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(Thurston County Superior Court No. 17-2-06442-34)

**COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON**

MILLENNIUM BULK TERMINALS – LONGVIEW, LLC,

Appellant/Plaintiff,

v.

WASHINGTON DEPARTMENT OF ECOLOGY,

Respondent/Defendant.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Washington's Public Records Act (the "PRA") is "a strongly worded mandate for broad disclosure of public records."¹ It stands for the proposition that "*full access* to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society."² The Washington Supreme Court has long recognized that the purpose of the PRA "is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions."³ The positions taken by Washington Department of Ecology's ("Ecology") in this case threaten the core purpose of the PRA.

For almost a year, Millennium Bulk Terminals – Longview, LLC ("MBT-Longview"), sought to obtain the data and assumptions underpinning Ecology's findings and conclusions in the Final Environmental Impact Statement (the "FEIS") that Ecology issued as a co-lead with Cowlitz County (the "County") on April 28, 2017, with respect to a project proposed by MBT-Longview. Although during that time Ecology produced a large volume of records, the key records needed to

¹ *Neighborhood All. of Spokane Cty. v. Spokane Cty.*, 172 Wn.2d 702, 714, 261 P.3d 119 (2011).

² *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (quoting former RCW 42.17.010(11)) (emphasis added by Court).

³ *Id.*

validate the FEIS were missing or incomplete. MBT-Longview's expert, Julie Carey, identified 26 different workpapers, which were readily available to Ecology, that were missing or incomplete that were needed to allow MBT-Longview to verify the accuracy and validity of the FEIS greenhouse gas ("GHG") analysis (together, the "GHG Modeling Data").

Ecology does not dispute that the GHG Modeling Data was not disclosed or produced by Ecology. Further, Ecology does not dispute that the GHG Modeling Data is needed to verify and validate Ecology's findings and conclusions in the FEIS. Instead, Ecology contends that the GHG Modeling Data was not requested by MBT-Longview and that even if it was requested, Ecology was not obligated to disclose or produce it.

There is no question that the GHG Modeling Data was squarely within the scope of MBT-Longview's public-records request.⁴ Indeed, in an interrogatory request MBT-Longview specifically inquired about the status of the production of the GHG Modeling Data, and Ecology claimed to have already produced it.⁵ Ecology did not indicate in any way that the GHG Modeling Data was not within the scope of what was requested.

In arguing that it was not obligated to produce the GHG Modeling Data that was needed to verify the accuracy and validity of Ecology's FEIS analysis, Ecology seeks to undermine the fundamental purpose of

⁴ CP 50-53.

⁵ CP 387-388.

the PRA. It is undisputed that the GHG Modeling Data was used in the process of drafting Ecology's FEIS. It is also undisputed that without the GHG Modeling Data, it is impossible to verify the accuracy and validity of the findings and conclusions in Ecology's FEIS. Records such as these that allow the public to verify the validity and accuracy of a government agency's work are exactly the type of information that the PRA was designed to make available to the public.

Because MBT-Longview has identified specific documents missing from Ecology's production and Ecology has not produced the documents, identified an exemption that allows it to withhold the documents, or even explained why it did not produce the requested documents, MBT-Longview has established that Ecology has violated the PRA. Accordingly, it requests that this Court order Ecology to produce the missing documents and award MBT-Longview the attorney fees and costs incurred to bring this action, as well as a per diem penalty against Ecology for its failure to comply with the PRA.

II. REPLY TO ECOLOGY'S STANDARD OF REVIEW

In its Standard of Review, Ecology correctly notes that "[j]udicial review under the PRA is de novo, as to both the agency's actions and the court decisions below."⁶ It further correctly notes that appellate courts

⁶ State of Washington, Department of Ecology's Response Brief ("Ecology Brief") at 15.

