 § 285 and by 2005 c 483 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Intent—Severability—1987 c 403: See notes following RCW 42.56.050.

42.56.090 Times for inspection and copying—Posting on web site. Public records shall be available for inspection and copying during the customary office hours of the agency, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives for a minimum of thirty hours per week, except weeks that include state legal holidays, unless the person making the request and the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives or its representative agree on a different time. Customary business hours must be posted on the agency or office's web site and made known by other means designed to provide the public with notice. [2009 c 428 § 2; 1995 c 397 § 12; 1973 c 1 § 28 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.280.]

42.56.100 Protection of public records—Public access. Agencies shall adopt and enforce reasonable rules and regulations, and the office of the secretary of the senate and the office of the chief clerk of the house of representatives shall adopt reasonable procedures allowing for the time, resource, and personnel constraints associated with legislative sessions, consonant with the intent of this chapter to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives. Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information. Nothing in this section shall relieve agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives from honoring requests received by mail for copies of identifiable public records.

If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives shall retain possession of the record, and may not destroy or erase the record until the request is resolved. [1995 c 397 § 13; 1992 c 139 § 4; 1975 1st ex.s. c 294 § 16; 1973 c 1 § 29 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.290.]

42.56.110 Destruction of information relating to employee misconduct. Nothing in this chapter prevents an agency from destroying information relating to employee misconduct or alleged misconduct, in accordance with RCW 41.06.450, to the extent necessary to ensure fairness to the employee. [1982 c 208 § 13. Formerly RCW 42.17.295.]

Additional notes found at www.leg.wa.gov

42.56.120 Charges for copying. No fee shall be charged for the inspection of public records. No fee shall be charged for locating public documents and making them available for copying. A reasonable charge may be imposed for providing copies of public records and for the use by any person of agency equipment or equipment of the office of the secretary of the senate or the office of the chief clerk of the house of representatives to copy public records, which charges shall not exceed the amount necessary to reimburse the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives for its actual costs directly incident to such copying. Agency charges for photocopies shall be imposed in accordance with the actual per page cost or other costs established and published by the agency. In no event may an agency charge a per page cost greater than the actual per page cost as established and published by the agency. To the extent the agency has not determined the actual per page cost for photocopies of public records, the agency may not charge in excess of fifteen cents per page. An agency may require a deposit in an amount not to exceed ten percent of the estimated cost of providing copies for a request. If an agency makes a request available on a partial or installment basis, the agency may charge for each part of the request as it is provided. If an installment of a records request is not claimed or reviewed, the agency is not obligated to fulfill the balance of the request. [2005 c 483 § 2. Prior: 1995 c 397 § 14; 1995 c 341 § 2; 1973 c 1 § 30 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.300.]

42.56.130 Other provisions not superseded. The provisions of RCW 42.56.070(7) and (8) and 42.56.120 that establish or allow agencies to establish the costs charged for photocopies of public records do not supersede other statutory provisions, other than in this chapter, authorizing or governing fees for copying public records. [2005 c 274 § 286; 1995 c 341 § 3. Formerly RCW 42.17.305.]

42.56.140 Public records exemptions accountability committee. (1)(a) The public records exemptions accountability committee is created to review exemptions from public disclosure, with thirteen members as provided in this subsection.

(i) The governor shall appoint two members, one of whom represents the governor and one of whom represents local government.

(ii) The attorney general shall appoint two members, one of whom represents the attorney general and one of whom represents a statewide media association.

magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated. [2010 c 204 § 1005; 2007 c 197 § 1; 2005 c 274 § 101.]

42.56.020 Short title. This chapter may be known and cited as the public records act. [2005 c 274 § 102.]

42.56.030 Construction. The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, 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. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern. [2007 c 197 § 2; 2005 c 274 § 283; 1992 c 139 § 2. Formerly RCW 42.17.251.]

42.56.040 Duty to publish procedures. (1) Each state agency shall separately state and currently publish in the Washington Administrative Code and each local agency shall prominently display and make available for inspection and copying at the central office of such local agency, for guidance of the public:

(a) Descriptions of its central and field organization and the established places at which, the employees from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain copies of agency decisions;

(b) Statements of the general course and method by which its operations are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(c) Rules of procedure;

(d) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(e) Each amendment or revision to, or repeal of any of the foregoing.

