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

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**ARTHUR WEST**  
appellant

**Vs.**

**WASHINGTON PUBLIC PORTS ASSOCIATION, et al**  
respondents

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**Appeal from the rulings of the honorable Judges  
Hirsch and Casey of the Thurston County Superior Court**

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**APPELLANT'S OPENING BRIEF**

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**Arthur West**  
**120 State Ave N.E. #1497**  
**Olympia, Washington, 98501**

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## **INTRODUCTION-SUMMARY OF ARGUMENT**

This case concerns the same basic issue determined by this Court in *West v. WACO*, whether the Washington Public Ports Association should be considered a public agency for the purposes of the Open Public Meetings and Public Records Acts.

A secondary issues concern the issue of whether the OPMA should be broadly construed to promote its remedial intent, and whether the silent withholding of records in the absence of a privilege log and the deliberate destruction of public records in the absence of a valid records retention and destruction schedule violate the PRA.

Despite the vehement denials of its status as a public agency under both the OPMA and the PRA apparent in the WPPA's reply at CP at 46 and 47 respectively, it is clear under the express terms of State law that the WPPA is a public entity required to comply with the sunshine laws.

Evidence in the record, appearing at CP 539-544, CP 13 and CP 116-118 demonstrate that the WPPA openly represents itself as a public entity, and is accepted as such by the government of the State of Washington. As such it was manifest error for the Court to allow the WPPA to continue to perpetrate the fiction that it is not a public agency.

This is also a case where the WPPA admittedly failed to respond as required in RCW 42.56.520, and where silent withholding by the agency concealed the existence of claimed exemptions for over a year.

When plaintiff did maintain suit, it was discovered that despite a pending controversy, the defendants had deliberately destroyed public records that were required to be retained under title RCW 40.14, in clear contravention of the express terms of RCW 40.14 070.

By silently withholding records from plaintiff in response to both of his requests, failing to assert exemptions in a timely manner, and destroying public records and official public records of the WPPA's president without a valid retention and destruction schedule, approved by the State or local records committee, the WPPA undeniably violated the PRA.

As recognized by the 9<sup>th</sup> Circuit in its recent ruling in Doe v. Reed, sound public policy underlies the Public Records Act, a policy that has been thwarted by the Court's refusal to declare that the WPPA is a public entity. Thus the WPPA has been allowed to continue to deny that it is a public agency, and evade the public oversight and accountability required by the sunshine laws, Significantly, the concealment, destruction and

alteration of public records appears to be a regular business practice of the .ports of this State, a situation that should not be surprising if the fact that their coordinating agency is itself allowed to openly flaunt its refusal to abide by the sunshine laws.

In the present case, not only did the court grant essentially declaratory relief to the WPPA, allowing it to continue to maintain that it is not a public entity the Superior Court has sanctified the WPPA's destruction of all of the records of its chief executive officer, and subsequent failure to make even a pro forma recovery effort, far below the standard required when records are unlawfully destroyed.. The recovery efforts made by defendants to recover the Emails subsequent to suit were completely inadequate and unreasonable, and did not extend past “attempting to log onto a computer”.

The WPPA cannot maintain that the recovery was adequate when there was in fact absolutely no actual attempt at diligent or forensic recovery.. Defendants cannot maintain such an an inconsistent position in regard to the nature of the recovery efforts in regard to the destruction of the WPPA's president's E-mails, and the Court erred in approving a “recovery effort” that was not in reality a recovery effort...

As a result of the Court's rulings in this case, Agencies like the WPPA will be able to destroy records with impunity and delay disclosure of evidence necessary for exercise of the people's right to know.

The Court erred in finding that the WPPA complied with the PRA when they failed to respond and properly assert exemptions for discreet records within 5 days as required in the PAWS II and Shoreline<sup>1</sup> and when the agency silently withheld records without asserting any exemptions for nearly a year.

The Court erred in failing to assess penalties for the agency's failure to produce proper privilege logs prior to plaintiff's filing suit, and for the lack of disclosure caused by the destruction of records, and in holding that records were exempt under the attorney-client privilege as part of a pattern of allowing the attorney-client privilege to be abused.

The Court erred in finding that the WPPA's destruction of official public records and public records was lawful or in accord with a duly adopted records retention schedule when no such schedule approved by the Secretary of State or local records committee was in evidence(as would be necessary for a local or State Agency under RCW 40.14) and when plaintiff had demonstrated that no such duly adopted schedule existed.

The Court erred in finding that the WPPA had conducted a diligent search when the WPPA itself denied that any reasonable attempt at forensic recovery was made and failed to disclose records of any such attempt. ( See RCW 42.56.070(6) A public record may be relied on, used, or cited as precedent by an agency against a party other than an agency and it may be invoked by the agency for any other purpose only if: (a) It has been indexed in an index available to the public; or (b) Parties affected have timely notice (actual or constructive) of the terms thereof.)

The Court erred in approving each and every Attorney Client exemption asserted, without attempting redaction and without any reasonable review, when the records that were exempted were not subject to the attorney client privilege, when her privilege had been waived and when the use of the attorney-client privilege to conceal otherwise public information was a commonly employed scheme

The Court further erred in entering literally dozens of whatever findings the WPPA counsel presented regardless of their grossly defective grammar and misrepresentations of fact and law

The Court erred in allowing the WPPA to silently withhold records without asserting exemptions, and allowing them to destroy public records

without a duly approved retention and destruction schedule, and in failing to award penalties for the delay resulting from silent withholding and the unlawful destruction..

**ASSIGNMENTS OF ERROR**

**I THE COURT ERRED IN FAILING TO DECLARE THAT THE WPPA WAS A PUBLIC AGENCY WHEN STATE LAW EXPRESSLY RECOGNIZES IT AS A PUBLIC ENTITY, WHEN THE WPPA'S FUNDING, CREATION AND FUNCTIONS WERE PUBLIC, AND WHEN WPPA'S DENIAL OF ITS PUBLIC STATUS CREATED A CASE OR CONTROVERSY UNDER THE UDJA.....**

**II THE COURT ERRED IN FAILING TO LIBERALLY CONSTRUE THE UDJA, OPMA AND THE PRA IN ACCORD WITH THEIR INTENT TO PROMOTE ACCOUNTABLE GOVERNEMENT AND IN DENYING PLAINTIFF'S STANDING.....**

**III THE COURT ERRED IN FAILING TO FIND THAT THE WPPA HAD SILENTLY WITHHELD RECORDS AND HAD FAILED TO RESPOND TO PLAINTIFF'D REQUESTS AS REQUIRED BY LAW WITH A VALID PRIVILEGE LOG.....**

