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No. 40361-7-II

**IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION II**

ARTHUR WEST

Vs.

**WASHINGTON STATE
DEPARTMENT OF NATURAL RESOURCES**

**Appeal from the rulings of
the honorable Judge McPhee**

APPELLANT'S OPENING BRIEF

**Arthur West
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INTRODUCTION-SUMMARY OF ARGUMENT

This is a case where the DNR failed to respond in a timely manner to plaintiff's original request, where the agency unreasonably delayed requesting clarification as a means of delaying any meaningful response, where the DNR destroyed public records and official public records of DNR's director of budget and finance without a valid retention and destruction schedule, where plaintiff was forced to file suit to compel even a partial recovery of the destroyed documents.

Unfortunately, due to the policy of concealment and secrecy of the DNR, even the evidence of what was actually done to partially recover the destroyed records is unavailable.

Plaintiff was required to maintain an expensive and burdensome court action, and was severely prejudiced in various pending proceedings by the delay in the release of evidence, yet somehow, despite all of this, the trial court refused to find a violation of the PRA.

The delays in disclosure of these records for nearly a year and the destruction of records of the chief financial officer of the Commissioner of Public Lands in this case effected a denial of information necessary for effective access to justice, because, as a result of the failure of DNR to promptly produce or restore public records, plaintiff was prejudiced in both Court and administrative proceedings.

Far from a technical violation of the PRA in which unimportant and inconsequential information is not promptly produced, with no real impact upon the public's ability to review the acts of their government, the delays in disclosure in this case are the result of the destruction of E-mails of the chief financial officer of the Commissioner of Public Lands of the State of Washington, perhaps one of the most sensitive and important administrative executive agency positions in State Government, responsible for the administration of resources and property greater than that of many small nations.

Inexplicably, the Superior Court has suppressed virtually all of the records concerning the recovery efforts made by defendants to recover the Emails subsequent to suit under color of attorney-client privilege when many of the records were not generated by attorneys or properly subject to the privilege to begin with, when any objections to their disclosure had been waived by the DNR's assertion that the consultant's efforts were

adequate and reasonable, and when the records are the best evidence of the adequacy of the recovery effort, as well as the issue of whether the suit was necessary to compel disclosure.

The State cannot in good faith maintain that the recovery effort was adequate and not proximately caused by the suit, while at the same time suppressing the very evidence necessary for plaintiff to prove his case on the basis that the communications about document recovery were made in anticipation of litigation.

Either the recovery was related to the lawsuit or it was not. Defendants cannot maintain an inconsistent position in regard to the nature of the recovery efforts in regard to the destruction of the Van Schoorl E-mails that were recovered and disclosed in response to this lawsuit.

If the Court's rulings in this case are upheld, the result will be that State Agencies will be able to destroy records with impunity and delay disclosure of crucial evidence (such as the presence of a SEPA determination that was withheld in this case for over a year) necessary for exercise of the 1st Amendment right of effective access to the Court and administrative agencies to petition for redress.

When such public records are finally released, after years of obstruction, delay and litigious gamesmanship, it is often too late for them to be of any use to the public, and that is exactly what happened in this case. This is certainly not what the people of this State intended when they enacted I-276 in 1973.

Plaintiff in this matter takes appeal from three Orders issued on November 6, 2009, (1) the Order from in camera Review, (2) the Order Sealing Documents, and (3) the Order on Show Cause Hearing. These Orders appear at CP- 287-3299, 300-302, and CP 303-309, respectively.

ASSIGNMENT OF ERRORS

1. The Court erred in finding that the DNR complied with the PRA when it was undisputed that they failed to respond to plaintiff's records request of November 19, 2007 within 5 business days, when the response was inadequate and unreasonably delayed, and when the suit was necessary to compel disclosure.

2. The Court erred in finding the destruction of public records of the communications of DNR's chief financial officer and the delays resulting from such disclosure to be authorized by the PRA when DNR had no retention and destruction schedule that authorized their destruction, and in failing to order an adequate forensic recovery.

3. The Court erred in finding that the DNR had conducted a diligent search to recover all destroyed records when the best evidence of any reasonable attempt at forensic recovery was not disclosed under the Public Records Act either.

4. The Court erred in approving each and every Attorney Client exemption asserted when the records that were exempted were not properly subject to the attorney client privilege, when the abuse of the attorney-client privilege and private contractors to improperly conceal information was a commonly employed scheme, when the privilege had been waived, and/or when the records withheld were necessary evidence relevant to the sufficiency of and motives for the recovery effort.

5. The Court erred in entering findings and conclusions when they were not supported by substantial evidence or any reasonable inference therefrom, and applying an improper legal standard which failed to account for the doctrines of waiver, estoppel or res ipsa loquitur.

ISSUES RELATED TO ASSIGNMENT OF ERROR

1. Did the Court err in finding that the DNR complied with the PRA when it was undisputed that they failed to respond to plaintiff's records request of November 18, 2007 within 5 business days, when the response was inadequate and unreasonably delayed, and when the suit was necessary to compel disclosure?

2. Did the Court erred in finding the destruction of public records of the communications of DNR's chief financial officer and the delays resulting from such disclosure to be authorized by the PRA when DNR had no retention and destruction schedule that authorized their destruction, and in failing to order an adequate forensic recovery.

3. Did the Court err in finding that the DNR had conducted a diligent search to recover all destroyed records when the best evidence of any reasonable attempt at forensic recovery was not disclosed under the Public Records Act either?

4. Did the Court err in approving each and every Attorney Client exemption asserted when the records that were exempted were not properly subject to the attorney client privilege, when the abuse of the attorney-client privilege and private contractors to improperly conceal information was a commonly employed scheme, when the privilege had been waived, and/or when the records withheld were necessary evidence relevant to the sufficiency of and motives for the recovery effort.?

