

365294-II

No. 78757-3

SUPREME COURT
OF THE STATE OF WASHINGTON

ARTHUR S. WEST,

and

WALTER R. JORGENSEN, an individual,
and LEAGUE OF WOMEN VOTERS OF
THURSTON COUNTY, a nonprofit corporation,

Appellants,

vs.

PORT OF OLYMPIA, a Washington
municipal corporation,

Respondent

and

WEYERHAEUSER COMPANY, a
Washington corporation,

Respondent.

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DAVID KOENIG,

Appellant,

vs.

PORT OF OLYMPIA,

Respondent.

BRIEF OF APPELLANTS JORGENSEN AND
LEAGUE OF WOMEN VOTERS OF THURSTON COUNTY

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii-iv
A. INTRODUCTION	1
B. ASSIGNMENTS OF ERROR	2
(1) <u>Assignments of Error</u>	2
(2) <u>Issues Pertaining to Assignments of Error</u>	3
C. STATEMENT OF THE CASE.....	5
D. SUMMARY OF ARGUMENT	9
E. ARGUMENT	10
(1) <u>Standard of Review on PDA Decisions</u>	10
(2) <u>The Trial Court Erred in Applying the Exemptions to the Act</u>	13
(a) <u>Deliberative Process</u>	14
(b) <u>Research Data Exemption</u>	20
(3) <u>This Court Should Direct the Port to Disclose Documents Deemed Exempt from the PRA by the Trial Court</u>	27
(4) <u>The Trial Court Erred in Applying a “Per Request” Penalty for the Port’s Willful Refusal to Provide Public Records to the League/Jorgensen</u>	28
(5) <u>The Trial Court Erred in Limiting the Locale for Comparing Hourly Rates of Counsel to Thurston County</u>	32

(6)	<u>The League and Jorgensen Are Entitled to Their Attorney Fees on Appeal</u>	35
F.	CONCLUSION	35

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

ACLU of Wash. v. Blaine Sch. Dist. No. 503, 86 Wn. App. 688,
937 P.2d 1176 (1997).....11

ACLU of Wash. v. City of Seattle,
121 Wn. App. 544, 89 P.3d 295 (2004).....15, 17, 18

Brouillet v. Cowles Publ'g Co., 114 Wn.2d 788,
791 P.2d 526 (1990).....15

Dawson v. Daly, 120 Wn.2d 782,
845 P.2d 995 (1993).....12

Evergreen Freedom Foundation v. Locke,
127 Wn. App. 243, 110 P.3d 858 (2005).....22

Hearst Corp. v. Hoppe, 90 Wn.2d 123,
580 P.2d 246 (1978).....12, 14, 15, 17

Koenig v. City of Des Moines, 158 Wn.2d 173,
142 P.3d 162 (2006).....12

Pederson v. Dumouchel, 72 Wn.2d 73,
431 P.2d 973 (1967).....33

Progressive Animal Welfare Soc'y v. Univ. of Wash.,
114 Wn.2d 677, 790 P.2d 604 (1990).....35

Progressive Animal Welfare Soc'y (PAWS) v. Univ. of Wash.,
125 Wn.2d 243, 884 P.2d 592 (1994).....14, 17, 20, 30

Scott Fetzer Co. v. Weeks, 114 Wn.2d 109,
786 P.2d 265 (1990).....33

Servais v. Port of Bellingham, 127 Wn.2d 820,
904 P.2d 1124 (1995).....20, 21, 25, 26

Sintra, Inc. v. City of Seattle, 131 Wn.2d 640,
935 P.2d 555 (1997).....30

Spokane Research & Defense Fund v. City of Spokane,
96 Wn. App. 568, 983 P.2d 676 (1999).....21

Yousoufian v. Office of Ron Sims, 152 Wn.2d 421,
98 P.3d 463 (2005).....12, 29, 32

Statutes

Laws of 2005, ch. 274.....	2
RCW 42.17.250	1
RCW 42.17.310(1)(i).....	13, 18
RCW 42.17.310(2).....	13, 14
RCW 42.56.030	28
RCW 42.56.210(3).....	13
RCW 42.56.270(1).....	14, 20
RCW 42.56.280	14
RCW 42.56.550	12
RCW 42.56.550(1).....	34
RCW 42.56.550(4).....	29, 30
RCW 43.21C.....	9

Rules and Regulations

RAP 18.1(a)	35
RPC 1.5(a).....	33
RPC 1.5(a)(3).....	33

A. INTRODUCTION

The trial court here hit the nail on the head when it said of the Port of Olympia (Port):

After reviewing *in camera* the documents sought to be kept secret by the Port of Olympia the court is left with a definite impression that the attitude of the Port, that is the platform from which they speak, is to maximize what can be kept secret and minimize what is to be made public. Instead of asking themselves, “What can we make available to the public,” they ask, “What can we keep from the public”? This is exactly the all too ordinary attitude of secrecy that the PDA was designed to confront. There is to be “broad disclosure,” “liberally construed”, with any claimed exemption “narrowly construed.” Instead they are protective of their information as if there was something to hide when there is little of that nature. The only big secret undisclosed is why do they come at it in this way?

CP 869.

The League of Women Voters of Thurston County and Walter R. Jorgensen (League/Jorgensen) sought documents pertaining to the Port’s lease of its public facilities to the Weyerhaeuser Company (Weyerhaeuser). Instead of giving those documents to them, the Port refused to fully disclose documents or only partially provided them, claiming they were exempt from disclosure because the deliberative process and research data exemptions to the Public Records Act, RCW 42.56 *et seq.*, (PRA), applied.¹ The trial court’s interpretation of those

¹ The Legislature recodified the disclosure provisions of the Public Disclosure Act, RCW 42.17.250 *et seq.*, in RCW 42.56, which is now known as the Public Records

exemptions creates an enormous hole in the Act by which governments in Washington can routinely evade disclosure of public records to their citizens. This Court, given its proud commitment to open government and public disclosure, should reject the trial court's overly broad interpretation of the exemptions.

Additionally, the trial court imposed a penalty of \$7380 against the Port for its failure to disclose documents, calculated on the basis of 123 days of delay with a \$60 per day penalty assessment. Although the Port withheld more than 2400 pages of documents, the trial court did not impose a per record penalty nor did it indicate how this de minimus sanction would deter the Port from routinely ignoring the policy of the PRA with impunity.

Finally, the trial court limited the hourly rates of counsel in PRA cases to those hourly rates charged by Olympia-area attorneys. Although the PRA is statewide in scope, the trial court's analysis effectively deters attorneys in larger legal markets like Seattle from taking PRA cases.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

Act. Laws of 2005, ch. 274. The League/Jorgensen will refer to RCW 42.56 as "the Act" or "the PRA" where appropriate.

1. The trial court erred in entering its March 29, 2006 order requiring public disclosure subsequent to in camera review.

2. The trial court erred in entering its May 4, 2006 order on reconsideration.

3. The trial court erred in entering finding number 13 in its findings of fact and conclusions of law regarding attorney fees, costs, and statutory penalties.

4. The trial court erred in making conclusion of law number 1 in its findings of fact and conclusions of law regarding fees, costs, and statutory penalties.

5. The trial court erred in making conclusion of law number 3 in its findings of fact and conclusions of law regarding fees, costs, and statutory penalties.

6. The trial court erred in entering the judgment on public records act award of attorney fees, costs, and statutory penalties on November 17, 2006.²

(2) Issues Pertaining to Assignments of Error

1. Is a municipality entitled to claim the exemption in the PRA for materials generated in the course of its “deliberative process”

² The November 17, 2006 judgment omitted a fee award to the League’s /Jorgensen’s late trial counsel by mistake. The trial court entered an amended judgment

where the decision on which the documents were prepared – the lease of municipal property to a tenant – has been made? (Assignments of Error Numbers 1 and 2).

2. Is a municipality entitled to claim the exemption in the PRA for research data for a lease that had been negotiated and executed by the municipality with a tenant for use of municipal property? (Assignments of Error Numbers 1 and 2).

3. In making an award of fees under the PRA, does a trial court abuse its discretion in confining consideration of reasonable hourly rates for PRA cases to those charged by attorneys in the Thurston County area? (Assignments of Error Numbers 3, 4, and 6).

4. In assessing penalties for failing to disclose documents under the PRA, does a trial court abuse its discretion when it fails to assess a penalty on a “per document” basis so that the trial court imposed a daily penalty as if only a single document had not been disclosed when, in reality, the municipality withheld more than 2400 pages of documents? (Assignments of Error Numbers 5 and 6).

5. Are the appellants entitled to their attorney fees on appeal? (Assignments of Error Numbers 1 and 2).

on public records act award of attorney fees, costs, and statutory penalties on December 8, 2006. That judgment is being submitted to the Court as supplemental clerk’s papers.

C. STATEMENT OF THE CASE

The present case arises out of the Port's decision to lease a large parcel of its public property to Weyerhaeuser for a log export facility. CP 11.

Concerned by the terms of the lease between the Port and Weyerhaeuser, Walter Jorgensen, an Olympia citizen, and Eve Johnson, president of the League of Women Voters of Thurston County, sent email on January 5, 2006 to Edward Galligan, the Port's executive director, requesting various Port documents pertaining to the lease. CP 17, 18, 477. The email was followed by a letter dated the next day with identical content. CP 17, 20-21, 478. Galligan called Johnson on January 11 indicating the Port's response would be forthcoming. CP 17, 478.

The Port made a series of disclosures of records to the League, but not to Jorgensen. An initial response was made on January 17, 2006. CP 478-79. A second response followed on January 25, 2006 and was accompanied by the Port's first log of documents on which it claimed a privilege applied, exempting them from disclosure. CP 479. The Port provided a second privilege log on January 27, 2006. *Id.*

When the Port failed to provide the requested documents, the League/Jorgensen filed a complaint for violation of the PRA in the Thurston County Superior Court on January 23, 2006. CP 7-13. They

also filed a motion for an order to show cause why the Port should not produce the requested documents and be subject to penalties and an award of attorney fees. CP 14-15. The Port responded to the League/Jorgensen show cause motion and requested an in camera inspection of its response. CP 27-476.

The initial show cause hearing in the League/Jorgensen case was held before the Honorable Richard Hicks on February 17, 2006. The trial court determined Weyerhaeuser was entitled to notice of the hearing and continued it; however, the trial court also ordered the Port to submit an expanded privilege log and to pay the attorney fees of the League/Jorgensen. RP (2/17/06):15-16; CP 1151-95. The Port moved for reconsideration of that order, which was denied on March 8, 2006. CP 622-24.

Weyerhaeuser then filed a special notice of appearance on February 22, 2006. CP 563-64.

Arthur West and David Koenig made similar PDA requests of the Port and also filed lawsuits in the Thurston County Superior Court. Separate hearings in the West and League/Jorgensen cases were held on March 3, 2006. The Port and Weyerhaeuser moved to consolidate the West and League/Jorgensen cases, which the trial court granted on March 3, 2006. CP 617-18. The cases were assigned to Judge Hicks. CP 870.

In the League/Jorgensen case, the trial court agreed to conduct an in camera review of the documents. The Port was told to file more complete privilege logs, and it submitted a revised second privilege log and revised expanded privilege log that day. CP 870, 994. On March 15, the Port filed an additional revised expanded privilege log. CP 663-860, 870.

A further hearing was held on March 17, 2006 in connection with the Port's production of documents and the League/Jorgensen's request for attorney fees. The trial court reiterated it would allow attorney fees to the League/Jorgensen for the Port's wrongful withholding of records. RP (3/17/06):4.

On March 20, the Port subsequently provided the trial court with copies of redacted emails and documents, with the redacted text highlighted. CP 866.

Although the Port confirmed it had filed all of the privilege logs pertaining to the documents on which the trial court was to conduct its in camera review,³ it later provided two additional logs. CP 955-72.

The trial court undertook an in camera review of the 2409 documents in 342 "packets" the Port provided, CP 869, and issued its

³ The trial court sent a letter to the Port's counsel specifically requesting confirmation that all logs had been submitted. CP 662.

ruling on March 29, 2006 ordering the Port to produce additional documents. CP 868-918. The court also ruled that certain documents were exempt from disclosure under the deliberative process and research data exemptions to the Act. CP 869-70. The court directed the parties to take additional steps to complete the case. CP 917-18.

The parties all moved for reconsideration. CP 921-72. The trial court issued a further letter ruling on May 4, 2006 in which it granted the League/Jorgensen motion for reconsideration in part and denied it in part. CP 993-1005. The trial court authorized a further award of fees and penalties to the League/Jorgensen. CP 1005.

The League/Jorgensen filed a notice of appeal to this Court on June 2, 2006. CP 1174-1241. Subsequent to the filing of the notice of appeal and the statement of grounds for direct review pursuant to RAP 4.2(a) and before the issue of PRA fees and penalties could be resolved in the trial court, counsel for the League/Jorgensen died. CP 1247-48.

The League/Jorgensen submitted the attorney fees and penalties issues to the trial court on October 20, 2006. CP 1249-1322. The League/Jorgensen specifically requested imposition of a per record penalty, CP 1287, but the trial court declined to impose such a penalty. CP 1416. The trial court did not clearly articulate why it chose a “per request” approach over a “per record” analysis for the penalty. RP

(10/20/06):26-27; CP 1413-14, 1416. Counsel for the League/Jorgensen also sought an award of attorney fees. CP 1280-1322. The trial court set the reasonable number of hours for the work of the League/Jorgensen attorneys, but reduced their hourly rates to those the trial court deemed to be comparable to those for lawyers practicing in the Thurston County area. RP (10/20/06):28-29, RP (3/17/06):4-5; CP 1414-16. The trial court entered a judgment for fees and costs in favor of the League/Jorgensen and West and against the Port on November 17, 2006. CP 1418-23.⁴

This Court granted a motion to consolidate the case of *Koenig v. Port of Olympia*, with the present case by a letter order dated September 29, 2006.⁵

D. SUMMARY OF ARGUMENT

In light of the purposes of the Act, the trial court interpreted the exemptions from disclosure for a municipality's deliberative process and research data far too narrowly.

⁴ The trial court entered an amended judgment on December 8, 2006 to correct the omission of a fee award to Bernard Friedman it ordered on November 17, 2006.

⁵ Mr. West has argued a distinct theory that the State Environmental Policy Act, RCW 43.21C (SEPA) is more extensive in its requirements for record disclosure and, in effect, trumps the PDA. The trial court rejected this argument by an order entered on July 7, 2006 and denied a motion for reconsideration on this issue on September 26, 2006.

The League/Jorgensen moved to deconsolidate their appeal from that of West's on December 8, 2006, arguing the two cases should be separated because West argues a distinct legal theory not advanced by the League/Jorgensen.

The Court should adopt a bright line rule that the deliberative process exemption terminates when the specific decision being considered by the municipality is made.

The exemption for research data as described by this Court in *Servais* should be available for only a limited time period and the burden should fall on the municipality to make a specific showing to a court on how the information will be used in a fashion adverse to the municipality's proprietary interest.

The trial court's decision to award a single penalty of \$7380 (\$60/day times 123 days) for the Port's withholding of more than 2400 pages of documents essentially provides no effective deterrent to the Port and other government agencies when they wrongfully withhold public documents from disclosure. This deterrent policy is again adversely affected where the trial court confined hourly rates when calculating the PRA fee award to those charged by Thurston County attorneys.

E. ARGUMENT

(1) Standard of Review on PDA Decisions

In 1972, the people of Washington enacted Initiative 276. The voter pamphlet's statement of support explained:

Our whole concept of democracy is based on an informed and involved citizenry. Trust and confidence in governmental institutions is at an all time low. High on the

list of causes of this citizen distrust are secrecy in government and the influence of private money on governmental decision making. Initiative 276 brings all of this out into the open for citizens and voters to judge for themselves.

1972 Voter's Pamphlet at 10. As enacted, the PRA clearly articulated the public policy of openness underlying the Act:

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

RCW 42.56.030 (emphasis added). This policy statement confirms “the Legislature’s intent to ensure full access to public records.” *ACLU of Wash. v. Blaine Sch. Dist. No. 503*, 86 Wn. App. 688, 697, 937 P.2d 1176 (1997).

This Court has articulated a standard for judicial interpretation of the Act that plainly favors the disclosure of public records to Washington citizens:

Consistent with this legislative directive, we have interpreted the Washington public disclosure act as “a strongly worded mandate for broad disclosure of public records.” *Hearst Corp. v. Hoppe*, 90 Wash.2d 123, 127, 580 P.2d 246 (1978). The act’s disclosure provisions are to be construed liberally and its exemptions narrowly. Former RCW 42.17.251; *Progressive Animal Welfare Soc’y v.*

Univ. of Wash., 125 Wash.2d 243, 251, 884 P.2d 592 (1994) (*PAWS*). The agency must carry the burden of proving the information sought falls within one of the act's exemptions. Former RCW 42.17.340(1); *Spokane Police Guild v. Liquor Control Bd.*, 112 Wash.2d 30, 35, 769 P.2d 283 (1989). Agency determinations are reviewed de novo. Former RCW 42.17.340(3). When reviewing agency actions, “[c]ourts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.” Former RCW 42.17.340(3).

Koenig v. City of Des Moines, 158 Wn.2d 173, 180-81, 142 P.3d 162 (2006). The Court's implementation of the liberal construction imperative in the PRA is designed to ensure complete disclosure, *Dawson v. Daly*, 120 Wn.2d 782, 788, 845 P.2d 995 (1993), and to “discourage improper denial of access to public records.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978). Thus, this Court reviews issues pertaining to disclosure de novo with any doubts about disclosure favoring access to public records. RCW 42.56.550.

The Court reviews the determination of PRA penalties against violating government agencies on an abuse of discretion standard. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 430-31, 98 P.3d 463 (2005).

In this case, upon de novo review, liberally construing coverage under the Act and narrowly interpreting any exemptions, the trial court

erred in its treatment of the deliberative process and research data exemptions of the Act, and the trial court abused its discretion in setting the penalties for the Port's wrongful withholding of public documents.

(2) The Trial Court Erred in Applying the Exemptions to the Act

RCW 42.56.210(3) states: "Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." The Port identified the exemption it claims for the record it listed in its various privilege logs, but it failed to include "a brief explanation of how the exemption applies to the record withheld" for the various records. *See, e.g.*, CP 494-95, 517-18. This enhanced the difficulty of understanding the Port's contentions.⁶

⁶ The Port was not relieved of its obligations to respond to requests for public records because a portion of the record contains information covered by an exemption. It had a duty to delete or redact specific information covered by an exemption and disclose the remainder of the document:

Except for information described in subsection (1)(c)(i) of this section and confidential income data exempted from public inspection pursuant to RCW 84.40.020, the exemptions of this section are inapplicable to the extent that information, the disclosure of which would violate person privacy or vital governmental interests, can be deleted from the specific records sought.

RCW 42.17.310(2). In *Hoppe*, the King County Assessor claimed an exemption to disclosure under RCW 42.17.310(1)(i), the "deliberative process" exemption. This Court agreed that portions of the records sought were exempt under that section, but further held the exemption "inapplicable to the extent that exempt materials in the record 'can be

The Port largely relied upon, and the trial court adopted, two exemptions to justify nondisclosure of documents requested by the League/Jorgensen: (1) RCW 42.56.280 (deliberative process) and (2) RCW 42.56.270(1) (research data). The trial court should have, but did not, construe such exemptions narrowly.

(a) Deliberative Process

RCW 42.56.280 states: “Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended are exempt under this chapter except that a specific record shall not be exempt when publicly cited by an agency in connection with any agency action.” However, the exemption is narrowly tailored to documents relating to *pending* deliberations of public agencies. “Because the exemption is intended to safeguard the free exchange of ideas, recommendations, and opinions *prior to* decision, the opinions or recommendations actually implemented as policy lose their protection when adopted by the agency.” *Hoppe*, 90 Wn.2d at 134 (emphasis added). *Accord*, *Progressive Animal Welfare Soc’y (PAWS) v. Univ. of Wash.*, 125 Wn.2d 243, 257, 884 P.2d 592 (1994) (“Once the policies of recommendations are implemented, the

deleted from the specific records sought,” citing RCW 42.17.310(2). *Hoppe*, 90 Wn.2d at 132.

records cease to be protected under this exemption.”); *Brouillet v. Cowles Publ’g Co.*, 114 Wn.2d 788, 800, 791 P.2d 526 (1990) (citing *Hoppe*).

The trial court, however, construed this exemption to apply even when the decisionmaking process had concluded:

It seems to this court that the PDA must have intended for the public to be able to review on what basis a public decision was made, however, at the same time in light of the holding in *ACLU*, this comes into direct contradiction with the possible agency argument that, we need to keep the basis secret because we might use such basis in some unknown future negotiation at some unknown future time.

CP 869-70. In effect, the trial court conflated the deliberative process and research data exemptions, relying on *American Civil Liberties Union of Wash. (ACLU) v. City of Seattle*, 121 Wn. App. 544, 89 P.3d 295 (2004).

On reconsideration, the trial court rejected the League/Jorgensen contention that this was an overly broad reading of the exemptions:

The ACLU court said on page 553, that the ACLU failed to recognize that labor negotiations are an “ongoing process” to an “ever-changing tableau.” In essence this is the same argument the Port is making here. Where this court considers that guidance is necessary for trial courts, from a higher court, is on the question: “What is the deliberative policy-making process?”

