

No. 48110-3-II

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

**ARTHUR WEST,
appellant,**

Vs.

**PORT OF TACOMA,
respondent**

Review of decisions entered by
the Honorable Judge Jerry Costello

**APPELLANT'S
OPENING BRIEF**

Arthur West
120 State Ave NE #1497
Olympia, Washington, 98501

FILED
COURT OF APPEALS
DIVISION II
2016 SEP 26 AM 11:56
STATE OF WASHINGTON
BY
DEPUTY

TABLE OF CONTENTS

Table of Contents.....	1-2
Table of Authorities.....	3-7
Summary of Argument.....	7-11
Assignments of Error.....	12-13
Statement of the Case.....	14-21
Argument.....	23-52
I The Court erred in entering a second improper dismissal after remand when the issue of jurisdiction of the Trial Court was beyond reasonable dispute due to the express rulings of both the Appellate and Superior Courts.....	23
II The Court erred in entering a second improper dismissal after remand based on a novel ex post facto misconstruction of RCW 42.56.550(2) alleged to exist in Hobbs Hobbs when West and three Appellate Courts had reasonably and justifiably relied upon prior law and practice.	25
III The Court erred in entering a second improper dismissal after remand when the Port's affirmative representations that the trial court did have jurisdiction in this case were binding under the doctrines of res judicata, collateral and equitable estoppel, and waiver.....	27
IV The Court erred in entering a second improper dismissal after remand based upon a novel ex post facto misconstruction of the PRA alleged to exist in Hobbs, when, unlike Hobbs, West had asserted a claim for an untimely response under RCW 42.56.550(2) due to the Port having repeatedly missed self-imposed deadlines.....	33
V The Court erred in entering a second improper dismissal after remand based on a novel ex post facto misconstruction of RCW 42.56.550(2) alleged to exist in Hobbs when the agency was not in the process of producing records and did not subsequently cure the defects in its response prior to the hearing.....	34
VI The Court erred in entering a second improper dismissal after remand based upon the new and undefined scope of the ruling in Hobbs when the	

Court in Hobbs reached the substantive claims of violation rendering its other extraneous language obiter dicta.....	37
VII The Court erred in failing to allow a reasonable amendment that would have cured any jurisdictional defects	42
VIII The Court erred in failing to afford West an objectively impartial process in accord with the Appearance of Fairness and the 5 th Amendment and in Refusing to Conduct a Show Cause Hearing to Determine that the Port Violated the PRA.....	44
Conclusion.....	50

TABLE OF AUTHORITIES

Am. Civil Liberties Union of Washington v. City of Seattle, 121 Wn. App. 544, 554, 89 P.3d 295 (2004).....	48-9
Bank v. Butler, 88 Wn.2d 777, 567 P.2d 631 (1977).....	27
Breier v. Northern California Bowling Proprietors' Ass'n, 316 F.2d 787, 790 (9th Cir.1963).	43
Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678.....	41
California Dep't of Corrections v. Morales, 514 US 499 (1995).....	42
Carrick v. Locke, 125 Wn.2d 129, 882 P.2d 173 (1994).....	41
Cause No 09-2-14216-1, (Port of Tacoma II).....	18
Cascade Sec. Bank v. Butler, 88 Wn.2d 777, 567 P.2d 631 (1977).....	18
Cerrillo v. Esparza, 158 Wn.2d 194,201,142 P.3d 155 (2006).....	25
City of Seattle v. Holifield, 170 Wn.2d 230, 244 n. 13, 240 P.3d 1162 (2010).....	40
Collins v. Youngblood, 497 US 37 (1990).....	42

D'Amico v Conguista, 24 Wash.2d 674, 167 P.2d 157 (1946).....	39
Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).....	42
Friends of Columbia Gorge, Inc. v. WA Forest Practices Appeals Bd., 129 Wn. App. 35, 47-48, 118 P.3d 354 (2005).....	26
Haines v, Anaconda Aluminum Co., 87 Wn.2d 28, 549 P.2d 13 (1976).....	27
Haywood v. Aranda, 143 Wn.2d 231, (2001).....	30
Hearst Corp. v. Hoppe, 90 Wn.2d 123, 139, 580 P.2d 246 (1978).....	45
Hobbs v. State Auditor's Office, 183 Wn. App. 925 (2014) ..	10, 25-7, 32-36, 39-42
In re Marriage of Parks, 48 Wn. App. 166, 170, 737 P.2d 1316 (1987).....	31
In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 331, 166 P.3d 677 (2007)	41
Kilian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002).....	26
Kuhlman Equipment v. Tammermatic, Inc., 29 Wn. App. 419, 425, 628 P.2d 851 (1981).....	31
Livingston v. Livingston, 43 Wn. App. 669, 672, 719 P.2d 166 (1986).....	31-2
Lopez v. Smith, 173 F.3d 749 (9th Cir. 2000).....	42-3
Luellen v. City of Aberdeen, 20 Wash.2d 594, 148 P.2d 849 (1944).....	39
Lybbert v. Grant County, 141 Wash 2d 29, 1 P3d 1124 (2000).....	31
Miotke v. City of Spokane,	

101 Wn.2d 307, 337, 678 P.2d 803 (1984).....	31
Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 727, 261 P.3d 119 (2011).....	45
Noble Manor v. Pierce County, 133 Wn.2d 269, 289, 943 P.2d 1378 (1997).....	41
Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987)..	43
PAWS v. U.W, 125 Wn.2d at 271.....	47
Peterson v. Hagan, 56 Wn.2d 48, 53, 351 P.2d 127 (1960).....	39
Rains v. State, 100 Wn.2d 660, 664, 674 P.2d 165 (1983).....	31
Romjue v. Fairchild, 60 Wn. App. 278, 281, 803 P.2d 57, review denied, 116 Wn.2d 1026, 812 P.2d 102 (1991)).....	29
Servais v. Port of Bellingham, 127 Wn.2d 820, 833, 904 P.2d 1124 (1995).....	48
Spokane Police Guild v. Washington State Liquor Control Bd., 112 Wn.2d 30, 33-34, 769 P.2d 283 (1989).....	49-50
Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 103-04, 117 P.3d 1117 (2005).....	46
State ex rel. Johnson v. Funkhouser, 52 Wn.2d 370, 325 P.2d 297 (1958).....	39
State ex rel, State Finance Commission v. Martin, 62 Wn.2d 645, 384 P.2d 833, (1963).....	27
State ex rel. Heyes v. Superior Court, 12 Wn.2d 430, 433, 121 P.2d 960 (1942).....	22

State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 777, 380 P.2d 735 (1963).....	22
State v. Halgren, 137 Wn.2d 340, 346 n. 3, 971 P.2d 512 (1999).....	40-41
State v. Jones, 168 Wn.2d 713, 722, 230 P.3d 576 (2010).....	25
State v Potter, 68 Wn.App. 134, 150, 842 P.2d 481 (1992).....	41
State v. Stewart, 125 Wn.2d 893, at 900, (Wash. 1995).....	41
Violante v. King County Fire Dist. No. 20 571, 114 Wn. App. 565, (1979).....	27, 46-7
Waremart v. Progressive Campaigns, 139 Wash.2d 623, 647-48, 989 P.2d 524 (1999).....	39
West v. Department of Natural Resources, 163 Wn. App. 235 (Div. II, August 23, 2011).....	27
West v. Port of Olympia, 146 Wn. App. At 116-118, (2007).	48
Whatcom County v. City of Bellingham, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996).....	25
Windust v. Department of Labor & Industries, 52 Wn.2d 33, 323 P. 2d 241, (1958).....	24

STATUTES

RCW 42.56.550(3).....	22
RCW 42.56.550(1-3)	44
RCW 42.56.550(2).....	7, 10-11, 23, 33-5 39-42
RCW 42.56.210 (3).....	45
RCW 42.56.520.....	44-5

RCW 42.56.270 (1).....47

RCW 42.56.280.....47

ARTICLES

Prospective or Retroactive Operations
of Overruling Decision, Annot.,
10 A.L.R.3d 1371, 1386 (1964).....27

21 C.J.S. Courts §§ 181, 186, pp. 289, 297
Goodhart, 'Determining the Ratio Decidendi
of a Case,' Jurisprudence in Action, p. 191.38

A Computational Model of Ratio Decidendi,
Karl Branting, University of Wyoming.....36

Black's Law Dictionary (8th ed. 2004).....38-9

William M. Lile et al., Brief Making and
the Use of Law Books 304 (3d ed. 1914).....39

Le Mythe de Sisyphe, Camus, Albert, 1942,
Hamish Hamilton, 1955, Trans. By Justin O'Brien.....9, 51

*The Facts in the Matter of the Great
Beef Contract*, Mark Twain, The Galaxy, 1870.....41

The Odyssey, Homer, Book 11, Trans. By Thomas Hobbes, 1675.....11

Thomas Hobbes, Leviathan.....41

CONSTITUTIONAL PROVISIONS

U.S. Constitutional Art 1, § 9.....7, 42

U.S. Constitutional Art. 1 § 10.....7, 43

The 5th Amendment.....42

Separation of Powers (Implied Doctrine).....7

Washington Constitution, Article IV Section 10.....52

SUMMARY OF ARGUMENT

This is a Public records Case originally filed by appellant West in 2008. The case was initially improperly dismissed in 2012. Following appeal of this first dismissal, an Order of Remand issued to the Superior Court. Yet, somehow, another Order of Dismissal has now been entered, based upon what is, in effect, an unconstitutional judicial ex post facto re-writing of Statute Law to eliminate RCW 42.56.550(2) from the Public Records Act. This appeal follows.

