

No. 78757-3
Consolidated with
No. 79102-3

365294I

SUPREME COURT
OF THE STATE OF WASHINGTON

ARTHUR S. WEST
and
WALTER R. JORGENSEN and LEAGUE OF
WOMEN VOTERS OF THURSTON COUNTY,
Appellants

And David Koenig, Appellant
v.

PORT OF OLYMPIA & WEYERHAEUSER COMPANY,
Respondent

RESPONSE BRIEF OF RESPONDENT PORT OF OLYMPIA

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**I. RESPONDENT PORT'S RESTATEMENT OF ISSUES
PERTAINING TO ASIGNMENTS OF ERROR**

1. Whether the Trial Court properly exempted from disclosure certain records by application of RCW 42.56.270(1) (former RCW 42.17.310(1)(h), and RCW 42.56.280 (former RCW 42.17.310(1)(i)).¹
2. Whether the Trial Court abuse its discretion in awarding a \$60 per day PRA penalty on a per request basis where the Port timely issued its initial responses, where the Court found the Port did **not** act in bad faith, and where the requestors make **no showing** of economic loss for the delay in releasing records.
3. Whether the Trial Court abuse its discretion in awarding attorney fees at an hour rate of \$250, where the Court explained its rationale for the slightly reduced rate based on lodestar and reasonable factors.

II. INTRODUCTION / SUMMARY

I don't want to turn the Public Disclosure Act into a printing press for making greenbacks, however. That would only encourage a cottage industry in making public disclosure requests in the hopes of gaining a windfall. So there has to be a balance here.²

¹ The public records provisions of Chapter 4219 RCW were re-codified as the Public Records Act (PRA) Chapter 42.56 RCW in 2005. See RCW 42.56.001, Laws of 2005, chapter 274. Former RCW 42.17.310(1)(h) is re-codified as RCW 42.56.270(1), and former RCW 42.17.310(1)(i) is re-codified as RCW 42.56.280. The exemption language has not changed.

² Transcript of the Trial Court's October 20, 2006 oral ruling at 33:11-15. The Port filed a Second Supplemental Designation of Clerks Papers on May __m 2007. Clerks Papers numbers for the Transcript were not available when this brief was filed. A copy of the Transcript of Trial Court ruling is attached as Appendix A.

In this Public Records Act appeal, the Appellants and Amicus (hereinafter League³) seek to overturn the Trial Court's ruling that portions of Port of Olympia records pertaining to lease negotiations with Weyerhaeuser Company were properly exempt from public records disclosure. Dominating this appeal is the League's request for a Public Records penalty award of nearly two (2) million dollars (\$1,818,442.50). In a ruling supported by a 51 page, single spaced Decision CP 868-918, a 13 page Ruling on Reconsideration CP 993-1005, a ruling specific to SEPA issues CP 2512-2515, and a detailed, oral explanation of the penalty imposed⁴, the Trial Court imposed a "per day" penalty of \$60.00, applied a "per request" factor, and awarded fees at an hourly rate of \$250.00. The Court's applied per day penalty *exceeds* that requested by League. However, the League wants more and appeals.

III. RESPONDENT PORT'S RESTATEMENT OF FACTS⁵

By email in early January, the Port received a request for records from the Port. CP 477. On January 10 2006, the Port received the same request in a single letter dated January 5, 2006, from the League of

³ This is a consolidated case with Appellants Arthur West, Walt Jorgenson, the League of Women Voters, and David Koenig, and two Amicus. With the minor exception of the Port's initial response to West, the public records release dates are near identical. The terms "League" and "Appellants" is used to refer to all Appellants and Amicus.

⁴ Attachment A, See Footnote 2 herein.

⁵ The majority of Port facts are based on the Declaration of Port Director Ed Galligan filed February 10, 2006.

Women Voters of Thurston County, and Walter R. Jorgenson (hereinafter collectively referred to as the 'League').CP 478. **On January 11, 2006**, the Port timely responded via the Port's Executive Director Ed Galligan's telephone call to the President of the League. CP 478. Port Director Galligan informed the League President that the Port would require several days to respond. *Id.* **On January 17, 2006**, the Port through its legal counsel further responded to the League's request by (1) disclosing 17 records (210 pages) CP 49-259, and (2) advising that the Port would require additional time to complete the records search and to provide further basis for any non-disclosure of exempt records:

Given the breadth of your request, and to ensure our records **search, disclosure and any explanation for non disclosure of exempt** documents is as thorough as possible, we will **require additional time. We estimate we can respond more completely to your request by January 23, 2006, or earlier if possible.**

CP 49.

On January 23, 2006, consistent with its prior notice, the Port through its legal counsel further responded to the League's request by (1) disclosing an additional 39 records (85 pages), and (2) advising that the Port would require additional time to complete the records search and to provide further basis for any non-disclosure of exempt records: "Enclosed please find additional public documents in response to your request. **We will provide**

you an explanation for non disclosure of exempt documents later this week.” CP 1366.

On January 24, 2006, the League filed a Complaint against the Port in Thurston County. The League alleged that the Port have *failed to respond completely* to the League’s request, setting and Show Cause hearing and requesting costs and fees. CP 260-265. In fact, the Port had sent its January 17, 23 and 25th responses to the Leagues’ post office box noted on the League’s letter head. Prior to filing its Complaint, the League failed to check the mail box and therefore believed the Port had not responded. CP 492. Thus while the League rushed to the courthouse, the Port was in the midst of providing a complete response, had supplied some records, and had announced its intention to release even more.

On January 25, 2006, consistent with its prior replies, the Port further responded to the League’s public records request by providing the League with the Port’s (First) Privilege Log, which is a compilation of the exempt records withheld, with citation to the supporting exemptions. CP 277. The Port also notified the League that it would provide “additional public documents in response” to the League’s request, as well as a “Second Privilege Log consisting of Bates stamped documents No. 000933 to 0002409 which will include the list of exempt Port Staff emails and the supporting exemption.” *Id.*

On January 27, 2006, the Port provided the League with the Port's Second Privilege Log CP 352-370, and disclosed an additional 57 public records (105 pages).CP 371-476. **On February 10, 2006**, the Port supplied the Court a copy of the records deemed exempt from disclosure by the Port for the Court's in camera review pursuant to RCW 42.17.340. CP 490-534.

At the February 17, 2006 Show Cause hearing, the Court set over the Show Cause hearing to add Weyerhaeuser as a interested party, ordered the Port to submit an expanded privilege log and awarded Plaintiffs attorney's fees and costs through February 17, in an amount to be determined at a later date. CP 565. ⁶

On March 15, 2006 the Port disclosed additional public records and an updated and expanded Exemption Log for Documents deemed exempt and withheld by the Port. CP 663-860. **On March 20, 2006** the Port filed an expanded Exemption Log for Emails deemed exempt and withheld by the Port. CP 866.

On March 29, 2006, the Court issued its initial Order on Exempt Records. CP 868-918. Of the 146 records deemed exempt by the Port, the Court agreed that 66 records or 45% were exempt or partially exempt. Of

⁶ The Port's Motion for Reconsideration of the attorney fee award was later denied. CP 622-624, 952-972.

the remaining 89 records deemed public, the Port had already released more than half prior to the Court's Order on March 3, 2006 (50 records or 56%). *Id.*

On or before April 12, 2006, the Port and League timely filed for Reconsideration. The Port requested reconsideration of 12 records; the League requested on Reconsideration that **all 155 records** be deemed public. CP 952-972. **Also on April 12, 2006** the Port released 55 records deemed public by the Court, excepting the records which were the subject of the Port's pending request for Reconsideration. CP 2061-2279.

On May 3, 2006 the Court granted the Port's Reconsideration as to one (1) record. CP 993-1005. **On May 18, 2006** the Port released 11 records, those for which the Court denied its Reconsideration Motion: CP 1073-1143.

On May 26, 2006, the Court provided parties copies of Documents Bates Stamped No(s).0565, 0933, 0934, 2156, 2166, which depicted the Court's redactions. CP 1073-1143.

On May 26, 2006 the parties entered an agreed Order to Release Additional Records. The intent of the Order was to memorialize that all documents not found exempt by the Court have been released. CP 1166-1168. **Also on Friday, May 26, 2006**, Mr. Friedman, the then-attorney for Mr. Jorgensen and the League, provided counsel and the Court with a

pleading in which he listed documents which he believed his clients had not yet received. Along with language acceptable to Mr. West, the parties interlineated Mr. Freidman's list of presumed missing documents into the Agreed Order. Bates Stamped No.(s) 103, 485, 700, 790, 793-4, 1489,1764-5, 2394-2395, and 921 (oversized). CP 1017 -1027.

On May 30, 2006, the Port wrote to all parties attaching a copy of all documents listed by Mr. Friedman, but clarifying that one document requested listed by Mr. Freidman was ruled exempt by the Court, and that several documents had been previously released by the Port. CP 1367-8. The Port requested all parties to confirm they had received all documents and to notify the Port if any were believed missing. "All parties should be in possession of the full complement of the documents found non-exempt by the Court. If any party believes they have not received all non-exempt documents, please advise." The Port also filed a later Declaration with the court with the final disclosed documents attached. CP 1073-1143. After the Port's last disclosure on May 30, 2006, neither the League, nor Mr. Jorgenson nor Mr. West notified the Port that any documents were missing or had not yet been received. *Id.*

On September 29, 2006 this Court consolidated the appeals of Koenig and the League by letter Order. On October 20, 2006 the Trial Court issued its PRA penalty ruling, making one shared award to the

League and Jorgenson, and one award to Mr West.⁷ Appellants appeal, and are joined by two Amicus.

IV. AUTHORITY & ARGUMENT

A. TRIAL COURT PROPERLY FOUND CERTAIN RECORDS EXEMPT UNDER PRA.

Under Washington's Public Records Act ("PRA"), all state and local agencies must disclose any requested public record, unless the record falls within a specific exemption. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wash.2d 243, 250, 884 P.2d 592 (1994). The PRA enables citizens to retain their sovereignty over their government and to demand full access to information relating to their government's activities. RCW 42.17.010, .251. RCW 42.17.251.

The Act's provisions must be liberally construed to promote the public policy, and exemptions from it must be strictly construed. *Id.* When

⁷ See Appendix A. This Court authorizes a trial court to determine that multiple requests are actually one single request based on the subject matter and timing of the requests. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, at footnote 10, and the Court properly did so here. When the Port received the League's request for documents, Walter R. Jorgenson was listed as a requestor. Because the Port understood the request to be a single request on behalf of the League of Women Voters for Thurston County and Walter R. Jorgenson, the Port responded to both parties collectively in its responses. Only one counsel represented both the League and Jorgenson, further adding to the conclusion that the parties were not independent. The West case and League and Jorgenson cases were consolidated very early on March 3, 2006. The Port has always responded to Plaintiffs requests collectively. Accordingly, given the facts of this case, the similar subject matter requests made by Plaintiffs Jorgenson, and the League, the trial court properly issued one award to be shared by the League and Jorgenson.

an agency refuses to disclose information, it bears the burden of proving that its refusal is valid based on one of the exemptions included in the Act. *Id.* citing *King County v. Sheehan*, 114 Wn.App. 325, 337, 57 P.3d 307 (2002).

Issues pertaining to disclosure are reviewed de novo. RCW 42.56.550. The standard of review of issues pertaining to PRA penalties and fees is abuse of trial court discretion. *Yousoufian v. Office of Ron Sims*, 152 Wash.2d 421, 98 P.3d 463 (2004).

1. TRIAL COURT PROPERLY FOUND RECORDS ARE EXEMPT UNDER THE RESEARCH DATA EXEMPTION

The Trial Court agreed with the Port that a portion of the information prepared for use in the Port's negotiation with potential lessees is exempt under the 'research data exemption,' RCW 42.56.270(1) (former RCW 42.17.310(1)(h)). *See Servais v. Port of Bellingham*, 127 Wn.2d 820, 832, 904 P.2d 1124 (1995).

Pursuant to the Research Data Exemptions the following are exempt from public inspection and copying: (h) Valuable formulae, designs, drawings, computer source code or object code, and **research data** obtained by any agency within five years of the request for disclosure **when disclosure would produce private gain and public loss**. Former RCW 42.17.310(1)(h). (emphasis added). Research data is defined as "a

body of facts and information collected for a specific purpose and derived from close, careful study, or from scholarly or scientific investigation or inquiry.” *Servais*, 127 Wn.2d at 833, 904 P.2d 1124; *PAWS*, 125 Wn.2d at 255, 884 P.2d 592. Here the Trial Court’s Decision shows the Court properly applied *Servais* and focused on whether both private gain and public loss would result, in its ruling finding the information exempt. *Id.* at 832.

In *Servais*, this Court held that a cash flow analysis of Port properties prepared for the Port's sole use in lease negotiations with prospective partners and operators was exempt from disclosure pursuant to the research data exemption. *Id.* This Court reasoned that both private gain and public loss would result upon disclosure: “private developers would benefit by insight into the Port’s negotiating position if the financial data were disclosed, thereby resulting in a loss to the public.” *Id.* (emphasis added) Moreover, the Court discussed the Port’s duties to the public in assessing the harm caused by disclosure:

The Port has responsibility under RCW 53.06 to "promote and encourage port development along sound economic lines," RCW 53.06.030(4) to "promote and encourage the development of transportation, commerce and industry," RCW 53.06.030(5) and to "initiate and carry on the necessary studies, investigations and surveys required for the proper development and improvement of the commerce and business generally common to all port districts...." RCW 53.06.030(1).

Id. at 832-833. In sum, the Court held that the ‘cash flow analysis’ was exempt under 42.17.310(1)(h) because it was information prepared in furtherance of lease negotiations, it was considered ‘Research Data,’ and because disclosure would harm the public:

The cash flow analysis was prepared to provide the Port with data it could use in negotiations with developers. That portion of the study should remain exempt under RCW 42.17.310(1)(h) to permit the Port to conduct negotiations in the best interests of the public and to perform its statutory duties.

Id.

The Trial Court here found same reasoning applies in the present case. In negotiating its lease with Weyerhaeuser, the Port staff compiled a great deal of data for use in its analysis of what would be the costs and benefits of entering the agreement, as well as analyzing the estimated effects of taking any one particular course of action related to the terms of this lease. In addition, the Port staff also engaged in an exhaustive analysis of the potential terms for the lease and the best method of negotiating said terms. Much of this information is recorded in various cost estimates, draft leases, e-mails, and other reports, memos, and notes. Moreover the Port’s records also include data that has been collected, compiled, and calculated for the purpose of negotiating the terms of the lease, and the disclosure of said records would result in the Port’s loss of its ability to effectively and competitively prepare for and negotiate with private entities.