If the deliberative process is only the specific lease negotiations between the Port and Weyerhaeuser then upon the completion of that deliberative process the Port must disclose all the documents that might otherwise be kept exempt during the deliberative process under the above four principles from PAWS just as the “pink sheets” would

be disclosed in PAWS, or the “lists” would be disclosed in ACLU, upon the completion of the process.

But the Port is a municipal corporation with several properties. It is engaging in ongoing negotiations with several tenants, from time to time, and must necessarily have in anticipation of these negotiations the development and recommendations of “policies” the disclosure of which could conceivably damage their ability to negotiate the best terms possible for the public in areas where more than one result might be reasonably negotiable. If the tenant, or negotiator on the other side of the lease, knows in advance what policies on which the Port will yield, but only under ‘what’ pressure, and what policies are nonnegotiable no matter what pressure is brought to bear, then the Port will not be able to develop the best possible alternatives for the public they represent. So, in an appropriate case, the deliberative policy making process *may* extend beyond a specific negotiation. This is similar, but not identical, to what is found in *ACLU*.

So, the question is, does this ongoing process in the ever-changing property management tableau in which documents, opinions and recommendations are prepared, not just for Weyerhaeuser in their specific lease, even though they might be initially generated in such a large undertaking, but for all future negotiations of this kind, the kind of deliberative process of policy development to which the RCW 42.17.310(1)(i) exemption is intended to reach? This is a possible result in certain situations. But if that is the result, then when is the policy finally implemented so that the considerations that went into its development might be disclosed? In an agency with ongoing negotiations, with similar situations, the privacy of the policy recommendations has a genuine value for negotiation purposes. If such is the case then we run into the question of when is the deliberative process at an end? This is the rhetorical question the court posed. What did the people, and subsequently the Legislature, in enacting and amending the PDA, intend here?

CP 997-98.

The trial court's conflation of the exemptions was error. The principle adopted by this Court in *Hoppe* should control -- the deliberative process exemption ends when the governmental body makes its decision. *ACLU* is not to the contrary.

The Court of Appeals in *ACLU* cited the *Hoppe* rule with approval. In discussing *PAWS*, the *ACLU* court said: "The [*PAWS*] court noted that once the proposal became funded, the policy is clearly implemented, so the 'pink sheets' would become disclosable." *ACLU*, 121 Wn. App. at 551 n.16 (citing to *PAWS*, 125 Wn.2d at 257, where this Court rearticulated the *Hoppe* rule). Thus, the *ACLU* decision, far from being hostile to the *Hoppe* rule, embraced it.

ACLU is entirely similar to the present case, and actually supports the conclusion that the deliberative process must be narrowly confined to the time leading up to a decision. In *ACLU*, that organization sought public records being used in negotiations between the Seattle Police Officers Guild and the City of Seattle aimed at producing a new collective bargaining agreement. The trial court in that case ruled that the deliberative process exemption applied: "Documents exchanged during the collective bargaining process with the Seattle Police Officers Guild *while the negotiations are ongoing* are exempt from disclosure pursuant to

the deliberative process exemption to the Public Disclosure Act, RCW 42.17.310(1)(i).” CP 931 (emphasis added). The trial court prohibited document disclosure “until the contract negotiations are complete and a final tentative contract has been reached.” *Id.* The Court of Appeals agreed:

This ongoing process involves negotiators and City officials in what is the essence of the deliberative process. *Until the results of this policy-making process are presented to the City Council for adoption*, politicization and media comments will by definition inhibit the delicate balance – the give and take of the City’s positions on issues concerning the police department.

121 Wn. App. at 554 (emphasis added). In *ACLU*, the deliberative process exemption applied while negotiations were ongoing, but ceased to apply once the contract was adopted because there were no further ongoing negotiations requiring confidentiality.

There is not a hint anywhere in *ACLU* that the Court of Appeals contemplated a continuing, indefinite exemption from disclosure for the requested records, even though the collective bargaining agreement had only a three-year duration, and negotiations were bound to begin again over a renewed agreement in the future. The trial court intended for the records to be released at the end of the ongoing negotiating process; no party argued that they should not be released then; and the Court of

Appeals never even considered the question of a continuing, indefinite exemption.

In the present case, the “deliberative process” exemption would apply were the lease still in negotiation, but the Port approved the lease at a meeting of Port commissioners on August 22, 2005, thereby finally implementing the subject of any policies and recommendations reflected in the records the Port claims are exempt. CP 145. The reason for the “deliberative process” exemption disappeared when the Port formally approved the Weyerhaeuser lease.

The scope of the “deliberative process” exemption should be confined by this Court to the duration of the deliberations at issue leading to a decision by the appropriate agency in order to fulfill the narrow duration of the exemption intended by the Legislature to protect the “give and take” of decisionmaking bodies.⁷ The public has a right under the Act to know the rationale of decisionmakers about a significant public decision, once it is made. This right is best implemented by a bright line rule discontinuing the exemption when the decision is made. This is not to

⁷ The potential for abuse of this “deliberative process” exemption is documented in Angela Galloway, “City keeps the public in the dark,” *Seattle Post-Intelligencer*, November 10, 2006 at A-1, discussing how the Seattle City Council refused to disclose all correspondence to and from the chair of a special council work group developing a preferred alternative on SR 520 and the Evergreen Point floating bridge even though the chair publicly submitted a resolution to the Council on the preferred alternative, completing the chair’s work.

say that the agency cannot interpose another applicable exemption to withhold disclosure once the deliberations have concluded.

(b) Research Data Exemption

RCW 42.56.270(1) provides an exemption from disclosure for “Valuable formulae, designs, drawings, computer source code or object code, and research data obtained by any agency within five years of the request for disclosure when disclosure would produce private gain and public loss.” Research data is “a body of facts and information collected for a specific purpose and derived from close, careful study, or from scholarly or scientific investigation or inquiry.” *Servais v. Port of Bellingham*, 127 Wn.2d 820, 832, 904 P.2d 1124 (1995).

Although the research data exemption seems to address valuable intellectual property and was treated as such in *PAWS*,⁸ this Court adopted a more expansive definition of the exemption in *Servais*. But simply asserting the exempted records consist entirely of “research data” does not establish the exemption. The Port must show “disclosure would produce private gain and public loss.”⁹

⁸ “The clear purpose of the exemption is to prevent private persons from using the Act to appropriate potentially valuable intellectual property for private gain.” *PAWS*, 125 Wn.2d at 255.

⁹ “The term ‘research data’ must then be limited by the question whether private gain and public loss would result if the requested documents were disclosed.” *Servais*, 127 Wn.2d at 832.

In *Servais*, the Port of Bellingham commissioned a cash flow analysis for use in negotiations with potential developers of three Port properties. *Id.* at 823. *Servais* made a public disclosure request for the cash flow analysis, and the Port denied the request. *Id.* at 823-24. This Court noted: “The trial court concluded, and the Court of Appeals agreed, that ‘private developers would benefit by insight into the Port of Bellingham’s negotiating position if the financial data were disclosed, thereby resulting in a loss to the public.’” *Id.* at 832. The *Servais* court then concluded the “research data” exemption applied to the cash flow analysis because:

The cash flow analysis was prepared to provide the Port with data it could use in negotiations with developers. That portion of the study should remain exempt under RCW 42.17.310(1)(h) to permit the Port to conduct negotiations in the best interests of the public and to perform its statutory duties.

Id. at 833. In other words, *future* negotiations with potential developers of the Port of Bellingham properties would be compromised by disclosure of its bargaining position as evidenced in the cash flow analysis.

Information is not necessarily “research data” merely because it is prepared for lease negotiations. *Spokane Research & Defense Fund v. City of Spokane*, 96 Wn. App. 568, 983 P.2d 676 (1999). In that case, the trial court concluded that the anchor tenant’s lease, assigned by developers

of a downtown shopping mall in Spokane as security for a HUD loan to a public development authority for the financing of a parking garage, pro formas, and credit studies by Gonzaga professors were subject to disclosure. The Court of Appeals agreed, finding the materials did not constitute research data and had no future effect. All of the materials pertained to the loan application, and the public was entitled to assess the wisdom of the loan. *Id.* at 578.

Just how extensively the research data exemption has been interpreted is evidenced by the Court of Appeals decision in *Evergreen Freedom Foundation v. Locke*, 127 Wn. App. 243, 110 P.3d 858 (2005). The Evergreen Freedom Foundation sought disclosure of an agreement between the Department of Community Trade and Economic Development and the Boeing Company to develop an Everett airplane assembly facility associated with the Legislature's decision to provide billions of dollars of tax credits to the company. The Department withheld or redacted documents on the grounds the documents allegedly contained material subject to the research data exemption. The trial court upheld the Department's conduct and the Court of Appeals affirmed because "[t]he information the Department withheld consists of designs that reveal details of plans necessary to facilitate the 787 project." Although Washington's taxpayers were, in effect, contributing to the funds available to construct

the 787 airliner at the Everett site, information about the facility was withheld from public scrutiny.

The trial court here adopted a broad interpretation of the research data exemption to the PDA, summarizing the test for the exemption as whether the definition of research data is met and whether private gain and public loss would result from disclosure. CP 1000. On the former issue, the court acknowledged difficulty with the definition:

The distinction between the Court of Appeals “organized information from careful or diligent search which serves as a basis for discussion” which the Supreme Court holds is too broad, and the Supreme Court’s definition, is that just gathering and organizing the information doesn’t make it research data it must be accompanied by some scholarly or scientific investigation or inquiry. *PAWS* might say it must be not only “organized data” but also involve the applicable “hypotheses.”

In *Servais* at issue was a cash flow analysis, 127 Wn.2d at page 822-823 prepared for the Port, by a national consulting firm, originally to enable the Port to determine the best use of its property and design a comprehensive development strategy for all the property. The Port publicly disclosed the results of the study at a commission meeting. Then, a second study with a particular cash flow analysis was commissioned for the Port to use in negotiations with certain prospective partners, and this second study was not disclosed, and formed the issue in that case. The trial court found, among other things, that the study was commissioned to provide for public gain so as to negotiate as a well-informed landlord and to have the necessary information to value the expected long-term leases and that the data contained valuable formula obtained specifically for negotiating these leases. The cash flow analysis was specifically prepared to provide the Port

with data it could use in negotiations with developers, *Servais*, 127 Wn.2d at p. 833. The *Servais* court held the specific cash flow analysis should remain exempt and noted that otherwise the entire marketing feasibility study was voluntarily and properly disclosed. *Id.*

CP 1001.

Here, the lease between Weyerhaeuser and the Port was a done deal on August 22, 2005. There are no “future” lease negotiations that would be compromised by disclosure of the records sought here. The League and Jorgensen seek only the historical record of the Port’s dealings with Weyerhaeuser. Weyerhaeuser has no way to achieve private gain now – *i.e.*, insights into the Port’s bargaining position on the lease – and the Port has no way to suffer a public loss from the revelation of such insights if the requested records are disclosed now.

The Port’s argument below implied that the data it collected, compiled, and calculated for the purpose of negotiating the terms of the Weyerhaeuser lease would be useful to other private entities doing business with the Port on other matters. CP 38, 480. However, the Port failed to show how data specific to the Weyerhaeuser log shipping operation could be used to advantage by somebody wanting to build a restaurant on Port property, or establish a boat repair facility, or open an air taxi service at the Port’s airport. To accept the illogic of the Port’s

argument would allow the Port to keep all business deals secret from the public, even after the deals have been closed.¹⁰

Moreover, like the deliberative process exemption, the research data exemption is of limited duration. The exemption is available for only the first five years. Moreover, *Servais* says nothing at all about indefinite extension of the research data exemption. The cash flow analyses the *Servais* court held were exempt as research data were prepared for three specific potential development sites on Port of Bellingham property, and were not to “be used for any other purpose.” *Id.* at 823. The Court agreed the cash flow analyses were exempt because they were to be used in negotiations with potential developers of the three specified sites. *Id.* at 833. No party raised the question, and the Court did not address, whether the cash flow analyses would remain exempt once the negotiations were completed.¹¹

¹⁰ The Port argued below: “The disclosure of such information would inhibit the flow of recommendations made by Port staff to effectively and competitively contract with private entities and to conduct the business of the Port.” CP 38, 668. The Port seems to argue that to be accountable to the taxpayers of Thurston County for its actions, it cannot do its job properly. The Act is to the contrary.

¹¹ The Attorney General filed an amicus brief in *Servais* supporting the claimed exemptions, stating:

No compelling policy is served by adopting a more stringent standard, particularly where the exemption is a temporary one effective only so long as the potential for public loss continues to exist. In the instant case, the rationale supporting the exemption depended upon possible negotiations. The trial court and the Court of Appeals found that the Port’s weakened negotiating position was a sufficient showing

The Port's claim to the "research data" exemption shares the same reason for deciding the "deliberative process" exemption is inapplicable: the lease is in place and there is no current or future negotiation position that would be compromised by release of the records sought. The exemptions the Port claims did not survive its ratification of the lease on August 22, 2005.

The trial court's analysis of the research data exemption and *Servais* resulted in a far too broad interpretation of that exemption, shielding too many documents from public disclosure. Consistent with the statutory imperative to disclose public records and to avoid having the exemption swallow up the disclosure rule,¹² this Court should refine its rule in *Servais* to narrow the research data exemption, placing the burden on the public agency to specifically prove to the court that a trade secret was present, or that there was an actual potential for the research data as

of public loss. *When those negotiations are completed or are no longer foreseeable, presumably no public loss or private gain could result from disclosure.* However, in no event could the records be withheld under this exemption for more than five years. Protecting research data from disclosure *during negotiations*, so that an agency will not be disadvantaged at an expense to the public, is consistent with the language and intent of this exemption.

CP 933-34 (emphasis added). *Servais* stands for the proposition that when the research data exemption applies because of the use of that data in negotiations, the exemption ends when the negotiations are complete.

¹² Virtually all public records involve "a body of facts and information collected for a specific purpose" and derived from study by some public official, for example. See *Servais*, 127 Wn.2d at 832.

defined in *Servais* to be used in a fashion adverse to the public agency's proprietary interest before the exemption applies.

(3) This Court Should Direct the Port to Disclose Documents Deemed Exempt from the PRA by the Trial Court

A careful review of the trial court's orders on the documents subject to the two PRA exemptions here evidences the breadth of the trial court's ruling. The Port responded to the League/Jorgensen requests by stating routinely: "These records include policy opinions related to how the Port approaches lease negotiations [sic]"; and/or the Port says, "This [sic] data was [sic] assembled for lease negotiations and reveals [sic] the Port's approach and/or strategies to negotiations with tenants." CP 976. The Port then claimed all such information was exempt from disclosure. The trial court's rulings effectively allowed the Port to withhold what it deemed to be information relevant to some possible, yet unspecified, future lease negotiation. The trial court identified packet 000077-000092 as the most representative of its analysis of the exemptions. CP 875.

Financial information about Port operations is an aspect of any lease negotiations. Such financial data is essential for public disclosure if citizens like the League/Jorgensen are ever to determine if the Weyerhaeuser lease was a "good deal" for the Port's taxpayers or a "sweetheart deal" for Weyerhaeuser.

The League/Jorgensen would like to know, for instance, how the Port calculated the return on investment (ROI). If the Port made a colossal accounting error in calculating the ROI, like not accounting for capital expenses or replacement costs, under the trial court's view on exemptions, the taxpayers of Thurston County will never have the opportunity to find out, and hold their elected officials accountable. The purpose of the PRA is violated by the trial court's apprehension that at some unknown time in the future, some unknown bidder on some unknown project may find some unknown way to use the Port's ROI calculation for the Weyerhaeuser lease in a negotiation with the Port on a completely different project. The Port trumpeted the Weyerhaeuser lease as a good deal for the taxpayers, yet will not let the taxpayers see the data so they can decide for themselves if the lease was, in fact, good for them. The trial court's decision means that, contrary to RCW 42.56.030, Thurston County's taxpayers must simply trust the Port's assertion that the lease was a good deal for them.

This Court should remand the case to the trial court to reassess the various packets of exempt documents so that they may be fully disclosed to League/Jorgensen.

- (4) The Trial Court Erred in Applying a "Per Request" Penalty for the Port's Willful Refusal to Provide Public Records to the League/Jorgensen

RCW 42.56.550(4) provides:

Any 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. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he was denied the right to inspect or copy said public record.

“[T]he trial court must award penalties when the PDA is violated.”

Yousoufian, 152 Wn.2d at 433; *Koenig*, 158 Wn.2d at 188. As this Court has said:

. . . RCW 42.17.340(4) is “a penalty to enforce the strong public policies underlying the public disclosure act.” *Amren*, 131 Wn.2d at 35-36, 929 P.2d 389. And “[w]hen determining the amount of the penalty to be imposed the existence or absence of [an] agency’s bad faith is the principal factor which the trial court must consider.” *Id.* at 37-38, 929 P.2d 389 (second emphasis omitted) (quoting *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 303, 825 P.2d 324 (1992)).

Yousoufian, 152 Wn.2d at 435-36. The purposes of the Act are served “by increasing the penalty based on the agency’s culpability.” *Id.* at 436. A penalty is mandatory when a government agency violates the PRA.

The mandatory penalty under the PRA is vital to its effective enforcement, *Amren*, 131 Wn.2d at 35-36, particularly as citizens may not recover their damages for an agency’s violation of the Act. Citizens are

encouraged by the penalty/fee provisions of RCW 42.56.550(4) to act as private attorneys general, enforcing the sunshine directives of the PRA. Without this type of private enforcement mechanism, agencies can readily fall into the habit of refusing to disclose public records. No public agency enforces the PRA, and agencies have access to virtually unlimited public resources, including publicly-paid counsel, to resist disclosure. Penalties must be sufficiently punitive to deter future improper denials of access to public records. *See, e.g., Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662, 935 P.2d 555 (1997); *PAWS*, 125 Wn.2d at 272.

The Port's conduct here illustrates precisely why a penalty is appropriate. The Port delayed disclosing, or wrongly withheld, numerous records since the date of the League's request.¹³ The Port disclosed 8 records on January 23, 2006, the day before the League filed this action. CP 1288-89. The Port produced an additional 406 records in response to the lawsuit and the trial court's March 29, 2006 ruling. CP 1289. There

¹³ The determination of what constitutes a "record" or a "packet" is made somewhat more difficult in this case as emails are involved. The Port frequently disclosed email records in "strings" or "threads" as a matter of convenience rather than providing a separate copy of each discreet email within the thread. CP 1287, 1298. In many instances, the email threads span several days and involve many people. CP 1287. Although there do not appear to be any decisions in Washington addressing this specific issue, each discreet email within a thread should constitute a separate record upon which the daily penalty must be imposed. Each email within the thread was written by an easily identifiable individual on a specific day. This is no different than considering traditional letters exchanged by regular mail as individual records upon which a penalty can be imposed, even where the written letters appear to continue a previous discussion.

are, however, at least 12 instances for which the penalty calculations cannot be completed because critical pages that would confirm the number of records to which the penalty would apply are missing. And in 19 other instances, the Port completely failed to provide the records, redacted or otherwise, that it was ordered to disclose. *Id.* The trial court's March 29, 2006 ruling spoke in terms of 342 "packets" totaling 2409 pages of material reviewed. CP 1427.

The Port actually withheld the records anywhere from three weeks to nearly 9 months,¹⁴ but the trial court settled on 123 days as the number chosen to reflect the Port's delay in disclosing documents to the League/Jorgensen. CP 1413.

Notwithstanding the Port's willful refusal to provide the League/Jorgensen the public documents relating to the Weyerhaeuser lease that they requested, the trial court apparently treated the requests of the League and Jorgensen as a single request, and imposed a "per request" penalty of \$60 per day for 123 days, or \$7380. RP (10/20/06):33; CP 1477. The trial court offered no detailed analysis of why it chose a "per request" penalty over a "per record" or even a "per packet" approach to imposing penalties. *Id.* at 26-27.

¹⁴ Assuming *arguendo* that the Port had disclosed the missing records by October 1, 2006, 270 days would have passed between the date of the League/Jorgensen request and the Port's final disclosure.

The trial court had discretion under this Court's *Yousoufian* decision to impose a "per request" or "per record" penalty. 152 Wn.2d at 435-36. But it was required by the Act to impose a penalty taking into consideration the agency's culpability. *Id.* at 435. The trial court found the Port to have willfully withheld documents. CP 1411. A penalty of \$7380 to a public port, bent on leasing its facilities to a major corporation without serious scrutiny by the public of the benefits or detriments of the lease is the proverbial "slap on the wrist," a mere cost of doing business for the Port. The trial court's failure to explain precisely how the penalty it imposed took into consideration the Port's culpability constituted an abuse of discretion.¹⁵

(5) The Trial Court Erred in Limiting the Locale for Comparing Hourly Rates of Counsel to Thurston County

The trial court reduced the hourly rates of attorneys Bernard Friedman and Philip Talmadge from \$300 per hour to \$250 per hour because the court believed those rates were not comparable to those for attorneys practicing in Thurston County. This was error, making the trial court's fee award an abuse of its discretion.

