

ORIGINAL

**NO. 41334-5-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

**(Thurston County Superior
Court No. 06-2-00141-6)**

Arthur S. West, and Walter R. Jorgensen, and Eve Johnson,

Appellants (Plaintiffs)

v.

The Port of Olympia,

Respondent (Defendant)

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
DEPUTY

APPELLANTS JORGENSEN AND JOHNSON'S OPENING BRIEF

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Washington Statutes

- RCW 42.56.030
- RCW 42.56.550 (1)
- RCW 42.56.550(4)

I. INTRODUCTION

This case involves the Port of Olympia's repeated failure to provide full, timely and proper disclosure of public documents to multiple citizens, including the present Appellant Arthur West and the present Appellants Walter Jorgensen and Eve Johnson, requesting documents under the Public Records Act (PRA). The citizens filed suit in Thurston County to compel disclosure. Initially, the Trial Court ordered the Port of Olympia to disclose documents and imposed a penalty of \$60.00 per day for their nondisclosure. The Trial Court, however, allowed the Port of Olympia to continue to withhold many documents under the "deliberative process exemption." The citizens appealed and Division I of the Court of Appeals reversed, remanding the case to the Trial Court for additional disclosure of the withheld documents and ruling that the Trial Court "may increase" the penalty in a manner "consistent" with the decision.

On remand, the citizens discovered 298 pages of additional nondisclosed responsive documents which hadn't even been submitted to the Trial Court for its initial review. Additionally, the citizens requested an increased award consistent with the Court of Appeals' decision, as to the three categories of documents at issue: (1) the documents ordered disclosed by the Trial Court and for which the Trial Court assessed the \$60 per day penalty (the "Trial Court documents"); (2) the documents

disclosed by the Port *after* the Division I Court of Appeals held that the deliberative process exception did not apply (the “Court of Appeals documents”); and (3) the documents that were disclosed by the Port neither to the citizens nor to the Trial Court for in camera review, but that the citizens found on their own (the “nondisclosed documents”). Appellants Johnson and Jorgensen calculated the potential penalty as being as high as Three Million Eight Hundred Thousand dollars, but requested a recalculated penalty of only Two Hundred Sixty Eight Thousand Two Hundred Twenty dollars (\$268,220).

At the hearing on remand, the Trial Court, in clear disregard of the direction it received from the Court of Appeals, reduced rather than maintained or increased the daily penalty award for the Court of Appeals documents. Additionally, the Trial Court treated all the Trial Court documents and Court of Appeals documents as single documents, without regard to the differences among and between those documents either as discrete documents or as document categories, imposing single daily omnibus penalties for all documents ordered disclosed by either the Trial Court or the Court of Appeals. Finally, the Trial Court, without analyzing the nondisclosed documents in light of the public document requests to determine whether they were responsive to those requests, ruled that all nondisclosed documents were not responsive and therefore not a proper

basis for either an order of disclosure or an additional penalty. These rulings, in addition to being contrary to the requirements of the statute and its interpreting case law, are a flagrant refusal to follow the direction of a reviewing court on remand.

The Trial Court's errors in this case are egregious and should be reversed. In fact, those errors are so egregious that this Court should reverse without remand, exercising its authority to decide the case *de novo* and enter judgment without further process.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The Court Erred in Treating the Three Groups of Nondisclosed Documents (the Original Documents the Trial Court Ordered the Port to Release; the Additional Documents Division I of the Court of Appeals Ordered Released; and More Additional Documents Identified by Appellants as Responsive Documents the Port Never Submitted As Documents to be Considered for Release) as Single Documents.

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4. The Court Erred in Considering the Utility of the Documents in Outside Litigation, Rather than Whether the Nondisclosed Documents were Within the Scope of Requested Documents in the Appellants' Public Records Request, in Determining Whether Nondisclosed Documents were Responsive.

Issues Pertaining to Assignments of Error

1. Should a Single Per Diem Penalty be Imposed When a Public Agency Fails to Disclose Numerous Documents Responsive to a Public Document Request? No. Is a Per Document or Per Category Penalty required? Yes.

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4. Is it Proper for the Trial Court to Determine that Documents that Are Within the Scope of a Public Document Request are “Nonresponsive” Because the Court Doubts the Documents can be Effectively Used by the Requester? No.