5. Did the Court err in entering findings and conclusions when they were not supported by substantial evidence or any reasonable inference therefrom, in applying an improper legal standard and in failing to recognize the doctrines of waiver, estoppel or res ipsa loquitur?

STATEMENT OF THE CASE

1. This is an action for disclosure of records under RCW 42.56, and for costs and penalties for unlawful withholding and a delay of nearly an entire year in disclosure resulting from the deletion and destruction of Public Records and Official Public Records of an executive officer of an agency the State of Washington. (CP 42-45)

2. Declaratory and injunctive relief was also sought to prevent further acts of destruction of records required to be maintained by the Washington State Commissioner of Public Lands and his Executive Director of Finance and Budget, and to compel an adequate forensic search to recover the destroyed records. (CP 45)

3. Plaintiff also seeks Disclosure of records withheld under color of attorney-client privilege that relate to the timing and scope of efforts made to restore unlawfully deleted Emails sought by plaintiff, in he believes that they are the best evidence of any claims to reasonableness of the Search effort.(CP 132-35)

HISTORY OF COURT PROCEEDINGS

4. Plaintiff filed the original Public Records request Nov. 19 2007 in regard to Dredging and Van Schoorl. (CP 82)

5. Despite the pendency of a PCHB hearing for a project by the Corps, the DNR failed to respond to the request or produce even the first installment of records until October 5, days, resulting in suppression of evidence of defects in dredge monitoring which resulted in a CWA violation. (CP 90-94)

6. The existence of a SEPA review was also concealed by DNR until July 19, 2008 (CP 92)

7. Faced with the prospect of just such delays, plaintiff filed an original action in Cause No. 07-2-02399-0 on November 28, 2007. This suit was dismissed on a technical basis and this suit followed.(See Transcript of 10-24-08 at Page 4-8)

8. On 4/25/08 E mail sent by plaintiff to counsel for the DNR requesting authority for the destruction of the records of DNR finance and budget Director Robert Van Schoorl...and requested "any law that allows such destruction and any retention and destruction schedule that authorizes the destruction of DNR budget office records." No adequate response was ever made.(CP

9. Subsequently, plaintiff re-filed his complaint on June 27, 2008 in the instant cause No. 08-2-01549-9.

10. On March 16, 2009 a show cause Order was issued by Judge Tabor.

11. A hearing was held on September 19, 2008. Defendants WSAC and WACO were severed from the case. Defendant's motion to compel was denied. Plaintiff's motion for terms and a protective order was denied.

12. Orders to that effect were signed on October 24, 2008.

13. On December 12, 2008 an order was entered granting plaintiff's motion to amend the complaint.

14. On April 24, 2009, a hearing was held on plaintiff's motion for show cause. The Court found in favor of the defendant.

15. On November 6, the Court entered an order sealing records, and found no violations of the PRA. An order from in camera review was signed.

16. On January 22, 2010 a final Order denying reconsideration was signed.

17. On February 22, 2010, West filed a timely notice of appeal (CP 163) of the orders entered by the Court on November 6, 2009 Order from In Camera Review (CP 108-120) from the Show Cause Hearing, (CP 121-127) and the Order Sealing Court Documents, .(CP 128-130)

ARGUMENT

ERROR I The Court erred in finding that the DNR complied with the PRA when it was undisputed that they failed to respond to plaintiff's records request of November 19, 2007 within 5 business days, when the response was inadequate and unreasonably delayed, and when the suit was necessary to compel disclosure.

The Court's erroneous rulings in this case are based upon defendant DNR's skillful and deceptive presentation of the facts of the case, which, viewed impartially, demonstrate incontrovertibly that no prompt and sufficient reply was made as required by law, that both electronic and paper records were unlawfully withheld from disclosure for nearly a calendar year, and that plaintiff was compelled to file this case to obtain even a partial and belated recovery of the official records of one of the chief financial officers of the State of Washington..

Further, the Court's rulings a profound misunderstanding of existing law, which requires penalties to be assessed when a lawsuit can be seen as reasonably necessary¹ to prompt disclosure, and which mandates penalties, not rewards, for unauthorized destruction of records in contravention of lawful retention schedules.

RCW 42.56.520, as in effect at the time of the instant request, provided...

¹ Significantly, the DNR admitted in its pleadings in response to the plaintiff's Show Cause Order that the lawsuit was "arguably necessary" to compel disclosure

Within five business days of receiving a public record request, an agency, ...must respond by either (1) providing the record; (2) acknowledging that the agency,... has received the request and providing a reasonable estimate of the time the agency,...will require to respond to the request; or (4) denying the public record request.

Since it is undisputed that the DNR failed to respond within 5 business days as required by RCW 42.56.520, that it destroyed and obscured public records in defiance of any lawfully adopted retention and destruction schedule², and since the DNR admits that it was “arguably” necessary for plaintiff to file suit compel them to recover and disclose the records that were recovered, it is beyond reasonable dispute that the correct standard of law and established precedent required at least a minimum penalty be imposed for their violation of the PRA, and the resulting delays and obstruction of public disclosure.

Since it is apparent that the resources of the State squandered on defending this matter exceed by many orders of magnitude the minimum penalty due under the PRA, the The only real question this court should have in this matter is...

“Why was it necessary for plaintiff to appeal at all?”

² Prior to filing suit, plaintiff contacted the State Archives and Attorney General to determine if there was any schedule that authorized the destruction of the Emails in question. As the DNR's silence upon the subject and the declaration on file in this case demonstrates, there was no such schedule in existence.

The only answer the plaintiff can find to this question is that the PRA, as applied, is a litigious procedure which allows agencies to evade their duties to ensure disclosure by employing Scorched Earth tactics that waste public resources in overzealous litigation over matters that are clearly established.

While the State has virtually limitless resources to squander in this matter, the ordinary citizen, who pays for it with his taxes, is faced with the prospect of vast amounts of public funds being unreasonably expended to oppose the public's right to know. This is especially ironic in the case of a public initiative that was originally designed to preserve public oversight and accountability from the deleterious impacts of government secrecy.

