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No. 78757-3

SUPREME COURT
OF THE STATE OF WASHINGTON
BY RONALD H. CARPENTER

bjh

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

vs.

PORT OF OLYMPIA, a Washington
municipal corporation,
Respondent,

and

WEYERHAEUSER COMPANY, a
Washington corporation,
Respondent.

DAVID KOENIG,
Appellant,

vs.

PORT OF OLYMPIA,
Respondent.

COMBINED REPLY BRIEF OF APPELLANTS JORGENSEN AND
LEAGUE OF WOMEN VOTERS OF THURSTON COUNTY

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A. INTRODUCTION

An informed citizenry needs access to public records to have the knowledge of public issues necessary to maintain control over its government. The primary purpose of the Public Records Act, Chapter 42.56 RCW, is to provide the citizenry with full access to public records.¹ Accordingly, the Act contains a strongly worded mandate favoring broad disclosure of public records. It also contains a thrice-repeated mandate that its exemptions are to be construed narrowly.

Despite these clear commands, the Port of Olympia (Port) has attempted to “maximize what can be kept secret and minimize what is to be made public.” CP 869. The Port has refused to disclose certain records to the League of Women Voters of Thurston County and Walter Jorgensen (collectively “the League/Jorgensen”) relating to its lease of public facilities to the Weyerhaeuser Company (Weyerhaeuser). The Port claims those records are exempt from disclosure because the Act’s deliberative process and research data exemptions apply. RCW 42.56.270(1); .280.

The trial court erred by misconstruing and expanding the deliberative process exemption so broadly that it has essentially banned

¹ The Legislature recodified the disclosure provisions of the Public Disclosure Act, RCW 42.17.250 *et seq.*, in RCW 42.56, which is now known as the Public Records Act. Laws of 2005, ch. 274. The League/Jorgensen will continue to refer to RCW 42.56 as “the Act” or “the PRA” where appropriate.

the public's access to the challenged records even though the Port's lease negotiations with Weyerhaeuser were finalized in 2005. The trial court similarly misconstrued the research date exemption by permitting the Port to withhold the challenged records without a clear showing that public harm and private gain would result from disclosure. Where this Court has repeatedly rejected attempts to broadly construe exemptions to the PRA, it should continue to do so here.

The trial court effectively consolidated the League/Jorgensen's multiple requests for thousands of pages of records into a single request for purposes of determining the per-day penalty to which the League/Jorgensen are entitled. This resulted in a minimal fine that will do little to discourage the Port, or any other public agency, from wrongly withholding public records in the future.

Although the Act is statewide in scope, its venue provision leaves attorneys from around the state with no choice but to litigate PRA cases involving a state agency in Thurston County. Yet the trial court confined the hourly rate of the League/Jorgensen's counsel to the hourly rates charged by counsel in Thurston County even though counsel practicing in this area of law are routinely compensated at rates above or at that charged by the League/Jorgensen's counsel here.

B. REPLY TO THE PORT'S STATEMENTS OF THE CASE²

What is abundantly clear from the Port's restatement of facts is that the majority of the records it produced were not produced until after the League/Jorgensen filed their lawsuit; the Port would not otherwise have produced them. Moreover, the Port acknowledges that of the records it initially withheld, nearly half should have been disclosed. Br. of Resp't Port at 5-6. Even after the trial court's ruling, the League/Jorgensen were forced to join appellant Arthur West in a motion to compel the Port to produce documents it was ordered to disclose. CP 1015-37, 1161-67.

The Port also failed to comply with the Act in claiming exemptions to disclosure. *See, e.g.*, CP 277, 352-70, 663-860. Although the Port identified the specific exemption it claims for each record it listed in its various privilege logs, it failed to include "a brief explanation of how the exemption applies to the record withheld." RCW 42.56.210(3). The Port left the League/Jorgensen to guess how the alleged exemptions might apply, or, in the alternative, to simply take the Port's word for it.

² The League/Jorgensen only challenge the Port's withholding of records under the research data and deliberative process exemptions. Br. of Appellants League/Jorgensen at 3-4. They have not challenged or otherwise assigned error to the trial court's decision to exempt certain documents from disclosure based on Weyerhaeuser's claim that those documents are protected from disclosure as trade secrets under the "other statute" provision of RCW 42.17.260(1).

Finally, the Port makes much of the fact that the League/Jorgensen's original counsel, Bernard Friedman, never notified the Port after its last disclosure on May 30, 2006 that any documents were missing or had not yet been received. Br. of Resp't Port at 7. Yet the Port fails to acknowledge Mr. Friedman was hospitalized shortly thereafter and died on August 3, 2006. CP 1247-48.

