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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ARTHUR S. WEST

And

WALTER R. JORGENSEN, an individual, and LEAGUE OF WOMEN
VOTERS OF THURSTON COUNTY, a nonprofit corporation,
Appellants,

v.

PORT OF OLYMPIA, a Washington municipal corporation,
Respondent.

AMICUS CURIAE BRIEF OF ALLIED DAILY NEWSPAPERS OF
WASHINGTON, WASHINGTON NEWSPAPER PUBLISHERS
ASSOCIATION AND THE WASHINGTON COALITION FOR OPEN
GOVERNMENT IN SUPPORT OF PETITION FOR DIRECT REVIEW

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Newspapers of Washington,
Washington Newspaper Publishers
Association and The Washington
Coalition for Open Government

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I. IDENTITY OF *AMICI CURIAE*

A. Allied Daily Newspapers of Washington

Allied Daily Newspapers of Washington, Inc. (“Allied”) is a Washington not-for-profit association representing 27 daily newspapers serving Washington and the Washington bureaus of the Associated Press.

B. Washington Newspaper Publishers Association.

Washington Newspaper Publishers Association (“WNPA”) is a for-profit association representing 124 community newspapers in Washington.

C. Washington Coalition for Open Government

The Washington Coalition for Open Government (“the Coalition”), a Washington nonprofit organization, is an independent, nonpartisan organization dedicated to promoting and defending the public’s right to know in matters of public interest and in the conduct of the public’s business.

II. INTEREST OF *AMICI*

The interest of the *Amici* in this case stems from their – and the public’s – strong interest in timely access to accurate, complete information concerning the conduct of government and its agents. The members of Allied and WNPA serve as a primary source of news and information on such matters and are frequently forced to litigate denials of

public record requests. The Coalition is the state's official freedom of information association. The *Amici* daily promote access to government documents and decisions and use such access in their business and civic activities.

This case involves two poorly understood, misapplied and frequently abused exemptions to public disclosure – RCW 42.56.270(1) and .280. It also addresses how a Court should assess the reasonableness of fees and costs to be awarded to a prevailing requester in a Public Records Act (“PRA”) suit and how a Court should calculate the penalties to be assessed against an agency that inappropriately denies access to thousands of public records. There are conflicting decisions among the Courts of Appeals and inconsistencies in decisions from this Court on these three issues. The decision in this case will greatly impact the access of the *Amici* and millions of Washington citizens to public records..

This case presents an opportunity for this Court to clarify the appropriate scope of the two exemptions, the methodology for assessing attorney fees and costs, and the determination of penalties under the PRA. Review should be granted to resolve the conflicts among the case law on these important issues.

III. STATEMENT OF THE CASE

Amici adopts the Statement of the Case of the Appellants Walter

Jorgensen and League of Women Voters of Thurston County (hereinafter the “League”).

IV. ARGUMENT AND AUTHORITY

This Court should accept this case for direct review because it involves an issue that has created conflict between the Courts of Appeals and has generated inconsistencies in the decisions from this Court. RAP 4.2(a)(3). This case also involves a fundamental and urgent issue of broad public import requiring prompt and ultimate determination. RAP 4.2.(a)(4).

This case involves two misunderstood, misapplied, and oft-abused exemptions to the PRA – RCW 42.56.270(1) (formerly RCW 42.17.310(1)(h)) – commonly known as the “valuable formulae and design” exemption – and RCW 42.56.280 (formerly RCW 42.17.310(1)(i)) – commonly known as the “deliberative process” exemption. The trial court in this case applied these two exemptions to withhold hundreds of records prepared during long-since completed lease negotiations between a Port and a large multi-million dollar corporation. The “policy” discussion was not deemed to relate to this completed negotiation, and the allegedly valuable information was not tied to this concluded business arrangement. Rather, the trial court held that the information revealed could be akin to policy development for future

negotiations – *i.e.*, deciding what items to give in and what items to resist – and that knowing the give and take, the mark ups on the form lease and the like – was “valuable formulae, design” etc. because that knowledge could be valuable for the next entity doing business with the agency.

Not only should the Court grant review to reverse the misapplication of these exemptions to the records at issue in this case, but it should also grant review to resolve the confusion arising from conflicts in the case law from this Court and the Courts of Appeals.

