

No. 41334-5-II

FILED
BY: *ks*

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

ARTHUR WEST, WALTER JORGENSON, EVE JOHNSON

Vs.

PORT OF OLYMPIA and WEYERHAEUSER

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

APPELLANT'S OPENING BRIEF

**Arthur West
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Olympia, Washington, 98501**

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EVIDENCE RULES

ER 408

I.INTRODUCTION.

This is an appeal in a case under the Washington State Public Records Act, involving a penalty issued after remand by the Honorable Judge Hicks of the Thurston County Superior Court in regard to records withheld by the Port of Olympia concerning a proposed log yard for the Weyerhaeuser Corporation.

Included in the records that the Port of Olympia deliberately concealed were records that were necessary for a full evaluation of the environmental conditions of the proposed project, including the presence of federal wetlands on, and contamination of, the project site and the ongoing discharge of dangerous carcinogenic and toxic materials in violation of the Clean Water Act.

This appeal concerns a review of rulings of the Thurston County Superior Court issued in response to an Order of Remand from Division I of the Court of Appeals in *West v. Port of Olympia*.

The Order of remand charged the Thurston County Court with two main directives, (1) to determine the propriety of the additional exemptions to disclosure asserted by the port not considered by the Superior Court when it exempted them under the deliberative process exemption, and, (2) to consider applying a more stringent penalty based

upon the appropriate legal standard.

On September 22 and September 24 of 2010, the honorable Judge Hicks, acting pursuant to the Order of Remand of Division I of the Court of Appeals, issued a minimal penalty of 16,905.00 to both West and the League and Jorgenson. A judgment and 2 final Orders were entered on September 22 and 24. The penalty was based upon \$30 a day for 123 days prior to the Trial court's overturned order and \$ 15 a day for the 863 days that records were withheld by the Port without any basis ever having been argued for the various exemption asserted, other than deliberative process. The Court also declined to find newly disclosed records responsive to the appellant's requests.

The Court's rulings were made irrespective of the direction of the Court of Appeals that **“we remand to the trial court to determine whether any of the other exemptions claimed by the Port are applicable.”** and that...**“on remand, the trial court may choose to impose a more stringent penalty”**. The Court declined any attempt at consideration of the Yousoufian factors as they applied to the Port's response to West, but instead based its order-at least as it concerned the Port's reply to West-almost exclusively upon irrelevant and improper factors, including evidence barred by ER 408.

These improper factors included: (1) the Honorable Judge Hicks subjective Communitarian sentiments concerning the absence of any bad faith in “the community”, (2) the Port's (somehow exculpatory) actions in refusing to argue the exemptions it had frivolously asserted without any basis in law solely for the purpose of delay and burdening the appellants, and releasing these records to the plaintiffs after it was too late for them to be used to argue for environmental review of the dangerous and unlawful conditions that the Port had deliberately concealed, and (3) the actions of David Koenig in accepting a settlement, accepting the Port's arguments that this settlement was relevant and should be binding upon West and the League/Jorgenson (in clear violation of ER 408).

Despite the extensive briefing and plaintiff West's assertion of the specific factors of the port's response to him on November 16, January 3, January 10, and January 17 as they differed from the port's later and disparate responses to the League/Jorgenson, Judge Hicks refused to consider or even recognize that any of these facts had been argued, in a manner violative of 14th Amendment due process protections and equal protection of law.

West maintains that Judge Hicks, by refusing to even consider the disparate factual circumstances of the separate responses to West and the

League/Jorgenson, which made by different people, and which were nearly two months apart and very different in scope¹, failed to base his “Yousoufian” analysis and the resulting Order and judgment on facts in the record, a manifest abuse of discretion and a violation of equal protection of law.

In the process, Hicks arbitrarily and capriciously refused to recognize that indisputable evidence in the Court record, (including the actual correspondence of January 17, 2006 attached to the Second Declaration of Carolyn Lake), as well as evidence of Lake;s declaration in Cause No. 07-2-1198-3 that demonstrated that **the Port had never disclosed the Floyd Snider Environmental Site assessment or the EDR Wetlands Radius Map to West and had falsified the Port's administrative record** (in an action where it was material evidence) to eliminate any consideration of the Assessment by the reviewing Court.

Because of the concealment of the ESA and the EDR report and page 49 of the Port's lease with Weyerhaeuser that incorporated the ESA

¹ Significantly, while the original pre-litigation response to West of November 8 was issued by interim Director Rudolph, and refused to admit the existence of any records other than the Lease or provide any reasonable disclosure, the reply to Jorgenson/League of January 5 was made by Port counsel Lake and provided a significant amount of records. In addition, the responses of the 17th of January were not consistent, in that the Floyd-Snider ESA and related documents were concealed from West.

into the lease by reference, the port was enabled to conceal the fact that the project was on federal Wetlands and the full extent of toxic contamination and discharge of toxic material to the Sound, and advance a project on contaminated land without full disclosure of the facts to the public. The Port was also allowed by the Court to silently withhold the newly discovered records without any penalty whatsoever.

In light of the instructions of the Appellate Court on remand, that the court consider imposing **a more stringent penalty**, plaintiff West believes that the Court abused its discretion in **substantially lowering the penalty** it previously assessed, and refusing to apply the correct legal standards to determine the level of the agencies culpability or assess a penalty in accord with an impartial consideration of the actual facts of the case.

The record of the determinations of Judge Hicks confirm that he took absolutely no note of the facts of the circumstances of the Port's response to West of November 16, or the Port's responses of January 3, 10, and 17, and instead based his determination on 3 irrelevant non-Yousoufian factors:

1. Judge Hicks' "Communitarian" based creed of a utopian social order and "community" where the government can do no wrong.

2. The Port's refusal to support or argue the frivolous and baseless exemptions it had asserted to delay disclosure after Division I remanded the matter for such consideration.
3. The actions of David Koenig, a 3rd late filing fellow traveler who failed to participate in any of the proceedings in the trial court, who had no substantial interest in the records, and who apparently accepted a settlement from the Port, which were offered and considered in violation of ER 408.

In addition, Judge Hicks abused his discretion when he failed to **liberally construe the PRA and narrowly construe its exemptions to promote the public policy of the PRA by finding that the newly discovered records and/or the Floyd Snider ESA were not responsive to the parties requests. (See RCW 42.56.030)**

West believes that if the Quasi-Criminal penalties imposed by the PRA are required to be assessed in a manner that is not void for vagueness, Judge Hicks' reliance upon the actions of the Port in refusing to argue the exemptions they asserted after losing in the Court of Appeals, on a settlement made by parties the neither West nor Jorgenson or the League had any control over and his Panglossian ideals of an atavistic Greco-Roman "Communitarian" utopia superceding the terms of statute must be overturned, especially since these factors appear to have completely eclipsed any appropriate or Yousoufian based factors, and since the Honorable Judge Hicks never even bothered to acknowledge or

consider the separate circumstances of the Port's reply to West.

