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**SUPREME COURT OF THE STATE OF WASHINGTON**

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WADE'S EASTSIDE GUN SHOP INC., et al.,

Plaintiffs,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Appellant,

v.

SEATTLE TIMES COMPANY,

Respondent,

and

CHRISTOPHER SEAVOY and JANE DOE SEAVOY, et al.,

Defendants.

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**DEPARTMENT OF LABOR & INDUSTRIES  
ANSWER TO AMICUS CURIAE BRIEF OF ALLIED DAILY  
NEWSPAPERS, ET AL**

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 ORIGINAL

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## I. INTRODUCTION

Amici Allied Daily Newspapers et al. argue for an expansive interpretation of the Public Records Act's penalty provision, an interpretation that is inconsistent with the plain language of the Act, all available evidence of legislative intent, and four decades of case law. Allied's interpretation would open the door to penalty awards in amounts that do not reflect legislative intent, but that instead disproportionately reward those who abuse the Act by filing large and unmanageable public records requests in the hope of hitting a penalty jackpot. In so doing, Allied untethers the penalty from agency culpability and ties it instead to the size of the request. Allied's interpretation, which at its reach proposes possible per-word penalties, goes too far.

## II. ARGUMENT

### A. The Public Records Act Does Not Authorize Per-Page Per-Day Penalties

#### 1. The Text of the Public Records Act Does Not Authorize a Per-Page Penalty

In *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 98 P.3d 463 (2004) (*Yousoufian II*), this Court rejected the argument that the phrase "said public record" at the end of RCW 42.56.550(4) requires a per-record penalty (and by logical extension, a per-page penalty). Finding that phrase ambiguous, the Court resolved the ambiguity by holding that the purpose

of the Public Records Act—promoting access to public records—is “better served by increasing the penalty based on an agency’s culpability than it is by basing the penalty on the size of the plaintiff’s request.” *Yousoufian II*, 152 Wn.2d at 435. Although the Court expressly did not decide whether a trial court may have discretion to assess per-record penalties, *id.* at 436 n.9, the Court concluded that imposing penalties based on the number of records (or pages) is inconsistent with the purpose of the Act. *Id.* at 435-36.

Not satisfied with the Court’s determination of what “said public record” means in the context of setting the penalty, Allied turns to the definition sections of the Public Records Act, arguing that the phrase must be understood as synonymous with “writing” as defined in RCW 42.56.010(4). From that argument, Allied concludes the Act grants superior courts discretion to award per-page and even per-word penalties. Amici Br. at 4-7. Its argument fails in several ways.

Allied’s reading of the Act effectively rewrites RCW 42.56.550, allowing a penalty “for each day [a requester] was denied the right to inspect or copy said *writing*.” It would be as if the Legislature had never defined or used the term “*public record*.” But the Legislature has defined the term “public record” in RCW 42.56.010(3), and a “public record” is not equivalent to a “writing.” A public record *includes* a “writing” that

contains information relating to the conduct of government or the performance of any governmental or proprietary function where that record was prepared, owned, used, or retained by an agency. RCW 42.56.010(3). In other words, a “public record” is not a “writing,” but a document or other information storage medium that contains a “writing.”

The definition of “writing” does not treat individual pages or words—or by extension, individual letters or symbols (see *Amici Br.* at 6 n.1)—as discrete, divisible units. Rather, RCW 42.56.010(4) focuses on the means for recording information relating to the conduct of government or the performance of any governmental or proprietary function. The definition attempts to include every means by which such information can be retained. It does not, as Allied suggests, parse out individual bits of information as if their context in a record was of no moment. Nowhere in RCW 42.56.010(3) or (4) is there any indication the Legislature intended to define individual pages in a record or words on a page as discrete “public records.”

Allied’s attempt to deconstruct RCW 42.56.550(4) into the smallest possible particles to enhance the possible penalty discards the consistent understanding of that section that has prevailed in the Legislature and the courts for four decades. Except for recodification in 2005 and changes in the permissible penalty amounts in 1992 and 2011

(summarized in our opening brief at 41-42), the language in RCW 42.56.550(4) has not changed since the voters adopted Initiative 276 in 1972. We have found no legislative history suggesting the Legislature has ever understood that language to authorize or require per-record or per-page penalties.<sup>1</sup>

Allied cites two cases that properly applied a broad definition of “writing” to determine whether records containing the requested information were “public records” that must be produced under the Act. *See* Amici Br. at 8-9 (citing *O’Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010); *Nissen v. Pierce Cnty.*, 183 Wn. App. 581, 333 P.3d 577 (2014), *review granted*, 182 Wn.2d 1008 (Mar. 4, 2015)). But these cases were concerned with determining whether particular kinds of information contained in records must be released; neither *O’Neill* nor *Nissen* addressed the calculation of a penalty under the Public Records Act.

Nor is there history of judicial interpretation supporting per-record or per-page penalties.<sup>2</sup> This Court rejected that approach in *Yousoufian II*

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<sup>1</sup> Neither is there any evidence that the voters approving Initiative 276 in 1972 intended to impose per-record or per-page penalties. The relevant statements and summary in the 1972 Voter’s Pamphlet are silent as to penalties relating to public records. *See* [http://www.sos.wa.gov/\\_assets/elections/Voters%20Pamphlet%201972.pdf](http://www.sos.wa.gov/_assets/elections/Voters%20Pamphlet%201972.pdf); *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205-06, 11 P.3d 762, 27 P.3d 608 (Wash. 2000) (if an enactment is ambiguous, the court may examine the statements in the voters pamphlet to determine voters’ intent).

