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SUPREME COURT
STATE OF WASHINGTON

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Nos. 78757-3; 79102-3

SUPREME COURT OF WASHINGTON

ARTHUR WEST and

WALTER R. JORGENSEN et al., Appellants,

v.

PORT OF OLYMPIA, Respondent

DAVID KOENIG, Appellant,

v.

PORT OF OLYMPIA, Respondent

(Corrected) BRIEF OF APPELLANT WEST

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ORIGINAL

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INTRODUCTION

This case presents the interesting and novel issue of the proper scope of disclosure under both the Public Records Act (PRA) and State Environmental Policy Act (SEPA) in the context of records related to a corporate lease and development agreement between a large forest products corporation (Weyerhaeuser) and a public port district (Port of Olympia), as well as the proper application of penalty provisions in instances where a government entity has economic incentive in withholding from public inspection records relating to significant environmental impacts of proposed development and potentially severe public health risks, and where thousands of pages of documents have been withheld based upon voluminous, discreetly asserted claims of exemptions based upon individually designated records.

Although this court has, over the last 30 years, repeatedly made references to the “full disclosure” requirements of SEPA, the actual parameters of this in the context of the Public Records Act have not been precisely defined.

Further while it is axiomatic that disclosure under the PRA is essential to preserving the public’s right to sovereign exercise of political civil liberties, the role of public records disclosure in relation to the public’s participation in the SEPA process have not been clearly delineated.

Appellant West believes that the circumstances of this case provide an excellent opportunity to examine the proper, interrelated disclosure requirements of SEPA and the PRA, and the dangers public health, the integrity of the environmental review process, and democratic institutions in general if the public is denied access to records properly relevant to significant impacts to the environment under the guise of the deliberative process, attorney client and valuable research formula exemptions, as well as the newly created (*sua sponte*) “nondescript *de minimus*” exemption.

It is especially important that public disclosure not be viewed as a “*de minimus*” concern in

cases where an agency like the Port of Olympia has potentially overriding economic incentives to withhold records necessary to public participation in the political process to assess potential impacts to the environment as well as significant dangers to public health.

An appropriate penalty with actual deterrent effect is mandated to forever remove the possibility that public records related to significant public health threats such as dioxin contamination are not concealed for commercial gain, and that the public interest in records disclosure and fair environmental procedure are not frustrated.

In this case, where veritable “Apple crates” full of records were withheld from inspection wrongfully, based upon voluminous exemptions asserted for individual records, and where many more are still at issue, despite a year of litigation, and where evidence of significant threats to public health has been covered up and obstructed for the purpose of evading environmental review, something more than a “de minimus” concern and penalty is mandated.

While this case provides an opportunity to address the deliberative process, attorney client and valuable research formula exemptions, and the appropriate penalty to deter future withholding, other, less important issues concern whether certain plaintiffs whose records request post dates the filing of the original public disclosure action, and whose participation has become problematic, are entitled to a significant reward for such behavior.

ASSIGNMENTS OF ERROR

1. The court erred in regarding public disclosure “de minimus” when public access to information is a necessary prerequisite to the sound functioning of a democratic society as well as the exercise of 1st amendment and other civil rights, in overboldly construing the deliberative process, valuable research data, and attorney client privilege exemptions, and in failing to order disclosure of records related to the Weyerhaeuser lease and related development when such disclosure was necessary to comply with the “full disclosure” requirements of SEPA
2. The court erred in failing to award penalties based upon the actual number of days the records were withheld, and in failing to assess penalties based upon the number of packets or records withheld in a manner consistent with the individual assertion of exemptions by defendants, the undisputed terms of the March 29 order of the Court, and intent of the PRA that penalties have a actual deterrent effect in a case where the agency had a significant economic incentive to withhold the records and where such withholding was contrary to public health and safety.
3. The court erred awarding excessive fees for the preparation of a cost bill, in awarding fees and penalties to Jorgenson, et al, when their suit was not reasonably necessary to obtain disclosure, and in failing to properly vacate the award to, and abate the independant action of Jorgenson, et al.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR NO. 1

1. Did the court err in regarding public disclosure “de minimus” when public access to information is a necessary prerequisite to the sound functioning of a democratic society as well as the exercise of 1st amendment and other civil rights.
2. Did the court err in overboldly construing the deliberative process, valuable research data, and attorney client privilege exemptions
3. Did the court err in failing to order disclosure of records related to the Weyerhaeuser lease and related development when such disclosure was necessary to comply with the “full disclosure” requirements of SEPA

ISSUES PERTAINING TO ASSIGNMENT OF ERROR NO.2

1. Did the court err in failing to award penalties based upon the actual number of days the records were withheld?
2. Did the court err in failing to assess penalties based upon the number of packets or records withheld in a manner consistent with the individual assertion of exemptions by defendants, and the undisputed terms of the March 29 order of the Court,
3. Did the court err in failing to assess penalties based upon the number of packets or records withheld in a manner consistent with the intent of the PRA that penalties have a deterrent effect in a

case where the agency had a significant economic incentive to withhold the records and where such withholding was contrary to public health and safety..