(2) Except to the extent that he or she has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published or displayed and not so published or displayed. [2012 c 117 § 127; 1973 c 1 § 25 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.250.]

42.56.050 Invasion of privacy, when. A person's "right to privacy," "right of privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public's right to inspect, examine, or copy public records. [1987 c 403 § 2. Formerly RCW 42.17.255.]

Intent—1987 c 403: "The legislature intends to restore the law relating to the release of public records largely to that which existed prior to the Washington Supreme Court decision in "*In Re Rosier*," 105 Wn.2d 606 (1986). The intent of this legislation is to make clear that: (1) Absent statutory provisions to the contrary, agencies possessing records should in responding to requests for disclosure not make any distinctions in releasing or not releasing records based upon the identity of the person or agency which requested the records, and (2) agencies having public records should rely only upon statutory exemptions or prohibitions for refusal to provide public records. Further, to avoid unnecessary confusion, "privacy" as used in RCW 42.17.255 is intended to have the same meaning as the definition given that word by the Supreme Court in "*Hearst v. Hoppe*," 90 Wn.2d 123, 135 (1978)." [1987 c 403 § 1.]

Additional notes found at www.leg.wa.gov

42.56.060 Disclaimer of public liability. No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply with the provisions of this chapter. [1992 c 139 § 11. Formerly RCW 42.17.258]

42.56.070 Documents and indexes to be made public. (1) Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of *subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be explained fully in writing.

(2) For informational purposes, each agency shall publish and maintain a current list containing every law, other than those listed in this chapter, that the agency believes exempts or prohibits disclosure of specific information or records of the agency. An agency's failure to list an exemption shall not affect the efficacy of any exemption.

(3) Each local agency shall maintain and make available for public inspection and copying a current index providing identifying information as to the following records issued, adopted, or promulgated after January 1, 1973:

(a) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(b) Those statements of policy and interpretations of policy, statute, and the Constitution which have been adopted by the agency;

(c) Administrative staff manuals and instructions to staff that affect a member of the public;

(d) Planning policies and goals, and interim and final planning decisions;

(e) Factual staff reports and studies, factual consultant's reports and studies, scientific reports and studies, and any other factual information derived from tests, studies, reports, or surveys, whether conducted by public employees or others; and

(f) Correspondence, and materials referred to therein, by and with the agency relating to any regulatory, supervisory, or enforcement responsibilities of the agency, whereby the agency determines, or opines upon, or is asked to determine or opine upon, the rights of the state, the public, a subdivision of state government, or of any private party.

(4) A local agency need not maintain such an index, if to do so would be unduly burdensome, but it shall in that event:

(a) Issue and publish a formal order specifying the reasons why and the extent to which compliance would unduly burden or interfere with agency operations; and

(b) Make available for public inspection and copying all indexes maintained for agency use.

(5) Each state agency shall, by rule, establish and implement a system of indexing for the identification and location of the following records:

(a) All records issued before July 1, 1990, for which the agency has maintained an index;

(b) Final orders entered after June 30, 1990, that are issued in adjudicative proceedings as defined in RCW 34.05.010 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(c) Declaratory orders entered after June 30, 1990, that are issued pursuant to RCW 34.05.240 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(d) Interpretive statements as defined in RCW 34.05.010 that were entered after June 30, 1990; and

(e) Policy statements as defined in RCW 34.05.010 that were entered after June 30, 1990.

Rules establishing systems of indexing shall include, but not be limited to, requirements for the form and content of the index, its location and availability to the public, and the schedule for revising or updating the index. State agencies that have maintained indexes for records issued before July 1, 1990, shall continue to make such indexes available for public inspection and copying. Information in such indexes may be incorporated into indexes prepared pursuant to this subsection. State agencies may satisfy the requirements of this subsection by making available to the public indexes prepared by other parties but actually used by the agency in its operations. State agencies shall make indexes available for public inspection and copying. State agencies may charge a fee to cover the actual costs of providing individual mailed copies of indexes.

(6) A public record may be relied on, used, or cited as precedent by an agency against a party other than an agency and it may be invoked by the agency for any other purpose only if:

(a) It has been indexed in an index available to the public; or

(b) Parties affected have timely notice (actual or constructive) of the terms thereof.

