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I. **RESPONDENT PORT'S RESTATEMENT OF ISSUES
PERTAINING TO ASIGNMENTS OF ERROR**

Assignment of Error 1 & 2.

DO APPELLANTS WAIVE THEIR APPEAL OF THE TRIAL COURT'S CALCULATION OF THE NUMBER OF DAYS THE RECORDS WERE WITHHELD WHEN THEY DO NOT RAISE THIS ISSUE IN THEIR OPENING BRIEF? **YES**

DID THE TRIAL COURT ERR ON THE ISSUE OF PER DAY OR PER RECORD PENALTY? **NO.**

DID THE COURT ERR IN REDUCING THE PENALTY RATE FROM \$60 TO A STAGGERED RATE OF \$30 AND \$15 DOLLAR PER DAY? **NO**

Assignment of Error 3 & 4.

DID THE TRIAL COURT AFFIRMATIVELY REVIEW THE CLAIMED MISSING RECORDS & PROPERLY FIND THEM NON-RESPONSIVE? **YES**

Assignment of Error 1 & 2.

DID THE TRIAL COURT CORRECTLY SET PENALTY BY APPLYING *YOUSOUFIAN* CRITERIA? **YES**

DO APPELLANTS' ARGUMENTS OVERCOME THE TRIAL COURT'S APPLICATION OF THE *YOUSOUFIAN* TEST OR RELATE TO *YOUSOUFIAN* TEST FOR INCREASING PENALTIES? **NO**

Assignment of Error 3 & 4.

ARE THE CLAIMED "UNRELEASED RECORDS" ARE NON-RESPONSIVE TO APPELLANTS' PRR, THEREFORE PROPERLY NOT INCLUDED IN RECORDS RELEASED OR IN THE COURT'S PENALTY CALCULATION? **YES**

**II. INTRODUCTION / RESPONDENT PORT'S
RESTATEMENT OF FACTS**

This is a Public Records Act appeal. This matter originated in 2006. The matter was thoroughly litigated in 2006 at the trial court level, Appellants at that time sought Supreme Court direct review which was declined, and the Court of Appeals Division I ultimately ruled in 2008 (*West v. Port of Olympia*, 146 Wn. App. 108, 112-116, 192 P.3d 926 (2008)), overturning some of the trial court's decisions on exempt records. Thereafter, the Port immediately released all records, *Court's Ruling on Remand* 25 August 2010, TR at 5:8-15, and the Trial Court on remand held extensive proceedings on the fees and penalties to be imposed for the records originally deemed exempt by the trial court but overturned on appeal, including a hearing on the scope of remand June 18, 2010 CP 15-70; hearing on penalty CP 1184-1233, and hearing on attorney fees and costs CP 1480-1510.

Thus the sole issue on remand and in this appeal is Appellant's disagreement with the Trial Court's award of attorney fees and the penalty imposed on remand for that discreet set of records originally deemed by the Trial Court to be exempt, but reversed on appeal.

Despite the fact that the sole issue on remand was the penalty to be imposed for that discreet set of records deemed by the Trial Court to be exempt, but reversed on appeal, Appellants asked the Trial Court for an

award of **\$38,540,000.00**. Parsing each day and record to the maximum degree, they asked the Trial Court to find that the Port withheld records for 385,400 days, and to impose the maximum (\$100 per day) penalty.

Plaintiffs Motion for Penalties & Fees, CP 463-475 (without the math calculated), and see Port's Reply in Opposition CP 1184-1233, (requested amount actually calculated).

In its **original** ruling, the Trial Court had expressed dismay at overbearing pleas for large penalties:

Now, it shocked me a little bit to see the League of Women Voters asking for almost \$2 million in sanctions, also understanding that the sanctions have to be awarded to both Mr. West and the League of Women Voters, because if I were to award \$4 million, 1 it might put the Port out of business. And I'm not sure that's what the legislature had in mind here, and there are some dicta to that in the Yousoufian case. That's one reason why I don't accept the accounting put forward by the League of Women Voters.

October 20, 2006 *Transcript of Court's Ruling* at 32:20-33:4, **Ex 1**, CP 940¹. On remand, Appellants' request was even more exponentially shocking, and the Trial Court appropriately **again** reject their inflated accounting.

Rather than **astronomically increase** the penalty amount per day, the Trial Court appropriately **decreased the per day amount** from the Court's

¹ All exhibits referred to are attached to and authenticated by CP 923-1180, Declaration of Counsel, Carolyn Lake, filed 20 August 2010 hereto, unless otherwise noted.

initial award (from \$60 per day to a staggered rate of \$30 and \$15), primarily because (1) Appellants presented no credible factual or legal basis for any increase, (2) and upon the first go-round's adverse appeal ruling, the Port immediately released not only the remanded records, but all records previously deemed exempt. *Court's August 25, 2011 Ruling*, TR 12:6-11 and see CP 1574-1578. The Trial Court on remand found this significant:

The Port after losing this one issue at the Court of Appeals waived its right to claim any other exemption might apply and simply turned over all the records that were at issue. That is the kind of openness and transparency that wants to be encouraged by this legislation and reveals a change in attitude of the Port from their earlier reticence about which this court was critical at the time.

Court's Ruling on Remand 25 August 2010, TR at 5:8-15. Copy attached

Appendix A.

Appellants also presented no good reason to deviate from the Court's earlier approach as to the method for calculating the number of days and number of records, which remained consistent. Below on remand, the Port requested a penalty of no more than a \$10 a day fee for a total of \$8760. (January 28, 2006 through October 7, 2008 equals 876 days times \$10 a day). CP 1185. Instead, the Trial Court the court reduced the \$60-per-day penalty for the original 123 days to one-half what it was, or \$30 per day for the remand records only, for a total of \$3,690, plus an additional

calculation for the additional 861 days at \$15 per day for a total of \$12,915 for a total additional penalty of \$16,605 due to the issues on remand. *Court's August 25, 2011 Ruling*, TR 12:6-11 and see CP 1574-1578.

By separate Order the Court also awarded attorney fees and costs of Plaintiffs Jorgensen and Johnson submitted a fee request for 288 hours for four attorneys' work, plus additional paralegal time, for a total of \$56,745, plus \$3075.59 in costs. CP 1445-1449 and 1450-1458. The Court awarded sixty 60% of the requested attorney fees and the full requested amount of costs, or fees of \$34,047.00 and costs of \$3,075.59 to Jorgenson/Johnson and nominal costs to Mr West. CP 1579-1581.No party appeals the attorney fee award. Appellant West and Johnson/Jorgensen appealed thereafter.

III. AUTHORITY & ARGUMENT

A. APPELLANTS ARE FLAT WRONG ON THE STANDARD OF REVIEW: ABUSE OF DISCRETION.

The Appellants fail to show any abuse of discretion. The penalty imposed should not be disturbed on appeal. As a threshold but significant matter, the Appellants are flat wrong in the standard of review to be applied in this appeal. They argue:

Whether the Public Records Act authorizes a Trial Court to reduce the penalty period for violation of Act is a question of law, and de

novo review is the proper standard, not the abuse of discretion standard. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d421,98 P.3d 463 (2004), as amended, reconsideration denied....
Jorgenson /Johnson Opening Brief at page16, and

De novo review also includes review of a Trial Court decision to reduce a penalty, especially where (as here) the Trial Court received a directive from a reviewing Court to either increase or maintain, but not reduce, the penalty.
Id at 16-17.

In truth, a court reviews the *statutory meaning* de novo (*State v. Schultz*, 146 Wash.2d 540, 544, 48 P.3d 301 (2002)), and also reviews **challenges to agency actions** under the PRA de novo. *Soter v. Cowles Publ'g Co.*, 162 Wash.2d 716, 731, 174 P.3d 60 (2007). Issues pertaining to disclosure are reviewed de novo. RCW 42.56.550.

However, clearly, per statute and extensive case law, “[T]he trial court's determination of appropriate daily penalties is properly reviewed for an abuse of discretion.” *Yousoufian II*, 152 Wash.2d at 431, 98 P.3d 463, as quoted in *Yousoufian v. Office of Ron Sims*, 168 Wash.2d 444, 229 P.3d 735 Wash.,2010. RCW 42.56.550(4) provides: “...**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 or she was denied the right to inspect or copy said public record.”

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684, 132 P.3d 115 (2006).

A Trial Court's decision is 'manifestly unreasonable' if 'the court, despite applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take." ' ' *Id.* (quoting *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Lewis*, 115 Wash.2d 294, 298-99, 797 P.2d 1141 (1990))).

Trial courts may exercise their considerable discretion under the PRA's penalty provisions in deciding where to begin a penalty determination. *Yousoufian v. Office of Ron Sims*, 168 Wash.2d 444, quoting RCW 42.56.550(4). Therefore, depending upon the circumstances of a case, it may be within a trial court's discretion to begin a penalty determination at the minimum daily penalty amount of \$5. *Id* at FN9.

Even when Appellants make passing (and contradictory) reference to the correct abuse of discretion standard, they *incorrectly* argue- without any supporting authority- that the discretion is limited based on remand:

...an Appellate Court decision limits the Trial Court's discretion, the Trial Court cannot properly go beyond the bounds set by the Appellate Court and render a decision that contradicts the letter and the spirit of the Appellate direction it received on remand.

Jorgenson /Johnson Opening Brief at page 17.

Because Appellants' challenge to the penalty calculation clings to a wholly incorrect standard of review, it should thus be deemed waived. *In re Marriage of Haugh*, 790 P.2d 1266 Wash.App. 1990. A contention that is unsupported by legal argument is deemed waived on appeal. *Bercier v. Kiga*, 103 P.3d 232 Wash.App.Div.2, 2004. A party waives an assignment of error not adequately argued in its brief. RAP 10.3(a)(5).

B. APPELLANTS DO NOT CONTEST & THUS WAIVE APPEAL OF THE TRIAL COURT'S CALCULATION OF THE NUMBER OF DAYS THE RECORDS WERE WITHHELD

Determining a PRA penalty involves two steps: "(1) determine the amount of days the party was denied access and (2) determine the appropriate per day penalty between \$5 and \$100 depending on the agency's actions." *Yousoufian II*, 152 Wash.2d at 438, 98 P.3d 463 (citing *Lindberg v. Kitsap County*, 133 Wash.2d 729, 749, 948 P.2d 805 (1997)**Error! Bookmark not defined.** (Durham, C.J., dissenting)).

In its Original ruling, the Trial Court ruled the penalty should be assessed for 123 days. "The trial court determined that records were improperly withheld for a total of 123 days." See *West v. Port of Olympia*, 146 Wn. App. 108, 192 P.3d 926 (2008) CP 942-956, at 946.

That determination was **not appealed in the first go round**, and thus the Court's calculation remains the law of the case.

The court earlier determined that the records were improperly withheld for 123 days and set the penalty at \$60 per day (from January 28, 2006 to May 30th, 2006). The Court of Appeals accepted both the number of days and the amount of penalty and how it was calculated.... This court declines to recompute the number of days involved, except insofar as the total days until disclosure following the remand, but will re-visit the penalty amount for the days involved.

Court's Ruling On Remand August 25, 2010 at TR 4:10-19.

In this present appeal, Appellants do **not** contest the Trial Court's calculation of the number of days in their opening brief, and thus that issue is waived. The facts found by the trial judge in who originally heard this action and which were relied on by the trial court judge on remand are unchallenged and therefore are verities on appeal. *Davis v. Dep't of Labor & Indus.*, 94 Wash.2d 119, 123, 615 P.2d 1279 (1980).

Without argument or authority to support it, an appellant waives an assignment of error. *Milligan v. Thompson*, 42 P.3d 418 Wash.App.Div.2, 2002. A reviewing court will not discuss assignment of error which is not supported by argument. *Deer Park Pine Industry v. Stevens County*, 286 P.2d 98, Wash,1955.

C. THE TRIAL COURT DID NOT ERR ON THE ISSUE OF PER DAY OR PER RECORD PENALTY.

The Trial Court appropriately determined the penalty based on a "per request" basis. No error is shown by Appellants. Under *Yousoufian*, the Trial Court has authority to impose a "per request" or "per record" penalty. 152 Wn.2d at 435-36. "The statute does **not** require the

assessment of per day penalties for each requested record, but is merely based on the amount of days the document(s) have been erroneously withheld.” *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004).