"stand in the shoes of the trial court" when deciding PRA actions.⁷ Even so, Ecology goes on to argue that this Court should not consider MBT-Longview's argument that "Ecology's overall search was inadequate because it did not provide evidence of the specific steps ICF took to respond to the requests," because—Ecology argues—MBT-Longview was making this argument "for the first time on appeal."⁸

Ecology's argument on this point is factually and legally incorrect. Legally, as explained above, the appellate court "stand[s] in the shoes of the trial court" when deciding an action under the PRA. Factually, the whole point of MBT-Longview's motion to show cause was that Ecology's search was not adequate and that documents that should have been produced were not produced. It was Ecology that, at oral argument, referenced and relied on *Neighborhood Alliance*,⁹ noting that the public agency need only conduct a reasonable search, as shown by affidavit.¹⁰ In response, at oral argument, MBT-Longview argued that if all Ecology needs to do is to submit affidavits showing the reasonableness of its search, then a declaration from ICF was notably absent from the record.¹¹ It is axiomatic that without a declaration from ICF, all evidence about the

⁷ *Id.*

⁸ *Id.* at 16.

⁹ 172 Wn.2d 702.

¹⁰ Verbatim Report of Proceedings ("VRP") at 38:13-25.

¹¹ "It's interesting that ICF doesn't have a declaration here. There's nothing from ICF saying what did ICF do to search for and look for these records. . . ." VRP at 51:18-21.

search that ICF did or did not do is hearsay. Further, Ecology failed to provide any evidence of a "reasonable" search of ICF documents.

Regardless, MBT-Longview has consistently maintained that Ecology did not perform a reasonable search.¹² And MBT-Longview has consistently maintained that documents related to the FEIS in ICF's possession are public records that should be produced in response to a public-records request.¹³ There is nothing new about MBT-Longview's argument on appeal.

Further, on appeal MBT-Longview is not arguing that Ecology's search was inadequate simply because Ecology did not provide evidence of ICF's specific search steps. MBT-Longview is arguing that Ecology has violated the PRA by contracting out one of its jobs as a public agency to a third party and then failing to produce responsive documents that were easy to locate in possession of the third party. As evidence of this, MBT-Longview noted that Ecology did not provide sufficient evidence on the parameters of the search that ICF performed. It is the same argument that MBT-Longview has consistently made throughout this litigation. This Court is entitled to consider MBT-Longview's argument, and MBT-Longview respectfully requests that this Court do so.

¹² CP 1-6; CP 13-29.

¹³ *Id.*

III. LEGAL ANALYSIS

A. GHG MODELING DATA WAS MISSING OR INCOMPLETE.

As explained in Ms. Carey's declaration filed in support of MBT-Longview's motion,¹⁴ Ms. Carey reviewed the documents that Ecology produced in response to PDTS #42368. Ms. Carey determined that Ecology failed to produce significant workpapers that were derived from and utilized in the FEIS GHG analysis. Attached as Exhibit C to Ms. Carey's declaration was a list of 26 documents, readily available to Ecology, that were missing or incomplete.¹⁵ In some cases, entire documents were not provided. In other cases, critical formulas and calculations were removed from the documents provided.¹⁶ Without these documents, it was impossible for MBT-Longview to verify the accuracy and validity of the FEIS GHG analysis.

For instance, Ms. Carey explained that ICF's coal cost model workpaper (the "CoalDOM Cost Model") was not produced by Ecology.¹⁷ The CoalDOM Cost Model was used by Ecology to develop the coal supply curves in the United States and international regions used in the FEIS. The CoalDOM Cost Model is referenced in numerous other documents produced by Ecology but the model itself was not produced.

¹⁴ CP 34-55.

¹⁵ CP 54.

¹⁶ CP 35, ¶ 4.

¹⁷ CP 36, ¶ 7.

Ecology produced numerous input files and memos discussing the approach to coal market modeling but did not produce the full set of inputs, calculations, and output files for the CoalDOM Cost Model and runs that would be required to validate the analysis.¹⁸

Another example is the primary workpaper underlying the GHG emissions results in the FEIS, MBTL_GHG_Analysis_FinalEIS.xls (the "GHG Primary Workpaper"). The GHG Primary Workpaper was produced as an incomplete document. All the calculations had been removed and all numbers had been hard-coded.¹⁹ As Ms. Carey testified, the Excel workbook contained at least 50 different tabs with tables that extend hundreds of rows and dozens of columns with numerical figures and calculations. Ms. Carey testified that someone had to go to great effort to remove all the calculations and formulas from the workpaper, which entails a multistep process of copying the contents of all cells within each tab of the workbook and pasting the values as hard-coded numerical values.²⁰ Further, no reference files were provided for intermediate calculations that populate the final model inputs. In addition, the GHG Primary Workpaper has electronic links to numerous other files that were not produced by Ecology. As a result of all of this, MBT-

¹⁸ *Id.*

¹⁹ CP 37, ¶ 8.