As the Supreme Court noted in *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, at 103 (2005)...

The harm occurs when the record is improperly withheld.

The requester should recover his costs, and the agency should be penalized, if the requester has to resort to litigation (the reason for the later disclosure is irrelevant).

This rule promotes the PDA's broad mandate of openness.

In this case, the defendants did not dispute in their pleading that the plaintiff's suit was reasonably necessary. What they do dispute, unreasonably, for years and sparing no expense to the public, is their

responsibility for withholding and destroying documents and compelling West to maintain a suit out of his own pocket to compel disclosure.

The Court in this case manifestly erred in finding the DNR's original reply adequate when DNR initially failed to respond in a timely manner, and/or identify the specific records exempted as required by RCW 42.56.520.

In the Rental Housing and PAWS cases, the Washington State Supreme Court has denounced this type of "silent withholding" of information in response to a PRA request....

Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld. The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed. Moreover, without a specific identification of each individual record withheld in its entirety the reviewing

court's ability to conduct the statutorily required de novo review is vitiating. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1995) . at 270 , and *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525 (2009)

The Supreme Court emphasized the need for particularity in the identification of records withheld and exemptions claimed:

The plain terms of the Public Records Act, as well as proper review and enforcement of the statute, make it imperative that all relevant records or portions be identified with particularity. Therefore, in order to ensure compliance with the statute and to create an adequate record for a reviewing court, an agency's response to a requester must include specific means of identifying any individual records which are being withheld in their entirety. Not only does this requirement ensure compliance with the statute and provide an adequate record on review, it also dovetails with the recently enacted ethics act. *Id.* at 271 (footnote omitted).

In a footnote, the Court described the sort of identifying information that would be deemed adequate for review purposes under the PRA:

The identifying information need not be elaborate, but should include the type of record, its date and number of pages, and, unless otherwise protected, the author and recipient, or if protected, other means of sufficiently identifying particular records without disclosing protected content... Id. at 271 n.18.2

Since the DNR refused to comply with this clearly established requirement of a timely and valid response and since plaintiff was required to file two separate court actions to compel recovery and disclosure of the Van Schoorl E-mails, a finding of a violation of the PRA in these regards is mandatory.

ERROR II The Court erred in finding the destruction of public records of the communications of DNR's chief financial officer to be authorized by the PRA when DNR had no retention and destruction schedule that authorized their destruction, and in failing to order a forensic recovery.

In this case the critical and undisputed factual circumstance is the destruction of records by the DNR, and the unreasonable delays resulting

in what was only a partial recovery. While defendant DNR attempts to argue to the contrary, the unlawful destruction of public records does not and should not shield an agency from being found to be in violation of the law...

Because the documents were destroyed, the court cannot grant complete relief. However, the questions of costs, attorney fees and the \$25 per day statutory award remain. *Yacobellis v. Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989)

To entertain the spurious and obstructionist arguments of defendants and rule in the manner they suggest would encourage and reward agencies for destroying records, in clear contravention of the remedial intention of the people in adopting I-276. As the Ohio Court in *State ex rel Toledo Blade Co.* (see attached) ruled...

In the context of a public records claim...it is manifest that a public office violates (the law) by deleting Emails that it has a statutory obligation to maintain...*Toledo Blade Co. v. Seneca Cty. Bd. of Commrs.*, 120 Ohio St.3d 372, 2008-Ohio- 6253, 899 N.E.2d 961

Since the DNR in this case failed to respond within 5 days, failed to promptly request clarification, and withheld both material records and

information from plaintiff for over a year that was critical to his exercise of his right to petition for redress, and since this withholding of legitimate public records was also accompanied by both unreasonable delays in disclosure and a complete loss of information due to the unlawful destruction and deletion of public records, a clear ruling is required in order to ensure that the wanton destruction of information necessary for public oversight of democratic government does not become even more commonplace than it is already.

In this context, it should not be ignored that some of the records, both paper and electronic, that were destroyed and/or obscured for over a year were not some petty underling's irrelevant and inconsequential data, but financial management records of the Chief Financial Officer of the State Agency entrusted with the stewardship and management of the Public Lands of the State of Washington.

Such records are no technical and litigious reason to drag an agency into court, but are undeniably of a class of records near the apex of those necessary to oversee the operation of government.

Further, since the defendants attempted to raise a thorough and prompt recovery defense, disclosure of the records that are presently being withheld under attorney client privilege that are related to the efforts to recover the records are necessary to determine the scope of the recovery

efforts, and to make an accurate assessment of whether further forensic recovery might be productive.

There can be no conceivable valid public purpose in concealing legitimate, thorough and good faith attempts to recover data. That defendants even seek to withhold such information is very suspicious, and casts a dark pall upon the rest of their representations of good faith. That the Court indulged this concealment is even more troubling.

ERROR 3 The Court erred in finding the delays in the partial recovery and disclosure of the destroyed records to be reasonable when DNR had no retention and destruction schedule that authorized their destruction.

The destroyed records at issue in this case included the official E-mails and correspondence of Robert Van Schoorl, who occupied the office of Port Commissioner, WPPA president and DNR director of budget and finance (Van Schoorl was also temporarily the office of director of policy and administration, as evidenced in the withheld records). As Van Schoorl was an executive budget officer, plaintiff contends that all of Van Schoorl's E-mails were at least public records, and that a majority of them were official public records as defined in RCW 40.14.010, and financial records subject to a seven year retention requirement under federal law.

On 4/25/08 plaintiff sent an Email to counsel for the DNR requesting authority for the destruction of the records of DNR finance and budget Director Robert Van Schoorl the Email was as follows:...