On appeal, Appellants here admit that “the assessment of per-day penalties for each requested record is **not** required”. *Yousoufian*, 152 Wn.2d 421 supra...” *Jorgenson Johnson Opening Brief* at page 20.² But they go on to argue the Trial Court “*exploits an ambiguity* in the statute”, and committed “error because it *frustrates the purpose* of the Public Records Act in violation of *Kleven, supra* at 289-290,” *Id* at 20-21; and that *Yousoufian* “*appeared to favor* a penalty award by category of documents”. *Id* at 22.

To establish “error” on appeal, Appellants are required to show how the Court’s “per request” penalty calculation is an abuse of discretion. None of Appellants’ arguments regarding this claimed error relate to this required standard, nor is can abuse be found in the record.

Where decision or order of trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of

² Even Mr West more correctly describes that the effect of the Court of Appeals reference to penalty on remand was not a “directive” but amounted merely for the Trial Court “to consider applying a more stringent penalty”. *West Opening Brief* at 5.

discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 482 P.2d 775 (1971).

A Trial Court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Yousoufian v. Office of Ron Sims*, 168 Wash.2d 444, 229 P.3d 735 Wash., 2010. A Trial court's decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take. *Id.*

Here, the Trial Court's original ruling explained its rejection of the "per record" and or "per packet" calculation:

...Judge Learned, who was the trial court judge in the Yousoufian case, grouped records into subsets and did a calculation based upon how long it took for each subset to be produced, and I think that is a legitimate way to do it, and I don't think *Yousoufian* or the later case of *Mahler* for instance -- says you can't do it that way. And if I had followed the packet method of doing this, I think I would have had to have done something like that. **But I also need to keep this manageable.**

CP 939, Transcript of Trial Court's Original Penalty Ruling, **Attachment C** at 27:8-18. Emphasis added. The "per record or per packet" issue was appealed in the last go-round, and the Court of Appeals Division I upheld the Trial Court's reasoning.

Jorgensen and West contend the trial court erred when it failed to assess a daily penalty for each individual record

withheld. ...The court in *Yousoufian v. Ron Sims* held that under the PRA "penalties need not be assessed per record, and that trial courts must assess a per day penalty for each day a record is wrongfully withheld."³

Here, the records reviewed by the trial court were in packets and comprised of multiple pages. The court clearly found the Port had improperly withheld documents and acted contrary to the express purpose of the PRA. However, the court also found the Port's behavior was not so egregious as to mandate the maximum penalty. **The trial court chose to impose a daily penalty rather than a per record penalty.**

We review a trial court's award of statutory public disclosure penalties for an abuse of discretion.⁴ A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.⁵ We do not substitute our judgment for that of the trial court's but seek only to determine if substantial evidence supports the trial court's conclusion.⁵

West v. Port of Olympia, 146 Wn. App. 108, 192 P.3d 926 (2008), at CP 953. The Court of Appeals did not disturb that original calculation. The Trial Court did not abuse its discretion.

On remand, the Trial court noted the Appellate Court's previous acceptance of the penalty calculation:

The Court of Appeals accepted both the number of days and the amount of penalty **and how it was calculated.** The Court of Appeals reversed this court on only one issue, and that was the applicability of the deliberative process exemption to certain records and remanded the case back to this court to determine if any other exemption would cover the records withheld, and if not, then to extend the penalty to these records, and also with the

³ Court's fnt 33: 152 Wn.2d 421, 425, 98 P.3d 463 (2004).

⁴ Court's fnt 34: *Yousoufian*, 152 Wn.2d at 431.

⁵ Court's fnt 35: *King County v. Seawest Inv. Assocs., LLC*, 141 Wn. App. 304, 314, 170 P.3d 53 (2007)

freedom to re-visit the amount of the penalty when using the correct legal standard.

Court's Ruling 25 August 2010, TR 4:1-9. Emphasis added.

The Trial Court's exercise of discretion to remain consistent with his previous "per request" penalty calculation, which had been challenged but upheld on appeal, is neither manifestly unreasonable nor based on untenable grounds or reasons. Appellants have not shown that this approach is one "that no reasonable person would take".

Last, it should be noted that Appellants *completely fail* to supply the Appellant Court with any *alternative* method for calculating the number of records, reasonable or not. Instead they argue: "a multiplier penalty should be applied based on a logical organization of responsive documents into discrete categories of related documents (by author, or purpose, or some such) and that this organization should be done expressly, in a transparent and reviewable manner, by the Trial Court". *Opening Brief* at 22⁶. Despite their attempt at a formula, Appellants never fill in the blanks as to what would be their definition of the "logical organization" of the responsive documents in this case, or what "discrete categories of related documents"

⁶ Appellants' suggestion that the Trial Court undertake this ephemeral analysis also is inconsistent with Appellant's request that this Appellant Court NOT remand and instead: "The Trial Court's errors in this case are egregious and should be reversed. In fact, **those errors are so egregious that this Court should reverse without remand, exercising its authority to decide the case de novo and enter judgment without further process**" *Appellants' Opening Brief* at 10.

apply, or how failure to meet these skeletal criteria rises to an abuse of discretion. The Court is simply left to guess.

Accordingly Appellants fail to meet their burden to show an abuse of discretion. The Court's "per request" calculation should not be disturbed on appeal.

D. THE COURT DID NOT ERR IN REDUCING THE PENALTY RATE FROM \$60 TO A STAGGERED RATE OF \$30 AND \$15 DOLLAR PER DAY.

Appellants unconvincingly argue that the Court erred on remand by reducing the penalty rate from \$60 to a staggered rate of \$30 and \$15 dollar per day. Appellants are wrong in at least two significant ways. First, Appellants repeat their faulty reliance on an incorrect standard of review, arguing "de novo review" rather than the correct "abuse of discretion" standard which applies when reviewing a PRA penalty.

Second, Appellants incorrectly also argue that

The Trial Court misinterpreted this as leave to impose a more lenient penalty for the Court of Appeals documents on remand. **This was clear error and a near flaunting disregard of remand instructions from the Court of Appeals.**

Johnson Jorgenson Opening Brief at 23. Appellants also claim:

The Trial Court's errors in this case are egregious and should be reversed. In fact, those errors are so egregious that **this Court should reverse without remand, exercising its authority to decide the case de novo and enter judgment without further process.**

Johnson Jorgenson Opening Brief at 3.

Appellants' suggestion is wholly unsupported by Washington law.

If an appellate court holds that a trial court abused its discretion in awarding a PRA penalty, the usual procedure is to remand to the trial court for imposition of the appropriate penalty. *Yousoufian v. Office of Ron Sims*, 168 Wash.2d 444, 229 P.3d 735 Wash, 2010.

Only in the rare case “in light of the unique circumstances and procedural history” has the reviewing Court set the daily penalty amount in order to bring this dispute to a close. *Id* at 469.

“We emphasize that it is incorrect to interpret our decision to set the per day penalty as an invitation from this court to trial courts to accede to having penalties set at the appellate court level. It is generally **not** the function of an appellate court to set the penalty and “the determination of the appropriate per day penalty is within the discretion of the trial court.”” *Yousoufian II*, 152 Wash.2d at 439, 98 P.3d 463.

The PRA “grants discretion to the trial court to set the amount of the penalty within the minimum and maximum ranges.” An appellate courts “function is to review claims of abuse of trial court discretion with respect to the imposition or lack of imposition of a penalty, **not** to exercise such discretion ourselves.”) *Id* at 350-1.

Appellants have not established that the Appellant Court “required” or

“directed’ **any** outcome on remand;⁷ the Court’s reasoned rationale for reducing the penalty on remand was not an abuse of discretion and should remain undisturbed.

E. CONTRARY TO APPELLANTS’ CLAIM, TRIAL COURT DID AFFIRMATIVELY REVIEW THE “CLAIMED MISSING RECORDS”; & FOUND THEM NON-RESPONSIVE.

As a notably glaring omission, in their Opening Brief Appellants Jorgenson and Johnson do **not** include any assignment of errors or arguments about the Trial Court’s application of the mitigating factors. These arguments should be deemed waived as to these Appellants. Because Appellant West makes some attempt at arguing these matters, the Port responds in Sections F and G herein.

Instead Appellants Jorgenson and Johnson claim error in two odd ways: (1) by the Trial Court’s deviation from what they perceive as the Court of Appeal’s directive on remand (See *Johnson Jorgenson Opening Brief* at 23 Section D, refuted by Section D herein) and (2) by claiming the Trial Court failed to determine whether the claimed missing records were actually responsive to the original records request:

⁷ The Trial Court’s description is accurate:
This was originally a very complicated, time-consuming and fact-intensive case which after the trial court ruling came back from the Court of Appeals on a very simple reversal on one point and a remand to rule in accord with the Court of Appeals’ decision **with the freedom, but not requirement, to recalculate the penalties..**
Court’s 25 August 2010 Remand Ruling TR 5:3-9.

What is wholly missing from this analysis is a consideration of the scope of the public records requests and the secondary determination of **whether the documents fall within the set of documents requested**. That is, neither the Court nor the Port reviewed and interpreted the Appellants' public records requests across from the documents allegedly omitted to determine their responsiveness. This is clear error.

See *Johnson Jorgenson Opening Brief at Section E*, p. 24.

But Appellants are wrong. The Trial Court's Ruling reflects the Court **did** affirmatively review the records, and found them non-responsive:

In addition, the court finds that it has not been demonstrated that these additional records that they now produce, meaning the plaintiffs, were responsive and not logged as being withheld by the Port within the plaintiffs' original request, but the Port has shown more likely than not these documents were not responsive...

Court's Ruling on Remand, 25 August 2010, TR 4:13-19.

Then after staking out this (wrong) claim, Appellants fail to present any argument or supporting rationale as to how they believe the missing records are responsive to their original request. They do not cite to specific or particular records, and fail to offer the Appellate Court any rationale upon which to conclude the Trial Court was wrong in finding the records non-responsive. Lacking any evidence to the contrary, this reviewing Court must accept the Trial Court's determination. See also Section H herein.

The Trial Court also was correct in not considering the so called "missing records in the context of the remand, as Appellants did not raise

this issue during the first appeal, provided no rationale as to why the argument could not have been raised at that time, and accordingly waived that issue.

Questions determined on appeal, **or which might have been determined had they been presented, will not again be considered on a subsequent appeal of the same case** if there is no substantial change in the evidence at a second determination of the cause. *Adamson v. Traylor*, 402 P.2d 499 Wash.,1965 , *Clark v. Fowler*, 377 P.2d 998 Wash.,1963. See also *Buob v. Feenaughty Machinery Co.*, 103 P.2d 325 Wash.,1940.

It is too late now in 2010 on remand for Appellants to claim that in 2005 and 2006, pre-appeal, the Port failed to release records. The time to do so has passed. This is a wholly independent and equally compelling basis to find the Trial County did not error in failing to factor in the so-called missing records into the penalty calculation.

F. TRIAL COURT'S CORRECTLY SET PENALTY BY APPLYING YOUSOUFIAN CRITERIA

The Court's ruling spoke directly to how the Court applied the facts of this case to the seven factors identified in *Yousoufian* to support *decreasing* on remand from the original \$60 per day penalty:

mitigating factors that may serve to **decrease** the penalty are (1) a lack of clarity in the PRA request, (2) the agency's prompt response or legitimate follow-up inquiry for clarification, (3) the agency's good faith, honest, timely, and strict compliance with all

PRA procedural requirements and exceptions, (4) proper training and supervision of the agency's personnel, (5) the reasonableness of any explanation for noncompliance by the agency, (6) the helpfulness of the agency to the requestor, and (7) the existence of agency systems to track and retrieve public records.

Id.

As the Trial Court noted:

The Port after losing this one issue at the Court of Appeals waived its right to claim any other exemption might apply and simply turned over all the records that were at issue. That is the kind of openness and transparency that wants to be encouraged by this legislation and reveals a change in attitude of the Port from their earlier reticence about which this court was critical at the time.

Judge's Ruling on Remand, 25 August 2010 TR 4:8-15.

The Court's ruling supplied below also shows an understanding of the

Yousoufian mitigating factors for increasing a penalty:

aggravating factors that may support **increasing** the penalty are (1) a delayed response by the agency, especially in circumstances making time of the essence, (2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions, (3) lack of proper training and supervision of the agency's personnel, (4) unreasonableness of any explanation for noncompliance by the agency, (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency, (6) agency dishonesty, (7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency, (8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency, and (9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.