²⁰ *Id.*

Longview lacked the calculations that make the spreadsheet function and that identify the assumptions and equations used at every step.²¹

In its response, Ecology does not deny that it did not disclose or produce the missing and incomplete documents identified by Ms. Carey. In addition, Ecology does not point to any record evidence disputing that someone went to great effort to remove all of the calculations and formulas from many the workpapers that were produced. Further, Ecology does not dispute that the records were easily identifiable and available to produce. In fact, under the express terms of ICF's contract, all information related to the EIS process, including but not limited to all reports and "computer models and methodology for those models," was to be provided to Ecology upon completion of the contract.²²

B. MBT-LONGVIEW HAS CONSISTENTLY AND SPECIFICALLY IDENTIFIED THE DOCUMENTS IT SEEKS.

Ecology's claim that MBT-Longview did not request the GHG Modeling Data is nonsensical. PDTS #42368 could not be more clear. As Ecology admits, the records request sought all "data and assumptions" related to five different subject areas considered in ICF's IPM model.²³ In requesting "data and assumptions," MBT-Longview was seeking, among

²¹ *Id.*

²² CP 156.

²³ CP 50-53.

other things, all the underlying data and assumptions related to the model. Nothing about the term "data and assumptions" would suggest otherwise.

If Ecology was unclear about what was requested, however, it was required to seek clarification.²⁴ Ecology never sought any clarification of the request. Even after receiving an interrogatory request asking if Ecology possessed "modeling data related to, used, or considered in the GHG calculation contained in the FEIS," Ecology never asked for clarification regarding the records request. Instead, Ecology claimed the "modeling data related to the GHG calculation" had already been produced.²⁵

Although at trial Ecology argued that it did not understand the request to include modeling data, now Ecology concedes that when Ecology answered the interrogatory seeking information about modeling data in January 2018, Ecology "understood the term 'modeling data' as analogous to 'data and assumptions.'"²⁶ In other words, there is no dispute that Ecology knew that MBT-Longview was requesting the modeling data related to, used, or considered in the GHG calculations contained in the FEIS. Even if that request were narrowly construed, it would have to

²⁴ *Neighborhood Alliance*, 172 Wn.2d at 727-28. Further, under RCW 42.56.100, the agency is to adopt rules and regulations to "provide the fullest assistance to inquirers." Ecology's rules allow it to ask for additional time to respond in order to clarify a request. WAC 173-03-065(2).

²⁵ CP 387-388.

²⁶ Ecology Brief at 30.

include the CoalDOM Cost Model as well as the GHG Primary Workpaper discussed above, as well as the rest of the GHG Modeling Data.

C. IF GHG MODELING DATA IS NOT SUBJECT TO PRODUCTION, THE PRA IS EVISCERATED.

Unbelievably, in the Ecology Brief, Ecology continues to argue that (1) it had no obligation to produce documents in ICF's possession, and (2) although it had no obligation to do so, it did produce some ICF documents. While each argument is problematic on its own, if taken together, it would allow Ecology to pick and choose the documents it produces in response to a public-records request.

1. In Performing Its Work on the FEIS, ICF Was Acting as the Functional Equivalent of Both Ecology and the County.

It is undisputed that Ecology acted as a co-lead with the County on the FEIS. Ecology and the County as co-leads had the option of having agency staff, the applicant or applicant's agent, or an outside consultant retained by the agency or applicant prepare the FEIS.²⁷ Regardless of who participated in preparing the FEIS, the regulations make clear that it is the FEIS of the co-lead agencies.²⁸ Thus, both Ecology and the County were responsible for the FEIS and its findings and conclusions.²⁹

²⁷ WAC 197-11-420(2).