ISSUES PERTAINING TO ASSIGNMENT OF ERROR NO. 3

1. Did the court err in awarding excessive fees for the preparation of a cost bill?
2. Did the court err in awarding penalties to Jorgenson, et al when their suit was not reasonably necessary to obtain disclosure ?
2. Did the court err in failing to properly vacate the award to, and abate the independent action of Jorgenson, et al.?

STATEMENT OF THE CASE

The central issues in this appeal concern records related to a public records request originally made by Appellant West on November 8, 2005 for records related to a lease (and developments related thereto) between the Port Of Olympia (port) and the Weyerhaeuser Corporation (Weyerhaeuser). (CP 1891-1892)

THE WEYERHAEUSER LEASE AND DEVELOPMENT ISSUES

On August 22, 2005, the port executed a lease with Weyerhaeuser for the operation of a log exporting facility on Port property in Budd Inlet. In order to facilitate Weyerhaeuser's operations, the lease required the port to construct a number of improvements, including the dredging of sediment deposits in Budd inlet,(CP 1993, 1994) paving and development of the Cascade Pole Toxic waste containment site,(CP 1992) and various rail and other infrastructure improvements.(CP 2536-55)

THE RECORDS REQUEST

A public records request originally made by Appellant West on November 8, 2005, following his testifying at a SEPA hearing regarding the Cargo Yard.. On November 16 the port, while disclosing the lease, failed to respond to the request for "all records and correspondence" related to

the Weyerhaeuser lease and related development. (CP

On January 2 West discovered that one of the parties to the Cargo Yard SEPA appeal had filed a subsequent request in December for similar records, and that the port was withholding numerous records from inspection. On January 3, 2005, plaintiff West filed the original Public Records Act lawsuit, and the show cause order was signed by Judge McPhee the same day. (CP 1501-7)

Prior to the first hearing on the matter (and prior to what Jorgenson's counsel represents as the "initial response" of January 17), the port made 6 supplemental responses to plaintiff West's original request, (CP 1699-1841), and a number of records were released.

On January 5, 2005, upon reading the Olympian newspaper article concerning the suit, a certain Mr. Jorgenson and an organization claiming to represent the LWV in Thurston County filed a separate request for the same records previously requested by West. Bernard Friedman, (whose generous offer of representation had been declined by West on January 3), appeared for the newcomers to the records dispute.

It was not until January 24, nearly 3 weeks after plaintiff West's original filing, that Jorgenson and the League filed their belated, duplicitous suit. (CP 2013-2017).

The initial response to Jorgenson was actually a copy of the records and logs furnished to West.

Following the "initial disclosure:" to the league/ Jorgenson on January 17, 2006, the circumstances of disclosures to West and the intervening parties were identical.

INITIAL APPEARANCE IN 06-2-00002-6

Although the original date on the show cause order in Cause No. 06-2-00002-6 was February 3, by agreement of West and counsel it was continued to February 17 for the convenience of the port,

since the show cause order in the other case, 06-2-00141-8 was also set for that date.

Contrary to Jorgenson's representations, the "initial hearing" on disclosure of the records pertaining to the Weyerhaeuser lease took place before Judge McPhee on February 17, 2006. (CP 2033)

In response to the arguments of plaintiff West, the Honorable Judge McPhee directed the port to prepare more specific disclosure logs. The court also directed the port to arrange the records in related groups with shared exemptions. (CP 2033)

When the port subsequently appeared before Judge Hicks later that morning, Judge Hicks made a similar direction. At the suggestion of plaintiff West, the Port moved to consolidate the cases for administrative convenience.(CP 1975-1994)

Judge McPhee, presiding in West v. Port of Olympia, ordered the League case consolidated with the original action filed by West on March 3, 2006. (CP 2011-2012)

In the first of many attempts to assert vexatious control of the case, the fist act by Jorgenson and the T. C. League as co- plaintiffs was to attempt to have West's name removed from the case caption of the consolidated case.

Due in part to the assistance of Port counsel this attempt was frustrated by Judge Hicks, at the same M arch 17 hearing, where he also denied the application of the league for fees that he believed excessive. West's application for funds to obtain copies of the case file (2020-2031) for the purpose of obtaining counsel was denied by the court on the basis that West was able to properly represent his own interests.