¹⁵ The League/Jorgensen agree with the trial court's determination that a penalty of \$60 per day for 123 days was appropriate. It was more appropriate here for the trial court to have imposed a "per record" penalty. In this case, the trial court identified numerous "packets" of documents the Port refused to disclose. CP 1474.

RPC 1.5(a)(3) indicates that one of the applicable factors in determining a reasonable attorney fee is “the fee customarily charged in the locality for similar legal services.” Such a factor, however, is one among many in determining the reasonableness of the fee request.¹⁶

Necessarily, the application of RPC 1.5(a)(3) requires a determination of what the “locality” is for PRA cases. There is a direct analogy in cases of medical negligence to the locality for establishing the applicable standard of care for physicians. In *Pederson v. Dumouchel*, 72 Wn.2d 73, 431 P.2d 973 (1967), this Court rejected the “locality rule” for determining the applicable standard of care for physicians in medical negligence actions:

The original reason for the “locality rule” is apparent. When there was little intercommunity travel, courts required experts who testified to the standard of care that should have been used to have a personal knowledge of the practice of physicians in that particular community where the patient was treated. It was the accepted theory that a doctor in a small community did not have the same opportunities and resources as did a doctor practicing in a large city to keep abreast of advances in his profession; hence, he should not be held to the same standard of care and skill as that employed by doctors in other communities or in larger cities. Parenthetically, we note that the law of this jurisdiction has never recognized a difference in the professional competency of a lawyer in a small community

¹⁶ The lodestar method is the default principle for calculating a reasonable attorney fee. *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 124, 786 P.2d 265 (1990). The factors in RPC 1.5(a) only offer additional guidance to ensure that the fee award is truly reasonable. *Id.*

from that of the professional competency required of a lawyer in a large city.

Id. at 77. The Court adopted a new rule that looked to the skills of the practitioner, rather than mere geography:

A qualified medical or dental practitioner should be subject to liability, in an action for negligence, if he fails to exercise that degree of care and skill which is expected of the average practitioner in the class to which he belongs, acting in the same or similar circumstances. This standard of care is that established in an area coextensive with the medical and professional means available in those centers that are readily accessible for appropriate treatment of the patient. The instant case is a good example: plaintiff was taken almost immediately from Aberdeen to Seattle, a distance of 110 miles.

Id. at 79.

This Court should also reject a rule for PRA cases that restricts the hourly rates of attorneys to those of lawyers practicing in the Olympia area. First, the PRA is a state-wide enactment and numerous attorneys focus their practice on such cases. Limiting fees to those charged by Olympia attorneys may be a severe disincentive to lawyers in larger legal markets taking such cases. Second, lawyers from around the state may have little choice in litigating in Thurston County, given the PRA's venue provision, RCW 42.56.550(1), when a state agency is involved. A case must be filed in the county "in which a record is maintained." *Id.* Seattle-

area attorneys, for example, ought not to be penalized for having to file their PRA cases in Thurston County because a state agency is involved.

While a court may certainly consider hourly rates of counsel in the particular locale like Thurston County, those rates should not be conclusive. The better rule is for a court to consider the rates customarily charged by attorneys in PRA cases anywhere in the state. CP 1274-79 (hourly rates of attorneys in PRA cases).

The trial court here abused its discretion in confining the hourly rates of counsel to those charged by Thurston County attorneys.

(6) The League and Jorgensen Are Entitled to Their Attorney Fees on Appeal

RAP 18.1(a) requires a party seeking an award of attorney fees on appeal to request fees in a separate section of its brief. The trial court here awarded fees to the League and Jorgensen. If they prevail on appeal, they are entitled to their appellate fees. *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990).

F. CONCLUSION

The trial court erred in permitting the Port to evade disclosure of public records relating to its lease of public facilities to Weyerhaeuser. The trial court’s interpretation of the deliberative process and research

data exemptions to the Act creates an enormous loophole in the Act that this Court should close.

The trial court also abused its discretion in making its decision on the penalties and fees to which the League/Jorgensen were entitled under the PRA.

This Court should reverse the trial court's rulings on document disclosure and remand the case to the trial court for entry of an order directing the Port to disclose documents it improperly claimed were covered by the deliberative process and research data exemptions and to recalculate the penalties against the Port for its failure to turn over those documents to the League/Jorgensen as well as the trial court fees to which they were entitled. Costs on appeal, including reasonable attorney fees, should be awarded to the League/Jorgensen.

DATED this 13th day of December, 2006.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973

Emmelyn Hart-Biberfeld, WSBA #28820

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(206) 574-6661

Attorneys for Appellants Walter Jorgensen
and League of Women Voters of
Thurston County

APPENDIX

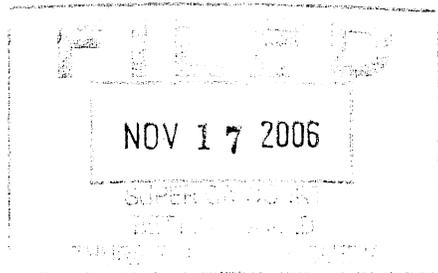
1 ■ **EXPEDITE** (if filing within 5 court days of hearing)

2 ■ Hearing is set:

3 Date: November 17, 2006

4 Time: 9:00 a.m.

5 Judge/Calendar: Judge Hicks



6
7
8 THE SUPERIOR COURT OF THE STATE OF WASHINGTON
9 FOR THURSTON COUNTY

10 ARTHUR S. WEST

No. 06-2-00141-6

11 and

~~(PROPOSED)~~ *TB* *18*
A

12
13
14 WALTER R. JORGENSEN, an
15 individual, and LEAGUE OF
16 WOMEN VOTERS OF THURSTON
17 COUNTY, a nonprofit corporation,

REVISED FINDINGS OF FACT
AND CONCLUSIONS OF LAW
REGARDING ATTORNEY FEES,
COSTS, AND STATUTORY
PENALTIES

18 Petitioners,

19 vs.

20 PORT OF OLYMPIA, a Washington
21 municipal corporation,

22 Respondent,

23 and

24 WEYERHAEUSER COMPANY, a
25 Washington corporation,

26 Respondent-Intervenor.
27

28
29 This matter comes before the Court on the motion of petitioners Walter
30 Jorgensen and the League of Women Voters (collectively "the League") for an
31

32 award of attorney fees, costs, and statutory penalties. The Court reviewed the
Findings of Fact and Conclusions Re:
Attorney Fees, Costs, and Penalties - 1

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(206) 574-6661 (206) 575-1397 Fax

ORIGINAL

1 files and previous orders in this case, and considered the following in regard to
2
3 the motion for attorney fees, costs, and penalties:

- 4 • Motion For Award Of Attorney Fees, Costs, And Statutory
5 Penalties Pursuant To The Public Records Act;
- 6
- 7 • Declaration of Philip A. Talmadge;
- 8
- 9 • Declaration of Stephen Bean;
- 10
- 11 • Declaration of Michele Earl-Hubbard;
- 12
- 13 • Declaration of Emmelyn Hart-Biberfeld;
- 14
- 15 • Port's Memorandum re Public Records Act Award and
16 Subjoined Declaration of Counsel;
- 17
- 18 • Plaintiff's (West) Motion for Penalties;
- 19
- 20 • Reply in Support of Award of Attorney Fees, Costs, and
21 Statutory Penalties;
- 22
- 23 • Plaintiff's (West) Motion for Show Cause;
- 24
- 25 • Port's Reply Opposing Show Cause Motion;
- 26
- 27 • Plaintiff's (West) Supplemental Declaration;
- 28
- 29 • Port's Response to West Supplemental Declaration and
30 Subjoined Declaration of Counsel;
- 31
- 32 • Declaration of Counsel (Lake) in Response to West Motion to
Strike;
- Supplemental Declaration of Emmelyn Hart-Biberfeld; and
- Comments of counsel at the hearing on October 20, 2006.

1 And being fully advised on the matter, the Court makes the following
2
3 FINDINGS OF FACT:

4 1. The League and Walter Jorgensen sent a records request to the Port
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6 on January 6, 2006, which requested copies of all public records associated with
7
8 a final lease the Port ratified with respondent-intervenor Weyerhaeuser Company
9
10 in August 2005. Petitioner Arthur West had already directed the exact same
11
12 public records request to the Port and had already initiated a lawsuit seeking the
13
14 identical relief. The League filed its lawsuit against the Port on
15
16 January 24, 2006. The cases were subsequently consolidated before this Court.

17 2. The Port responded to the League's request for records on
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19 January 11, 2006 and requested additional time to provide records. The Port
20
21 disclosed records on January 17, and 23, 2006, March 3, 2006, April 12, 2006,
22
23 and May 18, 24, and 30, 2006. It produced privilege logs on January 25 and 27,
24
25 2006 and again on March 3 and 15, 2006. The Port's last disclosure of records
26
27 was on May 30, 2006.

28 3. This Court entered an order on February 17, 2006 finding the Port
29
30 had wrongfully withheld public records and, under the Public Records Act,
31
32 awarding reasonable attorney fees and costs incurred through the date of that
order to the League and against the Port. Such costs and fees were to be
determined by submission of an appropriate cost bill and an attorney fee petition.

1 4. On March 10, 2006, the League's former counsel, Bernard
2
3 Friedman, filed a petition for an award of attorney fees and costs. The League
4 sought an award of \$10,860 in fees, representing 36.2 hours of work through the
5
6 February 17, 2006 hearing. The League also requested \$200 in costs. In support
7
8 of its request, the League submitted additional declarations from Philip Talmadge
9
10 and Kristal Wiitala.

11 5. On March 29, 2006, this Court entered an order requiring the Port to
12
13 disclose certain public records. It also required the parties to provide additional
14
15 briefing and arguments as to the penalties and sanctions to be imposed against the
16
17 Port for its wrongful withholding of records.

18 6. Mr. Friedman died before the Court ruled on his attorney fee
19
20 petition.

21 7. Talmadge Law Group appeared on behalf of the League after
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23 Mr. Friedman died and filed a motion for attorney fees, costs, and statutory
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25 penalties on October 13, 2006 and supported by additional declarations from
26
27 Stephen Bean and Michele Earl-Hubbard. The League sought an additional
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29 award of \$45,060 in attorney fees on behalf of Mr. Friedman, which represented
30
31 150.2 hours of additional work in the case between February 20, 2006 and
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33 July 26, 2006. The League sought an award of \$13,995.00 in attorney fees,

1 representing 60.1 hours of work performed by Talmadge Law Group, and an
2
3 award of \$420.92 in costs.

4 8. Talmadge Law Group filed a supplemental declaration on behalf of
5
6 the League requesting the Court to award \$2,437.50 in additional attorney fees
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8 incurred in preparing its reply brief. Mr. Talmadge billed 1.9 hours and Ms.
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10 Hart-Biberfeld billed 8.3 hours, which totals 10.2 hours of work. The League
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12 also requested supplemental costs of \$150.00, reflecting \$12.00 in photocopying
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14 expenses (60 copies x \$0.20) and \$138 in legal messenger fees.

15 9. The Public Records Act also requires the Court to award a statutory
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17 penalty for each day an agency denies a requestor the right to inspect and copy a
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19 public record. Having previously determined the Port wrongfully withheld
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21 records, the Court must assess a penalty against the Port of not less than \$5 but
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23 no more than \$100 per day.

24 10. As the Port finalized its initial release of records and provided
25
26 complete privilege logs on January 27, 2006, the first day of "delay" is
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28 January 28, 2006. The end date for purposes of this calculation is May 30, 2006,
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30 the date of the Port's last disclosure. Accordingly, the Port wrongly withheld
31
32 records for a total of 123 days.

11. The Court is critical of the attitude with which the Port approached
these disclosures. While the Port did not act in bad faith, it did not act in good

1 faith. Striking a balance between imposing an appropriate sanction and
2 discouraging a cottage industry of making public disclosure requests in hopes of
3 gaining a windfall, a minimum penalty of \$5 per day would be inappropriate
4 because there has to be more of a “sting.” A sanction of \$60 per day is
5 appropriate.
6
7
8

9 12. Washington courts have adopted the lodestar method to assess
10 reasonable attorney fees in public records cases. This methodology is a guiding
11 light and not an anchor. It requires the Court to determine what a reasonable
12 hourly rate is in the community for work of this nature, taking into account the
13 uniqueness of the question, the novelty of the issues, the experience of the
14 attorneys, and the venue in which the parties find themselves. A lodestar award
15 is arrived at by multiplying a reasonable hourly rate by the number of hours
16 reasonably worked.
17
18
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21

22 13. Bernard Friedman’s rate of \$300 per hour is not reasonable for a
23 case of this nature. Although Philip Talmadge can bill \$300 per hour for work
24 that requires his special expertise, that rate is unreasonable in a case of this type.
25 \$250 per hour for Emmelyn Hart-Biberfeld is a reasonable hourly rate given that
26 she performed the majority of the work on the motion. The Court therefore finds
27 that the reasonable hourly rate for all attorneys is \$250.00.
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1 14. The next step in the lodestar calculation is to determine the
2 reasonable number of hours expended by counsel. The Court is not required to
3 accept unquestioningly fee affidavits from counsel. From the Court's previous
4 experience in this case and in private practice, the Court finds that 6 hours per
5 day for two working weeks, or a total of 60 hours of attorney time, is reasonable
6 for the work of the Talmadge Law Group.
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10 15. The reasonable number of hours for Mr. Friedman to have expended
11 in this case, from start to finish, is 150 hours.
12
13

14 16. The Public Records Act permits recovery of reasonable costs and
15 not just statutory costs. Reasonable costs include legal messenger fees and
16 photocopying fees. Using the rate of \$0.20 per copy, as the League requests, is
17 reasonable. The League is entitled to statutory costs plus all of its reasonable
18 costs.
19
20
21

22 HAVING MADE these findings of fact, the Court reaches the following
23 CONCLUSIONS OF LAW:
24

25 1. The League is entitled to an award of attorney fees for its success in
26 obtaining public records wrongly withheld by the Port. The amount of attorney
27 fees to be awarded to the League for the work performed by Bernard Friedman is
28 \$37,500, determined by multiplying 150 hours by the reasonable hourly rate of
29 \$250. The amount of attorney fees to be awarded to the League for the work
30
31
32

1 performed by Talmadge Law Group is \$15,000, determined by multiplying 60
2 hours by the reasonable hourly rate of \$250. The total amount of attorney fees
3 awarded to the League and against the Port is \$52,500.
4

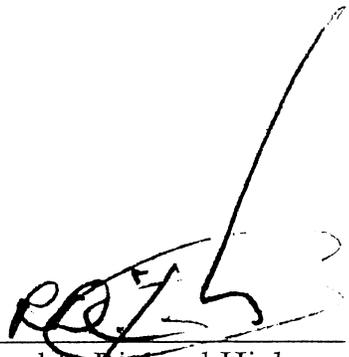
5
6 2. The League is entitled to an award of all statutory and reasonable
7 costs in the amount of \$770.92.
8

9 3. The League is entitled to sanctions against the Port for its wrongful
10 withholding of public records for a total of 123 days. The League and Jorgensen
11 are awarded a penalty of \$60 per day for 123 days, for a penalty award of \$7,380.
12

13 * See below

14 4. Judgment shall be entered in favor of the League and West for the
15 above amounts.
16

17 DATED this 17th of November, 2006.
18
19

20
21 
22 The Honorable Richard Hicks

23 * Arthur West is entitled to
24 sanctions against the
25 Port for its wrongful
26 withholding of records.
27 West is awarded
28 a penalty of \$60 per
29 day for 123 days, for
30 a penalty award of
31 \$7,380. AND IS TREATED
32 IN A LIKE MANNER
REGARDING THE MONETARY
SANCTIONS AWARDED.

Presented by:



Philip A. Talmadge, WSBA #6973
Emmelyn Hart-Biberfeld, WSBA #28820
Talmadge Law Group PLLC
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661
Attorneys for Petitioners
Walter Jorgensen and
The League of Women Voters

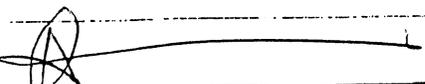


1 Approved as to Form;
2 Notice of Presentation Waived:

3 
4

5 Carolyn A. Lake, WSBA #13980
6 Goodstein Law Group, PLLC
7 1001 Pacific Avenue, Suite 400
8 Tacoma, WA 98402-4440
9 (253) 779-4000
10 Attorneys for Defendant Port of Olympia

11 *Right to object reserved*
12 ~~Approved as to Form;~~
13 ~~Notice of Presentation Waived:~~

14 
15

16 Arthur West, Pro se
17 120 State Avenue, Suite 1497
18 Olympia, WA 98501
19

20 Approved as to Form;
21 Notice of Presentation Waived:

22 
23

24 Matthew R. Hansen, WSBA #36631
25 Jeffrey August Beaver, WSBA #16091
26 Graham & Dunn PC
27 2801 Alaskan Way, Suite 300
28 Seattle, WA 98121-1128
29 Phone: (206) 340-9652
30 Attorneys for Respondent-Intervenor
31 Weyerhaeuser
32

Findings of Fact and Conclusions Re:
Attorney Fees, Costs, and Penalties - 9

Talmadge Law Group PLLC
18010 Southcenter Parkway
Tukwila, Washington 98188-4630
(206) 574-6661 (206) 575-1397 Fax

DECISION ON DOCUMENTS
 PRA dated 1/6/2006
 Lawsuit filed 1/24/2006

Doc. #	Should have disclosed or redacted	Disclosed 1/23/06	Lawsuit filed 1/24/06	Disclosed 1/27/06	Disclosed 3/3/06	Court's ruling 3/29/06	Disclosed 4/12/06	Disclosed 5/18/06	Disclosed 5/24/06	# records	Days delay or wrongly withheld	Comments
000022-23	Yes	Yes				Not exempt	Yes			1	18	
000026	Yes					Not exempt		Yes		1	133	Port's reconsideration denied
000030	Yes					Not exempt	Yes			1	97	
000031	Yes					Not exempt	Yes			1	97	
000035	Yes					Not exempt	Yes			1	97	
000036	Yes					Not exempt	Yes			1	97	
000037	Yes					Not exempt	Yes			1	18	Disclosed even though Port claimed exempt in 1/23 privilege log.
000049	Yes	Yes				Not exempt		Yes		1		
000050-53	Yes					Not exempt	No	Yes		3	133	Port's reconsideration denied
000054-55	Yes					Not exempt	Yes			1	97	
000069-73	Yes					Not exempt	Yes			3	97	
000074	Yes				Yes	Not exempt	Yes			2	57	
000075	Yes				Yes	Not exempt	Yes			3	57	
000076	Yes					Not exempt	Yes; redacted	Yes; unretracted		3	97	Unredacted not provided until 5/18.
000099-101	Yes				Yes; redacted	Not exempt	Yes; redacted			1	133	Unredacted copy not provided.
										9	270 ¹	

¹ A delay of 270 days is based on withholding through October 1, 2006.

Doc. #	Should have disclosed or redacted	Disclosed 1/23/06	Lawsuit filed 1/24/06	Disclosed 1/27/06	Disclosed 3/3/06	Court's ruling 3/29/06	Disclosed 4/12/06	Disclosed 5/18/06	Disclosed 5/24/06	# records	Days delay or wrongly withheld	Comments
000102-103	Yes				Yes; 103 provided but 102 redacted.	Not exempt			Yes; 102 unredacted; 103 not provided.	4	57	Unredacted copy not provided until 5/24.
000104-106					Yes	Not exempt w/redactions			Yes	1	139	Signature page only
000107						Not exempt w/redactions	No			4	57	
000108-110					Yes	Exempt with redactions	No			15	57	#000111-114 disclosed 3/3/06.
000111-116					Yes; 111-114	Exempt with redactions			Yes; 115-116	2	139	#000115-000116 not disclosed until 5/24/06
000118	Yes				Yes	Not exempt	Yes			1	57	
000154	Yes					Not exempt	Yes			1	97	
000155-156					Yes					3	57	
000208-209	Yes					Not exempt	Yes			2	97	
000225	Yes					Not exempt	Yes			1	97	
000247-249	Yes	Yes				Not exempt	Yes			2	97	
000250	Yes	Yes				Not exempt	Yes			1	97	
000290-297	Yes	Yes				Not exempt	Yes			1	97	
000382-385	Yes					Not exempt	Yes			UNK ²	97	
										UNK	270	Missing #000383.
000395	Yes					Not exempt	Yes			1	97	

² Use of "UNK" indicates the total number of records withheld is unknown because the Port failed to provide certain pages within the series.

Doc. #	Should have disclosed or redacted	Disclosed 1/23/06	Lawsuit filed 1/24/06	Disclosed 1/27/06	Disclosed 3/3/06	Court's ruling 3/29/06	Disclosed 4/12/06	Disclosed 5/18/06	Disclosed 5/24/06	# records	Days delay or wrongly withheld	CA status
000397	Yes					Not exempt	No	Yes		1	133	Port's reconsideration denied
000473-487	Yes					Exempt except as to 484; Court later rules 484-487 not exempt	No	Yes, but only 486-487	Yes, but only 484	1	133	Missing 00473-483, and 00485
000488					Yes	Exempt as redacted				2	57	Heavily redacted.
000527	Yes					Not exempt	Yes			1	97	
000546-547	Yes					Not exempt	Yes			1	97	
000560	Yes				Yes	Not exempt	Yes			1	97	
000565	Yes					Not exempt as redacted by court	No			UNK	270	On 5/18, Lake indicates she doesn't have redactions done by Court.
000568	Yes					Not exempt	No	Yes		1	133	Reconsideration denied.
000569	Yes					Not exempt as redacted by court	No	Yes		3	133	Port's reconsideration denied.
000570	Yes					Not exempt	No	Yes		1	133	Port's reconsideration denied. Not redacted.
000573-601	Yes					Not exempt	No		Yes, but only 573-74	1	139	Port's reconsideration denied. Court said #000573-601 not exempt.
										UNK	270	Missing 00576-601.