The common thread running throughout Appellant and Amicus' argument on appeal is that, in their opinion, the Port is not entitled as a government agency to the essential confidential information necessary to protect its interests. The Port, however, is obligated by law to promote development and serve the public of Thurston County. This obligation cannot be met without the opportunity for the Port Commissioners and staff to be adequately and reasonably informed on necessary business dealings. It is not reasonable, nor is it required for a governmental entity, like the Port, to act in a vacuum or without the benefit of confidential expert advice normally used in these situations.

No where does the PRA state that the Port is obligated to operate at a disadvantage to the public treasury by virtue of Act. There are both statutory exemptions and case law, which recognize a governmental obligation to protect the public interest, whether it be economic interest or otherwise. There are numerous decision by this Court affirming the necessity of the protection of the government's right to privacy (*Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993)*Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990), *Police Guild v. Liquor Control Board*, 112 Wn.2d 30, 769 P.2d 283 (1989), and where the efficient administration of government is protected by the very terms of the Washington Public Disclosure Act. Requiring disclosure where the public

interest in efficient government could be harmed significantly more than the public would be served by disclosure is not reasonable. Therefore, in such a case, the public concern is not legitimate. *Dawson, supra*, at 798.

The Port is charged with promoting the development of commerce and carrying out Port business. In negotiating with private entities, the Port compiles a great deal of data to aid in its negotiation tactics for the betterment of its public purpose. Declaration of Port Director Ed Galligan. CP 480-81. The Trial Court agreed that disclosure of a portion of the records requested by the League would give the private sector a severe advantage at the negotiating table and would injure the Port in current and future lease operations, such that the Research Data Exemption authorized in RCW 42.17.310(1)(h) applied. That ruling should be affirmed.

2. TRIAL COURT PROPERLY FOUND CERTAIN RECORDS ARE EXEMPT UNDER THE DELIBERATIVE PROCESS EXEMPTION

RCW 42.56.280 (former RCW 42.17.310(1)(i)) exempts from 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 found that the documents cited by the Port as ‘Deliberative Process Exemption satisfied the elements of this exemption

authorized in RCW 42.56.280 (former RCW 42.17.310(1)(i), and applied in *ACLU v. City of Seattle*, 121 Wn. App. 544, 89 P.3d 295 (2004) i.e. that the Port established that [1] the records contain pre-decisional opinions or recommendations of subordinates expressed as part of a deliberative process; [2] that disclosure would be injurious to the deliberative or consultative function of the process; [3] that disclosure would inhibit the flow of recommendations, observations, and opinions; and [4] .that the materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based. *Id.* citing *PAWS*, 125 Wn.2d at 256, 884 P.2d 592.

On appeal, the League argues that the Court should make new law, overturning *ACLU*, and “adopt a bright line rule” terminating the exemption, as to all deliberative documents, despite the context of their use and any resulting public harm. Appellant Koenig more narrowly focuses his argument, but also asks this Court to make new law and to overturn *ACLU*. Koenig complains that the deliberative exemption should not apply to five discreet records (108,110,117,820 1674-5), based on an argument that the exemption is void because the Port allegedly shared the records with Weyerhaeuser Company. Koenig Brief at 5. Appellants offer no compelling rationale to set new precedent.

In *ACLU v. City of Seattle*, 121 Wn. App. 544, 89 P.3d 295 (2004) the ACLU filed a lawsuit against the City of Seattle (City) to force the City to disclose ‘lists’ pursuant to the RCW 42.17, the Public Disclosure Act. *Id.* at 548. The lists were comprised of (1) a list of issues the City planned to address in its negotiations with the Seattle Police Officer’s Guild (Guild), and (2) a list of issues the Guild planned to address in its negotiation with the City. The City and the Guild had exchanged the lists in anticipation of their new contract negotiations for police services.

Without reviewing the documents, the “trial court ruled in favor of the City, concluding that the lists were exempt from the Act because they were part of the deliberative process.” On Appeal, Division I remanded for an in-camera review in the trial court.. *Id.* at 550. The court reasoned that the issue could not be resolved without determining “how the lists were generated and their function in the context of the decision-making process.” *Id.* The court concluded that “(w)ithout more information about the lists, such as what they actually contain, how they were generated, and who generated them, neither we nor the trial court can properly determine whether they are exempt from disclosure under the act.” *Id.*

In addition to remanding for an in-camera inspection, and “in the interest of judicial economy,” the Appellant Court also held:

1. The statute does not limit the exemption to intra-agency documents prepared by a government agency. In making this holding, the court relied on another of this Court's decisions, *PAWS*.⁸ In *PAWS*, this Court exempted from public disclosure documents prepared by scientists employed outside of a state agency. The Court reasoned that the statutory term "intra-agency" does not limit the exemption to only documents that are transmitted within the agency, but is simply "in addition to the other forms of communication the exemption lists." Thus, notes, drafts, and recommendations made as part of the deliberative process would be considered exempt. *Id.*

2. The statute does not require that exempt documents be prepared by subordinates. The ACLU Court also clarifies that "(t)he statute does not require or even suggest that exempt documents must be prepared by subordinates" within the public agency. *Id.*

In the present case, this Court should affirm the Trial Court's application of the *ACLU* and *PAWS* test when it found portions of the Port's records exempt. These records include policy opinions related to the Port's lease with Weyerhaeuser. This Court should find disclosure of such information would inhibit the flow of recommendations made by Port

⁸ *Progressive Animal Welfare Society v. University of Washington (PAWS)*, 125 Wn.2d 243, 884 P.2d 592 (1994).

Staff and impair effective and competitive contracting with future private entities and frustrate the Port's public purpose: economic development.

...pursuant to *ACLU*, at page 549, citing *PAWS*, to be exempt under .310 (1)(i) the information must contain (1) pre-decisional opinions or recommendations as part of deliberative process; (2) disclosure would be injurious to the process; (3) disclosure would inhibit flow on recommendations; and (4) materials recommend policy and opinion and not raw factual data on which the decision is based. *ACLU* also appears to recognize at page 553, that the deliberative exemption may extend to on-going processes, such as future lease negotiations with other parties, and is not necessarily dissolved at the completion of the particular process under discussion.

To this end the trial court is directed at *ACLU* page 550, to look at (1) how the material was generated; (2) the function of the material in the context of the decision-making process, (3) what the material contains, and (4) who generated the material.

Third, pursuant to *Servais*, at page 829, citing *PAWS*, instructs that exemption .310(1)(h) has (A), the purpose to prevent private persons to appropriate potentially valuable intellectual property for private gain; and (B), *Servais* points out at pp. 830-832, that the organized information or material derived from a careful search of data may be too broad, so that the court should look to see is "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."

CP 893.

The Trial Court acknowledged *ACLU*'s extension of the deliberative process exemption beyond a discreet event, as determined by the context of the decision making process.

In addition many of these documents properly claimed as exempt under RCW 42.17.310(1)(i) as extended by the analysis found at *ACLU v. Seattle*, 121 Wn. App. 544, 550-553 (2004), work to give

a broad construction, in this court's opinion, to what originally was intended to be a narrow exemption, **yet this court must respect, and does respect, the authority of the higher court in *ACLU*.** CP 869.

By its ruling finding portions of the record exempt, the Trial Court reflects its accurate grasp of the Port's statutory public purpose to undertake ongoing economic development, primarily as a landlord engaging in on-going, highly competitive leasing of terminal and marine lands.

But the Port is a municipal corporation with several properties. It is engaging in ongoing negotiations with several tenants, from time to time, and must necessarily have in anticipation of these negotiations the development and recommendations of "policies" the disclosure of which could conceivably damage their ability to negotiate the best terms possible for the public in areas where more than one result might be reasonably negotiable.

If the tenant, or negotiator on the other side of the lease, knows in advance what policies on which the Port will yield, but only under 'what' pressure, and what policies are nonnegotiable no matter what pressure is brought to bear, then the Port will not be able to develop the best possible alternatives for the public they represent. So, in an appropriate case, the deliberative policy making process *may* extend beyond a specific negotiation. This is similar, but not identical, to what is found in *ACLU*.

CP 997-98.

The PDA must have intended for the public to be able to review on what basis a public decision was made, however, at the same time in light of the holding in *ACLU*, this comes into direct contradiction with the possible agency argument that, "we need to keep the basis secret because we might use such basis in some unknown future negotiation at some unknown future time." **In this case, this court found many instances where the Port could properly advance this argument since they will from time to**

time find themselves in future negotiations with now known, and unknown tenants, yet the information is at best marginally (but genuinely) revealing of policy or strategies that once revealed could *arguably* (but not certainly) put the Port in some kind of bargaining disadvantage.

CP 870. Emphasis added.

The Port is mindful of the preference and the mandate for disclosure of public records. However, public agencies also have a duty to prevent harm to public interest by disclosure of otherwise exempted documents. Indeed, it is recognized in the Public Disclosure Act itself that the interest of the citizens must be fully protected. RCW 42.17.010 sets forth the public policy of the State of Washington.

(11) That, mindful of the right of individuals to privacy and of the desirability of the *efficient administration of government*, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society. The provisions of this chapter shall be liberally construed to promote complete disclosure ... and full access to public records so as to assure continuing public confidence of fairness of elections and governmental processes, *and so as to assure that the Public interest will be fully protected.*

RCW 42.17.010(11) (emphasis added).

This statute provides for full access to public records under circumstances which promote the public interest. Achieving the goal of an informed citizenry can sometimes conflict with other public interests. However, as the court noted in *Police Guild v. Liquor Control Board*, 112

Wn.2d 30, 769 P.2d 283 (1989), there must be a balance. Though tensions among these competing interests are characteristic of a democratic society, their resolution lies in providing a workable formula which encompasses, balances and appropriately protects all interests, while placing emphasis on responsible disclosure. *Police Guild, supra* at 33. After its *in camera* inspection, the trial court made the necessary determinations regarding the balance between the important but conflicting interests of the public. The Trial Court properly determined that balance, and the outcome should not be disturbed.

4. EXEMPTION RESULT ALSO SUPPORTED BY ALTERNATIVE BASIS.

A reviewing court “may sustain a trial court on any correct ground, even though that ground was not considered by the trial court.” *State v. Winings*, 126 Wn. App. 75, 88 n. 107 P.3d 141 (2005) (quoting *Nast v. Michels*, 107 Wn.2d. 300, 730 P.2d 54 (1986)). The Port has claimed several well-established exemptions under the Public Disclosure Act that prohibits disclosure of certain documents held by the Port of Olympia.

On appeal, the League argues the Trial Court conflated the deliberative process and research data exemptions. See Appellant Brief at

15. In fact, the Court recognized the interplay and sometimes overlapping application of the two exemptions, as applied to the Port's documents.

The many claimed exemptions under RCW 42.17.310(1)(h), which if standing alone would not support the exemption claimed, even under *Servais v. Port of Bellingham*, 127 Wn.2nd 820, 832 (1995)⁹, but which often was able to be kept back as exempt on the extended RCW 42.17.310 (1)(i) exemption (as explained above) or on the basis of attorney-client privilege, see *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

CP 870 and see:

000118-000151

The cover page is not exempt but the marked up lease, 000118-000151 qualifies for exemption under .310 (1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis because it contains marks that are pre-decisional opinions or recommendations, which could injure the Port in future negotiations with others, might inhibit flow of recommendations and show recommendations of policy and opinions. Arguable, careful study of this may allow future negotiators of other leases with the Port to see how the Port was willing to "mark-up" the standard lease for Weyerhaeuser and would allow future negotiators insight to the Port's current points of negotiation using that public information for private gain under .310(1)(i).

CP 876.

In another example, the Court rejected the Port's application of the Research exemption for Record 0032-34, but found the Deliberative Process exemption was proper:

⁹ *Servais* extended the 'research' exemption as originally explained in *PAWS v. UW*, 125 Wn.2nd 243, 256 (1994), to certain kinds of facts collected for a specific purpose, after careful study, *Servis*, 127 Wn.2nd at 832.

However, this is a part of a deliberative process expressing an opinion that would qualify pursuant to .310 (1)(i) and extended pursuant to *ACLU*, 121 Wn. App. at pages 550-553 analysis, when one considers what this contains, how it was generated and who generated it, and that this kind of consideration may be on-going process with other proposals similar to labor negotiations.

CP 872.

If this Court finds that either the Deliberative Process or the Research exemption applies, the Trial Court's finding of exemption should be affirmed. The Court may affirm on any ground supported by the record. *State v. Ellis*, 21 Wn. App. 123, 124, 584 P.2d 428 (1978).

5. TRIAL COURT FOUND CERTAIN RECORDS PROPERLY EXEMPT UNDER ATTORNEY-CLIENT PRIVILEGE & UTSA.

The League glosses over the fact that the Trial Court found many of the requested records exempt pursuant to the Attorney-Client Privilege, (See *Hangartner v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004) and) and pursuant to the Uniform Trade Secrets Act (RCW 19.108.010 et seq.) The League failed to brief these issues on appeal. These challenges should be deemed abandoned. *Cowiche Canyon Conservancy v. Bosley*, 828 P.2d 549, (Wash.,1992)(Appellants waived assignment of error with respect to which they presented no argument in their opening brief.); *Valley View Indus. Park v. City of Redmond*, 733 P.2d 182 (Wash.,1987),(Party abandons assignments of error to findings of fact if it

fails to argue them in its brief). For judicial economy, the Port also adopts by reference the Response Brief of Respondent Weyerhaeuser regarding application of the UTSA exemption.

B. TRIAL COURT PROPERLY APPLIED PENALTY & AWARDED ATTORNEY FEES CONSISTANT WITH PRA.

In its ruling on PRA penalty and fee award, the Trial Court imposed a per day penalty *greater* than that requested by the League (\$60 per day vs. the League's requested \$52.50 per day) and *increased* the hourly fee rate for one of the League's two current attorneys (applying \$250 instead of the requested \$225 per hour for the attorney performing the bulk of the work). However the Trial Court properly rejected the League's sole offered per record penalty calculation which would have resulted in an exorbitant and disproportionate total penalty of nearly 2 million dollars. The League offered the trial court no reasonable alternative means to calculate the penalty. The Trial Court explained its rationale for the penalty formula, which was based of one of two offered by the Port. Even without having the benefit of the recent March 2007 decision in *Yousoufian, v. Sims*, 137 Wash. App. 69, 151 P.3d 243, (2007), (*Yousoufian* 2007) rationale, the Court engaged in a balancing test, and

applied a penalty rate consistent with that recent Court of Appeals calculation. The Appellants fail to show any abuse of discretion. The penalty imposed should not be increased on appeal.