**IV THE COURT ERRED IN FAILING TO FIND THAT THE WPPA'S DELIBERATE DESTRUCTION OF RECORDS WITHOUT A VALID RETENTION AND DESTRUCTION SCHEDULE VIOLATED THE PRA AND IN FAILING TO REQUIRE A SHOWING OF A DILIGENT SEARCH OR RECOVERY EFFORT .....**

**V THE COURT ERRED IN OVERBROADLY CONSTRUING THE ATTORNEY CLIENT EXEMPTION AND IN FAILING TO COMPELL DISCLOSURE OF RECORDS RELATING TO A FRIEND OF THE COURT BRIEF.....**

**VI THE COURT ERRED IN MAKING FINDINGS UNSUPPORTED IN THE RECORD.....**

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**I DID THE COURT ERR IN FAILING TO DECLARE THAT THE WPPA WAS A PUBLIC AGENCY WHEN STATE LAW EXPRESSLY RECOGNIZES IT AS A PUBLIC ENTITY, WHEN ITS FUNDING, CREATION AND FUNCTIONS WERE PUBLIC, AND WHEN WPPA'S DENIAL OF ITS PUBLIC STATUS CREATED A CASE OR CONTROVERSY UNDER THE UDJA?.....**

**II DID THE COURT ERR IN FAILING TO LIBERALLY CONSTRUE THE UDJA, OPMA AND THE PRA IN ACCORD WITH THEIR INTENT TO PROMOTE ACCOUNTABLE GOVERNEMENT AND IN DENYING PLAINTIFF WEST STANDING TO ALLEGE VIOLATIONS OF THE OPMA? ....**

**III DID THE COURT ERR IN FAILING TO FIND THAT THE WPPA HAD SILENTLY WITHHELD RECORDS AND HAD FAILED TO RESPOND TO PLAINTIFF'D REQUESTS AS REQUIRED BY LAW WITH A VALID PRIVILEGE LOG?.....**

**IV DID THE COURT ERR IN FAILING TO FIND THAT THE WPPA'S DELIBERATE DESTRUCTION OF RECORDS WITHOUT A VALID RETENTION AND DESTRUCTION SCHEDULE VIOLATED THE PRA AND IN FAILING TO REQUIRE A SHOWING OF A DILIGENT SEARCH OR RECOVERY EFFORT?**

**V DID THE COURT ERR IN OVERBROADLY CONSTRUING THE ATTORNEY CLIENT EXEMPTION AND IN FAILING TO**

**COMPELL DISCLOSURE OF RECORDS RELATING TO A FRIEND OF THE COURT BRIEF?.....**

**VI DID THE COURT ERR IN MAKING FINDINGS UNSUPPORTED IN THE RECORD ?.....**

**STATEMENT OF THE CASE**

1. This case stems from an original public records request in June of 2008. (CP 61)

2. Although the WPPA replied promptly in July of 2008, they failed to inform West that records were being withheld or provide a privilege log until nearly a year later, on May 29 2009, after plaintiff had renewed his request and after he had personally reviewed records at the WPPA. (CP 14, 61)

3. No complete privilege log was originally provided, even on May 29 (CP 16-17) and even the “final” log failed to cite to a specific exemption or explain the application of such exemption. (CP 112-115)

4. On June 2<sup>nd</sup> , 2009, plaintiff West filed a complaint for declaratory relief and relief in regard to PRA and OPMA violations by the WPPA. The complaint asserted specific violations of the OPMA by individual members of the governing Board of the WPPA (CP 4-9) The Complaint also asserted

that the WPPA had silently withheld records by failing to provide a privilege log along with its response as required by law.(CP 4-5)

5 Also n June 2<sup>nd</sup>, 2009, the honorable Judge Pomeroy signed an Order to Show Cause based upon the circumstance that records concerning the executive director of the WPPA were “unavailable” (CP 10)

6. On June 8<sup>th</sup>, 2009, the WPPA filed a reply denying that it was a public entity subject to the OPMA and the PRA (CP at 46-47)

7. On June 19 a hearing was held and the matter continued. (CP 18)

8. On July 31 a hearing was held on WPPA's motion for summary judgment under the OPMA. The Court found West lacked standing and signed an Order on Summary judgment and an order dismissing the State of Washington.(CP 450-458))

9. On August 28, 2009, the Court signed an Order dismissing the OPMA claims for lack of standing (CP 219-221) On September 18, 2009 an agreed scheduling Order was entered.

10. On 10-23 2009 no hearing was held (CP 514 )

11. On August 6, 2010 a hearing was continued one week on the PRA issues.(Transcript of August 6, 2010)

12. On August 13, 2010 a hearing was held on the Public Records issues. The Court found that the WPPA's failure to provide a privilege log for nearly a year, as well as the defects in its privilege logs, and the destruction of public records without a retention schedule were not violations of the PRA. The Court further denied West's requests for a diligent search and recovery effort and for disclosure of all of the WPPA records claimed exempt under the "Hangartner" (attorney client and work product?) exemptions.(CP at 343-351)

13. At the hearing West argued that the WPPA should be considered a public agency under the PRA. The Court denied the request and granted an order of dismissal to the WPPA. (CP 18-19 )

14. On February 4, 2011, at the direction of this Court, the Trial Court entered a final order. (CP 166-176, 177-178)

15. On February 9, 2011, the Plaintiff timely appealed from the Court's orders. (CP 358, 359-375)

**ARGUMENT**

**I THE COURT ERRED IN FAILING TO DECLARE THAT THE WPPA WAS A PUBLIC AGENCY WHEN STATE LAW EXPRESSLY RECOGNIZES IT AS A PUBLIC ENTITY, WHEN ITS FUNDING, CREATION AND FUNCTIONS WERE PUBLIC, AND WHEN WPPA'S DENIAL OF ITS PUBLIC STATUS CREATED A CASE OR CONTROVERSY UNDER THE UDJA.....**

The Court erred in the Orders and Judgments of August 28, 2009, (CP 219-221 September 27, 2010, (CP 343-351) August 28, 2009 (357), December 21 2009 (260-261) and the final Order of February 4, 2011 (at CP 378) , and in entering the findings 1-2 in the Order of August 28, 2009, findings 1- 37 in the September 27, 2010 Order, in finding WPPA to be a private entity (or in failing to find and declare the WPPA subject to the PRA and OPMA) when the plaintiff had standing to allege violations under the law, when evidence demonstrated that the WPPA had violated the Acts, and when clear language of State law recognizes the WPPA as public agency created to coordinate administrative functions of public entities.

In 1970, the Legislature adopted, in the Laws of 1970 ex.s. c 69 § 1, the following...

