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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 OPENING BRIEF

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR	4
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	4
IV.	STATEMENT OF THE CASE.....	6
A.	FACTUAL BACKGROUND.....	6
1.	MBT-LONGVIEW'S PROPOSED PROJECT.....	6
2.	MBT-LONGVIEW'S FOUR PUBLIC-RECORDS REQUESTS.	6
3.	ECOLOGY'S RESPONSE.	8
B.	PROCEDURAL HISTORY.....	12
C.	THE TRIAL COURT'S RULING.	14
V.	ARGUMENT.....	15
A.	STANDARD OF REVIEW.....	15
B.	BURDEN OF PROOF.....	16
C.	ECOLOGY DID NOT PRODUCE RESPONSIVE DOCUMENTS.....	17
1.	IT IS UNDISPUTED THAT THE GHG MODELING DATA AND DATA/FORMULAE ARE PUBLIC RECORDS.	17
2.	ECOLOGY IS OBLIGATED TO PRODUCE PUBLIC RECORDS IN THE POSSESSION OF A THIRD-PARTY PRIVATE CONTRACTOR.....	18
3.	THE GHG MODELING DATA WAS WITHIN THE SCOPE OF PDTS #42368, AND ECOLOGY KNEW IT.....	23
4.	ECOLOGY HAS STILL NOT EXPLAINED WHY IT PRODUCED HARD-CODED SPREADSHEETS.....	26
D.	ECOLOGY DID NOT PERFORM A REASONABLE SEARCH.....	27

1.	ECOLOGY HAS THE BURDEN TO ESTABLISH THAT ITS SEARCH WAS REASONABLE.....	27
2.	ECOLOGY INTRODUCED NO EVIDENCE OF ICF'S SEARCH.....	29
E.	MBT-LONGVIEW IS ENTITLED TO ATTORNEY FEES AND A PER DIEM PENALTY.	30
VI.	CONCLUSION.....	31

TABLE OF AUTHORITIES

Cases

<i>Cedar Grove Composting, Inc. v. City of Marysville</i> , 188 Wn. App. 695, 354 P.3d 249 (2015).....	18, 19, 20
<i>Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1</i> , 138 Wn.2d 950, 983 P.2d 635 (1999).....	20
<i>Limstrom v. Ladenburg</i> , 136 Wn.2d 595, 963 P.2d 869 (1998).....	15
<i>Morgan v. City of Federal Way</i> , 166 Wn.2d 747, 213 P.3d 596 (2009).....	15
<i>Neighborhood All. of Spokane Cty. v. Spokane Cty.</i> , 172 Wn.2d 702, 261 P.3d 119 (2011).....	24, 28
<i>Nissen v. Pierce Cty.</i> , 183 Wn.2d 863, 357 P.3d 45 (2015).....	18
<i>O'Neill v. City of Shoreline</i> , 170 Wn.2d 138, 240 P.3d 1149 (2010).....	18
<i>Progressive Animal Welfare Soc'y v. Univ. of Wash.</i> , 125 Wn.2d 243, 884 P.2d 592 (1994).....	17, 25
<i>Sanders v. State</i> , 169 Wn.2d 827, 240 P.3d 120 (2010).....	8
<i>Sargent v. Seattle Police Dep't</i> , 179 Wn.2d 376, 314 P.3d 1093 (2013).....	16, 17
<i>Yakima Cty. v. Yakima Herald-Republic</i> , 170 Wn.2d 775, 246 P.3d 768 (2011).....	15

Statutes

RCW 42.45.550	16
---------------------	----

RCW 42.56.010	18
RCW 42.56.030	15, 17
RCW 42.56.070	15
RCW 42.56.550	15, 16, 30

I. INTRODUCTION

The goal of plaintiff Millennium Bulk Terminal—Longview ("MBT-Longview") in making public-records requests to the Department of Ecology was simple: to understand the science behind the conclusions reached in Ecology's Final Environmental Impact Statement (the "FEIS") on MBT-Longview's proposed coal terminal in Longview, Washington. To do this, MBT-Longview issued a handful of specific and tailored requests to Ecology under Washington's Public Records Act (the "PRA"). Ecology violated the PRA by failing to produce the key records needed to validate Ecology's conclusions in the FEIS.