Yousoufian v. Office of Ron Sims, 168 Wash.2d 444, 229 P.3d 735 Wash,

2010. The Trial Court's ruling carefully walks through how both the

factors for decreasing the penalty applied, and the factors for increasing the penalty did **not**:

First, as guided by *Yousoufian v. Sims*, 168 Wn.2d 444 (2010), this court considers the entire range of penalties that are possible. In that case the Supreme Court set out 16 non-exclusive factors to consider, seven mitigating and nine aggravating, and rejected a trial court's determination in that case of a \$15-a-day penalty raising it to \$45 per day for a total penalty of \$371,340 plus reasonable attorney fees and costs.

Without going through a pedantic listing of each of the 16 factors and other factors that will be mentioned and considered, this court, meaning myself, considered: ***(1) Whether a delayed response occurred where time was of the essence.*** Petitioners rely heavily on this to argue that this court should accept the invitation of the Court of Appeals to reconsider and perhaps raise the amount of per-day penalty.

But as the Port has shown, this argument does not carry that great weight, nor are these new documents considered more likely than not responsive. It doesn't carry much weight because plaintiffs argue that if they had this information earlier, then perhaps they could have made stronger arguments in challenging several of the Port's actions involving environmental or various other hearings in which they were also involved, such as hearings before other departments of this court in other cases and hearings before the City of Olympia hearing examiner. They argue that this would have strengthened all of their arguments, especially the Port was improperly piecemealing review of the Weyerhaeuser lease issues when such a project should have had a more comprehensive review.

First, in most of the instances which they cite alleging that this information would have been useful (most of which is earlier drafts of the eventual final lease), their cases failed by procedural defects and this other information would not have saved them. But second, and more important, in the case before Judge Tabor, piecemealing was actually advanced as an argument and considered by Judge Tabor and then rejected.

The timing of his ruling is not as important as its content because it affirms what the Port had originally considered as responsive, namely that these were independent projects, though not entirely unrelated, and though an exhibit to the lease speaks of the paving upgrade, for instance Exhibit A3 No. 7, at the same time paragraph 3.2 of the lease exempts No. 7 as a condition of rent and at least arguably makes the paving an independent matter. I don't say certainly, but only arguably. Here I would point out there is a difference between tax avoidance and tax evasion, and it is the same with shaping your business activities to avoid environmental review. That is to say shaping your activities to avoid a review is different than evading it when you should follow it. But here is where we are. It is clear that Judge Tabor heard these arguments about the paving and the lease being piecemealed, and he rejected them in his case. This is my colleague just down the hallway in another department of this court, and we are at the same level of review. In part because of this already being addressed by a department of this court, these so-called new documents are not only non-responsive to the original request, a consistent position taken by the Port, but if these documents withheld had been disclosed earlier, there is no logical reason why they would have necessarily changed any decisions by other courts or tribunals. It even looks as if Judge Tabor had these documents in front of him.

Judge's Ruling on Remand, 25 August 2010 TR 6:16 - 9:13.

The Court went to apply the balance of the *Yousoufian* factors to the facts of this case:

So then continuing with the factors considered by the *Yousoufian* court and this court: **(2) the degree of compliance by the Port with PRA requirements and the training of their personnel are not aggravating factors, (3) the reasons given for their withholding were not only reasonable but initially accepted by this court even though the Court of Appeals reversed on this one issue, (4) this was not negligence nor bad faith non-compliance nor did it involve agency dishonesty, nor is there any economic loss to the requestors, (5) this was indeed an issue of public importance foreseeable by the Port, and partly because of that and further because of (6) the need to deter future misconduct considered necessary because of the port's initial reticence, this court did assess a penalty of \$60 per day and was**

substantially critical of the Port at that time. Incidentally, this is substantially higher than what the Supreme Court assessed in the *Yousoufian* case previously mentioned, and on arguably even more egregious facts.

Now then, there does not appear to be issues of **(7) lack of clarity** -- though now I would say after listening to the oral argument that if plaintiffs were correct about omitted responsive documents, then there would be this new issue regarding the clarity of the request -- **nor delayed follow-up, nor improper training and supervision of agency personnel.**

Here there was **(8) agency good faith withholding** and the provision of a log showing all what was being withheld and the reasons for that withholding, and their explanations were reasonable, and in only one instance those accepted by this court later rejected by the Court of Appeals.

Finally, **(9) another important factor** only briefly mentioned above is that **as soon as the remand was final**, meaning the mandate from the Court of Appeals had been issued, **the agency very quickly waived its right to argue any other exception which would apply and quickly provided the previously-withheld records**, and for what it is worth, has settled and paid the other requestors involved. Those requestors were satisfied with a stipulated \$10-per-day penalty for 867 days for a total penalty of \$8,760 plus their attorney fees and costs.

This stipulated resolution by a different requestor certainly does not control what the court does here, but it is among the factors to notice and take into account.

More important, this arguably shows the effectiveness of the prior \$60-a-day penalty issued by this court since very quickly after the mandate, the Port waived any claim to argue about, and win or lose that would cause delay, any further exception that might apply and provided all the records found not subject originally to the deliberative process exemption by the Court of Appeals. **That is a strong mitigating factor which the court would be remiss to ignore**, and to ignore it could lead agencies to believe that the court is only interested in aggravation and not mitigation and that agency reasonableness in

the face of an adverse court ruling will not be rewarded but simply ignored.

Judge's Ruling on Remand, 25 August 2010, 9:14-11:24.Emphasis

provided. Against this backdrop of reasoned analysis, the Court imposed the following penalty on remand:

A court needs to seek balance, and anything else is the wrong message for any court to send. Based on this constellation of factors, the court is reducing the \$60-per-day penalty for the original 123 days to one-half what it was, or \$30 per day for the remand records only, for a total of \$3,690, plus an additional calculation for the additional 861 days at \$15 per day for a total of \$12,915 for a total additional penalty of \$16,605 due to the issues on remand.

The plaintiffs have already been awarded over \$50,000 in attorney fees, and any additional requests must be related to the Court of Appeals' remand plus that time reasonably used to meet and prepare for the hearing in this court as mandated by the Court of Appeals and not to support an unsuccessful expedition to unravel and deconstruct those parts of previously accepted rulings by both this court and the Court of Appeals.

Judge's Ruling on Remand, 25 August 2010, 12:3-19.

G. APPELLANT'S ARGUMENTS DON'T OVERCOME THE TRIAL COURT'S APPLICATION OF THE *YOUSOUFIAN* TEST NOR RELATE TO *YOUSOUFIAN* TEST FOR INCREASING PENALTIES

In contrast, due to the discredited claims, Appellants' arguments are not supported by any credible linkage to the applicable criteria for increasing the PRA penalty:

1. Claim of "Public Importance" Not Borne Out.

Appellants arguments to the Trial Court and mentioned only briefly again here on appeal⁸, simply don't speak to these factors, or where they do, are not supported by the actual facts. When the specifics of the appeals are revealed, Appellants were harmed **not** by missing information, but by faulty process. Appellants' claimed "smoking guns" are in fact ice cold, since Appellants "JJ" stamped records are either non-responsive, were disclosed or always considered a public document. See Section H herein. Appeals against the Weyerhaeuser operation – funneled through the Port- were numerous, were pursued in a variety of settings and some continue to this date. CP 1169-74, **Exhibit 20** is a true and correct copy of a six page Chart listing Weyerhaeuser-related appeals/ litigation in which counsel has represented the Port of Olympia and defended against. The matters both pre-date and post date Appellants' public records request, and also **post date** the Port's initial release of the requested public records and the Port's most recent release of records after the Court of Appeals ruling issued.

In sum, the opportunities to contest the project were many and varied, including **after** the October 2008 date when the Port most recently released the records. And despite the many appeals pursued both before

⁸ Appellants Johnson and Jorgenson Opening Brief fails to address any of the mitigating factors argued before the Trial Court, and these arguments should be deemed waived as to these Appellants. Because Appellant West makes some attempt at arguing these matters, the Port responds.

and after the Port's records were released on remand, the project decisions were upheld. There is no basis for Appellants' claims for an increased penalty based on the "public importance" criteria as related to the contested records.

2. No Facts Support Agency Dishonesty

The Port takes huge exception to Appellants arguments which impugn the honesty of both Port and Port counsel (See *West Opening Brief* generally pages 1-33, where various such claims are made, without support to any CP or basis in the record). No facts support this offensive claim. This Court should also disregard West's wild (and confusing) assertions, as he fails entirely to cite the Court to those portions of the record which purport to relate to his rambling arguments. Assignments of error on appeal where no reference is made to record, and no authority is cited in support of contention, are found meritless. *Glazer v. Adams* (1964) 64 Wash.2d 144, 391 P.2d 195.

First, Appellants primarily rest this slur on their singular claim that the Port did not release the Weyerhaeuser lease with the infamous "page 49", and the Floyd Snider ESA report until after the court of appeals ruled. Both claims have been shown to be flatly untrue. See *Exhibits 13 & 15, CP1082 & CP 1088, emails from Ms Witt dated Sunday, August 17, 2008*, which *predate* the Port's post appeal release and show Appellants'

had possession of the claimed missing records. Copy attached Appendix B.

Appellants' characterization that Port officials tried to get Floyd Snider to change its findings is also grossly disingenuous. Appellants cite to Records 1846-1848. A critical piece of the email string that Plaintiff omits is the following section which makes clear any requested revisions are **not substantive**.

I understand that a client cannot dictate the content of a consultant's report. However I think we all know that a consultant is usually amenable to requests or suggestions for a textual revision **where those changes do not affect the professional independence or integrity of the consultant or the report**. In fact, I believe you said in one of our meetings that you had received and were reviewing the drafts of this report prior to it being submitted to the port. Hopefully the consultant will accept the requested revision in this instance, **particularly since the changes do not affect the substance of the report**. Your effort toward achieving that goal to finalize this lease are appreciated.

Bates stamped 1877, **Exhibit 22**, CP 1180.

All Appellants' "evidence" regarding this criterion is entirely misleading. Appellants offer no scintilla of actual proof to support their claim of "agency dishonesty," which should be wholly rejected.

3. No "negligent, reckless, bad faith or intentional non compliance".

In support of this criteria to increase a penalty, Appellants repeat the same argument made with respect to "pubic importance," i.e., that their appeals *would have been* successful, "but for."

The plaintiffs provide the court with 284 pages of alleged new documents which they argue were also wrongfully withheld and not disclosed on the earlier privilege log reviewed by this court and the Court of Appeals and ask that these records now be included in any future consideration. Most of these records arise out of a sort "reverse engineering" rising from the ashes of plaintiffs' earlier arguments made in other courts and tribunals regarding "piecemealing" by the Port in addressing the environmental impacts of the lease with Weyerhaeuser, which was the core of the public record request in this case.

Court's Ruling on Remand, 25 August 2010, at 5:16-6:1

As the Port pointed out to the Trial Court, in reality, Appellants were harmed **not** by missing information, but by their own flawed arguments and processes. The Trial Court found this to be true.

...in most of the instances which they cite alleging that this information would have been useful (most of which is earlier drafts of the eventual final lease), their cases failed by procedural defects and this other information would not have saved them.

Court's Ruling on Remand, 25 August 2010, at 7:20-24.

Further, the Reid Middleton records, the bulk of Appellants' claimed "missing" "JJ-stamped" records are non responsive, as they relate to the Cargo Yard Project, ruled to be independent of the Weyerhaeuser lease by Judge Tabor. The Trial Court agreed with the Port:

In addition, the court finds that it has not been demonstrated that these additional records that they now produce, meaning the plaintiffs, were responsive and not logged as being withheld by the Port within the plaintiffs' original request, but the Port has shown more likely than not these documents were **not** responsive...

Court's Ruling on Remand, 25 August 2010, at 4:13-19.

Lastly, the bates stamped records 171-173 so heralded by the Appellants as proof of “piecemealing” is a discussion of the configuration of Cargo Yard and its SEPA processes. See *Motion for Fees and Penalties* as page 10. The emails discuss variations on the configurations of the Port’s routine paving projects, that would occur with or without Weyerhaeuser (the same issue as argued to Judge Tabor in (Superior Court Cause No. 05-2-02460-4, See **Exhibits 1** (CP 949) & **4** (CP 977)). This record was not suppressed.⁹ Significantly, these records were disclosed *by the Port* to Appellants as part of that 2005 Cargo Yard appeal in Superior court, which explains their bates stamp numbering unique to the Port. *Even with this evidence*, Judge Tabor correctly ruled no piecemealing occurred. **Ex 5**, CP 1009-1030. Again the Trial Court on remand agreed:

...more important, in the case before Judge Tabor, piecemealing was actually advanced as an argument and considered by Judge Tabor and then rejected. The timing of his ruling is not as important as its content because it affirms what the Port had originally considered as responsive, namely that these were independent projects, though not entirely unrelated, and though an exhibit to the lease speaks of the paving upgrade, for instance Exhibit A3 No. 7, at the same time paragraph 3.2 of the lease exempts No. 7 as a condition of rent and at least arguably makes the paving an independent matter. I don't say certainly, but only arguably.