**Purpose – 1970 ex.s. c 69:** "It is the purpose of this act to assist the legislature in obtaining adequate information as to the needs of its municipal corporations and other **public agencies** and their recommendations for improvements." [1970 ex.s. c 69 §1]

**Intent -- Construction -- 1970 ex.s. c 69:** "The intent of this act is to clarify and implement the powers of the **public agencies** to which it relates and nothing herein shall be construed to impair or limit the existing powers of any municipal corporation or association." [1970 ex.s. c 69 § 3.]

1970 ex.s. c 69 § 2., as amended in 199 and 2007, provides...

It shall be the duty of each **association of municipal corporations or municipal officers**, which is **recognized by law and utilized as an official agency for the coordination of the policies and/or administrative programs of municipal corporations**, to submit biennially, or oftener as necessary, to the governor and to the legislature the joint recommendations of such participating municipalities regarding changes which would affect the efficiency of such municipal corporations. Such associations shall include but shall not be limited to the Washington state association of fire commissioners and the Washington state school directors' association. [2007 c 31 § 7; 1999 c 153 § 59; 1970 ex.s. c 69 § 2.]

As demonstrated by foregoing provisions of State law, the express admission by the WPPA in its contracts with the State (CP ), under the clear terms of RCW 53.06.030 the WPPA is an “association of... municipal corporations” which is “recognized by law and utilized as (the) official agency for the coordination of...administrative programs of municipal corporations”

**RCW 53.06.030 provides...**

The port district commissions in this state are empowered to designate the Washington public ports association as a coordinating agency through which the duties imposed by RCW 53.06.020 may be performed, harmonized or correlated. The purposes of the Washington public ports association shall be:

1. To initiate and carry on the necessary studies, investigations and surveys required for the proper development and improvement of the commerce and business generally common to all port districts, and

to assemble and analyze the data thus obtained and to cooperate with the state of Washington, port districts both within and without the state of Washington, and other operators of terminal and transportation facilities for this purpose, and to make such expenditures as are necessary for these purposes, including the proper promotion and advertising of all such properties, utilities and facilities;

2. To establish coordinating and joint marketing bodies comprised of association members, including but not limited to establishment of a federation of Washington ports as described in RCW 53.06.070, as may be necessary to provide effective and efficient marketing of the state's trade, tourism, and travel resources;
3. To exchange information relative to port construction, maintenance, operation, administration and management;
4. To promote and encourage port development along sound economic lines;
5. To promote and encourage the development of transportation, commerce and industry;
6. To operate as a clearing house for information, public relations and liaison for the port districts of the state and to serve as a channel for cooperation among the various port districts and for the assembly and presentation of information relating to the needs and requirements of port districts to the public.

Under the express terms of State law and this Court's determination in *West v. WSAC*, the WPPA is therefore a "public agency" and the Court failed to recognize and give effect to the express wording of statutes or the admissions of the WPPA itself when it concluded that the WPPA should not be an agency subject to the OPMA or the PRA..

Even in the absence of express agency status, in two recent Cases, Spokane Research and Clarke, the Telford test was been adopted as the proper test to determine if an agency is subject to the public records section of the Public Records Act. First, in Spokane Research, the Court ruled that the Telford functional equivalence test was applicable in both contexts...

The Association and the City argue *Telford* applies solely to the PDA public funding section, not the public documents section. But the *Telford* court relied on persuasive case law in both situations. *Telford* , 95 Wn. App. at 161 -63; *see, e.g.* , *Public Citizen Health Research Group v. Dep't of Health, Educ. & Welfare* , 668 F.2d 537, 543-44 (1981) (functional equivalent test used in Freedom of Information Act (FOIA), 5 U.S.C. § 552, context); *Bd. of Trustees v. Freedom of Info. Comm'n* , 181 Conn. 544, 436 A.2d 266, 270 (1980) (Connecticut Supreme Court adopted federal four-factor test for agency document disclosure requests); *Marks v. McKenzie High Sch. Fact-Finding Team* , 319 Or. 451, 878 P.2d 417, 424-25 (1994) (Oregon Supreme Court adopted six-part functional equivalent test for public inspection request). **We conclude the functional equivalent test is applicable in both contexts.** *Spokane Research & Def. Fund. v. W. Cent. Cmty. Dev. Ass'n*, 133 Wn. App. 602, at 607, (2006)

More recently, in *Clarke v. Tri Cities Animal Control*, the Court held that the “Telford” test was the appropriate analysis to employ to determine the status of an agency for the purposes of public disclosure where agencies such as the WPPA had public functions but were not, like the WPPA

expressly designated as public coordinating agencies in the manner explained in *West v. WSAC*...

We first address the question of whether TCAC is a public agency as defined by the PDA, chapter 42.17 RCW, and thus obligated to follow the requirements of the PDA. The trial court found that TCAC is not a public agency under the PDA. Because statutory interpretation is a question of law, we review the trial court's legal conclusion de novo. *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 5, 802 P.2d 784 (1991).

The PDA requires a state or local "agency" to make available for public inspection and copying all public records, unless the record falls within a statutory exception. *Spokane Research & Def. Fund v. W. Cent. Cmty. Dev. Ass'n*, 133 Wn. App. 602, 606, 137 P.3d 120 (2006), (citing RCW 42.17.260(1)), review denied, 160 Wn.2d 1006 (2007). "The PDA is interpreted broadly, requiring agencies to give "the fullest assistance to inquirers and the most timely possible action on requests for information.'" *Id.* (quoting RCW 42.17.290). 42.17.020(1) (Now RCW 42.56.020 ) defines agency as follows:

"Agency" includes all state agencies and all local agencies. "State Agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-

municipal corporation, or special purpose district, or any office, department, division, bureau, board commission, or agency thereof, or other local public agency.

As the Court held in the Tri-Cities case...

To be considered an “agency,” TCAC must qualify as an “other local public agency.” This term is not defined in the PDA. *Telford*, 95 Wn. App. at 158. In *Telford*, Division Two of this court was asked to determine if two organizations, the “Washington State Association of Counties” and the “Washington State Association of County Officials” were public entities. *Id.* at 152-56. The court in *Telford* adopted a four-factor “functional equivalent?” balancing test to determine if an entity is to be regarded as a public agency for purposes of the PDA: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government. *Id.* at 162. Under *Telford*, each of these criteria need not be equally satisfied, but rather the criteria on balance should suggest that the entity in question is the functional equivalent of a state or local agency. *Id.*...

Thus, (in the case of agencies not clearly public due to their status as coordinating agencies, See WSAC) we engage in a *Telford* analysis to determine whether TCAC is an “other local agency” subject to the PDA. Under *Telford*, we conclude that TCAC is the functional equivalent of a public agency. *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185 (2008).

