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SUPREME COURT
OF THE STATE OF WASHINGTON

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BELO MANAGEMENT SERVICES, INC., a Delaware Corporation;
KIRO-TV, INC., a Delaware Corporation; TRIBUNE BROADCASTING
SEATTLE, LLC, a Delaware Limited Liability Company; and CBS
CORPORATION,

Respondents,

v.

CLICK! NETWORK, a Department of Tacoma Public Utilities Division
of the CITY OF TACOMA; and TACOMA NEWS, INC.

TACOMA NEWS, INC. as

Appellant.

APPELLANT TACOMA NEWS, INC.'S OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

Following an interruption in cable television service, and multiple public hearings on the matter, The News Tribune (“TNT”) made a Public Records Act (“PRA”) request. TNT simply sought *executed* contracts between the City of Tacoma (“City”) and various television broadcasters, including the Plaintiff-Respondents (collectively “Broadcasters”)—information that the City agreed was subject to disclosure: “The City Attorney’s Office has reviewed the request and the Agreement and determined that no applicable exemption can reasonably be asserted by the City under the Public Records Act.” Clerk’s Papers (“CP”) 45.

The Broadcasters filed suit asserting that the contract fees they receive from the City are trade secrets that the public, therefore, has no right to know. The Broadcasters, with subsequent cooperation from the City, convinced the trial court to grant an injunction prohibiting the release of these documents along with unspecified “related records.”

The trial court erred in entering this injunction. The final contract price with a government agency is not a trade secret. The Broadcasters failed to establish other statutory requirements specific to PRA injunctions, including the required findings that disclosure “*clearly* not be in the public interest” and would “irreparably damage a person or *vital* governmental functions.” The injunction was improperly broad because

it reached undefined “related records.” The trial court issued its injunction without ever reviewing the proclaimed trade secrets. All of this was error and the trial court’s order enjoining disclosure should be reversed.

II. STATEMENT OF THE CASE

A. The City of Tacoma operates a cable television network which enters retransmission agreements with broadcasters.

The City operates a cable television network known as Click! Network (herein “Click”). Through Click, the City serves approximately 23,000 (CP 432) of the 297,000-plus households in Pierce County.¹ Like Comcast, DIRECTV, and DISH Network, the City is a “multichannel video programming distributor” or MVPD. CP 142–43. According to CBS, “[t]he overwhelming majority of television households have a choice between three, and sometimes four, multichannel video programming providers.” CP 575.

Unlike Comcast, DIRECTV, DISH Network, or the vast majority of MVPDs across the country, Click is a government entity—not a private enterprise. Verbatim Report of Proceedings (“VRP”) 45–46 (less than five percent of Belo’s agreements are with publicly owned MVPDs; Click is the only public MVPD in Washington). Nonetheless, the City

¹ United States Census Bureau, *State & County Quickfacts* (available at <http://quickfacts.census.gov/qfd/states/53/53053.html>) (last accessed Aug. 6, 2013) (noting 297,839 households in Pierce County from 2007–11).

must still enter into "Retransmission Consent Agreements" ("RCA") with broadcasters, just like other MVPDs. MVPDs cannot retransmit signals without broadcaster consent, for which consideration must be paid. CP 143. The amount of consideration is the product of negotiations. CP 132. It is also the information the Broadcasters assert the public cannot know. CP 1-3.

B. The City Council passes an ordinance to increase cable rates based on unverifiable claims about retransmission fee increases.

On November 13, 2012, the Tacoma City Council passed Ordinance 28098, increasing rates for cable television products. CP 120, 127. The rate hike was intended to close a \$3.6 million budget shortfall facing Click and was part of a two-year, \$1.1 billion proposed budget for Tacoma Public Utilities ("TPU"). CP 129. The Council acted based on representations by City officials that increased carriage fees demanded by broadcasters necessitated higher rates. CP 129-30. For instance, Diane Lachel, the City's "principal negotiator" (CP 146) and Click's government and community relations manager, told the Council "[i]n some instances, programming rates have doubled year-over-year." CP 129.

Similarly, TPU's Director, Bill Gaines, explained to the Council that the rate increase was due to the rising cost of programming. CP 130. Councilman Ryan Mello explained the rate increase was the only way

to ensure fairness in balancing Click's budget: "If we don't raise the rates, because of the costs that are coming to Click, Tacoma Power ratepayers would end up eating any shortfall." CP 129.

C. The City's negotiations with Fisher Communications break down and the City's subscribers lose access to numerous channels.

Despite the City's approval of a rate increase for its cable customers, negotiations between the City and Fisher Communications reached an impasse. As a result, the City's subscribers lost access to KOMO-TV and KUNS-TV.² These stations went black beginning January 1, 2013. CP 143.

1. The stalemate between the City and Fisher was a matter of significant public concern in the Tacoma area.

At a public meeting on January 8, 2013, the Tacoma City Council passed Resolution 38602 "[e]xpressing support of Click! Network and encouraging Fisher Communications to re-engage with Click! Network to resolve stalled negotiations for carriage of KOMO and other services to Click! Network customers." CP 88, 93, 96. Members of the public and City officials were heard on the matter (CP 100-01, 105-107) and the Resolution passed unanimously. CP 93, 96.

During the meeting, the Resolution's prime sponsor, Deputy Mayor Marty Campbell, discussed the extent of rate increases. CP 105. He

² Fisher charges the City to air KOMO, KOMO HD, KUNS, KUNS HD, This TV, and MundoFox. KOMO is an ABC affiliate and KUNS an Univision affiliate. CP 142.

noted “the number of emails and support [he had] been getting and phone calls from citizens who [were] repeatedly saying thank you for fighting to keep our rates low[.]” *Id.* The Deputy Mayor also asserted, “they are very happy with us and want us to negotiate.” *Id.* This sentiment was shared by others at the public meeting. City Councilman Joe Lonergan stated, “I think this is an interesting battle being fought and applaud our click management for fighting it and encourage our TPU folks on.” CP 106. A member of the public was similarly enthusiastic in urging the City on, noting that Fisher’s “attempt to overcharge customers of Tacoma is unfair, unjust and [sic] won’t stand for it.” CP 97.

2. The City signed an RCA “under protest.”

KOMO, ABC, KUNS, Univision, and other channels were blacked out for over a month. CP 144. The City and Fisher did not reach an agreement until February 1. *Id.* Shortly after the contract was delivered, Click General Manager Tenzin Gyaltsen emailed Fisher’s negotiator, Randa Minkarah. *Id.* Mr. Gyaltsen wrote in part:

While Click! Network has executed this contract, please be advised that we are not at all pleased with the retransmission consent license fees that Fisher Communications has demanded and are entering into this Retransmission Consent Agreement under protest.

We believe that Fisher has an unfair advantage over Click! and used its power to withhold the signals and impose unreasonable terms in these negotiations. Fisher offered Click! no choice but to pay its demand so that

the broadcast signals of ABC and Univision could be restored^[3]

CP 154.

D. The City initially determines that RCAs are not exempt from disclosure under the Public Records Act—a possibility of which the Broadcasters were aware when they executed the agreements.

TNT was covering and continues to cover matters relating to the City's cable rate increases. *E.g.*, CP 129–30. A TNT reporter made a request for the retransmission agreement between the City and Fisher. CP 228–29. Shortly thereafter, the reporter requested all other current or active RCAs between the City and any broadcast entities. CP 43, 230. This request implicated the City's retransmission agreements with Belo Management Services, Inc. ("Belo"), the broadcaster of KING-TV and KONG-TV (CP 34–35); CBS Corporation, the owner-operator of KSTW-TV (CP 574); KIRO-TV, a subsidiary of Cox Media Group, LLC (CP 887); and Tribune Broadcasting Seattle, LLC, the owner-operator of KCPQ-TV and KZJO-TV (CP 894). CP 230.