Appellant West maintains as a preliminary consideration that the Judiciary simply lack authority under the Separation of Powers or Article I, sections 9 and 10 of the Constitution of the United States to enact ex post facto amendments to duly enacted Legislative Acts such as RCW 42.56.550(2) of the Public Records Act, which expressly provides jurisdiction for a citizen to challenge the actions of an agency in failing to provide a reasonable estimate for disclosure.

Significantly, this case is not about whether the Port violated the Public Records Act. The Port's actions and the previous unlawful withholding of the (now disclosed) records at issue in this case cannot be reasonably disputed.

Not only did the Port, by its own admissions, deliberately conceal information from the public and destroy records, it issued a series of public apologies, One published in the Tacoma News Tribune, a second to

the Port of Olympia¹, (CP 361) a third to the Port of Tacoma Employees, (CP 362) and a fourth to the Friends of Rocky Prairie, (CP 359) for (among other things) “withholding information from the public and otherwise undermining trust in our public process”. Notably, West did not receive an apology, but instead seems to have received the ill graces of the Port for being the cause of the disclosure of politically embarrassing secrets that they sought to hide in order to move a large project forward.

As the November 27, 2007 document entitled “**CONFIDENTIAL WORKING DRAFT/INTERNAL USE ONLY**” (at CP 149) demonstrates, the Port had a conscious deliberate policy to delay disclosure of records concerning the project for political advantage and Public Relations purposes until late January of 2008, while West's request was pending. This smoking gun record vitiates the Port's claims that it did not deliberately delay providing a reasonable estimate or producing records.

Nor, at this point are there any exemptions left to argue, as the Port has recently disclosed all of the previously redacted records in response to a 2016 request. The one primary issue that does exist in this case is why the Port is committed to perpetuating West's status as an eternal and futile

¹ ... (T)his project has attracted attention. It was through this increased scrutiny—one of the many public records requests we have received related to this project-- that we discovered unprofessional behavior among some of our staff members working on this project. The documents we gathered to meet the records request included e-mails that fell within the following categories of inappropriate behavior. Taking procedural shortcuts, *withholding information from the public* and otherwise undermining trust in our public process. Inappropriate comments about communities, partners, colleagues and consultants

laborer in the purgatory of the judicial system of Pierce County, where he seems doomed to an eternity of attempting to push the weighty burden of adjudication of the merits of this case up the precipitous slope of political resistance and influence in the face of the most technical jurisdictional arguments and other infernal torments that Counsel for the Port and an unlimited budget (over a Half a Million Dollars so far) can produce.

Perhaps the best answer to this conundrum is that, like the powerful and willful entities of myth whose behavior they so closely mimic, the Port Commissioners and counsel seek to frustrate West's efforts at seeking review and condemn him to a seeming eternity of fruitless labor because of the violations of public policy on the part of the Port he exposed, and, quite possibly his perceived levity in respect to the august authority of the Port of Tacoma².

Thus, upon remand, instead of proceeding reasonably to allow the court to conduct an in camera review of the records, the Port found yet another series of weighty jurisdictional pretexts to send the ponderous mass of this case tumbling down the slope again in an avalanche terminating, once more, at the feet of Division II of the Court of Appeals.

The most recent basis for the Port to attempt to evade accountability for their openly confessed, undeniable and deliberate

² Opinions differ as to the reasons why he became the futile laborer of the underworld. To begin with, he is accused of a certain levity in regard to the gods. He stole their secrets *Le Mythe de Sisyphé, Camus, Albert 1942* Hamish Hamilton, 1955, Trans. By Justin O'Brien

frustration of the public's right to know was what West believes to be obiter dicta in a new and undefined ruling in *Hobbs v. State Auditor*, 183 Wn. App. 925, (2014) a distinguishable case where the timeliness of the agencies' estimate under RCW 42.56.550(2) was not at issue, and where the court reached the merits of Hobbs claims and found that all of the asserted defects in the response had been cured by the final disclosure of the records by the Auditor prior to trial.

The circumstances in this case differ from those in *Hobbs* in a number of significant respects: The Port was not in the process of producing records at the time of suit, West asserted a claim for failure to provide a reasonable estimate of a date certain, after the Port repeatedly failed to meet its self imposed deadlines, and most importantly, perhaps, the defects in the Port's response were not cured by any final disclosure prior to a hearing in the Superior Court, as evidenced by the exemption logs on file in this case.

Even in the unlikely event that *Hobbs* or the Honorable Judge Costello could re-write RCW 42.56.550(2) to eliminate a cause of action for failure to provide a reasonable estimate, it is undeniable that this Court, Division I, the Supreme Court, the Port, West, and the Honorable Judge Edwards in Cause No. 09-2-14216-1 (CP 443-461) reasonably relied upon the jurisdiction of this case in taking many, many, affirmative acts over the course of the last 9 years

It would be the height of inequity to send this ponderous mass of litigation tumbling back down to the infernal depths of Tartarus after so much reasonable reliance has been placed upon the merits of this case to be heard at trial, merits, it must be mentioned, are no longer subject to dispute by the Port due to their internal memos and recent disclosures.

This most recent wrongful dismissal should also be vacated, and West should be afforded the opportunity to again resume his labors in attempting to push the ponderous burden of justice over the precipitous heights of the never-ending succession of obstructive and specious objections repeatedly raised by the Port in this case.

Perhaps, if it is the intent of this Court that the prosecution of this matter is not to assume mythic³ proportions of futility, instructions should issue to insure that this case is actually heard on the merits in the wake of this latest remand.

³And I saw Sisyphus at his endless task, seeking to raise a monstrous stone with both his hands. With hands and feet he tried to roll it up to the top of the hill, but always, just before he could roll it over on to the other side, its weight would be too much for him, and then down again to the plain would come rolling the ruthless stone the pitiless stone would come thundering down again on to the plain. Then he would begin trying to push it up hill again...*The Odyssey*, Homer, Original Publication Date Unknown, Book 11, Trans By Thomas Hobbes. 1675.

ASSIGNMENTS OF ERROR

I The Court erred in entering a second improper dismissal after remand when the issue of jurisdiction of the Trial Court was beyond reasonable dispute due to the express rulings of both the Appellate and Superior Courts.....

II The Court erred in entering a second improper dismissal after remand based on a novel ex post facto misconstruction of RCW 42.56.550(2) alleged to exist in Hobbs when West and three Appellate Courts had reasonably and justifiably relied upon prior law and practice.

III The Court erred in entering a second improper dismissal after remand when the Port's affirmative representations that the trial court did have jurisdiction in this case were binding under the doctrines of res judicata, collateral and equitable estoppel, and waiver.....

IV The Court erred in entering a second improper dismissal after remand based upon a novel ex post facto misconstruction of the PRA alleged to exist in Hobbs when, unlike Hobbs, West had asserted a claim for an untimely response under RCW 42.56.550(2) due to the Port having repeatedly missed self-imposed deadlines.....

V The Court erred in entering a second improper dismissal after remand based on a novel ex post facto misconstruction of RCW 42.56.550(2) alleged to exist in Hobbs when the agency was not in the process of producing records and did not subsequently cure the defects in its response prior to the hearing.....

VI The Court erred in entering a second improper dismissal after remand based upon the new and undefined scope of the ruling in Hobbs when the Court in Hobbs reached the substantive claims of violation rendering its other extraneous language obiter dicta.....

VII The Court erred in failing to allow a reasonable amendment that would have cured any jurisdictional defects

VIII The Court erred in failing to afford West an objectively impartial process in accord with the Appearance of Fairness and the 5th Amendment and in Refusing to Conduct a Show Cause Hearing to Determine that the Port Violated the PRA.....

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I Did the Court err in entering a second improper dismissal after remand when the issue of jurisdiction of the Trial Court was beyond reasonable dispute due to the express rulings of both the Appellate and Superior Courts

II Did the Court err in entering a second improper dismissal after remand based on a novel ex post facto misconstruction of RCW 42.56.550(2) alleged to exist in Hobbs Hobbs when West and three Appellate Courts had reasonably and justifiably relied upon prior law and practice? Yes.....

III Did the Court err in entering a second improper dismissal after remand when the Port's affirmative representations that the trial court did have jurisdiction in this case were binding under the doctrines of res judicata, collateral estoppel and waiver.....