**II THE COURT ERRED IN FAILING TO LIBERALLY CONSTRUE THE UDJA, OPMA AND THE PRA IN ACCORD WITH THEIR INTENT TO PROMOTE ACCOUNTABLE GOVERNEMENT AND IN DENYING PLAINTIFF WEST STANDING TO ALLEGE VIOLATIONS OF THE OPMA.....**

This case involves the legal issue of whether the Washington Public Port's Association is a public agency subject to the Open Public Meetings and Public Records Act. While Counsel for defendants asserted a number of creative arguments to the Trial Court to justify these agencies evasion of the Sunshine laws, compliance with the OPMA and PRA is necessary for public oversight of the WPPA.

In the Orders and Judgment of August 28, 2009, (CP 219-221 September 27, 2010, (CP 343-351) October 28, 2010 (357), December 21 2009 (260-261) and the final Order of February 4, 2011 (at CP 378) , and in entering the findings 1- 37 in the September 27, 2010 Order, the Court erred in failing to construe the OPMA broadly to require that agencies meeting the functional equivalency test conduct the public's business openly and in accord with RCW 42.30 and RCW 42.56.

The Court erred in the orders of August 28 and September 27 and in entering finding of facts 1-37 by failing to construe the OPMA broadly to allow for plaintiff to maintain an action as “any person” when the OPMA

employs some of the strongest language in any legislation to ensure that the public's business be conducted openly. As the Court recognized in Eugster...

The OPMA contains a powerful public policy statement. "The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly." RCW 42.30.010; see *Equitable Shipyards, Inc. v. State*, 93 Wn.2d 465, 482, 611 P.2d 396 (1980) (the statement of purpose in the OPMA "employs some of the strongest language used in any legislation"). The purpose of the OPMA is to permit the public to observe all steps in the making of governmental decisions. *Cathcart v. Andersen*, 85 Wn.2d 102, 530 P.2d 313 (1975). We must give the OPMA a liberal construction to further its policies and purpose. RCW 42.30.910. *Eugster v. City of Spokane*, 110 Wn. App. 212, 39 P.3d 380 (2002)

As this Court recently recognized in *West v. WSAC*, the intent section of the OPMA makes it clear that the remedial purpose of the act is to ensure public bodies make decisions openly:

The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

The people of this state do not yield their sovereignty to the agencies which 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 retain control over the instruments they have created. RCW 42.30.010. *Miller v. City of Tacoma*, 138 Wn.2d 318, at 324, (1999)

It is also clearly established that the OPMA must be liberally construed and that its exceptions be narrowly confined, this applies with greatest force when the exception to be employed would exclude an entire agency from the scope of the Act, and allow it to evade Title 36 RCW.

The act (OPMA) also mandates a liberal construction. RCW 42.30.910 ("[t]he purposes of this chapter are hereby declared remedial and shall be liberally construed"). Liberal construction of a statute "implies a concomitant intent that its exceptions be narrowly confined." *Mead Sch. Dist. No. 354 v. Mead Educ. Ass'n*, 85 Wn.2d 140, 145, 530 P.2d 302 (1975). *Miller v. City of Tacoma*, 138 Wn.2d 318, at 324, (1999)

Our conclusion is supported by the Supreme Court's observation that "the purpose of the Act is to allow the public to view the decisionmaking process at all stages." *Cathcart v. Andersen*, 85 Wn.2d 102, 107, 503 P.2d 313 (1975). Part of the Legislature's declaration of purpose states that the actions of public entities "be taken openly and that their deliberations be conducted openly." RCW 42.30.010. *Mason County v. PERC*, 54 Wn. App. 36, 771 P.2d 1185, (1989)

As This Court has previously ruled in *Telford*, and in *West v.*

*WSAC*, such agencies supported by tax dollars, and performing undeniably

governmental functions under the supervision and control of Governmental officials are public entities.

Under these circumstances, the trial Court erred failing to rule that the WPPA was an “agency” subject to the both the OPMA and PRA, and in failing to effect the intent of the legislature in adopting RCW 42.30.130 that provides that

Any person may commence an action either by mandamus or injunction for the purpose of stopping violations or preventing threatened violations of this chapter by members of a governing body.

The term “any person” is not ambiguous and demonstrates an intent to include “any person” within the ambit of the statute. Significantly, the original Senate version of the 1971 Bill (485) which was not adopted into law included a restrictive requirement just like that added by Judge Hirsch. The version of the House bill (526) that was chosen had no limiting requirement. Such a construction is in accord with both clear legislative intent and the purpose of the sunshine laws.

As this Court held in Telford...

The PDA is to be construed broadly to promote disclosure and accountability. The WSAC/WACO statutes are intended to restrict public funding of the associations to statutorily mandated services. Allowing WSAC/WACO to use their public funds to support private political agendas would

contravene both policies. Therefore, the trial court correctly ruled that, for purposes of the PDA, WSAC and WACO are "agencies." *Telford v. Thurston County Board of County Commissioners* 95 Wn. App. 149, at 166, 974 P.2d 886 (1999)

Simply put, the determination of this Court of Appeals in *West v. WSAC and Telford* is conclusive in this case on the issue of whether the WPPA is an agency for purposes of the PRA and OPMA, since the statutes are both remedial statutes with the same remedial intent and the statutory language of the OPMA is if anything, even stronger than that of the PRA..

Under these circumstances it is outrageous that the Court denied west standing to allege a violation of the OPMA, especially when it is apparent from the Legislative History of the OPMA that the Legislature failed to adopt the version of the proposed bill that would have required the type of personal interest asserted by the Port to be necessary in the hearing of July 31<sup>st</sup>, 2009 (and Order of August 28, 2009 before Judge Hirsh.

This type of limiting construction would run counter to express legislative intent of both the UDJA and the OPMA and completely eviscerate the OPMA, since it would deny standing to the vast majority of individuals who could not show direct damage caused by secret back room deals to the satisfaction of the Court. Such a construction would make it

effectively impossible to enforce the OPMA, and is at variance with the liberal construction required of remedial statutes like the UDJA and OPMA..

This case involves an action brought for declaratory relief under RCW 7.24, the Uniform declaratory Judgments Act. Plaintiff maintains that the issue of whether the port's coordinating agency should be subject to the sunshine laws and whether it has violated them in a specif manner is a matter of widespread importance, and as such, the Court's power to decide this case is governed by the clearly established precedent of Farris v. Munro, 99 Wn. 2D 326, 662 P.2d 821, (1982). As the Supreme Court held in Farris...

