

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

365294 II

2001 APR -6 P 1:53

BY ROBERT R. DANFORTH

NO. 78757-3

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

CLERK

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 EVERGREEN FREEDOM  
FOUNDATION IN SUPPORT OF PETITION FOR DIRECT REVIEW

Michael J. Reitz, WSBA No. 36159  
Attorney for Amicus Curiae  
Evergreen Freedom Foundation

2403 Pacific Ave. SE  
Olympia, WA 98501  
(360) 956-3482 Phone  
(360) 352-1874 Fax

APR 11 2001  
E  
b/h

**TABLE OF CONTENTS**

I. IDENTITY OF *AMICUS CURIAE*..... 1

II. INTEREST OF *AMICUS*..... 1

III. STATEMENT OF THE CASE..... 2

IV. ARGUMENT AND AUTHORITY ..... 2

    A. Conflicting Decisions on the Valuable Formulae Should be Resolved..... 3

    B. Deliberative Process Exemption is Not Intended to Exempt Records of “Unknown Future” Deliberations..... 4

    C. Penalties Should Deter Agency Misconduct..... 6

V. CONCLUSION..... 6

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>CASES</b>	
<i>American Civil Liberties Union of Washington v. City of Seattle</i> , 121 Wash.App. 544, 89 P.3d 295 (2004).....	4, 5
<i>Evergreen Freedom Foundation v. Locke</i> , 127 Wash.App. 243, 110 P.3d 858 (2005).....	3, 5
<i>Hearst v. Hoppe</i> , 90 Wash.2d 123, 133, 580 P.2d 246 (1978).....	4, 5
<i>Progressive Animal Welfare Soc. v. University of Washington</i> , 125 Wash.2d 243, 884 P.2d 592 (1994).....	3, 4, 5
<i>Servais v. Port of Bellingham</i> , 127 Wn.2d 820, 904 P.2d 1124 (1995).....	3
<i>Yousoufian v. Office of Ron Sims</i> , 152 Wn.2d 421, 98 P.3d 463 (2004).....	6
<b>STATUTES</b>	
RCW 42.17.310(1)(h).....	2
RCW 42.17.310(1)(i).....	2
RCW 42.56.030 .....	3
RCW 42.56.270(1).....	2, 3
RCW 42.56.280 .....	2, 4
RCW 42.56.550 .....	6

## I. IDENTITY OF *AMICUS CURIAE*

### **Evergreen Freedom Foundation**

Evergreen Freedom Foundation (“EFF”) is a Washington nonprofit corporation dedicated to advancing individual liberty, free enterprise and limited, accountable government. EFF is supported by over 4,500 citizens within the state of Washington.

## II. INTEREST OF *AMICUS*

EFF and its members believe that state and local agencies exercise their authority by consent of the governed, and therefore have a duty to conduct their activities in a transparent and open manner. Access to public records is an essential tool of transparency that should be protected and encouraged. EFF makes almost daily requests for public records, and on more than one occasion has been forced to litigate over denials of access to records.

The ruling of the trial court in the present case includes several decisions which, if not reviewed, will have a damaging effect on the Public Records Act (“PRA”) by expanding two often-used exemptions, and by furthering the judicial confusion surrounding adequate penalties for violations of the PRA. Both exemptions have been at issue in past

attempts to obtain public records by the *Amicus*, and continue to be a stumbling block to ensuring the transparency of governmental actions.

EFF urges this Court to grant review in order to provide clarification on the correct application of the two exemptions and to ensure that appropriate penalties are levied for improper denials of public records.

### **III. STATEMENT OF THE CASE**

*Amicus* adopts the Statement of the Case of the Appellants Walter Jorgensen and the League of Women Voters of Thurston County.