C. ARGUMENT IN REPLY³

1. Standard of Review

As the League/Jorgensen remark in their opening brief, this Court reviews agency actions involving the disclosure of public records de novo. Br. of League/Jorgensen at 12. Any doubts about disclosure are to be resolved in favor of access. *Id.* By contrast, the Court reviews penalties awarded under the Act for an abuse of discretion. *Id.* The Port does not challenge these standards. Br. of Resp't Port at 9.

2. The Trial Court Erred By Concluding Certain Records Are Exempt Under the Deliberative Process Exemption

The Port asserts the "deliberative process" exemption applies to nearly every document it claims is exempt from disclosure.

³ The Port claims at 22 that the League/Jorgensen have abandoned any challenge to the trial court's application of the attorney-client privilege and the Uniform Trade Secrets Act, Chapter 19.108 RCW, by failing to brief these issues on appeal. The League/Jorgensen have not addressed those exemptions because they were not the basis for the trial court's decisions.

RCW 42.56.280 exempts from public disclosure “[p]reliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended except that a specific record shall not be exempt when publicly cited by an agency in connection with any agency action.” The trial court applied this exemption to hundreds of pages of records exchanged between the Port and Weyerhaeuser even though the Port’s lease negotiations with Weyerhaeuser concluded in 2005. The trial court erred by expanding the scope of the exemption.

Relying on *ACLU v. City of Seattle*, 121 Wn. App. 544, 89 P.3d 295 (2004), the Port continues to assert the deliberative process exemption applies to nearly every record it claims is exempt from disclosure. Br. of Resp’t Port at 13-19. The Port’s reliance on *ACLU* is misplaced. More importantly, the Port has simply ignored *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 134, 580 P.2d 246 (1978), and the League/Jorgensen’s argument that *Hoppe* compels a different result here.

Contrary to the Port’s arguments, *ACLU* actually supports the conclusion that the deliberative process exemption must be narrowly confined to the time leading up to a decision. *ACLU* is the perfect example of the proper application of the deliberative process exemption: the exemption applied while negotiations were ongoing, *but ceased to*

apply once the contract was adopted because there were no further ongoing negotiations requiring confidentiality. *ACLU*, 121 Wn. App. at 554. There is no evidence the *ACLU* court contemplated a continuing, indefinite exemption from disclosure for the requested records.

By contrast, the Port's analysis of the deliberative process exemption would make all data created by or recommendations made by agency decisionmakers exempt even after the decision-making process has concluded. Br. of Resp't at 17-18. This is clearly not what this Court intended when it decided *Hoppe*. Instead, the exemption is to be narrowly tailored to documents relating to *pending* deliberations of public agencies. *Hoppe*, 190 Wn.2d at 134. *Accord Progressive Animal Welfare Soc'y (PAWS) v. Univ. of Wash.*, 125 Wn.2d 243, 257, 884 P.2d 592 (1994) ("Once the policies of recommendations are implemented, the records cease to be protected under this exemption."); *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 800, 791 P.2d 526 (1990) (citing *Hoppe*).

Despite this Court's dispositive holding in *Hoppe*, the Port fails to analyze why that decision does not apply here. Although the trial court stated it "must respect, and does respect, the authority of the higher court in *ACLU*," CP 869, neither the trial court nor the Port ever discuss how a Court of Appeals decision can overrule Supreme Court holdings directly

on point. *Hoppe* is controlling and dispositive. Yet the Port fails to respond to this argument.

There is a policy logic to a deliberative process exemption. While the agency is in the midst of making a decision it should be focusing on the decision and not responding to records requests. Its decision is not final; however, once the decision is final, no such practical bar to disclosure applies. The public's right to know about its government's decisions is the prevailing policy. Decisionmakers should be accountable to the public for their decisions. The trial court and the Port would cast a permanent shroud of secrecy over decisions that *might* have future implications. That is far too broad an exemption from disclosure.

The records the League/Jorgensen requested from the Port lost their deliberative process exemption in August 2005, when the Port ended any deliberative processes inherent in its lease negotiations with Weyerhaeuser by ratifying the lease. There is neither a statutory exemption nor any case establishing an exemption for information that might be applicable to unknown future negotiations at some unknown future time. The Court should reverse the trial court's order applying the deliberative process exemption because the holding is contrary to law.