IV Did the Court err in entering a second improper dismissal after remand based upon a novel ex post facto misconstruction of the PRA alleged to exist in Hobbs when, unlike Hobbs, West had asserted a cause of action for an untimely response under RCW 42.56.550(2) due to the Port having repeatedly missed self-imposed deadlines ? Yes.....

V Did the Court err in entering a second improper dismissal after remand based upon a novel ex post facto misconstruction of the PRA alleged to exist in Hobbs when the agency was not in the process of producing records and did not subsequently cure the defects in its response prior to the hearing ? Yes.....

VI Did the Court err in entering a second improper dismissal after remand based upon the new and undefined scope of the ruling in Hobbs when the Court in Hobbs reached the substantive claims of violation rendering its other extraneous language obiter dicta? Yes.....

VII Did the Court err in failing to allow a reasonable amendment that would have cured any jurisdictional defects ? Yes.....

VIII Did the Court err in failing to afford West an objectively impartial process in accord with the Appearance of Fairness and the 5th Amendment and in Refusing to Conduct a Show Cause Hearing to Determine if the Port Violated the PRA? Yes.....

STATEMENT OF THE CASE

This case involves a public records request (*Original records request at CP 503*) made nearly Nine (9) years ago to defendant and respondent Port of Tacoma, in which the plaintiff and three time appellant Arthur West requested specific identifiable public records concerning the Port's South Sound Logistics Center. (*Original records request at CP 503*)

On or about the 4th day of December, 2007, Appellant West, of Olympia, Thurston County, Washington, contacted the general government of the Port of Tacoma regarding public records. CP 494-9, 34.

Citing to RCW 42.56, Mr. West sought "All records and communications concerning the South Sound Logistics Center, from January 1, 2005 to present," "All correspondence or communication with Diane Sontag," and "Any records related to potential transport of Uranium Hexafluoride through Thurston County or the SSLC." CP 503, 34.

The South Sound Logistics Center ("SSLC") project was jointly undertaken by the Ports of Tacoma and Olympia, who entered into an Interlocal Agreement on July 17, 2006. The Port of Tacoma announced that the Interlocal Agreement called "for the two ports to cooperatively purchase, plan and develop a South Sound Logistics Center on a 745-acre site in Thurston County, along Interstate 5." See Port of Tacoma Joint News Release (July 18, 2006) (on file with author, *copy available at*

<http://www.portoftacoma.com/Page.aspx?cid=1351>). The Port explained that pursuant to the terms of the Interlocal Agreement “The Port of Tacoma will be responsible for the initial cost of due diligence and conceptual planning, and it will purchase the property, estimated at about \$20 million; [and] the Port of Olympia will lead conceptual planning, land use and permitting, consulting with local stakeholders and identifying market opportunities” See Joint News Release, Port of Tacoma (Jul. 18, 2006), *supra*. The Port of Tacoma bought the 745-acre parcel of land near Maytown, Thurston County, on July 18, 2006, paying \$21.25 million.

“But the proposed South Sound Logistics Center has generated much controversy among Thurston County residents, many of them concerned that the increased rail and truck traffic would have a negative effect on the surrounding prairie and nearby Millersylvania State Park.” Kelly Kearsley, Ports look at rail site, The News Tribune (Jan. 29, 2008).

Moreover, the Maytown land that the Port of Tacoma purchased was contaminated, and when the Port bought the land, it agreed to assume responsibility for completing remediation work required as part of a preexisting Washington Department of Ecology Agreed Order. This included clean-up of a former drum burial area, removal of contaminated soils, confirmation of the absence of any residual subsurface explosives-related materials and creation of a DOE-approved long-term plan for ongoing groundwater monitoring at locations throughout the site. CP 36.

“A BNSF Railway runs along the east side of the site, and Tacoma Rail tracks cross the property. The site used to be a munitions plant and is permitted for gravel mining. It’s adjacent to property owned by the Department of Fish and Wildlife.” *See* Kearsley, Ports Look at Rail Sites, *supra*. Mr. West was one of those concerned Thurston County residents mentioned in Ms. Kearsley’s article, and his concern sparked his public records request to the Port on December 4, 2007. CP 35

After Mr. West made his public records request, the Port responded with the first of a series of estimates for records release that the Port never met. In his Declaration, Mr. Andy Michels, Risk Manager of the Port of Tacoma, stated that “On December 6th, I advised Mr. West that the Port was gathering documents and that the Port expected it would be December 21 before they would be available.” CP 36. There is no record of Mr. Michels’s response, so the port would have trouble establishing this at trial, but a December 6 response would have been within five business days of Mr. West’s December 4 request. CP 36

Next, on December 21, Mr. Michels emailed Mr. West and told him he expected to release records “shortly.” CP 15. On December 26, Mr. West contacted Mr. Michels concerning the Port’s “privilege log,” or exemption log. CP 36-37. Also on December 26, Mr. Michels sought clarification, and Mr. West replied that same day. CP 37. On December 31, Mr. Michels emailed Mr. West and told him he expected to release the

first batch of records by January 10, 2008. On January 10, at 8:38 pm, the Port's attorney, Ms. Carolyn Lake, emailed Mr. West and told him that she expected the Port would release the first batch of records by January 17. CP 17. On January 11, Mr. Michels emailed Mr. West and repeated Ms. Lake's estimate of January 17. CP 36-37.

Having received only broken promises from the Port with an ever-moving target date for the release of any records, Mr. West filed this lawsuit on January 14, alleging that the Port has "failed to respond with exemptions or disclose records and plaintiff is entitled to the relief requested." CP 2. On that same day, Mr. West filed a Motion for a Show Cause Order, in support of which he declared, "To date the defendant has not released any records whatsoever, and although they have promised to respond with records on three separate occasions, each time they have failed to meet their own deadline" and "I am aware that in response to other requests for these same records by Dianne Sontag, defendants' counsel has prepared a 41 page log of records it refuses to disclose. However, even these exemptions have not been released to me in response to my request for records to the Port of Tacoma." CP 37.

After reviewing the exemption logs, Mr. West argued to the Trial Court that "[t]he exemptions that have so far been provided contain such irregularities as 'preliminary' exemptions, 'copyright' exemptions, and overly broad and erroneous applications of the attorney client and

deliberative process exemptions which fail to meet established standards under the PRA. A full consideration by the Court of all claimed exemptions and in camera review is necessary for the Court to proceed in this matter.” CP 37.

Mr. West also attached a copy of a record he had obtained from the Port, and argued to the Trial Court that “this record demonstrates (in paragraph 4) that the withholding of public inspection of records related to the SSLC was a strategy deliberately chosen by the Goodstein Law Group [Ms. Lake’s, the Port’s counsel’s, firm], Foster Pepper, and the Ports of Tacoma and Olympia.” CP 149. This record – a memo dated November 27, 2007, states:

When these studies [the Alternative Sites Analysis, the Market Analysis, and the Logistics Center Comparative Analysis – all relating to the SSLC] have been finalized, we are committed and prepared to share the results with a number of external groups, including Friends of Rocky Prairie [a group that, like Mr. West, made a PRA request to the Port seeking SSLC records]. However, we need to acknowledge two issues: ..2) the need to fully brief both Commissions on the results of these studies prior to or concurrently with sharing them with external groups.

At this point, our intent is to schedule a joint Commission study session on January 25, 2008 [actually scheduled on January 31; *see supra*]. The sole purpose of the study session will be to brief Commissioners on the results of the work done to date on the proposed project and the results of the studies.

Following this timetable will allow staff time during January to ...prepare an effective briefing for Commissioners and interested external groups. Both our

legal counselors at Foster Pepper and our general counsel Bob Goodstein [at Goodstein Law Group, Ms. Lake's firm] agree that this is an appropriate course of action conditioned on the premise that no one involved with the project at either port has made other specific commitments or promises that would be at conflict.

Finally, on May 21, the Port – in response to this, Mr. West's *third* motion for a show cause hearing – provided working copies of the records it was withholding with the Trial Court for in camera review and also filed a copy of its exemption log with the Trial Court. CP 36-7.

This filing was more than five months after Mr. West's December 4 public records request and more than three months after the public meeting on January 31 where the Port released the Logistics Center Comparative Analysis, the Preliminary Market Assessment, and the Alternative Sites Analysis to the public. CP 37

In this exemption log, the Port claimed exemptions that were not supported by law. For example, out of the more 345 separate records for which the Port claimed exemptions, the Port included the following:

1. The Port claimed the deliberative process exemption for drafts of 49 records that it had already released to the public or implemented into a record released to the public, including the SSLC Site Analysis that it presented at the January 31 study session. *See* CP 157, 176, 182, 184-85, 193, 196, 198, 106, 207, 208, 209, 210, 211, 217, 228, 229, 231, 232, 233, 236, 237, 239, 240, 242, 244, 246, 248, 249, 251, 289, 347, 353, 367, 368, 371, 372, and 374. For at least 13 of those records, the Port stated, on the exemption log, that the final version of the record had already been made public. *See* CP 184, 185, 196, 198, 206, 207, 208, 209, 210, and 211.