III. STATEMENT OF THE CASE

This is a case where the Port of Olympia piecemealed its response to citizens’ public records requests, drawing out its response and producing documents in dribs and drabs, fighting tooth and nail in the courts in order “to maximize what could be kept secret and minimize what is to be made public.” See Judge Hicks’ “Court’s Rulings on Material Reviewed *In Camera*,” available at West v. Port of Olympia, 2006 WL 6012649, Wash. Super. (Mar. 29, 2006), p. 2. While the Port of Olympia was piecemealing its response to citizens’ public records requests, the citizens themselves were doing the best they could *with* the documents that had been provided in dribs and drabs, challenging the Port’s State Environmental Policy Act (“SEPA”) determination of environmental non-significance for the Weyerhaeuser lease entered into by the Port and the Weyerhaeuser Company and every aspect of the lease in multiple forums, including Thurston County Superior Court and before the City of Olympia Hearings Examiner. The citizens, hampered by not having a complete,

honest, and *timely* disclosure of the documents responsive to their public records request, were largely unsuccessful, most notably on March 3, 2006, when Thurston County Superior Court Judge Gary Tabor held: “Was this a project that is merely piecemeal of a bigger project? I’ve specifically found that it is not under the facts that have been presented to me here today.” CP 1271. Had the Port of Olympia not “piecemealed” its public records response, the citizens would have had a better chance at presenting more facts to Judge Tabor and getting a determination that the Port had impermissibly piecemealed its improvements required under the Weyerhaeuser lease with the intention of avoiding SEPA review.

The procedural history of this case is nicely set forth in West v. Port of Olympia, 146 Wn. App. 108, 112-116, 192 P.3d 926 (2008) (“Port of Olympia”). Briefly, Walter Jorgensen and Eve Johnson (appellants here), Arthur West (an appellant here), and David Koenig (not an appellant here) made separate public records requests to the Port for records concerning the Weyerhaeuser lease. On November 2, 2005, Mr. West requested:

[a]n index to, and all Port records concerning, the recent repaving project and other developments required in the Port’s recent contract with Weyerhaeuser, including all correspondence, written or electronic.

Port of Olympia, 146 Wn. App. at 112-113. Mr. West also requested records relating to the Port's compliance with SEPA. The Port responded by letter on November 16, 2005, saying that there was no paving project and no index, but gave Mr. West a copy of the signed lease and its SEPA policy. Port of Olympia, 146 Wn. App. at 113.

Mr. Jorgensen and Mrs. Johnson's request, dated January 6, 2006, asked for:

Public records regarding, relating to, or reflecting the Weyerhaeuser lease with the Port that was approved by the Commissioners on August 22, 2005. This request is intended to include, but is not necessarily limited to, communications among or between Port employees, contractors, vendors, communications among or between Port employees, contractors, vendors, and agents, including the Commissioners, as well as communications among or between any of the above with any Weyerhaeuser employees or agents.

CP 1270. On January 11, 2006 the Port responded, requesting additional time to review and prepare the records. It made two disclosures to Jorgensen and Johnson on January 17 and 23, 2006. Both Mr. West and Mr. Jorgensen and Mrs. Johnson filed Public Records Act lawsuits. Port of Olympia, 146 Wn. App. at 113.

On February 7, 2006, the Port presented the Trial Court with 2,409 pages of sealed documents that it claimed were both responsive to the public records requests of both Mr. West and Mr. Jorgensen and Mrs.

Johnson *and* exempt from disclosure, along with related privilege logs. Port of Olympia, 146 Wn. App. at 113. The Port asked the Trial Court to review the documents *in camera*. The Trial Court consolidated the West and Johnson/Jorgensen actions on March 3, 2006, the same day that Judge Tabor found no piecemealing, under the facts that were presented to him. Port of Olympia, 146 Wn. App. at 113; CP 1271.

What the Port did not disclose to the Trial Court for *in camera* review was at least 298 pages of documents that were later found by citizens independent of any response by the Port to Mr. West's and Mr. Jorgensen's and Mrs. Johnson's request. These 298 pages are found at CP 89-386.

The Weyerhaeuser lease required the Port of Olympia to construct improvements. A list of these improvements is found at CP 729-730, including: 1) furnish and install shipping camels; 2) pave the 3.4 acre northern site; 3) pave 5.3 acre staging area; 4) paving of railway east of staging area; 5) construct lighting; 6) construct utilities for future shop/office/crew lunchroom at north side of lease site; 7) pave cargo yard east of Franklin Street extended; and 8) construct and install underground utilities and structures. Included in the 298 pages that were not disclosed to the Trial Court for *in camera* review were at least 192 pages of documents comprised of emails, charts, minutes, plans, signed contracts,

schedules, letters, and tables that were exchanged between the Port of Olympia and Reid Middleton, the company that the Port hired to provide engineering services for the improvements required by the Weyerhaeuser lease, including the paving. CP 89 through CP 280. By any stretch of the imagination, these documents were on their face responsive to Mr. West's public records request: "all Port records concerning, the recent repaving project and other developments required in the Port's recent contract with Weyerhaeuser," and also responsive to Mr. Jorgensen's and Mrs. Johnson's request: "Public records regarding, relating to, or reflecting the Weyerhaeuser lease with the Port...[including] communications among or between Port employees, contractors, vendors, or agents." Yet the Port did not produce these pages to Mr. West or to Mr. Jorgensen and Mrs. Johnson, *nor did the Port give these pages to the Trial Court for in camera review.*