It is clear that Judge Tabor heard these arguments about the paving and the lease being piecemealed, and he rejected them in his case. This is my colleague just down the hallway in another department of this

⁹ Appellants concede “the Bates stamps at the bottom of the page indicate at some point this email was released and made public. *Motion for penalty and fees*, at 10:3-4.

court, and we are at the same level of review. In part because of this already being addressed by a department of this court, **these so-called new documents are not only non-responsive to the original request**, a consistent position taken by the Port, but if these documents withheld had been disclosed earlier, there is no logical reason why they would have necessarily changed any decisions by other courts or tribunals. It even looks as if Judge Tabor had these documents in front of him.

Court's Ruling on Remand, 25 August 2010, TR 7:10-8:10 and 9:1-13.

Further, the email string relied by Appellants reveals the Port did not act to evade SEPA requirements, as that same string goes on to describe the public notice was given for SEPA 05-01, the Cargo Yard Project. The record is public and simply not nefarious. The Court agreed on this last point as well.

Although the averments are not identical, all three of the plaintiffs make extraordinary claims regarding what happened in other tribunals or courts and why public officials have resigned and how cases were "lost" because of delay in obtaining records. **All these kinds of averments are matters of opinion and speculation which the plaintiffs are free to hold and espouse, but that doesn't mean that such averments are necessarily true.**

Court's Ruling on Remand, 25 August 2010, 4:20-5:2. In sum, Appellants fail to support any claimed bad act. No error in the Court's penalty analysis has been shown.

4. No Appellant Economic Loss.

To the extent that Appellants attempted to weave an economic loss argument into the SEPA appeal issue, this also fails based on the complete lack of evidence to support the allegation. The Appellants fail completely

to make any showing that they suffered economic loss due to any delay in releasing the requested records. In *Yacobellis v. Bellingham*, 64 Wash. App. 295, 303, 825 P.2d 324 (1992)¹⁰, the Court held, “we agree with *Yacobellis* that in determining the amount of a penalty, the existence or absence of a governmental agency’s bad faith is the principal factor which the trial court must consider. **Economic loss is also relevant**, as *Yacobellis* acknowledges. Thus, **both factors** may be considered by the trial court in setting the amount of the award under RCW 42.17.340(3).”

The “existence or absence of public agency's bad faith is principal factor that trial court must consider in determining amount of penalty to be imposed, **and evidence of party's economic loss may also be taken into account**,” *Amren v. City of Kalama* 131 Wash.2d 25, 929 P.2d 389 (1997), Majority Opinion: Justice Madsen; Durham, C.J., and Dolliver, Smith, Guy, Johnson, Alexander, Talmadge and Sanders, JJ, concur “ A determination of the amount of the award *necessitates* a fact finding concerning the allegations made by the Appellant that the City has acted in bad faith and *any potential evidence of economic loss incurred by the Appellant as a result of the delay*.” *Id* at 396. Appellants failed on remand to identify any actual evidence that can support even a potential economic loss.

¹⁰ Abrogated by the *Amren v. Kalama*, *supra*.

H. CLAIMED “UNRELEASED RECORDS” ARE NON-RESPONSIVE TO APPELLANTS’ PRR, THEREFORE PROPERLY NOT INCLUDED IN RECORDS RELEASED¹¹

Appellants impermissibly argued below that a wholly new set of records were responsive to their request, but not disclosed. The Court ultimately rejected this argument primarily based on the Port’s presentation of extensive evidence and Court’s finding that the newly offered records were non-responsive to the Appellants’ public records request.

As long ago as 2005, various plaintiffs argued that the Port’s 2005 Cargo Yard Paving project (Contract 296) was directly linked and a part of the Port’s Weyerhaeuser Lease. CP 923-932. Various plaintiff pursued a SEPA and LUPA appeal which was predicated on this linkage, from which they argued the cargo Yard environmental review was impermissibly “piecemealed”, and should have included a comprehensive look as the paving Project AND the Weyerhaeuser Project. Id.

The Port’s response denied categorically that the actions undertaken by the Port (the cargo yard, the dredge project, etc) were all related to, and/or interdependent on the Port’s Weyerhaeuser lease. The Port explained that the lands, wharfs, berths, marine and industry infrastructure owned by the Port are all assets held in trust for the public by the Port. The

¹¹ The majority of Port facts are based on **Exhibits 1-22** CP 923-1180, attached to Declaration of Counsel, Carolyn Lake, dated 20 August 2010 unless otherwise noted.

Port has a statutory duty, according to state law, to use these assets to carry out the mission of the Port of Olympia, which is a mission extended to all Ports. (under RCW 53.06 to "promote and encourage port development along sound economic lines," RCW 53.06.030(4) to "promote and encourage the development of transportation, commerce and industry," RCW 53.06.030(5) and to "initiate and carry on the necessary studies, investigations and surveys required for the proper development and improvement of the commerce and business generally common to all port districts...." RCW 53.06.030(1)). CP 923-932. The Port maintains and improves its infrastructure, the assets used to facilitate its mission, on a regular and routine basis. It is probably not unusual that at times, the Port's infrastructure improvements or the timing of their maintenance, up keep or improvement by the Port might be complementary to or benefit a particular tenant; this means the Port is successfully carrying out its economic development mission. But it does not mean that the Port's actions are inextricably dependent upon a particular tenant. Id.

Various Plaintiffs pursued the matter, and this issue was fully adjudicated at the administrative and judicial level, via an appeal of the cargo yard project. An excerpt from the Port's briefing shows that the centerpiece issue in the 2005 appeal was Appellants attempts to artificially and incorrectly expanding the definition of the "Weyerhaeuser Lease"

cargo yard and other Port infrastructure even back then. That error continues today and leads Appellants to continue to argue today, also incorrectly, that Cargo Yard paving records should have been provided for in response PRR request for Weyerhaeuser lease records – when in fact they are non-responsive. CP 927-932.

In this appeal, Petitioners impermissibly attempt to **widen the narrow scope** of this routine Cargo Yard maintenance re-paving Project's SEPA review to encompass larger and unrelated Port development projects. Then, based on this manufactured expansion of the Project description, Petitioners argue they have standing--based **not** on the actual Project scope - but instead based on their artificially expanded description. Petitioners' attempt to expand the scope of this LUPA appeal is improper. **Petitioners also argue that the Port's SEPA determination was error - based not on the actual Project scope - but instead based on their artificially expanded description.**

In fact, the Port undertook SEPA environmental review to re-pave a portion of its Peninsula area, which has been previously paved and used for Marine Terminal traffic and cargo loading purposes from the day the land was created circa 1930's, and has been paved since at least the early 1970's. Rather than recognize the activity for the independent on-going maintenance action that it is, Petitioners argue that the Port erred in evaluating the site-specific environmental impacts of the paving project without also considering (1) the Port's pending lease with Weyerhaeuser and (2) impacts associated with the Weyerhaeuser export operation such as truck traffic, and (3) impacts associated with the Port's routine maintenance berth dredging.

Because **the re-paving activity is not dependent upon the Weyerhaeuser lease, nor upon Weyerhaeuser's potential truck traffic, nor upon the Port's routine maintenance berth dredging¹²**, the Court should dismiss the appeal.

¹² As to the un-related **Dredge Maintenance Project**, the Port explained:

See *Port Of Olympia's Memorandum In Opposition To Petitioners' LUPA Appeal Of Port's SEPA Determination & Motion To File Over Length Brief dated February 10, 2006*. (Superior Court Cause No. 05-2-02460-4), copy attached as **Exhibit 4**. CP 972-1004.

And the Court - Judge Tabor (Superior Court Cause No. 05-2-02460-4)- agreed with the Port and dismissed the appeal, finding that the cargo paving project, impacts associated with the Weyerhaeuser export operation such as truck traffic, and impacts associated with the Port's routine maintenance berth dredging were **NOT** linked with the Weyerhaeuser lease and instead were independent projects. Judge Tabor ruled as follows:

Was this a project that is merely piecemeal of a bigger project? I've specifically found that it is not under the facts that have been presented to me here today.

Parker v. Port of Olympia, Thurston County Cause No. 05-2-02460-4, Transcript of Court's Ruling, at 12:23-25 and 13:1. Exhibit 5 CP 1005-1025. Emphasis added.

The Port's dredging activity, like the paving action, is part of the Port's ongoing maintenance of its marine terminal assets. The dredging was contemplated prior to the Weyerhaeuser lease and or the 2005 routine cargo yard re-paving project and is an action wholly independent of these unrelated acts.

The Port undertook the initial action to commence dredging in the area of Berth 3 as long ago as 1999, when the proposed dredge material underwent DMMP characterization in anticipation of the Port's intent for open water disposal of the dredge material. The results of that characterization were documented in a May 2000 Suitability Determination Memorandum, and information and narrative from the Seattle District Corps of Engineers - Operations Division. These beginning steps, necessary for ultimate approval of the Port's current Berth 3 dredging activity were initiated years before the 2005 Weyerhaeuser lease negotiations, and are wholly independent of that lease.

The Port currently is undergoing independent SEPA review of the Dredge activity. A SEPA checklist for the dredge activity was filed and reviewed by the Port's SEPA Responsible Official. A SEPA MDNS Issued for the Dredge Maintenance activity on December 13, 2005. In response to public comments, a revised Notice of Extended Appeal Deadline issued on or about December 22, 2005. That MDNS has a public comment deadline of December 28, 2005 with an appeal deadline of January 4, 2006. See Exhibit 2, Declaration of Andrea Fontenot. **Exhibit 4**.

The following portions of the Court's decision makes clear that his ruling differentiate between the Weyerhaeuser Lease and the Cargo Yard paving (Contract 296/ Northwest Cargo Yard) Project.

I am going to uphold the decision of the Port Commissioners in this particular case. **My specific findings are that this project was indeed an independent project**, the repaving of a portion of the port property that had previously been paved. **I understand that there is a small portion, that is less than a half an acre, and I guess that's subjective how much you say that is, that was not previously paved, but another important part of that is that project did not change the character or use of any of the property. The property would be used as it had previously been used over a lengthy period of time.**

Transcript of Court's Ruling, at 9:15-25 and 11:1-3. **Ex 5** CP 1005-1025. Emphasis added.

Finally, I'll just tell you that while it was interesting to me to consider whether or not **traffic levels**, for instance, referred previously to a single trip or a round trip and how many trips we were talking about, how much traffic congestion was there in the past, how much is there now, all those issues... While of interest, I will concede this Court need not reach those issues because of its decision that this was an independent project. I would also indicate, however, that if I'm mistaken in that regard, **that there have previously been environmental impact statements that dealt with similar situations**, the most recent being in 1994, I believe. In any event, congestion of traffic and so forth has been addressed.

Transcript of Court's Ruling, at 13:19-25 and 14:1-9. Emphasis added. **Ex. 5** CP 1005-1025.

The Court's March 2006 ruling that the Cargo Yard Paving No 296 Project was independent from the Weyerhaeuser Project thus confirms that

documents related to this Cargo Yard Paving Project are simply NOT responsive to Appellants' request for records relating to the Weyerhaeuser Project. No appeal was taken from Judge Tabor's decision.

Ms Witt's very late-offered 17 August 2010 declaration (para a, b, c & d) CP 804-807 claims the 9/18/08 post-court of appeal release of records hampered her ability to show the Cargo Yard paving, the dredge project, and traffic levels were linked to the Weyerhaeuser lease, and that a grading permit should have required. Yet, she fails to cite to any specific document or explain how the unnamed document would have overcome Judge Tabor's ruling that the various infrastructure projects were **not** linked. The paving, traffic and dredge issues were all argued in the scope of this appeal, and were found to be *independent* projects.