The Supreme Court is to be commended for its good faith attempt to supply structure to the penalty assessments under the PRA. in the recent Yousoufian rulings. However, if this is to be regarded as a step forward rather than 16 great leaps into the void of uncertainty backwards, sufficient safeguards must be acknowledged to forestall arbitrary and capricious application of the law in a manner violative of the 14th Amendment and the guarantee of a Republican system of government..

The intent of the people in enacting the PRA was to ensure that organizations like the port of Olympia would not be able to conceal information necessary to their exercise of 1st Amendment liberties. The penalty provisions were intended to act as a deterrent to forestall further abuses before they occurred, not to immunize an agency for frivolously asserting exemptions and refusing to defend them on review.

From the Port's disparate responses to West, Witt, and the League/Jorgenson, it is clear that the Port knew that it did not have to consider the rights of individuals like West. Not until the League of Women Voters became involved did the Port become serious in its response. Even then, it selectively edited its replied to West to deny him access to the critical ESA and EDR reports that would have made the

difference between success and failure in many cases for environmental review.

The circumstances of the Port's original reply to West, which was not even made by the same person or process that the port employed in regard to the League/Jorgenson, and which was vastly different in scope, requires a higher penalty be applied to the port's evasion and obstruction of its reply to West, especially since the port's discriminatory response revealed a policy of invidious discrimination against a suspect class.

Up until the present date, the Port has been able to profit from its denial of equal protection and its selective denial of appellant West's rights, secure in the belief that the Courts of this State only respond to the rich and wealthy, and that regular citizen's rights may be violated with impunity.

Up to the present date, all of the proceedings in this case have been consistent with and in accord with this view of the world, where individual rights mean nothing to the rich and powerful, who may trample ordinary citizens with impunity, and the Constitution of the United States and the State of Washington are disregarded in preference to a nebulous creed of totalitarian Communitarianism.

West sincerely hopes that the Port of Olympia are incorrect in

adopting and following these policies, and that, if the PRA be effectuated in a manner consistent with the "sovereign" intent of the people who enacted the initiative (and the legislature which subsequently amended it) (See RCW 42.56.010-030) that the people should retain control of government, and that penalties should deter, rather than encourage agency delays and scorched earth tactics, and discourage the blatant and invidious disregard for individual rights demonstrated by the Port's (and the Superior Court's) disparate responses to citizens in preference to the rich and powerful.

Appellant West contends that fundamental fairness, the Yousoufian ruling (and the 14th Amendment) require the Court assessing a penalty under the PRA to consider the actual and specific individual circumstances of an agency's response to the citizen making the request, not those of the agency in responding to other parties in a different manner.

If there is to be any consideration of the 14th Amendment due process requirement that court decisions be made based upon the actual circumstances of the case, the deliberate and undeniable failure of the Court to consider the individual and particular circumstances of the Port's response to West on November 18, 2005, as they differed from the facts and circumstances of the January 5, 2006 initial response to the League

and Jorgenson (and the subsequent history of the responses to both parties) was a manifest abuse of discretion.

Plaintiff contends that the Trial Court failed to follow the direction of the Court of Appeals to determine the propriety of the ports remaining exemptions and to consider adjusting the \$65 dollar penalty award upward based upon the correct legal standard

Instead, the Court abused its discretion by failing to apply the Yousoufian factors in a manner consistent with the clear weight of evidence, failing to recognize plainly apparent concealment and suppression of evidence by the Port, and in assessing a penalty less than 10% of the amount spent by the Port to wrongfully oppose disclosure that had no deterrent effect and instead encouraged the Port to further and continuing violations of the PRA. (See RCW 42.56.030 Yousoufian v. Sims, 168 Wn.2d 444; 229 P.3d 735; (2010))

ASSIGNMENT OF ERRORS

1. THE COURT ERRED IN FAILING TO FOLLOW THE ORDER OF REMAND, AND IN ISSUING AN ORDER AND JUDGMENT THAT WERE MADE FOR UNTENABLE REASONS, BASED UPON FACTS WHOLLY UNSUPPORTED IN THE RECORD, AND WHICH WERE PRODUCTS OF AN ERRONEOUS VIEW OF THE LAW AND THE APPLICABLE LEGAL STANDARDS

2. THE COURT ERRED IN FAILING TO FIND THE NEWLY DISCLOSED RECORDS RESPONSIVE OR RULE IN ACCORD WITH THE PORT'S JANUARY 25 MEMORANDUM, EVIDENCE IN THE COURT FILE, AND THE PORT'S DECLARATION IN CAUSE NO. 07-2-01198-3 THAT ESTOPPED THE PORT FROM CLAIMING IT HAD DISCLOSED THE FLOYD SNYDER ESA

3. THE COURT ERRED IN FAILING TO RECOGNIZE MATERIAL EVIDENCE DEMONSTRATING THAT THE PORT'S REPLY TO WEST ON NOVEMBER 8, 2005 WAS VASTLY DIFFERENT THAN THE REPLY TO JORGENSON ON JANUARY 5, 2006 AND, IN VIOLATING USCA 14.

4. THE COURT ERRED IN FAILING TO IMPARTIALLY CONDUCT THE PENALTY ANALYSIS OF THE YOUSOUFIAN FACTORS BASED UPON EVIDENCE IN THE RECORD OF THE INDIVIDUAL CIRCUMSTANCES OF THE PORT'S RESPONSES TO WEST AND IN FAILING TO TO GROUP THE RECORDS

5. THE COURT ERRED IN APPLYING A QUASI-CRIMINAL STATUTE IN AN ARBITRARY MANNER THAT VIOLATED EQUAL PROTECTION OF THE LAW AND THE VOID FOR VAGUENESS DOCTRINE

6. THE COURT ERRED IN FINDING THAT THE PORT'S FRIVOLOUS ASSERTION OF EXEMPTIONS THAT IT REFUSED TO SUPPORT ON REMAND AFTER IT WAS TOO LATE FOR WEST AND JORGENSON TO EFFECTIVELY USE THE RECORDS WAS A MITIGATING RATHER THAN AN AGRAVATING FACTOR AND IN CONSIDERING OTHER IMPROPER EXTRA-YOUSOUFIAN FACTORS

ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

1. DID THE COURT ERR IN FAILING TO FOLLOW THE ORDER OF REMAND, AND IN ISSUING AN ORDER AND JUDGMENT THAT WERE MADE FOR UNTENABLE REASONS, BASED UPON FACTS WHOLLY UNSUPPORTED IN THE RECORD, AND WHICH WERE PRODUCTS OF AN ERRONEOUS VIEW OF THE LAW AND THE APPLICABLE LEGAL STANDARDS ?

2. DID THE COURT ERR IN IN FAILING TO FIND THE NEWLY DISCLOSED RECORDS RESPONSIVE OR RULE IN ACCORD WITH THE PORT'S JANUARY 25 MEMORANDUM, EVIDENCE IN THE COURT FILE, AND THE PORT'S DECLARATION IN CAUSE NO. 07-2-01198-3 THAT ESTOPPED THE PORT FROM CLAIMING IT HAD DISCLOSED THE FLOYD SNYDER ESA?