Despite petitioner's failure to satisfy... standing requirements, he raised an issue vital to the state revenue process... Thus, the case presented issues of significant public interest that, by analogy to other decisions, allow this court to reach the merits.

The remedial nature of the UDJA also supports such a determination, in that the Legislature expressly declared RCW 7.24 to be a remedial statute.

This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

In addition to the legislature, the Supreme Court of the State of Washington has declared that liberal construction is required for such remedial statutes.

A liberal construction requires that the coverage of the act's provisions "be liberally construed and that its exceptions be narrowly confined." *Hearst Co. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978)

Under the remedial provisions of Washington's Uniform Declaratory Judgments Act, a person whose rights, status, or other legal relations are affected by a statute may have any question concerning the construction of that statute determined by the court. *Branson v. Port of Seattle*, 152 Wn.2d 862 , 877, 101 P.3d 67 (2004).

Specifically, RCW 7.24.020 reads, in part, as follows:

A person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

In accord with the intent of the Legislature, this Court has determined that the UDJA is to be liberally construed and is designed to clarify uncertainty with respect to rights, status, and other legal relations.

*DiNino v. State* , 102 Wn.2d 327 , 330, 684 P.2d 1297 (1984).

This is especially necessary when the issue concerns matters of broad importance involving trade, industry and commerce, as is the case with the “public” records and meetings of the “Public” Ports Association.

Like the PRA, the OPMA should not and can not in accord with a liberal construction require any showing of harm or damage for “any person” to compel his government to act openly as required by law.

Government acting secretly damages each citizen, and as such any member of the public has standing to challenge back room action by a board subject to the OPMA. The case cited by the Port dealing with an actual member of the board is not on point because it was not a member of the public bringing the claim, but a member of the City Council itself.

This Court should make an additional finding of manifest bad faith for the refusal of the WPPA to comply with the clear language law.

**III THE COURT ERRED IN FAILING TO FIND THAT THE WPPA HAD SILENTLY WITHHELD RECORDS AND HAD FAILED TO RESPOND TO PLAINTIFF'D REQUESTS AS REQUIRED BY LAW WITH A VALID PRIVILEGE LOG.....**

In the Orders and Judgment of September 27, 2010, (CP 343-351) August 28, 2009 (CP 219-221), December 21 2009 (260-261) and the final Order of February 4, 2011 (at CP 378) , and in entering the findings of

August 28, 2009 and 1- 37 in the September 27, 2010 Order, the Court erred in finding the WPPA's original replies “adequacy” when the WPPA failed to respond in a timely manner to identify the specific records exempted or provide the exemptions asserted or the number of pages of exempt records. As the Supreme Court noted in *Rental Housing v. Des Moines*...

Of particular significance to this case is that the Court in PAWS II (and *Rental Housing*) denounced “silent withholding” of information in response to a PRA request of the type practiced by the DNR in this case.

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

In PAWs. at 270 (citation omitted), and the *Rental Housing* case, *Rental Housing Ass'n of Puget Sound v. City of Des Moines* , 165 Wn.2d

525 (2009), the Supreme Court emphasized the need for particularity in the identification of records withheld and exemptions claimed:

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

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

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

Since the WPPA refused to comply with this clearly established requirement of a timely and valid response and since plaintiff was required to file a court actions to compel disclosure of even a substandard exemption

log in regard to the silently withheld E-mails, a finding of a violation of the PRA in these regards is mandatory. This is especially so since even the final log faile to assert specific exemptions, but merely cites to Hanggartner, where several separate exemptions were asserted.

**IV THE COURT ERRED IN FAILING TO FIND THAT THE WPPA'S DELIBERATE DESTRUCTION OF RECORDS WITHOUT A VALID RETENTION AND DESTRUCTION SCHEDULE VIOLATED THE PRA AND IN FAILING TO REQUIRE A SHOWING OF A DIDLIGENT SEARCH OR RECOVERY EFFORT.....**

The records at issue in this case include the official E-mails of the former WPPA president. As an executive officer, and head of a state agency, virtually all of the destroyed E-mails were at least public records, if not official public records.

The records retention guidelines promulgated by the Secretary of State provide that certain e-mails are public records. Those that are public records may be deleted as long as they are printed along with the following information: name of sender, name of recipient, and date and time of transmission and/or receipt. (see O'neil v. Shoreline, cited in brief attached to plaintiff's bill of exceptions, and RCW 40.14.010-100)

As noted by Ramsey Ramerman in his memo to the Ports of Tacoma and Olympia, (See excerpt attached) , records destruction must be in accord

with a records retention and destruction schedule. For State agencies such as the WPPA, this requires a schedule approved by the Secretary of State or the local records committee.

Plaintiff certifies that his research has failed to uncover any WAC provisions adopted by the WPPA or any duly approved records and retention schedule appropriate for a State Agency. Thus, the destruction of the WPPA Emails was unlawful..(See also April 28, 2009 AGO letter opinion, a true copy of which is attached) in that the WPPA unlawfully destroyed Public Records in violation of the requirements of RCW 40.14 RCW.

It is important to recognize that the WPPA cannot credibly deny that the provisions of RCW 40.14 apply to it as a public entity. (See Letter opinion at CP 254-259), and that the WPPA, in the second declaration of Eric Johnson (CP 234-236) expressly admits to the destruction of public records without a retention and destruction schedule—a clear and undeniable violation of RCW 40.14.

However, despite the illegal destruction of public records of its chief executive officer, the WPPA seeks to invalidate the precedent of both *Yacobellis v. Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989) and

O'Neil v. Shoreline that penalties are appropriate when an agency illegally destroys such public records. Significantly, in Yacobellis, the Court found a violation of the PRA even when Yacobellis failed to demonstrate that the records had been destroyed after the request.

Further, in O'Neill, in regard to the sufficiency of the recovery effort, the Court held...

**We affirm the Court of Appeals and hold that the City may not have provided all public records to the O'Neills in accordance with the PRA. On remand, the trial court must give the City the opportunity to inspect Fimia's home computer's hard drive to consider whether all public records were properly disclosed. If the City refuses to inspect Fimia's home computer's hard drive, they have indisputably not provided all public records to the O'Neills, and the trial court should find that the City violated the PRA. Furthermore, if the City inspects Fimia's home computer's hard drive but cannot find the metadata associated with the September 18 e-mail, or metadata from the September 18 e-mail that is different from the metadata already released to the O'Neills, the trial court must determine, consistent with this court's opinion, whether the City's deletion of the metadata violated the PRA. If appropriate, the trial court should determine the monetary penalty under the PRA. O'Neill v. City of Shoreline, 145 Wn. App. 913, 936, 187 P.3d 822, 832 (2008))**

Obviously, the WPPA's arguments in this case concerning their destruction and withholding of records and the sufficiency of their recovery effort are based upon a view of the law at variance with the clear precedent

of both Yacobellis and O'Neill, a view that allows agencies to destroy public records with impunity. This is of greater concern when substantial records are destroyed in addition to the metadata.

