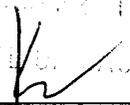


No. 41694-8-II

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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**

**Vs.**

**DOUG MAH, CITY OF OLYMPIA, ET AL**

---

**Appeal from the rulings of  
the honorable Judge W. T. McPhee**

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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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**2. THE COURT ERRED IN FAILING TO FOLLOW THE CLEAR PRECEDENT OF WOOD TO CONSIDER A LETTER FROM THE ATTORNEY GENERAL'S OMBUDSMAN, A BINDER FULL OF EMAIL COMMUNICATIONS, BETWEEN CITY COUNCIL MEMBERS DURING COUNCIL MEETINGS AND AN OFFER OF PROOF OF FURTHER EVIDENCE AS PRIMA FACIA EVIDENCE OF SERIAL VIOLATIONS OF THE OPEN PUBLIC MEETINGS ACT BY THE OLYMPIA CITY COUNCIL MEMBERS**

**4.THE COURT ERRED IN FAILING TO RECOGNIZE THAT THE CITY HAD FAILED FOR NEARLY A CALENDAR YEAR TO RESPOND PROMPTLY AS REQUIRED BY THE PUBLIC RECORDS ACT TO PROVIDE AN ESTIMATE FOR COMPLIANCE AND AN ADEQUATE EXEMPTION LOG IN A REASONABLY TIMELY MANNER**

**5. THE COURT ERRED IN FAILING TO REQUIRE DISCLOSURE OF OVER A THOUSAND RECORDS CLAIMED EXEMPT AS ATTORNEY-CLIENT COMMUNICATIONS WHEN THEY WERE NOT PROPERLY**

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## **INTRODUCTION-SUMMARY OF ARGUMENT**

This case illuminates the basic policy underlying the interrelation of the Sunshine laws the Public Records and Open Public Meetings Acts, to preserve fundamental democratic imperative that the people remain informed of the operations of their government so that they may retain control of the instruments they have created.

Both the OPMA and PRA at their most basic level require that public officers acting on behalf of the people conduct the people's business openly and transparently and be accountable for their actions.

Unfortunately, as their own communications demonstrate, a number of City council members, (many of who are for one reason or another no longer public officers, and/or not standing for re-election), developed a contempt for the “idiots” and “cowards” that, as private citizens, attempted to influence the actions and policy of their elected city council members.

While the surface symptoms of this malady were expressed by a pattern of covert and secret communications and deliberations, a bunker type mentality where the citizens were the enemy, and an over reliance on a legion of attorneys that they communicated with secretly on an almost daily basis the underlying basis for all of these phenomenon was at its core the denial of the basic truth that the government exists to serve the people, not the reverse.

Insulated by a corps of counsel with an aggressive risk management strategy, and a policy of stonewalling the public at every turn, our city council members lost sight of the circumstance that the people are the sovereign in Washington, and their own demeanor and communications are the most damning evidence against them.

The trial court, by refusing to recognize the weight of clearly established precedent, issued a series of rulings which denied the basic policy of both the PRA and the OPMA, that the people insist upon remaining informed so that they may retain control of the instruments they have created.

In addition, it also made some technical legal errors.

#### **STANDARD OF REVIEW**

The standard of review of discretionary rulings is abuse of discretion. Findings of facts and conclusions of law are reviewed under the de novo substantial evidence and error of law standards.

**ASSIGNMENT OF ERROR**

**1. THE COURT ERRED IN FAILING TO FOLLOW THE CLEAR PRECEDENT OF CONCERNED RATEPAYERS TO REQUIRE DISCLOSURE OF A RECORD USED BY THE CITY OF OLYMPIA ALLOWING THE CITY OF OLYMPIA TO ESTABLISH A MATERIAL FACT IN AN ADMINISTRATIVE PROCEEDING, AND IN FAILING TO FIND THE CITY IN VIOLATION OF THE PRA FOR CONCEALING THE RECORD EVEN WHEN IT HAD BEEN DISCLOSED AS A PUBLIC RECORD BY THE DEPARTMENT OF FISH AND WILDLIFE**

**2. THE COURT ERRED IN FAILING TO FOLLOW THE CLEAR PRECEDENT OF WOOD TO CONSIDER A LETTER FROM THE ATTORNEY GENERAL'S OMBUDSMAN, A BINDER FULL OF EMAIL COMMUNICATIONS, BETWEEN CITY COUNCIL MEMBERS DURING COUNCIL MEETINGS AND AN OFFER OF PROOF OF FURTHER EVIDENCE AS PRIMA FACIA EVIDENCE OF SERIAL VIOLATIONS OF THE OPEN PUBLIC MEETINGS ACT BY THE OLYMPIA CITY COUNCIL MEMBERS**

**4.THE COURT ERRED IN FAILING TO RECOGNIZE THAT THE CITY HAD FAILED FOR NEARLY A CALENDAR YEAR TO RESPOND PROMPTLY AS REQUIRED BY THE PUBLIC RECORDS ACT TO PROVIDE AN ESTIMATE FOR COMPLIANCE AND AN ADEQUATE EXEMPTION LOG IN A REASONABLY TIMELY MANNER**

**5. THE COURT ERRED IN FAILING TO REQUIRE DISCLOSURE OF OVER A THOUSAND RECORDS CLAIMED EXEMPT AS ATTORNEY-CLIENT COMMUNICATIONS WHEN THEY WERE NOT PROPERLY SUBJECT TO THE ACT, THE EXEMPTION HAD BEEN WAIVED OR WHEN DISCLOSURE WAS NECESSARY TO PROVIDE EVIDENCE OF THE CITY'S ACTIONS IN VIOLATION OF THE OPMA**

**6. THE COURT ERRED IN DISMISSING PLAINTIFF'S CLAIMS WITHOUT OPPORTUNITY TO AMEND OR A REASONABLE OPPORTUNITY TO PRESENT EVIDENCE IN RESPONSE TO A "CELOTEX" TYPE MOTION SUPPORTED BY DECLARATION OF COUNSEL THAT LACKED PERSONAL KNOWLEDGE AND WHICH WAS ADMITTEDLY PREPARED WITHOUT REVIEW OF THE CASE FILE OR CITY'S RESPONSES TO DISCOVERY**

**7. THE COURT ERRED IN LEGITIMIZING A PATTERN OF SECRET DECISIONMAKING AND CONCEALMENT OF THE CONDUCT OF GOVERNMENT Y THE CITY OF OLYMPIA**

**STATEMENT OF THE CASE**

On April 28, 2008 and in August of 2008, plaintiff requested records and communications related to City land use determinations, including communications with counsel and the council. plaintiff also requested records related to a declaration of Laura Keehan. (CP 11-71)

On November 3, 2008, West attended a City Council meeting and was excluded from the meeting by Joe Hyer and Mayor Mah, who also employed that occasion to orally berate and defame West and expose him to false light. On the same date, city council member Kingsbury accessed facebook during the meeting to impugn citizens such as West testifying as “idiot(s)” and typed to his facebook friends “Lol...you should hear these folks. I can look directly at them and type at the same time”.(CP at 489-518)

This facebook use promoted a citizen (Sam Seagal) to request records of city council email use, and to forward some of them to the Attorney General's office.

On December 9, 2008 Attorney General Ombudsman Tim Ford wrote to the City

about the potential for violation of the act by the communications evidenced I n  
the response to Segal.CP 954-1355

On or about February 11, 2009, plaintiff filed a complaint for relief” seeking  
disclosure of records and a finding that the City Council had violated the OPMA  
(CP at 4-10 )

Based upon plaintiff’s motion to show cause, which objected to the assertion of  
many specific exemptions to disclosure, (CP 11-71) an order t show cause was  
signed that day. CP 72

On February 20 a hearing was held (Transcript of Feb 20)

On the 27<sup>th</sup>, a further hearing was held and an order entered, allowing the  
defendants until April to finish asserting exemptions. (CP 75-78)

On May 8, 2009, an Order was ignored granting Summary Judgment Dismissing  
plaintiff’s 42 USC claims against the individual city council members. (See CP  
486-88)

On May 15 a motion hearing was held on the issue of the city’s continuing  
withholding of the WFWD maps relied upon to establish a material fact in a city  
administrative proceeding. (CP 535-537

On June 5 a motion hearing was held

On June 8 an Order granting partial summary judgment was entered CP 486-88

On June 26 a motion hearing was held on plaintiff’s April 20 order to show cause.

The Court ruled that the maps relied upon by the city and disclosed by the WFWD were exempt and the city did not violate the act by concealing these records. The Court ordered the city to provide the exempted records for in camera review by August (CP 535-537)

On September 18, 2009, a hearing was held and an order signed (CP 544-545)

On March 30, 2011, the Court issued its decision on review of the documents., upholding the attorney client and work product exemptions in nearly 2000 separate applications. The Court did find one record to have been improperly withheld, but decided to create its own judicially based exemption to deny West the satisfaction of having prevailed, even though at least one record was unlawfully withheld. The Court also applied an overly broad definition of controversy.