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4. DID THE COURT ERR IN FAILING TO IMPARTIALLY CONDUCT THE PENALTY ANALYSIS OF THE YOUSOUFIAN FACTORS BASED UPON EVIDENCE IN THE RECORD OF THE INDIVIDUAL CIRCUMSTANCES OF THE PORT'S RESPONSES TO WEST, AND IN FAILING TO TO GROUP THE RECORDS?

5. DID THE COURT ERR IN APPLYING A QUASI-CRIMINAL STATUTE IN AN ARBITRARY MANNER THAT VIOLATED EQUAL PROTECTION OF THE LAW AND THE VOID FOR VAGUENESS DOCTRINE?

6. DID THE COURT ERR IN FINDING THAT THE PORT'S FRIVOLOUS ASSERTION OF EXEMPTIONS THAT IT REFUSED TO SUPPORT ON REMAND AFTER IT WAS TOO LATE FOR WEST AND JORGENSEN TO EFFECTIVELY USE THE RECORDS WAS A MITIGATING RATHER THAN AN AGRAVATING FACTOR AND IN CONSIDERING OTHER IMPROPER AND IRRELEVANT FACTORS?

STATEMENT OF THE CASE

On or about November 8, 2005, Arthur West, of Thurston County, Washington, made a public records request to the Port of Olympia, for “An index to and all records concerning the recent repaving contract and all developments required in the ports recent contract with Weyerhaeuser, including all correspondence, written or electronic.” (CP at 399)

On November 16, 2005, interim director Rudy Rudolph responded by disclosing the Weyerhaeuser lease and port SEPA policy. (See CP at 399)

Subsequently, West discovered that a very different response was made to Jan Witt, who had made a virtually identical request for records. (see CP at 399-400)

West filed suit on January 2 and obtained a show cause order on January 4, 2005. (See CP at 399-400)

On January 3, January 10, January 17, and January 23, and January 27 the port made supplemental replies prior to the Substantial compliance date originally set by the court. (CP at 399-400)

The Port's correspondence to West of January 17, appearing in the record as an attachment to the Port's January 25, 2006 Memorandum, **did not include the Floyd Snyder ESA or the EDR Wetlands delineation**

report incorporated in the ESA. (CP at 817-888)

On March 3, 2006, the Port produced records. (CP at 400-401)

On March 29, 2006 the Superior Court issued its 51 page order.
(CP at 400-401)

On April 12, 2006 the Port released 55 records deemed public by
the Court. (CP at 400-401)

On May 18, 2006,an additional 11 records were released (CP at
400-401)

On May 27, 2006, the Port produced an additional 4 records (CP
at 400-401)

On May 30, 2006, the Port released additional records, as required
by the show cause order brought by plaintiffs. (CP at 401)

On July 21, 2008, The Court of Appeals released its published
opinion in this case. (CP at 401)

In overturning the trial Court's ruling on the deliberative process
exemptions, Division I ruled...the record before us indicates that the trial
court did not necessarily consider other exemptions claimed by the Port
once it found the deliberative process exemption applied. In its March 29,
2006 order, the trial court directed the trial court: **“to determine whether
any of the other exemptions claimed by the Port are applicable”**

(West v. Port of Olympia)

In regard to the penalties the Court stated...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 withheld by the Port. Thus on remand, the trial court may choose to impose a more stringent penalty. (West v. Port of Olympia)

After the Court of Appeals ruling, the port released the records which the had been remanded back to the Superior Court for consideration of additional exemptions. Despite having previously asserted exemptions for these records, the Port refused to substantiate their claims with any legal argument whatsoever. (CP at 1515-1521)

On 11-20-2009 a judgment was entered granting costs and fees to Talmadge against both the Port and West. (Transcript of Nov. 20, 2009)

On June 18, 2010 a hearing was held on the scope of the penalty hearing in light of a massive body of newly disclosed records. (transcript of June 16, 2010)

On August 25, 2010, the Superior Court held a hearing on remand. (CP at 1574), Transcript of August 25

On September 17 a hearing was held and a satisfaction of judgment issued, and on September 22, a judgment was issued re

Appellant West. (CP at 366)

A week later, an Order Awarding Penalties on remand and an Order setting attorney fees was issued by the honorable Judge Hicks (See CP at 1579-1581 and 1574-1578 , respectively)

The parties timely appealed on 10-18-2010 and 10-21-2010.

West Joins in all of the issues and errors raised by Jorgenson/Johnson

ARGUMENT

I. THE COURT ERRED IN FAILING TO FOLLOW THE ORDER OF REMAND, AND IN ISSUING AN ORDER AND JUDGMENT THAT WERE MADE FOR UNTENABLE REASONS, BASED UPON FACTS WHOLLY UNSUPPORTED IN THE RECORD, AND WHICH WERE PRODUCTS OF AN ERRONEOUS VIEW OF THE LAW AND THE APPLICABLE LEGAL STANDARDS

It is apparent from the transcripts of the hearing of August 24 and September 22 that the Honorable Judge Hicks, in issuing the orders and Judgment (appearing at CP 1562-1564 (Judgment of September 22, 2010) and CP 1574-1578 and 1579-1581 (Orders of September 24, 2010) failed to follow the instructions on remand, which were, in pertinent portions... **to determine whether any of the other exemptions claimed by the Port are applicable.”** and that...**“on remand, the trial court may choose to impose a more stringent penalty”**.

Plaintiff maintains that had the Court adhered strictly to the terms of the order of remand, and determined that the other exemptions asserted by the Port were frivolous, and exercised its discretion upward to “consider a more stringent penalty” this case could have been decided long ago without unreasonable delay and needless expenditure of judicial resources.

“The general rule (as to compliance with an Order of Remand) is as follows:

“ ‘On remand,...the trial court's duty is to comply with the appellate mandate “according to its true intent and meaning, as determined by the directions given by the reviewing court.” Ex parte Alabama Power Co., 431 So.2d 151 (Ala.1983) When the mandate is not clear, the opinion of the court should be consulted. See Cherokee Nation v. Oklahoma, 461 F.2d 674 (10th Cir.), cert. denied, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 489 (1972).’

The trial court proceedings on remand must be in accordance with the mandate and the result contemplated in the appellate court’s opinion. Therefore, a trial court must follow the mandate of the appellate court. *Jerry Bennett Masonry Contr., Inc. v. Crossland Constr. Co.*, 213 S.W.3d 733 (Mo. Ct. App. 2007) Similarly...

The trial court has a duty to follow the directions of the (Appellate) Court on remand. See *Stone v. Miracle*, 196 Okl. 42, 162 P.2d 534 (1945). See also *Grayson v. Stith*, 192 Okl.