“Mr. Pruitt: I am just opening my mail and I see a communication from your public records officer to the effect that the DNR has destroyed or rendered unrecoverable all electronic records sent by to Mr. Van Schoorl prior to 2007. As a public officer charged with budget and federal law compliance related matters certain of these records may not be merely public but "official public records" which are not to be obstructed or destroyed under any circumstances.

Please specify where any existing hard drives or electronic records now exist, and what type of forensic recovery service will be necessary to retrieve them.

Is it your position that the deletion of these records was done in conformity with state law? If so, please specify the law that allows such destruction and any retention and destruction schedule that authorizes the destruction of DNR budget office records.

Please also regard this as a request to negotiate an agreed settlement of claims based upon an admission of guilt, reasonable penalties, and a stipulation that no further records will be destroyed.

Thank you for your consideration.

Following notification that the records had been destroyed, plaintiff filed the present action to compel their disclosure. Since some of the records have been subsequently recovered and disclosed as a direct result of this suit, imposition of at least a minimum penalty is mandatory under the PRA. The fact that the communications of the DNR's Budget Director are in large part official public records, the destruction of which is prohibited is also a relevant concern.

Plaintiff alleged that many of the records recovered after filing suit and subsequently disclosed by the DNR contained records that met the definition of official public records, and in light of the fact that many of the un-recovered records are currently beyond review, the DNR cannot refute that these records were official public records too.

While willful destruction or concealment of official public records is a criminal offense, (See RCW 40.14.020-030) the records retention guidelines promulgated by the Secretary of State provide that even the lesser e-mails of officials like the policy and budget director of the DNR are public records which must be preserved³. Such public records may be legally deleted only so long as they are printed along with the following

³ See O'neil v. Shoreline at Note 57... "The records retention guidelines promulgated by the secretary of state provide that certain e-mails are public records. Those that are public records may be deleted as long as they are printed along with the following information: name of sender, name of recipient, and date and time of transmission and/or receipt..."

information: name of sender, name of recipient, and date and time of transmission and/or receipt. (see *O'Neill v. City of Shoreline*, 145 *Wn. App.* 913, 936, 187 P.3d 822, 832 (2008))

As noted by Ramsey Ramerman in his memo to the Ports of Tacoma and Olympia who the DNR Budget Director represented in 2007, (CP 153), records destruction must be in accord with a records retention and destruction schedule. For State agencies such as the DNR, this requires a schedule approved by the Secretary of State.

Plaintiff certified that his research has failed to uncover any WAC provisions adopted by the DNR or any duly approved records and retention schedule approved by the Secretary of State that would allow this type of destruction of records by the DNR. Thus, the destruction of the van Schoorl Emails was unlawful. (See also April 28, 2009 AGO letter opinion)

Since the records in this case were destroyed unlawfully, and since the best evidence of even a reasonable search, (let alone a diligent search as required to recover unlawfully deleted records) has been presented, the court's ruling in this case must be reversed. In addition, if the destroyed records are ever to be recovered, DNR should be compelled to conduct an adequate, open and honest forensic recovery procedure.

ERROR 4. The Court erred in approving each and every Attorney Client exemption asserted when the records that were exempted were not properly subject to the attorney client privilege, when the abuse of the attorney-client privilege and private contractors to improperly conceal information was a commonly employed scheme, when the privilege had been waived, and/or when the records withheld were necessary evidence relevant to the sufficiency of and motives for the recovery effort.

The Court erred in finding that a diligent search was conducted for the deleted records when the very communications necessary to establish that a search of all likely sources was conducted in a manner likely to uncover the records was withheld under attorney client privilege.

Both the Washington and the federal Courts require a diligent search to recover records. This requirement is elevated in regard to unlawfully deleted records.

At the summary judgment stage, where the agency has the burden to show that it acted in accordance with the statute, the court may rely on "[a] reasonably detailed affidavit, setting forth the terms and the type of performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Oglesby I*, 920 F.2d at 68; see also *Kowalczyck v. Department of Justice*, 388 (D.C.Cir.1996); *Weisberg*, 705 F.2d at 1351. However, if a review of the record raises substantial doubt, particularly in view of "well defined requests and positive indications of overlooked materials," *Founding*

Church of Scientology v. National Sec. Agency, _____, 837
(D.C.Cir.1979), summary judgment is inappropriate. Id.; see also Oglesby
v. United States Dep't of the Army, _____, 1185

The Court erred in denying disclosure based upon an attorney-client exemption when there was new evidence of a regular business practice of the ports represented by Van Schoorl (as a Port of Olympia Commissioner and WPPA president to evade the PRA by using the attorney-client exemption improperly.(See CP 153-155), where a concerted scheme is described to conceal records by forwarding them to counsel.

THE COURT ERRED IN EXTENDING ATTORNEY CLIENT PRIVILEGE TO COMMUNICATIONS BETWEEN DNR EMPLOYEES THAT HAD MERELY BEEN FORWARDED TO AN ATTORNEY OR WERE OTHERWISE NOT PRIVILEGED

RCW _____ (2) provides that the attorney-client privilege applies to communications and advice between attorney and client. The privilege extends to written communications from an attorney to his client, but not to those of a layman. Victor v. Fanning Starkey Co., _____, 486 P.2d 323 (1971).

The document in question here, exhibit 82, shows neither a communication from or advice by attorneys to Western Gear. It was prepared by a lay person, not a

lawyer. As noted by the Court of Appeals, on its face it is nothing more than a memorandum between corporate employees transmitting business advice rather than a privileged communication between attorney and client. Defendant's contention that *Upjohn Co. v. U. S.*, 449 U.S. 383, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981), applies to this case is not well taken. In *UPJOHN*, the documents involved were communications from the corporation's counsel to corporation employees. That was not the situation here. *Kammerer v. Western Gear Co.*, 96 Wn.2d 416, 635 P.2d 708.