3. The Trial Court Erred By Concluding Certain Records Are Exempt Under the Research Data Exemption

The Port has also asserted the research data exemption applies to the records it refuses to disclose. RCW 42.56.270(1) provides an exemption from disclosure for “[v]aluable formulae, designs, drawings, . . . , and research data obtained by any agency within five years of the request for disclosure when disclosure would produce private gain and public loss.” Research data is “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.” *Servais v. Port of Bellingham*, 127 Wn.2d 820, 832, 904 P.2d 1124 (1995).

Here, the trial court concluded certain Port records are exempt from disclosure if they theoretically could be of value to others seeking to do business with the Port, in any context, at some future time. The trial court’s application of this exemption is overbroad and allows the Port to withhold records without a specific showing that public harm and private gain will result from disclosure or that the records were even protected “research data.”

As an initial matter, the Port seems to suggest the research data exemption has continuing, indefinite viability. Br. of Resp’t Port at 11-13. On the contrary, there is no statutory or case law basis for extending the

life of a research data exemption beyond the circumstances in which the research data were created. The very wording of RCW 42.56.270(1) weighs against an indefinite extension of this exemption because it specifically states the exemption is available for only the first five years. Moreover, as the League/Jorgensen argue in their opening brief, *Servais* says nothing at all about an indefinite extension of the research data exemption. Instead, it stands for the proposition that when the purpose for which the research data exemption is granted ceases to exist, the exemption also ceases to exist. This is similar to the *Hoppe* rule for the deliberative process exemption. Yet the Port fails to address this argument.

The Port next argues that disclosing the records here would “result in the Port’s loss of its ability to effectively and competitively prepare for and negotiate with private entities.” Br. of Resp’t Port at 11. Although the Port discusses its lease negotiations with Weyerhaeuser generally, it fails to articulate how its negotiations for a log export facility cross over into lease negotiations with other companies today or in the future. Br. of Resp’t at 11. More importantly, the Port fails to argue how public harm and private gain will result from the disclosure of the records it claims are exempt. The public has a right to know if the lease, claimed to be a “good deal” for Port taxpayers, meets its advance billing by Port officials.

Finally, the Port contends the League/Jorgensen believe “the Port is not entitled as a government agency to the essential information necessary to protect its interests.” Br. of Resp’t Port at 12. On the contrary, the League/Jorgensen agree the Port has a protected interest in certain information. They do not agree, however, that the Port has a protected interest in the information it seeks to withhold here. The Port seems to suggest the public should simply trust it and has taken the position the people are not entitled to know what it considered when entering into the Weyerhaeuser lease. But information the Port compiled during its negotiations with Weyerhaeuser is key to the public’s ability to assess how or why the Port believed the Weyerhaeuser lease was a “good deal.” The public has a right to know what its government is doing.⁴ Accordingly, this Court should reject any attempt to broaden the research data exemption in the manner advanced by the Port and supported by the trial court.

⁴ “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.” RCW 42.56.030.

4. The Trial Court Erred In Assessing Statutory Penalties and Attorney Fees⁵

The Act requires a court to award a statutory penalty for each day an agency denies a requestor the right to inspect and copy a public record. RCW 42.56.550(4). The purpose of the penalty is to punish current misconduct sufficiently to deter future misconduct. *See, e.g., Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662, 935 P.2d 555 (1997). Minimum penalties pose little risk for agencies of any size.

Without analysis, the trial court here treated the League/Jorgensen's request for thousands of pages of public records as a single request. It then imposed a per day, per request penalty. The trial court abused its discretion by failing to impose a penalty taking into consideration the Port's culpability, especially where it was critical of the attitude with which the Port approached its disclosures; it entered no findings describing why a per day, per request approach better fulfilled the deterrent policy of the Act. CP 1413-14. The penalty, as imposed, is insufficient to deter future violations by the Port or any other agency.

⁵ The Port spends considerable time in its response brief arguing the trial court imposed an appropriate penalty amount and the League/Jorgensen miscalculated the number of days the Port wrongfully withheld documents. Br. of Resp't Port at 25-28, 30-31. The Port overlooks the fact the League/Jorgensen have not argued on appeal that the trial court's determination of a \$60 per day penalty for 123 days was inappropriate. Br. of Appellant's League/Jorgensen at 3-4, 31-32 n.15. What the League/Jorgensen challenge is the trial court's unexplained decision to treat their requests for numerous records as a single request and to award a per record, per day penalty on that basis. *Id.* at 4, 31-32.