³ Below, Fisher strongly implied that the City threatened to disclose the Click/Fisher RCA because the City was upset about what it considered unfair negotiation tactics by Fisher. CP 133. Subsequently, the City cited its fear of lawsuits from broadcasters like Fisher as a public harm that could stem from disclosure. CP 167.

1. The Broadcasters are informed that "no applicable exemption can reasonably be asserted by the City under the Public Records Act."

Having reviewed TNT's request and the responsive documents, the City sent letters to each of the Broadcasters advising that the requested RCAs were subject to disclosure under the PRA. *See* CP 229-30. Specifically, the City's Records Officer for the Department of Public Utilities, James Kauffman (CP 227), sent letters to each of the Broadcasters stating in relevant part:

The City Attorney's Office has reviewed the request and the Agreement and determined that no applicable exemption can reasonably be asserted by the City under the Public Records Act. The City therefore intends to disclose the subject Agreement to comply with law

CP 45 (Belo), 150 (Fisher), 592 (CBS).

2. The Broadcasters knew their contracts with a public agency were subject to disclosure.

Each retransmission agreement between the City and the Broadcasters contains a provision expressly notifying the broadcaster that the terms of the RCA itself are subject to potential disclosure. CP 374, 394, 417. Indeed, the letters sent by the City to each broadcaster cite the specific contractual provision in the retransmission agreements that contemplate public disclosure. CP 45, 150, 592.

For instance, under the heading "Public Disclosure Act Provisions," the City's retransmission agreement with CBS provides:

Notwithstanding the foregoing, CBS acknowledges that Operator is a municipal corporation of the State of Washington. As such, the provisions for confidentiality and non-disclosure contained in this Agreement do not apply if in Operator's reasonable legal judgment it is required to disclose information under the Washington State Public Disclosure Act (Chapter 42.56, R.C.W.).

CP 394.

The RCAs with Belo and KIRO similarly except from confidentiality any disclosure "as may be required by any court order or governmental agency or pursuant to applicable law or regulations[.]" CP 337, 374. The City's agreement with Fisher does not require confidentiality "to the extent necessary to comply with law or the valid order of a court of competent jurisdiction" CP 417.

Unlike the other Broadcasters, Tribune Broadcasting never reduced to writing its apparent desire to keep its RCA with the City confidential. CP 236. All that was produced relating to Tribune Broadcasting's RCA was a redacted "term sheet." *See id.*, CP 397-98. According to Click's General Manager, Mr. Gyaltzen:

[Term sheets are] typically part of and governed by a more comprehensive Retransmission Consent Agreement containing specific confidentiality provisions. However, after looking into the matter, it appears [the City] did not actually execute a [RCA] per se with Tribune Broadcasting as anticipated in the term sheet. This situation is very unusual.

CP 236.

Despite the express language contained in each of these agreements, each Broadcaster nonetheless executed the RCAs with the City (with the exception of Tribune Broadcasting). CP 376-77, 395, 401, 418, 427, 431. In a series of lawsuits that were subsequently consolidated (CP 172-74), each Broadcaster now claims that the prices in their respective contracts with the City are trade secrets. CP at 2.

E. The trial court is uncertain whether prices in a public contract are trade secrets but still issues an injunction “mainly . . . to preserve the status quo” for appellate review.

The trial court was conflicted during the March 15, 2013 hearing⁴ on whether the City should be enjoined from releasing the requested RCAs to TNT. *See* VRP 34-115. In its oral ruling, the court acknowledged that its decision “isn’t one [the court is] really happy with” because “[t]o [the court], this is a real close question.” VRP 108. Uncertain of the accuracy of his decision, the court conceded that the primary reason he was granting an injunction was to preserve the status quo so that this matter could be decided on appeal:

I’m going to grant a preliminary injunction. Mainly this is to preserve the status quo until this can be reviewed by another court, as I’m sure it will be. . . .

⁴ An initial hearing on a motion for a temporary restraining order (“TRO”) was held on March 6, 2013, with only some of the parties present. VRP 3-33. During the TRO hearing, the trial court repeatedly expressed concern with the limited time it had to study the issues before it. *See* VRP 3-4; 6-7, 20-21, 26, 27. No order was entered because the parties instead stipulated to the matter being set over until March 15 while the court better familiarized itself with the issues. VRP 31-32, 34, 36.

....

So on the balance I'm going to grant this mainly to preserve the status quo for potential review.

VRP 110-12.

On the central question of whether the prices contained in the contracts between the City and the Broadcasters were trade secrets, the trial court was apprehensive. See VRP 109 (noting that prices "arguably, the plaintiffs argue, qualify a trade secret"). The court noted:

I'm not sure it's an absolute slam dunk. Maybe it's just a number . . . not any particular secret. There's nothing novel; there's no process; there's no patents involved. It's just a number you keep close to your vest during negotiations.

VRP 109-10. The court was equally unsure whether there would truly be harm to the public if he did not issue an injunction:

I mentioned the concern about the ripple effect. I don't know how real that is If the information in this case comes out and what will happen with others throughout the country, I don't know, but it could be bad.

*Id.*⁵ Despite its uncertainty, the trial court entered an order enjoining the City from releasing the RCAs to TNT. CP 182-83. An order certifying the matter for review was contemporaneously entered. CP 185-86.

⁵ The trial court expressed similar uncertainty during the March 6 TRO hearing, stating that it would enter a TRO "simply to preserve the status quo" and that the Broadcasters had "barely made a showing" that they were entitled to relief. VRP 28.

F. The trial court determines that the public records contain trade secrets without ever reviewing the proclaimed secret documents.

The injunction order did not merely prohibit the release of the pricing information claimed as a trade secret. *Id.* By its terms, it enjoined the release of the RCAs in their entirety. *Id.* Over the course of the two injunction hearings, the court only reviewed a single, redacted RCA⁶ that the Broadcasters claim contain trade secrets. *See* CP 78, 175–77. TNT therefore moved for reconsideration of the injunction order, asking the court to conduct an *in camera* review of the unredacted RCAs to determine which portions actually contain trade secrets. CP 196–200.

1. On reconsideration, the court determines it must review the unredacted RCAs *in camera* to identify the trade secrets—representations by the parties are insufficient.

At the April 12, 2013 hearing, the trial court granted TNT's motion for reconsideration. CP 298–300. In its oral ruling, the court stated:

I'm going to require each of the five plaintiffs here to provide redacted copies of the Retransmission Agreements to me and I'm going to require them to provide an unredacted copy, which I will not make public, which I will either return to the parties or seal. . . .

⁶ CBS provided a redacted copy of its RCA with the City in support of its motion for TRO. CP 580–90. Fisher had previously authorized the release of a redacted copy of its agreement with the City. CP 230; VRP 142. Tribune Broadcasting had also authorized release of a redacted copy of its “term sheet” (CP 397–98) with the City. CP 232; VRP 130. Neither the Fisher nor Tribune Broadcasting agreements with the City were before the trial court when it ruled that they contained trade secrets. That did not occur until after the Court granted TNT's motion for reconsideration. *See* CP 379–84; 387–96; 397–98; 399–432, 451–84.

The fact that the plaintiffs think certain things are trade secrets doesn't make it so necessarily. There's a statute on what a trade secret is. Not everything in the documents clearly would be a trade secret, and I think the Public Records Act does kind of compel me to release as much as can be done in compliance with the Uniform Trade Secrets Act.

VRP 141.

During that hearing, the Court repeatedly questioned the City's attorney about what information was contained in the RCAs. VRP 124-25. While the trial court questioned him about the contents of those documents (*id.*), it nonetheless determined that it was most appropriate for the court to review the unredacted agreements *in camera*:

MR. BECK: It seems to make the most sense that they just produce what they're asserting should be redacted so that you can evaluate that.

THE COURT: Well, yes, that's what I was intending, and I wanted to compare their redactions with the originals.

VRP 142-43; *see also* VRP 149 ("I'm planning to read the unredacted versions and compare them").