### **IV. ARGUMENT AND AUTHORITY**

This Court should accept the petition for review to rectify confusion that exists over the proper interpretation of the exemptions to the PRA contained in RCW 42.56.270(1) (formerly RCW 42.17.310(1)(h)) and in RCW 42.56.280 (formerly RCW 42.17.310(1)(i)). The first of these is commonly known as the “valuable formulae and design” exemption; the second is known as the “deliberative process” exemption. The trial court applied these exemptions to documents related to a lease agreement between respondent and a major corporation that has long since been finalized.

Furthermore, this Court should accept the petition for review to provide clear guidance on the issue of how to determine penalties for violations of the PRA.

**A. Conflicting Decisions on the Valuable Formulae Should be Resolved.**

The trial court's application of RCW 42.56.270(1), the "valuable formulae and design" exemption, is overbroad, allowing the respondent to exempt documents without a clear and specific showing of the statutory exemption that public harm and private gain will result from disclosure. The respondent's negotiations are complete, and there is no identifiable public harm that outweighs the public's right to know.

Exemptions to the Public Records Act are to be construed narrowly, RCW 42.56.030, not denying the people the ability to determine how public resources are being used. Application of the valuable formulae exemption requires loss to the public and gain to private parties, as was required in *Progressive Animal Welfare Soc. v. University of Washington (PAWS II)*, 125 Wash.2d 243, 884 P.2d 592 (1994) and *Servais v. Port of Bellingham*, 127 Wn.2d 820, 904 P.2d 1124 (1995). This standard differs from decisions such as that in *Evergreen Freedom Foundation v. Locke*, 127 Wash.App. 243, 110 P.3d 858 (2005) and the instant case in which there were no clear showings of public loss.

**B. Deliberative Process Exemption is Not Intended to Exempt Records of “Unknown Future” Deliberations.**

The trial court held that hundreds of documents are exempt under RCW 42.56.280. This Court has recognized that the purpose of the deliberative process exemption “severely limits its scope.” *Hearst v. Hoppe*, 90 Wash.2d 123, 133, 580 P.2d 246 (1978). The goal is to safeguard existing deliberations, but this does not extend beyond the conclusion of these deliberations. “Because the exemption is intended to safeguard the free exchange of ideas, recommendations, and opinions prior to decision, the opinions or recommendations actually implemented as policy lose their protection when adopted by the agency.” *Hoppe*, 90 Wn.2d at 133.

This Court reiterated this in *Progressive Animal Welfare Soc. v. University of Washington (PAWS II)*: “Once the policies or recommendations are implemented, the records cease to be protected under this exemption.” 125 Wash.2d 243, 257, 884 P.2d 592 (1994).

The Court of Appeals (Division I) later held that records exchanged during negotiations between a labor organization and city negotiator were exempt under the deliberative process exemption in *American Civil Liberties Union of Washington v. City of Seattle*, 121 Wash.App. 544, 89 P.3d 295 (2004). The trial court in the present case

relied on *ACLU* to hold that the ongoing, cyclical nature of some deliberations may preclude disclosure. *Brief of Appellants* at 15. Disclosing negotiation records, for example, may jeopardize “some unknown future negotiation at some unknown future time.” *Id.*

*ACLU*, however, did not reject the rule that records lose their protection once implemented by the agency, as articulated in *Hoppe* and *PAWS II*, as negotiation documents are only exempt “[u]ntil the results of this policy-making process are presented to the City Council for adoption....” *ACLU*, 121 Wn. App. at 554.

The trial court erred by construing the deliberative process exemption so broadly as to forever bar the public’s access to these documents. Indeed, many government operations are of a repetitive, continuing nature. Whether the government function is a collective bargaining negotiation (*ACLU*), an economic development contract (*Evergreen*), a grant proposal (*PAWS II*), or a lease agreements as in the present case—the trial court’s application of the deliberation exemption could swallow up the rule favoring broad disclosure.

Allowing the exemption to protect documents after a negotiation is complete prevents citizens from viewing documents of legitimate public interest after the possibility of public harm has passed.