The nature of the records destroyed and concealed by the WPPA is also relevant in this case. Unlike the single E mail concerning Council matters of a single City in O'Neill or the municipal Golf Survey in Yacobellis, the records the WPPA destroyed and concealed included virtually all of the communications of the primary executive officer of the WPPA, an agency entrusted with a number of critical public functions.

These records are not some incidental technical data, but the very type of public records that the Public Disclosure Act was designed to require disclosure of, so that the citizens could be informed of the operation of their government.

If the records relating to a crucial administrative position like the CEO of a public agency are not required to be preserved, what likelihood is there that other State agencies and local government will ensure the preservation of less important records?

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

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

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

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

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

While willful destruction or concealment of official public records is a criminal offense, (See RCW 40.14.020-030) the records retention guidelines promulgated by the Secretary of State provide that even the lesser e-mails of officials like the executive director of the WPPA are

public records which must be preserved<sup>2</sup>. Such public records may be legally deleted only so long as they are printed along with the following information: name of sender, name of recipient, and date and time of transmission and/or receipt. (see *O'Neill v. City of Shoreline*, 145 *Wn. App.* 913, 936, 187 P.3d 822,. 832 (2008))

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

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

Since the records in this case were destroyed unlawfully, and since the best evidence of even a reasonable search, (let alone a diligent search as

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<sup>2</sup> See *O'neil v. Shoreline* at Note 57... "The records retention guidelines promulgated by the secretary of state provide that certain e-mails are public records. Those that are public records may be deleted as long as they are printed along with the following information: name of sender, name of recipient, and date and time of transmission and/or receipt..."

required to recover unlawfully deleted records) has been presented, the court's ruling in this case must be reversed. In addition, if the destroyed records are ever to be recovered, DNR should be compelled to conduct an adequate, open and honest forensic recovery procedure.

It is also apparent that the Court failed to require the WPPA to demonstrate that it had conducted a diligent search to recover the destroyed records.

The Court erred in finding that a diligent search was conducted for the deleted records when the WPPA failed to assert that any such effort had ever been conducted.

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

At the summary judgment stage, where the agency has the burden to show that it acted in accordance with the statute, the court may rely on "[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Oglesby I*, 920 F.2d at 68; see also *Kowalczyk v. Department of Justice*, 73 F.3d 386, 388 (D.C.Cir.1996); *Weisberg*, 705 F.2d at 1351. However, if a review of the record raises substantial doubt, particularly in view of "well defined requests and positive indications of overlooked materials," *Founding Church of Scientology v. National Sec.*

Agency, 610 F.2d 824, 837 (D.C.Cir.1979), summary judgment is inappropriate. Id.; see also *Oglesby v. United States Dep't of the Army*, 79 F.3d 1172, 1185

Since the records in this case were destroyed unlawfully, and since no evidence of even a reasonable search, (let alone a diligent search as required to recover unlawfully deleted records) has not been presented, the court's ruling in this case is erroneous..

The Court erred in finding that a diligent search was conducted for the deleted records when the WPPA itself admitted that no zealous search was conducted. Both the Washington and the federal Courts require a diligent search to recover records. This requirement is elevated in regard to unlawfully deleted records. In this case, the previous statements of counsel Lake raises serious doubts as to her veracity in this case in regard to evidence that has been destroyed or concealed.

**V THE COURT ERRED IN OVERBROADLY CONSTRUING THE ATTORNEY CLIENT EXEMPTION AND IN FAILING TO COMPELL DISCLOSURE OF RECORDS RELATING TO A FRIEND OF THE COURT BRIEF.....**

RCW 5.60.060(2) provides that the attorney-client privilege applies to communications and advice between attorney and client. The privilege extends to written communications from an attorney to his client. *VICTOR v. FANNING STARKEY CO.*, 4 Wn. App. 920, 486 P.2d 323 (1971).

The document in question here, exhibit 82, shows neither a communication from or advice by attorneys to Western Gear. It was prepared by a lay person, not a lawyer. As noted by the Court of Appeals, on its face it is nothing more than a memorandum between corporate employees transmitting business advice rather than a privileged communication between attorney and client. Defendant's contention that *UPJOHN CO. v. UNITED STATES*, 449 U.S. 383, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981), applies to this case is not well taken. In *UPJOHN*, the documents involved were communications from the corporation's counsel to corporation employees. That was not the situation here. *KAMMERER v. WESTERN GEAR CORP*, 96 Wn.2d 416, 635 P.2d 708.

Similarly, the communications between WPPA employees in this case, many of which were produced by WPPA employees, merely forwarded subsequently to counsel are not protected. The Court erred in suppressing E-mails that had not been produced by WPPA counsel, but which had been produced by consultants or disclosed to third parties. Merely forwarding these type to the attorney does not convert them to exempt records, especially when their disclosure is waived by defendants by disclosure of related subject matter or by the transmission of the records to third parties.

**THE COURT ERRED IN CONSTRUING ATTORNEY CLIENT PRIVILEGE BROADLY TO SUPPRESS A SEARCH FOR THE TRUTH AND EXCLUDE RELEVANT EVIDENCE**

Washington's attorney-client privilege is set forth in RCW 5.60.060

(2)(a).

The attorney-client privilege applies to communications and advice between an attorney and client and extends to documents that contain a privileged communication. *Dietz* , 131 Wn.2d at 842 . Because the privilege sometimes results in the exclusion of evidence otherwise relevant and material, and thus may be contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege is not absolute; rather, it is limited to the purpose for which it exists. *Dietz* , 131 Wn.2d at 843 ; *see also Baldrige v. Shapiro* , 455 U.S. 345, 360, 102 S. Ct. 1103, 71 L. Ed. 2d 199 (1982) (Statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth.). *VersusLaw, Inc. v. Stoel Rives, L.L.P.*, 127 Wn. App. 309 (2005)

Our court noted the following limitation on the attorney-client privilege in *Dike v. Dike* , 75 Wn.2d 1, 11, 448 P.2d 490 (1968):

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

The central purpose of the rule is to encourage free and open discussion between an attorney and his client by assuring the client that his information will not be disclosed to others either directly or indirectly. *State v. Chervenell*, 99 Wn.2d 309, 316, 662 P.2d 836 (1983).