2. The Port claimed the deliberative process exemption for emails containing staff feedback on qualifications for candidates for the Port's consultant positions. *See* CP 256, 257, 258, 259, 260, 261, 262, 263, 264, 266, 267, 269, 271, 273, and 275. The Port had already hired the consultants by the time the Port claimed the exemption.

The Port claimed the research data exemption, but made no attempt to separate out and produce non-exempt portions from the exempt portions. CP 37

Further the Port unlawfully withheld the records specifically identified by West at CP 135-143, asserting the deliberative process, interagency and Attorney-client exemptions improperly. The Port cannot deny these records were unlawfully withheld, as it has recently released them in response to a subsequent request. (See Motion to Supplement)

As the previous decision of this Court notes, this case was improperly dismissed in 2010 and remanded back to the Trial Court for further proceedings in 2014.

On April 16, 2015 plaintiff again placed his shoulder to the boulder and respectfully moved the Court for in camera review of the records the Port claimed were exempt. CP 6-18

On April 24, 2015, the Court held a hearing on plaintiff's Motion for in camera review, where West continued his eternal uphill struggle to attempt to obtain a hearing on the merits. (See Transcript of April 24)

The Court took the matter under advisement and subsequently

entered the Order of 05/04/2015 denying in camera review, (CP 274-277)

On 05/05 /2015, finding himself once again at the foot of the precipice of justice plaintiff filed for discretionary review, (CP 278)

On June 12, 2015, the Court held an ex parte proceeding with counsel Lake despite being aware of a conflict with West's Schedule requiring his appearance in Division I⁴ of the Court of Appeals. West's Motion to Amend was denied, (CP 239) but not memorialized in a ruling.

The Port did not respond to the Complaint until August after the Court's denial of the motion (CP at 188)

On July 2, the Court held a hearing (Transcript of July 2, 2015) and entered an Order granting terms for West having been at a mandatory hearing at the Court of Appeals. (CP at 272)

On July 14, the Court entered an Order vacating the Order of May 4th, and for a brief moment, the ponderous rock of justice was again perched at the tipping point of judicial review on the merits. (CP 276)

On August 3, 2015 plaintiff filed a notice of appeal in regard to the amendment of the complaint and limitations on discovery, (CP 278)

On 11/20/2015 the Court held a hearing and entered an Order of Dismissal without creating a record of the final arguments of the parties and West's objection based upon to RCW 42.56.550(2) prior to the entry

⁴ West was required to be present in Division I of the Court of Appeals (CP 239-240) to explain how, in a circumstance made known to him at the last minute, due to a court transcriptionist's mother dying, the transcript that had been filed in that case late by the bereaved transcriptionist had not yet been transmitted to the Court of Appeals by the Superior Court. (257-258)

of the Order. (See incomplete Transcript of November 20, 2015)

On 11/20/2015 West filed a third Notice of Appeal (CP 430)

On /08/2015 the plaintiff moved for reconsideration (CP 434-462)

On December 15, 2016, the Court issued an Order denying reconsideration. (CP 463)

Standard of Review

Where the Trial Court has jurisdiction over the parties and the subject matter, a mistaken belief that an action should be dismissed would be an error of law. State ex rel. Heyes v. Superior Court, 12 Wn.2d 430, 433, 121 P.2d 960 (1942). This Court reviews questions of law and statutory construction de novo. Likewise, judicial review of all agency actions under the Public Records Act chapter is de novo, as is the question of construction and interpretation of statutes. RCW 42.56.550(3); State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 777, 380 P.2d 735 (1963). This Court should review all issues de novo, except the amendment issue, which is reviewed for abuse of discretion.

ORDERS ON APPEAL

Appellant seeks review of the Order of Dismissal of November 20, 2016 (CP 432), and the Order Denying reconsideration of December 15, 2016. (CP 463) Appellant also seeks review of the determination of the Court to deny an amendment of the Complaint, which was not memorialized in an Order, but which appears in the Clerk's Notes.

ARGUMENT

I The Court erred in entering a second improper dismissal after remand when the issue of jurisdiction of the Trial Court was beyond reasonable dispute due to the express rulings of both the Appellate and Superior Courts

The Trial Court erred in entering the Orders of November 20 and December 15 (CP at 432 and 463, respectively) when this Court's Order in the Opinion of February 20, 2014, (In the previous appeal) expressly held that the port was not producing records at the time the suit was filed; and recognized West's claims under RCW 42.56.550(2)...

(... **“(T)he port repeatedly pushed back its expected release date.** On January 14, 2008, West filed a complaint alleging that the Port's Actions violated the Public Records Act.” (See Opinion of February 20, 2014, emphasis added)

Similarly, when counsel moved for dismissal of “duplicative” claims in Cause No 09-2-14216-1, Division I of the Court of Appeals explained in its April 20, 2014 ruling in 71366-3 in the companion Port of Tacoma II case...

On July 26, 2010, the trial court heard the Port's motion to dismiss West's claims, alleging they were duplicative of claims made in a previous lawsuit. The trial court granted the Port's motion as to one of the claims and sanctioned West in the amount of \$1500, payable to the Port.

This ruling that the Court of Appeals discusses was based upon the jurisdiction of the court in this present case.

The alleged untimely payment of these terms were then employed by counsel as a means to secure yet another wrongful and unlawful dismissal of PRA claims from the Honorable Judge Edwards in Port of

Tacoma II. (As in this present case, the previous dismissal in Port of Tacoma II was reversed.)

Significantly, the Port's Response in support of its Motion to dismiss of July 23, 2010 demonstrates that the Port obtained a dismissal of "duplicative" claims in that case based upon an express representation that this court had jurisdiction over West's PRA claims.

As Counsel Lake wrote in that pleading in Port of Tacoma II...

"However, despite his personal disagreement, Mr West cannot bypass *the jurisdiction* and judgments of the original litigation by inventing a new cause of action⁵...."
(**emphasis in original**)

Stare Decisis is defined as...

"Literally, to stand by decided matters; . . . as implying the doctrine or policy of following rules or principles laid down in previous judicial decisions unless they contravene the ordinary principles of justice. This principle had an important part in the development of the English common law." *Windust v. Department of Labor & Industries*, 52 Wn.2d 33, 323 P. 2d 241, (1958)

It was reversible error for the Trial Court to refuse to recognize the stare decisis and res judicata effects of the express language and holding of the Court of Appeals in remanding this case for further proceedings.

It was further reversible error to apply the precedent of Hobbs

⁵ See Port's Motion to dismiss of July 23, 2010, in Cause No. 09-2-14216-1, attached as a true and correct copy, and the Order of August 23, 2010 awarding the Port affirmative relief in the form of terms of \$1,500 as a result of the finding that this Court had previous jurisdiction over the PRA claims, also attached as a true and correct copy.

retroactively and overbroadly in a manner that did not account for the differing fact situations between the two cases and the limitations upon the ambiguous holding of Hobbs regarding initiation of a suit when an agency has not yet begun to produce records and has repeatedly failed to meet its own estimates for production, which justifies a second remand.

II The Court erred in entering a second improper dismissal after remand based on an alleged new principle of law established by Hobbs when West and three (3) Appellate Courts had reasonably and justifiably relied upon prior law and practice.....

To the extent that the Trial Court read what is best seen as obiter dicta in Hobbs to eliminate the cause of action in the PRA for failure to provide a reasonable estimate, or barred any action until an agency decided in its own sweet time it was done providing records, the Court impermissibly misconstrued the remedial terms of the Public Records Act.

The Court's use of the obiter dictum of Hobbs to support a construction of the PRA to eliminate the language in RCW 42.56.550(2) violated the principle that...

Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Whatcom County v. City of Bellingham*, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996)

"When interpreting a statute, the court must first look to its language." *State v. Jones*, 168 Wn.2d 713, 722, 230 P.3d 576 (2010); *Cerrillo v. Esparza*, 158 Wn.2d 194,201,142 P.3d 155 (2006). If a statute

is clear on its face, “its meaning is to be derived from the language of the statute alone.” *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). Where “the plain language of a statute is unambiguous and legislative intent is apparent, [the courts] will not construe the statute otherwise.” *Friends of Columbia Gorge, Inc. v. WA Forest Practices Appeals Bd.*, 129 Wn. App. 35, 47-48, 118 P.3d 354 (2005)

In this case the Trial Court violated all of these principles of statutory construction, and erred in disregarding the clear language of RCW 42.56.550(2) making it superfluous, and undermining the intent of the people that public records be disclosed in a reasonable time and that a requestor should not have to wait for disclosure for years or decades until an agency like the Port of Tacoma decides that there is no longer any political reason to hide information and “concludes” its response to the request, no matter how long it might take.

Such a precedent would effectively eviscerate the PRA, and that is exactly what the respondents hope to achieve in this case.