²⁸ WAC 197-11-420(1).

²⁹ WAC 197-11-420(2).

Rather than prepare the FEIS themselves, Ecology and the County elected to have the FEIS prepared by ICF under a third party contractual agreement in accordance with the requirements of SEPA and local ordinances.³⁰ Although ICF was hired by the County, the work it performed on the FEIS was for both Ecology and the County and was done at the direction and under the supervision of both Ecology and the County. In fact, ICF's contract expressly provided that "as long as the MOU remains in effect, [ICF] shall prepare the EIS under the joint direction of the County, Corps, and Ecology, collectively, the 'Agencies.'"^{31,32}

Further, Attachment D to the ICF agreement is a Communication Protocol Agreement between all the co-leads and ICF.³³ The Communication Protocol Agreement expressly states that ICF was subject to the sole supervision and control of the "co-leads" in the development of the FEIS. Further, it expressly states that the "'Co-leads' will direct [ICF] as to all aspects of the EIS process."³⁴ In addition, it confirmed "The 'Co-leads' will independently evaluate products prepared by [ICF's] Project

³⁰ CP 177.

³¹ CP 152.

³² Ecology admits that the MOU remained in effect well past the completion of the FEIS. CP 183.

³³ CP 177.

³⁴ *Id.*

Team upon their completion, and bear the final responsibility for the scope and content of the EIS."³⁵

In short, although Ecology did not hire ICF, Ecology did enter into a signed agreement (the Communication Protocol Agreement) with ICF and the County for ICF to perform work on behalf of both Ecology and the County. ICF's work on the FEIS was expressly under the supervision and control of both Ecology and the County.

There is also no question that the work that ICF was doing in preparing and drafting the FEIS was a core government function. Indeed, that core government function was expressly recognized in the Communication Protocol Agreement.³⁶

Given the above, it is disturbing, perhaps even baffling, that Ecology would argue in its response that ICF was not Ecology's functional equivalent. At trial Ecology argued: "The function that ICF performed, whether functionally equivalent to that of a public agency or not, was performed on behalf of the County, which hired it."³⁷ Now, Ecology concedes that "Ecology and the County jointly provided direction to ICF in its work completing the [FEIS]."³⁸ Nonetheless, Ecology still argues, in contradiction of the contract language discussed above, that ICF was not a

³⁵ *Id.*

³⁶ *Id.*

³⁷ CP 97.

³⁸ Ecology Brief at 28.

functional equivalent because the County retained ultimate authority to direct ICF's work.³⁹ Even if that were true, however, as co-lead agencies, under the law, it was both Ecology's and the County's FEIS and could not be published until Ecology approved it.⁴⁰

As repeatedly explained by Washington courts, the PRA applies to those records created by a private entity performing as the functional equivalent of a public employee in the same manner as it applies to the records that such an entity creates performing as the functional equivalent of a public agency.⁴¹ Here, there is no question that the nature of the work performed by ICF was the functional equivalent of a public employee. The work that ICF performed on the FEIS was work that Ecology was responsible for with the County as co-leads.

In this case, it is also clear that Ecology, the County, and ICF understood that ICF's documents would be subject to the PRA. ICF was contractually required to maintain all the records it received and generated so that they could be retrieved in accordance with the PRA.⁴² Notably, the executed control documents provide that both Ecology and the County were responsible for determining what is or is not releasable in response to

³⁹ *Id.*

⁴⁰ WAC 197-11-420(1).

⁴¹ *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 718, 354 P.3d 249 (2015).

⁴² CP 156.

a request for public records.⁴³ If, as Ecology now argues, ICF was not performing functionally equivalent work on behalf of Ecology, Ecology would not have needed to determine what is or is not releasable under a public-records request.