In some cases, Ecology produced documents that had been intentionally altered to provide less information—for example, Excel worksheets in which all underlying data and formulae had been intentionally removed. In other cases, Ecology simply failed to produce documents entirely, documents identified by MBT-Longview's expert that would allow it to verify the accuracy and validity of the FEIS greenhouse gas ("GHG") analysis (together, the work papers are referred to as the "GHG Modeling Data"). None of these missing or incomplete documents have been identified on an exemption log, and no exemptions have been

identified that would justify the withholding of these responsive documents.

Ultimately, MBT-Longview was required to initiate an action under the PRA to obtain the missing documents. At the center of the dispute were the data/formula removed from the hard-coded spreadsheets and the other GHG Modeling Data. To obtain these records, MBT-Longview brought a motion to show cause why an order compelling immediate production of public records should not be entered (the "Motion to Show Cause"). In response to the Motion to Show Cause, Ecology gave a number of reasons for its failure to produce them:

- It performed a reasonable search and, because of this, had no liability for documents not located or produced. Notably, it did not say that the documents in question did not exist or were difficult for Ecology to access.
- The documents that MBT-Longview sought belonged to and were generated by a private third-party contractor, so Ecology had no obligation to produce these documents and was not responsible for whatever search the contractor may or may not have done or for alterations to documents made by the contractor.
- It did not know that MBT-Longview was looking for specific modeling data (even though it had acknowledged that MBT-Longview was looking for specific modeling data when Ecology responded to MBT-Longview's discovery requests in the same litigation).

Following oral argument on the Motion to Show Cause, the trial court made a general, global ruling that Ecology had performed an adequate, reasonable search and that MBT-Longview had not established its claims. The trial court did not specifically rule on or address MBT-Longview's concerns about the hard-coded spreadsheets or the GHG Modeling Data.

Accordingly, MBT-Longview now appeals the trial court's ruling that Ecology conducted an adequate search and disclosed all the requested documents. MBT-Longview has identified key documents responsive to its request that Ecology has not produced, which establishes that Ecology has violated the PRA, and Ecology has never denied that the documents exist or claimed that they are exempt. Because of this, MBT-Longview seeks (1) a ruling that Ecology violated the PRA, (2) a ruling that MBT-Longview is entitled to recovery of its attorney fees and costs, (3) a ruling that MBT-Longview is entitled to a per diem penalty because Ecology withheld documents in violation of the PRA, and (4) an order on remand that the trial court issue an order directing Ecology to produce the requested documents.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by finding that the public-records-request search conducted by Ecology was "adequate."¹

2. The trial court further erred by finding that Ecology "disclose[d] all of the documents requested."²

3. The trial court further erred by dismissing MBT-Longview's complaint on the basis of its finding that MBT-Longview "fail[ed] to establish its claims."³

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the PRA, is a public agency required to produce documents "prepared, owned, used, or retained" by a private third party, when it contracted with the private third party to perform key functions of the public agency's job? Put another way, if a public agency uses a private third-party contractor to perform scientific analysis that must be done for the agency to perform its public function, and the contractor provides the agency with summaries of its scientific analysis that the public agency then relies upon, can the agency refuse to produce documents supporting

¹ CP 447.

² CP 447.

³ CP 447.

the summary documents because those documents belong to the third-party contractor?

2. Under the PRA, is a public agency's search reasonable if—by the agency's own admission—the agency gave the public-records request to the private third-party contractor, asked the contractor to provide documents responsive to the request, and then gave the contractor's results to the requestor without (a) reviewing or analyzing the content of the third party's response, or (b) introducing evidence of the search parameters used by the third party? May Ecology justify its failure to produce responsive records by stating that the records sought were in the care, custody, or control of its third-party contractor and that Ecology does not know what type of search the third-party contractor performed?

3. Is it a violation of the PRA to intentionally remove data and formulae underlying an Excel spreadsheet so that only the end results, not the data or formulae used to reach it, are present?

4. Is it a violation of the PRA for a public agency to argue as a defense to a motion to show cause that it did not know that specific documents were requested, even though the agency previously acknowledged that the documents in question had been requested?

IV. STATEMENT OF THE CASE

A. Factual Background.

1. MBT-Longview's Proposed Project.

MBT-Longview operates a bulk materials port on the Columbia River in Cowlitz County, Washington. MBT-Longview is committed to the environmental cleanup and redevelopment of this site into a vibrant, world-class port facility that will create family-wage jobs and help keep Longview and Cowlitz County working.