**C. Penalties Should Deter Agency Misconduct.**

Finally, this Court should accept the petition for review to provide clear guidance on the issue of how to determine penalties for violations of the PRA. Despite the unlawful withholding of hundreds of documents after repeated requests, the trial court apparently consolidated multiple requests for hundreds of documents into a single request for the purpose of determining the per-day penalty. This resulted in a minimal fine that will do little to discourage future unlawful withholdings. Penalties assessed should have a deterrent value.

While this Court held in *Yousoufian v. Office of Ron Sims* that RCW 42.56.550 does not “require the assessment of per day penalties for each requested record,” little guidance has been given for how to determine what the appropriate penalty should be. 152 Wn.2d 421, 98 P.3d 463 (2004).

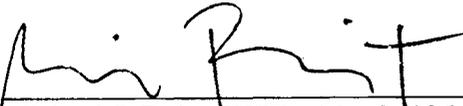
This case presents an opportunity for clarifying the statute in a way that ensures agencies are appropriately punished for violations of the PRA.

**V. CONCLUSION**

For the foregoing reasons, *Amicus* Evergreen Freedom Foundation urges the Court to accept direct review to clarify the enforcement of the relevant portions of the Public Records Act.

RESPECTFULLY SUBMITTED this 6th day of April, 2007.

EVERGREEN FREEDOM FOUNDATION

By:   
Michael J. Reitz, WSBA No. 36195  
Attorney for *Amicus* Evergreen Freedom  
Foundation

FILED AS ATTACHMENT  
TO E-MAIL

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2007 APR -6 P 1:53

BY RONALD N. CARPENTER

CLERK

**CERTIFICATE OF SERVICE**

I, Ryan Bedford, hereby declare:

1. I am over the age of eighteen and competent to testify to matters herein.

2. I am an employee of the Evergreen Freedom Foundation, business address: 2403 Pacific Ave. SE, Olympia, WA 98501.

3. On April 6, 2007, I caused to be served a copy of the attached document, filed in connection with the above-referenced matter and in the manner indicated:

Philip A. Talmadge  
Talmadge Law Group PLLC  
18010 Southcenter Parkway  
Tukwilla, WA 98188-4630  
Attorneys for Appellants  
Jorgensen/League  
**Delivery Method: *Via Email & U.S. Mail per agreement***

Matthew R. Hansen  
Jeffrey August Beaver  
Graham & Dunn PC  
2801 Alaskan Way, Suite 300  
Seattle, WA 98121-1128  
Attorneys for Weyerhaeuser  
Company  
**Delivery Method: *Federal Express***

Carolyn A. Lake  
Goodstein Law Group, PLLC  
1001 Pacific Avenue, Suite 400  
Tacoma, WA 98402-4440  
Attorneys for Port of Olympia  
**Delivery Method: *Federal Express***

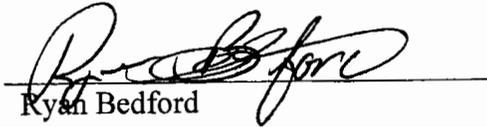
Arthur West  
120 State Avenue, Suite 1497  
Olympia, WA 98501  
Pro Se Plaintiff  
**Delivery Method: *Federal Express***

William John Crittenden  
Attorney at Law  
927 North Northlake Way Ste. 301  
Seattle, WA 98103  
Attorney for Co-Appellant David  
Koenig  
**Delivery Method: *Via Email & U.S. Mail per agreement***

Michele Earl-Hubbard  
Davis Wright Tremaine LLP  
1501 4th Avenue, Suite 2600  
Seattle, WA 98101  
Attorney for Amici  
**Delivery Method: *Via Email & U.S. Mail per agreement***

Declared under penalty of perjury under the laws of the state of  
Washington.

Dated at Olympia, Washington this 6th day of April, 2007.

  
Ryan Bedford

FILED AS ATTACHMENT  
TO E-MAIL