The problem with Ecology's argument that Ecology had no obligation to produce ICF's documents is that, if accepted, public agencies would be allowed to shirk their duties under the PRA by creating complicated contractual relationships. It is precisely because of this that in *Cedar Grove Composting, Inc. v. City of Marysville* (discussed at length in MBT-Longview's opening brief), the court held that the documents of a for-profit corporation acting as the functional equivalent of a public agency are public records and subject to disclosure.⁴⁴ Otherwise, "a local government could 'contravene the intent of the PDA and the public records act by contracting with private entities to perform core government functions.'"⁴⁵

Here, Ecology has conceded that ICF performed the "highly technical System Summary Reports, formula, [and] calculations" that it then summarized into "reports, presentations, and other documents" for Ecology's review.⁴⁶ Without the science, Ecology could not issue the

⁴³ CP 178.

⁴⁴ 188 Wn. App. at 717.

⁴⁵ *Id.* at 718 (quoting *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 194, 181 P.3d 881 (2008)).

⁴⁶ Ecology Brief at 25.

FEIS on MBT-Longview's proposed project. Yet Ecology is arguing that because it received from ICF the simplified, summary version of the very technical job done by ICF, MBT-Longview is not entitled to the underlying technical data.

Simply put, the question is whether a co-lead agency is obligated to produce the data and assumptions underlying a public document such as the FEIS in response to a public-records request. In other words, can a co-lead agency contract out to a third party the job of evaluating the science behind an applicant's request, receive back from the third party only the conclusions of its evaluations, and then produce only the conclusions when the applicant requests the information needed to evaluate the agency's conclusions? Such a holding would make it impossible for the public to obtain the necessary records to verify and validate the agency's conclusions and would frustrate the very purpose of the PRA, which is to make the government accountable to the people.⁴⁷

If this Court accepts Ecology's arguments, then a citizen applicant such as MBT-Longview that wants to perform its own analysis of the science underlying the conclusions in Ecology's FEIS will never be able to access that information, simply because Ecology contracted with the County and ICF in a way that shields all data, formulae, and calculations

⁴⁷ See *Progressive Animal Welfare Soc'y*, 125 Wn.2d at 251.

underlying the FEIS from production. Such a result would eviscerate the PRA's purpose.

2. The Requested Records Were Public Records Because Ecology "Used" the GHG Modeling Data for Purposes of the PRA.

The definition of "public record" for purposes of the PRA is very broad. Washington courts have construed it as referring to "nearly any conceivable government record related to the conduct of government."⁴⁸

An agency "uses" information for purposes of the PRA when the information is "applied to a given purpose or instrumental to a governmental end or process and where a nexus exists between the information and an agency's decision-making process."⁴⁹ Regardless of whether an agency ever possessed the requested information, the agency may have "used" the information within the meaning of the PRA "if the information was either: (1) employed for; (2) applied to; or (3) made instrumental to a governmental end or purpose."⁵⁰

Here, it is undisputed that the GHG Modeling Data was used to develop the findings and conclusions in the FEIS. The fact that Ecology did not possess and/or did not understand the GHG Modeling Data is irrelevant. What is relevant is that the GHG Modeling Data was used in

⁴⁸ *Cedar Grove*, 188 Wn. App. at 717 (internal quotation marks and citations omitted).

⁴⁹ *Id.* at 721 (internal punctuation and citation omitted).

⁵⁰ *Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1*, 138 Wn.2d 950, 960, 983 P.2d 635 (1999).

reaching the findings and conclusions in the FEIS—the FEIS that was the responsibility of Ecology. Ecology has not disputed that without the GHG Modeling Data it is impossible to verify or validate the conclusions in the FEIS. Given that the GHG Modeling Data is needed to verify and validate the FEIS's conclusions, there is no basis for Ecology's argument that it is "too attenuated" to form the nexus contemplated by *Concerned Ratepayers*. Information needed to verify and validate government findings and conclusions falls squarely within the nexus contemplated by *Concerned Ratepayers*.

Ecology's argument that it did not use the GHG Modeling Data because it did not possess the technical expertise to understand the modeling and calculations is quite remarkable. Just because Ecology was not able to understand and verify its own findings and conclusions does not mean that MBT-Longview and the public should not be able to do so. According to that reasoning, an agency would never need to produce records that would allow the public to verify the accuracy and reasonableness of the agency's findings and conclusions so long as the modeling and calculations were done by a third party and not retained and/or understood by the agency. Such a result would defeat the purpose of the PRA in an increasing number of situations in which agency uses scientific analysis prepared by consulting experts.