Significantly, Judge Tabor's ruling encompasses and renders non responsive *nearly all* Plaintiff's offered records stamped "JJ"001-231, claimed by Appellants as improperly withheld¹³. CP 1005-1025. Appellants *concede* that "a great many of the documents filed in this court with the designation "JJ" were Reid Middleton documents, the engineering firm that worked on the plans for the *improvements required*

¹³ The sole exceptions are for the following which are also non-responsive and or were public, released and not included on the Port's Privilege Logs: JJ039 A – **Fender repair** - marine terminal Project; JJ071 – **MNO Dock Project**, JJ179-180 **Weyerhaeuser Truck Traffic memo** – used as Exhibit J in administrative appeal hearing, and JJ195- **Berth Maintenance Project**. See CP 82-386.

by the lease.” Plaintiff’s *Motion For Penalty And Fees* at CP 471. But because Appellants ***underlying assumption is wrong*** (i.e., Judge Tabor ruled the Reid Middleton documents for the Cargo Yard Project 296 were **not** related to and were independent of the Weyerhaeuser lease), The Port established and the Court on remand agreed, that Appellants’ entire argument that these records were impermissibly withheld folds like a house of cards, as the “JJ stamped” records are simply not responsive.

1. Effect of Records On Prior Unsuccessful Appeals Was Non-Existent.

Appellants also argued that they were hampered in pursuing a number of appeals due to the Port’s release of records after the court of appeal ruled. Appellants then attempted to bootstrap this into an *Yousoufian*¹⁴ argument that the Port exercised “negligent, reckless wanton bad faith or intentional non compliance:” See Plaintiff’s *Motion For Penalty And Fees* at 471. Appellants’ arguments were not supported by the facts, and the Court on remand properly rejected them.

The Port established for the Trial Court that the entire set of claimed, un-released (JJ stamped) records were NOT responsive. In addition, however, the Port also conclusively established that (1) many of the claimed missing documents were actually ***disclosed and used as***

¹⁴ *Yousoufian v. Office of Ron Sims* (2007) 137 Wash.App. 69, 151 P.3d 243, reconsideration denied, review granted 162 Wash.2d 1011, 175 P.3d 1095).

exhibits within the appeals, (especially the administrative and judicial appeals of that cargo yard project) and (2) the majority of the appeals referred to by Appellants were dismissed outright due to *faulty procedural missteps* by Appellants, and **not** due to any claimed “information gaps”, and (3) in at least one case, the Examiner *did* set over rulings to allow Appellants to review the records the Port released post- appeal. Nonetheless the appeals remained unsuccessful. The appeals raised in Appellants’ pleadings were extensively reviewed for the Trial Court and in pertinent part below, and are supported by actual pleadings from the respective appeals, in order to provide the appropriate clarification, and dispel Appellants’ claim of “public importance” and “harm”.

2. Cargo Yard LUPA appeal. (Superior Court Cause No. 05-2-02460-4)

Appellants below (and West on appeal) presented only speculation that *if* the post-Court of appeals records had been released earlier, their SEPA/LUPA appeal of Cargo Yard Paving contract 296 (also known as NW Cargo Yard) would have been more successful. However, in that matter the Court ruled that the Cargo Yard was a separate Project from the Weyerhaeuser Lease, and correctly dismissed Appellants’ appeal. In that case, Appellants also attempted to link various other routine terminal infrastructure activities as inextricable linked with the Weyerhaeuser

Project, which the Court rejected. See Court's ruling and transcript Exhibit 5, CP 1005-1025.

The Port established to the Trial Court on remand that the great majority of the many documents Appellants claimed were suppressed by the Port were actually part of that 2005-2006 Cargo yard appeal, including the final Weyerhaeuser Lease with page 49 that appears **no less than three times** in the Cargo Yard appeal (See specifically Bates No.s 703-752, 2097-2143, and 912-950 from *Parker v. Port of Olympia, Thurston County Cause No. 05-2-02460-4*). See Dec of Lake, Re; Page 49, CP 1234-1239. As part their appeal, Appellants relied on the final version of lease, but claim they were harmed by not receiving the **draft** leases, which were released after the Court of Appeal ruling. Yet the **final** version of the lease is the only relevant version. It matters not what prior lease drafts contained, the final version is the only operable document. In any case, Judge Tabor found the many projects claimed by Appellants as interdependent on the Weyerhaeuser lease were in fact **independent**; those records (Reid Middleton and Cargo Yard 296 records) thus were non responsive to Appellants' request for records related to the Weyerhaeuser lease. CP 1005-1025.

3. 2005 Grading permit – Case No. 05-2504, City Of Olympia Hearing Examiner

On November 4, 2005, Jerome Parker and Jan Witt filed an appeal of administrative decision seeking review of the City's failure to require a grading permit for what the Port terms its "Cargo Yard Paving Project or NW cargo yard." See true & correct copy of Hearing Examiner's ruling, 2005 Grading permit – Case No. 05-2504, City Of Olympia Hearing

Examiner Exhibit 6. CP 1026-1044. That hearing also included as an Exhibit Plaintiff's JJ 161, and JJ179-180 **Weyerhaeuser Truck Traffic memo** – used as an Exhibit in administrative appeal hearing, which Appellants claim was hidden by the Port. (The Port objected to its admission as beyond the scope of that appeal but it was admitted.) See excerpt of Hearing Examiner's ruling **Exhibit 6** at page 3, CP 1029:

Attachment 5 comprises a series of past traffic studies for Port projects and documents relating to traffic which may be generated by the current lease of Port property to Weyerhaeuser. The Port objects to these as beyond the scope of the grading permit issue presented in this proceeding. For the reasons set out in the Conclusions, below, this attachment presents factual assertions which are relevant to the Appellants' claim of standing and is ADMISSIBLE for that purpose.

Ultimately on March 1, 2006, the Examiner Thomas R. Bjorgen dismissed the appeal based on procedural defects – not due to any missing substantive information:

The appeals are not authorized by governing ordinances. For that reason, they are dismissed. **The appeals were filed after the appeal period had run.** If the appeals were authorized by ordinance, they would be untimely and are dismissed also for that reason.

Id at CP 1044.

Ms Witt's declaration (para a) CP 804-807 claimed the 9/18/08 post-court of appeal release hampered her ability to show the Cargo Yard paving was linked to the Weyerhaeuser lease and that a grading permit should have required. But she again failed to cite to any specific

document or explain how the unnamed document would have overcome her *procedurally defective* appeal. In addition, the records were *admitted*. Finally, the City's Staff report to the Grading permit appeal speaks substantively to the issue, clarifying that no permit was required for SEPA 05-01 as Ms. Witt continues to claim:

By way of issuing a SEPA determination of nonsignificance (DNS) on September 14, 2005, the Port of Olympia announced its intention to maintain existing cargo yard areas through the replacement of existing asphalt and compacted soils with new asphalt. In the associated environmental checklist the Port indicated that a grading permit would be needed for this proposal. On September 20 Port staff met with City staff and determined that a grading permit was not required for this activity. In an addendum to the DNS the Port indicated that, "A grading permit will not be required from the City of Olympia has [sic] first believed."

Beginning in October, communication ensued between the appellants and City staff regarding this statement by the Port. That communication culminated in this appeal being filed on November 4. Appellants seek both a finding that a grading permit is required and an environmental review of the project by the City.

See **Exhibit 7**, CP1045-1047. City Staff Report for Appeal 05-2504.

4. 2006 Appeal of Electrical permit – Case No. 06-0567, City Of Olympia Hearing Examiner

In this case, appellants Jerome F. Parker and Jan L. Witt appealed an electrical permit issued July 21, 2006 to the Port of Olympia for the installation of electrical conduit. That hearing also admitted numerous Exhibits, which Appellants claim in this suit were previously undisclosed (related to Cargo Yard paving project 296 – Reid Middleton), See excerpt

of Hearing Examiner's ruling *2006 Appeal of electrical permit – Case No.*

06-0567, Exhibit 8 p. 6, CP 1048-1059, at 1053.

5. On August 22, 2005, the Port of Olympia Commission approved a Capital Expense Authorization of \$3,728,489 for the purpose of carrying out the cargo yard improvements which the lease required the Port to make. See Ex. 1, Att. D.

6. On September 12, 2005, the Port of Olympia Commission awarded Contract No. 296 for the reconstruction of the Northwest Cargo Yard on Port property. Contract No. 296 included, among other matters, repaving the 5.3 and 3.4 acre areas as required by the lease, installing a portion of the yard lighting required by the lease, and the installation of 3500 linear feet of electrical conduit to serve improvements required by the lease. See Ex. 1, Att. D.

7. Ex. 1, Att. D, Att. 13 is a Reid Middleton drawing for the Northwest Cargo Yard reconstruction, dated August 23, 2005. This Northwest Cargo Yard project is the subject of Contract No. 296. A comparison of this Reid Middleton drawing with the drawing attached to the electrical permit here at issue (Ex. 1, Att. A) shows that the work to be performed under the electrical permit is part of that authorized by Contract No. 296. The Port of Olympia's Memorandum at Ex. 7, p. 3 confirms this.

8. On September 14, 2005 the Port of Olympia issued a Determination of Nonsignificance (DNS) under SEPA for a project described as "replacement of existing asphalt and compacted soils with new asphalt." An addendum to this DNS was issued on September 22, 2005, which does not bear on the resolution of these motions. See Ex. 11, Atts. 6 and 7.

Id. In that same 21st day of December, 2006, the Examiner Thomas R.

Bjorgen dismissed this appeal based on procedural defects (issues

collaterally estopped by Judge Tabor's ruling in Superior Court Cause No.

05-2-02460-4) - not due to any missing substantive information:

DECISION

The decisions of motions to exclude evidence and the decisions on all evidence offered are reflected in the list of exhibits, above. The motion to dismiss the appeals for lack of standing is **denied**. **The motion to dismiss the appeal under the doctrine of collateral estoppel is granted,**

and the appeal is dismissed. The request by Arthur West for status as a party or as an intervener is **denied**.

In light of the dismissal, the remaining motions by the Port and City do not require decision.

See **Exhibit 8** at page 10-11 CP 1057-8, Hearing Examiner's ruling 2006

Appeal of electrical permit – Case No. 06-0567.

5. 2007 Appeal of Engineering Permits, City Of Olympia Hearing Examiner No. 07-209

Mr West and Mr Dierker filed an appeal of engineering permits. The City, Port and Weyerhaeuser moved to Dismiss on jurisdictional grounds because the appeal was untimely filed long after the 14 day period expired. The dismissal was again granted on grounds the appeal was *procedurally defective*.

This appeal was filed by Mr. West and Mr. Dierker on October 30, 2007. It challenges Engineering Permit No. 07-0959, which was issued September 5, 2007 to the Port of Olympia for various cargo yard improvements associated with the lease of property to the Weyerhaeuser Company for a log export facility. Under Olympia Municipal Code (OMC) 18.75.020 and .040 appeals of this type of permit must be filed with the Hearing Examiner within 14 days of the date of decision. This appeal was filed 55 days after the permit's date of September 5, 2007.

Appeal deadlines are jurisdictional requirements. As shown above, the Appellants did not file this appeal within 14 days of the date of decision, as required by law. Alternatively, they did not file this appeal within 14 days of the date they received notice of the decision. For each of these reasons, this appeal is untimely and must be dismissed.

See *HE Consolidated Order on Motions No(s) 07-0209, 07-0210, 07-0234*

at page 8-9, **Exhibit 9** hereto. CP 1060-1076, at 1073.

5. **2007 Appeal of Electrical Permit City of Olympia Hearing Examiner No. 07-0210**

This appeal was filed November 2, 2007 by Janet Witt, Jerome Parker, Patrisa DiFrancesca, Steve Mason and Walter Jorgensen of electrical permit issued to Port on October 26, 2007. From **Exhibit 9**, excerpts of *HE Consolidated Order on Motions No(s) 07-0209, 07-0210, 07-0234* at page 10, CP 1070 the Examiner describes the appeal.

The appeal argues the electrical permit is invalid because (a) it was issued in violation of SEPA in a number of ways, (b) it erred in not evaluating related trenching which would occur in the area of the slurry wall around a hazardous waste clean-up site, (c) it violates RCW 53.20.010, and (d) it was issued without a valid Land Use Approval (site plan review). Because the Appellants do not claim any other legal flaw in their claim related to trenching, this decision assumes that to be an aspect of their SEPA claims. This appeal also challenges the City's decision not to require an application for a shoreline permit for some of the permit activity. Weyerhaeuser Company and the Port of Olympia moved to dismiss this appeal. See Ex. M-23.