340, 138 P.2d 530 (1943); *Davis v. Baum*, 192 Okl. 85, 133 P.2d 889 (1943). See also *State v. Schwab*, 163 Wn.2d 664, (2008)

Moreover, a lower court cannot give any further relief beyond the scope of the mandate and also it cannot review the mandate. Any proceedings on remand that seems to be contrary to the directions contained in the mandate will be considered as null and void. *State v. Washington*, 249 S.W.3d 255 (Mo. Ct. App. 2008)

Judge Hicks clearly failed and refused to **determine whether any of the other exemptions claimed by the Port are applicable**. Nor did the Court comply with the limited direction that **“on remand, the trial court may choose to impose a more stringent penalty”**

Instead, the court exceeded the scope of the directions on remand, issued no Order determining that the port's assertion of multifarious exemptions, was frivolous and a violation of CR 11, and instead found that the lack of any basis for the assertion of the exemptions by the Port was a mitigating factor.

Similarly, while the Court was directed that it might choose to impose a more stringent penalty, it transcended this direction and drastically reduced the penalty, based upon the court's refusal to determine the inappropriate and frivolous nature of the port's exemptions.

The standard of review of the penalty amount is abuse of discretion. Findings of facts and conclusions of law are reviewed under the substantial evidence and error of law standards.

A court abuses its discretion when an "order is manifestly unreasonable or based on untenable grounds." Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). A discretionary decision "is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (emphasis added) (quoting State v. Rundquist, 79 Wn.App 786, 793, 905 P.2d 922 (1995)). Indeed, a court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) quoting *Fisons*, 122 Wn.2d at 339

With all due respect to the Honorable Judge Hicks and his atavistic and rose colored "Communitarian" creed of a "community" without class struggle or dialectic conflicts, plaintiff maintains that the Court abused its discretion by issuing an order that was based on an erroneous view of the law, made 'for untenable reasons' and based on untenable grounds, resting on facts unsupported in the record and reached by applying the wrong legal standard." "

As such the ruling of the Honorable judge Hicks was an abuse of discretion in that it was manifestly unreasonable and contrary to undisputed facts apparent in the court record.

As the foregoing demonstrates, the Court erred in abusing its discretion and in failing to follow the instructions on remand to allow for a timely and orderly review. *State v. Schwab*, 163 Wn.2d 664, (2008)

II THE COURT ERRED IN FAILING TO FIND THE NEWLY DISCLOSED RECORDS RESPONSIVE OR RULE IN ACCORD WITH THE PORT'S JANUARY 25 MEMORANDUM, EVIDENCE IN THE COURT FILE, AND THE PORT'S DECLARATION IN CAUSE NO. 07-2-01198-3 THAT ESTOPPED THE PORT FROM CLAIMING IT HAD DISCLOSED THE FLOYD SNYDER ESA

As a preliminary matter the Court manifestly abused its discretion in disregarding the clear and indisputable evidence in the record that the newly disclosed records had not been produced and Floyd Snyder ESA had not been disclosed to West, and that this concealment was made for the purpose of obstructing environmental review of the reasonably foreseeable impacts of the Weyerhaeuser lease. See *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d. 554 (1990).

This error of the Court was especially egregious since the Port was equitably estopped by the statements of their own counsel which induced West to believe Lake's various sworn declarations and certifications to the effect that the Weyerhaeuser Lease did not contain a page referencing the Floyd Snider report and that the report had not been disclosed to West

In the light of retrospect, it is apparent that the true motive of the

Port in concealing so many records and dissembling about their concealment was to confuse and hide, behind a litigious smokescreen, the damning evidence of the Floyd Snider ESA and the the critical page 49 of the Weyerhaeuser lease incorporated by reference in the missing page 49, a policy that allowed the Port to deny the existence of toxic waste, clean water act violations, and the fact that their own study by EDR and Floyd Snyder demonstrated that the Weyerhaeuser Lease Site was located on a federal wetland requiring a federal 404 permit.

As the materially uncontested evidence in the Court file (in the form of the 2nd Declaration of Carolyn Lake and the declarations of West and Witt re the withholding of the Floyd Snyder ESA, Page 49 of the Weyerhaeuser Lease and the Floyd Snider Environmental Site Assessment incorporated into this lease were concealed in this case by the filing of a false instrument by the Port of Olympia, in the form of a deliberately altered lease which omits page 49, and which fails to have appended to it the Floyd Snider ESA incorporated into the lease by the missing page 49.

As plaintiff West noted in the Hearing on the 25th, in addition to the declaration of Port counsel that shows that the letter of the 17th did not contain the ESA, and Port counsel's pleading and admission that all of the responsive records collected for the Port's reply to West had been Bates

Stamped, the certified Administrative Record filed in Thurston County case No. 07-2-01198-3, (at exhibit 14, under Port SEPA Bates No. 704-751) contains a purported copy of the Port-Weyerhaeuser Lease. This lease filed by the Port in this other case as a certified "true and correct" document is missing the "true and correct" copy of Page 49, which incorporates the Floyd-Snider ESA.

Such actions by Lake, and West's reasonable reliance thereon to his detriment constituted

"(1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement or act; (3) injury to such other party resulting from permitting the first party to contradict or repudiate such admission, statement, or act. *Wilson v. Westinghouse electric corp.*, 85 Wn..2d 78, 81, 530 P.2d 298 (1975)

The Court erred in failing to recognize that the port was estopped from denying that it had failed to produce the ESA to West.

In conformity with this omission, the Floyd Snider ESA was not included in by the Port the record of any judicial or administrative proceeding that the plaintiff participated in. This is no inadvertent omission, as page 49 and the ESA, as well as the EDR wetlands report are critical evidence in any action concerning the impacts of the port's development projects

Attached to West's declaration and placed before the trial court at the August hearing was a true and correct copy of the missing page 49, which plaintiff did not obtain until after it was too late to use it in any administrative proceeding, as well as Bates stamp No.s 750 and 751, which correlate to page 48 and 50 of the lease, respectively, as the version of the lease filed in this Court as an administrative record-significantly missing the critical page 49 that referenced the Floyd Snyder ESA

Also apparent in the record before the trial court were the original copies of the two letters from the Port of Olympia composed on January 17, 2006, one to plaintiff West, missing the Floyd Snider ESA, and a second, vastly different letter to the League/Jorgenson. Which included the ESA. (See CP at 1589)

Also attached are records that the Port of Olympia provided to the league/Jorgenson, but which were never Bates Stamped or made a part of the Port of Olympia's formal response to the public records requests in this case. (See CP at 397-462)

These "newly discovered records" include, most significantly, an August 2005 Environmental Site Assessment of the Port of Olympia prepared for Weyerhaeuser by Floyd Snider, a private consultant. None of these documents has a Bates Stamp number and none of these records

were disclosed to West by the port in response to the records request in this case. Nor can disclosure to third parties be considered (See Woesner)

Plaintiff West was never informed of the disclosure of these records to the League/Jorgenson, and was reasonably led to believe that no such records had been withheld without being bates stamped and noted on a privilege log because, on January 25, a week after the two January 17 letters issued, Port of Olympia counsel Carolyn Lake certified to the Court as follows :

As noted above, the Port responded in a timely manner to Mr. West's several inquiries. 932 pages of documents were compiled by various Port staff, along with approximately another 1500 pages of Emails. This voluminous data was Bates stamped, reviewed by attorneys and a Privilege Log created in response to Mr. West's request. Mr. West was kept informed of the Port's progress in responding to his request...In doing so, the port informed West of the nature of the documents being withheld...(See Port's Memo in Response, Page 12, lines 14-19, Page 13, line 4)

The Floyd Snider Environmental Site Assessment and the accompanying 4 unstamped records (Correspondence of August 18, 24, and 31, 2005 and a fax of December 15, 2005) disclosed to the League/Jorgenson on January 17, 2006 have no Bates stamp numbers. They do not appear as attachments to the letter of January 17 filed as an attachment to the Declaration of Carolyn Lake.

