

36529-4-II

Nos. 78757-3; 79102-3

SUPREME COURT OF WASHINGTON

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ARTHUR WEST and WALTER R.  
JORGENSEN et al., *Appellants*,

v.

PORT OF OLYMPIA, *Respondent*

---

DAVID KOENIG, *Appellant*,

v.

PORT OF OLYMPIA, *Respondent*

---

BRIEF OF APPELLANT KOENIG

---

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## I. INTRODUCTION

This case arises out of a request for the same public records from the Port of Olympia that are at issue in the consolidated case *West et al. v. Port of Olympia*, No. 78757-3. The substantive rulings entered by Judge Richard D. Hicks on the Port's exemption claims in the *West* matter are also the rulings of the superior court in this matter pursuant to stipulations between Appellant David Koenig, the respondent Port and the Weyerhaeuser Company. In the interest of judicial economy, appellant Koenig adopts the arguments of the other appellants and supplements those arguments as set forth more fully in Section IV below.

## II. ASSIGNMENTS OF ERROR

**Assignment of Error No. 1** The trial court erred in entering its March 29, 2006 order requiring public disclosure subsequent to in camera review.

**Assignment of Error No.2** The trial court erred in entering it May 4, 2006 order on reconsideration.

### **Issues Pertaining to Assignments of Error**

A. Whether the trial court erroneously applied the deliberative process exemption in RCW 42.56.280 (Former RCW 42.17.310(1)(i)) to exclude records relating to the Weyerhaeuser lease where the final decision to which those records relate had been made.

B. Whether the trial court erroneously applied the research data exemption in RCW 42.56.270(1) (Former RCW 42.17.310(1)(h)) to exclude records relating to the Weyerhaeuser lease.

### III. STATEMENT OF THE CASE

Appellant David Koenig requested the same records that are at issue in the *West* case on or about January 17, 2006. CP(K)<sup>1</sup> 5. The Port of Olympia responded to Koenig's request and provided the Port's exemption logs to Koenig on or about January 25-27, 2006. *Id.*

The case brought by Koenig, captioned *Koenig v. Port of Olympia*, Thurston Cy. No. 06-2-00703-1, was filed on or about April 14, 2006. CP(K) 4. For reasons that are not material to the present appeal, the Koenig matter was *not* consolidated with the *West* case in the superior court. Because Judge Hicks had already reviewed the records *in camera* and made his rulings on the Port's exemption claims in the *West* case, CP 868-918, 993-1005, the parties to the *Koenig* case obtained a stipulated order dated July 26, 2006, that provided:

1. The rulings previously entered by Judge Hicks in *West et al. v. Port of Olympia*, Thurston Co. No. 06-2-00141-6 on March 29, 2006, and May 4, 2006, shall become the rulings of this Court on the merits in this

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<sup>1</sup> The clerk's papers in both the *West* and *Koenig* case begin with CP 1. For clarity, this brief refers to the clerk's papers in the *West* case with the notation "CP" and refers to the clerks papers in the *Koenig* case with the notation "CP(K)".

action. All parties reserve the right to challenge those rulings on appeal.

2. Pursuant to the rulings entered by Judge Hicks, plaintiff Koenig is determined to be the prevailing party in this action.

3. The issues of attorney's fees and penalties ... are reserved for subsequent motion or stipulation.

CP(K) 295.

By the time this order was entered in the *Koenig* case, appellants Jorgensen had already filed a notice of appeal in the *West* case even though the issues of penalties and attorney's fees under RCW 42.56.550(4) had not been resolved by the superior court. As a precautionary measure, appellant Koenig filed a notice of appeal from the July 26, 2006, stipulated order. CP(K) 298-367.

By order dated September 29, 2006, this Court consolidated the *West* and *Koenig* matters in this Court. Those cases remained unconsolidated in the superior court.

Judge Hicks heard argument on the motions for penalties and attorney's fees in the *West* matter, and issued an oral ruling on October 20, 2006. Appellants Jorgensen requested a penalty of \$1.8 million based on a daily penalty of \$52.50 for each of 406 individual "records." CP 1290; RP (10/20/06) at 9. Judge Hicks rejected Jorgensen's "per record" penalty argument, and imposed a penalty of \$60 per day for a period of 123 day

for a total penalty of \$7380.00 for each requester (Jorgensen and West).  
RP (10/20/06) at 33.