A. Inconsistencies in Decisions of the Supreme Court and Conflicts Among the Courts of Appeal Regarding the Deliberative Process Exemption.

The trial court held that hundreds of pages of records exchanged between a public agency and an adversary during lease negotiations were exempt under RCW 42.56.280 as part of the deliberative process. The court also held that records exchanged internally and related to the lease were similarly exempt. The lease was signed in August 2005 – more than a year and a half ago. These rulings contradict this Court’s case law.

In *Hearst v. Hoppe*, this Court rejected a claim that all information, including opinions contained in property assessments, could be exempt as deliberative process. 90 Wn.2d 123, 132-33, 580 P.2d 246 (1978).

Instead, the Court held former RCW 42.17.310(1)(i) inapplicable to the

extent that exempt materials in the record “can be deleted from the specific records sought.” 90 Wn.2d at 132.

In *Progressive Animal Welfare Society v. University of Washington II*, this Court rejected the claim that facts as opposed to opinions could be shielded by the deliberative process exemption. 125 Wn.2d 243, 256, 884 P.2d 592 (1994). To rely on this exemption, the agency must show: (1) the records contain predecisional opinions or recommendations (2) of subordinates (3) expressed as part of a deliberative process; (4) that disclosure would be injurious to the deliberative or consultative function of the process; (5) that disclosure would inhibit the flow of recommendations, observations and opinions; and (6) that the exempt materials were policy recommendations and opinions and not the raw factual data upon which a decision is made. 125 Wn.2d at 256. The issue before the Court in *PAWS II* was whether “pink sheets” – a portion of a grant proposal – were exempt when the grant was not funded. The pink sheets were occasionally sent by faculty to a peer in another agency such as a federal agency for comment and feedback. This Court nonetheless exempted these external discussions under the exemption, which by its own terms is limited to internal agency discussions. RCW 42.56.280 (“preliminary drafts, notes, recommendations, and intra-agency

memorandums...”).¹ *PAWS II* thus seemingly expanded the statutory language of the exemption to include records which are shared outside of the public agency at issue. However, in *PAWS II*, the records at issue were not exchanged with an adversary, but with a peer who aided the agency through his or her review of the proposal.

Following this inconsistency between *PAWS II* and the statute, Division I, in *ACLU v. City of Seattle*, held that the deliberative process exemption could apply to issue lists exchanged between a union and a city at the onset of collective bargaining labor negotiations. 121 Wn. App. 544, 551, 89 P.3d 295 (2004). These exchanges were clearly not “intra-agency” but rather were submissions between adversaries during negotiations. The court did not rule that these issues lists were exempt forever, but rather only while the negotiations were underway. 121 Wn. App. at 553-54. Here, the trial court extended *ACLU* to exempt marked up lease drafts exchanged between the parties during negotiations that concluded several years ago. To be clear, the trial court’s decision misconstrued and expanded *ACLU* to deny access to records even after negotiations had concluded and decisions on the lease had been reached and implemented.

¹ “Intra-agency” means “within” an agency. *Websters’ II New College Dictionary* (1999) at 581.

This Court's holding in *PAWS II* as interpreted by Division I in *ACLU* creates a clear conflict regarding a central issue in this case on this exemption – whether the externally exchanged records should fall within the exemption at all. *Amici* respectfully suggest this Court's statement in *PAWS II* could not have intended such a result, particularly, as this case illustrates, when to do so exempts literally thousands of records related to negotiations that concluded years ago. Review should be granted to clarify *PAWS II*'s application of this exemption to hold the exemption does not apply to records exchanged between a public agency and its adversaries.

B. Inconsistencies in Decisions of the Supreme Court and Conflicts Among the Courts of Appeal Regarding the Valuable Formulae and Design Exemption.