Therefore, according to the uncontested record of the trial court, as well as the previously mentioned January 25, 2006 Declaration of Carolyn Lake, the ESA and these other records do not form any part of the records assembled by the port as responsive to the public records requests filed by plaintiff West. Nor do these records appear in the Privilege Log or records disclosed to the Appeals Court, since they have been unlawfully concealed from plaintiff to this day.

This omission by the Port is extremely outrageous in that the Floyd Snider Environmental Site Assessment (ESA) is literally a case of smoking guns containing material evidence concealed by the Port for partisan advantage in litigation., describing, among other matters:

- (1) "Upland contamination outside the CPC slurry wall and within the proposed lease area". (Floyd Snider ESA, Page v)
- (2) Data indicating elevated polycyclic aromatic hydrocarbons (PAH's) and pentaclorophenol (PCP) in soils and groundwater outside the proposed lease area. (ESA, Page v)
- (3) A 30 inch City of Olympia storm Drain which was believed to be a pathway for migration of contaminants. (ESA, Page v)
- (4) "Former bulk petroleum storage facilities that operated within the proposed lease area". (ESA, Page v)
There was no record found to indicate that any adequate investigations were performed in this area. (ESA, Page v)
- (5) Hot spots of PCP and naphthalene concentrations greater than 10,000 ug/L. (ESA, Page 3-4)
- (6) An abysmal record in the area of Clean Water Act compliance, with persistent violations and violation of

effluent limitations in the areas of Zinc, Copper, Turbidity, Biological Oxygen demand, and a lack of Best Management Practices (BMPs) or a Stormwater Pollution Prevention Plan (SWPPP). (ESA, Page 4-5)

(7) Numerous other contaminated sites in the immediate vicinity. (ESA 4-9)

(8) "...recognized environmental conditions (i.e. significant potential for soil and groundwater contamination exist outside the CPC site and within the proposed lease area..) (ESA Page 7-1)

(9) indications of "discharge of contaminants from the storm line" (ESA Page 7-2)

(10) In addition a detail map attached as an exhibit shows the port peninsula, (and thus the project area) contains federal wetlands, which would require a federal 404 permit and NEPA review for development. Significantly, the Port has steadfastly maintained in numerous courts and administrative tribunals that absolutely no wetlands exist on the site.

Like Jan Witt and Mr. Jorgenson, plaintiff West has been substantially damaged by the concealment of this document and the other "newly discovered" records recently disclosed by counsel, in that his 1st Amendment right to petition for redress of grievances has been abridged.

The impact upon the just adjudication of land use decisions of the port's spoliation of this relevant evidence is undeniable, for the very evidence now seen to have been unlawfully concealed by the port is exactly what plaintiff and the public needed to obtain in order to demonstrate that the interrelated developments now revealed to have been compelled by the lease were in fact interrelated and reasonably likely to

produce significant environmental impacts.

Had the material evidence of the interrelated nature of the developments and the environmental conditions of the port peninsula appearing in the newly discovered “undisclosed” records and the ESA (and as described by Jan Witt in her declaration and plaintiff West, herein) not been concealed by the port, and had that crucial evidence been available to West and the other citizens questioning the port's actions, it is very likely that the determinations of the Honorable Judges Tabor, Pomeroy, Wickham, Hirsch, McPhee, Leighton and Bryan might have been adverse to the port, to say nothing of the administrative determinations of the PCHB the GMHB, and at least 6 determinations of the City of Olympia Hearings Examiner.

The obstruction of the due course of justice before all of these magistrates and hearing officers as a result of the concealment of material evidence was apparently the goal of the Port's deliberate conduct in this matter.

As he declared to the trial court, plaintiff West was and continues to be personally and substantially prejudiced by the port's unlawful concealment of these records in proceedings for review of port and city land use decisions involving the port peninsula before the Pollution

Control Hearings Board, the Growth Management Hearings Board, the City of Olympia Hearing Examiner, the Thurston and King County Superior Courts, Division II of the court of Appeals and the Supreme Court of the State of Washington. Federal cases in the United States District Court and proceedings before the 9th Circuit Court of Appeals have also been tainted by the deliberate spoliation of this relevant evidence.

In one case pending before the Appellate Courts, respondent Port and Weyerhaeuser obtained a total of over \$30,000 in attorney fees in retaliation for plaintiff having lost a land use related challenge to a City approval of a land use determination --a challenge that plaintiff might very well have won had he had the benefit of the records deliberately concealed by the port.

The City of Olympia also suffered from this concealment in that they were never given a copy of the Floyd Snider ESA and made land use decisions approving the Port's projects without this critical evidence.

III THE COURT ERRED IN FAILING TO RECOGNIZE MATERIAL EVIDENCE DEMONSTRATING THAT THE PORT'S REPLY TO WEST ON NOVEMBER 8, 2005 WAS VASTLY DIFFERENT THAN THE REPLY TO JORGENSON ON JANUARY 5, 2006 AND IN VIOLATING USCA 14 AND ARTICLE

In entering the Orders and Judgment of September 22 and 24 and

the Court manifestly abused its discretion and erred in failing to rule in accord with specific evidence in the Court file that demonstrated that the port calculated its responses to the political power and influence of requesters denying requests by ordinary citizens while answering differently to politically influential organizations, effecting a denial equal protection of the laws to West in an invidious and discriminatory manner that violated the 14th Amendment and the privileges and immunities clause of the Constitution of the State of Washington.

The Trial Court erred in failing to recognize that the circumstances of the disparate responses to West, Witt and the League/Jorgenson demonstrate that the Port responded differently to the various requesters, (West, Witt, and the League/Jorgenson) and refused to comply with the PRA in any meaningful manner in response to an ordinary citizen like West until the League of Women Voters became involved.

Had plaintiff's case not been followed by the League, the Port would probably still be withholding records as the Goodstein law group has in regard to the SSLC records, which were also related to the greater plan to move Weyerhaeuser to Olympia, and which continue to be withheld to this day.

As the November 16, 2005 response demonstrates, when West first

requested records, he was not provided with any record other than the lease itself. The Port, in a response authored by interim director Rudy Rudolph, flat out denied that any other records existed in regard to the Weyerhaeuser project.

On January 2, 2006, plaintiff learned that the port, in response to a request by Jan Witt, had asserted a number of exemptions in a reply vastly different from that it provided to him. Appellant

West filed suit on January 3.