On March 14, 2007, the parties to the Koenig case stipulated that Judges Hicks' penalty award of \$60.00 per day would become the superior court's ruling on penalties in the *Koenig* case. The parties also resolved the issue of attorney's fees by stipulation. The superior court entered the parties' stipulated order on March 19, 2007. CP(K) \_\_\_<sup>2</sup>; Appendix A.

Koenig filed an amended notice of appeal in this Court on or about March \_\_\_, 2007. CP(K) \_\_\_.

#### IV. ARGUMENT

Appellant Koenig adopts and incorporates by reference the argument and authority in the *Brief of Appellants Jorgensen* on pages 10-12 regarding the scope of review under the Public Records Act, RCW Chapter 42.56 ("PRA").

##### A. Deliberative Process Exemption

Appellant Koenig adopts and incorporates by reference the argument and authority in the *Brief of Appellants Jorgensen* on pages 13-

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<sup>2</sup> Koenig filed a supplemental designation of clerk's papers on March \_\_\_, 2007. Clerk's papers numbers were not available when this brief was filed. A copy of the stipulated order dated March 19, 2007 is attached to this brief as Appendix A.

20 regarding the trial court's incorrect application of the deliberative process exemption in RCW 42.56.280 (Former RCW 42.17.310(1)(i)).

**1. Documents shared with Weyerhaeuser are not exempt as deliberative process under RCW 42.56.280 (Former RCW 42.17.310(1)(i)).<sup>3</sup>**

Some of the records determined to be exempt as deliberative process in this case are documents that previously were shared by the Port with Weyerhaeuser. *See, e.g.*, CP 875, 889, 905 (record log nos. 108-110, 117, 820, 1674-75). The trial court held that these records were exempt under RCW 42.56.280 (Former RCW 42.17.310(1)(i)) as interpreted in *American Civil Liberties Union v. City of Seattle* ("ACLU"), 121 Wn. App. 544, 89 P.3d 295 (2004). CP 869-870. Contrary to *ACLU* and the trial court's decision in this case, the deliberative process exemption should not apply to records that an agency shares with any non-governmental party. This Court should overrule *ACLU* and hold that the deliberative process exemption does not apply to any documents that the Port shared with Weyerhaeuser or any other non-governmental third-party.

The deliberative process exemption applies to:

Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or

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<sup>3</sup> The public records provisions of RCW Chapter 42.17, were re-codified as the Public Records Act, RCW Chapter 42.56, in 2005. *See* RCW 42.56.001; Laws of 2005, ch. 274. Former RCW 42.17.310(1)(i) was re-codified as RCW 42.56.280, but the language of the exemption was not changed.

policies formulated or recommended are exempt under this chapter, except that a specific record is not exempt when publicly cited by an agency in connection with any agency action.

RCW 42.56.280; Former RCW 42.17.310(1)(i). Several cases have interpreted and applied this exemption. However, the specific question of whether this exemption applies to documents shared with a *non-governmental* party was not squarely addressed prior to 2004, when the Court of Appeals issued its opinion in *ACLU, supra*.

In a few earlier cases the requested records were shared with or obtained from other government agencies. For example, in *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989), *review denied*, 114 Wn.2d 1002 (1990), the requester sought copies of a questionnaire sent to 20 local agencies who managed 27 public golf courses. The stated purpose of the survey was to assist in negotiating a new contract with Yacobellis. The appellate court held that completed questionnaires were not exempt because they contained only factual data. *Yacobellis*, 55 Wn. App. at 715. In *Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990), a teachers' union argued that the exemption applied to letters from a local school district superintendent to the State Superintendent of Public Instruction. This Court held that such letters were not records of a *policy-making* process and therefore were not

exempt. *Brouillet*, 114 Wn.2d at 799. Finally, in *Progressive Animal Welfare Soc’y v. UW (“PAWS II”)*, 125 Wn.2d 243, 884 P.2d 592 (1994), this Court held that records from the National Institutes of Health (NIH) relating to a research grant proposal were exempt so long as the specific proposal was unfunded. *PAWS II*, 125 Wn.2d at 257. This Court did not address the question of whether the exemption applied to documents obtained from a federal agency. *Id.* Although each of these cases involved records shared with other governmental agencies, the specific question of whether the deliberative process exemption applies to such records — or to records shared with non-governmental parties — was not actually addressed. Consequently, these cases are not proper authority on those questions. *In re Burton*, 80 Wn. App. 573, 582, 910 P.2d 1295 (1996) (an appellate opinion is not authority on an issue that it does not actually address).