1. LEAGUE FAILS TO ADDRESS OR MEET STANDARD OF REVIEW: ABUSE OF DISCRETION.

Pursuant to RCW 42.17.340(4), the penalty to be imposed for PRA violation is “**within the discretion of the court** to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he was denied the right to inspect or copy said public record.”

The PRA “grants discretion to the trial court to set the amount of the penalty within the minimum and maximum ranges.” (the Court of Appeals held that under RCW 42.17.340(4) an appellate courts “function is to review claims of abuse of trial court discretion with respect to the imposition or lack of imposition of a penalty, **not** to exercise such discretion ourselves.”) Id at 350-1.

As a threshold but significant matter, the Appellants fail entirely to address or support the requisite standard on appeal: that the trial court abused its discretion in setting the penalty amount.. The Appellants’

challenge to the penalty calculation should thus be deemed waived. *In re Marriage of Haugh*, 790 P.2d 1266 Wash.App.,1990. Contention that is unsupported by legal argument is deemed waived on appeal. *Bercier v. Kiga*, 103 P.3d 232 Wash.App.Div.2, 2004. Without argument or authority to support it, an appellant waives an assignment of error. *Milligan v. Thompson*, 42 P.3d 418 Wash.App.Div.2, 2002. A party waives an assignment of error not adequately argued in its brief. RAP 10.3(a)(5). A reviewing court will not discuss assignment of error which is not supported by argument. *Deer Park Pine Industry v. Stevens County*, 286 P.2d 98, Wash.,1955.

2. TRIAL COURT USED CORRECT PENALTY & FEE MULTIPLIERS

Here the Trial Court here was presented with three primary issues:

(1) the **number of days** the penalty is to be applied, (2) the **appropriate penalty**, including whether a “**per record**” **penalty** is warranted, and (3) the appropriate **fees and costs** to be assessed.

The process for determining the appropriate PDA award is best described as requiring two steps: (1) determine the **amount of days** the party was denied access and (2) determine **the appropriate per day penalty** between \$5 and \$100 depending on the agency's actions. *Lindberg*, 133 Wash.2d at 749, 948 P.2d 805 (Durham, C.J., dissenting). The determination of the number of days is a question of fact. *Id.* ...the determination of the appropriate per

day penalty is within the discretion of the trial court.
RCW 42.17.340(4).

Yousoufian v. Office of Ron Sims, 152 Wash.2d 421, 98 P.3d 463 at 438-9.

The Court properly and succinctly supported and explained each ruling.

a. League Miscalculates The Number Of Days Release Was Delayed.

The determination of the number of days public records are improperly withheld is a question of fact. *Lindberg*, 133 Wash.2d at 749, 948 P.2d 805 (Durham, C.J., dissenting), as cited in *Yousoufian v. Office of Ron Sims*, 152 Wash.2d 421, 98 P.3d 463 at 438-9. Here, the Trial Court found: “**So as a factual matter I'm going to find that the Port's calculation of the number of days at 123** is the number of days we're talking about”. Transcript of Court’s October 20, 2006 Ruling 26: 15-25. Appendix A.

Before the Trial Court and again here on appeal, the League argues the Court should have ruled 270 rather than 123 days as determined by the Court. However, the Trial agreed with the Port that the League incorrectly calculated the number of days by **starting its count too early and ending its count too late**. The League begins its count as of the day of the *League’s Request*. CP 1290. See Footnote 7, “270 days would have passed between the date of the League’s request and the Port’s final disclosure.” Emphasis added. But, pursuant to RCW 42.17.320, an agency

is **not** required to respond *instantaneously* on the very date of the request. An agency properly may notify the requestor that additional time is needed to gather the records and to notify third parties, and to consider possible exemptions.¹⁰ Accordingly, the League's use of its *request date* of January 5, 2006 as the *first* date the records were due is incorrect. All subsequent League calculations were based on this error and cannot be used. Instead, here the Port timely responded to the League's initial request, thereafter responded within a reasonable timeline made known in advance to the League. The Port finalized its initial release of records and provided complete Privilege Logs on January 27, 2006. Thus the Trial Court correctly relied on the Port's calculation of the first day of "delay" as January 28, 2006.

The factual determination that the court has to make is how many days are we talking about, and up until the last remarks of Mr. West, I thought the Port had accurately calculated the number of days as 123, because I think **Ms. Lake is correct, we don't start counting when the request is made because they have to respond within five days, and then that response can trigger a longer time if they ask for more time, depending upon the breadth and scope of the records, and have a reasonable justification to**

¹⁰ See RCW 42.17.320: "Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request."

ask for more time.

Transcript of Court's 10/20/06 Ruling, 26: 15-25. Appendix A, see Footnote 2 herein.

The League also does not correctly **stop** counting the number of days. The League mistakenly claimed some records were missing even as of the Penalty hearing date, and thus used October 1, 2006 as its end date, resulting in 270 days of delay. In fact, the record shows Port throughout the proceedings disclosed records (57 records January 27, CP 1323-1389; records on March 3, CP 663-860; 55 records April 12, CP 2061-2279; 11 records May 18, CP1073-1143) and completed its final disclosure on May 30, 2006, as confirmed by all parties. CP 1367-8, CP 1073-1143. Given the disclosures memorialized by Declarations filed with the Court, by both the League and Port counsels during the relevant time frames, the Trial Court properly determined the number of days to be **123 days (January 28, 2006 through May 30, 2006)**, not 270 days as claimed by the League.¹¹ The League presents no compelling reason to disturb the Court's factual finding.

¹¹ The League is represented by new Counsel. The League's new counsel inaccurately claims records to be missing as of October which were previously disclosed and or were ruled exempt by the Court (Bates Stamped Document(s) 700, 1019-20, 1092-1110, 1103-1129, 1497, 1504, 2156), and which former Counsel Friedman did **not** consider missing. See Declaration of Bernie Friedman dated 27 May 2006 on file. CP 1161-1165. The League's list of missing documents may be due to a perhaps understandable glitch when files were

b. Court Did Not Abuse Discretion By Rejecting “Per Record” Or “Per Packet” Penalty.

The League also concedes the Trial Court has discretion under *Yousoufian* to impose a “per request” or “per record” penalty. 152 Wn.2d at 435-36.¹² The League does **not** argue abuse of that discretion. Instead, it argues “it was *more appropriate* here for the Court to have imposed a “per record” penalty.” (Footnote 15 of League’s Opening Brief at p. 32). Emphasis added. “Appropriateness” is **not** the controlling legal standard.

In addition, before the Trial Court and on appeal, the League inflated the number of “records” by “parsing” each page and / or group into artificial multipliers by counting each email within a connected string as a discrete record. The Court’s 3/29/06 Order anticipated such a rote calculation, and expressly **disavows** its use:

Because the Port followed the Court’s request to include threads of emails in which some part was claimed exempt, the above material contains some duplication. That is, there are some emails that might be redacted or emails claimed exempt and which are not exempt but they now appear in more than one packet. **Therefore to consider sanctions the**

transferred. A close review of the League’s list of purportedly missing documents show most were provided May 30, 2006. CP 1367-8, CP 1073-1143.

¹² “The statute does not require the assessment of per day penalties for each requested record, but is merely based on the amount of days the document(s) have been erroneously withheld.” *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004).

court, nor the parties can simply add up the above 102 pages or packets.

CP 951.¹³ The Court further explained its rejection of the “per record” and or “per packet” calculation:

...Judge Learned, who was the trial court judge in the Yousoufian case, grouped records into subsets and did a calculation based upon how long it took for each subset to be produced, and I think that is a legitimate way to do it, and I don't think *Yousoufian* or the later case of *Mahler* for instance -- says you can't do it that way. And if I had followed the packet method of doing this, I think I would have had to have done something like that. **But I also need to keep this manageable.**

Transcript of Court's Penalty Ruling, Appendix A at 27:8-18. Emphasis added. The Court did not abuse its discretion. Accordingly the Court's “per request” calculation should be affirmed.

c. Court's “Per Day Award” Is Proper.

The record does **not** support the League's argued for 270 days, and the Court did **not** abuse its discretion in determining a “per request”

¹³ “Because the court requested that threads of emails be produced in an identifying exhibit, this, on occasion leads to emails that are not individually exempt being found as part of submitted email threads where other materials are exempt. It could be more accurate for the Port to identify or leave unredacted those **kinds of emails which are usually perfunctory and devoid of meaningful content and as such should not necessarily call for a penalty** since it would not necessarily be the Port's intent to claim their exemption from disclosure.... Another factor for consideration is whether to require redaction of the headers of emails that are otherwise exempt. **The court at this stage does not consider this sanctionable as intended by the PDA** in the context of over 2400 pages through using the legal principle of *de minimis non curat lex* which the court finds in accord with the PDA's intent. **This is also the same for certain ‘cover’ emails which carry no substantive information of import.**” CP 893.

penalty. The sole, remaining penalty multiplier is the “per day” amount. Intent on grasping at its multi-million dollar award, the League both “agree(s) with the Courts determination that a penalty of \$60 per day” but inconsistently argues that the trial court abused its discretion by failing to “explain precisely how the penalty it imposed took into consideration the Port’s culpability”. Brief of Appellant League at 32, and footnote 15.

In fact, the Court applied the proper standard and explained its ruling. The Court ruled the Port did **not** act in bad faith. The League makes **no showing** of economic loss. The Court balanced competing public policy factors. Even without the benefit of *Yousoufian, v. Sims*, 137 Wash. App. 69, 151 P.3d 243, (2007), the Court here used the degree of culpability to determine the appropriate per day penalty.

i. Bad Faith. When determining the amount of the penalty to be imposed for a violation of the Public Disclosure Act (PDA), the existence or absence of an agency's bad faith is the **principal** factor which the trial court must consider. *Yousoufian, v. Sims*, 137 Wash. App. 69, 151 P.3d 243, (2007). Here, the Court ruled:

The court’s criticism below is addressed to an overly protective attitude, **not of any perceived intent to deceive or mislead.** It is always proper for counsel to harbor the intent of zealously representing their client’s interest, often an interest to protect by ‘keeping the family,’ ... **There is no bad faith here.**

CP 869.

In *Yousoufian v. Office of Ron Sims*, 152 Wash.2d 421, 98 P.3d 463 (2004), the Court determined that “culpability” is the better measure by which to justify an increased penalty, rather than the number of records requested.

Although the PDA’s purpose is to promote access to public records, **this purpose is better served by increasing the penalty based on an agency's culpability than it is by basing the penalty on the size of the plaintiff’s request.** Indeed, it seems unlikely that the legislature intended to authorize a penalty that Yousoufian once estimated at between \$1,534,855 and \$30,697,100, *considering that the county did not act in bad faith.*

Yousoufian at 435-6. The Court cited good policy rationale for its ruling. If an agency’s culpability or lack thereof is not emphasized, “**agencies that acted in good faith but failed to respond adequately to broad requests for multiple documents** would often pay higher penalties than agencies that refused to disclose a single document in bad faith.” *Yousoufian*, 114 Wash.App. at 848, 60 P.3d 667.

The same is true here. In total, 308 records (932 pages) were compiled by various Port Staff, along with approximately another 1500 pages of emails. This voluminous data was Bates stamped, reviewed by Staff and attorneys and a Privilege Log created in response to the League’s request. The League was kept informed of the Port’s progress in responding to its request and the Port provided the League with public

records throughout the process. (Records released 1/17, 1/23, 1/25, and 1/27). Ultimately, the Port determined that certain documents cited as “Deliberative Process Exempt,” “Research Data Exempt,” and “Attorney-Client Exempt,” were exempt from the Leagues’ request pursuant to RCW 42.17.310.

The Port also released a significant number of records both *during its initial disclosures* (153 records released 1/17/06, 1/23/06, 1/27/06)), and *after its initial disclosures but prior to* the Court’s 3/29 ruling. (50 Records released 3/3/06). In total, the Port released 203 records prior to the Court’s initial ruling, compared to 97 records later found public by the Court. CP 1369-84, the Port’s Disclosure Logs for Documents and Emails, attached as Appendix B. ¹⁴. And, immediately after the Court’s rulings, both initially and following Reconsideration, the Port forthwith disclosed the records deemed public by the Court.

ii. Court Used Culpability to Set Penalty. In *Yousoufian 2007*, the Court of Appeals opined that “the purposes of the PDA would be better served by providing the trial courts with some guidance as to how to apply the Supreme Court’s emphasis on agency culpability to the PDA

¹⁴ The Logs accurately reflect the number of records released by the Port and the dates of the release. When the records were released and/or addressed in the Port’s prior Privilege logs, the documents were batched into discreet groups, (i.e. a draft lease is one document, and a string of related emails were printed out and treated as one discreet record.). Consistent with that treatment, the Port counts the group of pages as one record.

penalty range.” *Yousoufian 2007 at 248*. Therefore, the Court of Appeals adopted the Washington Pattern Jury Instructions (WPI) definitions as the source to provide trial courts with the guidance they need to locate an agency's conduct within the PDA penalty range. “Then using other factors the Supreme Court has identified, such as the plaintiff's economic loss, the trial court could more easily locate a violation of the PDA within the penalty range.” *Id* at 248.

Therefore, using the WPI as a guide, the minimum statutory penalty should be reserved for such “instances in which the agency has acted in good faith but, through an understandable misinterpretation of the PDA or failure to locate records, has failed to respond adequately.” Then, working up from the minimum amount on the penalty scale, instances where the agency acted with ordinary negligence would occupy the lower part of the penalty range. Instances where the agency's actions or inactions constituted gross negligence would call for a higher penalty than ordinary negligence, and instances where the agency acted wantonly would call for an even higher penalty. Finally, instances where the agency acted willfully and in bad faith would occupy the top end of the scale. Examples of bad faith would include instances where the agency refused to disclose information it knew it had a duty to disclose in an intentional effort to conceal government wrongdoing and/or to harm members of public. Such examples fly in the face of the PDA and thus deserve the harshest penalties. We decline to attach firm dollar amounts to these degrees of culpability, but offer them instead a guide for the trial court's exercise of discretion.

Id at 248-9.

While not employing the WPI terms, here the Trial Court explained how it actively gauged what it considered the degree of the Port's culpability in determining the per day sanction amount.