As part of that, MBT-Longview is seeking to construct and operate a coal-export terminal (the "Proposed Project"). On April 28, 2017, Ecology and Cowlitz County (the "Co-Lead Agencies") issued the FEIS for the Proposed Project. One of the FEIS's key authors was the consulting company ICF. ICF was the FEIS lead author for a number of different topics, including air quality, climate change, coal dust, and GHG emissions. According to the FEIS, ICF performed its work under the direction of the Co-Lead Agencies.

2. MBT-Longview's Four Public-Records Requests.

Upon receipt of the FEIS, MBT-Longview sought to obtain the records that Ecology and ICF had reviewed and relied on when reaching

the findings and conclusions in the FEIS.⁴ MBT-Longview wanted to review the informational inputs, methodology, and outputs to assess whether the work in the FEIS had been performed properly and reasonably.⁵ It wanted to see whether an independent and objective economist and scientist who started with the same data and formulae would attain the same results.⁶

Through its attorney Jon Sitkin, MBT-Longview issued the following public-records requests to Ecology:

- **PDTS #40713, dated May 17, 2017.** This request relates to the records considered in the preparation of the air-quality analysis in the FEIS.⁷
- **PDTS #41839, dated May 22, 2017.** This request sought follow-up information related to the air-quality analysis in the FEIS.⁸
- **PDTS #42368, dated July 7, 2017.** This request related to conclusions in the FEIS about GHG emissions. The purpose of the request was to obtain a complete set of inputs/outputs from the model runs and calculations that underpin the FEIS GHG analysis.⁹
- **PDTS #42527, dated July 27, 2017, and clarified July 28, 2017.** This request asked for communications

⁴ CP 57, ¶ 4.

⁵ *Id.*

⁶ *Id.*

⁷ CP 57, ¶ 4; CP 64-67.

⁸ CP 57, ¶ 4; CP 68-70.

⁹ CP 57, ¶ 4; CP 71-74.

between ICF and Ecology related to the Proposed Project and the FEIS.¹⁰

Each request was carefully tailored to be a narrow request for specific records that had been used to prepare the FEIS. The records sought in the public-records requests should have been readily available to Ecology and ICF because the FEIS had just been completed.¹¹

3. Ecology's Response.¹²

Because the public-records requests were carefully designed to be narrow requests for specific records and because the first of the public-records requests was made less than a month after the FEIS had been issued, MBT-Longview assumed that it would not be a challenge for Ecology to respond in a prompt and thorough manner. These are the types of documents that would be readily available to consultants who author

¹⁰ CP 57, ¶ 4; CP 75-76.

¹¹ CP 57, ¶ 4.

¹² The terminology used in this motion is the same as that explained by the Washington Supreme Court:

Records are either "disclosed" or "not disclosed." A record is disclosed if its existence is revealed to the requester in response to a PRA request, regardless of whether it is produced.

. . . Disclosed records are either "produced" (made available for inspection and copying) or "withheld" (not produced). A document may be lawfully withheld if it is "exempt" under one of the PRA's enumerated exemptions.

Sanders v. State, 169 Wn.2d 827, 836, 240 P.3d 120 (2010).

environmental reports such as the FEIS.¹³ Yet it took Ecology eight months to finish providing documents responsive to PDTS #42368 and nearly a year to finish providing documents responsive to PDTS #41839. Further, there were glaring problems with the productions that MBT-Longview received. MBT-Longview's experts identified the following specific problems with the production:

a. Missing Documents.

MBT-Longview's expert Julie Carey reviewed the documents that Ecology produced in response to PDTS #42368. MBT-Longview sought to obtain a complete set of inputs/outputs from the model runs and calculations that underpin the FEIS GHG analysis.¹⁴ These documents are needed in order to allow MBT-Longview to verify the accuracy and validity of the FEIS GHG analysis.¹⁵

Ms. Carey was able to identify several specific documents in Ecology's production that were either incomplete or missing entirely. Twenty-six documents are identified in Exhibit C to her declaration.

¹³ CP 35, ¶ 4.

¹⁴ CP 35, ¶ 3.