Weeks after plaintiff had obtained a show cause order, the Port's response to the League/Jorgenson was again vastly different from that provided to either the plaintiff or Jan Witt. This is obviously due to the port's taking the League's political influence seriously, while they could confidently rely upon their political leverage to sidetrack a simple citizen such as West. Such a belief is borne out in the rulings of the courts to date, which have largely ignored the distinctions between the responses to the League and West's requests and spared no opportunity to trample on West's rights as if he were some form of insect that had mistakenly found its way into the court for the purpose of being squashed.

This deliberate refusal of the Port to apply the law in accord with due process and the privileges and immunities clause, which bans such

special privileges or immunities, demonstrates a pattern of invidious discrimination and deliberate violation of the PRA to obstruct disclosure to ordinary citizens, while those with political influence and political organizations like the League of Women Voters received a vastly differing response than West- from both the Port and the Courts.

For this Court to grant the Port special privileges and immunities based upon its membership in a community, yet lump West and the League together for the purpose of its convenience in assessing a penalty when the circumstances of the Port's response were so different violated the paramount requirement of the Court in setting the Yousoufian factors, that the PRA penalty provisions be applied to the individual circumstances of each case, as well as the equal protection requirements of the 14th Amendment.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Trial Court erred when it failed to act to preserve the protections of the 14th Amendment that all citizens, even those like plaintiff West who are not part of the community entitled to special privileges and immunities, must be treated the same manner based upon

the circumstances applicable to their case since, By its plain language, history, and structure, article I, section 12 applies to any privilege or immunity granted by the State on unequal terms See Grant County Fire Protection District No. 5 v. City of Moses Lake, 150 Wn.2d 791, 806, 83 P.3d 419 (2004)

While it is unfortunate that special privileges and immunities have grown so widespread that some magistrates fail to recognize and rights that do not originate from membership in a favored group, the Constitution and Bill of Bights, as well as Article I section 12 compel a different conclusion that that reached by the honorable Judge Hicks.

IV THE COURT ERRED IN FAILING TO CONDUCT THE PENALTY ANALYSIS OF THE YOUSOUFIAN FACTORS BASED UPON EVIDENCE IN THE RECORD OF THE INDIVIDUAL CIRCUMSTANCES OF THE PORT'S RESPONSES TO WEST

The Court erred in finding that mitigating circumstances were present and in failing to group the records appropriately by category or date of disclosure when facts of this case clearly and undeniably reveal none of the mitigating Yousoufian factors were present in the League's response to West.Yousoufian v. Sims, 168 Wn.2d 444; 229 P.3d 735; (2010), and when the yousoufian decision itself was based upon a grouping of records by dates of disclosure.

As for (1) the lack of clarity of the PRA request; the plaintiff's

request was(clear and unmistakable, and virtually identical to the requests of Witt and the League/Jorgenson.

In Regard to 2) an agency's prompt response or legitimate follow-up inquiry for clarification; The Agency failed to promptly respond in any meaningful manner or make any request for clarification.

Concerning (3) good faith, honest, timely, and strict compliance with all the PRA procedural requirements and exceptions; the record clearly demonstrates this did not happen.

(4) concerning the proper training and supervision of personnel;

There is ample evidence from the nature of the original November 16 response, and in the circumstance that the subsequent replies to Witt and the league/Jorgenson were made by by port counsel that Interim Director Rudy Rudolph lacked any training in the PRA. Plaintiff alleged that he had no such training and this was undenied by the Port As such, it is an established fact that Rudolph lacked adequate training.

In regard to (5) reasonableness of any explanation for noncompliance; from the newly discovered evidence, it is evident that the reason for noncompliance was the desire to hide the interrelated nature of the Weyerhaeuser related developments and to minimize the port's violations of the Clean Water Act and the presence of toxic contamination

of the project site. Both of these factors were crucial to numerous SEPA actions that the Port wrongfully prevailed in on the basis of the illegal non-disclosure of relevant evidence, and also allowed the port's counsel and Weyerhaeuser to obtain an award of over 30,000 from appellant West..

(6) helpfulness of the agency to the requester; and (7) the existence of systems to track and retrieve public records are also absent in this case, as is demonstrated by the lack of any consistency in the Port's replies to West, Witt, and the Jorgenson/league parties.

In this case the agency completely dismissed plaintiff's November request, and then asserted a horde of exemptions that lacked a clearly established basis in law and which delayed disclosure unreasonably. The port's vast differences in response to virtually identical requests demonstrates that no system existed or was employed to track and fulfill requests.

THE COURT ERRED IN FINDING THAT NONE OF THE AGRAVATING FACTORS WERE PRESENT WHEN CLEAR AND UNCONTESTED EVIDENCE DEMONSTRATED THAT PRESENCE OF ALL SUCH AGRAVATING FACTORS

The Court erred and acted contrary to any reasonable or defensible reasoning based upon the weight of evidence in finding that none of the aggravating factors were present when the clear weight of evidence

demonstrated that all of the aggravating factors are present in regard to the port's response to West. First, the port (On November 16, 2005) unreasonably delayed responding in any meaningful manner, when the information was necessary for environmental appeals, thus satisfying aggravating factor (1) a delayed response, especially in circumstances making time of the essence; In addition, the evidence is clear that the port's responses to West, particularly up to January 17 demonstrated...

(2) (a) lack of strict compliance with all the PRA procedural requirements and exceptions; (3) lack of proper training and supervision of personnel and response; and (4) unreasonableness of any explanation for noncompliance; (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA; (6) dishonesty; (7) potential for public harm, including economic loss or loss of governmental accountability; See Yousoufian, supra.

In this case the loss to government accountability was extreme, as demonstrated by the fact that all 3 of the Commissioners who approved the Lease and withheld the documents resigned, (Pottle) were voted out of office, (Van Schoorl) or refused to stand for re-election (Telford) by the time this case was determined, and in the case of Mr. Telford and Van Schoorl, largely because of the scandal resulting from the concealment of the records.

It is significant to observe that Paul Telford, who was previously

viewed as a PRA advocate, refused to accept an award from WASHCOG for his previous actions as a private citizen in establishing the Telford Test, before this very Court.

Clearly, the actions of the port in this case caused an incalculable loss to the accountability of government and a resulting loss of confidence in our democratic institutions.

In regard to personal economic loss, the port has deliberately made this process as time consuming and expensive as possible, and causing aggravating factor (8) personal economic loss;

In regard to factor No. (9), a penalty amount necessary to deter future misconduct considering the size of the agency and the facts of the case, the Court erred in failing to follow the reasoning of the Court in Yousoufian and assess penalties based upon groupings according to the date of disclosure, for the 8 groupings of records disclosed to West.

While plaintiff believes a \$100 a day penalty is warranted based upon the facts of the case and especially the newly discovered records, (which would never have seen the light of day if the Port was able to conceal them), plaintiff West believes that a \$75, or even the former \$65 a day penalty may be barely adequate if applied to each separate date of disclosure, for the entire term of withholding, as the Yousoufian Court

found appropriate. In addition, due to the large number of remanded records, and the port's refusal to justify their exemptions with any type of a good faith argument, the newly disclosed records should be grouped in at least two groups based upon the frivolous assertion of two separate exemptions.