(7) Each agency shall establish, maintain, and make available for public inspection and copying a statement of the actual per page cost or other costs, if any, that it charges for providing photocopies of public records and a statement of the factors and manner used to determine the actual per page cost or other costs, if any.

(a) In determining the actual per page cost for providing photocopies of public records, an agency may include all costs directly incident to copying such public records including the actual cost of the paper and the per page cost for use of agency copying equipment. In determining other actual costs for providing photocopies of public records, an agency may include all costs directly incident to shipping such public records, including the cost of postage or delivery charges and the cost of any container or envelope used.

(b) In determining the actual per page cost or other costs for providing copies of public records, an agency may not include staff salaries, benefits, or other general administrative or overhead charges, unless those costs are directly related to the actual cost of copying the public records. Staff time to copy and mail the requested public records may be included in an agency's costs.

(8) An agency need not calculate the actual per page cost or other costs it charges for providing photocopies of public records if to do so would be unduly burdensome, but in that event: The agency may not charge in excess of fifteen cents per page for photocopies of public records or for the use of agency equipment to photocopy public records and the actual postage or delivery charge and the cost of any container or envelope used to mail the public records to the requestor.

(9) This chapter shall not be construed as giving authority to any agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall not do so unless specifically authorized or directed by law: PROVIDED, HOWEVER, That lists of applicants for professional licenses and of professional licensees shall be made available to those professional associations or educational organizations recognized by their professional licensing or examination board, upon payment of a reasonable charge therefor: PROVIDED FURTHER, That such recognition may be refused only for a good cause pursuant to a hearing under the provisions of chapter 34.05 RCW, the Administrative Procedure Act. [2005 c 274 § 284; 1997 c 409 § 601. Prior: 1995 c 397 § 11; 1995 c 341 § 1; 1992 c 139 § 3; 1989 c 175 § 36; 1987 c 403 § 3; 1975 1st ex.s. c 294 § 14; 1973 c 1 § 26 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.260.]

***Reviser's note:** Subsection (6) of this section was renumbered as subsection (7) by 1992 c 139 § 3; and subsection (7) was subsequently renumbered as subsection (9) by 1995 c 341 § 1.

Intent—Severability—1987 c 403: See notes following RCW 42.56.050.

Exemption for registered trade names: RCW 19.80.065.

Additional notes found at www.leg.wa.gov

42.56.080 Facilities for copying—Availability of public records. Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person including, if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure. Agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad. Agencies shall not distinguish among persons requesting records, and

CHAPTER 40.16

PENAL PROVISIONS

Cross References

Forgery, see § 9.44.080.
Fraud, see § 9A.60.010 et seq.
Materials specifically authorized to be printed and distributed by secretary of state, see § 43.07.140.
Misconduct of public officers, see § 42.20.020.
Public works accounts and records, penalty for falsifying, see § 39.04.110.

40.16.010. Injury to public record

Every person who shall willfully and unlawfully remove, alter, mutilate, destroy, conceal, or obliterate a record, map, book, paper, document, or other thing filed or deposited in a public office, or with any public officer, by authority of law, is guilty of a class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than one thousand dollars, or by both.

[2003 c 53 § 214, eff. July 1, 2004; 1992 c 7 § 34; 1909 c 249 § 95; RRS § 2347.]

Historical and Statutory Notes

Intent—Effective date—2003 c 53: See notes following RCW 2.48.180.

Laws 1992, ch. 7, § 34, substituted "a state correctional facility" for "the state penitentiary"; and made nonsubstantive grammatical and punctuation changes.

Laws 2003, ch. 53 reorganized criminal provisions in order to clarify and simplify the identification and referencing of crimes.

Laws 2003, ch. 53, § 1 provides:

"The legislature intends by this act to reorganize criminal provisions throughout the Revised Code of Washington to clarify and simplify the identification and referencing of crimes. It is not intended that this act effectuate any substantive change to any criminal provision in the Revised Code of Washington."

Library References

Records ⇐21, 22.
Westlaw Topic No. 326.
C.J.S. Records §§ 37, 39, 69 to 73.

Notes of Decisions

1. Public officers

Registrar of college of education as not being a public officer within meaning of statute. Op.Atty.Gen., No. 53–55–61.