The application of the deliberative process exemption to records from non-governmental parties was addressed in *ACLU, supra*. In that case, the City of Seattle argued that the deliberative process exemption applied to records exchanged between the City and the Seattle Police Officers Guild. The requester argued, *inter alia*, that the exemption was not applicable because the records were not “intra-agency” records. The Court of Appeals disagreed, broadly interpreting former RCW

42.17.310(1)(i) to apply to records shared with the Guild. *ACLU*, 121 Wn. App. at 551. This holding was based on an erroneous extrapolation of this Court's decision in *PAWS II*. *ACLU*, 121 Wn. App. at 551.

As explained above, *PAWS II* did not address the question of whether the exemption applied to documents obtained from a federal agency. Either the requester, the Court, or perhaps both, simply assumed that the exemption was applicable to the records obtained from a federal agency (NIH). The *ACLU* court erred in deriving a broad interpretation of former RCW 42.17.310(1)(i) from the *PAWS II* opinion based on nothing more than the facts of the case.

The *ACLU* court also erroneously concluded that its holding was supported by the definition of "agency" in RCW 42.17.020(1). *ACLU*, 121 Wn. App. at 552 n. 17. The court overlooked the fact that "agency" is defined under the PRA to include all state agencies and all local agencies "unless the context clearly requires otherwise." RCW 42.17.020. The primary definition of "agency" includes only state and local agencies for the obvious reason that such agencies are governed by the PRA while federal agencies are not. *See* RCW 42.56.070(1) (each "agency" shall make records available for inspection and copying). The question of whether a federal agency is an "agency" for purposes of former RCW

42.17.310(1)(i) was not presented in *ALCU* and the court's comments on that issue are dicta.

The interpretation of former RCW 42.17.310(1)(i) in *ACLU* is much too broad. This Court has repeatedly stated that the PRA's disclosure provisions must be construed liberally and its exemptions narrowly. *PAWS II*, 125 Wn.2d at 251. The records at issue in *ACLU* related to an agency's negotiations with a non-governmental party. Under a narrow interpretation of RCW 42.56.280 such records should have been characterized as the non-exempt *implementation* of agency policy rather than as part of the deliberative process to which the exemption applies.

As this Court noted in *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 132-33, 580 P.2d 246 (1978), the deliberative process exemption in the PRA is similar to an exemption found in the Freedom of Information Act ("FOIA"). The relevant FOIA provision, also known as FOIA "Exemption 5" excludes:

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

5 USC § 552(b)(5). The purpose of this exemption is "to protect the give and take of deliberations necessary to formulation of agency policy." *Hearst*, 90 Wn.2d at 133 (citing *EPA v. Mink*, 410 U.S. 73, 87, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973)). This Court also noted in *Hearst* that the

PRA is closely parallel to FOIA, and that judicial interpretations of the federal statute are particularly helpful in construing the PRA. *Hearst*, 90 Wn.2d at 1128.

The Supreme Court recently addressed the scope of FOIA's 'Exemption 5' in *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2001). In that case, an association of water users brought a FOIA action against the Department of the Interior seeking to obtain documents submitted by Indian tribes relating to water rights. The district court agreed with the Department that the documents were exempt as inter-agency or intra-agency memoranda under FOIA's Exemption 5. The Ninth Circuit reversed, and the Supreme Court affirmed, holding that the documents were *not* exempt inter-agency or intra-agency memoranda. *Klamath Water Users*, 532 U.S. at 5.

The Court noted that some circuit courts have applied FOIA Exemption 5 to documents prepared by outside (nongovernmental) entities, but only in cases where the outside parties were acting as consultants to agencies.