RCW 42.56.270(1) exempts “[v]aluable formulae, designs, drawings, computer source code or object code, and research data obtained by an agency within five years of the request for disclosure when disclosure would produce private gain and public loss.” In *PAWS II*, this Court limited the exemption to trade secrets. 125 Wn.2d at 255. In *Servais v. Port of Bellingham*, this Court more broadly interpreted the term “research data” when it held a cash flow analysis prepared for a Port to assist it in future negotiations was exempt from disclosure. 127 Wn.2d 820, 904 P.2d 1124 (1995). There, the Court defined research data as “a

body of facts and information collected for a specific purpose and derived from close, careful study, or from scholarly or scientific investigation or inquiry.” 127 Wn.2d at 832. As mandated by the statute, the Court continued to require a showing that there would be private gain and public loss from disclosure of the information. *Id.*

Division II subsequently ignored this mandate in *Evergreen Freedom Foundation v. Locke*. 127 Wn. App. 243, 110 P.3d 858 (2005). There, Division II exempted information regarding a tax-payer supported training facility for the Boeing Company under the valuable formulae and design exemption largely based on claims that disclosure of the information would result in gain to Boeing’s competitors and loss to Boeing, a private entity. 127 Wn. App. at 249-50. Thus, there is a clear conflict between *Evergreen Freedom Foundation*, *PAWS II*, and *Servais*.

Faced with this conflict, the trial court here expanded the exemption even beyond Division II’s *Evergreen Freedom Foundation* decision, and found that if the information theoretically could be of value to others seeking to do business with the Port in any context, it is exempt from disclosure. The Port made no showing that the information in the records at issue would be valuable to a private entity, that disclosure would result in public loss, or even that the records at issue constituted

“research data”, valuable formulae, designs, drawings, computer source code or object code.

The Court should grant review to resolve the inconsistency between the statute and the current case law. The Court should also accept review to ensure that an accurate definition of RCW 42.56.270(1) can be applied to this case and to provide guidance to future agency and court decisions.

C. The Attorney Fee and Penalty Rulings are Fundamental and Urgent Issues of Broad Public Import Requiring Prompt and Ultimate Determination by This Court.

The final issues involved in this case – the determination of reasonable attorney fees and costs and the calculation of statutory penalties – are issues this Court should address. These issues are fundamental and urgent issues of broad public import requiring prompt and ultimate determination by this Court because they stand at the very heart of the Public Records Act. These provisions alone serve to check agencies that flaunt the Act’s provisions and deny access to public records to Washington citizens. Without them, the Act loses its teeth and the public servants become the masters of the public.

1. Reasonable Attorney Fees Must be Awarded.

Requesters who challenge violations of the PRA are acting as private attorneys general protecting the rights of all citizens to access to

information and to accountability of government. It falls to requesters of public records to ensure that agencies comply with the obligation imposed by the PRA to make public records “promptly available to any person” unless the record falls within a specific statutory exemption. RCW 42.56.070, .080, .520. The requester is the one who takes the agency to court to show cause why it withheld requested public records. RCW 42.56.550(1). The requester is the one who takes the agency to court for the agency to show that its estimate of time to respond to a public records request was reasonable. RCW 42.56.550(2).

It can be very intimidating for a member of the public to request information from the government. If such a request is denied by an agency, most requesters simply go away, with a further diminished confidence in government as open or accessible. *See, e.g., Your Right to Know, available at <http://www.openwashington.com>.*

Agencies have a ready supply of taxpayer-paid attorneys to litigate public record actions. Few citizens have the resources to engage an attorney and fight back. The promise of penalties might convince some lawyers to take a case for a citizen on a contingent fee basis. Few, if any, lawyers will take a contingent fee case when the best they will ever receive is to be paid just their regular fee or less than their customary fee. Without full and just compensation of fees and awards of significant

penalties, requesters will not have the means or ability to secure counsel and prosecute violations so that agencies will be held accountable.

As with other civil rights laws, challengers must be compensated to encourage others to assume this burden and to ensure that government abuses do not go unquestioned and unchallenged. Decisions regarding civil penalties or attorney fees in addition to general damages consistently affirm the need to compensate such plaintiffs. *See Seattle Sch. Dist. No. 1 v. Washington*, 633 F.2d 1338, 1348 (9th Cir. 1980), *aff'd*, *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (providing attorney fees in civil rights cases were designed to “eliminate financial barriers to the vindication of constitutional rights and to stimulate voluntary compliance with the law”); *Minger v. Reinhard Distrib. Co.*, 87 Wn. App. 941, 948, 943 P.2d 400 (1997) (not compensating counsel for civil rights plaintiffs will discourage lawsuits “whose primary effects are vindication of citizens’ right[s]”).