The 298 pages also contained multiple records concerning the Port's attempts to avoid SEPA review of the Weyerhaeuser lease. *See*, roughly, CP 281-386. One of these is an email exchange so inflammatory it can only be described as a "smoking gun." Andrea Fontenot, an employee of the Port, writes on September 23, 2005:

Carolyn [Lake, attorney for the Port] and I discussed the concept this a.m. of deleting that portion of the cargo yard improvement project at the north end, which appears to be

the only portion of the project that is triggering SEPA, and moving forward with the rest of the non-SEPA triggered work as a separate, stand alone project.

CP 283. In response, Jim Amador, another Port employee, wrote: “Let’s proceed and do the north end as a separate project.” CP 282.

Now, it is important to notice that this email exchange cc’d Carolyn Lake, the Port’s attorney, and that the email was clearly marked “Attorney Client Privilege.” There were a number of attorney-client privileged emails that were given by the Port to the Trial Court to review *in camera*. However, they were described by the Port in privilege logs. Counsel for the appellants examined the privilege logs provided by the Port and do not believe that this email exchange was included in the attorney-client privileged documents provided to the Trial Court for *in camera* review. CP 82. Likewise, by any stretch of the imagination, this email exchange and the rest of the documents found at CP 281-CP 386 were responsive to Mr. West’s request (any records relating to the Port’s compliance with SEPA) and to Mr. Jorgensen’s and Mrs. Johnson’s request (records regarding, relating to, or reflecting the Weyerhaeuser lease). The Port did not, however, provide these documents to the Trial Court for *in camera* review, as it should have for any responsive document for which the Port was claiming that a privilege applied.

Moreover, as the original bates stamps on some of these documents attest, some of these documents were produced by the Port elsewhere, whether in response to another citizen's public records request or in the context of some other litigation. The moment that the Port chose to disclose a document – including this smoking gun email exchange – for which it earlier claimed privilege, the privilege ceases to apply. Yet even after the Port disclosed this smoking gun email in some other context, it did not disclose this email either to the Trial Court or to Mr. West or Mr. Jorgensen and Mrs. Johnson.

However, at the time of the original lawsuit, Mr. West and Mr. Jorgensen and Mrs. Johnson had no idea that the Port had withheld responsive documents from the Trial Court. To return to the procedural history of this case, after the Trial Court had conducted its in camera review of the 2,409 pages, it issued a 51 page memorandum decision. Port of Olympia, 146 Wn. App. at 114, *citing* West v. Port of Olympia, 2006 WL 6012649, Wash. Super. (Mar. 29, 2006). The Trial Court found many of the documents able to be disclosed in their entirety or with redactions. The Trial Court found that most of the documents fell within the deliberative process and research data exemptions to the Public Records Act. Port of Olympia, 146 Wn. App. at 114. The Trial Court found some exempt as attorney-client communications and others exempt as trade

secrets. After some further disclosures by the Port to Mr. West and to Mrs. Johnson and Mr. Jorgensen, and after motions by all parties for reconsideration, the Trial Court ordered a daily penalty of \$60 for a total of 123 days for the late disclosed records (the “Trial Court documents”), construing *all* the late disclosed records as one single document. Port of Olympia, 146 Wn. App. at 15.

The parties filed separate notices of appeal with the Washington State Supreme Court. The Supreme Court denied direct review and transferred the case to this Court, the Division II Court of Appeals. This Court (after consolidating this case with David Koenig’s appeal) transferred the case to Division I, who heard the appeal.

Division I held that because the Port had already executed the lease with Weyerhaeuser at the time of the requests, the Port’s reliance upon the deliberate process exemption of the Public Records Act was improper. Port of Olympia, 146 Wn. App. at 112. The Court held, “once the policies or recommendations are implemented, the records cease to be protected under this exemption.” Port of Olympia, 146 Wn. App. at 118 (internal citations omitted). As to the penalty imposed by the Trial Court, Mr. West and Mr. Jorgensen and Mrs. Johnson all argued that the Trial Court erred when it failed to assess a daily penalty for each individual record withheld. Port of Olympia, 146 Wn. App. at 121. Division I stated:

Here, the records reviewed by the trial court were in packets and comprised of multiple pages. The Court clearly found that the Port had improperly withheld documents and acted contrary to the express purpose of the [Public Records Act]. However, the Court also found the Port's behavior was not so egregious as to mandate the maximum penalty. The trial court chose to impose a daily penalty rather than a per record penalty.

Port of Olympia, 146 Wn. App. at 121.

After stating that the correct standard is abuse of discretion, Division I held:

Here, however, we are unable to determine whether the trial court would have assessed that same penalty had it applied the correct legal standard in reviewing the documents reviewed by the Port. Thus, on remand, the trial court may choose to impose a more stringent penalty.