The bottom line is that it is undisputed that the GHG Modeling Data was the basis for the findings and conclusions in the FEIS. Ecology's argument that ICF used the model to develop the supply curves and that the supply curves, not the model, were used in the FEIS misses the point. It is impossible to verify the findings and conclusions in the FEIS with just the supply curves. The model is needed to understand and validate the supply curves and therefore to understand the findings and conclusions in Ecology's FEIS. Consequently, the nexus between the model and Ecology's FEIS could not be stronger. Given that nexus, whether or not Ecology understood it or ever possessed it, the GHG Modeling Data was "used" by Ecology for purposes of the PRA. To hold otherwise would prevent the public from ever being able to verify the most publicized findings and conclusions of Ecology's FEIS.

3. Ecology Cannot Pick and Choose Third-Party-Contractor Documents to Produce.

Ecology also argues that although it had no obligation to do so, it did produce some ICF documents. This argument is as problematic as Ecology's argument that ICF documents are not subject to production at all because, if accepted, a public agency could silently withhold third-party contractor documents. It allows a public agency such as Ecology to argue, as Ecology has here, that when an incomplete document (such as the GHG Primary Workpaper) is produced to a requestor, the public agency has no

liability for producing that incomplete document because it was under no obligation to produce the document to begin with. Our courts have been clear: silent withholding is expressly and emphatically prohibited.⁵¹

If Ecology's failure to produce all of ICF's responsive documents is excused because Ecology is under no obligation to produce them, it would allow Ecology to engage in gamesmanship when responding to a public records request; Ecology could produce some of the third-party contractor's responsive documents, which would lead the requestor to believe that a search of the third-party contractor's documents had occurred, and withhold other, equally responsive third-party-contractor documents without identifying the held-back documents or even informing the requestor that other such documents existed. In this way, a public agency could silently withhold any third-party contractor documents it chose to withhold. Again, this result would frustrate the PRA's purpose.

D. ECOLOGY FAILED TO CONDUCT AN ADEQUATE SEARCH.

As it did to the trial court, Ecology largely responds to MBT-Longview's assertion that Ecology failed to produce critical documents by pointing to the amount of time, effort, and energy that went into its search for responsive documents. This response, however, misses the point of MBT-Longview's argument: MBT-Longview is not arguing that Ecology

⁵¹ *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 432, 327 P.3d 600 (2013).

failed to produce some responsive documents. MBT-Longview is arguing that by producing documents whose underlying data and formulae had been intentionally removed, or by failing to produce workpapers that must—based on industry standard, as explained by MBT-Longview's experts—be readily available, Ecology has violated the PRA.

This is not a case of MBT-Longview's filing suit against Ecology because Ecology failed to produce one or two obscure documents. It is a case of Ecology's failure to produce the science and calculations underlying the FEIS's conclusions. Ms. Carey testified that the data that MBT-Longview sought is the type of data that would normally be readily available. Yet despite this, Ecology failed to produce the documents to MBT-Longview. This is exactly the type of information that the PRA ensures is public record.

The PRA does not provide that a public agency is excused from producing key public records because the public agency has already produced many other records. Nor should it. Were this the case, any public agency could withhold critical public records from the public by simply pointing to the production of a large volume of documents when the requestor complained that the critical documents were missing.

Ecology bears the burden, beyond material doubt, of showing that its search was adequate.⁵² Ecology's reliance on *Neighborhood Alliance*

⁵² *Neighborhood Alliance*, 172 Wn.2d at 721.

for the proposition that it conducted an adequate search is misplaced. *Neighborhood Alliance* provides that an agency "may rely on reasonably detailed, nonconclusory affidavits submitted in good faith."⁵³ But the Supreme Court further explained: "These should include the search terms and the type of search performed, and they should establish that all places likely to contain responsive materials were searched."⁵⁴

Here, one of the obvious places containing responsive public records was ICF. Ecology has failed to provide any evidence of an adequate search of ICF records. Ecology states that it forwarded the records request to ICF and produced to MBT-Longview what ICF provided to Ecology. That is not an adequate search. No one would argue that Ecology could satisfy its obligations by merely forwarding the records request to internal agency employees and producing what the agency employees provided. Likewise, that approach is not sufficient with respect to the public records in possession of ICF. According to *Neighborhood Alliance*, there must be a detailed description of search terms used and the type of search performed. Ecology provided absolutely no evidence regarding the type of search that ICF performed. Further, Ecology provided no evidence indicating what, if anything, it did to review the adequacy of the documents produced by ICF.