2. Removal of records

Genuine issue of material fact existed as to whether county employee removed original county records from his office, precluding summary judgment on county's claim, under penal provisions relating to injury to public records, for injunctive relief requiring employee and his former counsel to return the documents in question. Kitsap County v. Smith (2008) 143 Wash.App. 893, 180 P.3d 834, review denied 164 Wash.2d 1036, 197 P.3d 1185. Judgment ⇐ 181(15.1); Judgment ⇐ 181(27)

40.16.020. Injury to and misappropriation of record

Every officer who shall mutilate, destroy, conceal, erase, obliterate, or falsify any record or paper appertaining to the officer's office, or who shall fraudulently appropriate to the officer's own use or to the use of another person, or secrete with intent to appropriate to such use, any money, evidence of debt or other property intrusted to the officer by virtue of the officer's office, is guilty of a class B felony and shall be punished by imprisonment in a state correctional facility for not more than ten years, or by a fine of not more than five thousand dollars, or by both.

[2003 c 53 § 215, eff. July 1, 2004; 1992 c 7 § 35; 1909 c 249 § 96; RRS § 2348.]

Historical and Statutory Notes

Intent—Effective date—2003 c 53: See notes following RCW 2.48.180.

Laws 1992, ch. 7, § 35, in four places, substituted "the officer" for "his" or "him"; substituted "a state correctional facility" for "the state penitentiary"; and made nonsubstantive grammatical changes.

Laws 2003, ch. 53 reorganized criminal provisions in order to clarify and simplify the identification and referencing of crimes.

Laws 2003, ch. 53, § 1 provides:

"The legislature intends by this act to reorganize criminal provisions throughout the Revised Code of Washington to clarify and simplify the identification and referencing of crimes. It is not intended that this act effectuate any substantive change to any criminal provision in the Revised Code of Washington."

Library References

Records ⇐21, 22.
Westlaw Topic No. 326.
C.J.S. Records §§ 37, 39, 69 to 73.

Notes of Decisions

School superintendents 4

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1. In general

Duplicate copy of tax receipt kept by county treasurer in lieu of stub is record of his office within meaning of this statute. State v. Ramstad (1925) 132 Wash. 406, 232 P. 349, on rehearing 135 Wash. 346, 237 P. 994.

2. Public officers

"Public officer," for purposes of offenses of misappropriation of or injury to record by public officer, includes assistants, deputies, clerks, and employees of any public officer, rather than more restrictive common-law definition of public officer. State v. Korba (1992) 66 Wash.App. 666, 832 P.2d 1346. Records ⇐ 22

Register of college of education as not being a public officer within meaning of statute. Op.Atty.Gen., No. 53–55–61.

3. Money

This statute does not require that funds appropriated by public officer be public funds, but only that such were entrusted to him by virtue of his office. State v. Norgard (1935) 183 Wash. 208, 48 P.2d 618.

4. School superintendents

Right of county school superintendent to alter budget filed in his office. Op. Atty.Gen. 1933–34, p. 45.

40.16.030. Offering false instrument for filing or record

Every person who shall knowingly procure or offer any false or forged instrument to be filed, registered, or recorded in any public office, which instrument, if genuine, might be filed, registered or recorded in such office under any law of this state or of the United States, is guilty of a class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than five thousand dollars, or by both.

[2003 c 53 § 216, eff. July 1, 2004; 1992 c 7 § 36; 1909 c 249 § 97; RRS § 2349.]

Historical and Statutory Notes

Intent—Effective date—2003 c 53: See notes following RCW 2.48.180.

Laws 1992, ch. 7, § 36, substituted "a state correctional facility" for "the state penitentiary"; and made a nonsubstantive punctuation change.

Laws 2003, ch. 53 reorganized criminal provisions in order to clarify and simplify the identification and referencing of crimes.

Laws 2003, ch. 53, § 1 provides:

"The legislature intends by this act to reorganize criminal provisions throughout the Revised Code of Washington to clarify and simplify the identification and referencing of crimes. It is not intended that this act effectuate any substantive change to any criminal provision in the Revised Code of Washington."

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Records ⇐21, 22.
Westlaw Topic No. 326.
C.J.S. Records §§ 37, 39, 69 to 73.