On July 12, an Order was signed CP at 885-886

On August 6, 2010 a hearing was held and an order signed dismissing the plaintiff's PRA claims. CP 890-892

On September 24, a hearing was held and an order signed dismissing plaintiff's remaining claims. The defendant moved for summary judgment based upon counsel's declaration, which was not based upon a review of the relevant evidence or records produced on discovery. (CP 1386-1388)

On December 1, 2010 a final Order denying Reconsideration was filed. (CP

1412-1413)

On January 18, 2011, a timely notice of Appeal was filed. CP at 1414-1433

**Orders on Appeal**

The appellant appeals the orders of December 17, September 24, August 6, July 12, 2010, the decision of March 30, 2010, and the Orders of February 27, May 8, and June 26, 2009

**ASSIGNMENT OF ERROR**

**1. THE COURT ERRED IN FAILING TO FOLLOW THE CLEAR PRECEDENT OF CONCERNED RATEPAYERS TO REQUIRE DISCLOSURE OF A RECORD USED BY THE CITY OF OLYMPIA ALLOWING THE CITY OF OLYMPIA TO ESTABLISH A MATERIAL FACT IN AN ADMINISTRATIVE PROCEEDING, AND IN FAILING TO FIND THE CITY IN VIOLATION OF THE PRA FOR CONCEALING THE RECORD EVEN WHEN IT HAD BEEN DISCLOSED AS A PUBLIC RECORD BY THE DEPARTMENT OF FISH AND WILDLIFE**

**2. THE COURT ERRED IN FAILING TO FOLLOW THE CLEAR PRECEDENT OF WOOD TO CONSIDER A LETTER FROM THE ATTORNEY GENERAL'S OMBUDSMAN, A BINDER FULL OF EMAIL COMMUNICATIONS, BETWEEN CITY COUNCIL MEMBERS DURING COUNCIL MEETINGS AND AN OFFER OF PROOF OF FURTHER EVIDENCE AS PRIMA FACIA EVIDENCE OF SERIAL VIOLATIONS OF THE OPEN PUBLIC MEETINGS ACT BY THE OLYMPIA CITY COUNCIL MEMBERS**

**4.THE COURT ERRED IN FAILING TO RECOGNIZE THAT THE CITY HAD FAILED FOR NEARLY A CALENDAR YEAR TO RESPOND PROMPTLY AS REQUIRED BY THE PUBLIC RECORDS ACT TO PROVIDE AN ESTIMATE FOR COMPLIANCE AND AN ADEQUATE EXEMPTION LOG IN A REASONABLY TIMELY MANNER**

**5. THE COURT ERRED IN FAILING TO REQUIRE DISCLOSURE OF**

**OVER A THOUSAND RECORDS CLAIMED EXEMPT AS ATTORNEY-CLIENT COMMUNICATIONS WHEN THEY WERE NOT PROPERLY SUBJECT TO THE ACT, THE EXEMPTION HAD BEEN WAIVED OR WHEN DISCLOSURE WAS NECESSARY TO PROVIDE EVIDENCE OF THE CITY'S ACTIONS IN VIOLATION OF THE OPMA**

**5THE COURT ERRED IN DISMISSING PLAINTIFF'S CLAIMS WITHOUT OPPORTUNITY TO AMEND OR A REASONABLE OPPORTUNITY TO PRESENT EVIDENCE IN RESPONSE TO A "CELOTEX" TYPE MOTION SUPPORTED BY DECLARATION OF COUNSEL THAT LACKED PERSONAL KNOWLEDGE AND WHICH WAS ADMITTEDLY PREPARED WITHOUT REVIEW OF THE CASE FILE OR CITY'S RESPONSES TO DISCOVERY**

**6. THE COURT ERRED IN LEGITIMIZING A PATTERN OF SECRET DECISIONMAKING AND CONCEALMENT OF THE CONDUCT OF GOVERNMENT Y THE CITY OF OLYMPIA**

**ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

**1. DID THE COURT ERR IN FAILING TO FOLLOW THE CLEAR PRECEDENT OF CONCERNED RATEPAYERS TO REQUIRE DISCLOSURE OF A RECORD USED BY THE CITY OF OLYMPIA ALLOWING THE CITY OF OLYMPIA TO ESTABLISH A MATERIAL FACT IN AN ADMINISTRATIVE PROCEEDING, AND IN FAILING TO FIND THE CITY IN VIOLATION OF THE PRA FOR CONCEALING THE RECORD EVEN WHEN IT HAD BEEN DISCLOSED AS A PUBLIC RECORD BY THE DEPARTMENT OF FISH AND WILDLIFE**

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**7. DID THE COURT ERR IN LEGITIMIZING A PATTERN OF SECRET DECISIONMAKING AND CONCEALMENT OF THE CONDUCT OF GOVERNMENT BY THE CITY OF OLYMPIA**

## ARGUMENT^

**THE COURT ERRED IN FAILING TO FOLLOW THE CLEAR PRECEDENT OF CONCERNED RATEPAYERS TO REQUIRE DISCLOSURE OF A RECORD USED BY THE CITY OF OLYMPIA ALLOWING THE CITY OF OLYMPIA TO ESTABLISH A MATERIAL FACT IN AN ADMINISTRATIVE PROCEEDING, AND IN FAILING TO FIND THE CITY IN VIOLATION OF THE PRA FOR CONCEALING THE RECORD EVEN WHEN IT HAD BEEN DISCLOSED AS A PUBLIC RECORD BY THE DEPARTMENT OF FISH AND WILDLIFE USED**

In issuing the Orders of February 27, 2009 June 26, 2009, the decision of March 30 and the Orders of July 12, August 6<sup>th</sup>, and September 24 and December 17<sup>th</sup>, 2010 he Court erred in failing to find the maps disclosed as public records by the WDFW and withheld as exempt by the City of Olympia to be public records when it was undisputed that the city had “used the records to support a formal determination in an adjudicative hearing.

The Superior Court failed to follow the clear precedent of the Supreme Court that has consistently held..

(T)his Court has found numerous types of information to be a public record even where portions of the requested information may be exempt *Concerned. Ratepayers Assn v. PUD* No. J, 138 Wn.2d 950, 960-91, 983 P.2d 635 (1999)

As the Supreme Court explained in a footnote in the Ratepayers case,

See *Confederated Tribes v. Johnson*, 135 Wn.2d 734, 958 P.2d 260 (1998) (State Gambling Commission records showing amount of "community contribution" paid by Indian tribes to defray impact of Indian gambling operations on nontribal governmental agencies

public records); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998) (portion of prosecutor's criminal files were "public records," though in-camera review by trial court was required to determine extent to which some documents were attorney work product); *Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997) (report investigating citizen complaints regarding City of Kalama's police chief not exempt from public disclosure act); *Lindberg v. Kitsap County*, 133 Wn.2d 729, 948 P.2d 805 (1997) (site and drainage engineering drawings for proposed residential developments disclosable public record); *Progressive Animal Welfare Soc'y (PAWS) v. University of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1994) (although university's research data exempt, grant proposal did not come within exemption); *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993) (county prosecutor's documents regarding child sex abuse expert witness were public records); *Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 618 P.2d 76, 26 A.L.R.4(tm) 692 (1980) (patient's public hospital medical records were public records); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978) (folios containing notes and information relevant to determining market value of real property for appraisal were factual data, even though contained within otherwise exempt data, were not exempt as intragency memoranda and must be disclosed); *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989) (questionnaires prepared by city's parks department to survey other governmental agencies' management of municipal golf courses were public records even though they were not the formal product the department intended to release to the public);...

More recently, Division I held in *Mechling* that...

We hold that former RCW 42.17.310(1)(u) does not exempt disclosure of personal e-mail addresses used by elected officials to discuss city business. On remand, *Mechling* is entitled to the requested e-mail messages without redaction of the personal e-mail addresses. *Mechling v. City of Monroe*, 152 *Wn.App.* 830, 222 P.3d 808 (2009) (emphasis added)

In light of the evident nexus between the withheld records and the City's determination demonstrated by the Keehan declaration, it was a manifest error for the court to refuse to find that the City was required to disclose the records that the WDFW itself did not seek to conceal from the public. See *Dragonslayer, Inc. v. Wash. State Gambling Comm'n.*, 139 Wn. App. 433, 448, 161 P.3d 428

The court also erred in allowing the City standing to assert an exemption that the WDFW did not seek to assert.

**. THE COURT ERRED IN FAILING TO FOLLOW THE CLEAR PRECEDENT OF WOOD TO CONSIDER A LETTER FROM THE ATTORNEY GENERAL'S OMBUDSMAN, A BINDER FULL OF EMAIL COMMUNICATIONS, BETWEEN CITY COUNCIL MEMBERS DURING COUNCIL MEETINGS AND AN OFFER OF PROOF OF FURTHER EVIDENCE AS PRIMA FACIA EVIDENCE OF SERIAL VIOLATIONS OF THE OPEN PUBLIC MEETINGS ACT BY THE OLYMPIA CITY COUNCIL MEMBERS**

In considering a motion for summary judgment, a court must consider all facts submitted and all reasonable inferences therefrom in favor of the moving party, and grant the motion if based on the evidence, reasonable persons could reach only one conclusion. *Vasquez v. Hawthorne*, 143 Wn. 2D 20 p.2d 780 (1961)

the Court's duty on Summary judgment is not to resolve factual issues, but to determine if any exist. *Jolly v. Folsom*, 59 Wash. 2D 20, 356 P.2d 780 (1961).

Just as the Supreme court determined in Wood..