Similarly, the communications between DNR employees in this case, many of which were produced by DNR employees, merely forwarded subsequently to counsel and/or shared with a private third party consultant are not protected. See *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989)

The Court therefore erred in suppressing E-mails that had not been produced by DNR counsel Pruitt or Rollinger, as well as those which had been produced by or disclosed to DNR's private consultants or DNR employees who were not attorneys like Gordon Ice or Peggy Murphy.

Once privileged communications are revealed, (to private parties like the DNR's IT consultants) the privilege is left with no legitimate function to perform. McCormick on Evidence § 93, at 371-72; see Underwater Storage, Inc., 314 F. Supp. at 549

Merely forwarding these type of communications to the attorney does not convert them to exempt records, especially when the communications were disclosed to private third party consultants, and since their disclosure was waived by defendants assertion that the recovery was adequate and not in response to litigation. Further, if the communications regarding the recovery are attorney-client privileged, it is beyond dispute that the suit caused their recovery, since the defendants are equitably and collaterally estopped from denying that the recovery was litigation related. This type of obvious contradiction is further evidence of the trial court's errors in this matter and a good reason why they should be overturned.

THE COURT ERRED IN CONSTUING ATTORNEY CLIENT PRIVILEGE BROADLY TO SUPPRESS A SEARCH FOR THE TRUTH AND EXCLUDE THE BEST EVIDENCE OF WHAT SEARCH WAS CONDUCTED

Washington's attorney-client privilege is set forth in RCW

(2)(a). The attorney-client privilege applies to communications and advice between an attorney and client and extends to documents that

contain a privileged communication *Dietz v. John Doe*. 131 Wn.2d 835. 842. 935 P.2d 611 (1997)

Because the privilege sometimes results in the exclusion of evidence otherwise relevant and material, and thus may be contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege is not absolute; rather, it is limited to the purpose for which it exists. *Dietz* , ; see also *Baldrige v. Shapiro* , 455 U.S. 345, 360, 102 S. Ct. 1103, 71 L. Ed. 2d 199 (1982) (Statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth.). *VersusLaw, Inc. v. Stoel Rives, L.L.P.*, 127 Wn. App. 309 (2005)

Our court noted the following limitation on the attorney-client privilege in *Dike v. Dike*, , 11, 448 P.2d 490 (1968):

" As the privilege may result in the exclusion of evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege cannot be treated as absolute; but rather, must be strictly limited to the purpose for which it exists.

The central purpose of the rule is to encourage free and open discussion between an attorney and his client by assuring the client that his information will not be disclosed to others either directly or indirectly. *State v. Chervenell*, _____, 316, 662 P.2d 836 (1983).

In this case the Court erred in applying the attorney client privilege broadly to suppress the only existing evidence about the nature and timing of defendants “adequate” search for responsive records, while at the same time holding that the recovery had nothing to do with the lawsuit. This type of contradictory ruling, used to deny the penalties required under the PRA, is nothing other than a veiled attempt to judicially repeal the Public Records Act..

THE COURT ERRED IN GRANTING THE STATE OVERLY BROAD PRIVILEGES IN SUPPRESSING THE ONLY RELEVANT EVIDENCE IN A CIVIL PRA PROCEEDING WHEN THE SUPERIOR PUBLIC INTEREST COMPELLED DOISCLOSURE

Although the exact contours of the Attorney-Client privilege in regard to the PRA have not been precisely defined, many courts have held that such privilege in the context of a government entity must give way when confronted with the existence of a superior public interest. See *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998)

There is a compelling argument that the attorney-client privilege cannot be asserted when allegations of bad faith are at issue in the case.

Escalante v. Sentry Ins. Co., _____, 743 P. 2d 832 (1987),
review denied, _____ (1988)

Undeniably, the Courts do not agree that the attorney-client privilege is of an overriding or constitutional dimension. See U. S. ex rel Edney v. Smith, 425 F. Supp. 1038, 1054 (E.D.N.Y. 1976) (court declined to freeze attorney-client-psychiatrist privilege into constitutional form), AFF'D, 556 F.2d 556 (2d Cir.), Cert. Den., 431 U.S. 955 (1977).

Moreover, in addition to the reasoning of the United States Supreme Court in Buchanan v. Kentucky, 483 U.S. 402, 97 L. Ed. 2d 336, 107 S. Ct. 2906, We, (The Washington Supreme Court) agree(ed) with the court in State v. Craney, 347 N.W.2d 668, 677 (Iowa), Cert Den, 469 U.S. 884 (1984), that defendant's asserted right to the effective assistance of counsel under the facts of this case reflects the "bygone philosophy that for an attorney's investigations to be effective they must be shrouded in secrecy." If defendant asserts an insanity defense, evidence pertaining to that defense must be available to both sides at trial. There is thus no need for the confidentiality defendant maintains is required. State v. Pawlyk, 115 Wn.2d 457, 800 P.2d 338.

Likewise, if a State PRA defendant seeks a "diligent search and recovery" defense, and seeks to assert that the recovery of destroyed

public records was not a result of the lawsuit, the evidence pertaining to these defenses must be available to all sides.

Otherwise the privilege may be abused to paint an incomplete or misleading picture of the nature of the search and to allow the state to assert that the recovery was not a result of the lawsuit while at the same time withholding the necessary evidence under a conflicting claim that the communications regarding the recovery of the records was privileged because it was made for the purposes of litigation.

Significantly, the Edney Court observed that “defendant suggests that he be permitted to suppress any unfavorable psychiatric witness whom he had retained in the first instance, under the guise of attorney-client privilege, while he endeavors to shop around for a "friendly" expert, and take unfriendly experts off the market.”, U. S. ex rel Edney v. Smith, 425 F. Supp. 1038, 1052 (E.D.N.Y. 1976), Aff'd, 556 F.2d 556 (2d Cir.), Cert Den. 431 U.S. 958 (1977).

This is exactly the type of unfair manipulation of evidence practiced by the DNR in this case.