⁵³ *Id.*

⁵⁴ *Id.* (emphasis added).

Further, there is no evidence contesting Ms. Carey's testimony that the missing and incomplete documents she identified were readily available. Nor could there be. For instance, it is impossible to argue that the GHG Primary Workpaper could not be found with a reasonable search. It was found and produced in an incomplete form after someone painstakingly went through and removed critical calculations and formulas. Ecology argues that there is no evidence that Ecology altered the GHG Primary Workpaper. Whether Ecology or ICF altered the workpaper is irrelevant. Ecology has not explained, and cannot explain, why the GHG Primary Workpaper, with all calculations and other data included, was not produced. Under the PRA, Ecology had an obligation to produce the complete GHG Primary Workpaper, and it failed to do so. Ecology has failed to satisfy its burden, beyond material doubt, showing that its search was adequate.

Similarly, it is impossible to argue that the CoalDOM Cost Model could not be found easily. This was the model used to develop the supply curves and it was a document referenced in numerous other documents produced by Ecology.⁵⁵

Ecology's claim that if MBT-Longview had simply made a follow up request for the missing and incomplete documents Ecology would have

⁵⁵ CP 36.

produced them is contradicted by the facts.⁵⁶ MBT-Longview's complaint for violation of the Public Records Act, filed on December 4, 2017, alleged that "Ecology has yet to produce modeling data to back up their GHG calculations so that MBT-Longview can replicate or verify the modeling results."⁵⁷ Ecology was served with an interrogatory expressly asking whether Ecology possessed modeling data related to, used, or considered in the GHG calculations contained in the FEIS and, if so, what more, if anything, needs to be done in order for the modeling data to be produced. On January 10, 2018, Ecology responded that the modeling data had already been produced.⁵⁸ And as Ecology itself admits, MBT-Longview's motion to show cause, filed May 11, 2018, even more specifically identified the missing and incomplete documents, including the CoalDOM Cost Model and the GHG Primary Workpaper.⁵⁹ Contrary to what Ecology now alleges, Ecology took no action to produce the missing or incomplete documents. Instead, Ecology argued that the documents were not within the scope of the request and/or that it had no obligation to produce the documents. Accordingly, Ecology's argument that MBT-Longview simply needed to ask for responsive documents does not hold water.

⁵⁶ Moreover, even if true, it would not excuse Ecology's failure to produce responsive public records.

⁵⁷ CP 5.

⁵⁸ CP 387-388.

⁵⁹ CP 54.

Ecology has never given a clear explanation for why it did not produce specific documents, such as the CoalDOM Cost Model and the GHG Primary Workpaper. Instead, it explains in detail the search and production of documents within Ecology. But this does not excuse Ecology from failing to produce clearly relevant public records possessed by ICF.

IV. CONCLUSION

MBT-Longview has identified specific documents that are public records, subject to production and nonexempt, which Ecology failed to produce. Accordingly, MBT-Longview has established that Ecology violated the PRA. The Court should overturn the trial court's denial of MBT-Longview's motion to show cause and dismissal of its lawsuit against Ecology under the PRA. As part of that, MBT-Longview should be awarded its attorney fees and costs incurred to bring this action (at the trial court and on appeal), as well as a per diem penalty against Ecology.

Dated this 6th day of March, 2019.

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CERTIFICATE OF SERVICE

I, Joseph Vance, certify under penalty of perjury under the laws of the state of Washington that on March 6, 2019, I caused service of the foregoing Appellant's Reply Brief on the following counsel of record as follows:

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