In this case, the trial court ruled arbitrarily that a former Supreme Court justice with more than thirty years of legal experience was not worth \$300 per hour and, in fact, should be reimbursed only at the rate of his sixth-year associate. The trial court claimed to be looking to the rates charged in the County where the court sat – the location where state agencies must be sued from around the state for denial of public record

laws and where it was highly unlikely a local practitioner experienced in the PRA could be found to represent requesters, particularly on a contingent fee basis. The trial judge further reduced the amount of hours to be compensated with no findings that the work was unnecessary or unsuccessful. Further, the record showed that attorneys practicing in this area of law routinely are compensated at rates above or at that charged by the attorney here.

This is a troubling result and, unfortunately, not an isolated occurrence. It has been duplicated in other jurisdictions where requesters prevail but are not even made whole despite awards of penalties. This Court should accept review and clarify that “reasonable” fees in PRA cases are what a reasonable consumer would pay for services, such as the lawyer’s customary fee. “Reasonable” fees should not be tied to local general practitioner rates, especially when no local practitioner was able or willing to take the case and when the case, such as this one, involves a discrete area of law in which there are few attorneys in the State with the knowledge to comfortably and efficiently litigate such a case.

2. Penalties Should Punish and Deter.

The purpose of a penalty is to punish current misconduct sufficiently to deter future misconduct. *See Sinatra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662, 935 P.2d 555 (1997); *Yousoufian v. Office of Ron*

Sims, 152 Wn.2d 421, 445, 98 P.3d 463 (2005) (Sanders, J., dissenting).

Only “strict enforcement” of ... fines will discourage improper denial of access to public records.” *PAWS II*, 125 Wn.2d at 272, 884 P.2d 592.

The statutory penalties in the PRA are designed to punish the offending agency but also to effect compliance and deter violations. The penalties imposed must be sufficient to deter future violations – not just by the one offending agency, but by other agencies as well. When penalties are assessed on a “per request” basis, as they were here, the price of secrecy is low. At a rate of \$5 a day, an agency would have to pay only \$1825 if it withheld for one year all records relevant to a request. Even if a court were to find that the agency acted in bad faith and should face the highest penalty of \$100 a day, the agency would only face a \$36,500 annual penalty.²

In the instant case – where the agency withheld hundreds of pages of non-exempt records, many of which are clearly not exempt from disclosure such as press releases, previously released records, and publicly filed property assessments – a per request assessment of \$60 a day provides insufficient punishment and insufficient deterrence. The Court should accept review to provide guidelines as to the appropriate analysis

² Since the PRA was recently amended to reduce the statute of limitations for bringing a PRA action from five years to one year, the overall penalty risk to agencies today is now 80 percent lower than it was at the time the Supreme Court issued its decision in *Yousoufian v. Ron Sims*, 152 Wn.2d 421, 98 P.3d 463 (2005).

for assessing penalties in a case such as this involving thousands of records.

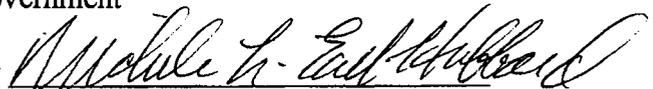
V. CONCLUSION

For the foregoing reasons, *Amici* Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association, and the Washington Coalition for Open Government urge the Court to accept direct review and provide needed guidance on the issues it involves.

RESPECTFULLY SUBMITTED this 28th day of March, 2007.

Davis Wright Tremaine LLP
Attorneys for Amici Allied Daily
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By



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CERTIFICATE OF SERVICE

I, Barbara J. McAdams, declare and state as follows:

1. I am over the age of eighteen and competent to testify to the matters herein.
2. I am an employee of the law firm of Davis Wright Tremaine LLP. My business and mailing address are: 1501 Fourth Ave., Suite 2600, Seattle, WA 98101.
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Seattle, Washington, this 28th day of March, 2007.

Barbara J. McAdams
Barbara J. McAdams

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