The wholesale abuse of the attorney-client privilege as a regular business practice is demonstrated by CP 153-155. As an attached excerpt of a memo from Ramsey Ramerman and the declaration of the plaintiff filed in support of show cause in this matter demonstrate, the

public agencies of this State and their counsel work together to veil their actions under false color of attorney client privilege.

The Court erred in finding that the withheld records submitted for in camera inspection were exempt when they were not properly exempt, when no reasonable attempt at redaction had been made, when the privilege was inapplicable and/or waived, and when there was evidence of a regular business practice and policy of abuse of the attorney-client exemption by WPPA members and their port districts.

ERROR 5 THE COURT ERRED IN ENTERING FINDINGS THAT WERE NOT IN ACCORD WITH SUBSTANTIAL EVIDENCE OR ANY REASONABLE INFERENCE THEREFROM AND WHICH WERE BASED UPON AN IMPROPER LEGAL STANDARD

The Court erred in entering findings proposed by counsel regardless of the gross misrepresentations of fact and law contained therein when they were not supported by substantial evidence or any reasonable inference therefrom.

This is especially the case for the sealing order findings where no evidence of what vital governmental functions would be substantially damaged or how the release of the records would clearly not be in public interest was provided, and where any such finding would be contrary to the intent of the PRA.

Attached hereto in appendix form, and incorporated herein integrally and by reference are verbatim copies of the five and a half pages of findings entered by the Court in the three Orders of November 6, 2009.

While none are designated findings of fact, and they all appear to be mixed findings for which the de novo standard of review applies, in the interests of caution, plaintiff respectfully challenges each and every finding: 1-18 of the Order from Show Cause (CP 166-171), 1-3 on the Sealing Order, (CP 300-302) and No. 1(a-e) and 2-7 of the Order on In Camera Review (CP 108-120) and the rulings appended thereto, and asserts that they are not in accord with substantial evidence or any inference therefrom, and fail to meet the standard of *Miller v. City of Tacoma*, 138 Wn. 2d 318, 979 P.2d 429 (1999), in addition to their having been based on an improper legal standard.

Plaintiff contends that in light of the September 8, 2008 correspondence appearing at CP 151, it is clear that the disclosure of the “destroyed” records continued until September 8 of 2009, and the delays were obviously caused by their negligent destruction under the doctrine of res ipsa loquitur. *Tinder v. Nordstrom*, 84 Wn. App. 787, 929 P.2d 1209, (1997).

Plaintiff's evidence appearing at CP 90-94 and CP 83-4, as well as the declaration at CP 58-80 demonstrate the falsity and misrepresentations

of the State's findings entered by the Court, including: that the State failed to adequately respond within 5 business days, that the State could have adequately responded, but delayed to plaintiff's prejudice, that the response when it did occur, was delayed due to the unlawful destruction of documents, and that the delay resulting from the destruction was unreasonable.

DEFENDANT DNR'S FAILURE TO DENY WITHHOLDING

In response to the Order to Show Cause, defendants failed to deny that:

1. DNR destroyed and deleted public records of its chief financial officer, without compliance with any retention and destruction schedule.
2. Their unlawful failure to properly preserve these official public records (See RCW 40.14) caused long delays in producing these records, which continued until September 8, 2009.
3. Plaintiff was "arguably" required to file suit to compel DNR to recover portions of the improperly deleted records.
4. A proper forensic search might recover more records.
5. In addition to the deleted electronic records, other records existing in material format were unreasonably withheld for

over a year. By “coincidence”, these records just happened to demonstrate the conflicts of interest between Van Schoorl’s roles in DNR, (Director of finance and Budget) the WPPA, (President) and the Port of Olympia, (Commissioner) in regard to a certain dredging project that plaintiff West was appealing.

DEFENDANT DNR’S OMISSION OF CRITICAL FACTS

As the declaration of plaintiff evidences, the Orders and findings fails to note the following facts:

- A.) In addition to electronic records of Van Schoorl’s E-mails, paper records and documentation regarding the interrelation between DNR, WPPA and the Port Dredging Project was also concealed and withheld for over a year.
- B.) The existence of a DNR SEPA determination was denied and obscured until many months after the time for appeal had passed.
- C.) Conditions of monitoring of a dredging project were withheld in a manner that allowed DNR counsel to misrepresent them to the PCHB, which contributed to a violation of the Clean Water Act.
- D.) The concealment of this information by DNR prejudiced Plaintiff in actions before the PCHB, the Executive Conflict of Interest Commission, the Thurston County Superior Court, and the Federal

District Court, in that DNR was able to conceal relevant evidence and misrepresent material facts.

Further, the defendants own record of the recovery effort demonstrates that the disclosure was delayed due to the destruction of the records, and that no records or retention schedule existed.

Attached to plaintiff's objection ay CP105-7 is a true copy of a 4/25/08 E mail sent by plaintiff to counsel for the DNR requesting authority for the destruction of the records of DNR finance and budget Director Robert Van Schoorl.

Following notification that the records had been destroyed, plaintiff filed an action to compel their disclosure, Since the records have been subsequently disclosed as a result of this suit, imposition of penalties is mandatory. This is of special concern also due to the fact that the communications of the DNR's Budget Director are in large part official public records, the destruction of which is prohibited. Plaintiff hereby certifies that the records recovered after filing suit and subsequently disclosed by the DNR contain records that meet the definition of official public records.

RCW 40.14.010(1) provides...Official public records shall include all original vouchers, receipts, and other documents necessary to isolate and prove the validity of every transaction relating to the

receipt, use, and disposition of all public property and public income from all sources whatsoever; all agreements and contracts to which the state of Washington or any agency thereof may be a party; all fidelity, surety, and performance bonds; all claims filed against the state of Washington or any agency thereof; all records or documents required by law to be filed with or kept by any agency of the state of Washington; all legislative records as defined in RCW _____; and all other documents or records determined by the records committee, created in RCW _____, to be official public records.