THE MARCH 29 ORDER

On March 29, 2006, the court issued a behemoth 51 page order making a series of rulings on discreet records, as specified by the port in asserting specific exemptions relating to discreet specific

records. (CP 868-917) Significantly, the Court directed that the parties submit requests for penalties on the basis of packets(CP 915) No party moved to reconsider the ruling as it applied to packets. All parties moved to reconsider the other portions of the ruling, and an order on reconsideration was signed on May 4, 2006.

Weyerhaeuser raised some objections concerning proprietary and confidential documents, seeking to withhold the required depth of dredging and displacement of Westwood shipping line breakbulk ships. (CP 2612-15)

Despite the order of the court requiring disclosure, West was required to file a subsequent motion to actually obtain disclosure of further records that the port had failed to disclose “by mistake”. Freidman joined in the motion. (CP 1161-65)

On May 26, 2006 the motion requiring disclosure on a date certain was granted and the port made two subsequent disclosures of records that it was supposed to have disclosed previously. (CP 1166-1168)

SEPA-PRA DISCLOSURE ISSUES

West moved for a ruling clarifying the construction and disclosure requirements of SEPA and the PRA. (CP 2280-2297) This was denied by order of the Court of September 15, 2006. (2556-2557)

The Court denied West’s motion to reconsider on September 26, 2006.(CP 2556-7)

NOVEMBER 17- OCTOBER 20 HEARINGS ON PENALTIES, FEES AND COSTS

On October 20, 2006, West and his co-plaintiffs appeared in court to argue for penalties and costs. As noted by the transcript, Jorgenson’s main concern was the collection of attorney fees and 1.8 million in sanctions. Appellant West spoke about the first amendment and argued for a more

reasonable sanction sufficient to deter future misconduct.

The late Mr. Friedman was awarded 37,500 in attorney fees. The Talmadge law group for the sole action of presenting a cost bill was granted \$15,000 in attorney fees. West was denied any costs whatsoever, was denied any penalties from November 8 through January 17, 2006 on a basis not articulated by the court, and was awarded a grand total of \$7,380.

On his way out of court, West was ridiculed by a Cities Insurance Authority attorney over the award who, despite having no business at the court attended for the purpose of advising West "Don't spend it all in one place".

ORDER AND JUDGMENT TAKE 3

Following the hearing on the penalty awards, counsel for the Jorgenson attempted to have a judgment entered excluding West from its terms by means of private informal letter to the court. When this proved unsatisfactory, counsel tried to obtain sanctions from their own co-plaintiff . On November 17, the court was forced to add West to the order and judgment by means of a handwritten addendum. (CP 1418-23) Significantly, in their zeal to collect their own fees and despoil West, counsel neglected to include their deceased colleagues judgment in the order, necessitating a further presentation.

On December 8, true to (bad) form counsel again requested terms from West and attempted to exclude him from the order. When the court discovered this third false step, it became so incensed that it stated that counsel would be working pro bono from then on, and directed the parties to go back behind the bar and co-operate to prepare a proper order. If it had not been for superhuman efforts of Port Counsel, there may not ever have been an order entered at all. (CP 3091-96)

Despite three attempts, counsel for Jorgenson were unable to prepare a proper order.

Counsel also attempted to leave West entirely off of the case, and purge the record of

appellant West's argument and pleadings. Counsel for Jorgenson also attempted to intimidate West in to allowing their coup by repeatedly (unsuccessfully) seeking CR 11 sanctions against their own co-plaintiff. (CP 3076-3090, 3022-3036)

The Court denied West's first motion for reconsideration On Dec 1

West filed a declaration opposing "latecomer fee awards" as they applied to Jorgenson (3039-43)

West moved to reconsider and abate the vexatious participation of Jorgenson, et al. (CP 3054-61)

On December 22, 2006, The Honorable Judge Richard Hicks entered a final order denying West's motions. (CP-)

On January 3, 2006, West filed a notice of Appeal (CP-)

ARGUMENT ERROR 1

1. The court erred in regarding public disclosure "de minimus" when public access to information is a necessary prerequisite to the sound functioning of a democratic society as well as the exercise of 1st amendment and other civil rights.

In the March 29 and May 4, September 15 and September 26, the court committed clear reversible error in failing to construe disclosure provisions liberally and to narrowly construe the exemptions contained in the PRA The primary error of the trial court is revealed on Page 2 of the epic 51 page order on disclosure, when it refers to redactions that the court "passed" on the basis "de minimus (non) curat lex".

In this declaration, and in the rational for withholding many of the records, (as well as the entirety of Nos 565-824) the court demonstrates the intention-contrary to the PRA-to construe public disclosure as a "de minimus" concern below the dignity of occupying the court's time.