The court's criticism below is addressed to an overly protective attitude, **not of any perceived intent to deceive or mislead**. It is always proper for counsel to harbor the intent of zealously representing their client's interest, often an interest to protect by 'keeping the family,' ... **There is no bad faith here**.

CP 869.

Now, that leaves the sanctions. I agree with much, but not all, of what Mr. West has said, and philosophically speaking, **there is a middle ground here. I did find, as Ms. Lake reminds me, that there was no bad faith**, but that doesn't mean I found that there was good faith. In philosophy we call it the excluded middle. To say it in a mathematical way, "Not not A doesn't equal A." So **what I was critical of was the attitude at which the Port approached this**. And Ms. Lake justifies this on behalf of her client by saying the Port, in addition to its public functions, has a proprietary function, and looking at this from their proprietary aspect, they have a greater wish to keep things out of the public eye in a way that other public agencies might not have because they're in competition with other municipalities, other ports and so on, and that argument was actually made earlier, **and I haven't really accepted it, although I don't think it's entirely without logic**.

But I think many of the rulings that I eventually made could have been made on the Port on its own. **So even though I don't find any bad faith, it's too much to say I found good faith. I did say that I was not attacking the character of any of the Port commissioners or their staff**.

Transcript of Court's 10/20/06 Ruling, Appendix A, 32:8-25, 33:1-18.

The Court's penalty explanation reveals that it considered factors of whether the Port acted in good faith and also *whether the case was a close one* involving competing public policy considerations. *Koenig v.*

City of Des Moines, 123 Wn.App. 285, 304, 95 P.3d 777 (2004).

Yacobellis, 64 Wash. App at 303, 825 P.2d 324

The Court further explained how it applied *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, at 428 to balance Port culpability with a determination of a penalty proportional to the Port's negligence, the harm done thereby, and any amount needed for deterrence:

Now, it shocked me a little bit to see the League of Women Voters asking for almost \$2 million in sanctions, also understanding that the sanctions have to be awarded to both Mr. West and the League of Women Voters, **because if I were to award \$4 million, it might put the Port out of business.** And I'm not sure that's what the legislature had in mind here, and there are some dicta to that in the Yousoufian case. **That's one reason why I don't accept the accounting put forward by the League of Women Voters.**

On the other hand, I don't agree with Ms. Lake that this is a minimum case that only five dollars a day should be appropriate. **I think there has to be more of a sting here than that in accord with what my earlier rulings were.** I don't want to turn the Public Disclosure Act into a printing press for making greenbacks, however. That would only encourage a cottage industry in making public disclosure requests in the hopes of gaining a windfall. So there has to be a balance here.

Transcript of Court's 10/20/06 Ruling, Appendix A, 33:22-25, 34:1-15.

iii. No Appellant Economic Loss. The Appellants fail completely to make any showing that they suffered economic loss due to any delay in releasing the requested records. In *Yacobellis v. Bellingham*,

64 Wash. App. 295, 303, 825 P.2d 324 (1992)¹⁵, the Court held, “we agree with *Yacobellis* that in determining the amount of a penalty, the existence or absence of a governmental agency’s bad faith is the principal factor which the trial court must consider. **Economic loss is also relevant**, as *Yacobellis* acknowledges. Thus, **both factors** may be considered by the trial court in setting the amount of the award under RCW 42.17.340(3).”

The “existence or absence of public agency's bad faith is principal factor that trial court must consider in determining amount of penalty to be imposed, **and evidence of party's economic loss may also be taken into account**,” *Amren v. City of Kalama* 131 Wash.2d 25, 929 P.2d 389 (1997), Majority Opinion: Justice Madsen; Durham, C.J., and Dolliver, Smith, Guy, Johnson, Alexander, **Talmadge** and Sanders, JJ, concur “ A determination of the amount of the award *necessitates* a fact finding concerning the allegations made by the Appellant that the City has acted in bad faith and *any potential evidence of economic loss incurred by the Appellant as a result of the delay.*” *Id* at 396.

“Economic loss” does **not** include attorney fees and costs.

Accordingly, we conclude that attorney fees not covered by the attorney fees provision itself should not be permitted to bootstrap their way into the statutory award in RCW 42.17.340(3) under the guise of economic loss.

¹⁵ Abrogated by the *Amren v. Kalama*, *supra*.

Yacobellis, at 305. *Emphasis added*. No appellants cite to any economic loss. This omission further underscores that the Court's per day penalty of \$60.00, and total penalty of \$ 7,380.00 should not be increased.

3. Attorney Fee Award Is To Be Reasonable.

Courts are required to award “**reasonable** attorney fees and statutory penalties.” *Yousoufian v. Office of King County Executive*, 114 Wash.App. 836, 846-47, 60 P.3d 667 (2003) (citing RCW 42.17.340(4); *King County v. Sheehan*, 114 Wash.App. 325, 334, 57 P.3d 307 (2002)). *Emphasis added*.

The League argues that its attorney fees should have been calculated using counsel's actual, as opposed to the Court's slightly reduced billing rates adjusted for the Olympia locality (from requested \$300 per hour to \$250). The League and Amicus argue that public policy favors encouraging attorneys to take public interest cases on a contingency fee basis, and that using current rates helps to offset the attorney's loss of use of money pending final resolution.

To prevail, Appellants must demonstrate a manifest abuse of discretion by the trial court. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). Moreover, outside of the civil rights context, courts applying the lodestar method should apply contemporaneous rates

actually employed, rather than current or contemporaneous rates adjusted for inflation. *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998).

Here, the Trial Court did not abuse its discretion when it rejected the League's arguments. The Court articulated its reasons for adjusting the rates, including review of rates actually charged by all counsel, (the court may consider the hourly rate of opposing counsel. *Boeing*, 108 Wn.2d at 66):

Insofar as attorney's fees, I looked at this closely because when Mr. Friedman first made his request at the show cause hearing, I remarked to him that I thought it was a little out of line for what we usually see in these kinds of cases at that stage of the proceeding and asked him to provide me further information such as in camera -- that is so that only I saw what it was -- his retainer agreement with his client to see what he was actually billing. Now, because I looked at it in camera, I don't see any need to disclose it, but that helped me make some of the determinations that wanted to be made here.

Now, I think our Supreme Court has made it clear that the way you begin an attorney's fees analysis is what we call the lodestar method. I want to remark that the lodestar is to be a guiding light, and not to be an anchor. The lodestar begins with determining what a reasonable hourly rate is in the community for work of this nature, and you take into account the uniqueness of the question, the novelty of the issues, the experience of the attorneys, those kinds of things, and I think you also take into account the venue you're in.

Now, that doesn't mean Seattle attorneys can't charge Seattle rates in Olympia or that attorneys from New York City, who maybe bill at \$500 an hour, can't come to Thurston County, but I think there has to be some relationship to the venue that we're in. I think somebody like Mr. Talmadge can in good conscience bill \$300 for work that requires his special expertise. The Port billed at \$225 an

hour. But you know, I was an attorney in private practice for several years, and I also understand that if you've got a steady retainer, you probably lower your hourly rate a little bit to accommodate that regular client. So those kinds of subtleties aren't lost on me.

Ms. Hart-Biberfeld is billing at \$225 an hour. I'm going to find that based upon all of this information that the appropriate hourly rate here for all attorneys is \$250 per hour. . . . In a way, I've elevated Ms. Hart-Biberfeld 25 dollars an hour to 250 because she did the bulk of the work.

Transcript of Court's 10/20/06 Ruling, Appendix A, at 28:11 - 29:25, 29:23-25.¹⁶

The "lodestar" is only the starting point and the fee thus calculated is not necessarily a "reasonable" fee. *Fetzer II*, 122 Wn.2d at 151; *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). Whether or not a fee is reasonable is an independent determination to be made by the awarding court. *Fetzer II*, 122 Wn.2d at 151; *Nordstrom*, 107 Wn.2d at 744; *Boeing*, 108 Wn.2d at 65. **The burden of demonstrating that a fee is reasonable always remains on the fee applicant.** *Blum v. Stenson*, 465 U.S. 886, 897, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984); *Fetzer II*, 122 Wn.2d at 151. Total fees and costs requested

¹⁶ Recent Counsel's work is confined to preparing this Motion. Most of recent Counsel's work (53.8 hours) has been prepared by Ms Biberfeld (a qualified yet associate attorney, admitted to the bar less than seven years ago). Only 6.3 hours were billed by Mr Tallmadge. By increasing Ms Biberfeld's fees by \$25 an hour and decreasing Mr Tallmadge's fees by the same rate, the Trial Court actually **enhanced** the League's current counsel's fee request by a net \$1187.50.

by the League in excess of nearly \$60,000 in this simplistic public records case that did not involve a trial are **not** reasonable.

Here, reasonable compensation was paid, and counsel faced no extraordinary legal issues, factual matters, or risk factors. The record supports the Court's reasoning.¹⁷

C. SEPA DOES NOT TRUMP PRA.

¹⁷ The Court also explained its decision to slightly modify the number of billable hours. "The next decision I have to make is how many hours do we apply this to. In looking at this, I'm in a unique position because first, let me say that the cases make it clear that -- for instance *Yousoufian* at page 440 says that the court's not required to, I guess, assess the penalties, but I'm not required to just accept the affidavits. I guess it's the *Mahler* case at page 434 and 435 says, "Courts should not simply accept unquestioningly fee affidavits from counsel," and it cites to the Nordstrom case. Now, the reason I say I'm in an unusual position here is because the way this case unfolded, I know how long it took me to look at 2,409 records and write -- if it had been double spaced -- a 102-page opinion, complete with researching case authority and citing. That took me a little over two weeks. So that gives me a benchmark that I wouldn't ordinarily have in which to measure the number of hours that should be necessary here. I also know from my private practice experience that an attorney probably has to work eight or more hours a day to get six billable hours in a day. So drawing on that, I can't accept the hours that have been requested, even though I pretty much accept the amount per hour. This doesn't mean I dispute that Mr. Talmadge can't bill at 300, but I'm not giving them all the hours that they've requested.

I'm finding that their work should have been able to have been done in about the same time I did the whole initial thing, which would be two full weeks' of time. That would be six hours a day for two working weeks, which would be 60 hours of attorney time at \$250 an hour, which would be \$15,000, keeping in mind they came into this late. For Mr. Friedman, I'm going to find 150 hours isn't unreasonable, but I'm also including with that from start to finish from January till today, and so 150 hours times \$250 an hour would be an award of \$37,500 to Mr. Friedman's estate. The total attorney's fees being awarded here are \$52,500." Transcript of Court 10/20/06 Ruling Appendix A 30:1-25, 31: 3-17.

This Court should reject Appellant West's argument that Washington's State Environmental Policy Act (SEPA) eviscerates the lawful exemptions contained within this state's Public Records Act (PRA). This Court should find that (1) SEPA policies do not apply to an action which was found to be exempt from SEPA review, and (2) that even if SEPA policies apply, SEPA in no way supersedes or eliminates the lawful exemptions contained within Chapter 42.17 RCW.

1. No Policy Battle Is Triggered As Action Subject of PRA Request Was Found Exempt from SEPA.

The Court need not reach the legal issue of if, how and/or the extent to which SEPA "trumps" any PDA exemptions because the factual foundation for Petitioner's claim for juxtaposition / prioritization / harmonization of the two laws simply does not exist. Appellant West describes his public record request as a request for "records related to a lease between Weyerhaeuser corporation and the port of Olympia, executed August 27, 2005...". Appellant then goes on to argue that "the requisite environmental documentation for the developments required by the lease have been the subject of several administrative and court proceedings, including 5 appeals of SEPA determinations..." In fact, the action which is subject of Petitioner's public records request

(Weyerhaeuser lease) was found by the Port to be categorically **exempt from SEPA**. No appeal of that Port decision was made. CP 2472-7.

2. Appellant West Arguments Ignore Express Provisions Of SEPA.

Even assuming *arguendo* that SEPA policies apply to the subject action, SEPA does not dictate that lawful PRA exemptions from public disclosure should be ignored. In construing a statute, the Court's objective is to ascertain and give effect to the Legislature's intent. *State v. Standifer*, 110 Wn.2d 90, 92, 750 P.2d 258 (1988); *State v. Wilbur*, 110 Wn.2d 16, 18, 749 P.2d 1295 (1988). That intent is determined primarily from the language of the statute. *Wilbur*, at 18. ***If the language is clear and unambiguous, there is no need for judicial interpretation.*** *Standifer*, at 92. Appellant West's arguments impermissibly ignore express provisions of SEPA, which explicitly incorporate the PRA. Notwithstanding the exemptions lawfully recognized within the PRA, Chapter 42.17 RCW, Petitioner cites SEPA's WAC 197-11-504 as support for his argument for **absolute** disclosure. In so doing, the Petitioner ignore the express legislative directive within that same WAC 197-11-504 which state that Chapter 42.17 RCW, the PDA applies to agency SEPA documents. **"SEPA documents required by these rules shall be retained by the lead agency and made available in accordance with Chapter 42.17 RCW."** Emphasis provided. Thus, by its express

terms, SEPA requires *application* of Chapter 42.17 RCW, the PDA (including its lawful exemptions), not obliteration of it. Similarly, Appellant improperly relies on SEPA's WAC 197-11-744, by again ignoring its plain language which confines the definition of "environmental document" to those which are "public".

Appellant West would have this Court ignore the inclusion of the word "public" in this definition of "environmental document". The words of a statute must, absent some ambiguity or a statutory definition, be accorded their usual and ordinary meaning. *Pope & Talbot, Inc. v. Department Of Rev.*, 90 Wn.2d 191, 194, 580 P.2d 262 (1978). Documents which are "exempt" pursuant to Chapter 42.17 RCW are not "public". Because the language of both WAC 197-11-744 and WAC 197-11- 504 are clear, no interpretation is proper, much less the strained argument presented by Appellant West.

The threshold question before us in a case such as this is whether the statute is ambiguous. **If language of a statute is clear, its plain meaning must be given effect without resort to rules of statutory construction.** *Murphy v. Department Of Licensing*, 28 Wn. App. 620, 625 P.2d 732 (1981). *As quoted in State v. Theilken*, 102 Wn.2d 271, 275, 684 P.2d 709 (1984).