Doc. #	Should have disclosed or redacted	Disclosed 1/23/06	Lawsuit filed 1/24/06	Disclosed 1/27/06	Disclosed 3/3/06	Court's ruling 3/29/06	Disclosed 4/12/06	Disclosed 5/18/06	Disclosed 5/24/06	# records	Days delay or wrongly withheld	Comments
000700						Exempt as redacted by Port	No			UNK	270	5/26 Court ordered Port to produce by 5/30.
000721						Exempt as redacted by Port	No		Yes	3	139	Still missing. Not redacted.
000722						Exempt as redacted by Port	No		Yes	1	139	Redacted.
00723-724					Yes	Exempt as redacted by Port	No			2	57	Redacted.
000768					Yes	Not exempt	No			1	57	Disclosed although claimed exempt.
000769					Yes	Exempt as redacted by Port				1	57	Heavily redacted.
000772		Yes.				Exempt as redacted by Port				1	18	Completely redacted.
000789						Exempt			Yes	1	0	
000790	Yes				Yes; redacted	Not exempt	No			1	270	5/26 Court ordered Port to provide.
000792					Yes	Exempt as redacted by Port				1	57	Still missing unredacted copy. Redacted.
000793-794						Exempt as redacted by Port				UNK	270	No copy provided, redacted or otherwise.

Doc. #	Should have disclosed or redacted	Disclosed 1/23/06	Lawsuit filed 1/24/06	Disclosed 1/27/06	Disclosed 3/3/06	Court's ruling 3/29/06	Disclosed 4/12/06	Disclosed 5/18/06	Disclosed 5/24/06	# records	Days delay or wrongly withheld	Comments
00795					Yes	Exempt as redacted				1	57	
00796					Yes	Exempt				1	57	
00797-802					Yes	Exempt				1	0	Heavily redacted.
000803-805					Yes	Exempt as redacted by Port				UNK	57	000803 disclosed heavily redacted; 000804 disclosed unredacted.
000807					Yes	Exempt				1	57	Missing 000805 (part of string). Disclosed but heavily redacted
000808					Yes	Exempt				2	57	Disclosed unredacted.
000815	Yes					Not exempt	No		Yes	1	133	Reconsideration denied.
000816-000817					Yes	Exempt				1	57	Disclosed unredacted.
000821					Yes	Exempt as redacted by Port				2	57	Heavily redacted.
000832		Yes				Not claimed exempt				1	18	
000833						Not claimed exempt			Yes	1	133	
000834	Yes					Not exempt	Yes			UNK	270	Missing.
000839	Yes				Yes	Not exempt	Yes			1	57	
000840	Yes					Not exempt	Yes			1	97	

Doc. #	Should have disclosed or redacted	Disclosed 1/23/06	Lawsuit filed 1/24/06	Disclosed 1/27/06	Disclosed 3/3/06	Court's ruling 3/29/06	Disclosed 4/12/06	Disclosed 5/18/06	Disclosed 5/24/06	# records	Days delay or wrongly withheld	Comments
000921	Yes					Not exempt	No			1	270	Port's reconsideration denied. 5/18 Lake indicates will be provided separately; however, oversized document. 5/20 Court ordered Port to provide by 5/30. Still missing.
000933-938	Yes					Portions exempt	No			UNK	270	Port has not disclosed these documents with Court's redactions.
000939	Yes					Not exempt	No		Yes	1	139	Reconsideration denied.
000940-942	Yes					Exempt as redacted	Yes			1	97	Disclosed heavily redacted
000943-944	Yes			Yes		Not exempt	Yes			1	97	
000945	Yes					Not exempt	Yes			1	97	
000946	Yes					Not exempt	Yes			2	97	
000947	Yes					Not exempt	Yes			1	97	
000948	Yes					Not exempt	Yes			UNK	133	Port's reconsideration denied.
000949-950	Yes					Not exempt as redacted by court	No	Yes, but only 949		UNK	270	Missing 000950.
000951-987	Yes					Not exempt as redacted				UNK	270	Missing.
001006				Yes	Yes					1	22	
001010				Yes	Yes					1	22	

Doc. #	Should have disclosed or redacted	Disclosed 1/23/06	Lawsuit filed 1/24/06	Disclosed 1/27/06	Disclosed 3/3/06	Court's ruling 3/29/06	Disclosed 4/12/06	Disclosed 5/18/06	Disclosed 5/24/06	# records	Days delay or wrongly withheld	Comments
001015-1017						Not exempt	No		Yes	2	139	
0001018-1021	Yes					Not exempt	No	Yes, but only 1018		UNK	133	Port's reconsideration denied.
001022	Yes				Yes; redacted	Not exempt	No		Yes; unredacted	2	57	Missing 001019-1020.
001069-1070					Yes	Not exempt				3	57	Disclosed 3/3 even though not exempt.
001071-001072	Yes				Yes; 1071 and 1072 with redaction	Not exempt			Yes; 1072 only. unredacted	8	57	Disclosed on 3/3 with redactions on 1072 even though Court ruled not exempt.
001073	Yes					Not exempt except as redacted by court	Yes			4	97	
001074	Yes					Not exempt	No		Yes	4	139	
001075-1084	Yes					Not exempt				UNK	270	Missing.
001085	Yes				Yes	Not exempt	No			5	57	
001086	Yes					Not exempt except as redacted by court	Yes; redacted	Yes; unredacted		4	97	
										1	133	
001087	Yes					Not exempt	No	Yes		4	133	
001088	Yes				Yes	Not exempt	No			1	57	
001089					Yes; redacted	Not exempt	No		Yes; unredacted	2	57	
										1	139	

Doc. #	Should have disclosed or redacted	Disclosed 1/23/06	Lawsuit filed 1/24/06	Disclosed 1/27/06	Disclosed 3/3/06	Court's ruling 3/29/06	Disclosed 4/12/06	Disclosed 5/18/06	Disclosed 5/24/06	# records	Days delay or wrongly withheld	Comments
001090					Yes; redacted	Not exempt	No		Yes; unredacted	2	57	
001091	Yes				Yes; redacted	Not exempt except as redacted by court	Yes			2	57	
001092-1129	Yes									UNK	270	Missing.
001101	Yes					Not exempt	No		Yes	1	139	
001102	Yes					Not exempt	No		Yes	3	139	
001225-1226	Yes					Exempt except for Clark msg of May 4, 9:08 a.m.	Yes			3	97	Port redacted only Clark msg of May 4 and nothing else. Port provided only #001225.
001227-1229	Yes				Yes	Partially exempt	No			2	57	
001230-1261	Yes				Yes	Exempt				2	57	Partially redacted.
001264-1292					Yes; redacted	Exempt except as to portion made public by Court				2	57	But 001264-1292 exempt
001293	Yes				Yes; redacted	Not exempt	Yes			2	57	Should have been unredacted.
001295-1333	Yes					Not exempt except as redacted by court	Yes	Yes		3	97	Port's reconsideration denied.
001334	Yes				Yes; redacted	Not exempt	Yes; unredacted			1	57	
001336-1337					Yes; redacted	Exempt				1	0	Exempt

Doc. #	Should have disclosed or redacted	Disclosed 1/23/06	Lawsuit filed 1/24/06	Disclosed 1/27/06	Disclosed 3/3/06	Court's ruling 3/29/06	Disclosed 4/12/06	Disclosed 5/18/06	Disclosed 5/24/06	# records	Days delay or wrongly withheld	Comments
001338	Yes				Yes; redacted	Not exempt except as redacted by court	Yes; redacted			3	57	
001343					Yes; redacted	[No ruling]				1	57	Port didn't claim exempt.
001344						Port didn't claim exempt				UNK	270	Missing unredacted copies.
001351					Yes; redacted	Partially exempt				1	57	
001355					Yes	Exempt				4	57	
001359					Yes	Exempt				1	57	
001360-1405					Yes	Exempt				1	57	
001406-1436					Yes; redacted	Exempt				1	57	
001440-					Yes; redacted	Exempt				2	57	
001473					Yes					1	57	
001474					Yes					1	57	
001475					Yes; redacted	Hughes msg not exempt; remainder exempt	Yes			1	97	
001476	Yes					Exempt	Yes			1	0	Port produced unredacted copy
001477	Yes									1	22	
001487-1488				Yes	Yes; 1487 only							
001489						Not exempt	No	No	No	UNK	270	5/26 Court ordered Port to provide.
												Still missing.

Doc. #	Should have disclosed or redacted	Disclosed 1/23/06	Lawsuit filed 1/24/06	Disclosed 1/27/06	Disclosed 3/3/06	Court's ruling 3/29/06	Disclosed 4/12/06	Disclosed 5/18/06	Disclosed 5/24/06	# records	Days delay or wrongly withheld	Comments
001496-1497	Yes				Yes; redacted	One email not exempt	No			UNK	270	Only 001496 disclosed on 3/3. Missing #001497.
001498					Yes; redacted	Exempt?				1	0	
001499-1501				Yes; all pages	Yes; missing 1500-1501					4	22	
001502				Yes	Yes	Not exempt	No			1	22	
001503					Yes; redacted					UNK	57	Missing #001504.
001505-1508	Yes				Yes; redacted	Not exempt	Yes			2	57	
001509	Yes				Yes	1505 Cover email not exempt but attachments are				1	97	
001510-1511	Yes				Yes	Exempt				0	0	Notes say 001506-1511 are exempt; however, 001510 provided. But #001510 provided.
001512					Yes	Not exempt	No			1	57	
001516-17.					Yes; redacted					13	57	
001519										UNK	270	
001521					Yes					1	57	
001522						Not exempt	No		Yes	1	139	
001525-1526						Not exempt	No		Yes	1	139	
001531-1537	Yes					Not exempt	No		Yes	1	139	
001546	Yes					Not exempt	Yes			1	97	
001547	Yes					Not exempt	Yes			1	97	
001548										1	57	
001558	Yes				Yes	Not exempt except as redacted by	Yes			3	97	

Doc. #	Should have disclosed or redacted	Disclosed 1/23/06	Lawsuit filed 1/24/06	Disclosed 1/27/06	Disclosed 3/3/06	Court's ruling 3/29/06	Disclosed 4/12/06	Disclosed 5/18/06	Disclosed 5/24/06	# records	Days delay or wrongly withheld	Comments
001559	Yes					court	No		Yes	1	139	
001580-001581					Yes	Not exempt				4	57	
001582-1583					Yes	Not exempt	No			6	57	
001598	Yes			Yes; redacted		Not exempt	No			2	22	Copy provided contains redaction. Reconsideration denied.
001603				Yes	Yes	Not exempt	Yes			1	22	
001621-1671	Yes					Not exempt				2	97	
001672	Yes					Not exempt	Yes			2	97	
001687	Yes					Partially exempt	Yes			2	97	
001688	Yes				Yes; redacted	Not exempt	No			1	270	Missing.
001694-1696	Yes					Partially exempt	No			1	270	#001694 disclosed with redaction.
001697					Yes					3	57	Court ruled not exempt. Missing unredacted copy.
001698					Yes					1	57	
001699	Yes				Yes; redacted	Not exempt	Yes; unredacted			1	57	
001700-1701					Yes; redacted	Partially exempt				1	97	
										1	57	

Doc. #	Should have disclosed or redacted	Disclosed 1/23/06	Lawsuit filed 1/24/06	Disclosed 1/27/06	Disclosed 3/3/06	Court's ruling 3/29/06	Disclosed 4/12/06	Disclosed 5/18/06	Disclosed 5/24/06	# records	Days delay or wrongly withheld	Comments
001702	Yes				Yes; redacted	Not exempt	Yes; unredacted			1	57	
001703	Yes					Not exempt	Yes			1	97	
001704	Yes			Yes	Yes	Not exempt except as redacted by court	Yes			3	57	
001705-1707	Yes				Yes; redacted	Exempt except for first email	No			1	57	Disclosed on 3/2, but with redaction in first email.
001708-1709	Yes				Yes; redacted	Not exempt	Yes; unredacted			4	97	
001710-1711	Yes					Exempt except for cover email	No		Yes; only 1711	1	270	Missing #001710 cover email.
001713				Yes	Yes					1	22	
001714					Yes					1	57	
001715	Yes					Not exempt	Yes; unredacted		Yes; unredacted	1	97	
001716	Yes					Not exempt	Yes; redacted		Yes; unredacted	1	97	
001719-1720	Yes					Partially exempt	Yes			3	133	
001721					Yes	Exempt				1	0	
001725	Yes					Not exempt	Yes			4	97	
001727	Yes					Cover email not exempt	Yes			1	97	
001729-1733	Yes					Not exempt except as redacted by court	Yes			2	97	
001734-1736	Yes					Not exempt	No		Yes	1	139	
001737-1738	Yes					Exempt except for first email	Yes			3	07	

Doc. #	Should have disclosed or redacted	Disclosed 1/23/06	Lawsuit filed 1/24/06	Disclosed 1/27/06	Disclosed 3/3/06	Court's ruling 3/29/06	Disclosed 4/12/06	Disclosed 5/18/06	Disclosed 5/24/06	# records	Days delay or wrongly withheld	Comments
001742					Yes	Exempt	No		Yes	1	57	
001744-1745						Exempt except for cover email				1	130	Only provided 001744. 001745 was exempt.
001746-1752	Yes				Yes; redacted	Exempt except for top of page	No			1	57	
001753	Yes				Yes; redacted	Not exempt	Yes; unredacted			1	57	
001754-1759	Yes				Yes	Partially exempt	No			1	97	
001760-1762	Yes				Yes; redacted	Not exempt			Yes; unredacted	1	57	
001763-1765	Yes				Yes	Not exempt except as redacted by court	No			1	139	
										UNK	270	5/26 Court ordered Port to provide by 5/30.
001766					Yes					2	57	
001813-1815	Yes				Yes	Not exempt except as redacted by court	Yes			8	97	
001816					Yes	Exempt?				1	0	
001819					Yes					1	57	
001820	Yes				Yes; redacted	Not exempt except as redacted by court	Yes; redacted		Yes; unredacted	1	97	
001822		Yes				Not exempt	No		No	1	22	
001823		Yes				Not exempt	No		No	2	22	
001824-1826	Yes	Yes; all			Yes; missing 1825-26	Not exempt	Yes			4	22	
001832					Yes					1	57	
001833					Yes					1	57	

Doc. #	Should have disclosed or redacted	Disclosed 1/23/06	Lawsuit filed 1/24/06	Disclosed 1/27/06	Disclosed 3/3/06	Court's ruling 3/29/06	Disclosed 4/12/06	Disclosed 5/18/06	Disclosed 5/24/06	# records	Days delay or wrongly withheld	Comments
001834-001835					Yes					2	57	
001836-001837			Yes		Yes					3	22	
001838	Yes				Yes	Not exempt	Yes			1	57	
001839-1842	Yes					Not exempt	Yes			2	97	
001843-1845	Yes					Not exempt	Yes			3	97	
001846-1875	Yes					Not exempt	No			0	0	Final lease - already disclosed elsewhere
001895-19445	Yes				Yes; redacted	Not exempt	Yes; unredacted			1	57	
001959					Yes; redacted					1	97	
002055					Yes; redacted					1	0	Exempt
002108					Yes; redacted					1	57	
002156					Yes					UNK	270	Still Missing.
002160					Yes					2	57	
002161					Yes					1	57	
002162			Yes		Yes					2	57	
002163-2167	Yes					Not exempt as redacted by court	No			UNK	270	Reconsideration denied. Still missing.
002168-2172	Yes					Partially exempt as redacted by court	Yes			16	97	The Port provided 002168, 002169, 002171, and 002172 entirely unredacted. 002170 is redacted per the court.
002173					Yes; redacted					1	0	Exempt

Doc. #	Should have disclosed or redacted	Disclosed 1/23/06	Lawsuit filed 1/24/06	Disclosed 1/27/06	Disclosed 3/3/06	Court's ruling 3/29/06	Disclosed 4/12/06	Disclosed 5/18/06	Disclosed 5/24/06	# records	Days delay or wrongly withheld	Comments
002176					Yes; redacted					1	0	Exempt
002221					Yes; redacted					1	0	Exempt
002284-2287	Yes					Not exempt except as redacted by court	Yes			UNK	97	Missing #002285 and 2287.
002290					Yes; redacted					1	0	Exempt
002293					Yes; redacted					3	0	Exempt
002295					Yes; redacted					1	0	Exempt
002331					Yes; redacted					1	0	Exempt
02386					Yes; redacted					1	0	Exempt
002392					Yes					2	57	
002393-2395	Yes				Yes	Not exempt	No	Yes	No	2	133	5/26 Court ordered Port to provide by 5/30. Port's reconsideration denied.
002396										2	57	
002398	Yes				Yes		Yes			2	97	
002400-2401	Yes			Yes			Yes			3	22	
002408										1	57	
002409	Yes				Yes	Not exempt	Yes			2	97	

Superior Court of the State of Washington
For Thurston County

Paula Casey, Judge
Department No. 1
Richard A. Strophy, Judge
Department No. 2
Wm. Thomas McPhee, Judge
Department No. 3
Richard D. Hicks, Judge
Department No. 4
Christine A. Pomeroy, Judge
Department No. 5
Gary R. Tabor, Judge
Department No. 6
Chris Wickham, Judge
Department No. 7



RECEIVED
MAR 31 2006

Scott C. Neilson
Court Commissioner
709-3201
Christine Schaller
Court Commissioner
709-3201

Marti Maxwell
Superior Court Administrator
Gary Carlyle
Assistant Superior Court Administrator
Ellen Goodman
Drug Court Program Administrator
357-2482

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**ORDER REQUIRING PUBLIC
DISCLOSURE SUBSEQUENT
TO *IN CAMERA* REVIEW**

Re: *West and League of Women's Voters, Jorgenson v. Port of Olympia*
Thurston County No. 06-2-00141-6

Dear Mr. West and Counsel:

In light of the following remarks in the next paragraph, I find it important to point out that it is the impression of this court (based on what little it knows, or, has been brought to it's attention) that the public authorities retaining the attorneys at the Port of Olympia, and the attorneys that they have retained, are honorable and this court is not the least critical of their character. The court's criticism below is addressed to an overly protective attitude, not of any perceived intent to deceive or mislead. It is always proper for counsel to harbor the intent of zealously representing their client's interest, often an

interest to protect by 'keeping it in the family,' but the PDA turns this protective principle inside out for public agencies. Here protection should be to maximize disclosure, consistent with narrowly construed exemptions, that, for the most part, protect other citizens, or, the effectiveness of the public agency. There is no bad faith here.

After reviewing *in camera* the documents sought to be kept secret by the Port of Olympia the court is left with a definite impression that the attitude of the Port, that is the platform from which they speak, is to maximize what can be kept secret and minimize what is to be made public. Instead of asking themselves, "What can we make available to the public," they ask, "What can we keep from the public"? This is exactly the all too ordinary attitude of secrecy that the PDA¹ was designed to confront. There is to be "broad disclosure," "liberally construed", with any claimed exemption "narrowly construed."² Instead they are protective of their information as if there was something to hide when there is little of that nature. The only big secret undisclosed is why do they come at it in this way?

Why does the court have this impression? The court found 102 pages or packets³ that should have been disclosed or redacted out of the 342 pages or packets⁴ the Port claimed as exempt. There were 2,409 pages given to the court to review *in camera* that make up the 342 packets.⁵ This does not include the many possible redactions pursuant to RCW 42.17.310(2) that the court 'passed' on the basis of *de minimis curat lex*. In addition many of these documents properly claimed as exempt under RCW 42.17.310(1)(i) as extended by the analysis found at *ACLU v. Seattle*, 121 Wn. App. 544, 550-553 (2004), work to give a broad construction, in this court's opinion, to what originally was intended to be a narrow exemption, yet this court must respect, and does respect, the authority of the higher court in *ACLU*. Hopefully, the Court of Appeals, Division II, should this be appealed, will give further guidance to trial courts which must decide how something that is properly exempt during deliberations continues to remain indefinitely exempt, even though the deliberations have been concluded and finalized. It seems to this court that

¹ Public Disclosure Act, in particular certain sections of chapter 42.17 RCW.

² *Servais v. Port of Bellingham*, 127 Wn.2nd 820, 826-828, (1995)

³ The 102 disclosable 'pages or packets' is more than 102 pages since a packet may contain many pages.

⁴ It was necessary for the court to review 2409 pages in 342 packets based on the agency submission. In fact there were a few more packets to review based on Weyerhaeuser's independent exhibit.