In this case the Court erred in applying the attorney client privilege broadly to suppress records rather than narrowly to compel disclosure. Such is a thinly veiled attempt to judicially repeal the Public Records Act.

In addition the privilege was improper in regard to the Futurewise case, as many of the records pertain to in that the WPPA was not a party and had only an amicus interest. As the courts have recognized...

The purpose of an amicus brief is to help the court with points of law. RAP 10.3(e); *Pleas v. City of Seattle*, 49 Wn. App. 825, 827 n.1, 746 P.2d 823 (1987), *rev'd on other grounds*, 112 Wn.2d 794, 774 P.2d 1158 (1989)

Further it is recognized that

An Amicus is not a party to this case, and its interest in the outcome of it is merely tangential. *Cummins v. Lewis County* 156 Wn.2d 844, (2006)

Such tangential interest of the WPPA does not support the broad use of the attorney client exemption in regard to the public dispute between Futurewise and the Growth Management Hearings Board

Such an interest of a public entity in acting as a "friend of the court" to illuminate an issue of law is simply not a matter that should or can legitimately be secret, and the WPPA communications in this matter should be disclosed. For government to be conducted openly the friends of the court must be open and above board in their actions and intent.

A further argument against the attorney-client privilege being employed by the WPPA in regard to private counsel is that as a public agency, and as the State Port Association, the State Attorney general should properly represent them.

As RCW 43.10.040 provides...

The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings, and advise all officials, departments, boards, commissions, or agencies of the state in all matters involving legal or quasi legal questions, except those declared by law to be the duty of the prosecuting attorney of any county.

As this Court recognized in *Nelson v. Mcgoldrick*, 73 Wn. App. 763, (2006), As a general rule, a contract that is contrary to the terms or policy of an express legislative enactment is illegal. *State v. Pelkey*, 58 Wn. App. 610, 615, 794 P.2d 1286 (1990). and therefore a Court cannot extend any rights to the WPPA from an unlawful agreement—including the attorney-client exemption.

The Court further erred in denying disclosure based upon an attorney-client exemption when there was new evidence of a regular business practice of Goodsteil law Group clients (as evidenced by the

declaration of plaintiff and the memo of Ramerman) to evade the PRA by using the attorney-client exemption improperly.

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

Following notification that the records had been destroyed, plaintiff filed an action to compel their disclosure, Since the records have been subsequently disclosed as a result of this suit, imposition of penalties is mandatory. This is of special concern also due to the fact that the communications of the WPPA's Executive Director are in part official public records, the destruction of which is prohibited. While the records have been destroyed, it is impossible without recovery to know whether they included records that met the definition of official public records.

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

whatsoever; all agreements and contracts to which the state of Washington or any agency thereof may be a party; all fidelity, surety, and performance bonds; all claims filed against the state of Washington or any agency thereof; all records or documents required by law to be filed with or kept by any agency of the state of Washington; all legislative records as defined in RCW 40.14.100; and all other documents or records determined by the records committee, created in RCW 40.14.050, to be official public records.

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

Appellant West formally objects to all of the findings of fact (set forth as follows in an incorporated appendix) and conclusions of law entered by the Court on and September 27, 2010 and August 28 2009 and subsequently approved in order of February 4, 2011..

**INCORPORATED APPENDIX:**

**Based on the foregoing, and the Court being fully advised; the Court finds:**

- 1. To the extent that the Plaintiff seeks a Declaratory Judgment, the Plaintiff lacks standing to bring to bring this Declaratory Judgment action pursuant to RCW 7.24.020 under the facts presented to the Court.**
- 2. To the extent that the Plaintiff seeks to pursue a claim for alleged violation of the Open Public Meetings Act against either WPPA or the named individual Defendants, the Plaintiff lacks standing under the facts presented to the Court.**

1. On or about June 16, 2008, Plaintiff Mr. West submitted his initial request for information to the Defendant WPPA.
2. On June 20, 2008 the WPPA responded and notified Plaintiff West that the requested records would be ready by July 15, 2008.
3. WPPA's response was within five business days of receiving Plaintiff West's request for records.
4. On July 14, 2008 after WPPA gathered the records responsive to Mr West's 16 June 2008 records request, WPPA notified Mr West the records were ready for review and copying.
5. On August 25, 2008, WPPA again contacted Mr West and advised him the records were available to him.
6. However, Mr West failed to respond and did not thereafter review the records in 2008.
7. After Mr West failed to respond or review the gathered records, WPPA sent Mr West a letter notifying him the records request would be closed out on February 27, 2009.
8. On April 8, 2009, Mr West submitted another records request to WPPA.
9. West's records request (1) repeated the same request he has submitted in June 2008, and (2) requested additional records.
10. Two days later on April 10, 2009, the WPPA timely responded to West.

11. WPPA advised Plaintiff West that the WPPA was gathering responsive records, and would have the records responsive to the renewed June 2008 request ready by May 8, 2009, with the balance of records available by June 10, 2009.
12. On May 26, 2009 – Mr West reviewed the records made available by WPPA and marked some for copying.
13. On May 29, 2009, (prior to WPPA's forecasted response date of June 10, 2009), WPPA again wrote to Mr West, responding fully to the balance of the records request.
14. In its May 29, 2009 correspondence, WPPA provided Mr West with a copy of the WPPA records retention policy, and notified him what other records were available for inspection and review.
15. One part of Mr West's April 8, 2009 records request was for copies of the emails of WPPA Executive Director.
16. *Findings 16-24 are based on Defendants' declarations*  
Former Executive Director Pat Jones left WPPA employment voluntarily on January 1 2009.
17. At that time, his email account was deleted.
18. After inquiry and in response to Plaintiff's request, WPPA Staff discovered that they are not able to retrieve these deleted emails.
19. All of Pat Jones' memos, minutes, etc are retained for WPPA records, and WPPA has all of those. But Mr Jones' emails and his email account were deleted upon his leaving, and are not on that laptop anymore.

20. After he left WPPA, Pat Jones' old laptop was assigned a new user, username, etc. His laptop was re-issued to WPPA's newest employee (Mandy, WPPA's Admin Assistant, and it was wiped clean of all of Pat's emails when it was re-configured for a new user.)
21. That laptop was initially cleaned of Pat's files in early January, 2009, around the 7<sup>th</sup> or 8<sup>th</sup>. Mandy was hired here in mid-February, 2009, and her start date was March 2, 2009.
22. The laptop was wiped clean again and reconfigured for her the week of Feb. 23, 2009.
23. Mr West's PRR occurred April 8, 2009.
24. WPPA also tried to log into both Mr Jones' former computer and the WPPA server with Pat Jones' user name and password, and as expected, they were not recognized.
- ~~25. WPPA is not a County or a City, or even a big Association with an IT department. WPPA has six employees and a small operation.~~
- ~~26. WPPA doesn't have public works contracts, a big payroll, utility billings or any of the other things that would require a fancy big system to be backed up and crash-proof.~~
27. WPPA provided all the responsive emails that were able to be retrieved.
28. WPPA also advised Mr West that a few records were deemed exempt from public disclosure under the attorney client privilege, where information between attorney and WPPA staff is disclosed.