Even if interpretation were required, the applicable rules still not support Appellant's claims. Statutes must be interpreted so that no portion is rendered superfluous. *Svendsen v. Stock*, 143 Wn.2d 546, 23 P3rd 455

(2001). To find that SEPA requires that all documents be disclosed, even those exempt pursuant to Chapter 42.17 RCW, would improperly render superfluous the term “public” as used in the definition of “environmental document,” and would improperly render superfluous SEPA’s directive to make relevant documents “available in accordance with Chapter 42.17 RCW.” Statutes must not be construed in a manner that renders any portion thereof meaningless or superfluous. *Stone v. Chelan County Sheriff’s Dep’t*, 110 Wn.2d 806, 756 P.2d 736 (1988) (citing *Avlonitis v. Seattle Dist. Court*, 97 Wn.2d 131, 138, 641 P.2d 169, 646 P.2d 128 (1982)).*Svendson* at 55. Emphasis provided. Appellant’s argument that SEPA in any way dilutes the exemptions contained in Chapter 42.17RCW simply is unsupported.

D. FEE AWARD ON APPEAL, IF MADE, SHOULD BE LIMITED.

Any award of fees at the Appellate level should exclude fees and costs spent on non-Port related Appellant in-fighting. Much League attorney time on appeal has been spent defending against or attacking fellow Appellant Mr West. In the unlikely event the Court considers an award of attorney fees to the League on appeal, the Court should require careful accounting for time spent only on Port-related issues. “Under the lodestar methodology, a court must first determine that counsel expended a reasonable number of hours in securing a successful recovery for the

client. Necessarily, this decision requires the court to exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims....” *McCreary v. Kantor* 112 Wash.App. 1015, 2002. See also *Absher Constr. Co. v. Kent Sch. Dist.*, 79 Wn. App. 841, 905 P.2d 1229, (1995).

V. CONCLUSION

The Trial court did not commit reversible error in either its March 29, 2006, *Order Requiring Public Disclosure Subsequent to In Camera Review*, its September 15, 2006, *Order Denying Plaintiff West’s Motion for Release of PDA Exempt Records Based on SEPA*, or its October 20, 2006 *ruling on penalty award*. This Court should uphold the trial courts rulings on document disclosure under the PDA. On the other hand, if this Court ultimately overrules any of the trial court’s previous rulings for non-disclosure and remands the case back for further proceedings or disclosure, the Court should require further *in camera* review of other claimed exemptions properly made by the Port or Weyerhaeuser and that are consistent with this Court’s holdings.

RESPECTFULLY SUBMITTED this 15th day of May 2007.

GOODSTEIN LAW GROUP PLLC

By: _____

Carolyn A. Lake, WSBA #13980
Attorneys for Respondent Port.

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

WALTER JORGENSEN, an individual,)
and THE LEAGUE OF WOMEN VOTERS)
OF THURSTON COUNTY, a non-profit)
corporation, and ARTHUR S. WEST,)

Plaintiffs,)

vs.)

PORT OF OLYMPIA, a municipal)
corporation,)

Defendant.)

and)

WEYERHAEUSER COMPANY, a)
Washington corporation,)

Respondent-Intervenor.)

) COA NO. 78757-3

) SUPERIOR COURT NO.

) 06-2-00141-6

) and consolidated case NO.

) 06-2-00002-9

MOTION HEARING BEFORE THE HONORABLE RICHARD D. HICKS,
DEPARTMENT 4

October 20, 2006
2000 Lakeridge Drive SW
Olympia, Washington

Court Reporter
Ralph H. Beswick, CCR
Certificate No. 2023
1603 Evergreen Pk Ln SW
Olympia, Washington

Ralph H. Beswick, CCR (360) 786-5568

APPEARANCES

For the League of Women Voters and Walter Jorgensen: Emmelyn Hart-Biberfeld Attorney at Law 18010 Southcenter Parkway Tukwila, WA 98188-4630

For the Port of Olympia: Carolyn Lake Attorney at Law 1001 Pacific Ave, Ste 400 Tacoma, WA 98402

For Weyerhaeuser: Matthew R. Hansen Attorney at Law 2801 Alaskan Way, Suite 300 Seattle, WA 98121-1128

For Arthur West: Pro se 120 State Avenue NE, #1497 Olympia, WA 98502

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Ralph H. Beswick, CCR (360) 786-5568

1 THE COURT: Good afternoon. Please be
2 seated.
3 We're here for what I hope is the final hearing in
4 this matter before it goes on to the Court of Appeals
5 or the Supreme Court, and that's the plaintiffs'
6 request for attorney's fees, costs and sanctions,
7 which as one brief writer pointed out are three
8 discrete areas, and I agree with that.
9 So Ms. Hart-Biberfeld I guess.
10 And Mr. West, when it comes to time to hear
11 argument on sanctions, I'll allow you to participate
12 if you wish.
13 MR. WEST: Thank you, your Honor.
14 MS. HART-BIBERFELD: May I approach the
15 bench, your Honor?
16 THE COURT: Yes.
17 MS. HART-BIBERFELD: Good afternoon. May it
18 please the Court, Emmelyn Hart-Biberfeld appearing on
19 behalf of the petitioners Walter Jorgensen and the
20 League of Women Voters. Before I begin I'd just like
21 to confirm the Court received our reply briefing.
22 THE COURT: I received several subsequent
23 briefings including one you just handed me about five
24 minutes ago.
25 MS. HART-BIBERFELD: And I was also going to

1 confirm that one. Thank you, your Honor.
2 Essentially there are two issues before the Court:
3 The first one is the imposition of penalties. The
4 second one is the imposition or award of reasonable
5 attorney fees and costs. Turning first to the
6 penalty issue, having already determined that the
7 Port has wrongfully withheld records, all that
8 remains is to assess the penalty. The penalty must
9 be no less than five dollars, no more than a hundred
10 dollars. The first question is whether the Court's
11 required to award a per record, per day penalty or
12 some other penalty. The Supreme Court has actually
13 confirmed that this court has the discretion to award
14 a per record, per day penalty.
15 And Yousoufian, 152 Wn.2d 241, in that particular
16 case the Supreme Court was asked to address the
17 imposition of sanctions and whether it could award a
18 per record, per day penalty. It never actually got
19 to that issue. It said the Public Records Act is
20 ambiguous as to whether the court can do the per
21 record or per request penalty. But it didn't
22 actually rule out the per record request; it simply
23 said we can't address it at this point in time
24 because it's not before us on appeal. But it did say
25 while it's not required, it's within the Court's

1 discretion.
2 The second issue is the amount of the penalty.
3 Washington law dictates again between five dollars
4 and no more than a hundred dollars. The amount is
5 somewhere in between. Under the act -- under this
6 section of the act the penalty is characterized as a
7 fine, and along with fees and costs, it comprises the
8 act's punitive provision. So in essence you are
9 awarding a penalty against the Port. Since the award
10 is a penalty, the League is not required to show
11 actual damages. The Court may consider economic loss
12 as one factor, but it's not required to do so.
13 The main issue was whether the Port acted in bad
14 faith. We submit, your Honor, that the Port
15 misinterprets the holding in Yacobellis in its
16 response briefing. In that particular case
17 Yacobellis argued that the penalty award should
18 include fees that occurred before they became
19 compensable under the Public Records Act. The Court
20 of Appeals said that you can include fees not
21 otherwise covered in the amount the penalty, but it
22 never said that the fees could not be considered
23 economic loss.
24 THE COURT: I just want to remind all parties
25 that under the local rules, each side gets ten

Ms. Hart-Biberfeld

1 minutes. Now, I might let everybody have a little
 2 bit more than that, but I hope to complete this
 3 hearing including my ruling within an hour.
 4 MS. HART-BIBERFELD: Okay. Certainly, your
 5 Honor.
 6 THE COURT: And I'll say I have read
 7 everything.
 8 MS. HART-BIBERFELD: Okay. Then at this
 9 point I'll conclude the penalty issue and say we're
 10 simply asking the Court to award more than five
 11 dollars for the Port's conduct but not a hundred
 12 dollars. We're simply saying that their conduct
 13 falls somewhere in between the cases out there. It's
 14 not as egregious as some of the cases, but it's
 15 certainly more than the one's that have awarded five
 16 dollars a day.
 17 On the fee issue, because the Port has wrongfully
 18 withheld records, the League is entitled to its
 19 reasonable attorney fees and costs. Our motion
 20 describes the lodestar methodology to be used, and
 21 we've also provided declarations that describe all
 22 counsel's backgrounds and experience so I won't go
 23 into that detail here. We submit that it's rather
 24 ironic that the Port is complaining about the number
 25 of hours that current counsel has incurred where the

1 Port claimed is the League's limited success, meaning
 2 for example their assertion that we're only entitled
 3 to a small penalty, is not appropriate. The Supreme
 4 Court's already said that it cannot overturn large
 5 fee awards in civil litigation merely because the
 6 amount at stake in the case is small. And that's the
 7 case of Mahler v. Szucks, 135 Wn.2d 398.
 8 THE COURT: Page 433?
 9 MS. HART-BIBERFELD: That's correct, your
 10 Honor.
 11 For example as well in Yousoufian, Mr. Yousoufian
 12 at the Court of Appeals was awarded attorney fees of
 13 more than \$83,000, but the penalty itself was only
 14 \$25,000 from the Court of Appeals.
 15 Finally, we've also asked we be awarded fees for
 16 responding to the Port's response. And in
 17 conclusion, we'd ask that the Court award a statutory
 18 penalty of more than five dollars a day, but less
 19 than a hundred dollars. We've suggested 52.50 as a
 20 reasonable middle ground and asked that the Court
 21 also award us our reasonable attorney fees and costs.
 22 Both the amount sought and the hours expended have
 23 been reasonable. Thank you, your Honor.
 24 THE COURT: I just want to make clear one
 25 thing. The League of Women Voters wants me to assess

1 hours incurred reflect where the case has been and
 2 the reality of having to get up to speed on this case
 3 where thousands of documents were involved and
 4 counsel has died unexpectedly.
 5 Mr. Friedman made an opening effort to contact the
 6 Port back in July to try to resolve at least the
 7 first portion of records that were wrongfully
 8 withheld, and to our knowledge the Port never issued
 9 a response. Current counsel attempted to contact the
 10 Port on at least three occasions by telephone. None
 11 of those calls were ever returned. By the time there
 12 was any offer to discuss the issue by the Port, it
 13 was after we had contacted the parties to notify them
 14 that we planned to note the motion. We've been
 15 unable to sit back and wait any longer because of the
 16 strict deadlines imposed by the Supreme Court in the
 17 petition for discretionary review.
 18 Even if the Court determines that the hours should
 19 be discounted for the League's counsel, the League's
 20 requested rate's reasonable whether you're looking at
 21 Thurston County rates as supported by the declaration
 22 of Steven Bean or by the declaration of Michelle Earl
 23 Hubbard who practices almost exclusively in this
 24 area.
 25 Finally, reducing the fees to account for what the

1 a \$1.8 million penalty on the Port; is that correct?
 2 MS. HART-BIBERFELD: That's what our math has
 3 led us to believe, your Honor. That's correct.
 4 THE COURT: Okay. Thank you.
 5 On the attorney fee issue I guess, Ms. Lake, then
 6 we'll do the sanctions next. Or we could do this:
 7 Because Mr. West represents himself, he doesn't
 8 really have an attorney fee argument, and since
 9 Ms. Hart-Biberfeld addressed sanctions, maybe I
 10 should invite Mr. West to address sanctions and then
 11 you can respond to both sanctions and attorney's
 12 fees.
 13 MS. LAKE: Thank you, your Honor.
 14 THE COURT: So Mr. West.
 15 MR. WEST: Your Honor, I don't really have an
 16 argument for sanctions today. I'm not entirely sure
 17 that there are still records being withheld. All I
 18 got is I've heard that counsel believes there to be
 19 some. I haven't spoken with Ms. Lake concerning
 20 that. She represents that all the records have been
 21 disclosed. Under those circumstances, I can't really
 22 make a good-faith argument for sanctions. So I'm not
 23 going to make one.
 24 THE COURT: Okay. Thank you.
 25 MR. WEST: As far as -- we're talking about

1 CR 11 sanctions for withholding records?
 2 THE COURT: No, we're talking about --
 3 MR. WEST: Oh, the per diem penalties?
 4 THE COURT: Yes.
 5 MR. WEST: Under those -- on that argument,
 6 I'd like to talk about why we have a Public Records
 7 Act and what the purposes of the Public Records Act
 8 is for. If you've read the cases and you've read
 9 especially the brief of the League of Women Voters
 10 from 1974, and the League of Women Voters has been
 11 supporting these issues for quite a while. This
 12 isn't the first time the League of Women Voters has
 13 come to court to argue for the -- on behalf of public
 14 disclosure.
 15 Public disclosure forms the core of one of the
 16 bastions of our liberties in this country, the First
 17 Amendment. The First Amendment is protected, not
 18 only by the right of people to disseminate
 19 information, but the right to receive information,
 20 one's right to talk and go to a city council or a
 21 port or any other agency, is just so good as the
 22 information one has to speak about. If you're not
 23 allowed to get the information from government, you
 24 might as well not be able to talk at all. I think
 25 that's why we have a Public Records Act, is to

1 case.
 2 I think also that due to the various environmental
 3 projects that the Port's undergone, that the
 4 withholding of these records has seriously interfered
 5 with the purpose and intent of the state
 6 Environmental Policy Act, and the records that -- the
 7 supplemental filings that have been made show that at
 8 least for several months, the Port, Department of
 9 Ecology and the Corp of Engineers withheld from the
 10 public the fact that there was dioxin contamination
 11 in the bay. That's not a matter that people can
 12 argue about. That happened.
 13 So we've got a threat to public health that was
 14 partially promoted by the withholding of public
 15 records. I think that's a rather serious concern
 16 that the citizens of the -- of this state should
 17 have. So I'd say that due to the fact that the
 18 withholding of public records in this case have
 19 impeded citizens' abilities to participate in their
 20 government, a reasonable sanction that will deter
 21 further conduct should be given, and it's also a fact
 22 that a -- if a small, or unreasonably small sanction
 23 is given, it serves only to encourage further
 24 behavior. If public agencies feel that they can
 25 violate the public records law and just get a slap on

1 preserve those rights, the First Amendment.
 2 That's why I think that a reasonable sanction --
 3 and it's left, I agree, that under the Yousoufian
 4 case and the Koenig case, it's left up to the Court's
 5 discretion. So what counsel is suggesting can be
 6 used as a guideline to the Court, but I don't think
 7 that the Court of Appeals is going to overturn
 8 whatever decision the Court makes because my
 9 understanding is that the Court has discretion to
 10 assess by the record, by the packet or by the request
 11 if it wants to. So that's my understanding of the
 12 case law. I think though that under these
 13 circumstances a reasonable sanction is in order
 14 because of what has been lost by the non-disclosure
 15 of these documents.
 16 This case -- I've been involved in at least a half
 17 a dozen public records cases. The only case that
 18 even came close to this many documents was the Dave
 19 Mortensen case involving an issue of 602 back in
 20 1994. That one I think there were two hearings in
 21 the King County Superior Court, and all the documents
 22 were disclosed. I've never been involved in a public
 23 records case that was this long, this drawn out,
 24 involved this many disclosures, involved this much
 25 time. I don't think this is a typical public records