Notes of Decisions

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1. Construction with other laws

Public Disclosure Act (PDA) civil statutes were not repealed by criminal statute pertaining to campaign disclosure laws under the doctrine of repeal by implication, where PDA did not cover the entire subject matter of the criminal statute, and the two statutes could be harmonized and both given effect. State v. Conte (2007) 159 Wash.2d 797, 154 P.3d 194, certiorari denied 128 S.Ct. 512, 552 U.S. 992, 169 L.Ed.2d 342. Elections ⇐ 311

Public Disclosure Act (PDA) civil statutes did not bar prosecution of defendants under criminal statutes for violating campaign disclosure laws; PDA expressly provided that other remedies provided by law were not displaced by PDA, the "general-specific" rule of statutory construction did not apply because the civil and criminal remedies were not in conflict and PDA was not intended to supersede the criminal statutes, and finally, "general-specific" rule did not apply where a criminal statute and a civil statute were at issue. State v. Conte (2007) 159 Wash.2d 797, 154 P.3d 194, certiorari denied 128 S.Ct. 512, 552 U.S. 992, 169 L.Ed.2d 342. Elections ⇐ 324.1

2. Due process

Defendants failed to establish that their right to due process was violated by prosecution, without adequate notice, under criminal statutes for violating campaign disclosure laws, in light of civil penalties that were available under Public Disclosure Act (PDA); defendants made no argument at all about whether the criminal statute provided fair notice of the conduct it proscribed and standards to prevent arbitrary enforcement. State v. Conte (2007) 159 Wash.2d 797, 154 P.3d 194, certiorari denied 128 S.Ct. 512, 552 U.S. 992, 169 L.Ed.2d 342. Constitutional Law ⇐ 4509(1); Elections ⇐ 311

3. Instrument

No statute or county health department sewage regulation explicitly or implicitly required, permitted, or even authorized filing of a final inspection form with department, and thus form was not an "instrument" within meaning of statute making it a crime to offer a false "instrument" for filing, precluding holding defendant, a department sewage system inspector who submitted an incorrect final inspection form, criminally liable; even though department had long-standing practice of filing final inspection forms for internal use, sewage regulations did not mention or reference final inspection form. State v. Hampton (2001) 143 Wash.2d 789, 24 P.3d 1035. Forgery ⇐ 15

Test for determining whether a document is an "instrument," within meaning statute making it a crime to offer a false instrument for filing, contains three separate requirements: first, the document must be required or permitted by statute or valid regulation, that is, it must fall within the literal scope of a state law; secondly, the content of the document must be scrutinized for materiality; finally, the court must consider the likelihood and extent of others' reliance on the document. State v. Hampton (2001) 143 Wash.2d 789, 24 P.3d 1035. Forgery ⇐ 15

The substantial penalties of statute making it a crime to offer a false instrument for filing are not to be universally applicable whenever a piece of paper may be filed in a public office; the document filed must first be required or permitted by law. State v. Hampton (2001) 143 Wash.2d 789, 24 P.3d 1035. Forgery ⇐ 15

Steelhead receiving ticket was an "instrument" within the meaning of this section making it the crime to knowingly file any false or forged instrument in any public office and, therefore, filing of steelhead receiving tickets, which were forged by affixing the purported signature of treaty Indians who

caught them, constituted violation of the statute. State v. Price (1980) 94 Wash.2d 810, 620 P.2d 994. Forgery ⇐ 15

In this section making it a crime to knowingly file any false or forged instrument in a public office, the term "instrument" encompasses a document which is required or permitted by statute or valid regulation to be filed, registered, or recorded in a public office if the claimed falsity relates to material fact represented in the instrument and the information contained in the document is of such a nature that the government is required or permitted by law, statute or valid regulation to act in reliance thereon, or the information contained in the document materially affects significant rights or duties of third persons, when such effect is reasonably contemplated by the express or implied intent of the statute or valid regulation which requires the filing, registration, or recording of the document. State v. Price (1980) 94 Wash.2d 810, 620 P.2d 994. Forgery ⇐ 15

4. Forged document

Statute prohibiting person from offering forged document for filing in public office does not require that document be materially false. State v. Sanders (1997) 86 Wash.App. 466, 937 P.2d 193. Forgery ⇐ 15

Evidence that forged child support order that defendant offered for filing with court clerk was consistent with prior findings and conclusions made by judge was not relevant in prosecution of defendant under statute prohibiting person from offering forged document for filing in public office. State v. Sanders (1997) 86 Wash.App. 466, 937 P.2d 193. Forgery ⇐ 43