The Examiner dismissed all issues raised via summary judgment motions, except the site plan review issue. See *HE Consolidated Order on Motions No(s) 07-0209, 07-0210, 07-0234* at page 15, Exhibit 9 CP --

¹At the hearing on the merits of Appeal No. 07-0210 on January 22, 2007, the appeal of the decision not to require a shoreline permit was dismissed, because the uncontroverted evidence made clear that none of the activities at issues in fact took place in the shoreline.

Id. After hearing, the Permit was upheld, and appeal dismissed on February 14, 2008. See **Exhibit 10** at page 14, *CP 1077-1090 at 1090, Hearing Examiner's ruling in 2007 Appeal of Electrical Permit City of*

Olympia Hearing Examiner No. 07-0210. Again, the dismissal was based on legal not substantive grounds (facts were uncontroverted).

7. **2007 Appeal of Foundation Permit, City Of Olympia Hearing Examiner No. 07-0234**

Excerpts from the HE's Order of Dismissal aptly summarize this unsuccessful appeal, dismissed for failure to state a legal (not substantive claim).

This appeal was filed by Mr. West and Mr. Dierker on December 12, 2007. The appeal challenges foundation construction Permit No. 07-1830, which was issued November 28, 2007 for the construction of the foundation of a Weyerhaeuser shop building associated with the proposed log export facility. The appeal claims that this permit is invalid because: (a) it is based on a vacated SEPA threshold determination, (b) it was not consolidated with all related permits, (c) it violates LUPA, (d) it violates the state Public Records Act, and (e) it violates SEPA.

The Weyerhaeuser Company moved to dismiss Appeal No. 07-0234, arguing that none of the bases of the appeal describe any legal defect in the permit. Because this motion rests on both legal standards and uncontroverted factual assertions contained in the exhibits, it is analogous to a motion for summary judgment under CR 56 and will be treated as such.

In their briefing, the Appellants also argue that Permit No. 07-1830 violates the Harbor Improvement Act, the Appearance of Fairness doctrine and the Shoreline Management Act. The Appellants, however, neither included these claims in their appeal nor attempted to amend their appeal to incorporate them. As such, they cannot be entertained.

On the basis of the uncontroverted facts, none of the bases of this appeal describe any legal error in the issuance of Permit No. 07-1830. The motion to dismiss Appeal No. 07-0234 should be granted.

See *HE Consolidated Order on Motions No(s) 07-0209, 07-0210, 07-0234* at page 9, **Exhibit 9** CP 1073.

7. **Witt& Jorgenson/ West &Dierker LUA Appeal, City HE No. 08-0044-1& 2**

In this 2008 consolidated appeal, Appellants claimed the City Site Plan Review committee erred in modifying its 2006 Land Use Approval of

the Weyerhaeuser site at the Port of Olympia to incorporate the conditions of the Port's MDNS. Mr Jorgenson was a party, along with Ms Witt. These appeals also were unsuccessful, but they are significant to this matter – as notably *many of the “JJ stamped” documents were exhibits offered by Appellants in this case*. See Appellant's witness list (in email form) Exhibit 11, CP1091-1093. **Exhibit 12** is Ms Witt's list cross-referenced against Plaintiff's “JJ stamped” documents, which include (at least): JJ 229-235, JJ 030-32, JJ 265—282, JJ 035- 037, JJ 171-173, and JJ 236-238. CP 1095-1108¹⁵

A core claim within Ms Witt very late 16 August 2010 Declaration (para f) CP 804-807 was her claim she did not have a copy of page 49 of the WeyCo Lease until after the court of appeals records were released.¹⁶ Yet, she offered the Lease – with *specific reference to page 49* as an exhibit in *this* hearing:

As another paper - saving measure, **attached is a pdf of the Weyerhaeuser / Port lease agreement which we will ask be submitted into the record tomorrow**. Please note, as with some other copies we received of the lease, this pdf is missing page 49. **We will bring extra page 49 hardcopy to hearing tomorrow**

Exhibit 13-CP1109, email from Ms Witt dated Sunday, August 17, 2008

11:08:26 AM. But - the Port did not notify the parties Mr Jorgenson of

¹⁵ More overlaps may exist that are readily apparent based on the vagaries of some exhibit descriptions

¹⁶ Mr Jorgenson repeats this argument in his even later filed Declaration dated August 18, 2010, at para 3. The Trial Court granted the Port's Motion to strike this declaration. CP 1192-3.

the release of post court of appeals records until **September 18, 2008**, *over a month later*. See **Exhibit 14, CP 1110-1114, Port Of Olympia's Objection to Appellants' Post Hearing Objection & Motion To Introduce Post Hearing Exhibits, filed in that same appeal No. 08-0044-2. Therefore, The Port was able to show the Trial Court on remand that Ms Witt & Ms Jorgenson clearly had possession of the complete Lease with page 49 prior to the Port's post court of appeals release. This makes sense, for another reason, as only *drafts* of the lease were withheld under the deliberative process exemption, the final lease was released out-right.¹⁷ See also CP 1234-1239, responding to West's claim he lacked page 49.**

Ms Witt's declaration (para f) CP 804-807 and Mr Jorgenson at para 7(d) CP 808-816 (stricken by the Trial Court but improperly referred by Appellants) also implies the Floyd Snyder ESA was not released, or its linkage to the Lease was not "revealed" until after the **9/18/08** post-court of appeal release. But here again, the Port showed that Ms Witt's *pre-release 8/17/08* emails belies this claim, as she also introduces the ESA as in an Exhibit in this appeal:

One of the documents / exhibits we'll be asking be submitted into the record tomorrow is the Port / **Weyerhaeuser lease. Page 49 of the lease incorporates by reference an Environmental Site Assessment.**

¹⁷ Port moved and the Trial court struck Ms Witts' hearsay as to what Ms Fontenot did or did not say re; page 49. Ms Fontenot is no longer a Port employee, so we cannot refute within the compressed timeframe

Because the ESA is quite long, in the interest of trying to cut down on use of paper, we are attaching this document as pdf to this e-mail.

Exhibit 15- CP 1115, email from Ms Witt dated Sunday, August 17, 2008

9:36:26 AM. Even more fatal to Appellants' claims they were "unaware the that the Floyd Snider ESA was linked to the Weyerhaeuser lease" is the plain wording of the Floyd Snider ESA document itself –

This report presents a Phase I Environmental Site Assessment (ESA) of the Weyerhaeuser Company's proposed lease area at the Port of Olympia, Washington.

Page (v.) to Floyd Snider ESA, attached as Exhibit A to Dec of Stephanie Bird dated 13 August 2010. CP 478-796. Ms Bird's Second Declaration dated 13 August 2010 also confirms this ESA was sent to Appellants on January 17, 2005 – only 12 days after their initial PRR. See **Exhibit 21, CP 1176-1179.**

The hearing in this appeal was held 18 August 2008. At the conclusion of the hearing and after various dispositive rulings, only two issues remained:

- (a) the claim that the Land Use Approval is defective because it was issued after most of the project had been permitted and constructed;
- (b) the claim that noise from these four buildings and their parking would violate a noise ordinance;

Following post hearing brief in on these two issues, the record in this appeal was closed. On 29 September 2008, the Appellants filed a request asking that the record be reopened to allow submittal of exhibits from the documents recently released by the Port of Olympia as part of a voluntary disclosure of records, formerly subject of a public record request appeal Order of Remand in *West et al. v. Port of Olympia, et al.*, No. 60723-5. The Port notified Mr Jorgenson of the release of records on September 18, 2008 and the records have been available since that date. The Appellants' Motion to submit additional records based on this Port release was dated 29 September, 2008, eleven days later. See **Exhibit 14**, *Port Of Olympia's Objection to Appellants' Post Hearing Objection & Motion To Introduce Post Hearing Exhibits*, filed in that same appeal No. 08-0044-2 CP 1110-1114.

Mr Jorgenson argued in his 16 August 2010 Declaration at para 5 CP 808-816 that the Port objected to the Examiner that the records should not be released. However, **Ex 14** CP 1110-1114 explains the actual Port position that none of the released records address the Appellants' issue of whether the Land Use Approval is defective because it was issued after portions of the project had been permitted and constructed. The Port's released records were responsive to a December 2006 public records request, and cover records generated only through the date of the 2006

records request. The released records thus as a whole fall entirely outside the timeframe relevant to this issue. The documents are irrelevant because they pertain to events that occurred before 2007. At the Hearing on the Merits, the Hearing Examiner specifically sustained objections to evidence of the early phases of the project and limited the timing issue to the relationship of the 2007 permit to the 2008 Land Use Approval. See *Transcript Excerpt of 18 August 2008 hearing* generally at pages 3-11 attached as **Exhibit 16**, CP 1116-1118.

Ultimately, however, the Examiner considered the additional records offered by Appellants, but found they did **not** support any changed decision:

19. As found, the Appellants submitted Port documents projecting that the facility will ship **130 million board feet** per year through 18 to 20 vessels and that three barges per month will deliver logs, in addition to log trucks. The difference between this estimate of 18 to 20 vessels and the 18 vessels per year on which the Environmental Checklist and Noise Study were based is **not significant enough to require reversal of the Land Use Approval**. The difference between the yearly total of 36 barges in these Port documents and the 30 barges per year assumed by the Noise Study is more significant, although its effect on the validity of the Noise Study is uncertain.

20. More to the point, the loading, unloading and log moving associated with this potential increased activity will not occur at the four buildings or parking. **The Appellants argue properly that an increase in log volume or the number of ships calling will also increase the level of activity around the buildings, including increased maintenance of heavy equipment at the shop. The evidence, though, gives no**

indication of the extent of this potential increase or of the increase in the noise it might cause.

21. For these reasons, the evidence supplies no basis for reversing the Land Use Approval, even if the Appellants projections of increased activity are assumed to be true.

See Exhibit 17, Hearing Examiner Decision in No. 08-0044-2, at page 19. CO1118-1140. The Examiner denied the appeal by Order dated 17 October 2008. Id.

b. West appeal - NO. 08-0044-1.

On October 1, 2008, the Olympia Hearing Examiner issued his Decision denying the Appeal brought by Mr West¹⁸, **Exhibit 18**. CP 1141-1153. Excerpts of that appeal include:

A complete decision on this appeal, however, cannot be made without an honest appraisal of the tactics and actions of the Appellants, especially Mr West. The Findings and exhibits above, together with the verbatim transcript of these appeal proceedings, show that Mr. West:

- (1) repeatedly violated the prehearing orders,
- (2) repeatedly raised issues which had already been dismissed or denied,
- (3) repeatedly attempted to submit information to the Hearing Examiner outside proper channels for offering evidence, despite multiple admonitions to cease and multiple explanations of the reasons why;
- (4) repeatedly submitted wholly irrelevant evidence and evidence on subjects which had already been ruled irrelevant or outside the appeal;**
- (5) repeatedly claimed violations of ordinances having no application to the issues on appeal;
- (6) made unfounded personal attacks on the Hearing Examiner and other parties;

¹⁸ The appeal was originally brought by Mr Dierker & Mr West, but due to health reasons, Mr Dierker withdrew from active participation.

- (7) attempted to intimidate the Hearing Examiner by filing a Bar grievance and lawsuit against the Examiner during the course of the hearing; and
- (8) failed to offer any evidence to support the one claim that was not dismissed.

These tactics, **coupled with the absence of evidence and argument when the merits were finally reached**, show a strategy of attempting to block the proposal by creating delay and expense, not by challenging it in a principled way. These tactics have cost taxpayers many thousands of dollars in attorneys and Hearing Examiner fees which should not have been necessary. Perhaps more importantly, these tactics showed contempt for and misuse of the quasi-judicial system which was affording the Appellants extraordinary accommodations to allow them to make their case. Most importantly, though, these tactics have not prevented this proceeding from affording the Appellants, parties without legal representation, a fair and full opportunity to present their case.

See *Hearing Examiner Order dated 1 October 2008*, No. 08-0044-1, attached as **Exhibit 18**. CP 1141-1153.

8. Remaining Issues Raised By Witt Declaration.

Two claims remained from Ms Witt's very late-offered 16 August 2010 declaration CP 804-807. In (para e -water quality) Ms Witt claims the 9/18/08 post-court of appeal release hampered her ability to show water quality issues. Again, Ms Witt pointed to no specific records, so the Port cannot reply, given this vacuum.