This is also necessary due to the port's withholding of the records just long enough to prevent their consideration by the City Hearing examiner in a proceeding where plaintiff West was excoriated for failing to produce evidence-evidence he could not produce in a timely manner due to the port's withholding.

Appellant West requests that this Court take judicial notice of the various SEPA cases that the port prevailed upon based in large measure upon their deliberate spoliation of relevant evidence, as evidenced by the records released on remand the suppressed ESA and EDR reports, and the declarations and newly discovered evidence filed by counsel for Jorgenson/Johnson.

The Court also erred in making all of the appended findings of fact and conclusions of law, 1-8 which are believed to be combined findings, set forth verbatim in an excess of caution, and objected to specifically as not being consistent with the facts and evidence or the weight of

precedent.

The Court finds as follows:

1. This is a hearing on remand from the Court of Appeals.
2. This Court earlier determined that the records were improperly withheld for 123 days and set the penalty at \$60 per day (from January 28, 2006 to May 30th, 2006).
3. The Court of Appeals accepted both the number of days and the amount of penalty and how it was calculated.
4. The Court of Appeals reversed this court on only one issue, and that was the applicability of the deliberative process exemption to certain records.
5. The Court of Appeals remanded the case back to this court to determine if any other exemption would cover the records withheld, and if not, then to extend the penalty to these records, and also with the freedom to re-visit the amount of the penalty when using the correct legal standard.
6. This Court declines to re-compute the number of days involved, except insofar as the total days until disclosure following the remand, but will re-visit the penalty amount for the days involved.

7. In addition, the Court finds that it has not been demonstrated that these additional records that they now produce, meaning the plaintiffs, were responsive and not logged as being withheld by the Port within the plaintiffs' original request, but the Port has shown more likely than not these documents were not responsive.
8. The Court's *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 467, 229 P.3d 735 (2010) (*Yousoufian V*) analysis is set out in the Transcript of the Court's August 25, 2010 ruling, attached hereto.

5. THE COURT ERRED IN APPLYING A QUASI-CRIMINAL STATUTE IN AN ARBITRARY MANNER THAT VIOLATED EQUAL PROTECTION OF THE LAW AND THE VOID FOR VAGUENESS DOCTRINE

Although the Honorable Judge Hicks appears to have attempted to act in the very same good faith he believed was a requirement of members of his community, he was hampered by the uncertain terms of the Public Disclosure Act itself, as recently judicially amended by the *Yousoufian* decision.

While prior to *Yousoufian*, the interest of deterrence was a primary consideration, the *Yousoufian* penalty scheme is so multifaceted and lacking in clear standards that it is unclear if it was applied by Judge Hicks

in a balanced and impartial manner required by USCA 14..

Under these conditions, the trial Court erred in applying the penalty provisions of RCW 42.56, a quasi-criminal statute, in a vague and arbitrary manner that violated both equal protection and the void for vagueness doctrine.

As a quasi-criminal statute, the PRA must be applied to constitutional standards to prevent arbitrary and discriminatory enforcement under the 14th Amendment and the "Void for Vagueness Doctrine". The Void for Vagueness Doctrine requires that a statute define a criminal or quasi-criminal offense... in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983).

As the Supreme Court has recognized, a vague law (like the PRA) impermissible delegates basic policy matters to... judges,...for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications"

The Court erred in assessing a penalty that, as applied, without consideration of the Yousoufian factors and without clear standards did not meet the Void for Vagueness standard of a valid scheme for a quasi criminal statute.

In stark contrast to the PRA, a federal quasi-criminal statute like the CWA operates in a much more circumscribed manner emphasizing its actual deterrent effect, and does not result in endless appeals and parties claiming that discretion was abused or that clear standards do not exist.

In assessing a civil penalty under the CWA, federal courts typically begin by calculating the statutory maximum penalty by multiplying the current maximum per day per violation civil penalty by the number of days of violation for each category of violation. Courts then use the following six statutory factors under 33 U.S.C. § 1319(d) to calculate an actual penalty given the specific facts and circumstances of each case:

1. the seriousness of the violation;
2. any economic benefit gained through noncompliance;
3. the defendant's history of violations;
4. good faith efforts at compliance;
5. the potential economic impact of the penalty on the defendant;

and

(6) such other matters as justice may require.

This calculus is performed using one of two principal techniques: (1) a "top down" method or (2) a "bottom up" method." The "top down" method uses the statutory maximum penalty as the "departure point" and

then reduces the civil penalty as appropriate based on the six factors. The "bottom up" method uses the economic benefit factor from § 309(d) to establish a baseline penalty and then adjusts that penalty upward based on the five remaining factors. Both appropriately focus on a deterrent effect.

Plaintiff believes that the application of the Yousoufian factors by the Courts, and especially by the Honorable judge Hicks in the present case fail to provide either the plaintiffs or the defendants the requisite certainty of the deterrent required of a quasi-criminal penalty statute.

The existence of much more clear cut standards and a specific set of guidelines for their application in the federal CWA illustrates the difference between actual detrence and the vague and arbitrary set of optional benchmarks in the PRA. A short and specific set of factors with a clear scheme of how to employ them is also apparent in the CWA.

6. THE COURT ERRED IN FINDING THAT THE PORT'S FRIVOLOUS ASSERTION OF EXEMPTIONS THAT IT REFUSED TO SUPPORT ON REMAND AFTER IT WAS TOO LATE FOR WEST AND JORGENSON TO EFFECTIVELY USE THE RECORDS WAS A MITIGATING RATHER THAN AN AGRAVATING FACTOR AND IN CONSIDERING OTHER IMPROPER EXTRA-YOUSOUFIAN FACTORS

The Court, in issuing the 2 Orders and udgment of September 22 and Septemebr 24 committed a manifest abuse of discretion by not only

failing to determine the validity of the Port's exemptions, but in concluding that the complete lack of any basis for the exemptions was a mitigating factor. In addition the Court's reliance upon improper criteria, some of which was proscribed by the evidence rules contributed to what can only be seen as a manifest abuse of discretion.

In so doing, the court allowed the agency to evade liability for withholding the documents for years, and assessed a penalty based not on the records were withheld and the agencies withholding but upon the agencies belated and self serving release of the records after they had materially profited from concealing them.

This is akin to granting a convicted murderer leniency because he graciously agreed to stop murdering other citizens after being convicted and placed on death row, or a Bank robber leniency for agreeing to stop robbing banks after he had amassed his first million dollars of swag.

Rather than penalizing the port for what amounted to an admission that its actions in asserting multiple exemptions were false and frivolous and taken for the purpose of delay and burdening plaintiffs in violation of CR11, somehow inexplicably, the court rewarded the Port for its callous and wanton assertion of exemptions that were so frivolous no good faith argument could be made for their continued concealment. This violated

the warning in Hangartner about over broad use of exemptions...

should an agency prepare a document for a purpose other than communicating with its attorney and then claim that the document is protected by the attorney-client privilege, the requesting party might well claim that the agency has acted in bad faith. A finding of bad faith could cost the agency dearly... When deciding where, between \$5 and \$100 per day, the appropriate per day award should rest, **the court must consider whether the agency claimed an exemption in bad faith.** *Hangartner v. City of Seattle*, 151. *Wn.2d* 439, 90 P.3d 26 (2004) at 38.