Because the Broadcasters had expressed concerns about the security of filing documents under seal (*e.g.*, VRP 140), the order granting reconsideration contemplated additional briefing and another hearing "regarding the sealing [sic] the unredacted agreements and process for any production of the unredacted agreements" CP 299; *see also* CP 141 ("I understand that there's a concern about how [sealing]

will be done and we'll have a hearing to determine just how it will be done"). The order stayed the certification for appellate review. CP 299.

2. At a subsequent hearing, the trial court decides that *in camera* review is unnecessary based solely on the representations of the Broadcasters, City, and counsel.

While the trial court's order on reconsideration requested briefing on the *mechanism* by which *in camera* review would be conducted, the Broadcasters used the opportunity to re-argue whether *in camera* review should occur at all. *See* CP 303; 435; 486. Though the trial court had, just weeks earlier, recognized the necessity of independently reviewing the unredacted RCAs (CP 298-300; VRP 141-43, 149), it decided during the May 10, 2013 hearing it could rely solely on the representations of the City and the Broadcasters. CP 534-36; VRP 176.

One of those declarations was from Ms. Minkarah of Fisher, who noted simply that Fisher had redacted "certain non-cash compensation provided by Click! . . . in the form of promotion support to advertise Fisher's station." CP 447. There is no further explanation of what this means or why it is a trade secret. *See id.*

Similarly, Belo redacted entire sections from its contract with City, claiming that the entirety of those paragraphs, or tables (CP 341, 345, 356) are exclusively trade secret pricing information. CP 326. Belo's Jake Martinez provided no explanation why Belo's Amendment to Affil-

iate Agreement (CP 357) is redacted. *See* CP 326. The unredacted portion suggests modification of time periods, not prices. CP 357 (agreement “is amended to add new periods, as follows: [redacted]”). No argument was advanced that time periods are trade secrets.

CBS never submitted a declaration explaining why six different sections of its RCA (CP 389–93), including an entire redacted page (CP 391) are trade secrets. Rather, CBS’s Joan Nicolais declared generally that “[t]he agreements themselves contain CBS’s ideas concerning the way in which it negotiates its retransmission agreements.” CP 643. Apparently, “[s]uch decisions are . . . reflective of CBS’s negotiating methods and business practices, and are therefore trade secrets.” *Id.*

Based solely on affidavits such as this, the court ruled that it would not independently review the proclaimed trade secrets and that the March 15 injunction order would therefore stand. CP 534–36. The stay on appellate certification was lifted. VRP 187.

G. At the City’s request, the court enjoins the release of “related records pertaining to the parties/plaintiffs.”

The Broadcasters, the plaintiffs in the underlying action, filed lawsuits to enjoin the disclosure of their RCAs. *E.g.* CP 2, 555. The orders issued by the trial court enjoin the release of not only the unredacted RCAs, but also any records related to those RCAs. CP 183, 300, 535.

The injunction order issued on March 15 provides that the City is “enjoined from releasing the Retransmission Consent Agreements . . . and related records pertaining to the parties / plaintiffs to the News Tribune or any other party until further court order.” CP 183. The April 12 order on reconsideration provides in part:

Release of any records related to the retransmission agreements that are the subject of this consolidated case shall continue to be enjoined until each affected Plaintiff has received copies of such record [sic] affecting them and consented to such release. The March 15, 2013 Order applies to release of records to any person or entity, not just the parties of record herein.

CP 300. The May 10 order provides that these terms remain. CP 535.

During the April 12 hearing, it was explained that the City was dealing with a subsequent request by a third party. VRP 152. That request sought not only the RCAs, but “all communications relating to” the RCAs. VRP 154–55. The City relied on the March 15 order to deny the third party access. VRP 153. At the hearing, the court directed the City not to “release the additional documents [related communications] until the broadcasters have a chance to see them if there’s objections because of confidentiality.” VRP 156–57.

At the May 10 hearing, the City again sought an injunction over related records. VRP 179–80. TNT objected to the City’s proposed language in the order because there was no showing of any exemption

that would apply to “related” records, and because that question was separate from whether the release of unredacted RCAs should be enjoined. VRP 181. The court initially agreed. *Id.* (“I kind of agree with that. Weren’t we talking about Retransmission Agreements?”). But the court ultimately adopted the City’s language, over TNT’s objection, as “just a little extra coverage or protection for Click!” VRP 185.

III. ASSIGNMENTS OF ERROR

1. Did the Superior Court err in enjoining disclosure of records establishing the contract price and other financial and nonfinancial consideration in contracts with private third party vendors along with unspecified related records? In other words, did the Superior Court err in concluding that (a) these documents were trade secrets, (b) non-disclosure was clearly in the public interest and (c) there would be irreparable harm to a person or vital governmental function if the documents were disclosed?

2. In attempting to preserve the status quo, did the Superior Court use the standard injunction rules rather than the standard provided in the PRA, and if so, did it err in doing so?

3. Did the Superior Court err in refusing to review the contracts *in camera* to confirm that the redacted material was of the nature represented and no broader than necessary to comply with the PRA?

IV. ARGUMENT

A. Injunctions under the PRA are reviewed *de novo*.

“Judicial review under the PRA and th[e] injunction statute [RCW 42.56.540] is *de novo*.” *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 407, 259 P.3d 190 (2011). “When the record before the trial court consists entirely of ‘documentary evidence, affidavits and memoranda of law,’ this court stands in the same position as the trial court and reviews the trial court’s decision *de novo*.” *Morgan v. City of Federal Way*, 166 Wn.2d 747, 753, 213 P.3d 596 (2009) (reviewing PRA injunction) (internal quotation marks omitted).⁷

B. The PRA is interpreted broadly in favor of disclosure.

“The Public Records Act ‘is a strongly worded mandate for broad disclosure of public records.’” *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (“PAWS”) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). “The stated purpose of the Public Records Act is nothing less than the

⁷ If the Broadcasters contend that this injunction was preliminary, and is reviewed for an abuse of discretion, they are incorrect. While the proceeding was initially termed a preliminary injunction hearing (VRP 34), the court repeatedly asked what more would be learned from a subsequent trial on the merits. VRP 71, 96–98, 103. Following the court’s ruling, the parties stipulated to certification of the decision for appellate review—in essence, treating the preliminary injunction as permanent. VRP 112–13. The trial court’s order provides that “[b]y granting an injunction, the Court has entered an order . . . effectively determining the outcome of this action.” CP 185. Regardless, the trial court’s decision was based solely on affidavits and legal memoranda for which the trial court is no better positioned to interpret than this Court.

preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions." *Id.*

1. Both the Legislature and the Supreme Court have recognized the preeminent importance of public access to information concerning the workings of government.

Passed by popular initiative, *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 714, 261 P.3d 119 (2011), the PRA proclaims:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

RCW 42.56.030. As forcefully articulated by our Supreme Court:

Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."

PAWS, 125 Wn.2d at 251. And again, in *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389 (1997), the Court noted:

The Act reflects the belief that the sound governance of a free society demands that the public have full access to information concerning the workings of the government. The purpose of the Act is to ensure the sovereign-

ty of the people and the accountability of the governmental agencies that serve them.

2. Records must be disclosed unless the party resisting disclosure satisfies its burden of showing (among other things) that a specific exemption applies.

Under the PRA, agencies “shall make available for public inspection and copying all public records”⁸ unless the record falls within an exemption “or other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070(1). “[A]gencies must parse individual records and must withhold only those portions which come under a specific exemption. Portions of records which do not come under a specific exemption must be disclosed.” *PAWS*, 125 Wn.2d at 261. “The burden of proof is on the party seeking to prevent disclosure to show that an exemption applies.” *Ameriquest v. Office of the Attorney Gen.*, 177 Wn.2d 467, 300 P.3d 799 (2013).