Thus, in light of the OPMA's broad definition of "meeting" and its broad purpose, and considering the mandate to liberally construe this statute in favor of coverage, we conclude that the exchange of e-mails can constitute a "meeting." Just as in Wood, West has demonstrated at least a prim facia case of a violation of the act by serial emails and communications taken secretly at a public meeting.

As the record demonstrates...

On December 9, 2008, Attorney General Ombudsman Tim Ford corresponded with the city in regard to a complaint of violations of the OPMA and PRA, the city has not fully disclosed requested public record sand is conducting some of its deliberations during public meetings through the use of city computer laptops and city email accounts.

The letter notes that not only had the City failed to disclose complete records of City officers emails to Mr. Sega, the portion of those records disclosed provided "numerous examples of public records he obtained where city council members were deliberating public business by email during a public meeting."

As the Ombudsman recognized... "The open pubic meetings Act (OPMA) requires that the meetings and deliberations of the City be conducted openly, except as otherwise provided. The provisions of the OPMA are to be liberally construed to effectuate their purpose."

Email deliberations on public matters that are concurrently being discussed in a public meeting are wholly inconsistent with the requirements of the OPMA and should cease. The public is thwarted of the opportunity to view these deliberations and only finds out the substance of their nature upon disclosure of those public records. It is irrelevant whether the topics of some of the Email exchanges are later discussed in the open public meetings. All meetings, (including email meetings) of the governing body of a public agency shall be open and public. 42.30.030. an email exchange among members of a public in which action takes place can be a meeting under the OPMA. Since an email exchange among members of a governing body is not open to the public, such an exchange in which an action took place would violate the OPMA.

A review of the small portion of the disclosed email communication records that were filed in the court file reveals that Council members Joan Machlis, Joe Hyer, Jeff Kingsbury, Karen Messmer, Rhenda Strub and Craig Ottavelli sent at least one e-mail to another council member at meetings during the period. Hyer and Kingsbury wrote most frequently.

In several e-mails, council members discussed topics that were before the council on the given night. In an exchange on Sept. 23, Kingsbury appeared to try to line up enough votes to release a property from the moratorium on development in Chambers Basin in southeast Olympia.

He wrote to Hyer, "Are you comfortable if I make a motion removing the Kramer property from the moratorium area, and I think I can get (Councilman) Craig (Ottavelli) to second. And, do you support that? We haven't had a chance to talk, but I am ready to do that."

About a minute later, he wrote to Ottavelli: "If I move to remove the Kramer property from the moratorium area, will you second? Or are you on that page. We have at least 4 if you are."

Kingsbury was referring to four votes, the minimum needed to pass a measure. Ottavelli responded that he was willing to take action, but preferred waiting until the council took action on a comprehensive plan amendment that would resolve the Chambers Basin moratorium.

"In short, I think we can act more decisively and with more clarity if we wait just a few weeks," he wrote. Hyer's response later was similar. He said the council would deliberate on the issue in two weeks, not long to wait.

"Doug and I talked. ... I am uncomfortable ... because we are just weeks away from deliberating on the rezone. I think it is more appropriate to determine what it can develop to in that process, then release if we choose to."

There are a couple of other examples of e-mails in which votes were discussed. "You're seconding?" Kingsbury wrote to Councilman Joe Hyer during a

council meeting on Sept. 9.

"Only if I HAVE to, and no one else will. ...," Hyer replied.

Later that night, Kingsbury wrote to Councilwoman Karen Messmer, "Doug is goin(g) to ask for a motion since you moved it to other business. You need to chime in." In an interview, Messmer declined to comment on the e-mails, saying it is a "legality issue."

In several instances, the commentary turned to a member of the public. In addition to the "idiot" comment, during the Oct. 14 meeting, in an e-mail to Ottavelli, Kingsbury made a derisive comment about Gerald Reilly, a member of a citizen's group that wants to turn much of the area between Capitol Lake and Budd Inlet into a park.

"Jerry Reilly can't even look anyone in the eye. Coward," Kingsbury wrote. This demonstrates the contempt that forms the basis for all of the City's actions in regard to the citizens it is supposed to serve, and the prima facie case for the violation of the OPMA by the City council members by secretly communicating during meetings..

Such conduct underscores the violations of the broad intent of the OPMA...

The Supreme Court has found that the OPMA employs some of the strongest language of any legislation. *Equitable Shipyards, Inc. v. State of Washington*, 93 Wn. 2d 465, 611 P.2d 396(1980).

*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.

Some of the purposes of the OPMA are stated directly in the Act itself, for example:...To require governing bodies to conduct all actions and deliberations openly, with limited exceptions. RCW 42.30.010. This letter and intent are both violated by secret email communications and serial meetings of the type the City council conducted.

The types of serial meetings include (1) a series of telephone calls

between members to develop a collective commitment or promise on agency business; (2) successive meetings between board members; (3) use of electronic communications by a quorum of the governing body to deliberate toward or to make a decision; and (4) telephone trees where members repeatedly phone each other to form a collective decision. *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 27 P.3d 1208 (Div. 2 2001).

**THE COURT ERRED IN FAILING TO RECOGNIZE THAT THE CITY HAD FAILED FOR NEARLY A CALENDAR YEAR TO RESPOND PROMPTLY AS REQUIRED BY THE PUBLIC RECORDS ACT TO PROVIDE AN ESTIMATE FOR COMPLIANCE AND AN ADEQUATE EXEMPTION LOG IN A REASONABLY TIMELY MANNER**

The Court erred in finding that the City complied with the PRA when it was undisputed that they failed to respond to plaintiff's records request of November 18, 2007 within 5 days and when the response was inadequate and unreasonably delayed.

The Public Records Act requires an agency to take the "most timely possible action on requests" and make records "promptly available." RCW 42.56.080 and 42.56.100 .

The Court's rulings that the City was in compliance with these provisions of law were not supported by the weight of evidence and the factual record of the case, which unarguably demonstrate that no prompt and sufficient reply with an

estimate for complying with the request was made as required by the PRA, and that no exemption log was prepared for nearly a calendar year, and a misconstruction of existing law, which requires penalties to be assessed when a lawsuit can be (even “arguably”) seen as reasonably necessary to prompt disclosure, and which mandates penalties, not rewards, for unreasonable delay and obstruction of disclosure

The City's dilatory conduct in responding to records requests is especially objectionable due to the many attorneys that the City has on hand, as evidenced by the records and by the fact that no less than four (4) different attorneys could take time to attend the court proceedings on behalf of the City, and the Risk pool's aggressive case management policy and restrictive PRA procedures which required the city to submit records to the WCIA counsel for review before the city Public records officer could begin the process of disclosing them.

The City's year long delay in responding with an estimate or a complete privilege log violated the express requirement of RCW 42.56.520, as in effect at the time of the instant request, that provided...

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

require to respond to the request; or (4) denying the public record request.

Since it is undisputed that the defendants failed to respond and provide an estimate within 5 days as required by RCW 42.56.520, and that over 10 months passed without either an estimate or a complete exemption log,<sup>1</sup>, and since the City and WCIA policies require time consuming and unnecessary WCIA review, it was reasonably necessary for plaintiff to file suit compel them to even provide a reasonable estimate for compliance and provide the exemption log described in the Paws and Rental housing cases. ”

The only answer the plaintiff can find to this question is that the PRA as applied, is a litigious procedure which allows agencies to evade their duties to ensure disclosure for years.

As the Supreme Court noted in *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, at 103 (2005) such conduct is not in accord with the PRA...

The harm occurs when the record is improperly withheld. The requester should recover his costs, and the agency should be penalized, if the requester has to resort to litigation (the reason for the later disclosure is irrelevant). This rule promotes the PDA's

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<sup>1</sup> Prior to filing suit, plaintiff contacted the State Archives and Attorney General to determine if there was any schedule that authorized the destruction of the Emails in question. There was no such schedule in existence.

broad mandate of openness.

In this case, the defendants could not credibly dispute in their pleading that the plaintiff's suit was reasonably necessary. What they dispute is their responsibility for withholding and destroying documents and compelling West to maintain a suit to compel disclosure.

The Court erred in finding the City's original replies adequate when it failed to respond in a timely manner, and/or identify the specific records exempted or provide an exemption log describing the documents with sufficient particularity for the plaintiff to assess the basis for their withholding. 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 *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1995) . at 270 , and *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525 (2009) the Supreme Court emphasized the need for particularity in the identification of records withheld and exemptions claimed:

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

In a footnote, the court described the sort of identifying information that would be deemed adequate for review purposes under the PRA, much of which was absent from the City's log.:

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 City refused to comply with this clearly established requirement of a timely and valid response in part due to a policy of delay, and since plaintiff was required, after nearly a year, to file a court action just to obtain an exemption log and an estimate to compel recovery and disclosure of the non-exempt records, a finding of a violation of the PRA in these regards should have issued at the first hearing..

The Court erred in its orders of February 27, 2009, June 26, 2009, August 6, 2010 and December 17 and in the decision of March 30, 2010 in allowing the City to evade the requirement of promptly responding with an estimate, and in legitimizing a policy of aggressive obstruction as a policy of the risk pool determining city policy which resulted in unreasonable delays despite, and as a result of the vast number of counsel the City had to obstruct the public's right to know..