1 the wrist, they'll be willing to do it again.
 2 So I'd ask that the Court grant a reasonable
 3 sanction in some amount that will deter further
 4 conduct and compensate the attorneys who worked on
 5 this case and the various other people who've spent
 6 almost a year now trying to get records from the Port
 7 in order to participate in our democracy. Thank you.
 8 THE COURT: Thank you, Mr. West.
 9 Ms. Lake.
 10 MS. LAKE: Thank you. Thank you, your Honor.
 11 On behalf of the Port of Olympia, there are four
 12 issues today, and they're fairly simply issues.
 13 First is the number of days to count, number two, the
 14 amount of the award, and number three, whether a per
 15 record penalty is warranted, and number four, the
 16 attorneys fees and costs. I'm not going to talk
 17 about dioxin disclosures. That's been a subject of
 18 other courtrooms and it's not properly before the
 19 Court.
 20 As to the number of days, it's our position that
 21 the League simply miscalculates both the start and
 22 the stop date. They use as a start date the date
 23 that they request the documents, ignoring that the
 24 statute allows the agency time to compile the
 25 records, review them for exemptions, notify other

1 affected parties. That's exactly what the Port did.
 2 We had a series of disclosures, even prior to when
 3 the litigation started, beginning on the first
 4 contact of January 11th and three disclosures
 5 thereafter before litigation happened. The delay
 6 clock starts after our last disclosure where we
 7 didn't indicate that future records could be
 8 supplied. Perhaps that was the Port's biggest
 9 mistake, in not preserving the opportunity to further
 10 review records and continue its disclosure, but that
 11 date should be January 28th and not the request date
 12 as the League argues.
 13 The stop date also is calculated incorrectly by
 14 the League. The League argues that there's still
 15 documents that are missing. We suggest that this is
 16 perhaps a result of the transfer of files between
 17 former counsel and new counsel. The reason we say
 18 that is is that, as this Court is aware, on February
 19 27th, former counsel for the League, who would be the
 20 best person to know what documents had been received,
 21 filed an affidavit in which he listed the documents
 22 -- the full list of documents that he had not yet
 23 received. We were in court on the 29th, and the
 24 Court issued an order listing the documents that
 25 former counsel named, and by the following Monday,

1 the Port had supplied those documents and also
 2 memorialized that with a document filed with the
 3 court on May 30th. Of the documents listed by new
 4 counsel, most of the ones they list as missing are
 5 the ones that were supplied May 30th, and we believe
 6 that that's probably an error in the file transfer or
 7 -- but we also point out that because we filed a
 8 declaration on May 30th which memorialized that
 9 release, current counsel should have been aware of
 10 that. So the end -- the start and end date would be
 11 January 28th, beginning end date May 30th for a total
 12 of 123 days, not the maximum 270 as the League
 13 argues.
 14 On the per day amount, the Port is requesting that
 15 the five-dollar-a-day penalty be awarded. The League
 16 inserts a multiplier resulting in ten times that
 17 figure. They haven't supported any reason for doing
 18 so. Under the Public Records Act there is a range
 19 admittedly. The Court has discretion admittedly.
 20 One hundred dollars is for bad faith, culpable,
 21 perhaps where there's a pattern or intentional
 22 non-disclosure, the five dollars where there is a
 23 violation but no bad faith in doing so. The criteria
 24 -- although the Court has discretion, it's guided by
 25 criteria which the court -- various court cases have

1 provided. First of all, we know by the Kalama case
 2 that the purpose of the per day award is not to
 3 punish, but it's recognized as a sanction and to
 4 deter. The Kalama case also says that the Court is
 5 to look at -- it's a close case of competing public
 6 policy. We address this in our show cause brief, but
 7 it bears reminding that the Port is charged with a
 8 statutory mandate of economic development. That
 9 means unlike other agencies, it acts to promote
 10 economic development. It acts entrepreneurial more
 11 than most public agencies, and to some extent a lot
 12 of its activities are proprietary. That was the main
 13 subject of the basis for the Port's relying on the
 14 exemptions of attorney-client and deliberative
 15 process.
 16 And so it is a close case, and there are competing
 17 public policies, but perhaps the stronger criteria
 18 cited in all the cases is the presence or absence of
 19 bad faith. And in our case the question has been
 20 asked and answered already by this Court, page two of
 21 its 51-page order where the Court ruled, disagreeing
 22 with the Port's rationale, but finding that there is
 23 no bad faith. That criteria cannot then be used as a
 24 multiplier to justify anything higher than the
 25 five-dollar-a-day award.

1 Now, it's been suggested by the League, and also
 2 by Mr. West, that, well, you know, the Port didn't
 3 return phone calls in recent months. However, we'd
 4 suggest that the Port's willingness or unwillingness,
 5 without conceding those facts, willingness or
 6 unwillingness to settle or negotiate is not the
 7 correct criteria. Instead, what's relevant is
 8 whether there was bad faith in responding to the
 9 initial records request which this Court has found
 10 there is not.
 11 Today counsel for the League argued that, well,
 12 this isn't a bad case; it's more egregious than most.
 13 We'd ask on what basis? Courts have said that if an
 14 award of more than the five dollars is to be
 15 justified, there needs to be a fact-finding as to
 16 either bad faith or economic loss. The League or
 17 Mr. West have pointed to no actual facts in support
 18 of that.
 19 I'm only going to touch briefly on the economic
 20 loss. Certainly it's a factor to be determined -- to
 21 be used in a lesser degree, but in most of the cases
 22 the factor of whether the requestor has suffered
 23 economic loss is mentioned in the same breath as
 24 whether there was bad faith. Bad faith of course is
 25 described as, quote, the principal factor to be

1 determined. Because there is no evidence of economic
2 loss to the requestor and the Court has already
3 determined no bad faith, there's simply no -- doesn't
4 appear to be any justification under a fact-finding
5 standard to justify a penalty higher than five
6 dollars.

7 The only sole criteria that the League has relied
8 on was the dissent in which Justice Sanders argued
9 that the starting point should be \$2.50. We point
10 out of course that that's a dissent. But even if you
11 look at his language, Justice Sanders' language, he
12 talks about a hierarchy. He talks about where
13 someone has acted in good faith but is still
14 non-compliant, it's a five dollar penalty. He then
15 goes on to say it's different if it's negligent,
16 different if it's gross negligence and different if
17 there's an intentional violation. But even the
18 dissent that the League relies on concedes that where
19 there is non-compliance, but good faith, the penalty
20 should be five dollars.

21 Lastly, your Honor, on the point of the per
22 record, we believe that there is only one way to read
23 the Yousoufian case. That was a case where the --
24 whether a per record, per day calculation is
25 appropriate was put under scrutiny by the Supreme

1 Yousoufian trial court's method, it equates to 2300.
2 Both of those numbers establish what a statistical
3 outlier the League's \$1.8 million record is. It's
4 total disproportionate to be a deterrent in any
5 measure of delay and any measure of culpability on
6 behalf of the Port.

7 Lastly, your Honor, we have set out argument
8 regarding attorney fees. Former counsel expended 150
9 hours. They're suggesting \$300 an hour. That
10 equates to four full-time 40-hour weeks, and we
11 suggest that that time period is excessive given --
12 you know, quite frankly, although there's numerous
13 records involved, the issues are fairly simple and
14 straightforward, especially when you consider that
15 the League did not parse or take the fine detailed
16 look that this Court did in looking at each record.
17 Instead the League has consistently maintained they
18 all should be public records. That doesn't require a
19 fine point on any legal analysis. And we're
20 suggesting that not more than 90 hours be awarded.

21 Likewise, we're asking for a reduction in attorney
22 fee per hour rate to 250, which is commensurable(sic)
23 with the Port's counsel fees, and we'd suggest a
24 determinative market rate in Thurston County.
25 We've mentioned the lodestar analysis and why that

1 Court. The Supreme Court looked at it in the --
2 through the process of statutory interpretation, and
3 they said it appears to be one of first impression,
4 and it also appears to be a question of legislative
5 intent. Are the -- public records definitions talk
6 about singular or plural, and they conclude with,
7 quote, the statute does not require assessments of
8 per day penalties for each requested record, but,
9 quote, is merely based on the number of days the
10 documents have erroneously been withheld.

11 Under that reading, we'd suggest that there is no
12 per record penalty, and we also suggest in our
13 briefing that if there is a per record penalty to be
14 imposed, then one of the models -- alternative models
15 suggested by the Yousoufian's trial court could be
16 more appropriate. In that method the court took a
17 look at instead of a per record, per day, they
18 grouped the records based upon subject matter and
19 release date. If that method is applied to the Port,
20 there would be five release dates times the actual
21 number of days equaling 461 days. If that's times --
22 multiplied by the five-dollar-a-day penalty, you
23 would reach an award of \$2,305. Under our math of
24 one record per day times 123 days times a five dollar
25 penalty, the penalty would be \$615. Under the

1 doesn't mean that the Court has to blindly accept the
2 attorney fee, number of hours or rate that's
3 suggested. And under that analysis we would suggest
4 that new counsel, who suggests that 60 hours were put
5 in to bringing this one motion where the same records
6 show that former counsel had already expended 30
7 hours on the issue of sanctions and the issue of
8 document review, also warrants a reduction bringing
9 that to \$150 per hour, keeping the hours at 60.1 --
10 that's a total of 9,015 -- and for former counsel
11 22,500.

12 Finally, your Honor, there was no reply to our
13 last point, and that is that this Court has the
14 discretion to determine where multiple requests are
15 similar in time, similar in context, that that be
16 viewed as one single request. We'd ask the Court to
17 do that in this matter. All the requests are
18 identical. The timing was nearly exactly. They were
19 consolidated early on. Two out of the three parties
20 are represented by one counsel, and only one award is
21 appropriate. Thank you, your Honor.

22 THE COURT: Thank you, Ms. Lake.
23 Ms. Hart-Biberfeld. Do you wish to reply briefly?
24 MS. HART-BIBERFELD: Just briefly, your
25 Honor. I'll attempt to speak more slowly.

1 One of the issues that Ms. Lake brings up is that
 2 we should have been looking at the records to learn
 3 that the Port made some subsequent disclosures and
 4 filed declarations indicating those records had been
 5 filed. I reviewed the record. I reviewed the files
 6 that we had from Mr. Friedman's widow, and I went
 7 through what was supposed to have been disclosed
 8 following those May 30th disclosures and the Court's
 9 motions to compel and still could not locate those
 10 documents. That's the basis for the claim that some
 11 records appeared to still be missing as they were
 12 ordered to be disclosed. I don't have them. I've
 13 attempted to contact Ms. Lake to try to work through
 14 these issues and didn't get anywhere, and we reached
 15 the point in the Supreme Court case that something
 16 had to be done, so I worked with what I had available
 17 to me.

18 The League is not arguing that the Port's failure
 19 to settle is a reason to impose more than five
 20 dollars a day penalty. What we're arguing is that
 21 it's the failure to follow the Court's order to try
 22 to work together to mutually resolve these issues
 23 before coming to the Court is part of what indicates
 24 their lack of good faith.

25 And with respect to Mr. Friedman's fees,

1 unfortunately, as the Court is aware, he's deceased.
 2 He can't respond to it. All I can tell the Court is
 3 I was given the files from his widow. He had a
 4 contemporaneous time sheet and it has been provided
 5 to the Court.

6 And finally with respect to the economic loss,
 7 we're not required to show or make a finding or
 8 showing of economic loss. It is one of the factors
 9 that the Court can or may consider. It's not
 10 required to consider it. What it's supposed to be
 11 looking at is the conduct of the Port in refusing to
 12 turn over documents in what appears to be an ongoing
 13 attempt to keep documents secret from the League.
 14 Again, we ask that we be awarded our penalties and
 15 reasonable costs and attorney fees. Thank you.

16 THE COURT: Thank you.

17 Mr. West, anything further?

18 MR. WEST: Briefly, your Honor, if I may.

19 I'd just like to clarify that this motion came as
 20 sort of a surprise to me. I was not aware the motion
 21 for reconsideration had been denied. I've been
 22 involved in another -- several other cases.

23 I'd like to also clarify the date of the original
 24 request that spurred this, which was November 8th,
 25 2006. I filed the first request. I received the

1 first response from the Port, which was the lease and
 2 letter saying that there were no indexes and no other
 3 documents on November 16th, 2006. That would be the
 4 day --

5 THE COURT: You mean 2005.

6 MR. WEST: 2005, sorry. That would be the
 7 date from which any penalty would be assessed in
 8 reference to my request. So there's no identity of
 9 time between the request of the League and myself.
 10 In fact, their request came subsequent to the filing
 11 of the first complaint in this matter.

12 The Court's own order on -- in this case
 13 designated that fees were to be assessed by the
 14 packet. Counsel for the Port failed to take
 15 exception to that order. As such, it's law of the
 16 case. There's some argument as to whether or not the
 17 parties have in good faith met to try to discuss
 18 that. There's some correspondence from Mr. Friedman.
 19 Perhaps the parties need to be ordered to do that.
 20 That would -- I would not object to that. I'm not
 21 saying that -- I'm not arguing that counsel for the
 22 Port has demonstrated bad faith because I think
 23 they've conducted themselves pretty well, but their
 24 client I think should be found by the volume of
 25 records and by the obstruction of the political

1 process that's occurred from this to have acted in
 2 less than good faith.

3 THE COURT: What's your calculation of the
 4 number of days in your case?

5 MR. WEST: It's in the supplemental
 6 declaration.

7 THE COURT: What's the number?

8 MR. WEST: It would be -- I -- I'd have to
 9 look. It would start from November 8th and go on to
 10 January 17th, and then it would be identical with the
 11 League's after that point.

12 THE COURT: Okay. Thank you.

13 MR. WEST: And if the Court needs more
 14 information, I'd ask that it take this matter under
 15 advisement and allow the parties to submit documents
 16 or further briefings on the matter of economic loss
 17 or further -- further accounting of whatever criteria
 18 decides to decide(sic) upon for a week. Thank you
 19 very much.

20 THE COURT: Thank you, Mr. West.

21 Well, I'm not going to take this matter under
 22 advisement (Indicating). That's some of the files.
 23 Plus this one I guess.