3. The PRA supersedes conflicting laws—government agencies and courts must err in favor of disclosure where the PRA conflicts with any other act.

Given the need for open government, the PRA “shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.” RCW 42.56.030. “In the event of conflict between the provisions of [the PRA] and any other act, the provisions of the PRA shall govern.”

⁸ The City’s retransmission agreements are “public records.” RCW 42.56.010(3).

RCW 42.56.030. Thus, the “other statutes” exemption incorporates laws into the PRA provided those laws do not conflict with the PRA's mandate. *PAWS*, 125 Wn.2d at 602 (“if such other statutes mesh with the [PRA], they operate to supplement it”). If there is a conflict between “the [PRA] and other statutes, the provisions of the [PRA] govern.” *Id.*

C. The price paid by a public utility for services is not a “trade secret” because the terms of a contract are not the Broadcasters’ “idea” and are neither secret nor “novel.”

Neither the City nor the Broadcasters identify any exemption contained in the PRA that would exempt from disclosure the prices the City pays for services. Instead, the Broadcasters point to the Uniform Trade Secrets Act, 19.108 RCW (“UTSA”) as an “other statute” prohibiting disclosure. While Washington courts have recognized the UTSA as an “other statute,” *PAWS*, 125 Wn.2d at 262 (UTSA qualified as “other statute[.]’ *in the present context*”), the party seeking to establish the existence of a trade secret still “has the burden of proving that legally protectable secrets exist.” *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 49, 738 P.2d 665 (1987).

A “trade secret” is defined by RCW 19.108.010(4) as:

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or

use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

"[T]rade secrets law protects the author's very *ideas* . . ." *Boeing Co.*, 108 Wn.2d at 49 (emphasis added). A protectable trade secret must also therefore be "novel." *Buffets, Inc. v. Klinke*, 73 F.3d 965, 968 (9th Cir. 1996) (argument "that novelty is not a requirement of trade secret protection . . . clearly contradicts Washington law") (discussing *Boeing Co.*, 108 Wn.2d at 38).

Here, the Broadcasters cannot establish that the prices charged to a public cable company for services are a "trade secret." As acknowledged by the Broadcasters, those prices are the product of intense negotiation with the City. They are not the Broadcasters' protectable idea. Even if a negotiated price could be considered an "idea," placing that information in a public contract does not amount to a reasonable effort to maintain its secrecy. Even if a negotiated price in a public contract could be considered a secret idea, the Broadcasters cannot establish that such information is novel. And to the extent a negotiated price in a public contract could be considered a novel and secret idea under the UTSA, such an exceedingly broad interpretation would conflict with, and thus be superseded by, the PRA.

1. A negotiated contract price is not an “idea” or information to which the Broadcasters can claim ownership.

The UTSA is not intended to protect the disclosure of negotiated prices with government agencies. As noted, “trade secrets law protects the author’s very *ideas*” *Boeing Co.*, 108 Wn.2d at 49 (emphasis added). In *Boeing Co. v. Sierracin Corp.*, for instance, the idea at issue was Boeing’s designs for cockpit windows for its aircraft. *Id.* at 41. The allegation was that the idea was being copied to create an identical product to compete with the author. *Id.* at 43.

That is nowhere close to the situation here. The claimed trade secrets before this Court are negotiated prices—not formulas, patterns, compilations,⁹ programs, devices, methods, techniques, or processes.¹⁰ As acknowledged by each and every Broadcaster, the prices contained in their respective RCAs were the product of negotiation with the City. CP 36 (“License fees are generally determined only after extensive negotiation”), CP 143 (stations not carried during negotiation with

⁹ Compilations of valuable business data, such as customer lists *may* constitute protectable trade secrets. *Ed Nowogroski Ins., Inc. v. Rucker*, 137 Wn.2d 427, 441–42, 971 P.2d 936 (1999) (“[t]rade secret protection will not generally attach to customer lists where the information is readily ascertainable”). But here, there is no list of hard-earned current customers that was compiled through years of service.

¹⁰ Far from a pattern, formula, method, or process, the Broadcasters maintain that each negotiation with each MVPD is unique. *E.g.* VRP 167 (“These are different agreements that are individually negotiated”), VRP 136 (“our agreement, at least, was uniquely negotiated. It doesn’t start with boilerplate. Our agreement with every version of Click!, every cable channel is different”), VRP 77 (“this is not a generic government contract”).

City, because negotiations broke down), CP 574 (referring to “issues that arise in such negotiations”); VRP 137 (“Fisher negotiated the toughest agreement that Click! had ever signed”).

The prices are the *product* of a good faith¹¹ bargaining process between the Broadcasters and parties outside of their organizations. This is not the type of “information” intended to be protected as a trade secret under the UTSA. If it is, then the prices in the RCAs are as much the idea of the City as they are of the Broadcasters. One is not somehow the greater owner of that proclaimed idea.

2. The Broadcasters have not made reasonable efforts to maintain the secrecy of the prices the City pays because those prices are included in disclosable public contracts.

Explicit in the concept of a trade *secret* is the understanding that it must in fact involve a secret. When two parties enter into a contract, *both* necessarily know the terms. *E.g. Sea-Van Invs. Assocs. v. Hamilton*, 125 Wn.2d 120, 125–26, 881 P.2d 1035 (1994) (enforceable contract requires a “meeting of the minds”). The terms are no longer a secret because both parties must be aware of the terms by which their conduct will be governed. *Id.* This is particularly true with respect to the terms of a contract with a public agency.

¹¹ The Broadcasters assert they are required to negotiate RCAs with MVPDs in good faith. *See* VRP 54 (“they’ll bargain with them in good faith. They have to”). *See*, 47 U.S.C. § 325(b)(3)(C)(ii) (requiring broadcasters to negotiate in good faith).

In *Spokane Research & Defense Fund v. City of Spokane*, the court addressed whether a lease requested under the PRA fell within the “research data” exemption in the PRA. 96 Wn. App. 568, 576–76, 939 P.2d 676 (1999). In that context, the court stated: “[T]he . . . lease does not meet the definition of research data because it is simply a contract outlining the obligations of the parties.” *Id.* at 576.

The court next addressed whether the same lease could be considered a trade secret under the UTSA. *Id.* at 577–78. The court explained that “efforts to maintain secrecy were not reasonable under the circumstances” because the terms of any agreement must be disclosed in the event of a breach. “Secrecy for the lease is not possible in the event of default because the lease will be disclosed.” *Id.* at 578–79. Notably, there had been no default or breach of the lease at issue.

Here, the contract terms between the City and Broadcasters are not trade secrets as they are not capable of being maintained as a secret. First, a contract with a public agency is, at least in Washington, subject to public inspection. RCW 42.56.070(1) (agencies “shall make available for public inspection . . . all public records” not exempted). The RCAs expressly notify the Broadcasters that the contract terms are subject to disclosure and the CBS agreement even specifically references the PRA. CP 337, 374, 394, 417.

Moreover, the pricing provisions could not be kept secret if the contracts were to be enforced. The price the City agreed to pay would necessarily have to be disclosed in an enforcement action. Indeed, the Belo and KIRO agreements expressly contemplate disclosure “as necessary for a party to enforce its rights under this Agreement” (CP 337, 374) and in the Fisher agreement, “in order to enforce . . . rights pursuant to this Agreement” (CP 469).

Finally, and once again, to the extent the prices could be considered a secret, they are as much the City's secret as they are the Broadcasters' secret. Because the prices were reached after good-faith negotiations by *both* parties to the agreements, there is no compelling reason why the Broadcasters are any more entitled to claim ownership of the “secret” information than the City.

a. Confidentiality clauses in public contracts are unenforceable as agencies may not contract around the PRA.

The Broadcasters contend that they maintained the secrecy of their pricing terms because their agreements with the City contained confidentiality clauses. This is not the case for Tribune Broadcasting. Regardless, any such promise is unenforceable.