As appellant West argued in his declaration at CP , the Court should find that defendant's response was inadequate for a number of compelling reasons: The sheer number of City Attorneys that attended the hearing on the 20<sup>th</sup>, in addition to Mr. Friemund, (4) as well as the volume of pleadings produced by Counsel in response to the show cause order demonstrate that the City had more than ample resources to prepare a privilege log and make full disclosure by the date of the hearing, **had that been their priority**. However, it is clear that the primary concern of those in the WCIA who ultimately set municipal policy and procedure for the City of Olympia<sup>2</sup> is to conduct municipal operations secretly, and zealously defend such secrecy, regardless of any other considerations.

Defendants' response to plaintiff's original request failed to comply with the public Records Act in that no reasonable estimate was provided for disclosure of records and/or the production of privilege logs. In fact, no such reasonable estimate was provided until after the filing of this suit for disclosure. The time period (10-12 months) required by the City to disclose records and exemptions in this case was objectively unreasonable. (See January 15, 2008 ruling in Yousoufian v. King County) The privilege logs and redactions provided by the City were not sufficient to constitute adequate privilege logs under established precedent or the ruling in Rental Housing Associates.

The delays in responding to plaintiff's request were the result of deliberate City of Olympia policies, customs and usages, and WCIA mandated training and

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<sup>2</sup> See CP at , a true and correct copy of WCIA PRA policy

procedures to delay or obstruct responses to requests in order to limit liability for wrongful actions, and in order to attempt to protract replies beyond one year in an attempt to evade the one year limitation for the maintenance of a Public Records action. (see Rental Association v. Des Moines)The delays in producing records by the city in regard to the East Bay and Weyerhaeuser projects demonstrate that the constituted an impermissible prior restraint upon plaintiff's right to speech and petition for redress, in violation of Article 1, section 4, and USCA 1.

Examination of the redacted records produced by the City's allegedly "time consuming" process of "redaction" reveals that the redactions are actually withholdings of entire records under the guise of redaction. Such entire withholding of records differs significantly from limited redactions, and does not justify the additional time sought by the City under color of making redactions.

The amount of privileged material is a direct result of City policies to conduct the operations of government behind closed doors and behind a veil of attorney-client privilege and cannot be a reasonable justification for any delay in disclosure. The continuing culture of secrecy and resulting delays in disclosure of records related to City and port development projects are the result of a regular business custom of the port and City to hide records and obstruct review of their determinations.

The repeated delays and obstruction of disclosure by the City in this case are especially egregious in that they constitute just one aspect of a series of interlocking prior restraints that serve to deny citizens the right to timely access to

information necessary to speak and petition in a responsible and informed manner. The delays in providing public records on the part of the City are part of a deliberate strategy to impermissibly abridge rights protected under the 1<sup>st</sup> Amendment and in Article 1 section 4 and 5 of the State Constitution, and thus also under the 14<sup>th</sup> Amendment's equal protection clause as State created rights.

As such, the Court erred in failing to hold the City accountable for a prompt response as required by the PRA

**THE COURT ERRED IN FAILING TO REQUIRE DISCLOSURE OF OVER A THOUSAND RECORDS CLAIMED EXEMPT AS ATTORNEY-CLIENT COMMUNICATIONS WHEN THEY WERE NOT PROPERLY SUBJECT TO THE ACT, THE EXEMPTION HAD BEEN WAIVED OR WHEN DISCLOSURE WAS NECESSARY TO PROVIDE EVIDENCE OF THE CITY'S ACTIONS IN VIOLATION OF THE OPMA**

The City's overbroad use of attorney client exemption to withhold literally thousands of records violates the requirement that the construction of exemptions be narrow, even as recognized by the Hanggartner court. As the majority noted in Hanggartner...

Indeed, in this case, even though Hanggartner made requests that he referred to as "voluminous," the City claimed that only six documents, three of the light rail documents and three AIA documents, fell within the attorney-client privilege. HCP at 27; *see* HCP at 417.

Here, the majority does not incorporate a narrow exemption of specific information or records into the PDA, but rather incorporates the extremely general attorney-client privilege which swallows the PDA's purpose of allowing citizens a right to public records. The holding is, to use a word from the majority opinion, absurd.

Finally, the majority's argument is inconsistent with the legislative history of the statutory exemptions that created the "other statute" exemption. The "other statute" language was added by the legislature in 1987. LAWS OF 1987, ch. 403. The legislature made this change in direct response to our case of *In re Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986). LAWS OF 1987, ch. 403, § 1.

Relying upon *Escalante v. Sentry Ins. Co.*, 49 Wn. App. 375, 743 P. 2d 832 (1987), review denied, 109 Wn.2d 1025 (1988), appellant also contends that the attorney-client privilege cannot be asserted when allegations of bad faith are at issue in the case.

The attached exhibit and index of the records withheld by City demonstrates that portions of the withheld records are themselves correspondence between a quorum of Board members on matters of city business. In *Washington*

*Public Trust Advocates v. City of Spokane*, 120 Wn. App. 892, 86 P.3d 835 (Div. 3 2004), the issue was whether a private meeting between the mayor and special litigation counsel about litigation violated the OPMA.

The court said that the meeting with the mayor did not come within the definition of "public agency" or "governing body." /In the context of WPTA's OPMA arguments we do not view a meeting of the Mayor and **special counsel** as coming within the definition of "public agency" or "governing body" under the act. See RCW 42.30.020 (1), (2); *Cathcart v. Andersen* , 85 Wn.2d 102 , 106-07, 530 P.2d 313 (1975) (governing body is a policy or rule-making body). Assuming OPMA applies for the sake of argument, the act

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permits executive sessions for governing bodies when discussing **litigation** or **potential litigation** if public knowledge regarding the discussion is likely to result in adverse legal or financial consequences. RCW 42.30.110 (1)(i).

Of the attached index, Records No --- p-\_\_\_\_\_ all appear to demonstrate communications between a quorum of council members. Additional records are on the issues of the City withholding or concealing land use actions and other acts that may not be within the legitimate scope of the privilege, but it is impossible to determine due to the lack of any proper description of how the exemptions apply. Some of the records appear to have been forwards to third parties or may fall within the category of communications between non lawyers.

While under some circumstances non attorneys may author documents constituting work-product, this is only the case so long as they act under the general direction of attorneys. *See, e.g., Exxon Corp. v. FTC*, 466 F. Supp. 1088, 1099 (D.D.C. 1978), *aff'd*, 663 F.2d 120 (D.C. Cir. 1980)

Further, cases interpreting Fed. R. Civ. P. 26(b)(3) have generally held that to justify disclosure, a party may show the importance of the information to the preparation of his case and the difficulty the party will face in obtaining substantially equivalent information from other sources if production is denied. In *re Intl. Systems and Controls Sec. Litigation*, 693 F.2d 1235 (5th Cir. 1982); 4 J. Moore, FEDERAL PRACTICE 26.64 (1984). The clearest case for ordering production is when crucial information is in the exclusive control of the opposing party. *See Loc-Tite Corp v. Fel-Pro, Inc.*, 667 F.2d 577 (7th Cir. 1981).

Such concerns are especially important in Public Records actions which are designed to be an expedited process, and which almost always involve a determination of bad faith.

The bad faith alleged in this case as the gravamen of plaintiff's claims also militates for disclosure in that...Given the unique nature of bad faith actions, and considering the protection available in the form of in camera inspections, we hold that mental impressions, etc., are discoverable in a bad faith action if they are directly in issue, and if the discovering party makes a stronger showing of

necessity and hardship than is normally required under CR 26. See *Upjohn v. U. S.*, 449 U.S. 383, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981) (Court declining to hold that such material is always protected by the work product rule, and implying that a stronger showing of necessity and unavailability would be required for disclosure). See *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 706 P.2d 212 (1985)

As the Supreme Court held in *Escalante*...

Thus, under *Heidebrink*, Washington courts are required to evaluate the specific parties and their expectations in order to determine whether the materials sought were prepared in anticipation of litigation. *Heidebrink* also clearly states that even if a particular object of discovery is found to be protected by the work product doctrine, the material sought is still discoverable if the discovering party shows substantial need. *Heidebrink*, at 401. Since a determination of the parties' "expectations" is presumably, in part, a factual inquiry, and since the "substantial need" test is essentially a FACTUAL determination "vested in the sound discretion of the trial judge", (*Heidebrink*, at 401), we must remand all discovery requests to which Sentry objected on the basis of work product for the trial court to determine which documents are subject to the work product doctrine, and to determine whether substantial need has been shown. *Escalante v. Sentry Ins. Co.*, 49 Wn. App. 375, 743 P. 2d 832 (1987)

Similarly, in this case, the issues of whether the records of the City's attorney client communications were necessary for evidenciary purposes should be determined.

The Court also erred in denying disclosure based upon an attorney-client exemption when there was pattern evidence of a regular business practice of the city to evade public accountability under both the OPMA and the PRA by hiding records of their actions and using the attorney-client exemption improperly. Where a concerted scheme is described to conceal records by forwarding them to counsel.

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, but not to those of a layman. *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. U. S.*, 449 U.S. 383, 66

L. Ed. 2d 584, 101 S. Ct. 677 (1981), applies to this case is not well taken. In UPJOHN, the documents involved were communications from the corporation's counsel to corporation employees. That was not the situation here. *Kammerer v. Western Gear Co.*, 96 Wn.2d 416, 635 P.2d 708.

