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SUPREME COURT
STATE OF WASHINGTON

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36529-4-II

Nos. 78757-3; 79102-3

BY ORIGINAL FILED ENTER
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*

REPLY BRIEF OF APPELLANT KOENIG

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I. REPLY ARGUMENT

A. Deliberative Process Exemption

1. Documents shared with Weyerhaeuser are not exempt as deliberative process under RCW 42.56.280 (Former RCW 42.17.310(1)(i)).¹

The trial court erroneously ruled that documents shared with Weyerhaeuser are exempt under RCW 42.56.280. This ruling was based on the interpretation of the deliberative process exemption in *American Civil Liberties Union v. City of Seattle* (“*ACLU*”), 121 Wn. App. 544, 89 P.3d 295 (2004). In *ACLU*, Division One of the Court of Appeals erroneously extended the exemption to apply to records that were shared with a non-governmental party. This Court² has never approved or followed the analysis of in *ACLU*.

As a threshold matter, this issue is *not* limited to “five discreet records,” as the Port claims. *Resp. Br.* at 14. The five records listed in Koenig’s opening brief are merely *examples* of the misapplication of the

¹ The public records provisions of RCW Chapter 42.17, were re-codified as the Public Records Act, RCW Chapter 42.56, in 2005. See RCW 42.56.001; Laws of 2005, ch. 274. Former RCW 42.17.310(1)(i) was re-codified as RCW 42.56.280, but the language of the exemption was not changed.

² At the time of this writing, the Washington Supreme Court has not decided whether to accept direct review in this case. Koenig *opposes* direct review. See *Appellant Koenig’s Statement of Grounds for Direct Review; Answer to Statement of Grounds* (March 2, 2007). Neither the supreme court nor Division Two of the Court of Appeals has addressed *ACLU*.

deliberative process exemption to documents shared with Weyerhaeuser. On remand, the Port must be ordered to review its privilege logs and produce all documents that were shared with Weyerhaeuser or any other non-governmental third party.

The Port characterizes Koenig’s argument as a request to make “new law.” *Resp. Br.* at 14. It is true that this Court has never addressed the question of whether the deliberative process exemption applies to records shared with non-governmental parties. However, the argument presented by Koenig is not “new.” It is based on the text of the statute, the purpose of the exemption as expressed in *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978), and the interpretation of the parallel FOIA provision by the United States Supreme Court. *See Department of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2001) (documents submitted to agency by Indian tribe were not exempt under FOIA’s Exemption 5).

The trial court’s application of the deliberative process was *not* based on a “PAWS test” because *PAWS II* did not address the issue presented in this case. *Resp. Br.* at 16. The *PAWS II* case involved records from the National Institutes of Health (NIH). The deliberative process exemption was only one of several exemptions at issue in *PAWS II*. The only issues relating to that exemption actually addressed in *PAWS*

II were (i) whether the requested records revealed any policy-making or deliberative process, and (ii) whether those records became disclosable once the policy was implemented. *Progressive Animal Welfare Soc’y v. UW (“PAWS II”)*, 125 Wn.2d 243, 256-57, 884 P.2d 592 (1994). The question of whether the deliberative process exemption applied to documents obtained from a federal agency was *not* addressed in *PAWS II*. Nor did the *PAWS II* court address the question presented here: whether the exemption applies to documents shared with non-governmental parties.

The trial court’s decision is not supported by *PAWS II*. Rather, it is based on an erroneous interpretation of *PAWS II* in *ACLU*. In the latter case, the Court of Appeals assumed, based on the type of records at issue in *PAWS II*, that the Washington Supreme Court had approved the application of the deliberative process exemption to documents obtained from a federal agency. *ACLU*, 121 Wn. App. at 551-52. Based on that erroneous assumption, the Court of Appeals extended the deliberative process exemption to records obtained from a *non-governmental* party. That holding was clearly incorrect under *Klamath Water Users, supra*.

ACLU was also based on an erroneous interpretation of the term “agency” in RCW 42.17.020(1). *See Brief of Appellant Koenig* at 8. The Port ignores this defect in the reasoning of *ACLU*.

RCW 42.56.280 is intended to protect the deliberative or policy-making processes of government agencies. *PAWS II*, 125 Wn.2d at 256. The Port seeks to expand that exemption to allow secret communications and negotiations between agencies and private parties. Such an overly broad interpretation of the exemption directly conflicts with the policy and purpose of the PRA:

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. The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

PAWS II, 125 Wn.2d at 260 (quoting Former RCW 42.17.251). This Court has repeatedly rejected attempts by agencies to construe PRA exemptions broadly. *See PAWS II*, 125 Wn.2d at 261 (rejecting agencies interpretation of former RCW 42.17.330 as a general exemption); *Koenig v. Des Moines*, 158 Wn.2d 173, 183-84, 142 P.3d 162 (2006) (rejecting agency's broad interpretation of former RCW 42.17.31901); *Prison Legal News v. Department of Corrections*, 154 Wn.2d 628, 640-41, 115 P.3d 316 (2005) (rejecting agency's broad definition of "law enforcement" in former RCW 42.17.310(1)(d)).

The Port's own policy arguments confirm that the trial court and the Port have stretched the deliberative process exemption much too far. Quoting portions of the trial court's ruling, the Port asserts that the disclosure of its negotiation "policies" would prevent the Port from obtaining the best possible result for the public. *Resp. Br.* at 18. But these concerns are not applicable where records have already been shared with an outside party such as Weyerhaeuser. The Port is not protecting its hole cards in order to better serve the public. On the contrary, the Port is showing its cards to Weyerhaeuser while withholding the same information from the general public.

Under *ACLU*, the deliberative process exemption in RCW 42.56.280 has mutated into a secret communications exemption that is the very antithesis of open government. Allowing the Port to withhold documents shared with Weyerhaeuser exacerbates the excessive secrecy already created by allowing the Port to withhold documents after the lease negotiations have concluded. If both aspects of *ACLU* (and the trial court's decision in this case) were affirmed, the public would *never* be permitted to examine public records relating to a lease of public property to a private business interest.

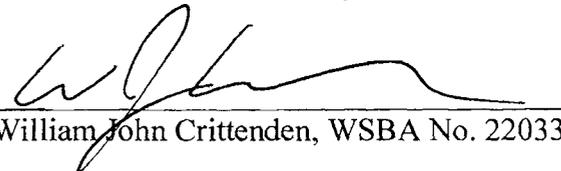
This Court should overrule the broad interpretation of deliberative process in *ACLU*. This Court should hold that the deliberative process

exemption does not apply to any documents that the Port shared with Weyerhaeuser or any other non-governmental third-party.

II. CONCLUSION

This Court should reverse the trial court's overbroad application of the deliberative process and research data exemptions. This court should award appellant Koenig attorney's fees on appeal and remand this matter to the trial court.

RESPECTFULLY SUBMITTED this 14th day of June, 2007.

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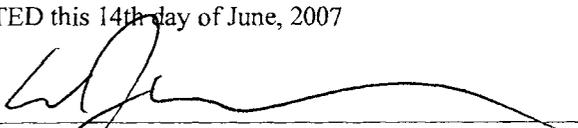
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The undersigned certifies that on the date written below, a true and correct copy of this document was served on each of the parties below as follows:

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