As an initial matter, the Court should disregard the Port's incorrect assertion that the League/Jorgensen failed to address or meet the standard of review applicable to this Court's review of the trial court's penalty award. Br. of Resp't Port at 24, 29. The League/Jorgensen called the Court's attention to the abuse of discretion standard in their opening brief. Br. of Appellants League/Jorgensen at 12. Simply stated, the trial court never explained the rationale for its decisions to treat the League/Jorgensen's request for multiple records as a single request and to impose a per request penalty on that basis. CP 1411-15. Failing to explain precisely how the per request penalty imposed took into consideration the Port's culpability was an abuse of discretion. Br. of Appellant's League/Jorgensen at 31-32 (citing *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 430-31, 98 P.3d 463 (2004)). The League/Jorgensen have not waived their challenge to the trial court's penalty award.

The Port next urges this Court to find that no "per record" multiplier is appropriate here. Br. of Resp't Port at 29-31. In doing so, the Port fails to consider the impact of this Court's decision in *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 438-39, 98 P.3d 463 (2004) (*Yousoufian* 2004), and instead focuses on *Yousoufian v. Office of Ron Sims*, 137 Wn. App. 69, 151 P.3d 243 (2007) (*Yousoufian* 2007).

In *Yousoufian* 2004, this Court analyzed whether the Act required the assessment of a penalty based on each record or document to which access was denied. 152 Wn.2d at 438-39. The Act indicates a penalty is to be assessed “for each day [the requestor] was denied the right to inspect or copy said public record.” RCW 42.56.550(4). The Court said this language was ambiguous because the Act was unclear on whether the legislature intended to assess a penalty for each record wrongfully withheld or whether the term included the plural and applied to the request itself, regardless of the number of records requested. 152 Wn.2d at 433-34. This Court then considered which interpretation best served the purpose of the Act and determined the policy of encouraging access would be better served by imposing a penalty based upon the culpability of the agency rather than the size of the request. *Id.* at 436. Importantly, however, the Court *did not* rule out an award based on each record, nor did it specifically approve the grouping that was used by the trial court. *Id.* at 436 n.9. Instead, it concluded the number of days access was denied was to be determined by the trial court as a question of fact. Since the county did not appeal the manner in which the trial court grouped the records for calculating the daily penalty, this Court could not address whether the grouping was proper on appeal. *Id.*

Although the League/Jorgensen clearly present the argument this Court touched upon but was unable to address in *Yousoufian* 2004 because the county did not raise it, the Court of Appeals in *Yousoufian* 2007 focused only on the county's lack of good faith as the principal factor which must be considered when assessing the statutory penalty. Yet nothing prevents this Court from assessing the per record penalty proposed by the League/Jorgensen where neither *Yousoufian* 2004 nor *Yousoufian* 2007 specifically rule out an award based on each record because the County failed to raise it in those cases. The trial court's imposition here of a \$7,380 penalty for the Port's willful withholding of records it characterized as a single request amounts to the "proverbial slap on the wrist" and does nothing to deter future PRA violations.

The Port, citing *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 301, 825 P.2d 324 (1992), then focuses on economic loss to the League/Jorgensen. Br. of Resp't Port at 36-37. This is clearly error. Both *Amren v. City of Kalama*, 131 Wn.2d 25, 35-36, 929 P.2d 389 (1997) and *Yousoufian* indicate economic loss to the requesting party is a factor in setting penalties, but not *the* factor. Although a showing of economic loss is not required in the determination of whether an award for delay in disclosure should be granted, it is a factor to be considered in determining the amount to be awarded. *Amren*, 131 Wn.2d at 37. To

focus, as the Port does, on economic factors will defeat the purpose of the Act. Citizens have a broad right of access to public documents in Washington and they may seek documents without any “economic” need in mind.

The Port also argues the trial court did not abuse its discretion when it rejected the League/Jorgensen’s request for attorney fees on the basis of their counsel’s reasonable hourly rates. Br. of Resp’t Port at 39.⁶ The Port fails to consider several additional factors when responding to the League/Jorgensen’s argument on this issue.

A public records case is a highly specialized form of action with a specific venue requirement: suits against agencies failing to disclose public records must be brought in the county in which the records are maintained. This means, more often than not, that public records actions will be filed in Thurston County regardless of where the plaintiff or the attorney resides. A requestor should not be limited to hiring an attorney from Thurston County simply because that is where the action must be filed, especially since finding experienced counsel willing to take on

⁶ The Port contends the trial court’s fee award actually enhanced the League/Jorgensen’s fee request by a net \$1,187.50 by increasing one attorney’s reasonable hourly rate to \$250 from \$225 and by reducing the other two attorney’s reasonable hourly rates from \$300 to \$250. Br. of Resp’t at 40 n.16. Yet the Port fails to fully acknowledge the trial court significantly reduced the amount of hours counsel was to be compensated without finding the work was unnecessary or unsuccessful. CP 1412-13.

such a matter on a contingent basis is difficult in any county. Yet that is exactly what the trial court did by confining rates of attorneys in Act cases to rates for Thurston County attorneys.