24 Well, I've listened closely, and I've read
 25 everything. I also stand by my earlier rulings and

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1 remarks in those rulings, and in particular the
2 51-page -- if it was done in brief form, it would be
3 102-page -- ruling -- although single spaced, it was
4 51 pages -- of March 29th, 2006. The only thing I
5 might have to back up a little bit from in there is
6 something Mr. West just made reference to, and that
7 is my first view is that -- before researching this
8 -- is that I would consider sanctions on a per packet
9 basis. But the way this has unfolded, I'm not sure I
10 can accurately do that, and I think under Yousoufian
11 it's a discretionary matter whether to do a per
12 record or simply a per day basis, that is per record,
13 per day or just per day until all the records are
14 produced.

15 The factual determination that the court has to
16 make is how many days are we talking about, and up
17 until the last remarks of Mr. West, I thought the
18 Port had accurately calculated the number of days as
19 123, because I think Ms. Lake is correct, we don't
20 start counting when the request is made because they
21 have to respond within five days, and then that
22 response can trigger a longer time if they ask for
23 more time, depending upon the breadth and scope of
24 the records, and have a reasonable justification to
25 ask for more time. And for those people who have

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1 been following this, I'll remind everybody that I
2 received an apple box full of records that I had to
3 look at individually that was over 2,409 pages. So
4 there was some basis to ask for some additional time.
5 So as a factual matter I'm going to find that the
6 Port's calculation of the number of days at 123 is
7 the number of days we're talking about.

8 Now, as Ms. Hart-Biberfeld pointed out, Judge
9 Learned, who was the trial court judge in the
10 Yousoufian case, grouped records into subsets and did
11 a calculation based upon how long it took for each
12 subset to be produced, and I think that is a
13 legitimate way to do it, and I don't think Yousoufian
14 -- or the later case of Mahler for instance -- says
15 you can't do it that way. And if I had followed the
16 packet method of doing this, I think I would have had
17 to have done something like that. But I also need to
18 keep this manageable.

19 I'd also suggest, for what its worth, that the
20 next trial judge who gets a record of requests of
21 this magnitude needs to appoint a special master in
22 order to do this. It just so happened in my case
23 that the day this came in a civil case that had been
24 scheduled for two weeks settled on the night of trial
25 and so I had a pocket of time that I wouldn't

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1 ordinarily have. But there's no way that I could
2 have done my ordinary responsibilities and taken the
3 time it took to do this if that unusual occurrence
4 hadn't appeared.

5 So I believe that reasonable costs are allowed,
6 not just statutory costs. I think that includes
7 legal messenger fees and photocopying fees.
8 Ms. Hart-Biberfeld, using the rate of 20 cents a page
9 for photocopying is acceptable, and so I would allow
10 statutory costs plus those reasonable costs.

11 Insofar as attorney's fees, I looked at this
12 closely because when Mr. Friedman first made his
13 request at the show cause hearing, I remarked to him
14 that I thought it was a little out of line for what
15 we usually see in these kinds of cases at that stage
16 of the proceeding and asked him to provide me further
17 information such as in camera -- that is so that only
18 I saw what it was -- his retainer agreement with his
19 client to see what he was actually billing. Now,
20 because I looked at it in camera, I don't see any
21 need to disclose it, but that helped me make some of
22 the determinations that wanted to be made here.

23 Now, I think our Supreme Court has made it clear
24 that the way you begin an attorney's fees analysis is
25 what we call the lodestar method. I want to remark

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1 that the lodestar is to be a guiding light, and not
2 to be an anchor. The lodestar begins with
3 determining what a reasonable hourly rate is in the
4 community for work of this nature, and you take into
5 account the uniqueness of the question, the novelty
6 of the issues, the experience of the attorneys, those
7 kinds of things, and I think you also take into
8 account the venue you're in.

9 Now, that doesn't mean Seattle attorneys can't
10 charge Seattle rates in Olympia or that attorneys
11 from New York City, who maybe bill at \$500 an hour,
12 can't come to Thurston County, but I think there has
13 to be some relationship to the venue that we're in.
14 I think somebody like Mr. Talmadge can in good
15 conscience bill \$300 for work that requires his
16 special expertise. The Port billed at \$225 an hour.
17 But you know, I was an attorney in private practice
18 for several years, and I also understand that if
19 you've got a steady retainer, you probably lower your
20 hourly rate a little bit to accommodate that regular
21 client. So those kinds of subtleties aren't lost on
22 me. Ms. Hart-Biberfeld is billing at \$225 an hour.

23 I'm going to find that based upon all of this
24 information that the appropriate hourly rate here for
25 all attorneys is \$250 per hour.

8 (Pages 26 to 29)

Ralph H. Beswick, CCR (360) 786-5568

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Ruling

1 The next decision I have to make is how many hours
2 do we apply this to. In looking at this, I'm in a
3 unique position because first, let me say that the
4 cases make it clear that -- for instance Yousoufian
5 at page 440 says that the court's not required to, I
6 guess, assess the penalties, but I'm not required to
7 just accept the affidavits. I guess it's the Mahler
8 case at page 434 and 435 says, "Courts should not
9 simply accept unquestioningly fee affidavits from
10 counsel," and it cites to the Nordstrom case.

11 Now, the reason I say I'm in an unusual position
12 here is because the way this case unfolded, I know
13 how long it took me to look at 2,409 records and
14 write -- if it had been double spaced -- a 102-page
15 opinion, complete with researching case authority and
16 citing. That took me a little over two weeks. So
17 that gives me a benchmark that I wouldn't ordinarily
18 have in which to measure the number of hours that
19 should be necessary here.

20 I also know from my private practice experience
21 that an attorney probably has to work eight or more
22 hours a day to get six billable hours in a day. So
23 drawing on that, I can't accept the hours that have
24 been requested, even though I pretty much accept the
25 amount per hour. In a way, I've elevated

1 Ms. Hart-Biberfeld 25 dollars an hour to 250 because
2 she did the bulk of the work. This doesn't mean I
3 dispute that Mr. Talmadge can't bill at 300, but I'm
4 not giving them all the hours that they've requested.

5 I'm finding that their work should have been able
6 to have been done in about the same time I did the
7 whole initial thing, which would be two full weeks'
8 of time. That would be six hours a day for two
9 working weeks, which would be 60 hours of attorney
10 time at \$250 an hour, which would be \$15,000, keeping
11 in mind they came into this late.

12 For Mr. Friedman, I'm going to find 150 hours
13 isn't unreasonable, but I'm also including with that
14 from start to finish from January till today, and so
15 150 hours times \$250 an hour would be an award of
16 \$37,500 to Mr. Friedman's estate. The total
17 attorney's fees being awarded here are \$52,500.

18 Now, that leaves the sanctions. I agree with
19 much, but not all, of what Mr. West has said, and
20 philosophically speaking, there is a middle ground
21 here. I did find, as Ms. Lake reminds me, that there
22 was no bad faith, but that doesn't mean I found that
23 there was good faith. In philosophy we call it the
24 excluded middle. To say it in a mathematical way,
25 "Not not A doesn't equal A."

1 So what I was critical of was the attitude at
2 which the Port approached this. And Ms. Lake
3 justifies this on behalf of her client by saying the
4 Port, in addition to its public functions, has a
5 proprietary function, and looking at this from their
6 proprietary aspect, they have a greater wish to keep
7 things out of the public eye in a way that other
8 public agencies might not have because they're in
9 competition with other municipalities, other ports
10 and so on, and that argument was actually made
11 earlier, and I haven't really accepted it, although I
12 don't think it's entirely without logic.

13 But I think many of the rulings that I eventually
14 made could have been made on the Port on its own. So
15 even though I don't find any bad faith, it's too much
16 to say I found good faith. I did say that I was not
17 attacking the character of any of the Port
18 commissioners or their staff. And all of my remarks
19 I stand by as they are written in my March 29th, 2006
20 ruling.

21 Now, it shocked me a little bit to see the League
22 of Women Voters asking for almost \$2 million in
23 sanctions, also understanding that the sanctions have
24 to be awarded to both Mr. West and the League of
25 Women Voters, because if I were to award \$4 million,

1 it might put the Port out of business. And I'm not
2 sure that's what the legislature had in mind here,
3 and there are some dicta to that in the Yousoufian
4 case. That's one reason why I don't accept the
5 accounting put forward by the League of Women Voters.

6 On the other hand, I don't agree with Ms. Lake
7 that this is a minimum case that only five dollars a
8 day should be appropriate. I think there has to be
9 more of a sting here than that in accord with what my
10 earlier rulings were. I don't want to turn the
11 Public Disclosure Act into a printing press for
12 making greenbacks, however. That would only
13 encourage a cottage industry in making public
14 disclosure requests in the hopes of gaining a
15 windfall. So there has to be a balance here.

16 The way I find the balance in this case, using the
17 123 days, which to some extent holds down what the
18 penalty can be, that it's also appropriate to assess
19 a sanction of \$60 per day. So I'm awarding \$60 per
20 day for 123 days to the League of Women Voters and
21 Jorgensen, and secondly, to Mr. West, who are the two
22 separate parties here. That's \$7,380 to the League
23 of Women Voters, \$7,380 to Mr. West for a total of
24 \$14,760 in sanctions. I think that's probably just
25 under the circumstances.

Ruling

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1 Any questions?
2 MS. LAKE: No, your Honor.
3 THE COURT: Good luck to all of you.
4 MS. HART-BIBERFELD: Thank you, your Honor.
5 (A recess was taken.)
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CERTIFICATE OF REPORTER

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

I, RALPH H. BESWICK, CCR, Official Reporter of
the Superior Court of the State of Washington in and for
the County of Thurston do hereby certify:

That I was authorized to and did
stenographically report the foregoing proceedings held in
the above-entitled matter as designated by Counsel to be
included in the transcript and that the transcript is a
true and complete record of my stenographic notes.

Dated this 25th day of October, 2006.

RALPH H. BESWICK, CCR
Official Court Reporter
Certificate No. 2023

Ralph H. Beswick, CCR (360) 786-5568

10 (Pages 34 to 35)

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APPENDIX B

Port's Disclosure Log - Documents
 Port of Olympia – West/Jorgensen/League
 Public Records Request
 October 20, 2006

BEG DOC #	END DOC #	Timely Disclosed 1/17/06 (0 days w/held)	Timely Disclosed 1/23/06 (0 days w/held)	Timely Disclosed 1/27/06 (0 days w/held)	Disclosed 3/3/06 (35 days w/held)	Courts ruling 3/29/06	Post Ruling Disclosed 4/12/06 (75 days w/held)	Post reconsideration Disclosed 5/18/06 (111 days w/held)	Disclosed 5/24/06 (117 days w/held)	Disclosed 5/30/06 (123 days w/held)	Record	Days	Total
000022	000023		X			Not Exempt					0	0	Timely Disclosed
000026	000026					Not Exempt		X			1	111	
000030	000030					Not Exempt	X				1	75	
000031	000031					Not Exempt	X				1	75	
000035						Not Exempt	X				1	75	
000036						Not Exempt	X				1	75	
000037						Not Exempt	X				1	75	
000049			X			Not Exempt					0	0	Timely Disclosed
000050	000053					Not Exempt		X			1	111	
000054	000055					Not Exempt	X				1		
000069	000073					Not Exempt	X				1		
000074	000074					Not Exempt	X				1		
000075	000075				X	Not Exempt					1	35	
000076	000076					Not Exempt	Redacted	X			1	111	
000099	000101				Redacted	Exempt as redacted	X				1	75	Court redacts pg. 100 see Order @ 8 of 51
000102	000103				Redacted	Not Exempt	X				1	75	
000104	000107				X	Not Exempt					1	35	
000108	000110				X	Not Exempt					1	35	
000111	000116				X	Not Exempt					1	35	

Exhibit

Port's Disclosure Log - Documents

Port of Olympia – West /Jorgensen/League

Public Records Request

October 20, 2006

BEG DOC #	END DOC #	Timely Disclosed 1/17/06 (0 days w/held)	Timely Disclosed 1/23/06 (0 days w/held)	Timely Disclosed 1/27/06 (0 days w/held)	Disclosed 3/3/06 (35 days w/held)	Courts ruling 3/29/06	Post Ruling Disclosed 4/12/06 (75 days w/held)	Post reconsideration Disclosed 5/18/06 (111 days w/held)	Disclosed 5/24/06 (117 days w/held)	Disclosed 5/30/06 (123 days w/held)	Record	Days	Total
000118					X	Not Exempt					1	35	
000154	000154					Not Exempt	X				1	75	
000155	000156					Not Exempt	X				1	75	
000208	000209					Not Exempt	X				1	75	
000225	000225					Not Exempt	X				1	75	
000247	000249					Not Exempt	X				1	75	
000250	000250					Not Exempt	X				1	75	
000290	000297		X			Not Exempt	X				1	75	
000382	000385					Not Exempt	X				0	0	Timely Disclosed
											1	75	Claims 383 missing but provided 4/12/06 see 4/12/06 dec of Lake
000395	000395					Not Exempt	X				1	75	
000397	000397					Not Exempt		X			1	111	
000473	000487					Exempt except for 484, Later Court rules 484-487 not exempt		X	(484)	(485), X	1	123	See order @ 16 of 51 & Dec of Lake 5/30/06

Port's Disclosure Log - Documents

Port of Olympia – West /Jorgensen/League

Public Records Request

October 20, 2006

BEG DOC #	END DOC #	Timely Disclosed 1/17/06 (0 days w/held)	Timely Disclosed 1/23/06 (0 days w/held)	Timely Disclosed 1/27/06 (0 days w/held)	Disclosed 3/3/06 (35 days w/held)	Courts ruling 3/29/06	Post Ruling Disclosed 4/12/06 (75 days w/held)	Post reconsideration Disclosed 5/18/06 (111 days w/held)	Disclosed 5/24/06 (117 days w/held)	Disclosed 5/30/06 (123 days w/held)	Record	Days	Total
000488	000488				X	Exempt as redacted					0	0	Exempt
000527						Not Exempt	X				1	75	
000546	000547					Not Exempt	X				1	75	
000560	000560				X	Not Exempt					1	35	
000565	000572 ???					Exempt w/court redactions			X, Port Invites Disclosure of Court Redaction		1	117	See Dec of Lake 5/24/06
000568						Not Exempt		X			1	111	
000569						Redacted by court		X			1	111	
000570						Not Exempt					1	111	
000573	00601					Exempt		X			0	0	
000700	000700					Exempt See Order @ 19 of 51, see Dec of Lake 5/30/06					0	0	Exempt
000721	000721					Exempt as redacted by port			X		1	117	
000722	000722					Exempt, See order @ 19 of 51					0	0	Exempt
000723	000724				X	Exempt as redacted by					1	35	