Similarly, the communications between DNR employees in this case, many of which were produced by DNR employees, merely forwarded subsequently to counsel are not protected. The Court erred in suppressing E-mails that had not been produced by the City.

Merely forwarding these type of communications to the attorney does not convert the to exempt records, especially since their disclosure was waived by defendants assertion that the recovery was adequate and not in response to litigation. Further even if the withheld communications are attorney-client privileged, it is beyond dispute that the suit was necessary to compel the production of privilege logs and the disclosure of the records thjat were eventually disclosed. This type of obvious contradiction is further evidence of the trial court's errors in this matter and a good reason why they should be overturned.

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 v. John Doe*. 131 Wn.2d 835, 842, 935 P.2d 611 (1997)

. Because the privilege sometimes results in the exclusion of evidence otherwise relevant and material, and thus may be contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege is not absolute; rather, it is limited to the purpose for which it exists. *Dietz* , 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 the truth about the nature and timing of defendants search for responsive records, while at the same time holding that the recovery had nothing to do with the lawsuit. This type of contradictory ruling, used to deny the penalties required under the PRA, is nothing other than a veiled attempt to judicially repeal the Public Records Act..

**THE COURT ERRED IN GRANTING THE STATE OVERLY BROAD PRIVILEGES IN SUPPRESSING THE ONLY RELEVANT EVIDENCE IN A CIVIL PRA PROCEEDING**

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

Moreover, in addition to the reasoning of the United States Supreme Court in *Buchanan v. Kentucky*, 483 U.S. 402, 97 L. Ed. 2d 336, 107 S. Ct. 2906, we are inclined to agree with the court in *State v. Craney*, 347 N.W.2d 668, 677 (Iowa), *Cert Den*, 469 U.S. 884 (1984), that defendant's asserted right to the

effective assistance of counsel under the facts of this case reflects the "bygone philosophy that for an attorney's investigations to be effective they must be shrouded in secrecy." If defendant asserts an insanity defense, evidence pertaining to that defense must be available to both sides at trial. There is thus no need for the confidentiality defendant maintains is required. *State v. Pawlyk*, 115 Wn.2d 457, 800 P.2d 338.

Likewise if a defendant seeks a defense that it has failed to violate any protected rights,, and seeks to assert that its conduct was upright and lawful, the evidence pertaining to these defenses must be available to all sides. Otherwise the privilege may be abused to paint an incomplete or misleading picture of the facts while at the same time withholding the necessary evidence under a claim that the communications regarding the recovery of the records was privileged because it was made for the purposes of litigation.

The Court erred in failing to find that the withheld records submitted for in camera inspection were exempt when they were not properly exempt, when no attempt at actual redaction had been made, and when there was evidence of a regular business practice and policy of abuse of the attorney-client exemption by the City to the extent that the exemption had swallowed the policy that the public be informed of the activities of their public servants.

**THE COURT ERRED IN DISMISSING PLAINTIFF'S CLAIMS WITHOUT OPPORTUNITY TO AMEND OR A REASONABLE OPPORTUNITY TO PRESENT EVIDENCE IN RESPONSE TO A "CELOTEX" TYPE MOTION SUPPORTED BY DECLARATION OF COUNSEL THAT LACKED PERSONAL KNOWLEDGE AND WHICH WAS ADMITTEDLY PREPARED WITHOUT REVIEW OF THE CASE FILE OR CITY'S RESPONSES TO DISCOVERY**

The Order of Dismissal entered by Judge McPhee was based upon a misperception of *Celotex v. Catret* that violated the **Black Letter Precedent** of *Celotex* itself that the initial burden is on the party moving for summary judgment to show the absence of any genuine issue showing. As the Supreme court stated in *Celotex*, citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970)...here we held that summary judgment had been improperly entered in favor of the defendant restaurant in an action brought under 42 U.S.C. § 1983. In the course of its opinion, the *Adickes* Court said that "both the commentary on and the background of the 1963 amendment conclusively show that it was not intended to modify the burden of the moving party . . . to show initially the absence of a genuine issue concerning any material fact." *Id.* At 398 U.S. 159. We think that this statement is accurate in a literal sense, since we fully agree with the *Adickes* Court that the 1963 amendment to Rule 56(e) was not designed to modify the burden of making the showing generally required by Rule 56(c). It also appears to us that, on the basis of the showing before the Court in *Adickes*, the motion for summary

judgment in that case should have been denied...

In the present case, the Court appears to have failed to require any reasonable showing by the defendant, and to have confused CR 56 with CR 12, and failed to note that a court may grant a motion to dismiss pursuant to CR12(b) (6) only if, "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Haberman v. WPPSS*, 109 Wn.2d 107, 744 P.2d 1032, 750 P.2d 254 (1987) (quoting *Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985)) This was error in that plaintiff demonstrated that evidence did exist that would justify relief.

The Court's ruling in regard to the OPMA claims contravenes the clear precedent of *Eugster v. City of Spokane* 110 Wn. App. 212, (2002) and *Wood v. Battle Ground* that Email exchanges may constitute a violation of the OPMA. (See *Eugster*, at 224, "Even so, under the Wood standards and the circumstances here, we cannot say further inquiry is unwarranted.")

The ruling of September 24 and December 17, and the previous orders also contravene clearly established Ninth Circuit precedent that leave to amend should be guided by the underlying purpose to facilitate decisions on merits, rather than on mere technicalities of pleading. *United States v. Webb*, 655 F.2d 977, 979-80 (9th Cir. 1981), *Calderon v. United States Dist. Ct. (Taylor)*, 134 F.3d

981, 986 n.6 (9th Cir.) '[a] dismissal with prejudice is a harsh sanction which should usually be employed only in extreme situations (see also Schilling v. Walworth County Park & Planning Comm'n, 805 F.2d 272, 275 (7th Cir.1986). These concerns are especially applicable to Pro se pleadings, which must be liberally construed. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, (9th Cir.1990).

Under the facts of this case, the failure of the Court to grant a motion to amend was an abuse of discretion and reversible error.

The September 24, 2010 ruling and the other rulings of Judge McPhee contravene the clearly established Ninth Circuit precedent that "The Constitution protects one's right to petition the government for redress of grievances." And that "Deliberate retaliation by state actors against an individual's exercise of this right (to petition) is actionable under section 1983." Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir.1989).

The Court also erred in determining that West had no claim for ejection from a public meeting, violation of the OPMA, a pattern of concealment of evidence, or any other claims, based upon counsel's self serving "evidence": that lacked credibility or any basis in fact or law, and based upon the Court's improper ex parte consideration of evidence.

The Court's ruling also was in error in allowing counsel to present

evidence in violation of the RPC 's restrictions on the lawyer as witness, and in allowing counsel Friemund to present ostensibly “credible” evidence as to the presence or lack of evidence generally, and especially the filing of tort claims, when Friemund's previous “testimony” had been twice shown to be false and fraudulent in regard to the filing of Tort Claims, and when Friemund's “testimony” was not credible or impartial, and was made in bad faith as part of the very same pattern of prior restraints plaintiff complained of to begin with.

The Order of Dismissal is premised upon a failure to accommodate violative of the ADA, and a denial of substantive and procedural due process under false color of draconian and biased misapplication of Celotex to “railroad” plaintiff in violation of the express language of Celotex regarding discovery and CR 56(f).

All of the Courts “evidenciary” determinations were based upon arbitrary and partial distortion of the facts by counsel that had no relation to the actual evidence or pleadings submitted to the Court by plaintiff. Contrary to the Court’s mistaken impression, based upon the partial representations of counsel, plaintiff's claims were supported by evidence which was in large part already in the court file in the form of the evidence that the Court reviewed in camera, and which viewed impartially, (or with all inferences drawn in the plaintiff's favor, as required under CR 56, demonstrates a policy of improper use of attorney client privilege to veil

the actions of the City from public oversight and the requirements of the OPMA, invidious retaliation and attempts to conceal the issue of land use approvals by the City in order to evade review.

The Court's "findings of fact" as to the lack of any evidence are based upon clear error, and are also based upon the suppression of the only real evidence, the evidence sought by plaintiff under the PRA which was ruled to be privileged by the court. In this case, the lack of other evidence requires the court to re-examine its ruling on the City E-mails in light of the legal principle that attorney client privilege must be subordinated to the paramount necessity of justice and the necessity of reviewing all relevant evidence prior to granting a motion to dismiss. The Court erred in suppressing, under an improperly asserted attorney-client privilege, the very evidence needed by plaintiff to prove his claims of abridgment of civil rights and abusive policies of the City.

The Court also failed to recognize that injury to reputation caused the denial of a federally protected right may be actionable. *Stevens v. Rifkin*, 608 F.Supp. 710, 726-27 (N.D.Cal.1984) (where plaintiffs alleged that prosecutor disseminated accusations to the press in an attempt to deprive plaintiff of his Sixth Amendment right to an impartial jury panel, this stated a claim for relief under section 1983). See also *Wisconsin v. Constantineau*, 400 U.S. 433, 434 n. 2, 437, 91 S.Ct. 507, 508 n. 2, 510, 27 L.Ed.2d 515 (1971) (plaintiff stated cause of

action under section 1983 for due process violation where defamatory act of posting an individual's name as having an excessive drinking problem without prior hearing resulted in the deprivation to that individual of the right previously held under state law to purchase or obtain liquor); *Marrero v. City of Hialeah*, 625 F.2d 499, 517 (5th Cir.1980) (court held plaintiff stated a due process violation under section 1983 where the alleged defamation by the public official caused plaintiff to lose business goodwill, a protected property interest in Florida), cert. denied, *Rashkind v. Marrero*, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981).