¹⁵ *Id.*

Generally, three categories of documents are missing from Ecology's production with respect to PDTS #42368:

- **Documents that should be present but are not.** For example, Ecology did not produce ICF Integrated Planning Model ("IPM") System Summary Reports ("SSRs"). The SSRs are standard output files produced with every IPM that ICF runs as well as other files for its base case and scenario analysis within the power sector in the United States.¹⁶ Ecology did not produce the full set of input files and output files for the IPM model and runs that would be required to validate the FEIS analysis.
- **Documents that are referenced as work papers within Ecology's produced documents but were not themselves produced.** Many documents produced by Ecology refer to ICF's coal cost model work paper, but this model that would be required to validate the FEIS analysis was not produced by Ecology.¹⁷
- **Produced documents that are incomplete.** MBTL_GHG_Analysis_FinalEIS.xls appears to be the primary work paper underlying the GHG emissions results in the FEIS. The document that Ecology produced is incomplete because the calculations have been removed and all numbers are hard-coded. It is an Excel workbook that contains at least 50 different tabs with tables that extend for hundreds of rows and dozens of columns of tables with numerical figures and calculations. Someone had to go to great effort to remove all the calculations and formulae from the work paper, 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. Further, no reference files were provided for intermediate calculations that populate the final model inputs. In addition, there are highlighted cells in the workbook that do not contain any explanation (e.g., tab interpolated results 25). As a result, MBT-Longview lacks

¹⁶ CP 36, ¶ 6.

¹⁷ CP 36, ¶ 7.

the calculations that make the spreadsheet function and that identify the assumptions and equations used at every step.¹⁸

Ecology did not introduce any evidence refuting Ms. Carey's declaration. It did not introduce any evidence that the specific documents did not exist, or were exempt. It did not introduce any evidence that the referenced materials were too difficult, for some reason, for Ecology to obtain. Ms. Carey's declaration, establishing that Ecology did not produce key documents needed for MBT-Longview to validate findings in the FEIS—documents that should have been easily accessible—is unrefuted. On appeal, then, her declaration is unchallenged fact.

b. Ecology Did Not Assert Exemptions for Withheld Documents.

Not only has Ecology not produced the documents identified above, Ecology has not provided an exemption log identifying these documents or giving any indication that these documents were withheld. Further, until the missing and incomplete documents are produced, MBT-Longview will not know for sure what other documents have not been produced. In other words, the missing documents may indicate additional documents that have not been produced.

¹⁸ CP 37, ¶ 8.

B. Procedural History.

When MBT-Longview realized the inadequacies of Ecology's production, it brought suit under RCW 42.56 et seq., the PRA. A complaint for violation of the PRA was filed on December 4, 2017 in Thurston County. MBT-Longview then issued written discovery to Ecology and received Ecology's responses. One of the interrogatories issued to Ecology asked about the status of production of the GHG Modeling Data, and Ecology claimed to have already produced it. Ecology did not indicate in any way that the GHG Modeling Data was not within the scope of what was requested.¹⁹

After reviewing Ecology's responses to its discovery requests, MBT-Longview filed the Motion to Show Cause, which was heard on June 8, 2018. At that hearing, which centered on data/formula removed from the hard-coded spreadsheets and the GHG Modeling Data, Ecology did not deny that the data, formulae, and documents that MBT-Longview requested existed. Nor did Ecology allege that the materials in question could not feasibly be accessed and produced. Instead, Ecology argued:

- **That it failed to produce requested documents because the documents belonged to ICF, not Ecology.** "These aren't Ecology's documents. It doesn't possess them, and it

¹⁹ CP 387-88.

didn't use them. These are highly technical results of some highly technical model runs that Ecology never looks at, sees. What it is doing in this EIS, it's asking the County's contractor to do studies in order to provide certain information that then can go into an impact statement that the County and Ecology can use to make decisions about permitting."²⁰

- **That the search was reasonable because it gave the public-records requests to ICF, which then gave Ecology responsive documents in its possession.** "What it did was take the requests that Millennium gave it, it goes to the County whose contractor holds the documents²¹ if they are responsive and gets authority to give it to the contractor, gives it to them. The contractor reads it, provides the responsive documents, gives a memo that describes what they are getting saying data assumptions; we are getting data and assumptions, and provides it. If Millennium had asked for something else in addition, Ecology would have done the same thing, give it to the County, give it to the ICF, and it would have provided to Millennium whatever ICF provided."^{22, 23}
- **That it believed MBT-Longview had not requested the GHG Modeling Data.** "Second, in fact, Millennium didn't ask for the documents that it is asking for now. . . . It was asking for data and assumptions, understood as input files. You guys are the modelers, you know what that means. And they said yes, that is how we understand it. Data goes into a model; outcome is what comes out. And if they had asked for output, presumably they would have gotten output."²⁴

²⁰ Verbatim Report of Proceedings, argument of counsel for Ecology, at 26:22-27:5.