This is obvious error because the clear intent of the PRA is that public disclosure is not a de minimus concern, but rather a fundamental tenet of the American political system.

As this court held in *Fritz v. Gorton*, 83 Wn. 2d 275, at 296, 517 P. 2d 911, (1974) “We accept as self evident the proposition of the intervenors (The league of women voters) that the right to receive information is the fundamental counterpart of the right of free speech...Freedom of speech without the corollary-freedom to receive- would seriously discount the intendment, purpose, and effect of the First Amendment. See *Stanley v. Georgia*, 394 U. S. 557, 564, 22 L.Ed. 2d 542, 89 S. Ct. 1243 (1969)

By openly denigrating disclosure matters as de minimus, the Trial court failed to properly apply the disclosure provisions of the PRA broadly. In adopting sua sponte a novel “nondescript de minimus” exemption not contained in the law to justify nondisclosure, the court clearly failed to construe its exemptions narrowly. See *PAWS v. U.W.* 125 Wn.2d 243, 251, 884 P.2d 592, (1994)

In fairness to the trial court it should be noted that it prefaced it’s de mini mus exemption disclaimer with a recitation of horrors concerning the burdens placed upon it by the extreme number of records required to be reviewed. However, the fact that the agency failed to present the court with a manageable group of records would better have been viewed as a de maximus reason for full disclosure rather than an excuse for withholding under the guise of virtually unlimited findings of “nondescript de minimus” exemptions.

To paraphrase mark Twain, the difference between full disclosure required by the law and “de minimus” non disclosure provided by the trial court in this case is the difference between **Lightning and the Lightning Bug.**

2. The court erred in overboldly construing the deliberative process, valuable research data, and attorney client privilege exemptions

In addition to inventing its own de minimus exemption, the court also erred in trivializing the PRA by over broadly applying the exemptions cited by the defendants. Rather than narrow exemptions with required redactions, the court based its ruling upon overly broad interpretation of existing exemptions and a lack of required redaction under the sua sponte declared aegis of “de minimus” exemption.

The court erred in applying the deliberative process exemption when the deliberative process for the lease had ceased, and when the withholding was not necessary to protect the give and take of deliberations necessary for the formulation of agency policy. See *Hearst C. V. Hoppe*, 90 Wn. 2d 123, 580 P.2d 246. Rather, in this case the withholding was viewed necessary by the port to conceal from the public what agency policy had already been formulated contrary to the public interest.

The court also erred in construing the Valuable research exemption overboldly, and relying upon *Servais v. Port of Bellingham*, 127 Wn.2d 820, 904 P.2d 1124, (1995) when the records withheld went far beyond the scope of the financial analysis found to be exempt in the *Servais* case.

The court further erred in construing the attorney client privilege exemption “as extended by” *ACLU v. City of Seattle*, 121 Wn. App 544, 89 P.3d 295 (2004) over broadly to records not properly within the scope of a narrowly construed exemption when the exemption was not reasonably narrow to constitute a specific exemption to the PRA.

Under the circumstances of this case, this court should follow the reasoning of the dissent in *Hangartner v. City of Seattle*, 151 Wn.2d 439, at 458-60, 90 P.3d 26 (2004) and rule that the attorney client exemption is not available for an “absurd” and over broad purpose that “swallows” the PRA’s intent of allowing citizens a right to public records. The deliberative process and valuable formula

exemptions should also be narrowly construed in accord with the intent of the PRA. Such a construction would result in a much greater or complete disclosure of all withheld documents and records.

3. The court erred in failing to order disclosure of records related to the Weyerhaeuser lease and related development when such disclosure was necessary to comply with the "full disclosure" requirements of SEPA

This case concerns a novel set of circumstances. Defendant Port of Olympia, while attempting to negotiate the State Environmental Policy Act (SEPA) process in regard to multiple segments of the Weyerhaeuser lease and an integrated Marine Terminal Expansion Plan, has also attempted to unlawfully withhold public records directly relevant to the various related components of the project necessary for effective SEPA review.

The court erred in each of the findings of the (51 page) Order of March 29, (the findings are incorporated herein by reference), the order on reconsideration of may 4, 2006, and September 15 and September 26 orders on SEPA disclosure in finding each of the the requested records exempt, and in failing to order full disclosure of the requested records when such disclosure was necessary to comply with the full disclosure mandate of SEPA

It is Black letter law that SEPA is an environmental full disclosure act. As this Court has maintained for 30 years, "The procedural provisions of SEPA constitute an environmental "full disclosure" law. Norway Hill Preservation and Protection Ass'n v. King County, 87 Wn.2d 267, 552 P.2d 674, (1976),

It (SEPA) is an attempt by the people to shape their environment by deliberation, not default. See Norway Hill, at 272, quoting Stempel v. Dept of Water Resources, 82 Wn.2d 109, at 118, 508 P.