Even in the highly unlikely event that the dicta in *Hobbs v. State Auditor's Office*, 183 Wn. App. 925 (2014) could be seen to establish a new standard, the Court also erred in applying the new standard of *Hobbs* (to the extent it was a new standard), retroactively when plaintiff, the Court of Appeals in its February 20 determination, as well as Division I in the companion case (and the Supreme Court in denying review in both

cases) justifiably relied upon prior law (See, eg, *Violante v. King County Fire Dist. No. 20 571*, 114 Wn. App. 565, (1979)) *West v. Department of Natural Resources*, 163 Wn. App. 235 (Div. II, August 23, 2011), that allowed parties to bring PRA actions prior to completion of a request or where an agency had failed to meet its own deadlines.

So, even to the extent the misconstrued dicta from *Hobbs* might be seen establish a new standard the Court still erred in applying any such new standard retroactively when *West* and three appellate Courts had previously and justifiably relied upon prior law and practice.

Such justifiable reliance on the part of *West* and Divisions I and II and the Supreme Court was appropriate under the precedent of *Cascade Sec. Bank v. Butler*, 88 Wn.2d 777, 567 P.2d 631 (1977); *Haines v. Anaconda Aluminum Co.*, 87 Wn.2d 28, 549 P.2d 13 (1976); *State Ex Rel State Finance Commission v. Martin*, 62 Wn.2d 645, 384 P.2d 833, (1963). (See also, *Prospective or Retroactive Operations of Overruling Decision*, Annot., 10 A.L.R.3d 1371, 1386 (1964)).

Such manifest justifiable reliance on established precedent and the clear language of State Law and the manifestly justifies a second remand.

III The Court erred in entering a second improper dismissal after remand when the Port's affirmative representations that the trial court did have jurisdiction in this case were binding under the doctrines of *res judicata*, *collateral* and *equitable estoppel* and waiver.....

The latest pretext for dismissal is based upon a boldfaced denial of the express waiver of jurisdiction effected by port counsel having moved for dismissal of “duplicative” claims in Cause No 09-2-14216-1, (Port of Tacoma II) and having prevailed and obtained terms of \$1,500 based upon that express representation.

As Division I of the Court of Appeals explained in its April 20, 2014 ruling in 71366-3 in the companion Port of Tacoma II case...

On July 26, 2010, the trial court heard the Port's motion to dismiss West's claims, alleging they were duplicative of claims made in a previous lawsuit. The trial court granted the Port's motion as to one of the claims and sanctioned West in the amount of \$1500, payable to the Port.

It should come as no surprise that the alleged untimely payment of these terms were then employed by counsel as a means to secure yet another wrongful and unlawful dismissal of PRA claims from the Honorable Judge Edwards in Port of Tacoma II. (As in this present case, the previous dismissal in Port of Tacoma II was reversed.)

Significantly, page Three of the Port's Response in support of its Motion to dismiss of July 23, 2010 (attached hereto in true and correct form) demonstrates that the Port obtained a dismissal of “duplicative” claims in that case based upon an express representation that this court had jurisdiction over West's PRA claims.

As Counsel Lake wrote in that pleading in Port of Tacoma II...

“However, despite his personal disagreement, Mr West

cannot bypass *the jurisdiction* and judgments of the original litigation by inventing a new cause of action⁶....”
(emphasis in original)

Significantly, the “original litigation” which counsel Lake successfully asserted “**the Jurisdiction**” of *in boldface is this present case*. Yet, having prevailed on this argument in one trial court, the port proceeded to play a jaundiced form of jurisdictional shell game to assert just the opposite in the next court, in this case presided over by the Honorable Judge Costello.

It is difficult to predict what court might ever actually have jurisdiction over claims against counsel's client, unless it would be the court counsel is not presently in. In this manner, counsel's effects on our system of justice are akin to that of a massive gravitational vortex disturbing the continuum of equity; creating a localized jurisdictional vacuum from which not even a dim flicker of justice can escape.

Perhaps, despite the best efforts of the Honorable Judges in this and the previous cases to rule correctly and in good faith, it is conceivable they were persuaded into error by the anomalous judicial “event horizon” and the disturbance in the jurisdictional continuum resulting from counsel anomalously having packed so much cunning and deception within the Schwarzschild radius of their practice.

⁶ See Port's Motion to dismiss of July 23, 2010, in Cause No. 09-2-14216-1, and the Order of August 23, 2010 awarding the Port affirmative relief in the form of terms of \$1,500 as a result of the finding that this Court had previous jurisdiction over the PRA claims. (CP 425-31)

Thus, for nearly a decade, the Port's (metaphoric) black hole of injustice has soaked up vast amounts of the parties' resources and time letting not the slightest glimmer of rectitude escape, despite the best efforts of a succession of honorable judges attempting to rule in good faith. Truly, something akin to "The Schwartz" appears to have been with the Port of Tacoma.

This ethereal downward pressure has resulted in a series of wrongful dismissals of port cases, of which the Orders of November 20, and December 15, 2015 might be seen to be merely the latest example.

Obviously, on a level playing field and without any fancy trickery, the successful assertion of the jurisdiction of this Court in a different case and the judgment the port sought and received therein would bar the diametrically opposite Order of Dismissal that the Court obtained in this present case under the doctrines of Res Judicata, Estoppel, and Waiver.

Further, as both cases have been subject to improper dismissals reversed as abuses of judicial discretion, Stare Decisis applies as well to demonstrate that this latest dismissal was also reversible error precipitated by the port.

Significantly, the true and correct copies of a portion of the Port's Reply in Support of its Motion to Dismiss of July 23, 2010 and the Order of the Superior Court of August 13, 2010 (and subsequent proceedings) demonstrate not only Equitable and Collateral Estoppel but Res Judicata

(see *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983) as well as express waiver of the right to contest jurisdiction.

To paraphrase counsel's July 23 Brief (in Port of Tacoma II) ..

However, despite (her) personal disagreement, (Ms. Lake) cannot bypass *the jurisdiction* and judgments of the original litigation...

The appellate Courts have repeatedly and consistently found defenses to be waived under similar circumstances...

Common law waiver can two ways. "It can occur if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior." *Lybbert*, 141 Wn.2d at 39 (citing *Romjue v. Fairchild*, 60 Wn. App. 278, 281, 803 P.2d 57, review denied, 116 Wn.2d 1026, 812 P.2d 102 (1991)). "It can also occur if the defendant's counsel has been dilatory in asserting the defense." *Lybbert*, 141 Wn.2d at 39 (citing *Raymond*, 24 Wn. App. at 115). As we explained in *Lybbert*, "the doctrine of waiver is sensible and consistent with . . . our modern day procedural rules, which exist to foster and promote 'the just, speedy, and inexpensive determination of every action.' " *Lybbert*, 141 Wn.2d at 39 (quoting CR 1)... *Haywood v. Aranda*, 143 Wn.2d 231, (2001) (See also *Miotke v. City of Spokane*, 101 Wn 2d 307, 337, 678 P.2d 803 (1984), where the Supreme Court held a jurisdictional defense was waived because it was not raised until three years after the litigation began and after "substantial" litigation progress less than what has taen place in this case.)

Estoppel and waiver can also be premised upon seeking accessory relief in the manner that the Port did in Cause No. 09-2-14216-1. See In re Marriage of Parks, 48 Wn. App. 166, 170, 737 P.2d 1316 (1987), *Kuhlman Equipment v. Tammermatic, Inc.*, 29 Wn. App. 419, 425, 628 P.2d 851 (1981), *Livingston v. Livingston*, 43 Wn. App. 669, 672, 719

P.2d 166 (1986)

Clearly, despite its best efforts, the most recent order of dismissal entered by the Honorable Court in this case was in error – (as were the previous 2 unjustified orders of dismissal obtained by counsel Lake from other honorable judges in Port of Tacoma I and II) – due to the circumstance that the issue of this Court's jurisdiction was expressly settled in the opinions of 3 other Courts and an award to counsel Lake of \$1,500 based upon the jurisdiction of this Court over the PRA issues: issues that have yet to be finally adjudicated in nearly Nine (9) years due to Ms. Lake's uncanny ability to persuade honorable and competent magistrates into making incorrect decisions in regard to the PRA claims brought by plaintiff West.

While it is evident that "the doctrine of waiver is sensible and consistent with . . . our modern day procedural rules, which exist to foster and promote 'the just, speedy, and inexpensive determination of every action.' , it is equally evident from the nearly a decade of delay that counsel has unilaterally precipitated, that the progress of this case has been woefully at odds with any form of just, speedy, and inexpensive determination whatsoever.

Thus, this is just the type of case that the doctrines of waiver, collateral estoppel and res judicata were designed to address. Thus, under the circumstances of this case, it was be unfair and inequitable to enter yet

another Order of Dismissal without reaching the merits of the plaintiff's claims, as the Court of Appeals obviously intended when it remanded this case back for consideration in the first place on February 20, 2014.

IV The Court erred in entering a second improper dismissal after remand based upon the new and undefined scope of the ruling in Hobbs when, unlike Hobbs, West had asserted a cause of action for an untimely response under RCW 42.56.550(2) due to the Port having repeatedly missed self-imposed deadlines...