Outrageously, by judicially enforcing a creed of “Communitarianism” that denies the existence of bad faith on the part of his fellow community members immunizing them from even the most egregious acts, but which leaves appellant West subject to continual allegations of bad faith against the “Community” and penalties assessed on the basis of this invidious discriminatory bias, the Honorable judge Hicks violated due process, equal protection, and the privileges and immunities clause of the State and federal Constitutions.

The honorable Judge Hicks certainly has the 1st Amendment right to adhere to any creed he fancies, including a brand of communitarianism that grants special privileges and immunities to a community composed of a select membership of politically connected “community members” from which West is obviously excluded.

Similarly Appellant may freely believe in the class struggle theory of progress, the cult of dialectical materialism, or that individual rights protected by the constitution are the foundation of any just social order.

However, when a judge allows his political ideals to dictate his rulings from the Bench, as Judge Hicks community first speech of August 25 demonstrates, and grants Community members like the port special privileges and immunities (such as the ability to take any action whatsoever and have it considered to be in good faith) that are denied to others like West (whose every act is excoriated and fined for being akin to actions of Beelzebub or Adolph Hitler or “a threat to our democracy”) the permissible limits of bias, freedom of religion, and separation of church and state are at one time ripped asunder. See *Lemon v. Kurtzman*, 91 S.Ct. 2105, (1971)

Appellant West has a 1st Amendment right to decline to associate in any group, and to eschew any creed that he finds repugnant or objectionable, and feels the desire to exercise this right most strongly in regard to “communitarian” social orders that presuppose a pattern of denial of the 1st and 14th Amendments in the manner of the “community” described by the honorable judge Hicks.

A further error committed by the honorable judge Hicks was

justifying a minimal penalty based upon "evidence" of a settlement between Koenig and the Port that was inadmissible under er 408, and which even if properly considered was irrelevant to the PRA dispute between West Jorgenson and Johnson and the Port of Olympia.

It is improper to consider or speculate upon the reasons for a party to accept or offer a settlement in any particular amount, but it should be noted that even of the settlement entered into by Mr. Koenig was admissible, it might have been the result of personal considerations having nothing to do with the Port, individual caprice of Mr. Koenig or, (more probably) counsel's frustration with the scorched earth tactics and siege mentality of the port.

Judge Hicks improper consideration of inadmissible factors and "evidence" to justify his preconceived notions that his fellow communitarians could do no wrong illustrates that penalties in quasi-criminal statutes should not rest upon the unregulated caprice of subjective and self-serving relativistic factors picked out of thin air, but should have clear standards to guide the exercise of discretion to prevent arbitrary enforcement. As the Supreme Court ruled in a similar case...

whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State

itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in (Citations omitted) *Yick Wo v. Hopkins*, 118 U. S. 374, 1886

In addition to the previous improper and irrelevant considerations, the Court erred in employing evidence that was barred under ER 408, which provides, in pertinent portions....

In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

CONCLUSION

Any unbiased review of the largely undisputed facts of the long history of the port's obstructive and deliberately piece-mealed responses to plaintiff West and Jorgenson and Johnson and the resulting confusion, prejudice and accessory concealment of material evidence of toxic

contamination will demonstrate to the Court's satisfaction that the circumstances of this case require grouping and a substantial penalty in order to effectuate the express intent of the people in adopting the PRA that the strict application of the penalty provisions have a deterrent effect.

In summary, The Court manifestly abused its discretion in failing to follow the direction of the Court of Appeals that it consider imposing a more stringent penalty, especially in light of the port's refusal to demonstrate any good faith basis for the exemptions it had asserted, and the evidence that all of the Yousoufian factors favored grouping mandated a penalty in the extreme upper range of the scale.

Contrary to the ruling of the trial Court, the previous per day amount should be increased by \$15 or at the very least remain unchanged, and the groupings of records should at the very least follow the precedent of Yousoufian and be based upon the various dates of disclosure. Only in this manner can the intent of the legislature be effected and a penalty with actual deterrent effects be imposed.

While this would not be adequate to produce a penalty of a reasonable size appropriate to the resources of the port, and consistent with the circumstances of the case, where the records were withheld in a successful attempt to stifle public knowledge of toxic contamination, and

where the withheld records were material to environmental cases that the Port prevailed in on the basis of their concealment, it may be that this could be seen to be appropriate.

In any event, it is simply not subject to reasonable dispute that a penalty based upon the various successive dates of disclosure of the records is appropriate and necessary in this case to ensure that the port is deterred from lightly and improperly asserting an exemption that might, in the future, be employed to unjustly frustrate the interest of legitimate public oversight of government, especially since the Port refused to dignify its exemptions with any argument whatsoever on appeal.

Rather than another remand and further endless proceedings, this court should retain the previous penalty of \$65 dollars a day and consider imposing it based upon the discrete dates of disclosure, as the Court in *Yousoufian* did to put an end to the endless cycle of litigation. See *Yousoufian v. Office of King County Executive* 152 Wn.2d 421 at 424, (2004)

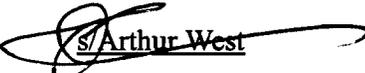
For the sake of eliminating duplication, plaintiff West concurs and Joins in the statement of the case and argument that counsel for Jorgenson and Johnson has presented to this Court and in the pleadings, aside from the issues relating to the specific differences in the response of the port

that are unique to their response to West's requests of November 8, 2005 and January 3, 2010.

While there is still some uncertainty in the application of the 16 recently factors enunciated by the Supreme Court in *Yousoufian III*, two basic principles must be recognized- first as the *Yousoufian* Court expressly recognized, the purpose of the PRA's penalty provision is to deter improper denials of access to public records, (See *Paws v. UW*) and second, that the Court's analysis must be based upon the application of the 16 "Yousoufian factors" to the unique circumstances of the agencies response to each requestor of records, (which in this case required a grouping at least by the various date of disclosure), and third, that any order must be within the scope of the directions on remand.

Appellant West respectfully requests that this court issue a ruling that either sets a deterrent penalty in the amount of \$65 per day and group the records based upon the various dates of disclosure or as requested by Appellant's Jorgenson and Johnson in their application for penalties.

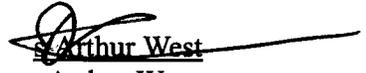
Alternatively, an order of remand should issue that at least compels the trial court to consider a more stringent penalty than \$60 a day, as the Court of Appeals for Division I did . Done March 15, 2011.


s/Arthur West

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CERTIFICATE OF SERVICE

I certify that this document was mailed and/or Emailed to counsel
on March 15th 2011.


~~Arthur West~~
Arthur West