²¹ Ecology repeatedly referred to ICF as Cowlitz County's contractor, but this allegation is disingenuous, since Ecology was a co-lead on the FEIS project and identified as a party to the contract with ICF.

²² Verbatim Report of Proceedings, argument of counsel for Ecology, at 25:18-26:4.

²³ Ecology reiterated this argument several times at oral argument.

²⁴ Verbatim Report of Proceedings, argument of counsel for Ecology, at 26:5-18.

With respect to the Excel files that MBT-Longview sought in original form, instead of hard-coded (i.e., the underlying formulae and data had been removed, so that only the end result appeared on the spreadsheet, but none of the information needed to evaluate the science behind the end results), Ecology did not address at oral argument why the original spreadsheets had not been produced.

C. The Trial Court's Ruling.

Immediately after the parties presented their oral arguments, the trial court made an oral ruling from the bench. It did not address MBT-Longview's specific arguments about the GHG Modeling Data or the hard-coded Excel spreadsheets. Instead, the trial court ruled:

The Court finds that the production time was reasonable. The Court finds that the search conducted by the Department of Ecology was adequate. The Court finds that the Department of Ecology did timely disclose all of the documents requested. The Court finds that Millennium fails to establish its claims.²⁵

It then dismissed MBT-Longview's complaint. MBT-Longview now appeals the trial court's ruling.

²⁵ Verbatim Report of Proceedings, at 61:6-12.

V. **ARGUMENT**

A. **Standard of Review.**

Under RCW 42.56.550(3), "[j]udicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo." This action alleged violation of RCW 42.56.070. Accordingly, the standard of review is de novo.

Here, the record before the trial court consisted entirely of documentary evidence. Thus, as Washington's Supreme Court has explained:

A trial court reviews an agency's action under the PRA de novo. RCW 42.56.550(3) (providing that "[j]udicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo"). When the record before the trial court consists entirely of "documentary evidence, affidavits and memoranda of law," this court stands in the same position as the trial court and reviews the trial court's decision de novo. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 753, 213 P.3d 596 (2009); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 612, 963 P.2d 869 (1998).

Yakima Cty. v. Yakima Herald-Republic, 170 Wn.2d 775, 791, 246 P.3d 768 (2011). Washington law is clear; this Court is entitled to "stand in the same position" as the trial court and perform a de novo review of the record in deciding on the merits of MBT-Longview's PRA action against Ecology.

B. Burden of Proof.

Under RCW 42.56.550(1):

Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

Washington courts have repeatedly stated that this statute—and the PRA collectively—is a strong directive for agency disclosure. Because the burden of proof is on the public agency, the practical effect of RCW 42.45.550(1) is that

[d]isclosure is therefore mandated unless the agency can demonstrate proper application of a statutory exemption to the specific requested information; the agency bears the burden of proof. *Newman*, 133 Wn.2d at 571, 947 P.2d 712 (stating that "the agency claiming the exemption bears the burden of proving that the documents requested are within the scope of the claimed exemption"); *Hearst*, 90 Wn.2d at 130, 580 P.2d 246 ("The statutory scheme establishes a positive duty to disclose public records unless they fall within the specific exemptions.").

Sargent v. Seattle Police Dep't, 179 Wn.2d 376, 385-86, 314 P.3d 1093, (2013).

Thus, it is Ecology's burden—at the trial court and on appeal—to show that it complied with RCW 42.56 et seq. in responding to MBT-

Longview's public-records requests. If it cannot meet its burden to show that the information requested is not exempt, then disclosure is "mandated."

C. Ecology Did Not Produce Responsive Documents.

1. It Is Undisputed That the GHG Modeling Data and Data/Formulae Are Public Records.

The PRA mandates broad public disclosure of public records. RCW 42.56.030. The PRA stands for the proposition that *full access* to information concerning the conduct of government on every level must be ensured as a fundamental and necessary precondition to the sound governance of a free society. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994). In keeping with the PRA's express language, Washington's Supreme Court consistently construes the PRA liberally and expansively. *Sargent*, 179 Wn.2d at 385. The PRA requirement of disclosure is broadly construed and its exemptions are narrowly construed to implement this purpose. *Id.*

The PRA defines a "public record" as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function *prepared, owned, used, or retained* by any state or local agency regardless of physical form or

characteristics." RCW 42.56.010(3) (emphasis added). The Supreme Court has recognized that the definitions of "agency" and "public record" are each comprehensive on their own and, when taken together, mean that the PRA subjects "'virtually any record related to the conduct of government' to public disclosure." *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 874, 357 P.3d 45 (2015) (quoting *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 147, 240 P.3d 1149 (2010)). This broad construction is deliberate and meant to give the public access to information about every aspect of state and local government. *Id.*

In short, there can be no dispute that the GHG Modeling Data is a "public record" as defined by RCW 42.56.010(3). The GHG Modeling Data is information directly related to Ecology's job as a public agency of preparing the FEIS for the Proposed Project. There can be no dispute that Ecology "used" the GHG Modeling Data because its agency conclusions reflected in the FEIS were based on this data.