The Court should not limit the League to a reasonable hourly rate in Thurston County just because venue for the action is proper there. Even if it does, the reasonable hourly rate charged by the League/Jorgensen's counsel should be discounted to hourly rates charged by attorneys in Thurston County. The League/Jorgensen's requested hourly rates are not disproportionate to the reasonable hourly rates for Thurston County attorneys. CP 1279-80 (Bean). Nor are the requested hourly rates disproportionate to the rates charged by other attorneys specializing in public records cases. CP 1273, 1276 (Hubbard).

The trial court abused its discretion by confining the hourly rates of the League/Jorgensen's counsel to those hourly rates charged by Thurston County attorneys.

5. The League and Jorgensen Are Entitled to Their Attorney Fees on Appeal

As the League/Jorgensen recite in their opening brief, RAP 18.1(a) requires a party seeking an award of attorney fees on appeal to request fees in a separate section of its brief. They have done so. Br. of

Appellants League/Jorgensen at 35. If they prevail on appeal, they are entitled to their appellate fees. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990).⁷

The Port does not dispute the League/Jorgensen's entitlement to attorney fees on appeal if they prevail; instead, it simply requests the Court to require a careful accounting for time spent on Port-related issues. Br. of Resp't Port at 45. The League/Jorgensen would expect nothing less.

D. CONCLUSION

The trial court erred by misconstruing and expanding the deliberative process and research data exemptions. Its decisions essentially ban the public's access to the challenged records even though the Port's lease negotiations with Weyerhaeuser were finalized in 2005. Where this Court has repeatedly rejected attempts to broadly construe exemptions to the PRA, it should continue to do so here.

The trial court abused its discretion by failing to make findings on the penalty against the Port for nondisclosure, taking into consideration

⁷ A "prevailing party" is "one who has an affirmative judgment rendered in his favor at the conclusion of the entire case." *Tacoma News, Inc. v. Tacoma-Pierce County Health Dep't*, 55 Wn. App. 515, 525, 778 P.2d 1066 (1989). Prevailing party status is not, however, conditioned on the lawsuit causing disclosure. See *Spokane Research & Defense Fund v. City of Spokane (Spokane IV)*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005) (internal footnote omitted). A party can prevail even if he does not successfully obtain the documents being requested. *Citizens For Fair Share v. Dep't of Corrections*, 117 Wn. App. 411, 437, 72 P.3d 203 (2003).

the Port's culpability, especially where it was critical of the attitude with which the Port approached disclosure. Its decision to impose a single, per record penalty is unexplained and does nothing to deter future PRA violations by the Port or any other public agency.

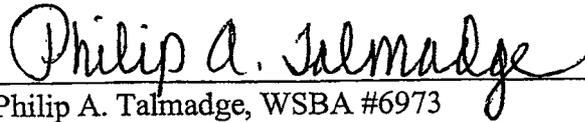
The trial court also abused its discretion by confining the hourly rates of the League/Jorgensen's counsel to those hourly rates charged by Thurston County attorneys. The League/Jorgensen's requested hourly rates are not disproportionate to the reasonable hourly rates for Thurston County attorneys nor are they disproportionate to the rates charged by other attorneys specializing in PRA cases.

This Court should accept review and reverse the trial court's overbroad application of the deliberative process and research data exemptions and remand for entry of an order directing the Port to disclose documents it improperly claimed were covered by those exemptions. The Court should also remand for recalculation of the penalties and fees imposed against the Port for its failure to turn over nonexempt documents to the League/Jorgensen.

Finally, the Court should award the League/Jorgensen their reasonable attorney fees and costs on appeal.

DATED this 25th day of June, 2007.

Respectfully submitted,



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DECLARATION OF SERVICE

On this day said forth below, I deposited with the U.S. Postal Service a true and accurate copy of: Combined Reply Brief of Appellants Jorgensen and League of Women Voters of Thurston County in Cause No. 78757-3 to the following parties:

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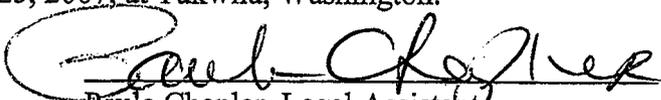
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 25, 2007, at Tukwila, Washington.


Paula Chapler, Legal Assistant
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