Port of Olympia, 146 Wn. App. at 122.

Division I *did not* hold that the Trial Court might, on remand, choose to impose a *less* stringent penalty. The Division I decision was dated July 21, 2008.

Meanwhile, the citizens were using the documents they had been receiving in dribs and drabs from the Port in order to challenge the lease in various fora. Recall that as early as March 3, 2006, Judge Tabor held under the facts that were presented to him that the Port had not been impermissibly piecemealing the Weyerhaeuser lease in order to avoid SEPA review. If Judge Tabor had had the benefit of reading the smoking

gun email, he would have decided the case differently. Even if Judge Tabor had not been able to read the smoking gun email (at that time it was very likely as-yet-released by the Port and thus likely protected by the attorney client privilege), but had been able to review other documents that were being withheld by the Port (whether released after the Trial Court ruling, after the Division I Court of Appeals Ruling, or the undisclosed documents that the Port failed to disclose to Mr. West and Mr. Jorgensen and Mrs. Johnson and also failed to disclose to the Trial Court for *in camera* review), he would have found impermissible piecemealing. *See, e.g.*, Declaration of Jan Witt, CP 804-807; Declaration of Walter Jorgensen, CP 808-816 (stricken by Trial Court).

It was while one of Mr. Jorgensen's cases was pending before the City of Olympia Hearing Examiner that Division I ruled that the deliberative process did not apply, on July 21, 2008. CP 810 (stricken by Trial Court). Mr. Jorgensen asked the Port to release the records. *Id.* The Port argued to the Hearing Examiner that there were some records for which more than one exemption applied, and that the case had been remanded back to the Trial Court for a determination of those other exemptions besides the deliberative process. *Id.* Mr. Jorgensen argued that there were many records for which the Port had claimed only the deliberative process exemption, and argued that the Port should release

those records immediately. *Id.* After the record was closed in Mr. Jorgensen's case before the Hearing Examiner, on September 18, 2008, the Port released all the records for which it had claimed deliberative process exemption, without asking the Trial Court to consider additional exemptions. *Id.* However, since the record was closed, Mr. Jorgensen had to argue to the City of Olympia Hearing Examiner for the inclusion of the records. *Id.* The Hearing Examiner allowed the inclusion of some, but not all, of the records. *Id.*

After Division I issued its decision, this case still was not ready for remand to the Trial Court to decide whether it chose "to impose a more stringent penalty." Port of Olympia, 146 Wn. App. at 122. There were procedural speed bumps and attorney fee issues to deal with. The satisfaction of judgment for the earlier phase of the case was filed only on December 7, 2009. Then came this phase. Mr. Jorgensen and Mrs. Johnson filed the set of undisclosed documents that they and other citizens had found, which the Port had disclosed neither to Mr. West, Mr. Jorgensen and Mrs. Johnson, nor to the Court for *in camera* review. All Plaintiffs – Mr. West, Mr. Jorgensen, and Mrs. Johnson – argued that the Trial Court should hold that these undisclosed documents were responsive to their public records requests, should choose to impose a daily penalty per record (or at the very least per packet) rather than a single daily

penalty, and should impose a more stringent penalty based on the Division I ruling. The Trial Court ruled, instead, that the undisclosed documents *were not responsive to the public records requests*, imposed a *more lenient* penalty for the records the Port released after the Division I ruling (the Court of Appeals records), declined to impose a more stringent penalty for the records released pursuant to the Trial Court's rulings (the Trial Court records), and declined to impose a per record or per packet daily penalty, instead treating the thousands of pages of documents as one single record. CP 1574-1578.

IV. ARGUMENT

A. Standard of Review

An appellate court reviews a public records request *de novo*. Mechling v. City of Monroe, 152 Wn. App. 830, 222 P.3d 808 (2009), review denied 169 Wn.2d 1007, 236 P.3d 206; City of Federal Way v. Koenig, 167 Wn.2d 341, 217 P.3d 1172 (2009). This *de novo* review extends to all agency actions challenged under the Public Records Act. Building Industry Ass'n of Washington v. McCarthy, 152 Wn. App. 720, 218 P.3d 196 (2009). *De novo* review also includes review of a Trial Court decision to reduce a penalty, especially where (as here) the Trial Court received a directive from a reviewing Court to either increase or

maintain, but not reduce, the penalty. Whether the Public Records Act authorizes a Trial Court to reduce the penalty period for violation of Act is a question of law, and *de novo* review is the proper standard, not the abuse of discretion standard. Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 98 P.3d 463 (2004), *as amended, reconsideration denied*. However, even under the abuse of discretion standard, where, as here, an Appellate Court decision limits the Trial Court’s discretion, the Trial Court cannot properly go beyond the bounds set by the Appellate Court and render a decision that contradicts the letter and spirit of the Appellate direction it received on remand.