The Court erred in basing the latest dismissal on the untested scope of Hobbs when the circumstances were simply not comparable: In Hobbs' case, Hobbs failed to assert a cause of action under and the Auditor in Hobbs was producing records to Hobbs prior to his suit. By contrast in this case, (as this Court has previously recognized), West's complaint specifically asserted a cause of action under RCW 42.56.550(2)

This Court's Order in the Opinion of February 20, 2014, (In the previous appeal) expressly held that the port was not producing records at the time the suit was filed; and recognized West's claims under RCW 42.56.550(2)...

(... **“(T)he port repeatedly pushed back its expected release date.** On January 14, 2008, West filed a complaint alleging that the Port's Actions violated the Public Records Act.” (See Opinion of February 20, 2014, emphasis added)

This recognition was in accord with the express black letter law of RCW 42.56.550(2) which provides...

Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show

that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

As the honorable Rob McKenna arguing in the March 6, 2015 Brief on behalf of the Auditor opposing discretionary review of the decision of this Court in Hobbs in the Supreme Court observed...

In any event, the PRA provides requesters with a distinct cause of action to challenge an agency's estimate of time it will take to respond; a PRA claim that Hobbs did not pursue in this case. RCW 42.56.550(2). Any other requester who wishes to challenge an agency's estimate of time to respond would be able to argue that his case is distinguishable from the decision below.

These observations by the Attorney General as to the limited scope of the Hobbs case are correct and should be seen as an appropriate interpretation of the express letter of law which explicitly provided jurisdiction for the filing of this case.

V The Court erred in entering a second improper dismissal after remand based upon the new and undefined scope of the ruling in Hobbs when the agency was not in the process of producing records and did not subsequently cure the defects in its response prior to the hearing.....

Substantively, the Trial Court erred by failing to consider the limitations and factual basis for the holding of the Court of Appeals in Hobbs, and in failing to recognize that both the differing circumstances of this case and the Order of the Court of Appeals vacating the previous dismissal of this action foreclosed the port from obtaining yet another

improper dismissal.

For the first part, it is unclear if Hobbs has established a new standard and what the parameters of such a standard might be. Under accepted practice

Significantly, the Hobbs court included a footnote that distinguishes the circumstances of this present case and other cases under RC W 42.56.550(2) challenging the reasonableness of an agency's estimate from the facts of Hobbs...

Here the Auditor was producing records in installments. We do not address the situation where an agency completely ignores a records request for an extended period.

Even if the port has not expressly or equitably waived its right to argue that this Court lacks jurisdiction, it seeks to rely upon is manifestly obiter dictum limited to a very specific fact situation, where the agency was not withholding records and had fully complied with the PRA at the time the case was heard. These are most evidently not the facts of this case.

The brief filed by the Attorney General of the State of Washington in the Supreme Court in the Hobbs Case that illustrates the nature of the operative portions of the Hobbs decision and the limitations that the chief law enforcement officer of the State viewed the actual precedent in the Hobbs decision to incorporate.

Hobbs' Petition does not claim that the Auditor's final, complete response to his records request denied non-exempt information or inadequately explained exemptions from disclosure in violation of the PRA. Rather, he seeks a finding that the Auditor's first installment violated the PRA during the short period of the time it took the Auditor to consider Hobbs' concerns and address them.... These are not issues of substantial public interest which merit review under RAP 13.4(b)(4).

As the both Attorney General and the Court (at 940-41) concluded..."Under these circumstances, Hobbs was not "denied" an opportunity for inspection of the records." (emphasis added) Finally, the Attorney General in the March 6, 2015 Brief observed...

In any event, the PRA provides requesters with a distinct cause of action to challenge an agency's estimate of time it will take to respond; a PRA claim that Hobbs did not pursue in this case. RCW 42.56.550(2). Any other requester who wishes to challenge an agency's estimate of time to respond would be able to argue that his case is distinguishable from the decision below.

In the instant case, the presence of claims for failure to provide a reasonable estimate and the ultimate final withholding of records by the Port provide a sound basis for the jurisdiction of this court to determine, as the Court in Hobbs did, the merits of the PRA withholding claims.

The Port's lack of any compelling argument based upon law may be demonstrated by a close reading of the obiter dicta cited by counsel from Hobbs v. State. In Hobbs, the Court actually reached the merits of Hobbs' claims, and found no violation, making the portions of their ruling on the timing of Hobbs suit obiter dictum inapplicable to cases where an actual

violation of the PRA is present. As the Court of Appeals ruled in Hobbs, reaching the merits of the unreasonable withholding claims...

We hold that the Auditor's search for records to produce in response to Hobbs' public records request was reasonable, and Hobbs' PRA claim fails.

Significantly, under the unique facts in Hobbs, the Appellate Court found...

When an agency diligently makes every reasonable effort to comply with a requestor's public records request, and **the agency has fully remedied any alleged violation of the PRA** at the time the requestor has a cause of action (i.e., **when the agency has taken final action and denied the requested records**), **there is no violation entitling the requester to penalties or fees.** (See Hobbs, (emphasis added))

Thus, it is evident that the dicta of Hobbs that counsel attempts to cite as precedent is limited to situations where an agency is still responding to a request or has cured all of its omissions prior to any hearing in the Superior Court, and the operative Ratio Decidendi of Hobbs is simply inapplicable to the facts of any case where the complaint seeks relief for failure to provide a reasonable estimate and where the agency is actually "finally" withholding records in violation of the PRA at the time the case is brought to trial.

VI The Court erred in entering a second improper dismissal after remand based upon the new and undefined scope of the ruling in Hobbs when the Court in Hobbs reached the substantive claims of violation rendering its other extraneous language obiter dicta.....

The Hobbs Court's finding of no violation of the PRA on the

merits was irrespective of its dicta concerning the timing of filing suit and thus, under the Wambaugh inversion test, or any other precedential analysis, the ratio decidendi of Hobbs is limited to the basis for the decision...

The bindingness of a series of holdings of a court of last resort under the rule of stare decisis is determined by the 'decision' rather than the opinion or rationale advanced for the decision. 21 C.J.S. Courts §§ 181, 186, pp. 289, 297. The controlling principle of a case is generally determined by the judgment rendered therein in the light of the facts which the deciding authority deems important. Goodhart, 'Determining the Ratio Decidendi of a Case,' *Jurisprudence in Action*, p. 191. (See also, *A Computational Model of Ratio Decidendi*, Karl Branting, University of Wyoming)

Where a statement in a judicial decision is offered as authority for a position or legal argument, a court must examine the statement in context and evaluate whether the statement is dicta; if it is, it has no precedential effect.

Where a statement in a judicial opinion relates to an issue that was not before the court, that statement does not constitute a holding of the court. Black's Law Dictionary defines a "holding" as "[a] court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision. Cf. OBITER DICTUM." Black's Law Dictionary (8th ed. 2004).

Black's Law Dictionary sets forth the following definition for "obiter dictum":

[Latin "something said in passing"] A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). – Often shortened to dictum or, less commonly, obiter. Pl.

obiter dicta. See DICTUM. Cf. HOLDING (1); RATIO DECIDENDI. Black's Law Dictionary (8th ed. 2004⁷).

"In considering . . . statements made in the course of judicial reasoning, one must remember that general expressions in every opinion are to be confined to the facts then before the court and are to be limited in their relation to the case then decided and to the points actually involved." Peterson v. Hagan, 56 Wn.2d 48, 53, 351 P.2d 127 (1960) (citations omitted); see also Waremart v. Progressive Campaigns, 139 Wash.2d 623, 647-48, 989 P.2d 524 (1999) (Madsen, J., concurring). (emphasis added)

Statements in a case that do not directly relate to the actual issue before the court and are unnecessary to decide the case constitute dicta. In D'Amico v. Conguista, 24 Wash.2d 674, 167 P.2d 157 (1946), the Supreme Court cautioned against reliance upon dicta:

Our attention has been called to the fact that in some of our cases, we have made statements which would indicate our adherence to a rule that an employee was in the course of his employment when he was eating lunch. Those statements, however, were made in the course of our reasoning and did not, and could not, announce our adherence to such a rule because the question was not present in any of those cases. D'Amico at 683. (emphasis added)

In State ex rel. Johnson v. Funkhouser, 52 Wn.2d 370, 325 P.2d 297 (1958), the Supreme Court applied the same rule in a similar situation, where the lower court had relied upon the court's statement in an earlier case, Luellen v. City of Aberdeen, 20 Wash.2d 594, 148 P.2d 849 (1944), that "it quite clearly appears from a reading of the pension act

⁷1 The Black's Law Dictionary definition of obiter dictum also includes the following explanation: "Strictly speaking an 'obiter dictum' is a remark made or opinion expressed by a judge. in his decision upon a cause, 'by the way'... or it is any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy, or suggestion. . . . In the common speech of lawyers, all such extrajudicial expressions of legal opinion are referred to as 'dicta,' or 'obiter dicta,' these two terms being used interchangeably." William M. Lile et al., Brief Making and the Use of Law Books 304 (3d ed. 1914).

that one must have the status of a police officer before he can apply for retirement and a pension.” The court refused to accord any precedential effect to that statement:

The quoted statement, upon which the court relied in the instant case, was made in the course of this court’s reasoning. The issue to which the statement relates was not before the court and, therefore, the statement did not and could not announce our adherence to such a rule. [citing D’Amico] That the statement was not essential to the opinion is evidenced by the court’s conclusion The court’s conclusion in the Luellen case does not support respondent’s contention. *State ex rel. Johnson v. Funkhouser*, 52 Wash.2d at 373-74.