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A second basis for finding an actionable claim under section 1983 is where the plaintiff alleges the injury to reputation was inflicted in connection with a federally protected right. *Stevens*, 608 F.Supp. at 727 (court held plaintiffs stated proper claim under section 1983 where defamatory statements were made in connection with alleged unconstitutional arrest and prosecution). See also *Gobel v. Maricopa County*, 867 F.2d 1201, 1205 (9th Cir.1989) (plaintiffs properly alleged the kind of "defamation plus" injury necessary to state a section 1983 claim where they alleged that the false statements were made in connection with their illegal arrest); *Board of Regents v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972) (defamation in the course of termination of public employment by the state sufficient to state cause of action under section 1983).

**CONCLUSION**

The Court erred by failing to enforce the Sunshine laws to require that the people remain informed of the activities of their government as the fundamental prerequisite for the sound governance of a free society.

The rulings of the Court should be reversed and this case remanded for further proceedings.

**CERTIFICATE OF SERVICE**

I, Arthur West, hereby certify that I served this document on counsel for the City of Olympia by delivering it to their office on August 22, 2011.

  
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ARTHUR WEST

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## November 3, 2008 City Council Kinsbury Facebook-"idiot"

### -- Hyer "you're outa here" incidents [Inbox X](#)

**A West to Jeff**

[show details](#) **Mar 11**

[Not sure what to think about Facebook in Council!](#)

Submitted by zeet on Mon, 11/03/2008 - 9:48pm.

- [Jeff Kingsbury](#)
- [Olympia city council](#)

I saw this on my Facebook updates, and though I'm not sure what to think about it, I suspected other people would have some idea. Was anyone watching Council at 7:23 PM? (Edit: 7:13PM) Interesting how the Internet is really everywhere.

**Jeff is listening to an idiot at the moment.**

[9 Comments](#)



**Ben Butler**  
who's the idiot?



**Jeff Russen-Kingsbury**  
A citizen who doesn't like our policy. I'm in Council.



**Megan Peters Temple**  
Facebook in Council...nice!



**Jeff Russen-Kingsbury**  
lol... you should hear these folks. I can look directly at them and type at the same time!



MC PUBLIC #1

Rob McKenna

**ATTORNEY GENERAL OF WASHINGTON**

1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

December 9, 2008

The Honorable Doug Mah  
Olympia City Council  
PO Box 1967  
Olympia, WA 98507-1967

**RE: Public Records and Open Public Meetings**

Dear Mayor Mah:

I am the Attorney General's Open Government Ombudsman and provide technical assistance to the public on matters related to public records and public meetings. I received a complaint from Mr. Steven Segall that the Olympia City Council has not fully disclosed requested public records and is conducting some of its deliberations during public meetings through the use of city computer laptops and city email accounts.

On November 12, 2008, Mr. Segall requested records of council members' emails and internet usage logs during specified public city council meetings. The City provided most of the requested emails and internet logs except from September 22<sup>nd</sup> to October 6<sup>th</sup> of 2008. An email from the City records manager to Mr. Segall concluded that the City's database stopped recording internet usage during that period. In addition to the City's database, internet usage activity is usually recorded by the City's internet server provider. The City should likely be able to recover the requested logs from their internet provider with little effort provided it makes a request. Since Mr. Segall's request is still outstanding, this request for the missing days of emails and internet logs should be made promptly.

The City should consider adopting parts of the Attorney General's model rules on the Public Records Act. The purpose of the model rules is to provide information to records requestors and state and local agencies about "best practices" for complying with the Public Records Act. It is available at <http://apps.leg.wa.gov/WAC/default.aspx?cite=44-14-00001>. The rules are to help agencies provide the "fullest assistance to inquirers and the most timely possible action on requests for information". RCW 42.56.100.

Additionally, Mr. Segall provided numerous examples of public records he obtained where city council members were deliberating public business by email during a public meeting. The Open Public Meetings Act (OPMA) requires that the meetings and deliberations of the City Council be

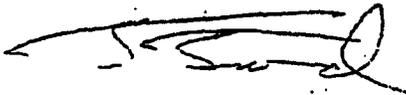
The Honorable Doug Mah  
December 9, 2008  
Page 2

conducted openly, except as otherwise provided. RCW 42.30.030. The provisions of the OPMA are to be construed liberally to effect their purpose. RCW 42.30.910.

Email deliberations on public matters that are concurrently being discussed in a public meeting are wholly inconsistent with the requirements of the OPMA and should cease. The public is deprived of the opportunity to view these deliberations and only finds out the substance of their nature upon disclosure of these public records. It is irrelevant whether the topics of some of the email exchanges are later discussed in the open meetings. All meetings (including email meetings) of the governing body of a public agency shall be open and public. RCW 42.30.030. An email exchange among members of a governing body in which an "action" takes place can be a "meeting" under the OPMA. *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 564, 27 P.3d 1208 (2001). Since an email exchange among members of a governing body is not open to the public, such an exchange in which an "action" took place would violate the OPMA.

I would encourage the City Council to adopt a policy that restricts email and personal internet usage during public meetings. Not only would it ensure that the public is able to witness all the deliberations of the Council, but it would instill confidence with the public that the council members are attentive to the public's business.

Sincerely,



TIMOTHY D. FORD  
Open Government Ombudsman  
Assistant Attorney General for  
Government Accountability

TDF/ieg

cc: Steven Segall  
Tom Morrill, City Attorney  
Brian Sommuag, State Auditor

## The OPMA's Broad Definition of "Action"

Under the Open Public Meetings Act ("OPMA" or "Act") "action" is broadly defined as "the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions."<sup>13</sup> RCW 42.30.020(3). A "meeting" occurs when a majority of the governing body meets to take an "action" – application of the Act is not limited to "final actions." The case law demonstrates that courts have taken a broad view as to what qualifies as action.

### A. OPMA Broadly Defines "Action"

Originally, the OPMA defined "action" to be limited to what is now defined as final action. But in 1985, the Act was amended to include a much broader set of activities "including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations." Laws of 1985, ch. 366, § 1.

With the amendment, courts have noted, "the plain language of the OPMA does not distinguish between 'action' and discussions short of actions because the definition of action includes 'discussions.'" *Eugster v. City of Spokane*, 110 Wn. App. 212, 225 (2002). "[A]ll action, including final actions, must be done in a meeting open to the public." *Eugster*, 110 Wn. App. at 225.

### B. Case Law Broadly Interprets "Action"

The following are examples of "action" that would violate the OPMA if not transacted consistent with the Act:

*Eugster v. City of Spokane*, 110 Wn. App. 212, 225 (2002):

- To qualify as action, members of the governing body "need merely 'communicate' about issues that may or will come before the Board for a vote."
- Council member would have violated the Act if he "gathered a collective position on an issue from a majority of Council Members."

*Wood v. Battle Ground School District*, 107 Wn. App. 550, 565-66 (2001):

- Exchange of emails between a majority of the board discussing the superintendent's contract was a "meeting" because the discussions were "action."

*Miller v. City of Tacoma*, 138 Wn.2d 318, 325 (1999):

- Reaching a consensus on a hiring decision, even though no formal vote was taken, qualified as "final action."

*In re Recall of Anderson*, 131 Wn.2d 92, 95-96 (1997):

- "Study session" was a "meeting" because council members discussed town business.

<sup>13</sup> "Final action" means "a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance." RCW 42.30A.020(3).

 FOSTER PEPPER ...

*OPAL v. Adams County*, 128 Wn.2d 869, 883 7 n.2 (1996):

- Substantive telephone discussion between two members of a three-member board about issue that would be raised at the next meeting qualified as “action.”

*In re Recall of Beasley*, 128 Wn.2d 419, 426 (1996):

- Discussion among the majority of a board about whether to modify superintendent’s contract was action.

*Protect the Peninsula’s Future v. Clallam County*, 66 Wn. App. 671, 676 (1992):

- Holding that “discussion and review of the draft [document] at the closed meeting was ‘action’ that constituted a violation of the Open Public Meetings Act.”

*Feature Realty, Inc. v. City of Spokane*, 311 F.3d 1082, 1089 (9th Cir. 2003):

- Discussion about and approval of settlement agreement was action.

*Clark v. City of Lakewood*, 259 F.3d 996, 1013 (9th Cir 2001):

- Taking testimony and public comment, and conducting hearings qualified as “action.”

**C. Examples of “Action” from the Office of the Attorney General**

In addition to cases, the Attorney General has provided the following examples of “actions” subject to the OPMA in an Attorney General Opinion and the Open Government Internet Manual:

- “A meeting occurs if a quorum of the members of the governing body were to discuss or consider, for instance, the budget, personnel, or land use issues no matter where that discussion or consideration might occur.” *Open Government Internet Manual* §1.3.a.
- “The OPMA does not allow for ‘study sessions’, ‘retreats’, or similar efforts to discuss agency issues without the required notice.” *Open Government Internet Manual* §1.3.a.
- “Examples of an ‘action’ include members deliberating or discussing a decision they might eventually make.” *AGO 2006 No. 6*.
- “‘Action’ includes ‘receipt of public testimony’, so council members attending a third party’s public meeting would need to consider whether they are receiving public testimony.” *AGO 2006 No. 6*.