The findings adopted by the court and each of them which are objected to specially, grossly misrepresent the facts and circumstances of this case, and fail to note that the DNR (1) unlawfully destroyed public records without any approved retention and destruction schedule, (2) refused to disclose these records prior to plaintiff filing suit, and (3) recovered many of the records after the plaintiff was forced to file this suit.

As but one instance of the suppression of evidence, the DNR's destruction of E-mails in this case allowed Van Schoorl to evade an ethics investigation on the basis of false representations that he had no administrative duties in regard to timberlands when the records finally

released demonstrated that he temporarily held the position of director of administration for DNR.

The existence of a SEPA determination was also allowed to be concealed by the DNR for nearly a year, making any attempt at enforcing the environmental laws futile at best.

This type of suppression of evidence necessary for effective access to the court is exactly what a system of prior restraints effects, and perpetuates, as part of policy, custom and usage under color of law.

Under these circumstances, the findings and conclusions of the court must be reversed, especially since the court applied the wrong standard of law, and failed to find the DNR strictly liable for penalties under a liberal construction of the PRA when the plaintiff was forced to file suit to obtain their disclosure, PAWS,

This is especially necessary when the DNR's destruction of records was clearly unlawful under the PRA and by the application of the doctrines of both estoppel, See *Kramarevsky v. DSHS*, 122 Wn.2d 738, P.2d 535, (1993) and *Res Ipsa Loquitur*. See *Rasmussen v. Bendotti*, 107 Wn. App. 947, (2001), due to the fact that the DNR had clearly and plainly acted to recover only a portion of the destroyed records only after a

4"strict enforcement' of fees and fines will discourage improper denial of access to public records." PAWS I, quoting *Hearst v. Hoppe*,).

lawsuit was instituted, and when their destruction was undeniably negligent per se when no lawful retention and destruction schedule did or could possibly authorize such destruction.

Under these uncontroverted circumstances, the failure of the Court to find a violation of the PRA and award a penalty was a manifest error.

CONCLUSION

The DNR failed to respond to West's request as required by law. The DNR destroyed public and official public records without a valid retention and discovery schedule. Plaintiff West was required to maintain a suit to compel disclosure, unreasonable delays and only a partial recovery of the destroyed records resulted, mandating a finding of violation and a penalty.

Defendants have waived their claim that the recovery of the Van Schoorl E-mails was not litigation related by asserting that communications regarding their recovery are exempt because they were made for the purposes of litigation, and have waived the privilege by disclosing their communications to third parties.

The defendants cannot have their records and destroy them too, and keep the records of their recovery exempt under attorney client privilege while asserting the recovery had nothing to do with the lawsuit.

Such contradictory representation violates common sense and the clear precedent of Heidebrink, 104 Wn.2d at 400.

Such a bizarre set of contradictory findings demonstrates a compelling basis for reversal and vacation of the trial court's rulings, and each of them, and an order of remand with instructions for the assessment of penalties both for the untimely disclosure and the destruction of records, for an injunction to prevent any further destruction, and for a forensic recovery to be conducted.

Only in this manner will the DNR be deterred from further destruction and evasion of its responsibilities under the Public Records Act.

The five pages of findings follow as an integral incorporated appendix.

Done August 29, 2010.


ARTHUR WEST

INTEGRAL APPENDIX I

I. FINDINGS

The Court does hereby find and conclude as follows:

1. On October 19, 2007, Arthur West personally delivered a very broad public records request to State.
2. State immediately acknowledged receipt of Mr. West's records request on the same date it was received, October 19, 2007.
3. State could not have provided Mr. West with a reasonable estimate of time necessary to respond to the entire breadth of his request without seeking clarification from him.
4. State began to consider the clarification it would need as soon as Mr. West's records request was received. The clarification sought was completed and transmitted to Mr. West on November 5, 2007, the eleventh business day after State received Mr. West's request, along with 81 pages of records responsive to Mr. West's request.
5. After the request for clarification was sent to Mr. West, there was an exchange of letters and e-mail between State and Mr. West working toward clarification of Mr. West's public records request.
6. State mailed 3,182 pages of responsive records to Mr. West on November 30, 2007.
7. The two broadest categories of records requested by Mr. West are included in paragraphs 1 and 4 of his request. Paragraph 1 requested production of all records of any communication between the Department of Natural Resources or any of its employees, officers, or agents over a two-year time frame. The parties negotiated and agreed that the two-year time frame would cover calendar years 2006 and 2007.
8. In paragraph 4, Mr. West requested, in part, records of all job functions and work product of Robert Van Schoorl, including hours of work and all communications sent by

him. The language was very broad and amorphous. State reasonably requested clarification. In response to the request for clarification, Mr. West responded he wanted all communications between Robert Van Schoorl and the Port. The records encompassed by the clarified request were available for inspection in late December 2007. Mr. West did not inspect the records until February 2008.

9. During the inspection of records in February 2008, Mr. West made it clear to State he was now looking for all e-mails of Bob Van Schoorl over the two-year time frame. State treated this request as an amended Public Records Act request.

10. On February 13, 2008, State wrote to Mr. West, acknowledging his clarified records request that included all e-mails of Bob Van Schoorl, not just those relating to the Port of Olympia. State provided Mr. West with the bulk of Bob Van Schoorl's recovered e-mails and other requested records in the following increments:

DATE	PAGES
February 29, 2008	420
March 14, 2008	1,498
March 28, 2008	3,050
April 4, 2008	383
April 11, 2008	4,177*

*To include Bob Van Schoorl's work product and summary of Port of Olympia billings.

11. Given the scope of Mr. West's public records requests, which resulted in production of over 13,000 pages, and the events that occurred after the November 5, 2007, request for clarification when the parties exchanged information clarifying and defining the scope of the request, the Court finds that it was unreasonable to expect State to respond within five days to a request of this nature and that State acted in a reasonable and timely manner to understand the scope of this request and to seek clarification.