2d 166, (1973) *Loveless v. Yantis*, 82 Wn. 2d 754, at 765, 513 P. 2d 1023 ,(1973)

Though displaying what one commentator has termed discreet plumage from its predecessor NEPA, the disclosure aspects of NEPA (see *Warm Springs Dam Task Force v. Gribble*, 565 F. 2d 549 at 552, (1977) have been incorporated into SEPA.

Since one of the core policies of SEPA is environmental full disclosure, and since the other laws of the state are to be construed in harmony with SEPA, it is only logical to conclude that the ecological disclosure imperative of SEPA be engrafted onto the PDA in the case of information (such as that withheld from the port in the instant case) which is directly related to the SEPA process.

As one authority has stated...

(T)here is no serious doubt that SEPA-generated information and public participation routinely induces modifications and sometimes inspires withdrawals or denials of proposals...Moreover, the information and analyses generated by SEPA may influence government decision makers directly or indirectly as ammunition in the hands of neighborhood and environmental advocates who otherwise would have been unarmed. *The Washington Environmental Policy Act*, Richard L. Settle, 1987, section 18.2, *Washington Land use and Environmental Law and practice*, , Richard L. Settle, 1983, P. 167.

Significantly, the port's originally withheld Weyerhaeuser lease records that have been disclosed concerned such issues as the contamination of the Cascade Pole site, the channel and harbor dredging, as well as records related to paving the terminal (AKA Cascade Pole) site and the Weyerhaeuser lease in general, and further contain records demonstrating a deliberate intent of the Port to break the marine terminal expansion project into a number of smaller component parts with the intention of evading the environmental review required of any project with reasonably foreseeable significant impacts.

For such records, the deliberative process and work product exemptions of the PDA falsely claimed by the port as a pretext to withhold records are in reality damning admissions of their relevance to the SEPA process and the gross injustice of allowing subversion of the sound public policy of full disclosure of project related environmental information, with its attendant danger to public health and safety.

It is clear that the delays in disclosure and nondisclosure of the records at issue in this case compromised the ability of appellant West, and other members of the public to participate effectively in the SEPA review process. The disclosure requirements of both SEPA and the PDA have been violated in this case, as well as the intent of SEPA that the environment be determined by deliberation, not default. Rather than public deliberation based upon full disclosure it is apparent that the respondents prefer the default of litigious obstruction of records pertaining to public health and the environment when they threaten lucrative projects such as the Weyerhaeuser lease.

This court should clearly define the disclosure requirements for SEPA project related records to remove the uncertainty and danger to public health caused by the delays in obtaining records related to significant development in the future.

ARGUMENT PERTAINING TO ERROR II

1. The court erred in failing to award penalties based upon the actual number of days the records were withheld.

The court erred in the findings of fact of November 17, Nos 11-16, and the preliminary order of November 17, and in the orders of December 8 December 22, in failing to enter the proposed findings of fact and conclusions of law presented by plaintiff on December 8, (CP 3050-3053), reflecting that records had actually been withheld for 184 days, and in failing to enter an award of

penalties to Appellant West for the actual number of days the records were withheld starting from his November 8, 2005 request.

Under the unambiguous and clearly established precedent of *Koenig v. Des Moines*, 142 P.3d 162, 2006, and that of *Yousoufian v. King County Executive*, 152 Wn.2d 421, 98 P.3d 463, (2004) a trial court has no discretion to reduce the number of penalty days assessed against an agency failing to disclose records.

In failing to assess penalties against the port for the entire time that records had been withheld, the trial court abused its discretion and committed obvious error. Regardless of the ultimate determination of whether the records constitute a single mega "record", 134 packets, or the greater number of individual records specified by Jorgenson, the trial court should be, in accord with the Koenig precedent, required to assess penalties based upon the actual number of days the records were withheld.

2. The court erred in failing to assess penalties based upon the number of packets or actual records withheld in a manner consistent with the deliberate grouping of the records into packets as recognized by the terms of the March 29 order, or the actions of the port in filing voluminous exemption logs based upon individual exemptions to discreet records.

The court erred in the orders and findings described above not only in failing to award penalties based upon the actual number of days that records were withheld, but in failing to base its penalty award upon the intentional actions of the port in asserting individual exemptions, or in grouping the records into packets and accepting the ruling of the trial court in regard to 342 discreet packets.

This court should be aware that the circumstances of this case in regard to the number and/or grouping of records are somewhat out of the ordinary, and that, due to the sheer number of records

withheld and the voluminous individual exemption logs asserting exemptions individually by each record, compelling circumstances exists justifying the award of per diem penalties on a per record or per packet basis.