29. WPPA provided Mr West with a Privilege Log which identified the exempt records and cited to the exemption.
30. On or about June 2, 2009, Mr West picked up a copy of the records he had reviewed on May 26, 2009.
31. Also June 2, 2009, Mr West apparently signed and filed his Complaint against WPPA alleging a public records violation and open public meetings act violation.
32. Plaintiff West's Motion for Show Cause states as follows:
  1. That WPPA appear and show cause why it should not be found to be a subdivision of the State of Washington subject to the Open Public Meetings and Public Records Act, and why it should not be found in violation of the PRA for failing to prepare adequate privilege logs and or disclose or recover requested records.
33. This Court has since dismissed Plaintiff's Open Public Meetings Act and Declaratory Judgment Act claims. See Order on file dated August 28, 2009.
34. The Washington Public Ports Association was created by the legislature in Title 53.06 of RCW to coordinate the state's ports.
35. The ports are authorized to pay dues to the association from public funds.
36. *The records of the association are subject to audit.*
37. The purposes of the association are to carry out studies for the development of port businesses, coordinate marketing, exchange information related to port management, promote port development, act as a clearing house and so forth.

Plaintiff objects to each and every one of the **incorporated appendix** of findings and to all of the Court's conclusions of law and asserts they are unsupported in fact or law and demonstrate that the Court failed to rule in accord with the weight of substantial evidence or clearly established law..

The standard of review is de novo for issues of law, substantial evidence for factual matters, and de novo and consistency with precedent and law in regard to mixed issues, and it is evident that the findings were not consistent with the evidence, the rulings were not based upon substantial evidence or consistent with existing law, and the Court's determinations do not meet the standard of review in this case.

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

This is especially the case for the findings where no credible evidence was provided by the WPPA to support the court's findings

While none are designated findings of fact, and they all appear to be mixed findings for which the de novo standard of review applies, in the

interests of caution, plaintiff respectfully challenges each and every finding: made and asserts that they are not in accord with substantial evidence or any inference therefrom, and fail to meet the standard of *Miller v. City of Tacoma*, 138 Wn. 2d 318, 979 P.2d 429 (1999), in addition to their having been based on an improper legal standard.

Plaintiff contends that the WPPA is liable for their negligent destruction under the doctrine of *res ipsa loquitur*. *Tinder v. Nordstrom*, 84 Wn. App. 787, 929 P.2d 1209, (1997).

Plaintiff's evidence appearing at CP 90-94 and CP 83-4, as well as the declaration at CP 58-80 demonstrate the falsity and misrepresentations of the State's findings entered by the Court, including: that the State failed to adequately respond within 5 business days, that the State could have adequately responded, but delayed to plaintiff's prejudice, that the response when it did occur, was delayed due to the unlawful destruction of documents, and that the delay resulting from the destruction was unreasonable.

**DEFENDANT WPPA'S FAILURE TO DENY DESTRUCTION AND DELAY IN PROVIDING A PRIVILEGE LOG WERE VIOLATIONS**

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

1. WPPA destroyed and deleted public records of its chief executive officer, without compliance with any retention and destruction schedule.
2. Their unlawful failure to properly preserve these official public records (See RCW 40.14) caused a violation of the Act, and no diligent recovery effort or search was conducted.
3. Plaintiff was not provided with a privilege log for nearly a year, and even then it was defective..
4. A proper forensic search might recover more records.
5. Exemptions under “Hanggartner” were asserted broadly for records that should not have been exempt.

The findings 1-37 adopted by the court and each of them which are all objected to specially, and the conclusions of law grossly misrepresent the facts and circumstances of this case, and failed to note that the WPPA (1) unlawfully destroyed public records without any approved retention and destruction schedule, (2) refused to furnish an adequate privilege log prior to plaintiff filing suit.

Under these circumstances, the findings and conclusions of the court must be reversed, especially since the court applied the wrong standard of law, and failed to find the WPPA strictly liable for penalties under a liberal

construction of the PRA when the plaintiff was forced to file suit to obtain a proper privilege log, PAWS, 114 Wn.2d 677, 790 P.2d 604 (1990)<sup>3</sup>.

This is especially necessary when the WPPA's destruction of records was clearly unlawful under the PRA and by the application of the doctrines of both estoppel, See *Kramarevsky v. DSHS*, 122 Wn.2d 738, P.2d 535, (1993) and *Res Ipsa Loquitur*. See *Rasmussen v. Bendotti*, 107 Wn. App. 947, (2001), due to the fact that their destruction was undeniably negligent per se when no lawful retention and destruction schedule did or could possibly authorize such destruction, and when the WPPA has made no showing of any recovery effort. Under these circumstances, the failure of the Court to find a violation of the PRA was a manifest error.

### CONCLUSION

The WPPA withheld records silently for over a year without informing plaintiff they had been withheld, The WPPA destroyed records without a valid retention and discovery schedule. Plaintiff was required to maintain a suit to compel the provision of an adequate exemption log and to determine if the WPPA was subject to the PRA at all.

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<sup>3</sup>"strict enforcement' of fees and fines will discourage improper denial of access to public records." PAWS I, 114 Wn.2d 677, 790 P.2d 604(1990) quoting *Hearst v. Hoppe*, 90 Wn.2d at 140.

It was manifest error for the Court to deny West the status of a substantially prevailing party when he should have prevailed in finding the WPPA, as a public agency, subject to the PRA and the OPMA.

.For the foregoing reasons, the Court's ruling that WPPA is not an agency subject to the PRA and OPMA should be reversed, and the dismissal should be vacated., and all other rulings in regard to the WPPA should be annulled, other than the fact that it is a coordinating agency under RCW 53.06.030.

An Order of remand should issue to compel a declaratory ruling that the WPPA is a public entity, to compel the issue of penalties under the PRA, and for further proceedings under the OPMA. Done 6/30/2011..

  
**ARTHUR WEST**

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**CERTIFICATE OF SERVICE**

I certify under penalty of law that I served the defendants by Emailing and mailing a copy to their address of record on or before July 1, 2011.

  
**ARTHUR WEST**