It is a long-established principle under Washington law that “*an agency's promise of confidentiality or privacy is not adequate to establish the nondisclosability of information; promises cannot override the*

requirements of the disclosure law.” Hoppe, 90 Wn.2d at 137 (emphasis added). It is of no consequence whether the Broadcasters understood that any representations of nondisclosure by the City were not binding. “Allowing private information to become public, even through carelessness, precludes protection as a trade secret[.]” Woo v. Fireman’s Fund Ins. Co., 137 Wn. App. 480, 490, 154 P.3d 236 (2007).

The Broadcasters—no doubt represented by competent counsel—understood that the contract amount may not be kept confidential. They knew or should have known that any attempt to contract around the PRA was invalid. They entered the contracts anyway and enjoyed the benefit of their bargain. They put prices in the public domain.

b. Tribune Broadcasting has no confidentiality agreement with the City and therefore cannot assert a trade secret.

While any attempt to contract with a public agency around the effects of the PRA is invalid, it bears mention that Tribune Broadcasting has no such agreement in place with the City. It therefore lacks a claim of confidentiality under the UTSA, let alone the PRA.

As discussed, Tribune Broadcasting simply executed a “term sheet” with the City, not an RCA. CP 236. It has no written confidentiality agreement. *See* CP 397–98.

[The UTSA] does not protect information disclosed without establishing a basis for its confidentiality. Where the complaining party discloses to a third party a trade se-

cret without any attempts to insure confidentiality, a claim for misappropriation of trade secrets will not lie.

16A DeWolf & Allen, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 22.31 (3d ed. 2012) (footnotes omitted).

Despite its forecasts of disaster should its prices get out, Tribune Broadcasting never bothered to reduce its desire for confidentiality to writing. This is not a reasonable effort to maintain secrecy under the UTSA.

3. The Broadcasters' conclusory statements, lacking "concrete examples," are insufficient to establish that the prices they negotiated with the City are "novel."

"To be a trade secret, information must be 'novel' in the sense that the information must not be readily ascertainable from another source." *Spokane Research*, 96 Wn. App. at 578 (citing *Confederated Tribes v. Johnson*, 135 Wn.2d 734, 749, 958 P.2d 260 (1998)). The mere fact that information is contained in a contract—even one with a confidentiality clause—does not render it novel. *Id.* ("A lease is not inherently novel"). The burden of establishing novelty is quite high.

Conclusory declarations that merely state that information is unique, innovative, or coveted by competitors are not sufficient to establish novelty. See *McCallum v. Allstate Property & Cas. Ins. Co.*, 149 Wn. App. 412, 425, 204 P.3d 944 (2009) (discussing *Woo, supra*). A business asserting a trade secret must provide "concrete examples"

illustrating how the information it seeks to protect is materially different from that of its competitors, such that its competitors would want the information. *Id.*; *Woo*, 137 Wn. App. at 489.

In *Woo*, the court addressed whether insurer Fireman's Fund's claims manuals were trade secrets. 137 Wn. App. at 484. It explained:

The declarations of the claims managers are too conclusory to prove that the claims manuals compile information in an innovative way. The declarations do not supply any concrete examples to illustrate how the strategies or philosophies of Fireman's Fund claims handling procedures differ materially from the strategies or philosophies of other insurers.

Id. at 489. Similarly, "[t]he fact that the manuals go into many pages of detail on the fine points of handling claims [did] not make them novel."

Id. The suggestion that competitors would copy manuals rather than writing their own was "too speculative and conclusory" *Id.* Moreover, the declarations did not "quantify in any meaningful way the competitive advantage that the hypothetical plagiarizer would enjoy." *Id.*

Following *Woo*, the court in *McCallum* similarly found that Allstate had not established that its claim manuals were trade secrets. 149 Wn. App. at 426. As in *Woo*, the declarations "consist[ed] of conclusory statements that should its competitors gain access to its national policies, the competitors will gain an unfair advantage." *Id.*

Here, the Broadcasters' declarations are rife with the same kinds of conclusory (and quite hypothetical) statements that were insufficient to establish trade secrets in *McCallam* and *Woo*. *E.g.*, CP 644 (CBS witness declaring: "I do not know everything that could occur as a result"). In essence, the Broadcasters speculate that if their individual rates with the City are disclosed, then they may, hypothetically, at some point in the future, need to explain, to an unidentified cable provider, in an unidentified market, why the rates offered to the City may differ, resulting in some unquantifiable loss. *E.g.*, CP 37 (if prices were known, "then other cable systems . . . would seek to use such license fees as a base point and negotiate lower license fees to be paid by them"), CP 146 ("If other MVPDs know the financial terms . . . they will be unwilling to pay more"), CP 642 ("the cable operator sitting across the table . . . would surely use that information to resist paying a higher rate"). This is hardly a "concrete example" of a specific harm.

Notably, these conclusory hypotheticals about harm to the Broadcasters are also internally inconsistent with the Broadcasters' argument that Click will be harmed by disclosure. While arguing that cable providers will demand lower rates, the Broadcasters simultaneously claim that Click will be harmed because the Broadcasters will demand higher rates. *E.g.*, CP 38 ("It is likely that each television station would

then use the license fee . . . as leverage and a base point to bargain up the license fee”), CP 146 (“no other local broadcaster is likely to agree to grant retransmission consent . . . for a lower fee than CLICK! has already agreed to pay”), CP 448 (“other local broadcasters will be unwilling to knowingly accept less in fees than their competitors”), CP 892 (if disclosed “then the highest rate paid by Click! to any television station would be used by every other television station as a floor to negotiate future rates with Click!”).

Also indicative of the speculative nature of the harm to the Broadcasters is the Broadcasters’ own concession that each RCA is different, with each Broadcaster bringing unique strengths and weaknesses to the bargaining table, dictated by different and fluctuating market forces. *E.g.* CP 36 (“License fees are generally determined only after extensive negotiation”); VRP 167 (“These are different agreements that are individually negotiated”), VRP 136 (“our agreement, at least, was uniquely negotiated. It doesn’t start with boilerplate. Our agreement with every version of Click!, every cable channel is different”), VRP 77 (“this is not a generic government contract”). These “license fees are in a continual state of flux such that license fees assessed a year or two ago may be outdated.” CP 37. As Ms. Minkarah put it: “RCA’s are the result of complex, individualized negotiations between broadcasters

and MVPDs. No RCA is identical because no two broadcasters are exactly alike and no two MVPDs are exactly alike." CP 448.

One wonders: If every market is different, and every negotiation is different, and every broadcaster is trying to get the highest fee, and every MVPD is trying to get the lowest fee, how speculative is the hardship truly faced by the Broadcasters?¹²

The Broadcasters' desire to shield the prices they expect to be paid by a public agency from market scrutiny, and particularly public scrutiny, does not amount to novelty. They knew or should have known that Washington requires public disclosure of such contracts. They knew or should have known that a government agency cannot contract around disclosure. They entered into those public contracts anyway. The Broadcasters should not now succeed in arguing that the information they freely bargained into a public contract is actually a novel secret.

¹² The suggestion that broadcasters have no idea what their competitors are charging for services by virtue of confidentiality clauses is incomprehensible. There is a market for cable television content. *See* CP 575 ("all of CBS's retransmission agreements include rates that are within a range reflecting what we have received in marketplace negotiations"). The City, like every other MVPD in the country, knows what each broadcaster they contract with charges. Cable providers are undoubtedly aware of typical market rates for the services they offer.

4. Even if negotiated prices in public contracts could be considered secret, novel ideas under the UTSA, that excessive interpretation would conflict with the PRA.

As mentioned, “[i]n the event of conflict between the provisions of [the PRA] and any other act, the provisions of the PRA shall govern.” RCW 42.56.030. Here, even if a negotiated price in a contract with a public agency could be considered a secret and novel idea protectable under the UTSA, such an overly broad interpretation would clearly conflict with the PRA’s dictate that access should be liberally granted.