On the initial appearance of the port in this matter before judge McPhee on February 17, 2006, in cause no. 06-2-00002-9, the court directed the port to “group the records together if they are related and involve the same exemption.”

Subsequent to this direction the port submitted “expanded privilege logs” many hundreds of pages in length, asserting individual exemptions for individual records.

The port further acquiesced in the grouping of, and/or grouped the records into 342 “packets”, and accepted the benefit of individual review of each packet. It should be noted that the length of the privilege logs and the proliferation of packets was one of the considerations employed by the court in finding certain withholdings “de minimus”-in that due to the vast nature of the records sought to be withheld the court was unable in the limited time available to it to properly review all of the particular exemptions asserted.

Having acted affirmatively to assert individual exemptions, and/or group the records, having accepted the benefit of the assertion of such particular exemptions pertaining to each discreet record, and having accepted without objection or reconsideration the court’s ruling of March 29 directing that penalties be awarded based upon at least the number of packets withheld, the port should be bound by it’s affirmative conduct and the law of the case.

Both equitable and judicial estoppel act to prevent a party from taking inconsistent positions in the same litigation. *Mueller v. Garske*, 1 Wash App 406, 461 p. 2d 886, (1969), *Esmieu v. Shrag*, 92 Wash.2d 535, 598 P.2d 1366, (1975) See also, *CJS Estoppel and waiver &*

In Yousoufian v. King County Executive, 152 Wn.2d 421, at 436, 98 P.3d 463, (2004), this

court held that the penalty provision of the records act “does not require the assessment of per day penalties for each requested record.” However, as the footnote reveals, this ruling was based upon the defendant county acquiescing in the grouping of the records, and as the court noted, “The issue of whether the trial court has the discretion to assess penalties per record if it should choose to do so is not before us.” Yousoufian, supra at 436, note 9.

In this case, like King county in Yousoufian, the port made admissions, statements and took actions consistent with the grouping of the records into 342 packets. Further, the port went beyond the actions of King County in Yousoufian in its assertion of individual exemptions for individual records, based upon the submission of multiple privilege logs of Mahabharata-like length. This court should find that the port, by submitting voluminous privilege logs asserting individual exemptions pertaining to individual records, and in consenting to (and in this case actually effecting) the grouping of the records into packets, is bound by such conduct under the doctrines of Judicial and equitable estoppel and waiver.

Appellant west believes that the purpose of the PRA is best served if the trial court is allowed to base its determination upon the grouping of records presented by the defendant, or in appropriate cases, upon individual records. Such a ruling would not conflict with Yousoufian, and would allow for appropriate penalties in cases involving records with significant public interests where disclosure has been delayed and made unduly burdensome by voluminous individually asserted exemptions.

3. The court erred in failing to assess penalties based upon the number of packets or records withheld in a manner consistent with the intent of the PRA that penalties have a deterrent effect in a case where the agency had a significant economic incentive to withhold the records and where such withholding was contrary to public health and safety.

A further argument in support of the award of appropriate penalties based upon the packet basis specified by the court in the March 29 order, or upon the basis of the individual records and discreet exemptions asserted in the mahabharata-like expanded privilege logs is the intent of the PRA that the awards have an actual deterrent effect.

The penalty provision of the PRA is intended to discourage improper denial of public records and encourage adherence to the goals and procedures dictated by statute *Yousoufian v. King County Executive*, 152 Wn.2d 421, at 436, 98 P.3d 463, (2004)

In this case, the records were relevant to a contract with one of the largest forest products corporations in the world, and involved various multi million dollar development projects.

As a result of the public records obtained from the port and West's related appeal of a port dredging project, significant dioxin contamination of port property and Budd inlet was revealed, resulting in postponement of the Weyerhaeuser project and a major regional cleanup initiative of the sound.

Port counsel's legal fees for the past year total nearly a third of a million dollars alone.

In light of the above, it was a clear abuse of discretion and a violation of the intent of the act that the penalties should act as a deterrent to award West a mere \$7,380, especially, when the interloping counsel whose participation in the trial court was limited to the presentation of a cost bill was awarded more than twice that figure.

If this matter is not remanded with instructions that the trial court impose penalties based upon the specified packets or individual records, the next public agency faced with the prospect of disclosing unpleasant facts with potentially major adverse economic consequences will be able to ignore the "de minimus" duties of public disclosure confident that the penalties awarded will be less than a slap on the wrist in comparison top the millions of dollars at risk if their project is derailed by

the disclosure of its evident danger to public health.

It most certainly was not the intent of the people and legislature in adopting and modifying the PRA that the penalties for nondisclosure would be so insignificant as to actually encourage the evil that it was intended to forestall.