Thus, a court’s statement – no matter how clearly articulated, unambiguous, or definitive – is not a holding and has no precedential effect if it does not relate to an issue actually decided by the court. The briefs in *Hobbs* do not even tangentially deal with the issue of whether a suit may be filed before an agency has completed its response to a request, and the issue was not before the Court for resolution.

Nor was *Hobbs* decided on the basis that the Court lacked jurisdiction, rather the Court proceeded, after its brief analysis into the realm of dicta, to reach the merits of *Hobbs* claims, which due to their defects being remedied prior to the hearing, lacked vitality in their own right, as the Court expressly held. Absolutely nothing in this decision sets a precedent anywhere near what Ms. Lake would have the Court believe in the present case.

In addition to the cases cited above, Washington Courts have consistently upheld the principle that unnecessary surplusage such as the dicta in *Hobbs* is to be disregarded. See *City of Seattle v. Holifield*, 170 Wn.2d 230, 244 n. 13, 240 P.3d 1162 (2010) (court’s comments in an opinion that are immaterial to the outcome are dicta); *State v. Halgren*,

137 Wn.2d 340, 346 n. 3, 971 P.2d 512 (1999) (court's comments that do not bear on the outcome of a case are dicta); In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 331, 166 P.3d 677 (2007) (declining to be influenced by dicta injudicial decision that encouraged the State's argument); see also Noble Manor v. Pierce County, 133 Wn .2d 269, 289, 943 P.2d 1378 (1997) (Sanders, J. concurring) (dicta are not controlling precedent); State v. Potter, 68 Wn.App. 134, 150, 842 P.2d 481 (1992) (statements in a case that are unnecessary to decide the case constitute dicta and need not be followed). State v. Stewart, 125 Wn.2d 893, at 900, (Wash. 1995) (Johnson, concurring) "This dicta is unnecessary to the resolution of this case, confuses the analysis... and is not helpful to the trial courts "

In light of the actual precedential portion of the ruling of the Court of Appeals in Hobbs, such a mis-application of its dicta as is suggested by counsel in this case to re-write RCW 42.56.550(2) would not only violate the separation of powers, under Carrick v. Locke, 125 Wn.2d 129, 882 P.2d 173 (1994) it would be in complete violation of the intent of the PRA, as it would encourage agencies to deny disclosure interminably until a requestor either expired of old age⁸ or the records became antiquated and useless.

A further problem for the "**Nasty, brutish and short**"⁹ "Hobbesian" analysis of counsel is that...

When a state court overrules established precedent with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law "in its primary sense of an opportunity to be heard and to defend [his] substantive right." Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678.

⁸ See, i e. *The Facts in the Matter of the Great Beef Contract*, Mark Twain, *The Galaxy*, 1870
⁹ See Thomas Hobbes, *Leviathan*

Thus, to apply Hobbs to upset over 40 years of precedent under the PRA where jurisdiction has been found to exist under RCW 42.56.550(2) under which suits have been routinely and regularly filed prior to an agency dotting the last i and crossing the last t on their response to bar any PRA suit until an agency had fully responded to a request would also violate the prohibition on ex post facto law in U.S. Constitutional Art 1, § 9 and Art. 1 § 10. (see, e.g. Collins v. Youngblood, 497 US 37 (1990) and California Dep't of Corrections v. Morales, 514 US 499 (1995), and due process concerns, especially in the absence of the right to amend to cure any technical defect by amendment. This, again, was reversible error.

VII The Court erred in failing to allow a reasonable amendment that would have cured any jurisdictional defects
.....

Another critical factor that distinguishes the circumstances of the case from Hobbs is the Court in Hobbs did not abuse its discretion in denying an amndment of the pleadings, and the claims in Hobbs were unable to be cured by an amended pleading.

On June 12 Appellant moved to Amend the Complaint. This was denied.

The Court erred and committed an abuse of discretion in denying this amendment in that both the Federal and State Court rules provide that the right to amend a complaint shall be freely given... The Supreme Court has stated that “this mandate is to be heeded.” Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

In addition, it is clearly established in the 9th Circuit that “a...court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.” See *Doe*, 58 F.3d at 497.

In *Lopez v Smith*, the 9th Circuit Court of Appeals held..

The dismissal without leave to amend was therefore contrary to our longstanding rule that “[l]eave to amend should be granted ‘if it appears at all possible that the plaintiff can correct the defect.’ ” *Balistreri*, 901 F.2d at 701 (quoting *Breier v. Northern California Bowling Proprietors' Ass'n*, 316 F.2d 787, 790 (9th Cir.1963)).

The district court's action was also inconsistent with our precedent because *Lopez* was a pro se plaintiff. We have noted frequently that the “rule favoring liberality in amendments to pleadings is particularly important for the pro se litigant. Presumably unskilled in the law, the pro se litigant is far more prone to making errors in pleading than the person who benefits from the representation of counsel.” *Noll v. Carlson*, 809 F 2d 1446, 1448 (9th Cir. 1987)

Because the district court failed to grant *Lopez* leave to amend, we reverse the dismissal and remand to the district court with instructions that *Lopez* be given an opportunity to amend his complaint. *Lopez v. Smith*, 173 F 3d 749 (9th Cir. 2000)

Under this precedent, the Trial Court abused its discretion in denying plaintiff West's request for leave to amend the Complaint. This is particularly glaring in this case where the plaintiff's amendments were not to add any substantive claims that the Port had not been aware of and resisting for 7 years and such an amendment would not prejudice the Port as it would not add any substantive claims, and would certainly be in the interest of justice. This, again, was reversible error.

VIII The Court erred in failing to afford West an objectively impartial process in accord with the Appearance of Fairness and the 5th Amendment and in Refusing to Conduct a Show Cause Hearing and Determine if the Port Violated the PRA.....

West noted the case for a show cause hearing multiple times. A show cause hearing is appropriate in the PRA context. RCW 42.56.550(1) and (2) provide for a show cause hearing on why a public agency has refused to allow inspection or copying of a specific public record or class of records, and whether the estimated time it provided for response was reasonable. RCW 42.56.550(3) allows for a hearing based solely on affidavits. But the Trial Court refused to consider whether the Port had violated the PRA, even though the Port's violations were apparent at the times that Mr. West noted up the show cause hearings.

For example, the Port responded to Mr. West by giving him an expanding series of promised dates by which it would provide the first installment of the records, none of which promises it kept. Nor did the Port provide a complete exemption log until five months after Mr. West's request.

The act sets forth strict standards for administrators to meet. "Responses to requests for public records shall be made promptly by agencies.[...] Denials of requests must be accompanied by a written statement of the specific reasons therefor." [RCW 42.56.520]. This statement "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)]. If the agency fails to provide the required written statement by the end of the second business day following denial of inspection, review of the records in question can be submitted directly to the superior court. [RCW 42.56.520] and [RCW 42.56.550(2)]. Hearst Corp. v. Hoppe, 90 Wn.2d 123, 139, 580 P.2d 246 (1978). “Strict enforcement of these provisions where warranted should discourage improper denial of access to public records and adherence to the goals and procedures dictated by the statute Hearst Corp., 90 Wn.2d at 140.

The Port continually argued to the Trial Court that it had properly and completely responded to Mr. West’s request. The Port is wrong. It did not produce the records in a timely fashion, nor did it timely disclose the privilege log of the withheld records. “[T]he remedial provisions of the PRA are triggered when an agency fails to properly disclose and produce records, and any intervening disclosure serves only to stop the clock on daily penalties, rather than to eviscerate the remedial provisions altogether.” Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 727, 261 P.3d 119 (2011). Further, the Port’s own records, that it provided to Mr. West and that were quoted in newspaper articles in *The Olympian* and *The News Tribune* showed that the Port destroyed responsive records to Mr. West’s request.

The Port also continually argued to the Trial Court that Mr. West prematurely filed suit. This is not correct, either. “Whether suit is reasonably regarded as necessary must be objectively determined, from

the point of view of the requesting party. We agree with the [responding agency] that a history of prompt responses to previous requests may be relevant. But after four attempts to obtain the same information, the likelihood of inadvertent agency error was obviously low, the likelihood of a timely response was obviously nil, and there was nothing to indicate the [requestor's] request would ever be honored. Viewed objectively from the [requestor's] point of view, this lawsuit was reasonably regarded as necessary." Violante v. King County Fire Dist. No. 20, 114 Wn. App. 565, 571, 59 P.3d 109 (2002).