**D. Not Everything Is an “Action”**

There are three situations where an “action” will not occur.

First, even if a majority of the governing body is together in one place, as long as they do not discuss official business (or hear testimony, conduct hearings, etc.), then there is no action or illegal meeting. *AGO 2006 No. 6*.

Second, the Act at least implicitly recognizes that procedural discussions about issues, like what should be on an agenda, do not amount to “action.”

Third, the courts have recognized that governing boards do not violate the OPMA when each member receives the same information individually. But see the discussion below on serial meetings.

**FP FOSTER PEPPER****E. Serial Discussions Can Be Meetings Subject to the OPMA**

The "serial meeting" is a concept recognized in Washington case law, but not very well developed. A serial meeting would occur when a majority of members of a governing body have a series of smaller gatherings or use a go-between, so that a majority of the body is never together, but through this series of meetings, the majority collectively intends to take "action." Courts in other states have consistently held that if serial meetings were permitted, it would be too easy to evade the requirements of open public meeting act laws. *Wood*, 107 Wn. App. at 562. The *Wood v. Battle Ground School District* case provides four examples of what might qualify as a serial meeting:

- "series of telephone calls between individual members and attorney to develop collective commitment or promise on public business violated [the law]"
- "successive meetings between school superintendent and individual school board members violated Sunshine Law"
- "use of serial electronic communication by quorum of public body to deliberate toward or to make a decision violates state open meeting law"
- "'telephone trees,' where members repeatedly phone each other to form a collective decision, are inappropriate under the OPMA."

*Wood*, 107 Wn. App. at 563 n.4.

Message

**Darren Nienaber**

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**From:** Darren Nienaber

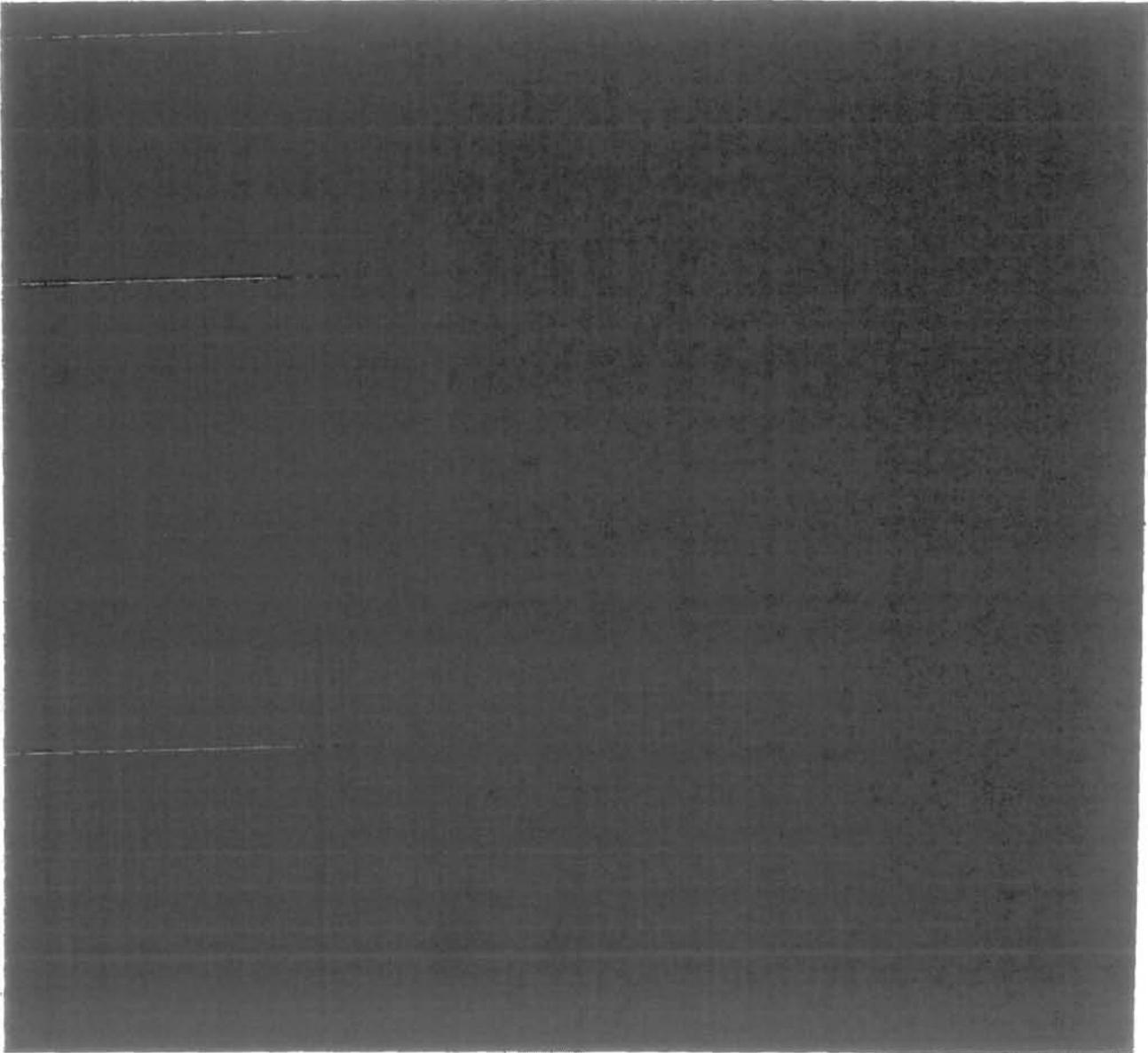
**Sent:** Monday, June 18, 2007 11:53 AM

**To:** Mark Foutch; Laura Ware; Doug Mah; Jeff Kingsbury; Joe Hyer; Karen Messmer; TJ Johnson

**Cc:** Steve Hall; Tom Morrill; Subir Mukerjee

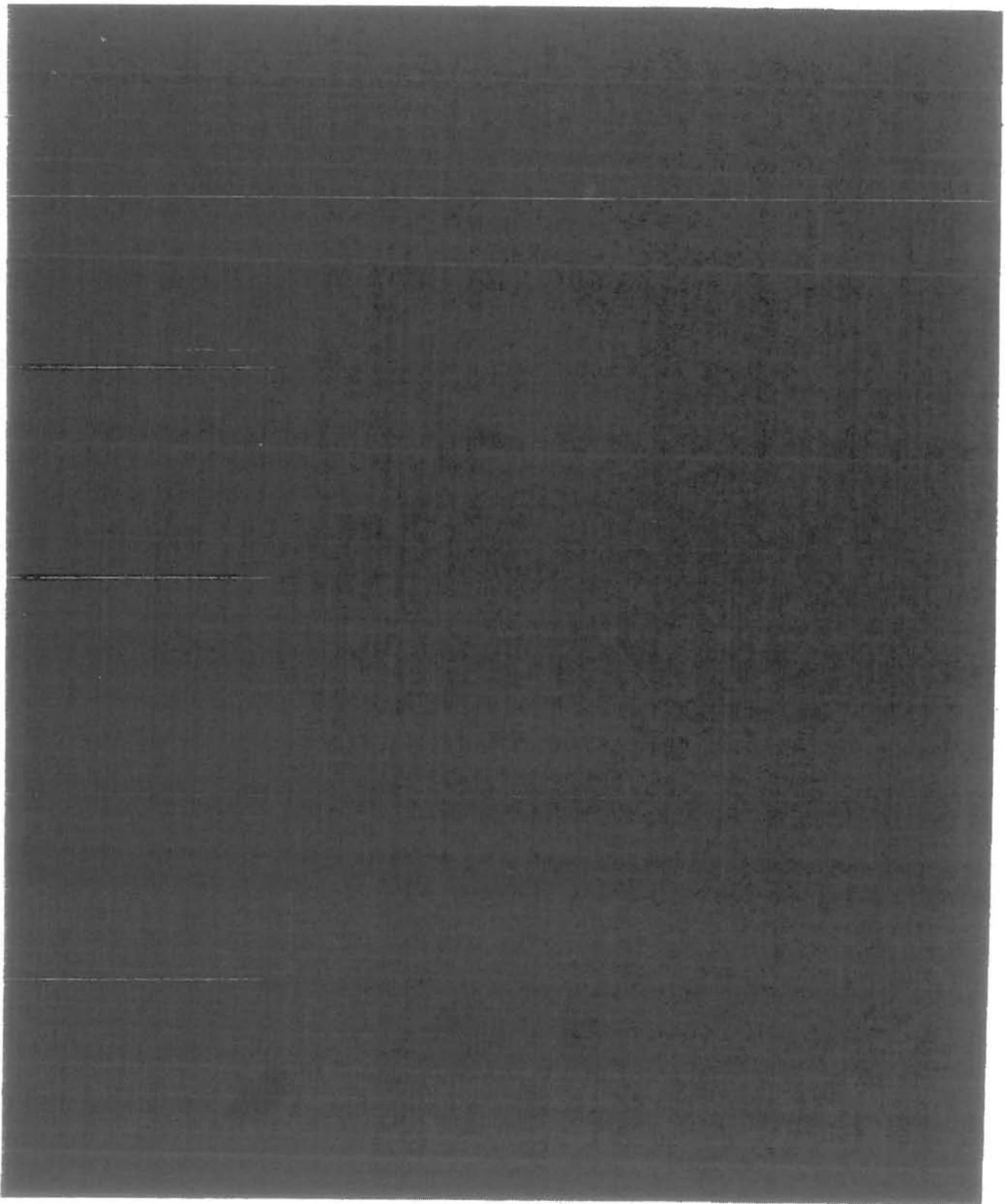
**Subject:** Attorney client privileged

Dear Council members,



8/13/2008

JN12  
1 of 2



New BusinessWCIA Policy Regarding Public Disclosure RequestsBackground:

WCIA Members are experiencing increased demands from members of the public for production of documents in the custody of the Member pursuant to the Public Disclosure Act, RCW 42.56. With increased frequency these demands are made by potential liability claimants or their attorneys as a means of "free" discovery prior to a formal claim or lawsuit being filed. The Public Disclosure Act (PDA) requires every public agency in the State including all local governmental entities to provide its' records and documents for public inspection and copying unless exempt under the stated exemptions in the Act. RCW 42.56.030 requires the Act to be broadly construed in favor of disclosure and states that exemptions be narrowly construed. RCW 46.52.030 provides:

**"The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy."**

The appellate courts of the State of Washington have taken the legislative statement of purpose in RCW 42.56.030 to heart and have repeatedly ruled in favor of the public in disputed cases. The RCW 42.56.550 allows persons who feel that a PDA request has not been properly responded to by a governmental agency to seek judicial review of the agency actions. Superior courts making such a review can compel production of documents and award fines ranging from \$5.00 to \$100.00 per day "for each day that he or she was denied the right to inspect or copy said public record." In making the review the Superior Court is required to "...take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." The Court will also award attorney fees and costs to the prevailing party in the review. The PDA puts the burden of proof on the public agency to justify refusal of inspection. It states, "The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records."

The PDA does specify a lengthy list of certain types of public records which an agency may withhold from public inspection. (See RCW 42.56.210 through 42.56.610.) In general, the exemptions are to prohibit release of documents that would invade personal privacy of individuals or information that would compromise vital governmental interests if made public. (Ongoing police investigations are a prime example). However, even this information may be required to be disclosed because, "the exemptions of this chapter are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from

the specific records sought." (RCW 42.56.210(1)). Furthermore, if an agency refuses to provide certain records based on the belief they are exempt, the "Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." (RCW 42.56.210(3)). This is commonly called an "exemption log." The PDA gives some protection to public agencies from third party lawsuits alleging improper release of information pursuant a PDA request. RCW 42.56.060 states: "No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply with the provisions of this chapter."

WCIA and all of its Members are "Agencies" as defined in the PDA. RCW 42.17.020(2) states: "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." The definition does not include private businesses or law firms.

RCW 42.17.020 (41) defines a "Public Record" subject to the PDA as follows: "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."

Agency public records that are relevant to a legal controversy involving the agency may be partially exempt from public disclosure. RCW 42.56.290 states: "Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts are exempt from disclosure under this chapter." Court rules on discovery, CR 26 (b)(1)&(4), generally preclude discovery of attorney/client communications and attorney work product. (See also *Hanger v. City of Seattle* 141 Wash 2d 339 (2004) and *Guillen v. Pierce Co.* 144 Wash 2d 696 (2001)) They also generally preclude discovery of insurer files and investigations done on behalf of an insured involved in the legal claim. Attorneys cannot ethically disclose attorney/client communications without the clients consent. ER 408 Offers to compromise & ER 409 Payment of medical or other expenses are also precluded from discovery by Court Rules. Per RCW 48. 62.101(2), WCIA claims reserves are statutorily exempt from public disclosure and the PDA.

#### Discussion:

Recently problems have occurred when PDA document requests have been made to Members that broadly seek information regarding prior matters that have been in claim or suit. Some have sought all information regarding a particular expert witness used in prior

litigations. Some involve requests for all information involving a particular employee's involvement in prior litigations. Some involve requests for all information involving claims or litigation regarding a particular intersection. Some of the requested information may not be in the possession of the Member but is in the possession of WCIA and/or defense counsel retained to defend a Member. The time scope of the requests can cover many years. In some cases this can mean dozens, if not hundreds of prior claim files and/or lawsuit files that might have information responsive to the request in them.

WCIA General Counsel Mark Bucklin is of the opinion that a PDA request to the Member does not trigger a requirement for the Member to actively go get WCIA file material or defense counsel file material because those are not "public records" of the "agency"/ Member. Documents sent to the Member by WCIA or defense counsel during the course of the claim file handling or litigation would become "public record" when received by the Member but may still be subject to one or more of the exemptions from disclosure mentioned above. No appellate reported case has addressed the issue of whether private law firm files can be regarded as "public records" when the client is a public agency. Only one reported case has dealt in any way with the issue of records created and held by a private business vendor of a public agency. In Concerned Ratepayers v. P.U.D. No. 1 138 Wash.2d 950 (1999) the Court held that a private document created and in the sole possession of a private business vendor of a public agency could become a "public record" if it was referenced in a document actually given to the public agency and if the public agency had relied on the referenced document's information in its decision making process. In that scenario the court ruled the private vendor document was "used" by the public agency and therefore became a "public record" subject to a PDA disclosure request.

Some City attorney's are concerned that if they do not request the private defense attorney files and /or WCIA claim files be copied to them with "exemption logs" for those documents that are privileged that their Cities will be exposed to the fines and attorney fee awards provisions of the PDA. Defense attorney firms face considerable expenditure of time to review close files and respond to such requests by their clients. They have and will seek reimbursement for this time and WCIA may need to incur attorney costs to determine if certain claim documents are discloseable or subject to exemption when a Member asks for WCIA to give them copies to respond t a PDA request served on the Member. As a result of these issues, and at the Executive Committees direction, the Executive Director, Claims Manager and General Counsel have drafted the attached resolution regarding WCIA responses to PDA requests received by it from the public or for help to Members receiving such requests.

## RESOLUTION 204-06

**A Resolution creating WCIA policy regarding Public Disclosure Request Response and Expense.**

**WHEREAS**, WCIA members are experiencing increased demands from members of the public for production of documents in the custody of the Member pursuant to the Public Disclosure Act, RCW 42.56, and

**WHEREAS**, potentially large costs of search and reproduction activity can be incurred, and legal interpretation as to compliance or exemption of municipal risk pool work products by staff and defense attorneys create member uncertainties as the RCW evolves,

**NOW THEREFORE BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE WASHINGTON CITIES INSURANCE AUTHORITY THAT:**

WCIA will, as a matter of policy, treat the financial costs of responding to Public Disclosure Act (PDA) (RCW 42.56) requests for public record review or copying in the following manner and circumstances:

1. If the PDA request is made directly to WCIA by a member of the Public, WCIA will respond in accordance with the law and will treat any financial cost in doing so and any legal costs incurred in so responding as an internal operating budgeted cost.
2. If the PDA request is made directly to a Member and the Member requests WCIA to review its records and provide copies of documents to the Member for inclusion in the Member's PDA request response, WCIA will do so but will create a suggested "exemption log" of those documents WCIA believes are not required to be disclosed because they are exempt under the PDA. Costs incurred in finding, copying and creating exemption logs, including legal consultation fees, shall be treated as an internal operation budgeted cost of WCIA.
3. If the PDA request is made to a Member who requests that a WCIA defense counsel firm search it's open and closed files for documents response to the request and that they create an exemption log for documents they believe are not subject to disclosure, the costs and billable attorney time incurred will be billed by WCIA defense counsel firm to WCIA. This will become a claims cost, attributable to the requesting Member, and calculated as part of the Members loss history for future assessment determinations.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Doug Robinson, President  
Washington Cities Insurance Authority

FILED  
SUPERIOR COURT  
THURSTON COUNTY WA

08 SEP 12 AM 03

BETTY L. GOULD CLERK

BY \_\_\_\_\_ DEPUTY

EXPEDITE (if filing within 5 court days of hearing)

Hearing is set:  
 Date: \_\_\_\_\_  
 Time: \_\_\_\_\_  
 Judge/Calendar: \_\_\_\_\_

**SUPERIOR COURT OF WASHINGTON  
FOR THURSTON COUNTY**

---

Arthur West  
Plaintiff/Petitioner,

vs.

City of Olympia  
Defendant/Respondent.

NO. 08-2-01949-4  
 MOTION STIPULATION

---



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PLEASE PRINT CLEARLY

COMES NOW the undersigned and moves this court as follows:

The undersigned stipulate: The request for the  
 administrative record of the City's land use  
<sup>(for the development 105 Yards No 08-0044)</sup>  
 approved is considered by the City prior to the  
 decision does not constitute a request for an identifiable  
 record.

[Attach additional sheets of paper, if needed]

This Motion is based upon the records and files herein and the Declaration filed herewith.

Dated: 9/12/08

Jeffrey S. Myers #16390  
 Law, Lyman, Daniel, Kamester  
 & Bogdanovich  
 Attorney for City of  
 Olympia

Signature: [Signature]  
 Print Name: Arthur West  
 Address: 120 State Ave NE  
 City, State: Olympia, WA 98508  
 Telephone No: \_\_\_\_\_