⁵ This review took almost two and one-half weeks of court time; and in the future, requestors of such large bundles of information, or, agencies who withhold such large numbers of documents requesting a court to review their decisions *in camera*, may well find the first stage of review is completed by a referee, if such is possible under either RCW 2.24.060, or, chapter 4.48 RCW, or, a discovery master pursuant to CR 53.3. Although this cost would have to be guaranteed out of the court's budget, for which no allowance is currently made, it might be assessed against the agency within the concept of sanctions if that were appropriate. There does not currently appear to be a way to recover this *in camera* review cost from a requestor, nor would such necessarily be wise in light of the purpose of the PDA (so as not to chill or cloud the transparency of government). If this trial court had not had two large civil cases settle at the last moment this review would have taken several months to work into the court's regular obligations.

the PDA must have intended for the public to be able to review on what basis a public decision was made, however, at the same time in light of the holding in *ACLU*, this comes into direct contradiction with the possible agency argument that, "we need to keep the basis secret because we might use such basis in some unknown future negotiation at some unknown future time." In this case, this court found many instances where the Port could properly advance this argument since they will from time to time find themselves in future negotiations with now known, and unknown tenants, yet the information is at best marginally (but genuinely) revealing of policy or strategies that once revealed could *arguably* (but not certainly) put the Port in some kind of bargaining disadvantage. Secondly, this impression of a secretive attitude is further reinforced by the many claimed exemptions under RCW 42.17.310(1)(h), which if standing alone would not support the exemption claimed, even under *Servais v. Port of Bellingham*, 127 Wn.2nd 820, 832 (1995),⁶ but which often was able to be kept back as exempt on the extended RCW 42.17.310(1)(i) exemption (as explained above) or on the basis of attorney-client privilege, see: *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

The Port submitted documents *in camera* in one large sealed box but at first only provided Exhibits A and B which dealt with emails only (and their attachments) covering packets 000933-002409. During separate hearings on March 3, 2006, in front of both departments three and four of Thurston County Superior Court the Port was requested to file more complete logs. On March 2, 2006, Weyerhaeuser submitted a memorandum as to material they considered proprietary, together with an exhibit that for the most part mirrored the exhibits submitted by the Port.

On March 3, Judge McPhee signed an Order consolidating the cases in front of this department. On that same date, March 3, 2006, the Port filed their revised second privilege log and revised expanded privilege log. Then on March 15, 2006, the Port filed an additional revised expanded privilege log covering packets 000022-000921 (also dated March 3, 2006 but filed on the 15th). On March 16, 2006, in response to a letter from the court, the Port verified that they had now filed all the logs pertaining to the box of 2,409 *in camera* documents. On March 20, 2006, after a comment from the court during the hearing of March 17, 2006, the Port filed an additional log showing what redactions they had made on earlier documents made public which could not be determined from just looking at the documents filed *in camera*.

This court had begun to make its *in camera* review based on the first filed exhibit by the time of the hearing on March 17, 2006.

⁶ *Servais* extended the 'research' exemption as originally explained in *PAWS v. UW*, 125 Wn.2nd 243, 256 (1994), to certain kinds of facts, collected for a specific purpose, after careful study, *Servais*, 127 Wn.2nd at 832.

Examination of Documents

000022-000023

The court does not find this exempt under .310(1)(h) as research, as there is no danger of someone appropriating intellectual property for private gain and it is not research data such as a body of facts derived from careful study such as the .310(1)(h) financial data or cash flow analysis found in *Servais v. Port of Bellingham*, 127 Wn.2nd 820, 832 (1995). It is also not exempt under the deliberative process exemption of .310(1)(i) even as extended by *ACLU v. Seattle*, 121 Wn. App. 544, 550-553 (2004), when one considers what this contains, how it was generated and who generated it, and that this is not an on-going process such as labor negotiations, but simply a press release. It is more of the nature of factual data held disclosable pursuant to *Brouillet v. Cowles*, 114 Wn.2nd 788, 799-800 (1990) citing *Hearst v. Hoppe*, 90 Wn.2nd 123, 133 (1978).

000026

This is a partial printout of a spreadsheet dated 5/31/05 which contains labeled columns of raw data. It has four unlabeled columns that include some kind of compilation (perhaps year-to-date sums in at least one case) and percentages that are not indicated of what they are a per-cent. It is not .310(1)(i) deliberative process opinion as claimed by the Port but rather raw data. The more difficult question is whether it qualifies as .310(1)(h) based on the four unlabeled columns and the principles in *Servais*, 127 Wn.2nd at 832. There is no way tell if this meets those principles based on what has been submitted and the Port has the burden to prove the exemption under *King Cty. v. Sheehan*, 114 Wn. App. 325, 336 (2002), RCW 42.17.340(1). Therefore, absent additional information, this must be disclosed. Weyerhaeuser also claims some exemption but this is not proprietary information as to them and they are hardly mentioned among the many entities that are.

000030

This flow chart of a proposed paving scheduled tied to the months in which weather is apparently a consideration is not .310(1)(i) deliberative process opinion as claimed by the Port but rather raw data but even if the comment "Tight?" expresses an opinion it does not survive the *ACLU*, 121 Wn. App. at pages 550-553 analysis, when one considers what this contains, how it was generated and who generated it, and that this is not an on-going process such as labor negotiations but simply when one can best lay pavement on the earth.

000031

The is same principle as 000030.

000032-000034

Although this is research data, and a proposed time line, it is difficult to see how if disclosed this could produce private gain and public loss under .310(1)(h). However, this

is a part of a deliberative process expressing an opinion that would qualify pursuant to .310(1)(i) and extended pursuant to *ACLU*, 121 Wn. App. at pages 550-553 analysis, when one considers what this contains, how it was generated and who generated it, and that this kind of consideration may be on-going process with other proposals similar to labor negotiations.

000035

This is apparently an estimate of June 19, 2005, to repair Berth 2 at the Port. Although this is research data, and a proposed repair cost, it is difficult to see how if disclosed this could produce private gain and public loss under .310(1)(h). Although this may have been preliminary data gathered in considering the Weyerhaeuser proposal it is not .310(1)(i) deliberative process opinion as claimed by the Port but rather raw data but even if the 'estimate' expresses an opinion it does not survive the *ACLU*, 121 Wn. App. at pages 550-553 analysis, when one considers what this contains, how it was generated and who generated it, and that this is not an on-going process such as labor negotiations but simply what it would cost to repair a damaged berth at the Port.

000036

This appears to be a duplicate of 000035.

000037

This is an estimate to upgrade certain fenders at the Port. Although this is research data, and a proposed repair cost, it is difficult to see how if disclosed this could produce private gain and public loss under .310(1)(h). Although this may have been preliminary data gathered in considering the Weyerhaeuser proposal it is not .310(1)(i) deliberative process opinion as claimed by the Port but rather raw data but even if the 'estimate' expresses an opinion it does not survive the *ACLU*, 121 Wn. App. at pages 550-553 analysis, when one considers what this contains, how it was generated and who generated it, and that this is not an on-going process such as labor negotiations but simply what it would cost to repair a damaged berth at the Port. The court does not find this exempt under .310(1)(h) as the kind of research data that is exempt, as there is no danger of someone appropriating intellectual property for private gain and it is not research data such as a body of facts derived from careful study such as the .310(1)(h) financial data or cash flow analysis found in *Servais v. Port of Bellingham*, 127 Wn.2nd 820, 832 (1995).

000041

Although this is research data, and a proposed time line, it is difficult to see how if disclosed this could produce private gain and public loss under .310(1)(h). However, this is a part of a deliberative process expressing an opinion that would qualify pursuant to .310(1)(i) during deliberations and can be extended by the Port pursuant to *ACLU*, 121 Wn. App. at pages 550-553 analysis, when one considers what this contains, how it was generated and who generated it, and that this kind of consideration may be on-going process with other proposals similar to labor negotiations.

000042

Similar to above.

000043

Similar to above.

000044

Similar to above.

000045

Similar to above.

000046

Similar to above.

000047

Similar to above.

000048

Similar to above, although not much different from the information in 000030, it contains some additional data and hand written notes (on both sides).

000049-000053

This is both a chart of longshoremen hours worked in the past on certain ships and estimates for the future of such hours for Weyco log cargo on a per ship basis. Although this is research data, and a estimate of longshoremen hours, it is difficult to see how if disclosed this could produce private gain and public loss under .310(1)(h). Although this may have been preliminary data gathered in considering the Weyerhaeuser proposal it is not so much .310(1)(i) deliberative process opinion as claimed by the Port but rather raw data but even if the 'estimate' expresses an opinion it does not survive the *ACLU*, 121 Wn. App. at pages 550-553 analysis, when one considers what this contains, how it was generated and who generated it, and that this is not an on-going process such as labor negotiations but simply an estimate of longshoremen labor cost to load a certain kind of log ship at the Port. The court does not find this exempt under .310(1)(h) as the kind of research data that is exempt, as there is no danger of someone appropriating intellectual property for private gain and it is not research data such as a body of facts derived from careful study such as the .310(1)(h) financial data or cash flow analysis found in *Servais v. Port of Bellingham*, 127 Wn.2nd 820, 832 (1995). The burden of proof has not been met that shows by narrowly construing the exemption this kind of information should be secret since some of it is actual hours and the balance a simple, though apparently complete, estimate.

000054-000055

This appears to be a July 5, 2005, estimate from Jones Stevedoring Company for the proposed cost to load tons of sand in bags. Although this is research data, and an estimate of hypothetical costs to log bags of sand, it is difficult to see how if disclosed this could produce private gain and public loss under .310(1)(h). Although this may have been preliminary data gathered in considering the Weyerhaeuser proposal it is not so much .310(1)(i) deliberative process opinion as claimed by the Port but rather raw data but even if the 'estimate' expresses an opinion it does not survive the *ACLU*, 121 Wn. App. at pages 550-553 analysis, when one considers what this contains, how it was generated and who generated it, and that this is not an on-going process such as labor negotiations but simply an estimate to load a certain kind of ship at the Port. The court does not find this exempt under .310(1)(h) as the kind of research data that is exempt, as there is no danger of someone appropriating intellectual property for private gain and it is not research data such as a body of facts derived from careful study such as the .310(1)(h) financial data or cash flow analysis found in *Servais v. Port of Bellingham*, 127 Wn.2nd 820, 832 (1995). The burden of proof has not been met that shows by narrowly construing the exemption this kind of information should be secret since some of it is actual hours and the balance a simple, though apparently complete, estimate.

000069-000073

These are three emails dated March 9, 2005, between George Fox and Jim Amador requesting information about Weyerhaeuser. The pre-deliberative opinions expressed would be exempt pursuant to .310(1)(i) during deliberations but most of the email is passing on to the Port information already public and filed with the SEC in Weyerhaeuser's 10-K form and so is public now and was then. Accordingly, it does not survive the *ACLU*, 121 Wn. App. at pages 550-553 analysis, when one considers what this contains, how it was generated and who generated it, and that this is not an on-going process such as labor negotiations but simply an opinion, most of which is already public record, as to whether Weyerhaeuser will endure in the kind of business of selling logs in the Northwest. It is not exempt.

000074

Here is a document that has been made public and the Port still claims it is exempt under .310(1)(i) and .310(1)(h). This is an example of not broadly construing the PDA and narrowly construing the exemptions but just the opposite. It is not exempt even if it had not already been made public since it does not survive the *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000075

Same principles as above.

000076

This email does not contain Port policy recommendations as claimed but Weyerhaeuser requests none of which are trade secrets or proprietary. It is not exempt.

000077-000092

This packet is exempt pursuant to .310(1)(i) and is the most representative example of the *ACLU*, 121 Wn. App. at pages 550-553 analysis which retains exemption because of what it discloses that might come up in future negotiations. It is exempt.

000093-000098

Similar to above.

000099-000101

Here are emails that have been made public and the Port still claims are exempt under .310(1)(i) and .310(1)(h). This is an example of not broadly construing the PDA and narrowly construing the exemptions but just the opposite. It is not exempt even if it had not already been made public since it does not survive the *ACLU*, 121 Wn. App. at pages 550-553 analysis with the possible exception of one sentence the court has highlighted on page 000100.

000102-000103

Same as above with highlight on page 000102.

000104-000107

Here are emails, some already public, that qualify for exemption under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis except as redacted by the Port's submission of March 20, 2006.

000108-000110

Here are emails, some already public, that qualify for exemption under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis except as redacted by the Port's submission of March 20, 2006.

000111-000116

Here are emails, some already public, that qualify for exemption under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis except as redacted by the Port's submission of March 20, 2006.

000117

Here is an email, some part already public, that qualify for exemption under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000118-000151

The cover page is not exempt but the marked up lease, 000118-000151 qualifies for exemption under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis because it contains marks that are predecisional opinions or recommendations, which could injure the Port in future negotiations with others, might inhibit flow of recommendations and show recommendations of policy and opinions. Arguably, careful study of this may allow future negotiators of other leases with the Port to see how the Port was willing to "mark-up" the standard lease for Weyerhaeuser and would allow future negotiators insight to the Port's current points of negotiation using that public information for private gain under .310(1)(h).

000152

This predecisional map qualifies for exemption under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis because it contains geographical indications that are predecisional opinions or recommendations, which could injure the Port in future negotiations.

000153

This chart of proposed improvements qualifies for exemption under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis because it contains accommodations that are predecisional opinions or recommendations, which could injure the Port in future negotiations.

000154

Although this email contains predecisional coordination of proposed exhibits with the final lease and would be exempt during negotiations under .310(1)(i) it does not qualify for extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis because it would not be harmful in any future negotiations with other tenants once the lease itself is made public.

000155-000205

Apparently portions of this email and attachment have been made public but emails and the marked up lease, 000155-000205 qualifies for exemption under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis because it contains marks that are predecisional opinions or recommendations, which could injure the Port in future negotiations with others, might inhibit flow of recommendations and show recommendations of policy and opinions. Arguably, careful study of this may allow future negotiators of other leases with the Port to see how the Port was willing to "mark-up" the standard lease for Weyerhaeuser and would allow future negotiators insight to the Port's current points of negotiation.

000206-000207

Although this is research data, and a proposed time line, it is difficult to see how if disclosed this could produce private gain and public loss under .310(1)(h). However, this is a part of a deliberative process expressing an opinion that would qualify pursuant to .310(1)(i) during deliberations and can be extended by the Port pursuant to *ACLU*, 121 Wn. App. at pages 550-553 analysis, when one considers what this contains, how it was generated and who generated it, and that this kind of consideration may be on-going process with other proposals similar to labor negotiations.

000208-000209

These legal descriptions to Port property are already (if accurate) public record and don't qualify for exemption even though listed as an exhibit to the lease.

000210-000214

These documents and notes illustrate a proposed facility that was never build but reveal what the Port is willing to consider in certain lease situations so are exempt as part of a deliberative process expressing an opinion that would qualify pursuant to .310(1)(i) during deliberations and can be extended by the Port pursuant to *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000215-000224

This marked up draft qualifies for exemption under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis because it contains marks that are predecisional opinions or recommendations, which could injure the Port in future negotiations with others, might inhibit flow of recommendations and show recommendations of policy and opinions. Arguably, careful study of this may allow future negotiators of other leases with the Port to see how the Port was willing to "mark-up" the standard lease for Weyerhaeuser and would allow future negotiators insight to the Port's current points of negotiation.

000225

This is not exempt.

000226

This marked up draft qualifies for exemption under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis because it contains marks that are predecisional opinions or recommendations, which could injure the Port in future negotiations with others, might inhibit flow of recommendations and show recommendations of policy and opinions. Arguably, careful study of this may allow future negotiators of other leases with the Port to see how the Port was willing to "mark-up" the standard lease for Weyerhaeuser and would allow future negotiators insight to the Port's current points of negotiation.

000227-000228

This email exchange is exempt .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis and it is exempt under .310(1)(h) as the kind of research data that is exempt, as there is danger of someone appropriating intellectual property for private gain and it is research data such as a body of facts derived from careful study such as the .310(1)(h) financial data or cash flow analysis found in *Servais v. Port of Bellingham*, 127 Wn.2nd 820, 832 (1995).

000229-000238

These documents are exempt under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis and also is exempt under .310(1)(h) as the kind of research data that is exempt, as there is danger of someone appropriating intellectual property for private gain and it is research data such as a body of facts derived from careful study such as the .310(1)(h) financial data or cash flow analysis found in *Servais v. Port of Bellingham*, 127 Wn.2nd 820, 832 (1995).

000239-000246

These documents are exempt under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis and also is exempt under .310(1)(h) as the kind of research data that is exempt, as there is danger of someone appropriating intellectual property for private gain and it is research data such as a body of facts derived from careful study such as the .310(1)(h) financial data or cash flow analysis found in *Servais v. Port of Bellingham*, 127 Wn.2nd 820, 832 (1995).

000247

This photocopy of business cards is not exempt.

000248-000249

This list of public phone number is not exempt.

000250

This Jones Stevedoring monthly log comparison is not exempt.

000251-000252

These documents are exempt under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis and also is exempt under .310(1)(h) as the kind of research data that is exempt, as there is danger of someone appropriating intellectual property for private gain and it is research data such as a body of facts derived from careful study such as the .310(1)(h) financial data or cash flow analysis found in *Servais v. Port of Bellingham*, 127 Wn.2nd 820, 832 (1995).

000253-000255

This is exempt under .310(1)(h) as the kind of research data that is exempt, as there is danger of someone appropriating intellectual property for private gain and it is research data such as a body of facts derived from careful study such as the .310(1)(h) financial data or cash flow analysis found in *Servais v. Port of Bellingham*, 127 Wn.2nd 820, 832 (1995).

000256-000259

This is exempt under .310(1)(h) as the kind of research data that is exempt, as there is danger of someone appropriating intellectual property for private gain and it is research data such as a body of facts derived from careful study such as the .310(1)(h) financial data or cash flow analysis found in *Servais v. Port of Bellingham*, 127 Wn.2nd 820, 832 (1995).

000260-000262

This is exempt under .310(1)(h) as the kind of research data that is exempt, as there is danger of someone appropriating intellectual property for private gain and it is research data such as a body of facts derived from careful study such as the .310(1)(h) financial data or cash flow analysis found in *Servais v. Port of Bellingham*, 127 Wn.2nd 820, 832 (1995).

000263-000265

Same as above.

000266

Same as above.

000267

Same as above.

000268

Same as above.

000269

Same as above.

000270

Same as above

000271-000272

Same as above.

000274

This predecisional map qualifies for exemption under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis because it contains geographical indications that are predecisional opinions or recommendations, which could injure the Port in future negotiations.

000275

This is exempt under .310(1)(h) as the kind of research data that is exempt, as there is danger of someone appropriating intellectual property for private gain and it is research data such as a body of facts derived from careful study such as the .310(1)(h) financial data or cash flow analysis found in *Servais v. Port of Bellingham*, 127 Wn.2nd 820, 832 (1995).

000276

Same as above.

000277-000282

These documents are exempt under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis and also is exempt under .310(1)(h) as the kind of research data that is exempt, as there is danger of someone appropriating intellectual property for private gain and it is research data such as a body of facts derived from careful study such as the .310(1)(h) financial data or cash flow analysis found in *Servais v. Port of Bellingham*, 127 Wn.2nd 820, 832 (1995).

000283-000287

Same as above.

000288-000289

Same as above.

000290-000297

This 'report' by Jones Stevedoring regarding Washington and Oregon ports is not exempt.

000298-000299

These documents are exempt under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000300-000305

These documents are exempt under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000306

Same as above.

000307-000310

Same as above.

000311-000314

Same as above.

000315-000320

Same as above.

000321-000325

Same as above.

000326-000331

Same as above.

000332-000338

Same as above.

000339-000344

Same as above.

000345-000351

Same as above.

000352-000358

Same as above.

000359-000363

Same as above.

000364-000367

Same as above.

000364-000367

Same as above.

000368-000371

Same as above.

000372

Same as above.

000373-000374

Same as above.

000375-000376

Same as above.

000377-000379

Same as above.

000380-000381

Same as above.

000382-000385

These tariff charges are not exempt and don't show any pre-deliberative notes of any kind. The Port may have already published these.

000387

These documents are exempt under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000388

Same as above.

000389

This an email that is exempt under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis and exempt through Weyerhaeuser's claim that this is exempt pursuant chapter 19.108 RCW through RCW 42.17.20(1), disclosing limitations, abilities and business plans of Weyerhaeuser that might be used to gain a competitive advantage.

000390-000392

These documents are exempt under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000393

Same as above.

000394

Same as above.

000395

This email is not exempt in its entirety (this is not a ruling on the indicated attachment).

000396

These documents are exempt under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000397

This chart of current rates is not exempt.

000398-000412

These documents are exempt under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000413-000422

Same as above.

000423-000436

Same as above.

000437-000445

Same as above.

000446-000455

Same as above.

000456-000459

Same as above.

000460-000469

Same as above.

000470-000471

Same as above.

000472

Same as above.

000473-000487

Same as above, except the emails at 000484 are not exempt.

000488

Public as indicated by the Port except as redacted in the exhibit of March 20, 2006.

000489-000491

These documents are exempt under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000492-000526

Same as above.

000527

Not exempt.

000528

This a close issue but the court finds this document exempt under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis, consistent with similar findings for similar charts above.

000529-000530

These documents are exempt under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000531-000533

These documents are exempt under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000534

Same as above.