Here, the Port made three failed promises to produce records; the likelihood of a timely response was obviously nil and there was nothing to indicate that Mr. West's request would ever be honored. Moreover, a record that the Port did produce to Mr. West showed that this failure to respond promptly to Mr. West was the result of a deliberate policy decision by the Port, to withhold public records from the public until the Port had its chance to put its own spin on the records when it released them at the January 31 study session.

Violante was partially abrogated by Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 103-04, 117 P.3d 1117 (2005); Spokane Research stands for the proposition that a requestor's lawsuit does not have to *cause* the release of the records in order for the requestor to be the prevailing party, instead, "prevailing" relates to the legal

question of whether the records should have been disclosed on request. 155 Wn.2d at 103. Here, of course, Mr. West's lawsuit actually *did* cause the release of the records, even though all he must show to prevail is whether the records should have been disclosed on request.

Not only can Mr. West show that the records should have been disclosed on request, but he can also show that the Port's exemption log was lacking. "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." PAWS, 125 Wn.2d at 271. "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...." PAWS, 125 Wn.2d at 271, n. 18. The Port did not include dates, page numbers, and the names of authors and recipients in its exemption logs.

Finally, Mr. West can show that the Port's claimed exemptions were not supported by law. For example, the Port frequently claimed the research data exemption (RCW 42.56.270(1)), but the Port made no attempt to separate and produce any non-exempt portion of any of the studies for which it was claiming the exemption, in contravention of Servais v Port of Bellingham, 127 Wn.2d 820, 833, 904 P.2d 1124 (1995).

Likewise, many of the Port's claimed exemptions were for

deliberative process (RCW 42.56.280), but the Port claimed exemptions for draft versions of records that it had already released in their final form to the public, that is, the Port was claiming the deliberative process exemption for records that it had already implemented as policy. This is prohibited, even by the case upon which the Port places the most reliance, Am. Civil Liberties Union of Washington v. City of Seattle, 121 Wn. App. 544, 554, 89 P3d 295 (2004) (“ACLU”) (even in the context of ongoing labor negotiations, records where opinions are expressed or policies are formulated are only protected up until the moment when they are presented to the agency in question for adoption). *See also* West v. Port of Olympia, 146 Wn. App. At 116-118, (2007); PAWS, 125 Wn.2d at 256-57.

Likewise, after the Port decided to abandon its plans to develop the SSLC at the Maytown site, it should have released *all* the records for which it had claimed the deliberative process exemption (that did not also fall under another exemption), because the Maytown site had been presented to the two Port Commissions for adoption and they had rejected it. Instead, however, the Port continued to claim the deliberative process exemption, even to the special master Judge Lukens.

One of the most troubling aspects of the Port’s exemption log is its parroting of a phrase taken out of context from the ACLU opinion: “This ongoing process involves negotiators and City officials in what is the essence of the deliberative process. Until the results of this policy-making

process are presented to the city council for adoption, politicization and media comments will by definition inhibit the delicate balance – the give-and-take of the City’s positions on issues concerning the police department.” ACLU, 121 Wn. App. at 554.

The Port quotes this line as if media attention and public scrutiny of a public agency are by definition an evil to be guarded against, and have no benefit in our open democratic society. But there is a balance to be struck, and the Port needs to realize that the sensitive negotiations in ACLU are factually different from the case of the SSLC, which was a poorly-planned, ham-handedly implemented, environmentally questionable, and outrageously expensive boondoggle that quite frankly could benefit from the glare of a little media attention and public scrutiny.

Achieving an informed citizenry is a goal sometimes counterpoised against other important societal aims. Indeed, as the act recognizes, society’s interest in an open government can conflict with its interest in protecting personal privacy rights and with the public need for preserving the confidentiality of criminal investigatory matters, among other concerns. Though tensions among these competing interests are characteristic of a democratic society, their resolution lies in providing a workable formula which encompasses, balances and appropriately protects all interests, while placing emphasis on responsible disclosure. It is this task of accommodating opposing concerns, with disclosure as the primary objective, that the state freedom of information act seeks to accomplish.

Spokane Police Guild v. Washington State Liquor Control Bd., 112 Wn.2d 30, 33-34, 769 P.2d 283 (1989).

2 " 5

The Trial Court could have, and should have, conducted a show cause hearing, as thrice noted by Mr. West, and could have and should have found that the Port was in violation of the PRA, both in the inadequacy and tardiness of its response, and in its overreaching claiming of exemptions contrary to case law. This Court should remand the case back to the superior court for a long overdue show cause hearing on the merits of this case.

Request for Attorney Fees

Mr West was representing himself pro se below. He properly did not request attorney fees and costs in his complaint. Mr West requests attorney fees on appeal for work done by counsel in both appeals pursuant to RAP 18.1 and RCW 42.56.550(4), and upon remand to the Trial Court.

CONCLUSION

This is a case about delay, reasonable reliance and RCW 42 56. 550(2). The Port deliberately delayed in its response to Mr. West's public records request and in its production of the exemption log to Mr. West and to the Trial Court. The first Trial Court delayed in its adjudication of the case and in its appointment of the special master, which in and of itself

was another error. Then there were further delays due to the Trial Courts error in dismissing Mr. West's case for alleged "want of prosecution". Even after remand there were further delays and obstructions. During all of these actions and for nearly a decade, the Courts and parties concerned reasonably relied upon the underlying jurisdiction of the Superior Court.

This Court should again reverse the latest improper dismissal in this case and remand the case back to superior court for determination, by the Trial Court, of the ultimate issues in the case: whether the Port violated the Public Records Act and whether it properly claimed exemptions, and for determination of penalties and fees.

The decision of the Trial Court should be vacated, and this case remanded back to give West the opportunity to renew his epic struggle to secure justice in the Pierce County Superior Court¹⁰, with instructions for the award of appropriate costs and penalties for the unlawful withholding of records.

This case has already lasted a long time: longer than the War of Independence, longer than the indenture of Jabez Stone's immortal soul, twice as long as the Civil War, and longer than the participation of the United States in WWI and WWII combined.

In many ways, the burdens placed upon West in this matter are

¹⁰ At the very end of his long effort measured by skyless space and time without depth, the purpose is achieved. Then Sisyphus watches the stone rush down in a few moments toward the lower world whence he will have to push it up again toward the summit. He goes back down to the plain. *Le Mythe de Sisyphe*, Hamish Hamilton, 1955, Trans. By Justin O'Brien.

unprecedented in law or Myth¹¹. to the extent that if this case is again remanded this Court should seriously consider issuing explicit orders on remand and assigning it to another Honorable Judge in order that these proceedings may comply with Article I, section 10 of the Constitution of the State of Washington, that *Justice in all cases shall be administered openly, and without unnecessary delay.*

Respectfully submitted this 26th day of September, 2016.


ARTHUR WEST

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2016, I caused to be served a true and correct copy of the preceding document on the party listed below at their Tacoma Hilltop offices via.

Via Email
Attorneys for Respondent Port of Tacoma

Carolyn Lake
Goodstein Law Group, PLLC
501 South G Street
Tacoma, WA 98405

FILED
COURT OF APPEALS
DIVISION II
2016 SEP 26 AM 11:56
STATE OF WASHINGTON
BY _____
DEPUTY


ARTHUR WEST

¹¹ It should be noted that while Sisyphus had the luxury of enjoying the company of Hades, Thanatos and the sulphurous atmosphere of the infernal regions, West, in the course of his seemingly eternal quest for a hearing on the merits of this case, must make do with Ms. Lake, the Honorable Judge Costello, and the somewhat less salubrious air quality in the City of Tacoma.

From: Quitugua, Donnie
Sent: Tuesday, December 04, 2007 1:55 PM
To: 'A West'
Cc: Michels, Andy
Subject: RE: Public Records Request
Importance: High

Good Afternoon Mr. West,

I will forward your request to Mr. Andy Michels, Risk Manager for the Port of Tacoma. He is now handling all 'Public Records Requests' for the Port.

Warm Regards,

Donnie A. Quitugua | IT Generalist | Port of Tacoma | P.O. Box 1837 | Tacoma, WA 98401-1837 |
253-592-6790

From: A West [mailto:awestaa@gmail.com]
Sent: Tuesday, December 04, 2007 1:49 PM
To: Quitugua, Donnie
Subject: Re: Public Records Request

Please regard this as a formal request for the following records under RCW 42.56.

1. All records and communications concerning the South Sound Logistics Center, from January 1, 2005 to present.
2. All correspondence or communication with Diane Sontag.
3. Any records related to potential transport of Uranium Hexafluoride through Thurston County or the SSLC.

Thank you for your consideration.

Arthur West
120 State Ave NE 1497
Olympia, Wa. 98501

On Jun 13, 2006 3:12 PM, Quitugua, Donnie <dquitugua@portoftacoma.com> wrote:
Dear Mr. West:

Exhibit 1