B. General Rules for Public Records Act Cases

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030.

“[T]he Public Records Act is a strongly-worded mandate for broad disclosure of public records.” Neighborhood Alliance of Spokane County

v. County of Spokane, 153 Wn. App. 241, 258, 224 P.3d 775 (2009), *reconsideration denied; review granted* 168 Wn.2d 1039, 233 P.3d 889; see also West v. Port of Olympia, 146 Wn. App. 108, 116, 192 P.3d 926 (2008). “The central purpose of the Washington Public Records Act is preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.” King County v. Sheehan, 114 Wn. App. 325, 335, 57 P.3d 307 (2002); Building Industry Ass'n of Washington v. State Dept. of Labor & Industries, 123, Wn. App. 656, 98 P.3d 537 (2004), *review denied* 154 Wn.2d 1030, 116 P.3d 399; Kitsap County Prosecuting Attorney's Guild v. Kitsap County, 156 Wn. App. 110, 231 P.3d 219 (2010). Administrative inconvenience, governmental embarrassment, or difficulty does not excuse strict compliance with the Public Records Act (PRA). Rental Housing Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 535, 199 P.3d 393 (2009).

In construing the Public Records Act, a court looks at the Act in its entirety in order to enforce the law's overall purpose. Rental Housing Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 536, 199 P.3d 393 (2009). Such exemptions to disclosure as applied under the Public Records Act should be narrowly construed, while the disclosure provisions should be liberally construed, to provide a maximal disclosure. Port of Olympia, 146 Wn. App. *supra* at 116; O'Neill v. City of Shoreline,

145 Wn. App. 913, 187 P.3d 822 (2008), *reconsideration denied, review granted*, 208 P.3d 554. “The Public Records Act begins with a mandate of full disclosure of public records, and that mandate is limited only by the precise, specific, and limited exemptions the Act describes. If public records do not fall within an exemption from disclosure under the Public Records Act, their disclosure must be timely.” West v. Thurston County, 144 Wn. App. 573, 581, 183 P.3d 346 (2008) (*citations omitted*); Yousoufian, 152 Wn.2d 421 *supra*; Neighborhood, *supra*. A party seeking to prevent disclosure of documents under the public records act bears the burden of proof. RCW 42.56.550 (1); Zink v. City of Mesa, 140 Wn. App. 328 at 335, 166 P.3d 738 (2007), *amended on reconsideration*; Tacoma News, Inc. v. Tacoma-Pierce County Health Dept., 55 Wn. App. 515, 778 P.2d 1066, *review denied*, 113 Wn.2d 1037, 785 P.2d 825 (1989); Confederated Tribes of Chehalis Reservation v. Johnson, 135 Wn.2d 734, 958 P.2d 260 (1998). These rules imply that the Court must view with caution any interpretation of the statute that could frustrate its purpose (as the interpretation used by the Trial Court in this case would). Kleven v. City of Des Moines, 111 Wn. App. 284, 289-290, 44 P.3d 887 (2002), *reconsideration denied*.

When governmental agency fails to respond to request for public records as provided in Public Records Act, it violates the Act, and the individual requesting the public record is entitled to a statutory penalty.

Smith v. Okanogan County, 100 Wn. App. 7, 12, 994 P.2d 857 (2000).

There is no requirement that the agency must have acted unreasonably for a penalty to be awarded to a records requester under the Public Records Act, based on an agency's wrongful withholding of public records. King County v. Sheehan, *supra* at 351. When the failure to disclose is substantial (as here), the penalty should so reflect, and should fall within the high, rather than the low, end of the range. Yousoufian v. Office of Ron Sims, 137 Wn. App. 69, 151 P.3d 243 (2007), *reconsideration denied, review granted* 162 Wn.2d 1011, 175 P.3d 1095, *affirmed as modified* 168 Wn.2d 444, 229 P.3d 735.

C. It is Inappropriate to Treat a Group of Different Responsive Documents as a Single Document for Purpose of the Public Records Act.

The Trial Court here appears to have divided the documents, which include hundreds of distinct documents with different degrees of kinship (by topic, file, author) into three sets of documents and then treated each of those sets as a single document, imposing a daily penalty for the nondisclosure of two sets, and ruling that all the disparate documents in the third set were categorically nonresponsive. This approach to the documents, while it exploits an ambiguity in the statute recognized by the Supreme Court (based on the ambiguity of the statute and the purpose for enacting the Public Records Act, the assessment of per-day penalties for each requested record is not required. Yousoufian, 152 Wn.2d 421 *supra*

is an error because it frustrates the purpose of the Public Records Act in violation of Kleven, *supra* at 289-290.