2. Ecology Is Obligated to Produce Public Records in the Possession of a Third-Party Private Contractor.

The PRA's mandate for broad disclosure is not limited to documents prepared by government officials. *Cedar Grove Composting*,

Inc. v. City of Marysville, 188 Wn. App. 695, 717, 354 P.3d 249 (2015).

Public records may include records for a for-profit corporation acting as the functional equivalent of a public agency. *Id.* Washington courts have recognized that

a local government may delegate performance of a public function to a private entity, but it cannot avoid its statutory responsibility to perform its PRA obligations through this delegation. 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. Similarly, a local government could thwart the intent of the PDA and the PRA by contracting with a private entity to perform its employees' work. For this reason, the PRA should apply to those records created by a private entity performing as the functional equivalent of a public employee in the same manner it applies to the records such an entity creates performing as the functional equivalent of a public agency. Otherwise, a local government could by piecemeal contracts avoid its PRA obligations.

Id. at 718-19 (footnotes, internal quotation marks, and citations omitted).

Here, there is no question that the nature of the work performed by ICF was the functional equivalent of that of a public employee. The work that ICF performed on the FEIS was work that Ecology was responsible for with the County as Co-Lead Agencies.

Yet despite this clear direction from Washington courts, Ecology argued repeatedly at oral argument that the documents that MBT-

Longview was asking for did not need to be produced because "[t]hese aren't Ecology's documents. It doesn't possess them, and it didn't use them."²⁶ Ecology's counsel explained to the Court as follows

[The GHG Modeling Data] are highly technical results of some highly technical model runs that Ecology never looks at, sees. What it is doing in this EIS, it's asking the County's contractor to do studies in order to provide certain information that then can go into an impact statement that the County and Ecology can use to make decisions about permitting.²⁷

Ecology's argument has been expressly rejected by the courts. 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." *Cedar Grove*, 188 Wn. App. at 721 (internal punctuation and citation omitted). "[R]egardless of whether an agency ever possessed the requested information, an 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." *Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1*, 138 Wn.2d 950, 960, 983 P.2d 635 (1999).

²⁶ Verbatim Report of Proceedings, at 26:22-23.

²⁷ Verbatim Report of Proceedings, at 26:23-27:5.

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 or did not understand the GHG Modeling Data is irrelevant. What is relevant is that the GHG Modeling Data was used by ICF in reaching its findings and conclusions in the FEIS—the FEIS that was the responsibility of the Co-Lead Agencies.

There is simply no basis for Ecology's argument that if it relies on a third-party private contractor to provide summaries of critical data, the underlying data (held by the private contractor) is not a public record. If Ecology's argument is accepted, the PRA is eviscerated: a public agency could simply rely on a private contractor to generate data, obtain only a summary of that data from the private contractor, and then argue that the actual data need not be produced under the PRA. Private citizens could not evaluate the validity of the private contractor's summaries or the validity of the public agency's conclusion because they would not have access to the most important piece of the equation—the actual, hard data.

For instance, what if an external auditor provided an agency with only a summary of its findings? Under Ecology's theory, the public could not see the financial analytics of an agency's bonding efforts. Similarly, if

a summary of financial impacts of a stadium lease agreement were provided by a third-party accountant, under Ecology's theory, the public would not be entitled to the work product and analytics to evaluate whether the public wished to support the tax measure.

This is exactly the position in which MBT-Longview finds itself. It wants its own experts to evaluate the accuracy of the conclusions of an agency, here Ecology's conclusions found in its FEIS, but Ecology will not produce the underlying data because it was generated by ICF and now speciously asserts that it "didn't use" the data.

It is particularly remarkable that Ecology is now claiming that it need not produce ICF documents because in this case it is clear that the Co-Lead Agencies and ICF all 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.²⁸ Notably, the executed control documents provide that the Co-Lead Agencies were both responsible for determining what is or is not releasable in response to a request for public records.²⁹ If,

²⁸ CP 156.