The public’s fundamental right to know is at its apex when dealing with the prices a government agency pays for services. If citizens are deprived of the ability to know how their government is spending their own tax dollars, then the lofty principles of open government underlying the PRA may well be meaningless. If the term “trade secret” can be interpreted so broadly as to encompass the prices paid by the government for services, the purpose of the PRA would be circumvented. Aside from the question of *whether* the government should be in the cable television business in the first place, TNT has the right to know and report what that service costs. To the extent the UTSA conflicts with the PRA in this regard, the PRA must govern.

D. The PRA does not exempt from disclosure the prices that government agencies pay for cable television.

The Broadcasters claim that the prices in the City's RCAs "fall[] categorically into the exemption listed in RCW 42.56.270(11)." CP 23; *see also* VRP 8–9. But that provision only exempts "trade secrets, or other information that relates to . . . determining prices or rates to be charged for services submitted by any vendor *to the department of social and health services for purposes of the development, acquisition, or implementation of state purchased health care . . .*" RCW 42.56.270(11) (emphasis added).

Beyond the fact that its application is limited to submissions to DSHS, RCW 42.56.270(11) still does not exempt *final* prices in government contracts from disclosure. Rather, it concerns information that relates to "*determining*" those prices (such as bids or descriptions of processes). Once the price is set in a public contract, it remains subject to disclosure.

The health care exemption demonstrates that the Legislature is entirely capable of identifying information—including prices—that should *not* be subject to disclosure. As counsel noted, the Legislature has identified "nearly 400" such exemptions. VRP 41. Absent from that list is any exemption for RCAs. The Broadcasters, themselves media outlets, understand better than most the power and scope of Washing-

ton's PRA. VRP 39. Yet there is no evidence that they have ever asked the Legislature for an exemption based on the concerns they now raise. *See* VRP 74–75. This would have been a reasonable effort to maintain the secrecy of proclaimed trade secrets. *See* § V(C)(2), *surpa*.

E. Even under the Freedom of Information Act's less favorable disclosure scheme, pricing in public contracts is disclosable.

"[W]hile the [PRA] closely parallels [FOIA], nevertheless the 'state act is more severe than the federal act in many areas.'" *PAWS*, 125 Wn.2d at 266 (quoting *Hoppe*, 90 Wn.2d at 129). But even under FOIA's less favorable public disclosure scheme, prices in government contracts are disclosable.

"FOIA does not contain a mandate for liberal interpretation." *Am. Civil Liberties Union of Wash. v. Blaine School Dist. No. 503*, 86 Wn. App. 688, 697, 937 P.2d 1176 (1997). "Nor does FOIA contain the statements of policy that the Washington act does indicating the Legislature's intent to ensure full access to public records." *Id.* Relevant here, FOIA's exemption for financial information is broader than that in the PRA and requires courts to balance the interests of government and the public,¹³ something the PRA forbids.¹⁴

¹³ FOIA "contains nine exemptions to its general policy mandating the broad disclosure of government documents." *G.C. Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1112 (9th Cir. 1994) (citing 5 U.S.C. § 552). "The Ninth Circuit has construed Exemption Four as preventing 'disclosure of (1) trade secrets *and* commercial or fi-

Nonetheless, federal courts applying the less favorable FOIA have widely held that prices in public contracts should be disclosed. See Gregory H. McClure, *The Treatment of Contract Prices Under the Trade Secrets Act and Freedom of Information Act Exemption 4: Are Contract Prices Really Trade Secrets?*, 31 PUB. CONT. L.J. 185, 196 (2002) (“The vast majority of cases have held that unit prices are releasable”).

“Disclosure of prices charged the Government is a cost of doing business with the Government. . . . Adequate information enables the

financial information, (2) obtained from a person or by the government, (3) that are privileged or confidential.” *Freeman v. Bureau of Land Mgmt.*, 526 F. Supp. 2d 1178, 1186 (D. Or. 2007) (quoting *Pac. Architects & Eng’rs, Inc. v. United States Dep’t of State*, 906 F.2d 1345, 1347 (9th Cir. 1990)); see also 5 U.S.C. 552(b)(4). FOIA’s Exemption Four goes beyond the protection of trade secrets, reaching “commercial or financial” information and requiring courts to balance competing interests in disclosure. 5 U.S.C. 552(b)(4). Information qualifies as “confidential”:

[I]f disclosure is likely to have either of the following effects: (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Id. (quoting *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974)). The first *National Parks* factor—impairment of the government’s ability to obtain necessary information requires a balancing of the interest in nondisclosure against the public interest in disclosure.” *Pub. Citizen Health Research Group v. Food & Drug Admin.*, 185 F.3d 898, 909 (D.C. Cir. 1999) (internal quotation marks omitted). In essence, if “disclosure will impair the government’s information gathering,” courts must conduct a “rough balancing of the extent of impairment and the importance of the information against the public interest in disclosure.” *Id.* (internal quotation marks omitted).

¹⁴ Unlike FOIA’s Exemption Four, Washington courts are constrained to follow the dictates of the Legislature’s exemptions—without “balancing” competing interests. Such balancing “would be unwise as the Legislature has not authorized this kind of freewheeling policy judgment.” *Boroumet v. Cowles Publ’g Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990) (balancing right to privacy and public accountability not permitted); see also *PAWS*, 125 Wn.2d at 258 (“We start with the proposition that *the act establishes an affirmative duty to disclose* public records unless the records fall within *specific statutory exemptions* or prohibitions.” (quoting *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 36, 769 P.2d 283 (1989)) (emphasis added)).

public to evaluate the wisdom and efficiency of public programs and expenditures." *Racal-Milgo Gov't Sys., Inc. v. Small Bus. Admin.*, 559 F. Supp. 4, 6 (D.D.C. 1981). As one court has explained:

In perhaps no sphere of governmental activity would that purpose appear to be more important than in the matter of government contracting. The public, including competitors who lost the business to the winning bidder, is entitled to know just how and why a government agency decided to spend public funds as it did; to be assured that the competition was fair; and, indeed, even to learn how to be more effective competitors in the future.

Martin Marietta Corp. v. Dalton, 974 F. Supp. 37, 41 (D.D.C.1987).

The Ninth Circuit has similarly held that unit prices in government contracts are not exempt from disclosure under FOIA. *G.C. Micro*, 33 F.3d at 1112 (9th Cir. 1994); *Pac. Architects*, 906 F.2d at 1347-49; see also *JCI Metal Prods. v. U.S. Dep't of the Navy*, 09-CV-2139-IEG, 2010 WL 2925436 (S.D. Cal. July 23, 2010).

For example, in *Pacific Architects*, the plaintiff sought to prevent an agency from disclosing unit prices in a services contract. 906 F.2d at 1346. The agency rejected plaintiff's objections, noting that "disclosure of the 'unit price rates' would not cause competitive harm" due to "the number of variables that went into determining these rates." *Id.* The district court and the Ninth Circuit affirmed. *Id.* at 1346-48.

Likewise, in *G.C. Micro*, the agency refused to disclose subcontracting information. 33 F.3d at 1113-14. After the district court sustained

the agency's determination, the Ninth Circuit reversed, noting there was no likelihood of substantial harm. *Id.* at 1115. The data sought was “made up of too many fluctuating variables for competitors to gain any advantage from [its] disclosure.” *Id.*

In *JCI*, the plaintiff sought to enjoin release of “unit prices for each contract line item,” arguing that “it is the unit prices *by themselves* that constitute confidential information[.]” 2010 WL 2925436 at *1-2 (italics in original). The court explained that whether such prices will remain the same and be useful to JCI's competitors is purely speculative. . . . [C]onclusory allegations are insufficient to show that JCI will suffer substantial injury as a result of disclosure.” *Id.* at *2.