The Public Records Act (PRA) exists to give individual citizens access to public documents so that the citizens can exercise their inherent right to investigate the actions of their government and exercise their political rights to disagree with governmental actions, and to hold governmental actors accountable for misdeeds. The Trial Court's conflation of disparate documents together frustrates this purpose in several respects. First, it tends to obscure, rather than reveal, the meaning and importance of the public documents – the opposite of the intended effect of the PRA. Second, by treating all documents as a single document, entire documents can go missing without proper redress, as the missing document would merely be part of a whole and the Court could find (as it may have impliedly found here with regard to the nondisclosed documents) that the overall effect has been full disclosure despite missing “parts” of the documents. Finally, conflation into sets of documents without reference to their content, purpose or administrative context thwarts review of agency action by preventing the proper scrutiny of the document in comparison with the scope of the request to determine responsiveness. In this case, this problem can be seen starkly in the Court's across-the-board ruling that the documents that had been omitted from the initial review set were “nonresponsive” even though the

documents fall within the scope of the Appellants' public disclosure requests.

Further, even Yousoufian, *supra*, while holding that a per document penalty, unlike a per diem penalty, is not strictly required, appeared to favor a penalty award by category of documents. That is, documents should be grouped (by subject, author, purpose, or some similar organizational principle) and then administered by category set. Again, in this case, the Trial Court grouped the documents based on when and if a Court ordered them to be disclosed, rather than based on any organizational principle arising from the substance, purpose, or administrative context of the document.

This Court should rule that, even if a per document penalty is not applied, a multiplier penalty should be applied based on a logical organization of responsive documents into discrete categories of related documents (by author, or purpose, or some such) and that this organization should be done expressly, in a transparent and reviewable manner, by the Trial Court. A single per day penalty should only be imposed when a single document or a single discrete category of documents is requested, not with disparate documents of different kinds are requested.

D. The Court Erred in Reducing the Penalty Rate

Whether the Public Records Act authorizes a Trial Court to reduce the penalty period for violation of Act is a question of law, and *de novo* review is the proper standard, not the abuse of discretion standard.

Yousoufian, 152 Wn.2d 421 *supra*.

In remanding this case to the Trial Court, Division I stated “[W]e are unable to determine whether the Trial Court would have assessed that same penalty had it applied the correct legal standard in reviewing the documents withheld by the Port. Thus on remand, the Trial Court may choose to impose a more stringent penalty.” Port of Olympia, *supra* at 122. The Trial Court misinterpreted this as leave to impose a more lenient penalty for the Court of Appeals documents on remand. This was clear error and a near flaunting disregard of remand instructions from the Court of Appeals. This Court should reverse the reduction of penalty rate and bring the outcome of this case back into accord with the earlier decision of Division I in this matter.

E. The Court Erred in Failing to Recognize Additional Responsive Documents Identified by Appellants as Nondisclosed Documents under the Public Records Act.

“[A] person requesting documents from an agency under the Public Records Act must state the request with sufficient clarity to give the agency fair notice that it had received a request for a public record.”

Wood v. Lowe, 102 Wn. App. 872, 878, 10 P.3d 494 (2000). However, when such a request has been made, both the agency and any reviewing court must act to make all public records within the scope of the request available for inspection and copying. In re Dependency of KB, 150 Wn. App. 912 at 919-920, 210 P.3d 330 (2009); Servais v. Port of Bellingham, 127 Wn.2d 820, 904 P.2d 1124 (1995). “Once documents are determined to be within scope of Public Disclosure Act, disclosure is required unless specific statutory exemption is available.” Kleven, *supra* at 23. This means that to determine responsiveness of a document to a request, first the Agency and then the Court must analyze and interpret the request to determine its scope and then must analyze and interpret its documents to determine whether the document falls within its scope. In this case, Appellants discovered and produced 298 pages of documents which fell within the scope of their requests but which had never been produced, even for *in camera* review by the Court. The Port asserted that the documents were nonresponsive and the Trial Court agreed, citing two bases for the documents being nonresponsive: 1. That the documents had been produced by the Port in discovery in other litigation (which the Court ruled was a sufficient disclosure), and 2. That the documents would not have been actually useful in the SEPA litigation the Appellants intended to use them in. What is wholly missing from this analysis is a consideration

of the scope of the public records requests and the secondary determination of whether the documents fall within the set of documents requested. That is, neither the Court nor the Port reviewed and interpreted the Appellants' public records requests across from the documents allegedly omitted to determine their responsiveness. This is clear error.

1. Disclosure Outside the PRA Process is Irrelevant

Availability of records from another source does not affect analysis under Public Records Act (PRA). The PRA does not exempt records that the requester has already received from another source. Tacoma Public Library v. Woessner, 90 Wn. App. 205, 210, 951 P.2d 357 (1998), *review granted, cause remanded* 136 Wn.2d 1030, 972 P.2d 101, *on remand*, 972 P.2d 932. Disclosure to a third party, even one with an overlapping legal interest, is also not a proper or sufficient response to a public records request. Livingston v. Cedeno, 135 Wn. App. 976, 146 P.3d 1220 (2006), *review granted*, 161 Wn.2d 1014, 171 P.3d 1057, *affirmed*, 164 Wn.2d 46, 186 P.3d 1055.