²⁹ CP 178.

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 to a public-records request.

Ecology's argument that the GHG Modeling Data belonged to ICF is not a valid reason for Ecology's failure to produce that information in response to MBT-Longview's public-records requests. Ecology has not argued that the GHG Modeling Data does not exist, nor has it argued that it cannot reasonably obtain that data. Its argument that the data belongs to ICF, not Ecology, has been rejected by prior courts. Further, Ecology has not argued that the GHG Modeling Data is exempt. Ecology's failure to produce the GHG Modeling Data is a violation of the PRA.

3. The GHG Modeling Data Was Within the Scope of PDTS #42368, and Ecology Knew It.

As further defense for its failure to produce the GHG Modeling Data, Ecology argued at the Motion to Show Cause hearing that the GHG Modeling Data was not responsive to MBT-Longview's requests, and that it did not know that MBT-Longview wanted the GHG Modeling Data.³⁰ But this is simply wrong. PDTS #42368 could not have been clearer—as

³⁰ Verbatim Report of Proceedings, at 25:18-26:4.

Ecology admits, the records request sought all "data and assumptions" related to five different subject areas considered in ICF's IPM.

There is absolutely no basis for Ecology's contention that in requesting "data and assumptions," MBT-Longview was seeking only "inputs" into the GHG modeling, and not the outputs or the calculations related to the model.³¹ There is no basis for restricting the terms "data and assumptions" only to "inputs." "Data" is a term that includes both input data and output data—"data" is all data. In requesting "data and assumptions," MBT-Longview was seeking, among other things, all the underlying data and assumptions related to the model. Nothing about the term "data and assumptions" would suggest otherwise.

The request is very clear. If Ecology was unclear about what was requested, however, it was required to seek clarification. *Neighborhood All. of Spokane Cty. v. Spokane Cty.*, 172 Wn.2d 702, 727-28, 261 P.3d 119 (2011). At no time did Ecology seek clarification of PDTS #42368.

Further, the fact that Ecology understood what was being requested is evidenced by its interrogatory response. MBT-Longview served Ecology with the following interrogatory:

³¹ Verbatim Report of Proceedings, at 26:5-20.

Does Ecology possess modeling data related to, used, or considered in the GHG calculations contained in the FEIS? If so, on what date did Ecology obtain possession of the modeling data? What more, if anything, needs to be done in order for the modeling data to be ready to be produced?³²

On January 10, 2018, Sally Toteff, on behalf of Ecology, answered

Interrogatory No. 13 as follows:

ICF provided to Ecology the modeling data related to the GHG calculations contained in the FEIS on August 2, 2017 and August 11, 2017. Ecology provided it to MBT-Longview a short time later, in response to MBT-Longview's public records requests, on August 7, 2017 and September 6, 2017.³³

Given this interrogatory response, Ecology cannot now claim that it did not know that MBT-Longview was seeking the GHG Modeling Data. In its response to the interrogatory, Ecology did not claim that the GHG Modeling Data had not been requested. It did not claim that Ecology was not obligated to produce the GHG Modeling Data.³⁴ It did

³² CP 387-88.

³³ CP 387-88.

³⁴ Nor did Ecology ever deny the public-records request. If, as Ecology now claims, Ecology was not obligated to produce documents in the possession of ICF, Ecology should have denied PDTS #42368, which expressly requested such documents. By not denying the request, it gave MBT-Longview the misleading impression that all documents relevant to the request would be disclosed or produced. This is expressly and emphatically prohibited by the PRA. *Progressive Animal Welfare*, 125 Wn.2d at 270-71.

not claim that the GHG Modeling Data was too difficult for Ecology to access. Rather, Ecology stated that ICF had provided Ecology with the GHG Modeling Data and that Ecology had produced the GHG Modeling Data to MBT-Longview.

As discussed above, based on the undisputed declaration of Ms. Carey, the GHG Modeling Data was not actually disclosed or produced to MBT-Longview. And given Ecology's interrogatory response, there is absolutely no basis for Ecology to argue (as it has now repeatedly done) that it did not know that MBT-Longview was seeking the GHG Modeling Data. Because Ecology knew that MBT-Longview had requested the GHG Modeling Data and Ecology did not produce it, Ecology's failure to do so is a violation of the PRA.