In such cases, the records submitted by outside consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done. To be sure, the consultants in these cases were independent contractors and were not assumed to be

subject to the degree of control that agency employment could have entailed; nor do we read the cases as necessarily assuming that an outside consultant must be devoid of a definite point of view when the agency contracts for its services. But the fact about the consultant that is constant in the typical cases is that the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it. Its only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do.

532 U.S. at 10-11. In the *Klamath Water Users* case, however, the Tribe was not assisting the Department with its internal policy deliberations.

The Tribes, on the contrary, necessarily communicate with the Bureau with their own, albeit entirely legitimate, interests in mind. While this fact alone distinguishes tribal communications from the consultants' examples recognized by several Courts of Appeals, the distinction is even sharper, in that the Tribes are self-advocates at the expense of others seeking benefits inadequate to satisfy everyone.

As to those documents bearing on the Plan, the Tribes are obviously in competition with nontribal claimants, including those irrigators represented by the respondent... The position of the Tribe as beneficiary is thus a far cry from the position of the paid consultant.

532 U.S. at 12, 15.

Like the Tribes in the *Klamath Water Users* case, Weyerhaeuser was not assisting the Port's with its policy-making deliberations. Rather, Weyerhaeuser was communicating with the Port with its own private interests in mind. Those interests are potentially adverse to the interest of other private parties and the public in general. Consequently, any records

shared with Weyerhaeuser by the Port were not part of the Port's deliberative process and are not exempt under RCW 42.56.280.

This Court should overrule the broad interpretation of deliberative process in *ACLU*. This Court should hold that the deliberative process exemption does not apply to any documents that the Port shared with Weyerhaeuser or any other non-governmental third-party.

**B. Research Data Exemption**

Appellant Koenig adopts and incorporates by reference the argument and authority in the *Brief of Appellants Jorgensen* on pages 20-28 regarding the trial court's incorrect application of the research data exemption in RCW 42.56.270(1) (Former RCW 42.17.310(1)(h)).

**C. Statutory Penalties**

For the reasons stated in *Appellant Koenig's Statement of Grounds for Direct Review; Answer to Statement of Grounds* dated March 2, 2007, the arguments of appellant Jorgensen regarding statutory penalties are meritless. Jorgensen's request for a "per record" penalty of \$1.8 million was based on a tortured interpretation of this Court's decision in *Yousoufian v. Sims*, 152 Wn.2d 421, 98 P.3d 463 (2005), and was properly rejected by the trial court. No other argument regarding statutory penalties was preserved for appeal under RAP 2.5. Jorgensen's appeal of Judge

Hicks' ruling on penalties is an unfortunate distraction from the important PRA exemption issues presented in this case.

Nevertheless, the PRA requires all requesters to be treated equally. See RCW 42.56.080. Judge Hicks recognized this requirement in his oral ruling. RP (10/20/06) at 33. For this reason, the stipulated order in the *Koenig* case provides the Judge Hicks' award of \$60 per day per requester may be challenged on appeal. CP(K) \_\_; Appendix A.

If this Court holds that Judge Hicks' abused his discretion and that a larger statutory penalty is required, then the Court must also reverse the award of penalties in the *Koenig* matter and remand the issue of penalties to the trial court.

#### **D. Attorney Fees on Appeal**

The PRA requires an award of attorney's fees to a successful requester on appeal. *Progressive Animal Welfare Soc'y v. UW*, 114 Wash.2d 677, 690, 790 P.2d 604 (1990). Koenig respectfully requests an award of attorney's fees pursuant to RAP 18.1.<sup>4</sup>

### **V. CONCLUSION**

This Court should reverse the trial court's overbroad application of the deliberative process and research data exemptions. This court should

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<sup>4</sup> The issue of attorney's fees in the trial court in *Koenig* was resolved in the stipulated order. Appendix A.

award appellant Koenig attorney's fees on appeal and remand this matter to the trial court.

## **VI. APPENDICES**

Appendix A      *Stipulation and Order re: Attorney's Fees and Statutory Penalties* (March 19, 2007)

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RESPECTFULLY SUBMITTED this 20th day of March, 2007.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the date written below, a true and correct copy of this document was served on each of the parties below as follows:

Via US mail and via electronic mail to:

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DATED this 20~~th~~ day of March, 2007

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**SUPERIOR COURT OF WASHINGTON  
FOR THURSTON COUNTY**

DAVID KOENIG,

No. 06-2-00703-1

Plaintiff,

vs.