5. Authority to accept instrument

County health department had authority to accept a final inspection form submitted by defendant, a sanitarian for the department, as required to support conviction for offering a false instrument for filing, even if no regulation explicitly authorized the filing of the document; statutory authorization to regulate the sewer permit and installation process constituted authorization for the health department to accept all documents relevant to the process, and it justifiably relied upon the submission of the form. State v. Hampton (2000) 100 Wash.App. 152, 996 P.2d 1094, review granted 141 Wash.2d 1011, 10 P.3d 1072, reversed 143 Wash.2d 789, 24 P.3d 1035. Fraud ⇐ 68.10(3)

There was sufficient evidence that county health department had authority to accept a final inspection form submitted by defendant, a sanitarian for the department, to support conviction for offering a false instrument for filing; department oversaw the sewer permit and installation process, the process was controlled by regulations that had the force of law, and the final inspection form was a document relevant to the sewer permit and installation process. State v. Hampton (2000) 100 Wash.App. 152, 996 P.2d 1094, review granted 141 Wash.2d 1011, 10 P.3d 1072, reversed 143 Wash.2d 789, 24 P.3d 1035. Fraud ⇐ 68.10(3)

CHAPTER 40.20

REPRODUCED RECORDS FOR GOVERNMENTS AND BUSINESS

Section

Cross References

Court records, destruction and reproduction, see § 36.23.065 et seq.
Materials specifically authorized to be printed and distributed by secretary of state, see § 43.07.140.
Method for recordation of plats and documents, see § 65.04.040.
Photographic copies of business and public records as evidence, see § 5.46.010 et seq.
Photographic recordation of plats and documents, see § 65.04.040.
Surcharge revenue, use for protection of essential records as provided under this chapter, see § 40.14.027.
Uniform business records as evidence, see § 5.45.010 et seq.
Uniform photographic copies of business and public records as evidence act, see § 5.46.010 et seq.

40.20.010. "Business" defined

For the purpose of this chapter, the term "business" shall mean and include business, industry, profession, occupation and calling of every kind.

[1949 c 223 § 3; Rem. Supp. 1949 § 1257–6.]

Library References

Records ⇐13, 30.
Westlaw Topic No. 326.

C.J.S. Records §§ 37 to 39, 74, 76, 78, 80, 112.

Research References

Treatises and Practice Aids

5C Wash. Prac. Series § 1002.3, General Rule and Exceptions to Rule, Waiver.

40.20.020. Reproduction by film or photograph

The head of any business or the head of any state, county or municipal department, commission, bureau or board may cause any or all records required or authorized by law to be made or kept by such official, department, commission, bureau, board, or

IN THE WASHINGTON STATE COURT OF APPEALS
Division II

ARTHUR S. WEST, and JERRY L. DIERKER JR., Appellants; v. PORT OF OLYMPIA, et al, Defendants.	)	**No. 07-2-01198-3** **COA II # 43876-3** **Affidavit of Service**

Comes now Appellant Jerry Lee Dierker Jr., the undersigned, who declares and makes the following Affidavit of Service.

To comply with this Court's Sept. 10, 2013 ruling received notice of Sept. 12, 2013, granting Mr. Dierker 30 days to file a Reply Brief, after the Court sent it to him through the U.S. Mails, and since Oct. 12, 2013 was a Saturday, pursuant to CR 6(a) & (e), on Monday Oct. 14, 2013, I, the undersigned, caused this Court of Appeals and the following parties in this matter to be served at their addresses of record by personal service, by mail and/or by electronic service, with copies of Mr. Dierker's Oct. 12, 2013 Motion for Leave to File an Overlength "Consolidated" Reply Brief to properly respond to Respondents' 2 "joined/consolidated" Response Briefs filed in this appeal, with a copy of his Oct. 12, 2013 Consolidated Reply with its Attached Supplemental Authority and Certifying Affidavit, in reply to Respondents' two Response Briefs:

1) Defendants Port of Olympia, et al, through their attorney of record;

2) Mr. West's attorney of record; and

3) Defendant Weyerhaeuser through their attorney of record.

I certify the foregoing to be true and correct to the best of my knowledge, beliefs and/or abilities, under penalty of perjury of the laws of the State of Washington and the United States of America, this 14th day of October, 2013 in Olympia, Washington.

Jerry Lee Dierker Jr., Appellant
2826 Cooper Point Road NW
Olympia, WA 98502
Ph. 360-866-5287