2. Utility of Documents is Irrelevant

The Appellants sought the documents they requested to support a SEPA claim that the Port of Olympia and its tenant, Weyerhaeuser, were illegally piecemealing environmentally significant construction work in an

effort to avoid environmental review. Appellants were unsuccessful in their SEPA challenges. However, Appellants believed, and still believe, that the outcome of those challenges could have been different if the full record had been provided to them in time for them to present the information in the SEPA litigation.

It is clear from the ruling in this case that the Trial Court disagreed with Appellants' assessment of the utility of the documents which had not been disclosed, either under the Trial Court's original ruling or because the Port had failed to submit the documents for Court *in camera* review. The Trial Court applied this utility standard in determining responsiveness of the documents. That was error.

While harm to a party requesting the documents and the significance of the documents requested are factors to consider in setting the daily penalty, they are not factors that are relevant to either the determination that documents are responsive to a request or the determination of the number of days responsive documents were wrongfully withheld. To make these preliminary determinations, the Court must look at the scope and date of the public document request and the nature of the documents withheld and determine whether the documents fit the scope of the request. The Trial Court did not undertake any such analysis here. That is clear error, and this Court should reverse,

either remanding this case so that such an analysis can be expressly done or, preferably, conducting its own analysis and deciding this case with finality on its own authority.

F. This Court Should Enter a Ruling Resolving this Matter with Finality.

“In reviewing a Public Records Act request, the Court of Appeal stands in the same position as the Trial Court.” Lindeman v. Kelso School Dist. No. 458, 162 Wn.2d 196, 200, 172 P.3d 329 (2007), *on subsequent appeal*, 156 Wn. App. 1028.

The Trial Court erroneously applied what it believed to be the expeditious and good faith disclosure of documents following the Port’s loss on appeal, to be an indication of general good faith and, therefore, used that belated disclosure as a retrospective ground for reducing the original penalty. This was error. Subsequent events do not affect the wrongfulness of the agency’s initial action to withhold the records if the records were wrongfully withheld at that time. Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 101, 117 P.3d 1117 (2005).

The process for determining the appropriate award for a violation of the Public Records Act requires: (1) a determination of the amount of days the party was denied access, and (2) a determination of the

appropriate per day penalty between \$5 and \$100 depending on the agency's actions. Yousoufian, 152 Wn.2d 421 *supra*. This penalty may apply on a per-document, as well as a per-day, basis, providing for a per-document multiplier where appropriate. Lindberg v. Kitsap County, 82 Wn. App. 566, 919 P.2d 89 (1996), *review granted* 130 Wn.2d 1025, 930 P.2d 1229, *affirmed in part, reversed in part* 133 Wn.2d 729, 948 P.2d 805.

This penalty rate is not dependent on the agency's good or bad faith. Rather, the Public Records Act provision for award of costs, attorney fees, and monetary penalty for each day the prevailing party was denied access to public records by an agency is penalty intended to encourage broad disclosure and deter improper denial of access to public records, and applies even if the agency withheld the documents in understandable error or in utmost good faith. Doe I v. Washington State Patrol, 80 Wn. App. 296, 908 P.2d 914 (1996). These penalties are mandatory, within the prescribed range. Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 117 P.3d 1117 (2005). However, bad faith nondisclosure is a ground for an imposition of a penalty at the high end of the range. Yousoufian, 165 Wn.2d 439, 200 P.3d 232 (2009), *reconsideration granted, on reconsideration* 168 Wn.2d 444, 229 P.3d 735; King County v. Sheehan, *supra*.

Also, a party need not show actual damages or any actual harm as a predicate to receiving the penalty award for nondisclosure of public documents. Amren v. City of Kalama, 131 Wn.2d 25, 929 P.2d 389 (1997). Harm to the party who was denied access to public documents may be considered as a ground to penalize an agency in the high end of the range. Yacobellis v. City of Bellingham, 64 Wn. App. 295, 825 P.2d 324 (1992). However, the purpose of the penalty for violation of Public Records Act is to promote access to public records and governmental transparency; it is not meant as compensation for damages. Yousoufian, 165 Wn.2d 439 *supra*.

This case has already been reviewed and remanded once already. Division I reversed the Trial Court and remanded this matter to the Trial Court with fairly clear guidelines for the Trial Court to follow in re-evaluating and potentially increasing the penalty it had issued. Rather than follow those guidelines, the Trial Court cynically and (apparently) intentionally disregarded them, decreasing rather than maintaining or increasing its penalty. The Trial Court decision, from its first sentence to its final words, applied an idiosyncratic standard of “community spiritedness” as a trump over the proper legal standard of governmental responsiveness to citizen inquiry and oversight.