When a successful plaintiff prevailing in a case for disclosure of public records is openly ridiculed by government counsel on his way out of court over the minimal amount of the award, when the award fails to even reasonably make him whole for over a year and a half of complex litigation, and when payment of even the minimal amount of the award can be delayed, (absent a valid appeal or objection by the agency to the amount of the award) perhaps for over a decade by the agency found to have violated the act, and when a citizen's attempts to secure justice are obstructed at every turn by self serving latecoming fellow travelers like Jorgenson, et al, there is no way that anyone in their right mind would attempt to assert their rights-and those of the public to disclosure of records.

The failure of this court to remand this case with directions that the trial court impose penalties per packet or record will result in an implicit declaration of "open season" for agencies to willfully obstruct access to records of public health threats confident that the penalty for non disclosure will be so "de minimus" as to be meaningless and merely serve to make the prevailing requester an object of ridicule.

The trial court erred in entering the orders of November 17, December 8, and December 22, and in entering the findings of fact in its November 17 findings and conclusions in failing to award plaintiff reasonable costs, and in failing to award a penalty based upon the full number of records or packets withheld for the full number of days they were withheld and in failing to follow the intent of the act that penalties reimburse plaintiffs for their expenses and have an actual deterrent effect.

Plaintiff further asserts that it was error for the court to fail to award a per record/per diem

penalty of greater than \$60 when it was evident that the nondisclosure was not in good faith and that it interfered with disclosure of environmental impacts of development, dangers to public health, and obstructed the fair operation of the political and environmental review process.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR NO. 3

1. The court err in awarding excessive fees for the preparation of a cost bill, in awarding fees and penalties to Jorgenson, et al, when their suit was not reasonably necessary to obtain disclosure, and in failing to properly vacate the award to, and abate the independent action of Jorgenson, et al.

It is a requirement for recovery of fees and penalties under the public records act that a plaintiff's lawsuit be reasonably necessary to or have a causative effect producing disclosure.

Appellant West asserts that the court erred in making the findings of fact in the November 17 findings, (11- that a sanction of \$60 per day was appropriate, and 16 that the League is entitled to statutory costs and all of its actual costs) and the amended order of December 8, 2006, and in failing to make the findings in plaintiff's proposed order denying their fees and penalties, by awarding excessive fees to the Talmadge law firm for their preparation of a cost bill, and by awarding any penalties costs or fees whatsoever to Jorgenson when their original public records request postdated the filing of the original lawsuit by West by three weeks, and when their lawsuit was not reasonably necessary to compel disclosure.

The court further erred in failing to vacate the award of costs and in failing to abate the duplicitous and vexatious action of Jorgenson in the order of December 22, 2006.

In this case, a cursory examination of the record of Cause No. 06-2-00002-9 reveals that co-appellants Jorgenson, et al failed to even file a request for the records at issue on January 10, 2006, until after the plaintiff had commenced his court action for disclosure on January 3, 2006. Their filing

of their second, opportunistic lawsuit postdated plaintiff West's filing by nearly three weeks.

Under no circumstances can it be concluded that a second parasitic lawsuit by the League and their familiar associate filed well after the commencement of a lawsuit by West was reasonably necessary and/or had a causative effect on disclosure, especially when they failed to even file a request for disclosure of records until after West commenced litigation. See Building Industry Assn. Of Washington v. State Dept. Of Labor and Industries, 98 P. 3d 537, 123 WAP 666, review denied, 116 P. 3d 399 (2004).

To allow opportunistic, late coming fellow travelers to *worm* their way into a case and reap a windfall profit from such sharp practice would set a dangerous *crawling* precedent where numerous successive requesters could tag on to a public records request after a suit had been filed and unreasonably drain the public coffers. This is not consistent with sound public policy, and *bellies* the intent, substance, and black letter precedent of the Washington State Public Disclosure Act.

Since their belated attempt to tag on to the original action, and despite West and Koenig's counsel's attempts to co-operate with them, Jorgenson and Co have done everything possible to make their presence "vexatious" and obstructive of West's efforts, to the extent of attempting to purge the record of his argument when it did not support their request for 1.8 million dollars, seeking sanctions against him for his presumption in seeking a fair final order, and even attempting on three separate occasions to present an order that failed to reflect West's participation in the case.

In the December 22 order the court erred in failing to vacate its award of fees and penalties and to abate the action of Jorgenson, et al, when they were not entitled to fees and no relief they were legitimately entitled to could not be issued in the original action filed by West.