12. When State sought clarification, Mr. West's responses narrowed the scope of State's responsibility with regard to the records requested. Within 11 business days of Mr. West's initial request, State produced a portion of the records requested. Approximately 34 days thereafter State produced 3,182 pages, and by the end of December 2007, State had assembled and made ready for inspection the remaining records requested by Mr. West consisting of many thousands of additional pages. Under these circumstances, the Court finds the lack of procedural compliance with RCW 42.56.520 by State has not affected in any respect State's performance of its responsibilities under the Public Records Act.

13. With respect to Mr. West's claim that State destroyed e-mail records requested by him, the Court finds: (a) no evidence was submitted regarding State's requirement to retain the e-mails; (b) the destruction of these records occurred well before Mr. West's request for them; and (c) the e-mail records were not consciously destroyed but resulted from the conversion of the State agency e-mail system from Novell Groupwise to Microsoft Exchange in late 2006.

14. State made a good faith effort to recover the missing records through its Information Technology Department and by hiring an outside forensic consultant to recover the records. No recovery of the e-mails was possible.

15. The delay in seeking clarification of Mr. West's records request, while not meeting one of the requirements of RCW 42.56.520, did not delay or interfere with Mr. West's right to inspect or copy any of the records he requested, nor did it delay or interfere with his right to receive a response to his records request within a reasonable amount of time. Under these circumstances, RCW 42.56.550(4) provides no remedy.

16. State timely provided Mr. West with the opportunity to inspect or obtain copies of all existing records responsive to his October 19, 2007, request, as clarified and later amended by Mr. West, consistent with the Public Records Act.

17. State's failure to produce e-mail records not in the possession of State due to their inadvertent loss a significant time before the records were requested, and after State's extensive but unsuccessful good faith attempts to recover the records, is not a violation of the Public Records Act.

18. Mr. West challenges the records withheld by State where a claim of exemption has been made by State. State is directed to provide the records to the Court for an in-camera review, and the Court will make its determination as to the proper application of the claimed exemption(s).

FINDS AND CONCLUDES:

1. The Court received for in-camera review a compact disk containing the following:

(a) Copies of 70 pages of records withheld or partially withheld from Mr. West by the State in their unredacted form with the exempt records or portions thereof that were withheld from Mr. West highlighted in yellow.

(b) An eight-page spreadsheet of the above-referenced highlighted records identified by a Bate Stamp number corresponding to each page and a description of each document for the Court to reflect its ruling for each record or set of records.¹

(c) A 12-page document captioned "In Camera Index of Records Withheld from Arthur West's Second PRA Request With DNR Privilege Log" prepared by counsel of record for the State and including reasons for each record or series of records withheld or partially withheld from Mr. West (hereafter referred to as "In-Camera Index").

(d) An October 7, 2008, five-page DNR Privilege Log provided to Mr. West in partial response to his second PRA request (State Exhibit 3 to Defendant's Memorandum in Response to Order to Show Cause).

(e) Copies of all of the redacted records provided to Mr. West and copies of the same records in their unredacted form as the records were identified and described on the In-Camera Index referenced in (c) above.

2. The Court reviewed the 70 pages of records identified in 1(a) above in conjunction with the In-Camera Index in-camera and provided counsel for State and Mr. West with an eight-page spreadsheet as part of the Court's ruling on whether the exemptions claimed under either the attorney work product or attorney-client privilege or both were granted.

¹ DEF-0000115 was inadvertently included on the eight-page spreadsheet but was not provided to the Judge for his review because it was the redacted copy of DEF-0000116.

A copy of this eight-page spreadsheet, along with the Court's Rulings on Claims of Exemption, is attached to this Order and incorporated by reference as Exhibit 1.

3. The Court initially ruled all of the records or portions of records, but for small portions of one record (DEF-0000104), were properly withheld from Mr. West under the attorney-client privilege or as work product or both.

4. The Court initially ruled that the identity and address of the last recipient and the subject lines of all three e-mails in the string contained on the record designated as DEF-0000104 should be disclosed and that the failure to disclose this portion of the record was a de minimus violation of the Public Records Act.

5. Upon further consideration, the Court rules that the identity and address of the last recipient on the record designated as DEF-0000104 were properly withheld from Mr. West by the State because this portion of the record was created over one month after Mr. West's records request and was not responsive to his request.

[CHOOSE ONE #6 AND DELETE THE OTHER]

6. Upon further consideration, the Court rules the subject lines of all three e-mails in the string contained on the record designated as DEF-0000104 were properly withheld from Mr. West under the attorney-client privilege.

7. The Court concludes that all of the records or portions of records responsive to Mr. West's request were properly withheld from him under either the attorney-client privilege or as attorney work product or both consistent with RCW 42.56.290.

II. FINDINGS

The Court finds compelling circumstances to grant the order as follows:

1. Examination of the following records would clearly not be in the public interest and would substantially damage vital government functions.
2. The documents to be sealed contain attorney-client privileged communications, or attorney work product or both.
3. It is necessary to seal the documents to preserve the record for any reviewing court while preserving the attorney-client privilege and attorney work product exemption under RCW 42.56.290.

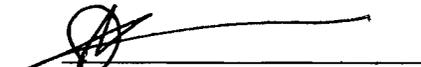
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AUG 30 2010

CLERK OF COURT OF APPEALS
STATE OF WASHINGTON

CERTIFICATE OF SERVICE

I certify that Appellant's Opening Brief and the foregoing integral, incorporated five page appendix of verbatim findings specifically objected to was served on respondent DNR personally or by mail on August 30, 2010, by delivering it or mailing it to the DNR's Address of record.

I certify the foregoing to be correct and true under penalty of perjury. Done August 29, 2010.


ARTHUR WEST