000535-000539

Same as above.

000540

Same as above.

000541-000544

Same as above.

000545

This is close but there is one line that interprets the rest of the information in a way exempt under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000546-000547

This might have been exempt during deliberations but does not meet the *ACLU*, 121 Wn. App. at pages 550-553 analysis for extension and is not exempt.

000548-000551

These documents are exempt under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000552-000554

Same as above.

000555-000559

Same as above.

000560

The Port has apparently made this public. This might have been exempt during deliberations but does not meet the *ACLU*, 121 Wn. App. at pages 550-553 analysis for extension and is not exempt.

000561-00563

These documents are exempt under .310(1)(i) and extension under *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000564

Same as above.

000565-000572

The Port claim this string of emails and attachments is exempt under .310(1)(i) and (h) and much of it is. However, there are more than *de minimis non curat lex* portions that are subject to redaction pursuant to .310(2). The court has redacted those portions that need not be disclosed. Page 000565 is disclosed except for the redactions highlighted. Pages 000566-000567 are exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions. Page 000568 is not exempt. Page 000569 is not exempt except for the redactions highlighted. Page 000570 is not exempt. Pages 000571-000572 are exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis and .310(1)(h).

000573-000601

Pages 000573-000575 are not exempt. Pages 000576-000601 are exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (even though this contains nondescript *de minimis non curat lex* portions that in this instance need not

cause significant redaction, including at least one short piece that was earlier ruled disclosable).

000602-000609

These pages are exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions).

000610-000613

Same as above.

000614-000622

Same as above.

000623-000640

Same as above.

00641-000681

Same as above.

000682-000713

These pages are exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions).

000715

This page is exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions).

000716-000717

These pages are exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions).

000718-000720

Same as above.

000721

This page is exempt as redacted by the Port in the Exhibit filed March 20, 2006, pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions).

000722

Same as above.

000723-000724

These pages are exempt as redacted by the Port in the Exhibit filed March 20, 2006, pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions).

000725-000744

These pages are exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions).

000745-000764

Same as above.

000765

This page is exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis and .310(1)(h).

000766-000767

These pages are exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions).

000768

This has apparently been disclosed, though it is claimed exempt.

000769-000770

These pages are exempt as redacted by the Port in the Exhibit filed March 20, 2006, pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions).

000771

This page is exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis and .310(1)(h).

000772

This page is exempt as redacted by the Port in the Exhibit filed March 20, 2006, pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions).

000773-000788

Apparently some part of this has been made public and another part redacted but such redaction is not indicated on the Exhibit filed March 20, 2006. The court finds this qualifies as exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions).

000789

Apparently some part of this has been made public. The court finds this qualifies as exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions).

000790

The court finds this is not exempt, nor necessary to redact as indicated on the Exhibit filed March 20, 2006.

000791

This page is exempt as redacted by the Port in the Exhibit filed March 20, 2006, pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions).

000792-000794

This page is exempt as redacted by the Port in the Exhibit filed March 20, 2006, pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions).

000795

This page is exempt as redacted by the Port in the Exhibit filed March 20, 2006, pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions).

000796

Apparently some part of this has been made public. The court finds this qualifies as exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions) as Exhibit filed March 20, 2006.

000797-000802

This email between the Port's attorney and the Port is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

000803-000805

This page is exempt as redacted by the Port in the Exhibit filed March 20, 2006, pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions), and exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

000806

Apparently some part of this has been made public. The court finds this qualifies as exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions) as Exhibit filed March 20, 2006.

000807

Same as above.

000808-000814

Apparently some part of this has been made public. The court finds this qualifies as exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions) though not indicated in Exhibit filed March 20, 2006.

000815

This is not exempt.

000816-000819

Apparently some part of this has been made public. The court finds this qualifies as exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions) as Exhibit filed March 20, 2006.

000820

This page is exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis and .310(1)(h).

000821-000822

Apparently some part of this has been made public. The court finds this qualifies as exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions) as Exhibit filed March 20, 2006.

000823

This page is exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000824

Apparently some part of this has been made public. The court finds this qualifies as exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions) as Exhibit filed March 20, 2006.

000825-000826

These pages are exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000827-000831

Same as above.

000832-000833

This is not claimed exempt.

000834-000838

Page 000834 is not exempt. The balance is exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis. However, since the content is intended for public distribution why it is claimed, even though it can be, is unusual.

000839-000840

This is not exempt.

000841

Apparently some part of this has been made public. The court finds this qualifies as exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis (except for certain nondescript *de minimis non curat lex* portions) as Exhibit filed March 20, 2006.

000842

These pages (front and back) are exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000843-000845

These pages are exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000846

Same as above.

000847

Same as above.

000849

This page is exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000895

This page is exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis as well as 301(1)(h).

000898

This page is exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000899

This page is exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis.

000917.1 & .2

This page is exempt pursuant to .310(1)(i) as extended by *ACLU*, 121 Wn. App. at pages 550-553 analysis as well as 301(1)(h).

000921

This survey is not exempt and may even be filed for public record.

After reviewing the above packets the court finds the following thirty-seven (37) packets or pages should have been disclosed or redacted:

000022-000023
000026
000030
000031
000035
000036
000037
000049-000053
000054-000055
000069-000073
000074

000075
000076
000099-000101
000102-000103
000118 (only)
000154
000208-000209
000225
000247
000248-000249
000250
000290-000297
000382-000385
000395
000397
000484
000527
000546-000547
000560
000565-000572
000573-000601
000790000815
000834 (only)
000839-000840
000921

Examination of Emails⁷

Because the court requested that threads of emails be produced in an identifying exhibit, this, on occasion leads to emails that are not individually exempt being found as part of submitted email threads where other materials are exempt. It could be more accurate for the Port to identify or leave unredacted those kinds of emails which are usually perfunctory and devoid of meaningful content and as such should not necessarily call for a penalty since it would not necessarily be the Port's intent to claim their exemption from disclosure. However, this must be distinguished from emails, which may also be part of such threads, which the Port does hold are exempt and the court finds are not. Another factor for consideration is whether to require redaction of the headers of emails that are otherwise exempt. The court at this stage does not consider this sanctionable as intended by the PDA in the context of over 2400 pages through using the legal principle of *de minimis non curat lex* which the court finds in accord with the PDA's intent. This is also the same for certain 'cover' emails which carry no substantive information of import but

⁷ Much of the prior material also contained emails but the below were segregated out and compiled as such.

have attached material that is claimed exempt. In most cases the nondisclosure of otherwise blank or innocuous information on a cover email should not support a sanction.

000933-00938 – Exemption claimed under (i) and (h) of RCW 42.17.310(1) as interpreted by *ACLU*, *PAWS*, and *Servais*.

First, *Servais*, at page 829, and RCW 42.17.310(2) & (3), requires redaction when part of a record is exempt and part is not.

Second, pursuant to *ACLU*, at page 549, citing *PAWS*, to be exempt under .310(1)(i) the information must contain (1) predecisional opinions or recommendations as part of deliberative process; (2) disclosure would be injurious to the process; (3) disclosure would inhibit flow of recommendations; and (4) materials recommend policy and opinion and not raw factual data on which the decision is based. *ACLU* also appears to recognize at page 553, that the deliberative exemption may extend to on-going processes, such as future lease negotiations with other parties, and is not necessarily dissolved at the completion of the particular process under discussion. To this end the trial court is directed at *ACLU* page 550, to look at (1) how the material was generated; (2) the function of the material in the context of the decision-making process, (3) what the material contains, and (4) who generated the material.

Third, pursuant to *Servais*, at page 829, citing *PAWS*, instructs that exemption .310(1)(h) has (A), the purpose to prevent private persons to appropriate potentially valuable intellectual property for private gain; and (B), *Servais* points out at pp. 830-832, that the exemption does not only apply to scientific information, although to apply it to any organized information or material derived from a careful search of data may be too broad, so that the court should look to see if “research data” is “a body of facts and information collected for a specific purpose and derived from close, careful study, or from scholarly or scientific investigation or inquiry.”

This thread begins with a Memorandum from staff to the Port Commissioners at 000934-000938, dated March 11, 2005, outlining issues remaining to be resolved during discussions in executive session regarding the “LP” (Logyard Program). Much of this Memorandum is exempt under .310(1)(i) and .310(1)(h) as claimed but it is subject to redaction under .310(2). Since the Port has filed copies for an *in camera* review the court has highlighted the exempt portions that should be redacted. The same has been done for 000933, which with 000934, contains all or portions of emails.

000939-00942

This thread begins with an email (000939) of August 17, 2005, which is not exempt. However, the attachment 000940-000942 is exempt for everything that follows the heading on 000940 “Weyerhaeuser Lease – Key elements of agreement to date.”

000943-000944

This is an email of August 11, 2005 with an attachment. The email 000943 is not exempt nor is the attachment 000944 and although included for *in camera* review is apparently not claimed exempt.

000945-000946

This is an email and attachment of April 25, 2005, estimating cost of paving a three acre staging area. The email, 000945 is not exempt. The attached estimate, 000946 is not exempt under .310(1)(i) because it doesn't include a predecisional opinion, the disclosure would not be injurious to the process or inhibit the flow of recommendations and is, in fact, in the nature of raw data, not a recommendation nor opinion, even though the Port staff generated this and sent it to Weyerhaeuser in the context of considering business development. Failure of any one of these elements would be fatal to exemption, *ACLU*, 121 Wn. App. at page 549. It is not exempt under .310(1)(h) because it is not potentially valuable intellectual property that can be used for private gain and although it is a body of information collected for a specific purpose it isn't "research" in the sense of being derived from close and careful study or from scholarly and scientific inquiry but rather a simple a general estimate to pave three acres at that particular time and place which years from will be of little value. It is not even a bid or proposal to do so, *Servais*, page 829-832.

000947-000948

This is an email and attachment of April 22, 2005, estimating cost of paving another site on Port property. It is the same as above.

000949-000987

This thread begins with an email of March 16, 2005, where the Port agrees to send to Weyerhaeuser copies of their basic standard lease and apparently a copy of a lease of another tenant (PLS), publishing it to Weyerhaeuser after notifying the other tenant, apparently as a public record. The marked up lease, 000951-000987 qualifies for exemption under .310(1)(i) because it contains marks that are predecisional opinions or recommendations, which could injure the Port in future negotiations with others, might inhibit flow of recommendations and show recommendations of policy and opinions. Arguably, careful study of this may allow future negotiators of other leases with the Port to see how the Port was willing to "mark-up" the standard lease for Weyerhaeuser and would allow future negotiators insight to the Port's current points of negotiation using that public information for private gain under .310(1)(h). The emails found at 000949-000950 however, can be redacted pursuant to .310(2), as indicated by the court highlighting material to be redacted.

000988-000990

This is an email of April 12, 2005, with an attached list of things "to do" in considering the proposed list. This meets the requirement of .310(1)(i) as discussed above. These

lists are similar 'in kind' to the lists held exempt in *ACLU*, 121 Wn. App. 544, 548 (2004).

000991-000994

This is an email of April 5, 2005, with an attached list of the things "to do". This meets the requirement of .310(1)(i) as discussed above applying the *ACLU* principles found 121 Wn. App. at page 553.

000995-000996

This is an email of March 9, 2005, with an attached list of the things "to do". This meets the requirement of .310(1)(i) as discussed above applying the *ACLU* principles found 121 Wn. App. at page 553.

001015-001017

No exemption claimed by the Port but Weyerhaeuser claims this is exempt under attorney client privilege but this can't be so where Weyerhaeuser's attorney sends information to other parties not their client, even if one, but not only, of the other parties is the Port's attorney.

001018-001021

This is email of August 17, 2005, attaching Schedule 6.1 – Known Conditions/Acceptance of Premises and 8.1 Orders. Emails found at 001018 are not exempt. Schedule 6.1 discusses potential environmental issues discussed in a report by Floyd & Snider in August 2005. The court can not tell if this is already of public record though it discusses environmental history at the Port. Schedule 8.1 is blank. However, the emails content in relationship to Schedule 6.1 appear more likely than not to meet the requirements of .310(1)(i) without further information applying the *ACLU* principles found 121 Wn. App. at page 553.

001022

Nothing exempt but makes a reference to 'redacted' material though none is evident.

001023-001068

These emails of August 12, 2005, discuss an attached market-up copy of he proposed lease. These all meet the requirements of .310(1)(i) and are exempt applying the *ACLU* principles found 121 Wn. App. at page 553.

001069-001070

No exemption claimed by the Port but Weyerhaeuser claims this is exempt under attorney client privilege but this can't be so where Weyerhaeuser's attorney sends information to other parties not their client, even if one, but not only, of the other parties is the Port's attorney.

001071-001084

This thread begins with an email of July 20, 2005 (001074), going through July 26, 2005 (001071) and contains an attachment of part of the proposed lease 'marked-up' (001075-001084). With the exception of two lines which the court has redacted and highlighted on 001073 the pages 001071-001074 are not exempt. Pages 001075-001084 are exempt under .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

001085-001088

This is a thread of emails from July 20, 2005, through July 22, 2005. The court finds two lines on 001086 exempt, which it has highlighted, and the rest of the emails not exempt. Again there is a reference in Exhibit B to redaction but none is evident though the redactions submitted in the Exhibit of March 20, 2006 are too broad. Further the Port's claim of attorney-client privilege for all of this is too broad for the reasons stated in 001069-001070.

001089

The Port does not claim this exempt though Weyerhaeuser claims attorney-client privilege but this can't be so where Weyerhaeuser's attorney sends information to other parties not their client, even if one, but not only, of the other parties is the Port's attorney.

001090

The Port does not claim this exempt though Weyerhaeuser claims attorney-client privilege but this can't be so where Weyerhaeuser's attorney sends information to other parties not their client, even if one, but not only, of the other parties is the Port's attorney.

001091-001129

This begins with an email of July 14, 2005 (001091) and the court has redacted one line and otherwise finds it not exempt. Pages 001092-001100 are a 'marked-up' option that meets the requirements of .310(1)(i). Page 001101 is a cover page not exempt. Pages 001102-001104 are a thread of emails from June 14, 2005 through June 30, 2005. The court finds 001102 not exempt and 001103-001104 exempt pursuant to .310(1)(i). Pages 001105 -001129 are a 'marked-up' list which is exempt under .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

001130-001205

Pages 001130-001131 and 001205 are emails from June 6, 2005 through June 28, 2005, explaining pages 001132-001204 which is a 'marked-up' lease draft and all are exempt pursuant to .310(1)(i)⁸ applying the *ACLU* principles found 121 Wn. App. at page 553.

⁸ Arguably the headers on these emails and all others might be unredacted under .310(2) but this would be a victory of form over substance. If the identity of these communicators were an issue the court would unredact the headers on the emails.

001206-001209

This is a thread of emails from April 28, 2005 through June 2, 2005. These are exempt under .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

001210-001213

This is a thread of emails from April 28, 2005 through June 1, 2005. These are exempt under .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

001214-001216

This is a thread of emails from April 28, 2005 through May 31, 2005. These are exempt under .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

001217-001221

This is a thread of emails from April 28, 2005 through May 31, 2005. These are exempt under .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

001222-001224

This is a thread of emails form April 28, 2005, through May 6, 2005. These are exempt under .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

001225-001226

This is a thread of emails form April 28, 2005, through May 4, 2005. These are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, except the email from Clark to several others of May 4, 2005, at 9:08 AM on 001225.

001227-001229

This is a thread of emails from April 28, 2005 through May 4, 2005. These are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, except the portion alleged by the Port to be public on 001227 which the court finds if the email of May 4, 2005 at 9:08 AM.

001230-001261

This is a thread of emails from April 28, 2005 through May 2, 2005, together with a 'marked-up' copy of the proposed lease. These are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, except the first email at the top of page 111230.⁹

001262-001263

This is a thread of emails from April 28, 2005 through May 2, 2005. These are exempt under .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

⁹ Again there are *de minimis non curat lex* lines from emails that might be unredacted such as "Have a good weekend" on 001230.

001264-001292

This is an email from April 28, 2005 and April 29, 2005, along with a 'marked-up' copy of the proposed lease. These are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, except for a portion, not indicated in Exhibit B, that the court has made public.

001293

There is no exemption here but this is an example of the Port's fastidiousness in broadly construing the exemptions, and narrowly construing the disclosures, contrary to the policy of the PDA.

001294

These are two emails of April 25, 2005. These are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001295-001333

This is a thread of three emails from March 16, 2005 through March 22, 2005 together with a 'marked-up' version of the proposed lease. The emails are to be redacted as indicated in 000949-000987 above, but the marked-up lease is exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001334

This is not exempt but it is evidence that the Port understood that it was its duty to contact a third party whose privacy might be at issue under a PDA request. This is contrary to the practice they followed in this case until ordered to do so by this court and one of the reasons interlocutory attorney fees were ordered through the Show Cause Hearing.

001335

These are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001336-001337

These are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with the blank email carrying an attachment subject to *de minimis non curat lex*.

001338

This is not exempt once redacted pursuant to .310(2). The court has highlighted redactions which 'may' coincide with those of the Port's which are indicated by words but not example.

001339-001340

These are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with the blank email carrying an attachment subject to *de minimis non curat lex*.

001341-001342

These are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with the blank email carrying an attachment subject to *de minimis non curat lex*.

001343-001344

Not claimed exempt in Exhibit B which is curious in light of the above claimed exemptions.

001345-001346

These are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with headers subject to *de minimis non curat lex*.

001347-001349

These are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with headers subject to *de minimis non curat lex*.

001350

These are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with headers subject to *de minimis non curat lex*.

001351-001354

These are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, though Exhibit B indicates some part of the email was made public but the redactions are not evident but the court agrees that most of the cover email is not exempt.

001355-001356

These are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with headers subject to *de minimis non curat lex*.

001357-001359

These are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with headers subject to *de minimis non curat lex*.

001360-001405

These are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with the blank email carrying an attachment subject to *de minimis non curat lex*.

001406-001436

These are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with the email carrying an attachment subject to *de minimis non curat lex*, and that part not *de minimis* exempt.

001437-001439

Weyerhaeuser claims this is an email but they are mistaken.

001440-001473

These are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with the email carrying an attachment subject to *de minimis non curat lex*, and that part not *de minimis* exempt.

001476-001477

The top email from Hughes on August 3, 2005, on 001476 is not exempt but the bottom email and remainder is under .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

001489

This is not exempt.

001490-001491

These are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with headers subject to *de minimis non curat lex*.

001492

These are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with headers subject to *de minimis non curat lex*.

001493-001495

This information is exempt under RCW 42.17.319(1)(b) similar to *Evergreen v. Locke*, 127 Wn. App. 243, 250 (2005).

001496-001497

These are two email one on August 28, 2005 which is exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with headers subject to *de minimis non curat lex*, and one on August 29, 2005 which is not exempt.

001498

This email is exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with headers subject to *de minimis non curat lex*, though the Port concedes a

portion is public in Exhibit B and supposedly this would refer to the first and last paragraph of the email.

001502

The Port does not claim this exempt though Weyerhaeuser claims attorney-client privilege but this can't be so where Weyerhaeuser's attorney sends information to other parties not their client, even if one, but not only, of the other parties is the Port's attorney.

001503-001504

This email is exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with headers subject to *de minimis non curat lex*, though the Port concedes a portion is public in Exhibit B and supposedly this would refer to the email of August 17, from Amador on 001503 and the email from Klose on 001504.

001505-001511

The cover email at 001505 is not exempt in its entirety but all of the attachments at 001506-001511 are exempt under .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

001512-001515

The cover email at 001505 is not exempt, as conceded in Exhibit B, but all of the attachments at 001513-001515 are exempt under .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

001520

This email is exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with headers subject to *de minimis non curat lex*.

001522-001524

The cover email at 001505 is not exempt in its entirety but all of the attachments at 001506-001511 are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001525-001526

The cover email at 001505 is not exempt in its entirety but all of the attachments at 001506-001511 are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001529-001530

Theses emails are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with headers subject to *de minimis non curat lex*.

001531-001537

The cover email at 001505 is not exempt in its entirety but all of the attachments at 001506-001511 are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001538

This email between the Port's attorney and the Port is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

001539-001545

This email and its attachments between the Port's attorney and the Port is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

001546-001547

This is an email and attachment of April 22, 2005, estimating cost of paving a 2.7 acre staging area. The email, 001546 is not exempt. The attached estimate, 001547 is not exempt under .310(1)(i) because it doesn't include a predecisional opinion, the disclosure would not be injurious to the process or inhibit the flow of recommendations and is, in fact, in the nature of raw data, not a recommendation nor opinion, even though the Port staff generated this and sent it to Weyerhaeuser in the context of considering business development. Failure of any one of these elements would be fatal to exemption, *ACLU*, 121 Wn. App. at page 549. It is not exempt under .310(1)(h) because it is not potentially valuable intellectual property that can be used for private gain and although it is a body of information collected for a specific purpose it isn't "research" in the sense of being derived from close and careful study or from scholarly and scientific inquiry but rather a simple a general estimate to pave three acres at that particular time and place which years from will be of little value. It is not even a bid or proposal to do so, *Servais*, page 829-832.