**STIPULATION AND ORDER  
RE: ATTORNEY'S FEES AND  
STATUTORY PENALTIES**

PORT OF OLYMPIA,

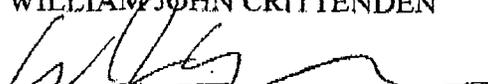
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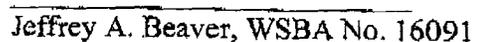
**I. STIPULATION**

The parties, by and through their undersigned counsel, hereby stipulate to the entry of the following order.

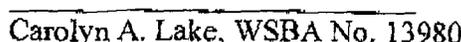
WILLIAM JOHN CRITTENDEN

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Jeffrey A. Beaver, WSBA No. 16091  
Attorney for Weyerhaeuser Company

GOODSTEIN LAW GROUP PLLC

  
Carolyn A. Lake, WSBA No. 13980  
Attorney for Port of Olympia

**STIPULATION AND ORDER RE: ATTORNEY'S  
FEES AND STATUTORY PENALTIES**

Page 1 of 3

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**SUPERIOR COURT OF WASHINGTON  
FOR THURSTON COUNTY**

DAVID KOENIG,

No. 06-2-00703-1

Plaintiff,

vs.

**STIPULATION AND ORDER  
RE: ATTORNEY'S FEES AND  
STATUTORY PENALTIES**

PORT OF OLYMPIA,

Defendant.

**I. STIPULATION**

The parties, by and through their undersigned counsel, hereby stipulate to the entry of the following order.

WILLIAM JOHN CRITTENDEN

GRAHAM & DUNN PC

*[Signature]*  
William J. Crittenden, WSBA No. 22033  
Attorney for Plaintiff Koenig

*[Signature]*  
Jeffrey A. Beaver, WSBA No. 16091  
Attorney for Weyerhaeuser Company

GOODSTEIN LAW GROUP PLLC

*[Signature]*  
Carolyn A. Lake, WSBA No. 13980  
Attorney for Port of Olympia

**STIPULATION AND ORDER RE: ATTORNEY'S  
FEES AND STATUTORY PENALTIES**  
Page 1 of 3

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**II. ORDER**

Based on the foregoing stipulation of the parties, it is hereby ORDERED THAT:

1. Pursuant to RCW 42.56.550(4) and the stipulated order previously entered by the Court on or about July 26, 2006, plaintiff David Koenig is entitled to an award of attorney's fees and statutory penalties from defendant Port of Olympia.

2. Plaintiff's counsel, William John Crittenden, spent approximately 46 hours on this matter from inception through October 30, 2006. Of that amount, 37 hours were related to the action in the trial court as opposed to the pending appeals in this matter. That amount of time (37 hours) is reasonable, and a rate of \$250 per hour is reasonable. Plaintiff Koenig also paid a filing fee of \$110.00. Plaintiff is therefore entitled to an award of \$9,360.00 for attorney's fees and costs.

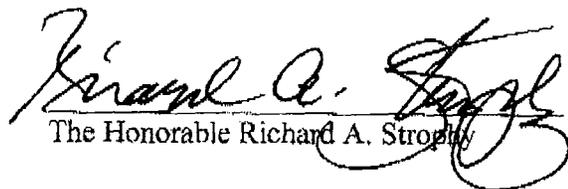
3. Claims for attorney's fees for any additional hours after October 30, 2006, as well as claims for costs on appeal, are not covered by this stipulation and order, and are reserved for the appellate court(s) and/or this Court on remand.

4. The ruling by Judge Hicks in *West et al. v. Port of Olympia*, Thurston Co. No. 06-2-00141-6 on or about October 20, 2006, that a penalty of \$60 per day is reasonable shall become the ruling of this Court in this action. All parties reserve the right to challenge that ruling on appeal.

5. The parties agree that the applicable penalty period for Koenig shall be 116 days (as opposed to 123 days in the West matter). Plaintiff Koenig is therefore entitled to a statutory penalty award of \$6,960.00.

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DONE IN OPEN COURT THIS 19<sup>th</sup> day of Mar, 2007,

  
The Honorable Richard A. Strogh