4. Ecology Has Still Not Explained Why It Produced Hard-Coded Spreadsheets.

In addition, as explained briefly in the fact section, above, Ecology also produced work papers to MBT-Longview that had been hard-coded; in other words, the calculations underlying the numbers on the spreadsheet

had been removed.³⁵ It is actually much more difficult to produce a work paper in hard-coded format, because it requires 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.³⁶ Thus, it is evident that before production to MBT-Longview, someone went to great effort to remove all the calculations from some of the work papers.

Ecology has not explained what basis it relies on to produce only the altered work papers, which contain significantly less information than the original. Ecology's failure to produce the original work papers is a violation of the PRA.

D. Ecology Did Not Perform a Reasonable Search.

1. Ecology Has the Burden to Establish That Its Search Was Reasonable.

A public agency has an obligation to perform a "reasonable search" in response to a public-records request. Although the PRA does not explicitly define that term, in 2011 Washington's Supreme Court explained that "[t]he adequacy of a search is judged by a standard of

³⁵ Attached as Exhibit C to Ms. Carey's declaration (CP 54) is a list of missing or incomplete work papers, including those for which the calculations were removed and the numbers hard-coded.

³⁶ CP37, ¶ 8.

reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents. What will be considered reasonable will depend on the facts of each case." *Neighborhood All.*, 172 Wn.2d at 720 (citation omitted). Additionally, the court explained that "agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered." *Id.*

Neighborhood Alliance also definitively established that it is the agency's burden, "beyond material doubt," to show that its search was adequate. 172 Wn.2d at 721. To establish this, the court explained, "the agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith. 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." *Id.*

In performing a search responsive to a public-records request, then, a public agency must establish that its search was reasonable, and it may not ignore "obvious leads" when doing so.

2. Ecology Introduced No Evidence of ICF's Search.

Here, Ecology provided an affidavit as to the internal search it did for documents responsive to MBT-Longview's public-records requests.³⁷ MBT-Longview is not challenging the sufficiency of that affidavit as to Ecology's *internal* search on appeal. Ecology has not established, however, that it performed an adequate or reasonable search in response to MBT-Longview's public-records requests because it introduced no evidence of what steps ICF took, if any, to respond to the requests. For instance, there is no evidence of what search terms, if any, ICF used in its search. Because of this, Ecology's declaration is essentially meaningless in that the responsive documents are retained by a third party and would not have been located by an Ecology internal search no matter how thorough that internal search was. Thus, there is absolutely no evidence of what, if any, steps the vendor took to locate responsive documents.

Further, in this case we know that the vendor was able to easily locate, and in fact did locate, responsive documents (the GHG Modeling Data), because the vendor intentionally manipulated responsive work

³⁷ CP 114-23; CP 336.

papers to remove the relevant calculations. The work papers with hard-coded numbers were the result. Accordingly, this is not a case in which documents could not be located. It is a situation in which the third-party vendor intentionally manipulated the documents to remove relevant information. Because of this, Ecology cannot argue that the relevant information could not reasonably be found. It was found and then removed.

Ecology has not established whether the search it conducted was adequate because it has introduced no evidence as to what search, if any, ICF performed to respond to MBT-Longview's public-records requests. When relevant, responsive documents are in the possession of a third-party contractor, this is a critical step. Accordingly, Ecology violated the PRA by failing to perform an adequate search.

E. MBT-Longview Is Entitled to Attorney Fees and a Per Diem Penalty.

Under RCW 42.56.550(4), "[a]ny person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action."

The statute continues, "[I]t shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record."

Under these provisions, MBT-Longview requests an award of its attorney fees incurred to date, on both the underlying action and this appeal. MBT-Longview also requests that the Court award it a per diem penalty for each day that Ecology denied it the opportunity to review the GHG Modeling Data and data underlying the hard-coded spreadsheets.

VI. CONCLUSION

MBT-Longview has established that Ecology did not provide key documents responsive to its public-records requests. The documents are critical to MBT-Longview's ability to validate the FEIS's conclusions. Washington law grants MBT-Longview the right to obtain these documents, and none of the reasons that Ecology has previously given for its failure to do so are valid defenses under the PRA. MBT-Longview has shown that Ecology violated the PRA, and so is entitled to an award of

attorney fees and costs, as well as a per diem penalty for each day that Ecology fails to meet its obligations under the PRA.

Dated this 3rd day of January, 2019.

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s/ Joseph Vance _____

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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 January 3, 2019, I caused service of the foregoing Appellant's Opening Brief on the following counsel of record as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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