In para g to her Declaration, Ms Witt claimed she was harmed by the 9/18/08 post-court of appeal release because records "would have alerted me that the light pole height was raised" *Witt Dec* at CP806. Ms Witt stated:

The SEPA 05-01 records indicated the pole height would be 60 feet but the court of appeals records includes documents showing that Weyerhaeuser was requiring much higher poles. Because the height of the lease was specified in the lease the height could only be changed via an amendment to the lease. The Port approved the SEPA 07-02 and the lease amendment (changing the pole height) on the same night.

The Port was challenged to determine how this related to the present matter, but showed the Trial Court that the Weyerhaeuser lease amendment was approved by the Commission in open session on July 9, 2007- so the action was fully transparent. CP 1154-1174, Copy of Lease Amendment, **Exhibit 19:**

The undersigned confirms that this **Lease Amendment No. 1** was ratified by the Port of Olympia Commission on July 9, 2007

- The Weyerhaeuser lease amendment occurred ***well after*** Plaintiff's PRR of December 2006, so is non-responsive to that records request
- SEPA 05-01 records relate to the independent cargo yard paving, not Weyerhaeuser lights
- The Weyerhaeuser lease amendment does not change the pole height, see **Ex 19** CP 1154-1174,.

The Port also established that Ms Witt did argue a lighting claim in Olympia Hearing Examiner appeal NO. 08-0044-2, but it was not successful again on **procedural** grounds.

11. At the hearing on August 18, 2008 the Respondents moved to dismiss a number of the remaining appeal claims on the ground that the Appellants' evidence and argument did not show that any City ordinance was violated. On their claims relating to **contamination and glare or light spillover**, the Appellants were

not able to identify any City ordinance which they claimed the project violated. **Because violation of a City ordinance was an essential element of these claims, as set out in the Consolidated Order on Motions at Ex. M-40, these claims were dismissed.** CP1119-1140 ,Exhibit 17, *Hearing Examiner Decision in No. 08-0044-2*,

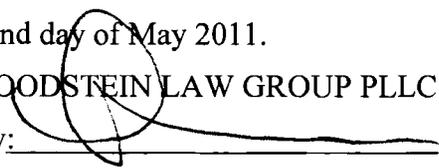
at page 9. In sum, the Port established and the Trial court agreed that Appellants did not show they were harmed by the timing of the Port's release of records, immediately after the court of appeals decision, since the various appeals were dismissed based on procedural miss-steps, not missing substantive information, and the records were not responsive to the Appellants' original records request.

IV. CONCLUSION

Appellants rely on the wrong standard on review. Appellants show no abuse of discretion in setting the PRA penalty. The Trial Court properly found the claimed "new and missing" records were not responsive to the original PRA request. Appellants offer no arguments as to how that determination was error. This appeal should be denied.

RESPECTFULLY SUBMITTED this 2nd day of May 2011.

GOODSTEIN LAW GROUP PLLC

By: 

Carolyn A. Lake, WSBA #13980
Attorneys for Respondent Port.

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

WALTER JORGENSEN, EVE JOHNSON)
and ARTHUR S. WEST,)

Plaintiffs,)

vs.)

SUPERIOR COURT NO. 06-2-00141-6

PORT OF OLYMPIA, a municipal)
corporation,)

Defendant.)

HEARING ON REMAND FROM COURT OF APPEALS
HONORABLE RICHARD D. HICKS, DEPARTMENT 4

August 25, 2010
2000 Lakeridge Drive SW
Olympia, Washington

Court Reporter
Ralph H. Beswick, CCR
Certificate No. 2023
1603 Evergreen Pk Ln SW
Olympia, Washington

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1
2 THE COURT: Well, let me begin by saying that
3 Mr. Jorgensen and Ms. Johnson and Mr. West and the people,
4 including the responsible people who work for the Port of
5 Olympia, and myself, we all live in the same community. I
6 don't really see any "us versus them," and it's my
7 impression that none of these people are motivated by an
8 evil intent, not the plaintiffs, nor the citizens who work
9 for the Port. I also am aware that innocent omissions can
10 be made to look like intentional commissions, but it isn't
11 always the case. And I come to that impression not really
12 from a position of naivete, but of sitting here a long time
13 and seeing facts argued to support one argument or another.

14 The plaintiffs ask the court to award each of them up to
15 \$38 million in penalties, but in any case, not less than a
16 quarter of a million dollars each. And they haven't
17 disclosed the amount of new attorney fees that they are
18 requesting. Plaintiffs Jorgensen and Johnson and West, who
19 filed his own motion, but joins in their motion, move the
20 court on remand to: (1) redetermine the number of records
21 withheld, and (2) redetermine the number of days that they
22 were wrongly withheld.

23 The court earlier determined that the records were
24 improperly withheld for 123 days and set the penalty at \$60
25 per day (from January 28, 2006 to May 30th, 2006). The

1 Court of Appeals accepted both the number of days and the
2 amount of penalty and how it was calculated. The Court of
3 Appeals reversed this court on only one issue, and that was
4 the applicability of the deliberative process exemption to
5 certain records and remanded the case back to this court to
6 determine if any other exemption would cover the records
7 withheld, and if not, then to extend the penalty to these
8 records, and also with the freedom to re-visit the amount
9 of the penalty when using the correct legal standard.

10 This court declines to recompute the number of days
11 involved, except insofar as the total days until disclosure
12 following the remand, but will re-visit the penalty amount
13 for the days involved. In addition, the court finds that
14 it has not been demonstrated that these additional records
15 that they now produce, meaning the plaintiffs, were
16 responsive and not logged as being withheld by the Port
17 within the plaintiffs' original request, but the Port has
18 shown more likely than not these documents were not
19 responsive, and I'll say more about that later.

20 Although the averments are not identical, all three of
21 the plaintiffs make extraordinary claims regarding what
22 happened in other tribunals or courts and why public
23 officials have resigned and how cases were "lost" because
24 of delay in obtaining records. All these kinds of
25 averments are matters of opinion and speculation which the

1 plaintiffs are free to hold and espouse, but that doesn't
2 mean that such averments are necessarily true.

3 This was originally a very complicated, time-consuming
4 and fact-intensive case which after the trial court ruling
5 came back from the Court of Appeals on a very simple
6 reversal on one point and a remand to rule in accord with
7 the Court of Appeals' decision with the freedom, but not
8 requirement, to recalculate the penalties. The Port after
9 losing this one issue at the Court of Appeals waived its
10 right to claim any other exemption might apply and simply
11 turned over all the records that were at issue. That is
12 the kind of openness and transparency that wants to be
13 encouraged by this legislation and reveals a change in
14 attitude of the Port from their earlier reticence about
15 which this court was critical at the time.

16 The plaintiffs provide the court with 284 pages of
17 alleged new documents which they argue were also wrongfully
18 withheld and not disclosed on the earlier privilege log
19 reviewed by this court and the Court of Appeals and ask
20 that these records now be included in any future
21 consideration. Most of these records arise out of a sort
22 "reverse engineering" rising from the ashes of plaintiffs'
23 earlier arguments made in other courts and tribunals
24 regarding "piecemealing" by the Port in addressing the
25 environmental impacts of the lease with Weyerhaeuser, which

1 was the core of the public record request in this case.

2 The Port responds to this extraordinary request of
3 awarding each of the plaintiffs up to 38 million dollars by
4 arguing that: (1) there is no factual or legal basis for
5 such an increase, (2) this court earlier determined the
6 Port's withholding was covered by an exemption, and (3)
7 upon the Court of Appeals rejecting the deliberative
8 process exemption and inviting the withheld records to be
9 tested by other possible exemptions, instead waived that
10 opportunity and simply turned over all the records to which
11 their ruling applied. Therefore, in light of their prompt
12 and immediate cooperation and action, the Port requests
13 that this court impose only a \$10-a-day penalty. They ask
14 for 876 days, but the correct calculation would be 984 days
15 and \$9,840.

16 First, as guided by *Yousoufian v. Sims*, 168 Wn.2d 444
17 (2010), this court considers the entire range of penalties
18 that are possible. In that case the Supreme Court set out
19 16 non-exclusive factors to consider, seven mitigating and
20 nine aggravating, and rejected a trial court's
21 determination in that case of a \$15-a-day penalty raising
22 it to \$45 per day for a total penalty of \$371,340 plus
23 reasonable attorney fees and costs. Without going through
24 a pedantic listing of each of the 16 factors and other
25 factors that will be mentioned and considered, this court,

1 meaning myself, considered:

2 (1) Whether a delayed response occurred where time was
3 of the essence. Petitioners rely heavily on this to argue
4 that this court should accept the invitation of the Court
5 of Appeals to reconsider and perhaps raise the amount of
6 per-day penalty. But as the Port has shown, this argument
7 does not carry that great weight, nor are these new
8 documents considered more likely than not responsive. It
9 doesn't carry much weight because plaintiffs argue that if
10 they had this information earlier, then perhaps they could
11 have made stronger arguments in challenging several of the
12 Port's actions involving environmental or various other
13 hearings in which they were also involved, such as hearings
14 before other departments of this court in other cases and
15 hearings before the City of Olympia hearing examiner. They
16 argue that this would have strengthened all of their
17 arguments, especially the Port was improperly piecemealing
18 review of the Weyerhaeuser lease issues when such a project
19 should have had a more comprehensive review.

20 First, in most of the instances which they cite alleging
21 that this information would have been useful (most of which
22 is earlier drafts of the eventual final lease), their cases
23 failed by procedural defects and this other information
24 would not have saved them. But second, and more important,
25 in the case before Judge Tabor, piecemealing was actually

1 advanced as an argument and considered by Judge Tabor and
2 then rejected. The timing of his ruling is not as
3 important as its content because it affirms what the Port
4 had originally considered as responsive, namely that these
5 were independent projects, though not entirely unrelated,
6 and though an exhibit to the lease speaks of the paving
7 upgrade, for instance Exhibit A3 No. 7, at the same time
8 paragraph 3.2 of the lease exempts No. 7 as a condition of
9 rent and at least arguably makes the paving an independent
10 matter. I don't say certainly, but only arguably.

11 Here I would point out there is a difference between tax
12 avoidance and tax evasion, and it is the same with shaping
13 your business activities to avoid environmental review.
14 That is to say shaping your activities to avoid a review is
15 different than evading it when you should follow it.

16 And this brings us to the third consideration.
17 Plaintiffs should be aware that piecemealing may or may not
18 be allowed by an agency, and it is allowed if one project
19 is independent of another, even if it may later benefit
20 another, and when the consequences of the entire
21 development cannot yet be initially assessed. On the other
22 hand, certain piecemealing is impermissible and not allowed
23 where there is a series of interrelated steps and the
24 current project under review is dependent on subsequent
25 phases.

1 But here is where we are. It is clear that Judge Tabor
2 heard these arguments about the paving and the lease being
3 piecemealed, and he rejected them in his case. This is my
4 colleague just down the hallway in another department of
5 this court, and we are at the same level of review. In
6 part because of this already being addressed by a
7 department of this court, these so-called new documents are
8 not only non-responsive to the original request, a
9 consistent position taken by the Port, but if these
10 documents withheld had been disclosed earlier, there is no
11 logical reason why they would have necessarily changed any
12 decisions by other courts or tribunals. It even looks as
13 if Judge Tabor had these documents in front of him.
14 Plaintiffs have filed affidavits or declarations of their
15 opinions, including inadmissible hearsay of what others may
16 have said and how they interpret that, but that is not
17 controlling evidence.

18 So then continuing with the factors considered by the
19 *Yousoufian* court and this court: (2) the degree of
20 compliance by the Port with PRA requirements and the
21 training of their personnel are not aggravating factors,
22 (3) the reasons given for their withholding were not only
23 reasonable but initially accepted by this court even the
24 though the Court of Appeals reversed on this one issue, (4)
25 this was not negligence nor bad faith non-compliance nor

1 did it involve agency dishonesty, nor is there any economic
2 loss to the requestors, (5) this was indeed an issue of
3 public importance foreseeable by the Port, and partly
4 because of that and further because of (6) the need to
5 deter future misconduct considered necessary because of the
6 port's initial reticence, this court did assess a penalty
7 of \$60 per day and was substantially critical of the Port
8 at that time. Incidentally, this is substantially higher
9 than what the Supreme Court assessed in the *Yousoufian* case
10 previously mentioned, and on arguably even more egregious
11 facts.