There is no good reason to believe that the Trial Court would behave more appropriately on a second remand. This Court has authority to decide this case with finality and impose a substitute penalty. It should do so, and it should impose a penalty of \$263,220 in accordance with that sought in the Supplemental Memorandum of 8/25/2010 (CP 1421-1423), with an additional fee award and a credit for previous penalties paid as supported by supplementary documents.

G. Appellants are Entitled to Attorneys' Fees on Appeal.

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

RCW 42.56.550(4) (in relevant part).

However, while the award of attorney fees under the Public Records Act is not discretionary, the amount awarded is. Port of Olympia, supra.

Appellants request fees on appeal under this statute pursuant to RAP 18.1.

V. CONCLUSION

The Port of Olympia repeatedly failed to provide full, timely and proper disclosure of public documents to several citizens requesting documents under the Public Records Act (PRA). While the Trial Court

ruled that these failures were innocent, such a ruling stretches the evidence past the breaking point. The more plausible explanation is that the Port of Olympia, in an attempt to avoid proper environmental review, intentionally thwarted citizen scrutiny until such time as the possibility for review had passed and then disclosed a large volume of no-longer-useful documents. This belated disclosure is not good faith.

However, even if the Port were acting in good faith, there is no question that the Port failed to provide proper and timely disclosure of public documents. Therefore, the Port has violated the Public Records Act. Even a good faith violation of the PRA requires a mandatory penalty be imposed, and that penalty must take into account the extent to which the person requesting the documents was damaged or deprived by the nondisclosure, as well as the good or bad faith of the Port. It is undisputed that the delay in disclosure prevented the documents from being used as the Requesters intended.

Initially, the Trial Court ordered the Port of Olympia to disclose documents and imposed a penalty of \$60.00 per day for the nondisclosure. The Trial Court, however, sustained the Port of Olympia's refusal to disclose many documents under the "deliberative process exemption." The Requesters appealed. On Appeal, Division I of the Court of Appeals reversed, remanding the case to the Trial Court for additional disclosure of

the withheld documents and ruling that the Trial Court “may increase” the penalty in a manner “consistent” with the decision.

Thereafter, the Plaintiffs on remand discovered 298 pages of additional responsive documents which hadn’t even been submitted to the Trial Court for *in camera* review. These Plaintiffs then requested an increased award consistent with the Court of Appeals’ decision, both as to the documents previously withheld as “deliberative documents” and as to the newly discovered documents. Johnson and Jorgensen calculated the potential penalty as being Three Million Eight Hundred Thousand dollars, but requested a recalculated penalty of only Two Hundred Sixty Eight Thousand Two Hundred Twenty dollars (\$268,220).

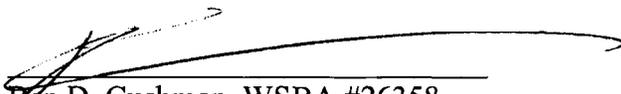
On remand, the Trial Court, disregarding the clear instructions it had received on review, imposed a more lenient penalty rather than a more stringent one for the Court of Appeals documents. The Trial Court also mischaracterized all nondisclosed documents as single documents, without regard to the distinguishing features of the documents either as discrete documents or as document categories. Rather than impose a full and proper penalty that takes seriously the scope of the violation of the Public Records Act, the Trial Court set a single daily omnibus penalty for all nondisclosed documents. Finally, the Trial Court failed to analyze the newly discovered documents in light of the longstanding public document

requests at issue in this case to determine whether those documents were responsive to those requests. Rather, the Trial Court issued a blanket ruling, without any analysis of the content of the documents and without any reference to the terms of the requests, that all the newly discovered documents were not responsive and therefore not a proper basis for either an order of disclosure or an additional penalty. These rulings do not comport with the requirements of the statute and its interpreting case law. Further, these rulings amount to a cynical and intentional refusal to follow either the letter or the spirit of a Court of Appeals decision on review.

The Trial Court's errors in this case call for complete, swift and total reversal. The Trial Court's disregard of Appellate direction should not be ignored or sustained. Rather, this Court should prevent further mischief by the Trial Court and reverse without remand, exercising its authority to decide the case *de novo* and enter judgment without further process.

SUBMITTED this 17th day of March, 2011.

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Jorgensen and Johnson

COURT OF APPEALS
DIVISION II

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON

BY [Signature]
DEPUTY

I declare under penalty of perjury according to the laws of the State of Washington, that on the date signed below, I caused the foregoing document to be filed with this Court, and emailed and mailed to opposing counsel and parties as indicated below:

DATED this 17 day of March, 2011.

[Signature]

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