The abatement of the action of Jorgenson for unwarranted excessive fees and penalties, when the legitimate relief they may seek in the form of actual disclosure of records can be granted in the

original action filed by West is a mandatory and non discretionary judicial action. State ex rel G. M. Lum. Co. V. Supr. Ct, 145 Wash 532, (1927). See also, in accord, Jones v. Centralia, 157 Wash. 227, 259 Pac. 14, (1930)

This Court should follow the clearly established precedent of this State and send the opportunistic late comers to this litigation crawling back to their lairs without any fruits whatsoever from the arboreal flora of public knowledge that they have so basely attempted to taint with their filarial presence.

Neither the ends of justice the public disclosure act are not served by allowing secondary plaintiffs to file duplicative and vexatious actions well after the original requester is in court, especially when they, like Jorgenson, are less than co-operative with their "fellow" co-plaintiffs and counsel.

CONCLUSION AND RELIEF SOUGHT

The court erred in making its findings, conclusions and orders when it was clear from the record, from defendant's admissions, and from the actual request on file that plaintiff 's original requests was made on November 8, 2005. As held by the court in the Koenig and Yousoufian cases, the trial court is not vested with discretion to reduce the number of days that records were withheld. This clear error alone would require a remand back to the trial court for entry of an order assessing penalties based upon the actual number of days they were withheld.

This case is not an ordinary public records case with a reasonable number of records but rather "Apple Crates" full as the Honorable judge hicks noted on February 17.

Defendants argued exemptions based upon discreet records based on a set of disclosure logs of Mahabharata like proportion. The court's March 29 order was therefore necessarily 51 pages long.

The sheer number of records and the individual nature of the exemptions placed such an undue burden upon the magistrate that he recommended that a special master be appointed for any such cases in the future, and although the Trial Court acted with the best of intentions, it was overwhelmed by the Herculean task of attempting to review and make appropriate redactions. The public interest in disclosure and effective environmental review was seriously compromised by defendant's actions.

Appellant West was forced to bear the economic brunt of over a year and a half of complicated litigation with no reward other than being ridiculed by government counsel over the "de minimus" award of penalties (without costs) made by the court. His task was complicated and made much more difficult by latecoming parties (Jorgenson and the league) filing a request for the same records after he had commenced the original action, for their own partizan and mercenary motives unrelated to legitimate disclosure.

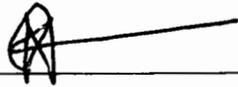
This case should be remanded back to the trial court with instructions to order full disclosure of all records, and to award penalties based upon the actual number of days the records were withheld from West.

Further, due to the individual specific assertion of discreet exemptions for each record, and the port's acceptance of the benefit of individual review, the trial court should be ordered to exercise its discretion to award appropriate per diem penalties based upon at least the number of packets withheld, if not for each record for which a specific exemption was claimed by the port. In this manner the court can effectuate and preserve both the deterrent effect of the PRA and the benign public policy of the State Environmental Policy Act.

The league and Jorgenson's belated action should be abated, and they should be allowed to continue with their participation in this case for the sole and specific purpose of pursuing any legitimate interest they may have in disclosure of the records at issue, without any award of fees or

penalties.

Done April 12, 2007. I certify the foregoing to be true.



ARTHUR WEST

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SUPREME COURT
STATE OF WASHINGTON

CERTIFICATE OF SERVICE

2007 APR 16 A 9:59

I, Arthur West declare and state as follows:

BY RONALD R. CARPENTER

CLERK

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

3. On April 16, 2007, I caused to be served a copy of the document to which this certificate is attached on the following, per the method indicated:

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

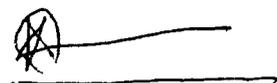
Matthew R. Hansen
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Philip A. Talmadge
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Voters of Thurston County
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William John Crittenden
Attorney at Law
927 North Northlake Way
Suite 301
Seattle, WA 98103
Attorney for Co-Appellant David
Koenig
Delivery Method: U.S. Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Olympia, Washington, this 16th day of April, 2007.


Arthur West

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I, Arthur West declare and state as follows:

BY RONALD T. PARFENTIS

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

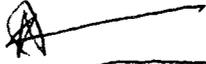
3. On April 12, 2007, I caused to be served a copy of
Appellant's (uncorrected) opening brief on the following, per the
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Carolyn A. Lake
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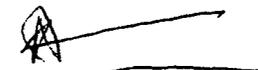
3. On April 12, 2007, I caused to be served a copy of Appellant's (uncorrected) opening brief on the following, per the method indicated:

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Seattle, WA 98103
Attorney for Co-Appellant David
Koenig
Delivery Method: Via Email &


Arthur West

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STATE OF WASHINGTON

2007 APR 16 A. 9:59

BY ROBERT L. CARPENTER

I, Arthur West declare and state as follows:

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

3. On April 16, 2007, I caused to be served a copy of the document to which this certificate is attached on the following, per the method indicated:

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Dated at Olympia, Washington, this 16th day of April, 2007.


Arthur West