Port's Disclosure Log - Documents
 Port of Olympia – West /Jorgensen/League
 Public Records Request
 October 20, 2006

BEG DOC #	END DOC #	Timely Disclosed 1/17/06 (0 days w/held)	Timely Disclosed 1/23/06 (0 days w/held)	Timely Disclosed 1/27/06 (0 days w/held)	Disclosed 3/3/06 (35 days w/held)	Courts ruling 3/29/06	Post Ruling Disclosed 4/12/06 (75 days w/held)	Post reconsideration Disclosed 5/18/06 (111 days w/held)	Disclosed 5/24/06 (117 days w/held)	Disclosed 5/30/06 (123 days w/held)	Record	Days	Total
000768	000768				X	port							
000769					X	Not Exempt					1	35	
000772	000772		X			Exempt as redacted by port					1	35	
000789	000789					N/A (Disclosed)					0	0	Timely Disclosed
000790	000790				Redacted	Exempt			X		0	0	Exempt
000792	000792					Not Exempt				X	1	123	See Lake 5/30 letter & 5/30/06 Dec of Lake
000793	00794				X	Exempt as redacted by port					1	35	
000795	000795				X	Exempt as redacted by port See Order @ 21 of 51				Another copy provided	1	35	See Lake 5/30 letter & 5/30/06 Dec of Lake
000796	000796					Exempt as redacted					1	35	
000797	000802				X	Exempt					0	0	Exempt
000803	000805				X	Exempt					0	0	Exempt
					X	Exempt as redacted by Port, See					1	35	

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BEG DOC #	END DOC #	Timely Disclosed 1/17/06 (0 days w/held)	Timely Disclosed 1/23/06 (0 days w/held)	Timely Disclosed 1/27/06 (0 days w/held)	Disclosed 3/3/06 (35 days w/held)	Courts ruling 3/29/06	Post Ruling Disclosed 4/12/06 (75 days w/held)	Post reconsideration Disclosed 5/18/06 (111 days w/held)	Disclosed 5/24/06 (117 days w/held)	Disclosed 5/30/06 (123 days w/held)	Record	Days	Total
						Order @ 21 of 51							
00807	00807				X	Exempt					0	0	Exempt
00808					X	Exempt					0	0	Exempt
00815	00815					Not Exempt			X		1	117	
00816	00819				X	Exempt					0	0	Exempt
00821	00821				X	Exempt as redacted by port					1	35	
00832			X			Not claimed as Exempt (Disclosed)					0	0	Timely Disclosed
00833						Not Exempt					1	117	
00834						Not Exempt	X		X		1	75	Claims missing, yet acknowledged receipt on 4/12/06
00839					X	Not Exempt					1	35	
00840						Not Exempt	X				1	75	
00921	00921					Not Exempt				X	1	123	See Lake 5/30 ltr & see 5/30/06 Dec of Lake

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Documents TOTALS		(see combined totals)	(see combined totals)	(see combined totals)	Records 21	Not Exempt – 42 Exempt 8	Records 22	Records 8	Records 7	Records 3	61 records		Records: 61

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BEG DOC #	END DOC #	Timely Disclosed 1/17/06	Timely Disclosed 1/23/06	Timely Disclosed 1/27/06	Disclosed 3/3/06	Courts ruling	Disclosed 4/12/06	Disclosed 5/18/06	Disclosed 5/24/06	Disclosed 5/30/06	Records	Days	Notes
000933	000938	0 days w/held	0 days w/held	0 days w/held	35 days w/held	3/29/06 Exempt as redacted by Court	75 days w/held	111 days w/held	117 days w/held X Port invites Disclosure of Court redactions	123 days w/held	1		See Order @ 26 of 51 & Dec of Lake 5/24/06
000939						Not Exempt			X		1		
000940	00942					Exempt as redacted	X				1	75	
000943	000944					Not Exempt					1	0	
000945				X		Not Exempt	X				1	75	
000946						Not Exempt	X				1	75	
000947						Not Exempt	X				1	75	
000948						Not Exempt	X				1	75	
000949	000950					Exempt As redacted by Court			X Port invites Disclosure of Court redactions		1	117	See Order @27 of 51 & Dec of Lake 5/24/06
000951	000987					Exempt See Order @27 of 51					0	0	
001006						Disclosed					0	0	Timely Disclosed
001010						Disclosed					0	0	Timely disclosed

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 Exhibit

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BEG DOC #	END DOC #	Timely Disclosed 1/17/06	Timely Disclosed 1/23/06	Timely Disclosed 1/27/06	Disclosed 3/3/06	Courts ruling	Disclosed 4/12/06	Disclosed 5/18/06	Disclosed 5/24/06	Disclosed 5/30/06	Records	Days	Notes
001015	001017	0 days w/held				Not Exempt			X		1	117	
001018	001021					Exempt See Order @28 of 51		Only 1018			0	111	Claims 1019-1020 missing but exempt
001022	001022				Redacted	Not Exempt			X		1	117	
001069	001070				X	Not Exempt					1	35	
001071	001074				Redacted	Exempt with Court redactions			X		1	117	
001075	001084					Exempt					1	0	
001085	001088				X	Not Exempt	Copy provided				1	35	
001089	001089				Redacted	Not Exempt			X		1	117	
001090	001090				Redacted	Not Exempt		X			1	117	
001091	001129				Redacted	1092 - 1129 Exempt as redacted by the Court See Order	Partial		X		1	117	Exempt 1092, 1101, 1103-1129, Not exempt 1091, 1101-2
00122	001226					Partially	X				1	75	

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BEG DOC #	END DOC #	Timely Disclosed 1/17/06	Timely Disclosed 1/23/06	Timely Disclosed 1/27/06	Disclosed 3/3/06	Courts ruling	Disclosed 4/12/06	Disclosed 5/18/06	Disclosed 5/24/06	Disclosed 5/30/06	Records	Days	Notes
		0 days w/held	0 days w/held	0 days w/held	35 days w/held	3/29/06	75 days w/held	111 days w/held	117 days w/held	123 days w/held			
001227	001229				X	Partially Exempt					1	35	
001230	001261				Provided	Exempt					0	0	Exempt
001264	001292				X	Partially Exempt					1	35	
001293	001293				Redacted	Not Exempt	X				1	74	
001295	001333				Redacted	Partially Exempt	X				1	74	
001334	001334				Redacted	Not Exempt	X				1	74	
001336	001337				Redacted	Exempt					0	0	Exempt
001338	001338				X	Exempt as redacted					1	35	
001343	001344				Provided	No ruling					10	0	
001351					x	Partially Exempt					1	35	
001355					Provided	Exempt					0	0	Exempt
001359	001359				Provided	Exempt					0	0	Exempt
001360	001405				Provided	Exempt					0	0	Exempt
001406	001439				Provided	Exempt					0	0	Exempt
001440	001473				Redacted	Exempt					0	0	Exempt
001476	001477				Provided	Exempt	x				0	0	Exempt
					Redacted	Partially Exempt	x				1	75	
					X	Redacted							
					Redacted	Redacted							

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BEG DOC #	END DOC #	Timely Disclosed 1/17/06	Timely Disclosed 1/23/06	Timely Disclosed 1/27/06	Disclosed 3/3/06	Courts ruling	Disclosed 4/12/06	Disclosed 5/18/06	Disclosed 5/24/06	Disclosed 5/30/06	Records	Days	Notes
001489	001489	0 days w/held	0 days w/held	0 days w/held	35 days w/held	3/29/06	75 days w/held	111 days w/held	117 days w/held	123 days w/held	1	115	See Dec of Lake 5/30/06
001496	001497				X Redacted	Partially Exempt: 1496 exempt as redacted; 1497 is exempt See Order at 33@51					1		Claims missing but 1497 - is exempt
001498	001498				Redacted	Exempt					0	0	Exempt
001499	001501			x		N/A					0	0	Exempt
001502	001502			x		N/A					0	0	
001503					Redacted	Disclosed					0	0	Claims Missing 1504 - not exempt
001505	001511				X Redacted	Partially Exempt					1	35	
001512	001515				x Redacted	Not Exempt					1	35	
001516	001519				X Redacted	Left blank					1	35	

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BEG DOC #	END DOC #	Timely Disclosed 1/17/06 0 days w/held	Timely Disclosed 1/23/06 0 days w/held	Timely Disclosed 1/27/06 0 days w/held	Disclosed 3/3/06 35 days w/held	Courts ruling	Disclosed 4/12/06 75 days w/held	Disclosed 5/18/06 111 days w/held	Disclosed 5/24/06 117 days w/held	Disclosed 5/30/06 123 days w/held	Records	Days	Notes
001521	001521				Provided	No ruling					0	0	
001522						Not Exempt			X		1	117	
001525	001526					Not Exempt			X		1	1179	
001531	001537					Not Exempt			X		1	117	
001546	001547					Not Exempt	X				1	75	
001558						Exempt as redacted	X				1	75	
001559						Not Exempt					1	117	
001580	001581				X	Not Exempt			x		1	35	
001582	001583				X	Not Exempt					1	35	
001598	001598			Redacted		Not Exempt		X			1	111	See Dec of Lake 5/18/06
001603				x		Exempt					0	0	Exempt
001621	001671					Not Exempt	x				1	75	
001672	001672					Not Exempt	x				1	75	
001687	001688					Partially Exempt		X			1	111	See Dec of Lake 5/18/06
001694	001696				X	Partially Exempt					1	35	
001697	001697				Redacted	Disclosed / Exempt					0	0	
001698	001698				X	Disclosed / Exempt					1	0	
001699	001699				Redacted	Partially	X				1	75	

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001700	001701	0 days w/held	0 days w/held	0 days w/held	X Redacted	Exempt Partially Exempt					1	35	
001702	001702				Redacted	Not Exempt	X				1	75	
001703	001703			X		Not Exempt					1	0	Timely Provide d -- Claims 57 days w/held although h 22days even under their formula
001704	001704				X	Partially Exempt					1	35	
001705	001707				X Redacted	Exempt but for 1 email					1	35	Exempt as redacted
001708	001709				Redacted	Not Exempt	X				1	75	

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001710	001711	0 days w/held	0 days w/held	0 days w/held	35 days w/held	3/29/06 Exempt except cover email	75 days w/held	111 days w/held	117 days w/held	123 days w/held	1	123	See Dec of Lake 5/30/06
001713				X		Disclosed					0	0	Timely Disclosed
001714	001714				X	Disclosed					1	35	
001715	001715					Not Exempt	X				1	75	
001716	001716					Not Exempt	Redacted		X		1	117	
001717	001718					Not Exempt	X				1	75	
001719	001720					Partially Exempt	X				1	75	
001721	001721				Provided	Exempt	X				10	0	Exempt
001725	001725					Not Exempt	X				1	75	
001727						Not Exempt	X				1	75	
001729	001733					Partially Exempt					1	75	
001734	001736					Not Exempt					1		

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001737	001738	0 days w/held	0 days w/held	0 days w/held	35 days w/held	3/29/06 Not Exempt		111 days w/held	117 days w/held	123 days w/held	1	117	
001739	001741					Exempt except cover email	X				1	75	
001742						Exempt					0	0	Exempt
001744	001745					Exempt except cover email			X		1	109	
001746	001752				X Redacted	Exempt except top of page					1	35	
001753	001753				Redacted	Not Exempt	X				1	75	
001754	001759				x	Partially Exempt					1	35	
001760	001762				Redacted	Not Exempt			X		1	117	
001763	001765				Partial	Exempt as redacted by court				X	1	123	Claims missing but 1764 - 1765 Provide d 5/30

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		0 days w/held	0 days w/held	0 days w/held	35 days w/held	3/29/06	75 days w/held	111 days w/held	117 days w/held	123 days w/held			
001766	001766				X	Disclosed					1	35	See 5/30/06 letter and Dec of Lake of Lake 5/30/06
001813	001815				X	Partially Exempt					1	35	
001816	001816				Provided	Exempt					0	0	exempt
001819	001819				Provided	Blank					0	0	
001820	001820				Redacted	Partially Exempt				X	1	123	
001822				X		Not Exempt					0	0	Timely Disclosed
001823				X		Not Exempt					0	0	Timely Provide
001824	111826			X		Not Exempt					0	0	Timely Provide

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001832	001837	0 days w/held			Provided	Blank					0	0	
001838	001838				X	Not Exempt	X				1	36	
001839	001842					Not Exempt	X				1	75	
001843	001845				Redacted	Not Exempt	X				1	75	
001846	001875	X				n/a					0	0	
001895	001945	X				Disclosed					1	0	
001959						n/a					1	0	
002055					Redacted	Exempt					0	0	Exempt
002108					Redacted	Exempt					0	0	Exempt
002110	002156				Redacted	Exempt					0	0	Exempt
						Exempt - See Order at 45@51							Claims missing but is exempt
002160					X	Disclosed					1	35	
002161					X	Disclosed					1	35	
002163	002167					Partially Exempt, Court Reductions					1		Not claimed as Missing by former counsel

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002168	002172					Partially Exempt	X			1	1	75	
002173	002221					Exempt							
002284	002287					Partially Exempt	X			1	1	0	
002393	002395					Not Exempt				1	1	75	
002396	002396					Blank		X					
002398	002398												
002400	002400			X		Not Exempt	X			X	1	111	See Dec of Lake 5/30/06
002409	002409					Not Exempt				1	1	75	Timely Disclosed

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BEG DOC #	END DOC #	Timely Disclosed 1/17/06	Timely Disclosed 1/23/06	Timely Disclosed 1/27/06	Disclosed 3/3/06	Courts ruling	Disclosed 4/12/06	Disclosed 5/18/06	Disclosed 5/24/06	Disclosed 5/30/06	Records	Days	Notes
Totals Emails		0 days w/held	0 days w/held	0 days w/held	35 days w/held	3/29/06	75 days w/held	111 days w/held	117 days w/held	123 days w/held			
Total Docs					29 records		33 records	3 records	17 records	4 records	86 records		
Combined Total		17 records	39 records	57 records	21 records		22 records	8 records	7 records	3 records	60 records		
Pre litigation Timely Release		153 records					55 records	11 records	24 records	7 records	155 records		
Port's Release of Additional Records Pre Court ruling				50 records									
Port's Post litigation Release											150 records		