Though FOIA's differing standards do not govern the PRA injunction here,¹⁵ it is noteworthy that the contract prices between the City and the Broadcasters would even be disclosable under FOIA's less favorable standards. As in the cases above, the Broadcasters acknowledge that “license fees are in a continual state of flux.” CP 37. Moreover, each negotiation is different and takes different market factors into consideration. CP 36; VRP 77, 136, 167. And as discussed, the Broad-

¹⁵ “Our courts have repeatedly refused to apply FOIA cases when interpreting provisions in the [PRA] that differ significantly from the parallel provisions in the federal act.” *Kleven v. City of Des Moines*, 111 Wn. App. 284, 291, 44 P.3d 887 (2002) (collecting cases). To the extent the Broadcasters rely on federal law to suggest that the PRA's exemptions should be *more* restrictive, they are mistaken.

casters provide no concrete examples of how mere knowledge of fees would result in injury beyond more complicated negotiations. CP 575.

F. The Broadcasters fail to establish the required elements for injunction under the injunction statute specific to the PRA.

PRA injunctions are governed by RCW 42.56.540. The Washington Supreme Court has repeatedly held that under that statute, “a court can enjoin the release of a public record *only* if disclosure ‘would clearly not be in the public interest and would substantially and irreparably damage any person, or . . . vital governmental functions.’” *Morgan*, 166 Wn.2d at 756–57 (quoting RCW 42.56.540) (emphasis added); *see also Bainbridge Island*, 172 Wn.2d at 420 (quoting *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 808, 246 P.3d 76 (2011) (citing *Soter v. Cowles Publ’g Co.*, 162 Wn.2d 716, 757, 174 P.3d 60 (2007) (“The court *must* find that a specific exemption applies *and* that disclosure would not be in the public interest and would substantially and irreparably damage a person.” (Emphasis added.)))

“[I]f we assume that the additional findings contemplated by RCW 42.56.540 are unnecessary, then a significant portion of the statute is rendered superfluous.” *Soter*, 162 Wn.2d at 756–57. Thus, for an injunction to be granted, a court must find that (a) an applicable exemption exists; (b) that “disclosure would clearly not be in the public interest”; and that disclosure would either (c-1) “irreparably damage any

person” or (c-2) “substantially and irreparably damage vital governmental functions.” RCW 42.56.540. Here, the Broadcasters’ inability to establish any of these elements is fatal to their claim for an injunction.

1. Disclosure is not *clearly* against the public interest which is, first and foremost, open and accountable government.

On this element, it is the Broadcasters’ position that “[t]hrough its creation of Click!, TPU [the City] has essentially determined that the public interest is served by providing cable television services to local residents.” CP 624. This argument, however, defies the PRA’s proclamation that “[t]he people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.” RCW 42.56.030. For a number of reasons, set forth below, disclosure of the documents sought by TNT is not *clearly* against the public interest.

As a threshold point, the public is not Click, the Broadcasters, the City, or the minority subset of the public that subscribes to Click. The trial court was apparently concerned that the Broadcasters’ threat of no longer doing business with Click was sufficient to warrant the injunction. As noted above, the Broadcasters cannot refuse to negotiate with the City. 47 U.S.C. § 325(b)(3)(C)(ii). But even if they were to stop doing business with the City, this is not clearly against the public interest. For certain, there are members of the community who do not be-

lieve it is the place for government to operate a cable business. The public should be allowed to assess how the City is doing business and whether this is an appropriate function for government.

Furthermore, the public has a right to understand the details behind its local government's legislative actions. When the City passed Ordinance 28098 in order to help close a budget shortfall, the basis of this action was that rates charged by the Broadcasters "have doubled year-over-year." CP 129. Similarly, when the City passed Resolution 38602 (CP 93), the Deputy Mayor explained that the public wanted the City to continue to fight Fisher and not give in to the rate increases. CP 105. One person who spoke at the public hearing argued the rate increases were "unfair, unjust and [sic] won't stand for it." CP 97. With this in mind, the City took legislative action based on the rates sought by the Broadcasters. Given that legislative action was taken, representations were made by elected officials and employees of the City, and comment was made by citizens—members of the public—there is no basis to say the same information is something the public has no interest in learning.

Additionally, the rates between the City and Fisher were so counter to the interest of the City that the contract was entered into "under protest." CP 154. By agreeing to Fisher's terms, the City did exactly the

opposite of what the Deputy Mayor and members of the public requested in passing Resolution 38602. The public should be allowed access whether the City honored the direction provided by the elected officials and public when passing the Resolution.

Also, what are the details of the non-cash terms between the City and Fisher? Are these benefits that are appropriate, particularly with a company that “imposed unreasonable terms” in its negotiations? Are the non-cash portions of the contract among the unreasonable terms in the final contract? Certainly, these are all questions the public has an interest in answering. While the cable outage was certainly a matter of public concern when it occurred, what the City ultimately traded to reacquire the signals is information the public—subscribers and non-subscribers alike—has an interest in learning.

Perhaps most importantly, the public has an interest in knowing how its government spends its money. This is particularly true, in this time of budget shortfalls, where government must choose between competing interests vying for limited resources. CP 129. The Preface to the Public Records Act Deskbook, drafted by then-Attorney-General Rob McKenna, explains that “[n]ot only do citizens have a right to know how their government is spending their tax dollars, they have the need

to know." *Public Records Act Deskbook*, at vii (2006). Either this principle is flawed, or the trial court's order was incorrect.

The proper inquiry is not merely whether there is some conceivable public good that *may* arise from enjoining disclosure of the records requested by TNT. Disclosure must "*clearly* not be in the public interest" before an injunction may be issued. RCW 42.56.540 (emphasis added). The trial court necessarily had to conclude that there was not even a reasonably debatable question as to whether the public has an interest in knowing how the City is spending its funds. Obviously, the trial court's own conflicted statements about the competing interests show that this was not truly the case. To issue an injunction when disclosure was not *clearly* against the public interest was error.

2. The Broadcasters are not a "person," and regardless, cannot show that they will be irreparably damaged.

The Broadcasters are also unable to show that disclosure would "irreparably damage any person." RCW 42.56.540. The Broadcasters are not a "person." But even if they were, they do not show, beyond speculation and internally inconsistent conclusory statements, that they will be irreparably damaged by disclosure. As CBS forthrightly admitted, disclosure may "greatly complicate" their negotiations (CP 575), but this does not rise to the level of "irreparable" damage.

3. Click does not perform a vital governmental function.

The Broadcasters concede that “operating a cable television system . . . is hardly an essential—or typical—function of government.” CP 576. Indeed, Tacoma operates the only public cable company in Washington. VRP 46. In the absence of Click, there would still be COMCAST, DISH, DIRECTV, and perhaps others to “compete” (such as they do) in the Tacoma television market. CP 575. Thus, even if the Broadcasters’ premonitions about the harm to Click are true (they are not because federal law requires negotiations in good faith) this does not justify an injunction as Click does not perform a vital governmental function.

4. The trial court erred in applying an injunction standard different than that set forth in the PRA.

There was argument by some of the Broadcasters that the trial court was not required to apply the PRA injunction statute, but only the generic injunction provisions in CR 65 and RCW 7.40.020, apparently because a preliminary, rather than permanent injunction was initially sought. CP 14; VRP 64, 70–71. To the extent the court relied on these arguments, it was error. Even if the March 15 hearing was termed a “preliminary injunction hearing,” the court entered a final order terminating the action. CP 185. Regardless, an injunction under the PRA, whether preliminary or permanent, must still comply with RCW 42.56.540.

This Court has repeatedly rejected the suggestion that anything less than each element of RCW 42.56.540 is required to impose a PRA injunction. In *Bainbridge*, 172 Wn.2d at 407 n.2, this Court stated:

RCW 7.40.020 codifies the court's general powers to grant an injunction. We have long recognized that where two statutes apply, the specific statute supersedes the more general statute. [Citation]. Because RCW 42.56.540 is specific to injunctions against production under the PRA, it is the governing injunction statute in this case.