12 Now then, there does not appear to be issues of (7) lack
13 of clarity -- though now I would say after listening to the
14 oral argument that if plaintiffs were correct about omitted
15 responsive documents, then there would be this new issue
16 regarding the clarity of the request -- nor delayed
17 follow-up, nor improper training and supervision of agency
18 personnel. Here there was (8) agency good faith
19 withholding and the provision of a log showing all what was
20 being withheld and the reasons for that withholding, and
21 their explanations were reasonable, and in only one
22 instance those accepted by this court later rejected by the
23 Court of Appeals.

24 Finally, (9) another important factor only briefly
25 mentioned above is that as soon as the remand was final,

1 meaning the mandate from the Court of Appeals had been
2 issued, the agency very quickly waived its right to argue
3 any other exception which would apply and quickly provided
4 the previously-withheld records, and for what it is worth,
5 has settled and paid the other requestors involved. Those
6 requestors were satisfied with a stipulated \$10-per-day
7 penalty for 867 days for a total penalty of \$8,760 plus
8 their attorney fees and costs. This stipulated resolution
9 by a different requestor certainly does not control what
10 the court does here, but it is among the factors to notice
11 and take into account.

12 More important, this arguably shows the effectiveness of
13 the prior \$60-a-day penalty issued by this court since very
14 quickly after the mandate, the Port waived any claim to
15 argue about, and win or lose that would cause delay, any
16 further exception that might apply and provided all the
17 records found not subject originally to the deliberative
18 process exemption by the Court of Appeals. That is a
19 strong mitigating factor which the court would be remiss to
20 ignore, and to ignore it could lead agencies to believe
21 that the court is only interested in aggravation and not
22 mitigation and that agency reasonableness in the face of an
23 adverse court ruling will not be rewarded but simply
24 ignored.

25 The PRA, the Public Records Act, is designed to

1 discourage improper denial of access to public records, but
2 this also means it wants to encourage record release and
3 compliance and not just pummel agencies with bludgeons. A
4 court needs to seek balance, and anything else is the wrong
5 message for any court to send. Based on this constellation
6 of factors, the court is reducing the \$60-per-day penalty
7 for the original 123 days to one-half what it was, or \$30
8 per day for the remand records only, for a total of \$3,690,
9 plus an additional calculation for the additional 861 days
10 at \$15 per day for a total of \$12,915 for a total
11 additional penalty of \$16,605 due to the issues on remand.
12 The plaintiffs have already been awarded over \$50,000 in
13 attorney fees, and any additional requests must be related
14 to the Court of Appeals' remand plus that time reasonably
15 used to meet and prepare for the hearing in this court as
16 mandated by the Court of Appeals and not to support an
17 unsuccessful expedition to unravel and deconstruct those
18 parts of previously accepted rulings by both this court and
19 the Court of Appeals. That's this court's ruling.

20 MR. WEST: Thank you, Your Honor. I'd like to
21 respectfully object for the purposes of appeal.

22 THE COURT: You may.

23 (A recess was taken.)
24
25

CERTIFICATE OF REPORTER

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

I, RALPH H. BESWICK, CCR, Official Reporter of the Superior Court of the State of Washington in and for the County of Thurston do hereby certify:

That I was authorized to and did stenographically report the foregoing proceedings held in the above-entitled matter as designated by Counsel to be included in the transcript.

Dated this 27th day of August, 2010.

RALPH H. BESWICK, CCR
Official Court Reporter
Certificate No. 2023

APPENDIX B

PORT OF OLYMPIA –WEST CASES

GLG Matter No.	Case Name / Jurisdiction	Description
GLG Matter PO- 16	<p>Parker & Witt, and Mason Appeal to City of Olympia Hearing Examiner</p> <p>Mr West sought to intervene (unsuccessfully)</p>	<p>Appeal of City of Olympia SEPA Decision by <u>Weyerhaeuser</u> Re: Its Building & Project permits</p> <p>Port participated in support of its potential tenant and to monitor the integrity of Port SEPA processes.</p>
GLG Matter No 19	<p>SEPA 07-02 SEPA Administrative Review & Appeal of Weyerhaeuser - Port SEPA Determination</p> <p>Olympians for Public Accountability, and Patrisa DiFrancesca, Stanley Stahl, Marissa Cacciari-Roy, Harry Branch, Dorothy Jean Mykland, Walter Jorgensen, Suzanne Nott, and Anne Buck</p> <p>Thurston County Superior Court No. NO. 07-2-01352-8 (OPA 1) and Thurston County Superior Court Cause No. 07-2-01586-5 (the "OPA II Case").</p>	<p>SEPA review and administrative and judicial appeal of the Port's marine terminal infrastructure improvements and <u>Weyerhaeuser</u> Company Log operation</p>
GLG Matter	<p>West & Dierker v. Port of Olympia Port and Weyerhaeuser Company et al</p>	<p>Superior Court Appeal of Port's SEPA MDNS Determination for Port Infrastructure Improvements & <u>Weyerhaeuser</u> Company Log</p>

EXHIBIT 20

PORT OF OLYMPIA –WEST CASES

GLG Matter No.	Case Name / Jurisdiction	Description
	<p>Patterson, City of Olympia, Washington Cities Insurance Authority, Jeffrey Myers, International Long Shoremans Union U.S. District Court of Western District of Washington at Seattle No. 08-687</p>	
<p>GLG Matter No. 47: Witt GLG Matter No. 48: West & Dierker</p>	<p>Appeal of June 17, 2008 Approval of Weyerhaeuser Log Yard (08-0044) by West, Dierker, Mason, Jorgensen, and Witt</p>	<p>Two sets of parties (Mr West & Mr Dierker) and (Ms Witt, Mr Mason Mr Jorgenson and Mr Parker) filed appeal to the City of Olympia Hearing Examiner of the City of Olympia’s approval of the <u>Weyerhaeuser</u> Company Log Yard Land Use Approval, 2008.</p>
<p>GLG Matter No. 49</p>	<p>West v. City Of Olympia, City Of Olympia Hearing Examiner, Port Of Olympia, Washington Cities Insurance Authority Thurston Co. Sup. Ct. No. 08-2-01949-4</p>	<p>This matter began as a Show Cause action brought by Mr. West against the City of Olympia on public records issues. After the Examiner denied Mr. West’s appeal of various permits issued to the Port and <u>Weyerhaeuser</u> Company (GLG Matter No. 37 & 39), Mr. West amended his Complaint to include a LUPA appeal to Superior Court of that City of Olympia Dismissal and to bring causes of action against the City of Olympia hearing examiner.</p>

PORT OF OLYMPIA –WEST CASES

GLG Matter No.	Case Name / Jurisdiction	Description
GLG Matter No. 50	2008 Clean Water Act – Arthur West	Mr. West filed a 60 day notice of intent to file Clean Water Act suit against the Port of Olympia for alleged stormwater discharge violations. (includes <u>Weyerhaeuser alleged impacts</u>)
GLG Matter No. 51	LUA Superior Court Appeal- West v. City Of Olympia, Weyerhaeuser Company, Port Of Olympia, Jan Witt, Steve Mason, And Jerry Parker Thurston Co. Superior Court No. 08-2-02607-5	This is the Superior court judicial appeal file by Mr. West following dismissal of his appeal to the City of Olympia Hearing Examiner of the City of Olympia’s approval of the <u>Weyerhaeuser</u> Company Log Yard Land Use Approval, 2008. (See GLG matter 49).
GLG Matter No. 52	2008 Stormwater Appeal – PCHB 08-113	Mr. West filed an appeal of the Department of Ecology Industrial Stormwater Permit. Parties named are the Department of Ecology, <u>Weyerhaeuser</u> Company & The Port of Olympia
GLG Matter No. 57	NPDES APPEAL- PCHB Arthur West v. Dept. of Ecology & Port of Olympia PCHB No. 09-077	Mr West’s 2009 appeal of NPDES permit (includes <u>Weyerhaeuser alleged impacts</u>)

PORT OF OLYMPIA –WEST CASES

GLG Matter No.	Case Name / Jurisdiction	Description
GLG Matter No. 59	<p>Olympians for Public Accountability et al. v. Department of Ecology Port of Olympia</p> <p>PCIIB No. 09-135 through 09-141 (all consolidated)</p>	<p>Appeal by several including Mr West of Ecology's Industrial General Stormwater permit applicable to <u>Weyerhaeuser</u></p>

APPENDIX C

Carolyn Lake

From: LJWitt312@aol.com
Sent: Sunday, August 17, 2008 11:07 AM
To: clake@goodsteinlaw.com; ESLASCHEVER@stoel.com; dnienabe@ci.olympia.wa.us; jmyers@lldkb.com; JTMORGAN@stoel.com; lkeehan@ci.olympia.wa.us; tstamm@ci.olympia.wa.us; awestaa@gmail.com; steve@masonimage.com; waltjorgensen@comcast.net; LJWitt312@aol.com
Subject: 08-0044-2
Attachments: lease.pdf.zip

Dear Parties,

As another paper - saving measure, attached is a pdf of the Weyerhaeuser / Port lease agreement which we will ask be submitted into the record tomorrow.

Please note, as with some other copies we received of the lease, this pdf is missing page 49. We will bring xtra page 49 hardcopy to hearing tomorrow

Please let me know if you are unable to open this attachment or if you prefer hardcopy

Again, I apologize am unable to send all exhibits to you electronically. (I have no scanner and thus am only able to send documents already in electronic format)

Jan Witt

Looking for a car that's sporty, fun and fits in your budget? Read reviews on AOL Autos.
(<http://autos.aol.com/cars-Volkswagen-Jetta-2009/expert-review?ncid=aolaut00030000000007>)

Information from ESET NOD32 Antivirus, version of virus signature database 5380
(20100819)

The message was checked by ESET NOD32 Antivirus.

<http://www.eset.com>

EXHIBIT 13

APPENDIX D

Carolyn Lake

From: LJWitt312@aol.com
Sent: Sunday, August 17, 2008 9:35 AM
To: clake@goodsteinlaw.com; ESLASCHEVER@stoel.com; dnienabe@ci.olympia.wa.us;
jmyers@lldkb.com; JTMORGAN@stoel.com; lkeehan@ci.olympia.wa.us;
tstamm@ci.olympia.wa.us; awestaa@gmail.com; steve@masonimage.com;
waltjorgensen@comcast.net; LJWitt312@aol.com
Subject: 08-0044-2 exhibit - ESA
Attachments: ESA05.pdf.zip

Dear Parties,

One of the documents / exhibits we'll be asking be submitted into the record tomorrow is the Port / Weyerhaeuser lease.

Page 49 of the lease incorporates by reference an Environmental Site Assessment.

Because the ESA is quite long, in the interest of trying to cut down on use of paper, we are attaching this document as pdf to this e-mail.

Please let us know if you cannot open this or if you'd prefer hard copy tomorrow

Thank you

Jan Witt

Looking for a car that's sporty, fun and fits in your budget? Read reviews on AOL Autos.
(<http://autos.aol.com/cars-Volkswagen-Jetta-2009/expert-review?ncid=aolaut00030000000007>)

Information from ESET NOD32 Antivirus, version of virus signature database 5380
(20100819)

The message was checked by ESET NOD32 Antivirus.

<http://www.eset.com>

EXHIBIT 15

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ARTHUR WEST and WALTER R.
JORGENSEN et al.

Appellants,

vs.

PORT OF OLYMPIA
Respondent.

NO. 41334-5-II

DECLARATION OF SERVICE

The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and the following document:

1. RESPONSE BRIEF OF RESPONDENT PORT OF OLYMPIA
and
2. MOTION FOR EXTENSION TO FILE RESPONSE BRIEF,
MOTION TO FILE OVERLENGTH BRIEF, AND MOTION TO
STRIKE

to be served on May 2, 2011, on the following parties and in the manner indicated below:

Arthur S. West
120 State Avenue, Ste. 1497
Olympia, WA 98501

- by United States First Class Mail
 by Legal Messenger
 by Electronic Mail
 by Federal Express/Express Mail
 by Personal Delivery

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
MAY -2 AM 9:26
BY _____
DEPUTY

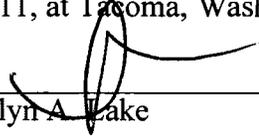
ORIGINAL

Stephanie Bird
Jon Cushman
Ben Cushman
Cushman Law Offices PS
924 Capitol Way S
Olympia, WA 98501-1210

by United States First Class Mail
 By Legal Messenger
 by Electronic Mail
 by Federal Express/Express Mail
 by Personal Delivery

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

DATED this 2 day of May, 2011, at Tacoma, Washington.



Carolyn A. Lake