001549

This email between the Port's attorney and the Port is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

001550-001557

This email between the Port's attorney and the Port is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004) as well as exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001558-001559

The first email on 001558, from Clark dated March 22, 2005, is exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553. The balance of the page and page 001559 is not exempt.

001561

This email is exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with headers subject to *de minimis non curat lex*.

001565

This email is exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with headers subject to *de minimis non curat lex*.

001567-001569

These emails are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with headers subject to *de minimis non curat lex*.

001570-001575

These emails between the Port's attorney and the Port is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004) as well as exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001576-001578

These emails between the Port's attorney and the Port is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004) as well as exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001580

This is NOT claimed as exempt under Exhibit B, but note that email from Heber dated July 12, 2005, on 001580 contains the kind of information that is claimed as exempt in other emails.

001582-001583

See above. The Port does not claim this exempt though Weyerhaeuser claims attorney-client privilege but this can't be so where Weyerhaeuser's attorney sends information to other parties not their client, even if one, but not only, of the other parties is the Port's attorney.

001596-001597

These emails between the Port's attorney and the Port is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

001598

This is not exempt.

001621-001671

Although this cover email dated September 8, 2005, has attached a document listed as a draft lease in Exhibit B, and inexplicably the date is blank at the top of page 6 (001627), at the same time it appears to be the final lease containing copies of all final signatures and their dated notarization of August 22, 2005 (see 001651-001653 as example) and is identified in the lease footer as "050818Lease(Final)." The Port in Exhibit B claims this is exempt under .310(1)(i) and (h). Weyerhaeuser does not claim this is exempt pursuant chapter 19.108 RCW through RCW 42.17.20(1). During the negotiations, much of which has been held exempt, the parties used another tenant's lease, perhaps with that party's permission (PLS), as an example. Clearly the final lease is not predecisional regarding Weyerhaeuser and that negotiation. It could be argued to be part of the Port's on-going lease negotiations with all their tenants similar to the point made at *ACLU v. Seattle*, 121 Wn. App. 544, 553 (2004), but if that is the case then all Port, and any other government agency, leases may be kept private and their terms never disclosed since the government has on-going negotiations somewhere all the time at almost every level. Since this doesn't contain any 'trade secret' claimed by Weyerhaeuser and since the process is completed, there does not appear to be an exception under .310(1)(i). This is especially so if disclosure is to be broad and liberally construed and exemptions narrowly construed and proved by the agency. The Port also claims the lease is subject to exemption as 'research' under .310(1)(h). Even though *Servais v. Port of Bellingham*, 127 Wn.2nd 820, 829, citing to *PAWS v. UW*, 125 Wn.2nd 243 (1994), makes clear that .310(1)(h) applies to more than scientific information, at the same time, it rejected the Court of Appeals interpretation that all organized information is exempt, in favor of a more strict interpretation, that such data must be collected for a specific purpose and derived from careful study or scholarly inquiry, *Servais*, pp. 830-832. The Port has not met its burden of proof on this issue and the court rules this final lease is not exempt. Allowing government confidentiality during negotiations is simply prudent and .310(1)(i) shows the legislature approves of that but once the negotiations are completed what the Washington state government and its agencies have done, should now, as their final acts, be transparent pursuant to the PDA, *Brouillet v. Cowles*, 114 Wn.2nd 788, 800 (1990). These documents, 001621-001671, are not exempt.

001672

This email of February 9, 2005, making an appointment for discussions does not disclose what the 'confidential discussions' will be about. It is not exempt and is another example of broadly construing the exemption and narrowly construing the PDA.

001674-001675

These emails are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with headers subject to *de minimis non curat lex*.

01676-001677

These emails are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, with headers subject to *de minimis non curat lex*.

001678-001684

These emails between the Port's attorney and the Port is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

001685-001686

These emails between the Port's attorney and the Port is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

001687-001688

The email from Fontenot of October 21, 2005, on 001687 is not exempt nor is the email from Amador of the same date and page. However, the email from Seifert is only exempt, as redacted by the court through highlighting, pursuant to .310(2). Nothing on page 001688 is exempt.

001692-001693

These emails between the Port's attorney and the Port is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004) as well as exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001684-001696

Page 001694 is a cover email for a three page attachment. The Port claims in Exhibit B that part of the email is public and part is exempt. It is not exempt but pages 001695-001696 are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001699

The Port claims this exempt under both .310(1)(i) and .310(1)(h). Again the Port should be strictly construing the exemptions and looking to broadly and liberally allow disclosure. They have not met that burden of proof with this email. Weyerhaeuser claims attorney-client privilege but this can't be so where Weyerhaeuser's attorney is included in information to other parties not their client, even if one, but not only, of the other parties is the Port's attorney.

001700-001701

The first email on 001700 dated July 20, 2005, authored by Amador is not exempt. The balance of the these pages are either emails between the Port's attorney and the Port exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004), or exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001702

This is not exempt and is another example of the Port not narrowly construing exemptions and not broadly construing disclosure.

001703

The Port claims this email involves confidential labor talks but it is simply a report that the local union had a meeting and the membership of the union approved of the agreement on log handling. It is not exempt.

001704

This email is not exempt except for two lines highlighted by the court that meet .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553. Even that is a close issue but is seen as integrated into similar but more straight-forward exemptions above.

001705-001707

The first email of June 24, 2005 drafted by Amador is not exempt but the second email from attorney Klose is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004) whereas 001706-001707 are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001708-001709

These emails are not exempt.

001710-001711

The cover email is not exempt but the attached data is exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001712

This email is exempt under .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

001715

This email posing a simple question about the jurisdiction of DNR is not exempt.

001716

This email posing a simple question about a copy of old sedimentation study from 1997/98 is not exempt.

001717

This email is exempt under .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

001719-001720

The first and third email on 001719 are exempt but middle email from Qvigstad, dated April 09, 2005 is not. Page 001720 is exempt.

001721

This email is exempt under .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

001722-001724

This email is exempt under .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

001725

This email is not exempt.

001726

This email is exempt under .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

001727

The cover email at 001727 is not exempt but its attachment at 001728 is exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001729-001733

Page 001729 is not exempt except for the last three lines the court has highlighted. Pages 001730-001733 are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001734-001736

The cover email at 001734 is not exempt but its attachments at 001735-001736 are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001737-001738

The top email from Amador dated March 13, 2005 is not exempt but the remainder of 001737 and 001738 are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001739-001741

This email and its two attachments are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001742-001743

This email and its attachment is exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001744-001745

The cover email at 001744 is not exempt but its attachment at 001745 is exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001746-001752

The top of page 001746 is not exempt but the bottom is exempt under .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553. Pages 001747-001752 are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001753

This email is not exempt and is an example of broadly construing a claimed exemption and narrowly construing the PDA.

001754-001759

The top of page 001754 is not exempt but the bottom part is as highlighted by the court under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553. Pages 001755-001759 are exempt under .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553.

001760-001762

The page 001760 is not exempt but the attachment, pages 001761-001762 are exempt under .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

001763-001765

These emails are not exempt even though there is a casual and non specific reference to certain issues except for the one opinion regarding pre-existing conditions which the court has highlighted.

001767-001812

This is an email (001767) of July 6, 2005, which is exempt pursuant to .310(1)(i), applying the *ACLU* principles found 121 Wn. App. at page 553, except for some headers and casual introductory remarks subject to *de minimis non curat lex* as is the attached 'marked-up' draft (001768-001812) applying the *ACLU* principles found 121 Wn. App. at page 553.

001813-001815

These emails are public except for certain court highlighted portions found at 001814 pursuant to .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

001816

This email is exempt pursuant to .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553 and also exempt through Weyerhaeuser's claim that this is exempt pursuant chapter 19.108 RCW through RCW 42.17.20(1), disclosing limitations and abilities of Weyerhaeuser that might be used to gain a competitive advantage.

001818

This email is exempt pursuant to .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553 and also exempt through Weyerhaeuser's claim that this is exempt pursuant chapter 19.108 RCW through RCW 42.17.20(1), disclosing limitations and abilities of Weyerhaeuser that might be used to gain a competitive advantage.

001820

This email is not exempt except for one court highlighted line that is exempt pursuant to .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553 and also exempt through Weyerhaeuser's claim that this is exempt pursuant chapter 19.108 RCW through RCW 42.17.20(1), disclosing limitations and abilities of Weyerhaeuser that might be used to gain a competitive advantage.

001822

This email is conceded to be not exempt

001823

This email is conceded to be not exempt

001824-001826

This email is claimed exempt by Weyerhaeuser but it is not exempt.

001838

This email is claimed exempt by Weyerhaeuser but it is not exempt.

001839-001842

The court does not find this exempt. It would be exempt under .310(1)(i) as predeliberative opinions but does not meet the criteria of extension under the *ACLU* principles found 121 Wn. App. at page 553 since it deals simply with the Port's public affairs 'strategy' of informing the public of what it has done and would not inhibit future deliberations or negotiations with others.

001843-001845

The court does not find this exempt. It would be exempt under .310(1)(i) as predeliberative opinions but does not meet the criteria of extension under the *ACLU* principles found 121 Wn. App. at page 553 since it deals simply with the Port's public affairs 'strategy' of informing the public of what it has done and would not inhibit future deliberations or negotiations with others.

001846-001875

The thread of emails of August 30, 2005 drafted by Klose and Colligan are exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004) whereas the attachment at 001849-001875 is not exempt and is already of public record.

001876-001880

The thread of emails of are exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

001881-001884

The thread of emails of are exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

001885-001888

The thread of emails of are exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

001889-001891

The thread of emails of are exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

001892-001893

This email is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

001894

This email is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

001895-001944

The Port does not claim this as exempt though Weyerhaeuser does however it does not appear to contain any Weyerhaeuser attorney's communication and simply conveys the final lease. Under these circumstances this is not exempt.

01946-001947

This email is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

001948

This apparently can be claimed exempt under RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004), however it contains no meaningful substantive information.

001949

This email is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004), although the recipients may include an argument that the privilege is lost through publication to others, however parts of it are also subject to exemption pursuant to .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

001950-002001

This email is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

002002-002054

This email is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

002055-002107

This email is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

002108-002109

This email is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004), although the recipients may include an argument that the privilege is lost through publication to others, however parts

of it are also subject to exemption pursuant to .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

002110-002159

This email and attachment are exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004), although the recipients may include an argument that the privilege is lost through publication to others, however it is also subject to exemption pursuant to .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

002161

This email is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004), although the recipients may include an argument that the privilege is lost through publication to others, however parts of it are also subject to exemption pursuant to .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

002163-002167

Except for the highlighted portion redacted by the court on page 002163 which is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004), the balance is not exempt.

002168-002172

Page 002168 and the top of page 002169 as indicated by the court's highlighting are exempt as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004), the balance is not exempt except for two lines the court highlighted on page 002170

002173-002175

This email and attachment are exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004), although the recipients may include an argument that the privilege is lost through publication to others, however it is also subject to exemption pursuant to .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

002176-002220

This email and attachment are exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004), although the recipients may include an argument that the privilege is lost through publication to others, however it is also subject to exemption pursuant to .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

002221-002225

This email and attachment are exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004), although the recipients may include an argument that the privilege is lost through publication to others, however it is also subject to exemption pursuant to .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

002226-002270

This email and attachment are exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004), although the recipients may include an argument that the privilege is lost through publication to others, however it is also subject to exemption pursuant to .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

002271-002283

This email and attachment are exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004), although the recipients may include an argument that the privilege is lost through publication to others, however it is also subject to exemption pursuant to .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553.

002284-002287

The emails at the top of page 002284 are to be redacted as indicated by the court's highlights as is the email at the bottom of page 002286 running over to 002287 by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004), although the recipients may include an argument that the privilege is lost through publication to others, however the last email is instead subject to exemption pursuant to .310(1)(i) applying the *ACLU* principles found 121 Wn. App. at page 553, the rest is not exempt.

002288-002289

This email is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

002290-002292

This email and attachment are exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

002293-02294

These emails are exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

002295-002330

This email and attachment are exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

002331-002357

This email and attachment are exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

002358-002385

This email and attachment are exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

002386-002391

This email is exempt by RCW 5.60.060(2)(a), through RCW 42.17.260(1), as explained in *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 (2004).

002393-002395

This material is not exempt under either .310(1)(i) even considering applying the *ACLU* principles found 121 Wn. App. at page 553. It is also not exempt pursuant to .310(1)(h) under the principles of *Servais v. Port of Bellingham*, 127 Wn.2nd 820, 832 (1995), since it is simply a quote made to an inquiry and not research data from close and careful study that would allow others to realize private gain from agency data gathering. Again the Port should keep in mind both the burden of proof and also the overriding principles of broadly construing public disclosure and narrowly construing any exemptions alleged.

002398

This material is not exempt under either .310(1)(i) even considering applying the *ACLU* principles found 121 Wn. App. at page 553, nor exempt pursuant to .310(1)(h) under the principles of *Servais v. Port of Bellingham*, 127 Wn.2nd 820, 832 (1995), since it is simply a statement of water depth for safe berthing requirements. Although it is an email exchange with Weyerhaeuser they have not claimed this as a trade secret exempt pursuant to chapter 19.108 RCW through RCW 42.17.20(1), disclosing limitations and abilities of Weyerhaeuser that might be used to gain a competitive advantage.

002400-002401

The Port does not claim this exempt though Weyerhaeuser claims this as a trade secret exempt pursuant to chapter 19.108 RCW through RCW 42.17.20(1), disclosing limitations and abilities of Weyerhaeuser that might be used to gain a competitive advantage. The court rules there is nothing of that sort here and the email is public.

002409

This material is not exempt under either .310(1)(i) even considering applying the *ACLU* principles found 121 Wn. App. at page 553, nor exempt as a trade secret exempt pursuant

to chapter 19.108 RCW through RCW 42.17.20(1), disclosing limitations and abilities of Weyerhaeuser that might be used to gain a competitive advantage.

In addition to the above findings already recorded above, and after reviewing the above packets, the court finds the following sixty-five (65) packets or pages should have been disclosed or redacted:

000933-000938
000939-000942
000943-000944
000045-000946
000947-000948
000949-000987
001018-001021
001022
001071-001084
001085-001088
001091-001129
001225-001226
001227-001229
001230-001261
001293
001295-001333
001334
001338
001476-001477
001496-001497
001505-001511
001531-001537
001546-001547
001558-001559
001598
001621-001671
001672
001687-001688
001684-001696
001699
001702
001703
001704
001705-001707
001708001709
001710-001711

001715
001716
001719-001720
001725
001727
001729-001733
001734-001736
001734-001736
001737-001738
001746-001752
001753
001754-001759
001760-001762
001763-001765
001813-001815
001820
001824-001826
001838
001839-001842
001843-001845
001846-001875
001895-00144
002163-002167
002168-002172
002284-002287
002393-002395
002398
002400-002401
002409

Because the Port followed the court's request to include threads of email in which some part was claimed exempt the above material contains some duplication. That is, there are emails that might be redacted or emails claimed exempt and which are not exempt but they appear in more than one packet. Therefore to consider sanctions the court, nor the parties, can not simply add up the above 102 pages or packets.

Once the above material is redacted and disclosed the requestors need to compare what they were originally given to what the court has now ruled must be redacted or disclosed and inform the court of the difference. That difference can then be one significant factor in considering what sanctions are appropriate.

At the hearing on March 17, 2006, the court gave assurances to both the Port and Weyerhaeuser that prior to further disclosure they would be given an opportunity to

review this court's rulings and either through making this *in camera* review ruling an interlocutory order, or, by a motion for reconsideration, no actual disclosure would be made until they had an opportunity to review this court's review. In that spirit the court will entertain a proper LCR 59 motion from any of the parties regarding the above rulings requiring additional disclosure. The ten (10) days still runs from the time of filing this order which will be sent to counsel and parties on the same day and the standards set out in LCR 59 need still be demonstrated.

Motions for reconsideration are not favored and frankly, after spending over two weeks reviewing this material, it will be interesting if some new factor is brought forward that could not have earlier been demonstrated with due diligence. It may be more prudent to simply accept the court's ruling for what it is and if dissatisfied appeal to the Court of Appeals. In that regard, the court will stay this order for two weeks so that an appeal or further stay can be requested from the Court of Appeals. This two week stay has nested within it the ten day time period for reconsideration so that this ruling is stayed two weeks from the day of filing not ten days plus two weeks. As always this court retains the right to adjust its own time limits for good cause but will not be inclined to keep this case lingering at this level.

WHAT REMAINS TO BE DONE

The following still needs to be resolved:

First, the Port or Weyerhaeuser need either apply to the Court of Appeals for a stay of disclosure beyond the two weeks allowed by this court pending any appeal, or, make the disclosures ruled appropriate by this court; or, if the requestors appeal to the Court of Appeals to broaden the disclosure the same situation applies though in that case it doesn't affect any stay.

Second, as soon as the disclosures ordered by this court, or, if they are modified, or, reversed by the Court of Appeals, the requestors must examine and compare the documents they were first given by the Port to any additional documents ordered by the last reviewing court and report the difference, if any, to this court with a copy to other parties. The difference here means between that which they were originally provided by the agency and that which they finally received after final court review. These will be identifiable documents or packets or redactions that can be demonstrated with certainty.

Third, after the final difference is determined, this court will request additional briefing and argument as to penalties and sanctions based in part on that difference. This will be in addition to the interlocutory attorney fees allowed the League of Women Voters and Jorgenson (they were not awarded interlocutory sanctions of any sort). There will not be a duplication of attorney fees allowed though some addition might be anticipated if any of this court's rulings of additional disclosure becomes final.

Fourth, there is still the issue raised by Mr. West regarding the application of SEPA and how that might affect the PDA which the parties are now briefing for the court's consideration.

The parties and reviewing court should note that this court did not address every reason why an exemption might be claimed in every case unless it was necessary to rule out a claim. Once an exemption was determined it was not necessary for the court to engage in any further analysis that achieved the same result. Sometimes the court did address all the arguments when the exemption could have been claimed on more than one basis but this was to offer future guidance of a general nature for subsequent rulings herein and not considered necessary in every instance.

Sincerely,



Richard D. Hicks
Superior Court Judge

RDH/dkr

cc: Thurston County Court File No. 06-2-00141-6

Superior Court of the State of Washington
For Thurston County

Paula Casey, Judge
Department No. 1
Richard A. Strophy, Judge
Department No. 2
Wm. Thomas McPhee, Judge
Department No. 3
Richard D. Hicks, Judge
Department No. 4
Christine A. Pomeroy, Judge
Department No. 5
Gary R. Tabor, Judge
Department No. 6
Chris Wickham, Judge
Department No. 7

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May 4, 2006

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ORDER ON RECONSIDERATION

Re: *West & LWV, Jorgensen. v. Port of Olympia*
Thurston County No. 06-2-00141-6

Dear Counsel and Mr. West:

Pursuant to two separate public disclosure requests¹ for documents that addressed the Port of Olympia's negotiation with the Weyerhaeuser Company regarding a certain lease, the Port provided some documents and withheld others. Pursuant to the request of plaintiff West, on January 4, 2006, a Court Commissioner entered an Order for the Port to Show Cause why any documents related to this issue might be withheld. On January 24, 2006, the other plaintiffs filed a motion seeking a similar Order.

¹ Mr. West made the initial request in Thurston County No. 06-2-00002-9, later the League of Women Voters and Mr. Jorgensen made their request in Thurston County No. 06-2-00141-6. Judge McPhee consolidated these two cases into one case under Thurston County No. 06-2-00141-6. This court had earlier ruled that the League of Women Voters and Mr. Jorgensen were to be treated as one party in their case for reasons earlier stated on the record.

On February 7, 2006, the Port filed 2,409 sealed documents with the court and requested an *in camera* review validating the withholding of those documents from both requests. On February 10, 2006, the Port filed a request for *in camera* review in the second case along with a Memorandum of Authorities. On February 28, 2006, Weyerhaeuser was joined as an interested party in the original action.² On March 3, 2006, Judge McPhee consolidated the two cases and on that same date the Port filed an expanded and revised privilege log, assigning legal principles and case cites justifying the withholding of each document, or, packet of documents. Later, on March 17, 2006, the Port filed an additional log of the same nature.

All parties filed Memoranda of Authorities addressing the legal principles that apply on the issue of what documents, if any, may be properly withheld. The court reviewed all this authority prior to beginning its *in camera* review.

After two and one-half weeks of *in camera* review the court issued a 51 page written ruling filed on March 29, 2006. This ruling required the disclosure of additional documents and cited statutes, cases and legal principles on which the ruling was based.

On April 7, 2006, plaintiffs League of Women Voters and Jorgensen filed a motion for reconsideration accompanied by a lengthy memorandum.³ On April 10, 2006, plaintiff West filed a motion for reconsideration accompanied by a memorandum. Also on April 10, 2006, defendant Port of Olympia filed a motion for reconsideration accompanied by a memorandum in the form of additional charts for certain documents. On April 11, 2006, Weyerhaeuser wrote a letter to the court requesting the court to 'review' Weyerhaeuser's privilege log submitted March 29, 2006, (received later in the day on which the court had delivered its written opinion) clarifying

² Judge McPhee had earlier ordered Plaintiff West to give notice to Weyerhaeuser and required them to be joined because of the scope and theories supporting that plaintiff's original request. During this same time period the undersigned had ordered that in the case before it, which although making an identical request for records, had not plead the additional matters plaintiff West had pled, that it was the duty of the Port in this case to give notice to Weyerhaeuser so that they might enter the case if they felt issues affecting them were at risk.