To the extent the trial court believed that it was not required to conduct a full analysis under RCW 42.56.540, it erred.

G. The trial court's injunction against the release of "related records" was overbroad because it did not comply with RCW 42.56.540.

The trial court's March 15 order enjoins the City "from releasing the Retransmission (RCA) consent agreements and related records pertaining to the parties/plaintiffs to the News Tribune or any other party until further court order." CP 183. The court's April 12 order further explains that "[r]elease of any records related to the retransmission agreements that are subject to this consolidated case shall continue to be enjoined until each affected Plaintiff has received copies of such record affecting them and consented to such release." CP 300. The trial court's May 10 order finalized this injunction by stating "[a]ll other provisions of this Court's April 12, 2013 order enjoining release of oth-

er records relating to said agreements shall remain the same.” CP 535. The injunction on related records remains in place today.

This injunction turns the PRA upside down and enjoins unspecified records based on the determination of a third party. The result of this injunction on “related records” is that the City, in consultation with the various Broadcasters, determines first whether the records are related. If the records are related, then the Broadcasters, not the agency, determine what portion of the records will be released. By the terms of this order, the Broadcasters have the ability to redact: (1) invoice amounts (even though multiple individuals have access to invoices, negating any claim that they qualify as a trade secret); (2) the amounts on checks from the government (even though checks are processed by the bank and multiple individuals have access to check amounts); and (3) the content of emails between the City and the Broadcasters regarding the retransmission agreements.

As set forth, an injunction may only be issued under the PRA where several specific requirements are met. RCW 42.56.540. Here, the trial court did not conduct any of the analysis, discussed above, supporting an injunction against the release of “related” records. In fact, it was not possible for the court to make any of these required holdings be-

cause the documents subject to this injunction were not specifically defined, nor were the documents actually before the trial court.

Because the trial court did not comply with RCW 42.56.540, the injunction regarding “related” records was entered in error and this Court should therefore reverse the order and vacate the injunction.

H. The trial court should have conducted an *in camera* review.

Though the trial court initially agreed that it should conduct an *in camera* review of the claimed trade secrets, VRP 142-43, it erred when it subsequently changed its position. CP 535. Reliance on the representations of the City and the Broadcasters to conclude that only trade secrets were redacted from the RCAs was error.

Under the PRA, “if the requested material contains both exempt and non-exempt material, the exempt material may be redacted but the remaining material must be disclosed.” *Amren*, 131 Wn.2d at 32.

Both the Washington Administrative Code and Washington legal decisions explain the importance of conducting an *in camera* review to determine whether an exemption applies. “Courts are encouraged to conduct an *in camera* review because it is often the only way to determine if an exemption has been properly claimed.” WAC 44-14-08004(6). It is often the case that “the only way that a court can accurately determine what portions, if any, of the file are exempt from dis-

closure is by in camera review of the files.” *Limstrom v. Ladenburg*, 136 Wn.2d 595, 615, 963 P.2d 869, 879 (1998) (remanding for trial court to conduct *in camera* review of documents claimed to be work product) (internal quotation marks omitted).

While the decision whether to conduct an *in camera* review is generally left to the discretion of the trial court, it is reversible error for a trial court to refuse a request for *in camera* review where “the court cannot evaluate the asserted exemption without more information than that contained in the . . . affidavits.” *Overlake Fund v. City of Bellevue*, 60 Wn. App. 787, 797, 810 P.2d 507, 512 (1991).

Here, the Court must have access to the unredacted documents in order to assess what material falls within the asserted trade secret exemption. As the trial court acknowledged, “[s]ome of the stuff in the agreements is trade secrets. I’m sure a lot of it isn’t.” VRP 144. A few examples illustrate why *in camera* review was critical.

First, Fisher redacted “certain non-cash compensation provided by Click! . . . in the form of promotional support to advertise Fisher’s station.” CP 447. There is no further explanation of what this means or why it is a trade secret. While counsel for Fisher stated that this redaction was for “free air time,” VRP 159, counsel’s statements are not evidence. More importantly, if Fisher discloses the terms of the redacted

material during a court hearing, *on the public record*, then this portion of the contract cannot qualify as a trade *secret*. The redactions are not limited to any alleged *amount* of free air time. CP 477. The portion of the contract that was produced states only: "Promotional Support. Commencing July 1, 2009, Operator shall provide Fisher with the following promotional support during the remainder of the Term:" *Id.* Everything that follows is black. Focusing on the actual evidence (CP 447), this "non-cash compensation" could be anything from advertising on City buses to renaming a local park "Fisher Field." To evaluate whether this contract term is subject to exemption, and meets the other statutory requirements, the Court must review the contract.

Second, Belo redacted entire sections from its contract with the City, claiming that the entirety of those sections (CP 341, 345, 356) are exclusively trade secret pricing information. CP 326. Belo provides no explanation as to why its Amendment to Affiliate Agreement, CP 357, is redacted. CP 326. The unredacted portion suggests modification of time periods, not prices. CP 357 (agreement "is amended to add new periods, as follows: [redacted]"). No argument was ever advanced by Belo that time periods are trade secrets.

Third, CBS never explained why six different sections of its RCA with the City, CP 389-93, including an entire redacted page, CP 391, are

trade secrets. Rather, CBS declared generally that “[t]he agreements themselves contain CBS’s ideas concerning the way in which it negotiates its retransmission agreements.” CP 643.

Here, the trial court correctly observed that “[t]he fact that the plaintiffs think certain things are trade secrets doesn’t make it so necessarily.” VRP 141. Yet, the court committed error in changing its position on whether an *in camera* review of the records was needed. Without actually reviewing the documents in question, the court could not determine whether the redactions were appropriate.

I. TNT is entitled to an award of its attorneys’ fees and costs.

RCW 42.56.550 provides that a prevailing requester is entitled to attorneys’ fees and litigation expenses. In this case, the City violated the PRA by requesting and receiving an injunction precluding the production of related records until the various broadcasters consent to release. VRP 182.

Additionally, the City violated the PRA by preferring the rights of the broadcasters over that of TNT, as well as failing to provide TNT its “full-est assistance” as is required by RCW 42.56.100. *Doe I v. Wash. State Patrol*, 80 Wn. App. 296, 304, 908 P.2d 914 (1996). Here, the City determined the documents were not exempt, CP 45, 150, 592, yet, the City filed a brief and declaration in support of the Broadcaster’s posi-

tion and asked that the Superior Court not release the documents “[f]rom a purely business perspective.” CP 158. Based on its own self-interest, the City argued “that such intentional interference would be reckless and should be avoided if at all possible.” CP 160. Click’s General Manager also supported the Broadcasters. CP 166.

V. CONCLUSION

For the reasons stated, Tacoma News, Inc. respectfully requests that this Court reverse the trial court’s injunction.

Dated this 12th day of August, 2013.

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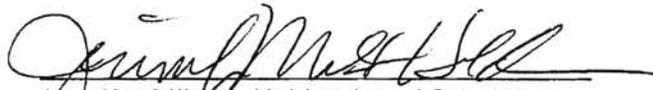
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CERTIFICATE OF SERVICE

I, Jennifer Milsten-Holder, declare under the penalty of perjury of the laws of the State of Washington that on August 12, 2013, I caused Appellant Tacoma News Inc.'s Opening Brief to be served via email, pursuant to the parties' mutual consent for service by email, as follows:

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Subject: Belo Management v Click Network Appeals #88934-1 Appellant Opening Brief Attached

Attached for filing in pdf format is Appellant Tacoma News Inc.'s Opening Brief submitted by the Appellant in *Belo Management Services, Inc., et al v. Click! Network, et al.*, Supreme Court No. 88934-1. The attorney for the Appellant filing this brief is James W. Beck, WSBA #34208, jbeck@gth-law.com.

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