³ On April 1, 2006, although not requested to do so by the court pursuant to LCR 59(1)(A), the plaintiffs League and Jorgensen filed a lengthy 'Reply' (Response) memorandum to the defendant Port's motion for reconsideration.

certain documents not claimed exempt by Weyerhaeuser and proposing a redaction for one document ruled disclosable (#002398).

Pursuant to CR 59 motions for reconsideration may be filed within 10 days of filing of the written order. The ten days would run on April 8, 2006, which was a Saturday, so that any motion filed by April 10, 2006, Monday, would be timely. This court was on annual leave until April 17, 2006, and so returned to find some of this material and then immediately attended the prescheduled spring judicial conference from April 23rd through 25th, 2006.

The standards for a motion for reconsideration are set out in LCR 59:

LCR 59 MOTIONS FOR RECONSIDERATION / REVISION

(1) *Procedures*

(A) *Civil and Criminal Orders.* At the time a motion for reconsideration is filed, working copies of the motion, brief, affidavit, proposed order, and notice of issue shall be provided to the judge's judicial assistant. All briefs and materials in support of a motion for reconsideration shall be filed at the time the motion is filed. At the time of filing, the motion for reconsideration shall be noted for a hearing to be held within 14 days. Briefs and materials in opposition to a motion for reconsideration, and reply briefs and materials shall be filed in accordance with LCR 5(b)(2). Each judge reserves the right to strike the hearing and decide the motion without oral argument. At the time of filing, the clerk of the court shall provide a copy of the first page of all motions for reconsideration to the judicial assistant for the assigned judge.

* * * * *

(3) *Standards.* Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence.

Plaintiffs League and Jorgensen begin⁴ by again arguing the scope of the exemption found in RCW 42.17.310(i), sometimes referred to as the 'deliberative process' exemption.⁵ They again point out their understanding of the relationship of *Hearst v. Hoppe*, 90 Wn.2nd 123, 133-134 (1978), to *ACLU v. Seattle*, 121 Wn. App. 544 549 (2004), with a lengthy quote from one of their prior memorandums submitted in this case. They then do offer

⁴ They also later address RCW 42.17.310(1)(h) among other matters. Plaintiff West has a separate basis for his request.

⁵ They erect a "straw man," based on a quote from the court's March 29, 2006, ruling, which they proceed to offer out of its context, and then twist it in a certain way, followed by an attack upon the twist that they have invented. They justify these intellectually suspect manipulations by saying "...it seems the Court concluded...". Plaintiffs Memorandum filed April 7, 2006, page 2, line 11.

anew certain excerpts from the attorneys' briefs in the *ACLU* case and the King County trial court's order in that case.

The 2004 *ACLU* case only cites the *Hearst* case in one place as authority on RCW 42.17.310(1)(i) in *dicta* (footnote 5 at page 549⁶), followed by an explanatory quote from *PAWS v. UW*, 125 Wn.2nd 243, 256 (1994),⁷ for the proposition that the deliberative process exemption found in RCW 42.17.310(1)(i) is limited in scope, requiring an agency to show: (1) the records contain predecisional opinions or recommendations of subordinates as part of a deliberative process; (2) the disclosure would be injurious to either the deliberative or consultative function of the process; (3) the disclosure would inhibit the flow of recommendations and (4) the materials reflect policy recommendations and not raw factual data.⁸

This court never ruled, as characterized by the plaintiffs in taking a quote out of context, that RCW 42.17.310(1)(i) necessarily created an indefinite continuing exemption into perpetuity of material that met the four prong test given by *PAWS*, and relied upon in *ACLU*, and cited by the Port as justification for their nondisclosure of certain documents. This court's request for future guidance, from a higher court to trial courts, through posing a rhetorical question, seized upon by the plaintiffs, went to a different issue, not specifically addressed in any of the prior cases, though touched upon in *ACLU* and *PAWS*.

This court referred to *ACLU* because, first, it is the case cited by the Port and second, we find in *ACLU* documents prepared "in anticipation" of a future negotiation, *ACLU*, 121 Wn. App. at page 548. In *ACLU* each party characterized the "lists" in dispute differently so the Court of Appeals remanded the case back to the trial court to undertake an *in camera* review⁹ thereby opening the documents to the later *de novo* scrutiny of the Court of Appeals. In *ACLU* the Court of Appeals disagreed with *ACLU*'s argument that the disclosure of documents prepared "in anticipation" of future negotiations would not be injurious to the deliberative function or inhibit the

⁶ It is also mentioned in footnote 18 as one of the cases discussed in *PAWS*.

⁷ *ACLU* 121 Wn. App. at p. 549.

⁸ *ACLU* 121 Wn. App. 549, citing *PAWS*, 125 Wn.2nd at 256.

⁹ *ACLU*, 121 Wn. App. at p. 550

flow of recommendations, *ACLU*, 121 Wn. App. pp. 550-551. This is the kind of rationale relied upon by the Port here and argued to be contrary to the *Hearst* case¹⁰ by plaintiffs. The *ACLU* court cited *PAWS* at 121 Wn. App. p. 551, for the proposition that documents, such as the “pink sheets” in that case (*PAWS*), which were part of an “ongoing process” were thus exempt. However, once the particular proposal was funded and the policy implemented the “pink sheets” became disclosable, *PAWS*, 125 Wn.2nd at 257, *ACLU*, 121 Wn. App. at p. 552, n. 16. In *ACLU*, 121 Wn. App. page 553, the city submitted declarations, explaining the negative impact of disclosure on future negotiations. The *ACLU* court said on page 553, that the *ACLU* failed to recognize that labor negotiations are an “ongoing process” to an “ever-changing tableau.” In essence this is the same argument the Port is making here. Where this court considers that guidance is necessary for trial courts, from a higher court, is on the question: “What is the deliberative policy-making process?”

If the deliberative process is only the specific lease negotiations between the Port and Weyerhaeuser then upon the completion of that deliberative process the Port must disclose all the documents that might otherwise be kept exempt during the deliberative process under the above four principles from *PAWS*¹¹ just as the “pink sheets” would be disclosed in *PAWS*, or the “lists” would be disclosed in *ACLU*, upon the completion of the process.

But the Port is a municipal corporation with several properties. It is engaging in ongoing negotiations with several tenants, from time to time, and must necessarily have in anticipation of these negotiations the development and recommendations of “policies” the disclosure of which could conceivably damage their ability to negotiate the best terms possible for the public in areas where more than one result might be reasonably negotiable. If the tenant, or negotiator on the other side of the lease, knows in advance what policies on which the Port will yield, but only under ‘what’ pressure, and what policies are nonnegotiable no matter what pressure is brought to bear, then the Port will not be able to develop the best possible alternatives for the public they represent. So, in an appropriate case, the

¹⁰ *Hearst v. Hoppe*, 90 Wn.2nd 123 (1978).

¹¹ *PAWS*, 125 Wn.2nd at p. 256.

deliberative policy making process may extend beyond a specific negotiation. This is similar, but not identical, to what is found in *ACLU*.

So, the question is, does this ongoing process in the ever-changing property management tableau in which documents, opinions and recommendations are prepared, not just for Weyerhaeuser in their specific lease, even though they might be initially generated in such a large undertaking, but for all future negotiations of this kind, the kind of deliberative process of policy development to which the RCW 42.17.310(1)(i) exemption is intended to reach? This is a possible result in certain situations. But if that is the result, then when is the policy finally implemented so that the considerations that went into its development might be disclosed? In an agency with ongoing negotiations, with similar situations, the privacy of the policy recommendations has a genuine value for negotiation purposes. If such is the case then we run into the question of when is the deliberative process at an end? This is the rhetorical question the court posed. What did the people, and subsequently the Legislature, in enacting and amending the PDA, intend here?

At the trial court level this question can only be answered by using the standard of, "who has the burden of proof?" Disclosure is broadly favored and any exemption is to be narrowly construed and, at the same time, the burden to prove the exemption might apply is on the agency claiming the exemption. This is what the court undertook to determine during the *in camera* review.

Because the parties at the hearing on March 17, 2006, had not at that time an opportunity to review each other's submissions the court stated on the record¹² that after issuing its ruling it would entertain motions for reconsideration so that all had a chance to be fully apprised of each other's position and address the results of the court's *in camera* review. With this in mind the court turns to the defendant Port's recent submissions to determine if it remains the opinion of this court that the burden of proof has been met.

¹² The plaintiffs League of Women Voters and Jorgensen remind the court of these remarks in their motion for reconsideration. The court had not forgotten its statements.

In its motion for reconsideration, filed April 10, 2006, the Port filed two new privilege logs.¹³ On April 17, 2006, plaintiffs League of Women Voters and Jorgensen filed a Memorandum in Response to the Port's motion. The Port requested reconsideration on 15 packets¹⁴ that included identifying two inconsistent rulings of certain duplicate documents among the 2,409 reviewed over two and one-half weeks.¹⁵ Although this is a small error it should also alert any later reviewer that as one goes through so many documents one's understanding of the factual basis begins to change based on the sheer quantity of the material covering the same subject matter even if one has an understanding of the legal principle to be applied.

Unlike parts of their original memorandum on their motion for reconsideration, about which this court was critical as discussed above, the plaintiffs' Response to the Port's motion, and accompanying charts, was useful and on point. Below, this court will again address the fifteen packets sought to be reconsidered by the Port and will set out its reasoning in more detail in the initial explanation which it will then draw upon in a shortened form when addressing the later matters:

1. Insofar as #000026 it is raw data with four unmarked columns that contain some simple arithmetic operations about which one might speculate. The Port has not met the burden of proof that this is part of an opinion or recommendation regarding deliberative policy-making process beyond the specific Weyerhaeuser lease in question. As such it could be exempt during the process but must be disclosed when the process is completed unless another exemption applies. If this were not the case then this is the kind of data about which the plaintiff rightfully complains might be kept from the public in perpetuity. What standard is there for disclosure or nondisclosure pursuant to RCW 42.17.310(1)(i) if there is a never-ending process? If there is something short of a never-ending process that applies it has not been shown by the Port.

¹³ Actually, the Port filed amendments to previously filed logs with additional explanations of their rationale for exemption.

¹⁴ Bates numbers: 000026, 000049-000053, 000076, 000397, 000484-000487, 000565-000572, 000815, 000921, 000933-000934, 000949-000951, 001295-001333, 001496-001497, 001598, 002163-002172, and 002393-002395.

¹⁵ This occurs because: (1) 000076 is a duplicate of 000949 and 001558, (2) 000565-000572 contains redacted, exempt and public material, and (3) the reverse of (1).

The spreadsheet data is not specific to Weyerhaeuser, and such a marshalling and calculating of activity might have uses beyond the Weyerhaeuser lease, so is it subject to the five year exemption under RCW 42.17.310(1)(h)? “The clear purpose of this exemption is to prevent private persons from using the Act to appropriate potentially valuable intellectual property for private gain.” *Servais v. Port of Bellingham*, 127 Wn.2nd 820, 829 (1995) citing to *PAWS*, 125 Wn.2nd at p. 243. This again comes down to the burden of proof. This spreadsheet appears to fall into the *Servais* Court of Appeals¹⁶ definition of “research data” paraphrased as ‘organized information derived from diligent search which serves as a basis for discussion or decision.’ But the Supreme Court reversed the Court of Appeals and rejected this definition as “overly broad.” *Servais*, 127 Wn.2nd at p.831. The Supreme Court ruled the exemption is more narrow. They define research data at 127 Wn.2nd page 832:

We define “research data” as “a body of facts and information collected for a specific purpose and derived from close, careful study, or from scholarly or scientific investigation or inquiry.”

They then held, at page 832, that the term “research data” must be limited by the question whether private gain and public loss would result if the requested documents were disclosed. They also instruct that this is consistent with *PAWS*, 125 Wn.2nd at p. 255. One should notice that *PAWS* held at page 255 that “research data” includes not only raw data but also the guiding hypotheses that structure the data with the comment that an informed reader might deduce relevant data or hypotheses from the structure of certain information and gives an explication at n.4 found at *PAWS*, 125 Wn.2nd 255. Of course, we don’t know exactly what was being reviewed in *PAWS* since the exemption was upheld. *Id.* Coming back, then, to *Servais*, we have two issues: first, does this spreadsheet (#000026) meet the more narrow definition of the Supreme Court, which rejected the more broad definition of the Court of Appeals; and, second, has the Port proved that private gain and public loss would result if the requested document were disclosed?

¹⁶ *Servais v. Port of Bellingham*, 72 Wn. App. 183, 190 (1993).

The distinction¹⁷ between the Court of Appeals ‘organized information from careful or diligent search which serves as a basis for discussion’ which the Supreme Court holds is too broad, and the Supreme Court’s definition, is that just gathering and organizing the information doesn’t make it research data it must be accompanied by some scholarly or scientific investigation or inquiry. *PAWS* might say it must be not only ‘organized data’ but also involve the applicable ‘hypotheses.’

In *Servais* at issue was a cash flow analysis, 127 Wn.2nd at page 822-823 prepared for the Port, by a national consulting firm, originally to enable the Port to determine the best use of its property and design a comprehensive development strategy for all the property. The Port publicly disclosed the results of the study at a commission meeting. Then, a second study with a particular cash flow analysis was commissioned for the Port to use in negotiations with certain prospective partners, and this second study was not disclosed, and formed the issue in that case. The trial court found, among other things, that the study was commissioned to provide for public gain so as to negotiate as a well-informed landlord and to have the necessary information to value the expected long-term leases and that the data contained valuable formula obtained specifically for negotiating these leases.¹⁸ The cash flow analysis was specifically prepared to provide the Port with data it could use in negotiations with developers, *Servais*, 127 Wn.2nd at p. 833. The *Servais* court held the specific cash flow analysis should remain exempt and noted that otherwise the entire marketing feasibility study was voluntarily and properly disclosed. *Id.*

It is with these principles in mind that the court finds the Port here has not met the burden of proof on this prong of the test. Why? Most of the spreadsheet is just raw data. There are some unmarked columns that contain some simple operative results and ‘maybe’ an informed reader could somehow reverse engineer some otherwise not obvious ‘required return on investment’ but this has not been shown. The court recognizes that this may be possible but, then again, perhaps not, and the burden has not been met to explain how this is so.

¹⁷ A second distinction would be that “research data” can be more than just scientific and technical information but the Court of Appeals also rejected that as being too narrow.

¹⁸ *Servais*, 127 Wn.2nd at page 825.

As to the second prong, the defining characteristic pointed out in *Servais, supra*, whether private gain and public loss would result: this too has not been shown. The court does not agree, nor find, as the plaintiffs argue, that because the Port only justified its nondisclosure on the basis that disclosure would give other Ports a competitive advantage, and therefore because other Ports are also public agencies, that thus there can be no risk of private gain or public loss *per se*. The port is a political subdivision of the state but also a municipal corporation, *Port of Seattle v. International Longshoremen's et. al.*, 52 Wn.2nd 317, 318 (1958), RCW 53.04.060. As such it has proprietary functions, in addition to its public functions, and may seek to further its own proprietary corporate ends. *Id.*, p. 322. In that capacity it may deal with other Ports as if there was private gain or public loss. But again it has not shown how disclosure of #000026 compromises this. The Port has not proven that RCW 42.17.319(1)(h) applies.

2. Looking again at ##000049-000053, this is simply denied for the reasons stated in the original ruling and further explained above. The burden of proof has not been met.

3. Next, considering #000076 (and the apparent inconsistency with #000949 and #001558) and the parenthetical companion documents: #000076 is a page that contains headers for three emails and contents of two. #000949 is the identical document but with some redactions. #001558 is not identical but does contain parts of the same email found in the above two. The way the port submitted the documents the first examined was #000949 and the court allowed some redactions but otherwise found it disclosable. The next time the court looked at this information was #001558 and based on the redactions in #000949 the court found #001558 exempt for the reasons stated. Finally, the court reviewed #000076¹⁹ and by this time was no longer persuaded by the conclusory arguments that the court had found sufficient for redaction or exemption when the material was first viewed in documents #000949 and #001558. The court rules now that documents are

¹⁹ The port submitted the documents *in camera* all at one time. But they gave the court their log of proposed exemptions for the higher numbered documents first, and the lower numbered documents second, and with (obviously) some duplication or overlap. This did not make the review any easier but some of this difficulty is of the court's own making by asking for threads of emails in order to view them in context.

not exempt for failure to meet the burden of proof as explained above. To this extent on this particular material the port's motion for reconsideration is denied and the plaintiff's granted.

4. The burden of proof has not been met to exempt #000397. This email from the Port of Tacoma to Jim Amador at a hotmail address is public.
5. Again these documents, ##000484-000487, are similar *in nature* to the raw data found in # 000026 above. The same explanation above of the failure of burden of proof applies here. Maybe some 'reverse engineering' could disclose something otherwise exempt under RCW 42.17.310(1)(h) for five years but it has not been shown. The court now withdraws its earlier redactions and finds the whole packet disclosable.
6. In considering ##000565-000572 the court denies reconsideration and only the court redacted information remains exempt. However, to the extent there is any inconsistency between the information found in this packet and #001729 and #001730. The later ruling and review controls²⁰ so that any information not redacted in ##000565-000572 is also not redacted nor exempt in #001729 and #001730.
7. The motion to reconsider #000815 is denied. There is nothing new here in this agenda with certain notes not already addressed
8. The port claims #000921 is not exempt because it is not a "public" survey meaning, apparently, that it is not filed for public record. But it does not survive the analysis explained in the discussion of #000026 above and the burden of proof has not been met. Reconsideration is denied.
9. This packet of ##000933-000934 has been redacted by the court and any further exemption has not met the burden of proof therefore the motion to reconsider is denied.
10. ##000949-000951 - This has already been ruled upon in list paragraph "3" above.

²⁰ Again the later ruling is found in the earlier numbers as explained above.

11. Again the packet ##001295-001333, has been redacted or exempted and any further redaction or exemption is denied for the reasons already given. The burden of proof has not been met.
12. This packet (##001496-001497) contains email to and from Ralph Klose one of the port's attorneys and as such is exempt pursuant to the attorney client privilege and *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 and RCW 5.60.060(2)(a) through RCW 42.17.260(1). Even though some of this has apparently been made public it qualifies for exemption.
13. The motion for reconsideration on #001598 is denied. The port claims this is attorney/client communication but that is neither apparent nor proved. To the extent it contains a vague reference to a 'personal' matter, and evidently not so personal to prevent it from being casually shared with others in the 'group,' it is so vague as to not qualify as exempt under RCW 42.17.310(b), if that is the exemption claimed.
14. Insofar as packet ##002163-002172 the court finds proved only the original redactions made by the court. Further, the court is not convinced that the attorney/client privilege applies when there is a communication between the port and Weyerhaeuser and an attorney is one of many people copied in on the email.
15. On ##002393-002395, the motion for reconsideration is denied for the same reason explained on #000026 in list paragraph "1" above.

In sum the port's motion for reconsideration is denied in its entirety except as modified in list paragraph "12" above.

The plaintiffs Jorgensen and League of Women's Voters motion for reconsideration is denied in part and granted in part as explained above and through the further case analysis found herein.

Plaintiff West's motion for reconsideration addresses the principles to apply pursuant to *Hangartner v. Seattle*, 151 Wn.2nd 439, 453 and RCW 5.60.060(2)(a) through RCW 42.17.260(1) together with a request for further briefing. These motions are denied.

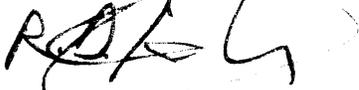
Weyerhaeuser's request for review is filed late and could be summarily denied on that basis alone. They also clarify certain exemptions that they were not claiming. The court did review again #002398 which speaks to certain water depths to be maintained by the port but does not find it exempt for the reasons explained in the original order.

The court reminds the parties that RCW 42.17.340 allows a summary hearing based solely on affidavits. That review alone swallowed weeks of the court's time. This order is the final order with two exceptions.

First, on April 21, 2006, plaintiff West filed his brief on the relationship of SEPA to the PDA. As of this writing no other party has responded. That issue remains to be resolved. The second matter is for plaintiffs to compare what the Port originally made public to what the court has now ruled is public and calculate the difference. Based on that calculation a request may be made for further attorney fees and sanctions.

Other than these two matters further review should be at the Court of Appeals.

Sincerely,



Richard D. Hicks
Superior Court Judge

cc: Original filed in Thurston County No. 06-2-00141-6

DECLARATION OF SERVICE

On this day said forth below, I deposited with the U.S. Postal Service a true and accurate copy of: Brief of Appellants Jorgensen and League of Women Voters of Thurston County in Cause No. 78757-3 to the following parties:

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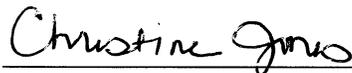
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CLERK

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

DATED: December 14, 2006, at Tukwila, Washington.



Christine Jones
Legal Assistant
Talmadge Law Group PLLC