<sup>2</sup> Allied also cites three Court of Appeals decisions in support of their argument that RCW 42.56.550(4) permits per-page penalties. Amici Br. at 7 (citing *West v.*

in 2004, as mentioned above, holding instead that a penalty determination involves a two-step inquiry: (1) determining the appropriate daily penalty amount; and (2) calculating the number of days the public agency denied the party access to the records. *Yousoufian II*, 152 Wn.2d at 438. *Accord Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 459, 229 P.3d 735 (2010) (*Yousoufian V*). And this Court's decisions both before and after *Yousoufian II* consistently have characterized RCW 42.56.550(4) (and former 42.17.340(4)) as providing for a daily penalty when a public record request has not been fulfilled as required in the Public Records Act. *See, e.g., Franklin Cnty. Sheriff's Office v. Parmelee*, 175 Wn.2d 476, 480, 285 P.3d 67 (2012) (under RCW 42.56.550(4), "agencies are penalized on a per-day basis for improperly denying a records request"); *Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane*, 172 Wn.2d 702, 716, 261 P.3d 119 (2011) ("agency culpability the focus in determining daily penalties"); *Koenig v. City of Des Moines*, 158 Wn.2d 173, 188, 142 P.3d

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*Thurston Cnty.*, 168 Wn. App. 162, 275 P.3d 1200 (2012); *Zink v. City of Mesa*, 162 Wn. App. 688, 256 P.3d 384 (2011); *Ockerman v. King Cnty. Dep't of Dev. & Envtl. Servs.*, 102 Wn. App. 212, 6 P.3d 1214 (2000)). The decisions do not support their argument. In *West*, the court explicitly followed the two-step approach in the *Yousoufian* decisions and held that the superior court correctly calculated "the number of days that the County had improperly denied West access to public records to which he was entitled." *West*, 168 Wn. App. at 192. In *Zink*, the court acknowledged the trial court's grouping of multiple overlapping records requests into a smaller number for the purpose of calculating the daily penalty per request (thereby limiting the size of the penalty), but it remanded for proper consideration of the *Yousoufian* factors. *Zink*, 162 Wn. App. at 702, 705-06. *Ockerman* did not address penalties, because there was no violation of the Act. *Ockerman*, 102 Wn. App. at 220.

162 (2006) (“Once the trial court determined Mr. Koenig was entitled to inspect the records, it was required [under former RCW 42.17.340(4)] to assess a penalty within the statutory range for each day the records were withheld.”); *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 100-01, 117 P.3d 1117 (2005) (“sanctions are calculated on a daily basis” (citing former RCW 42.17.340(4))); *Lindberg v. Cnty. of Kitsap*, 133 Wn.2d 729, 746-47, 948 P.2d 805 (1997) (affirming lesser penalty, and rejecting plaintiffs’ claim they should have been awarded \$100 per day for each day they were denied the requested records; records were described as “voluminous” (*id.* at 734)); *Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997) (plaintiff was denied access to a multivolume report (*id.* at 29), but size of the report was not considered in calculating the penalty; Court held the plaintiff was entitled to a daily penalty “for each day the report has been withheld” (*id.* at 37)).

Allied also points to RCW 42.56.120, which allows an agency to assess a per-page charge for producing certain records, to support its argument that each page of a record should be treated as a public record when awarding a penalty. Amicus Br. at 6. But this statute refutes Allied’s argument by showing that the Legislature chose per-page treatment when charging for records, but did not choose per-page treatment in the penalty statute.

Finally, Allied relies on liberal construction to support its argument, but liberal construction does not authorize the Court to supplant the Legislature by crafting a per-page penalty when none is provided in the statute. *Senate Republican Campaign Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997) (liberal construction directive does not require court to apply a strained or unrealistic interpretation of the statutory language). As explained in the next section, a per-page penalty assessment opens the door to absurdly large penalties that exceed any realistic interpretation ever given RCW 42.56.550(4) by the voters who enacted it, the legislators who amended it, and the courts that have interpreted it.

**2. Basing the Penalty on Culpability and Not the Size of the Request Reflects the Legislature's and Voters' Intent to Promote Access to Public Records**

Allied argues that per-page penalties ensure accountability. Amicus Br. at 9. But per-page penalties are determined by the size of a public record request and, as explained above, this Court has held that penalties should be based on an agency's culpability, not on the size of the request. *Yousoufian II*, 152 Wn.2d at 435. The penalties proposed by the Seattle Times and Allied go well beyond ensuring accountability. They encourage abuse of the Public Records Act by promoting improper

purposes—punishing agencies or obtaining large financial penalties—rather than legitimate requests for public records.

Contrary to what Allied may argue, legitimacy matters. Public dollars pay for responses to public records requests. The public has a right to expect that tax dollars will not disproportionately pad the pockets of lucky requesters who get rich because of an agency's error, or devious requesters who seek to get rich by causing agency errors. The Seattle Times and its amici may always have the public interest in mind when they request public records. But the Public Records Act does not allow agencies to discriminate among requesters. A different requester may not care about the public interest, but the same provision applies to all requesters—if an agency errs in responding, a devious or abusive requester would claim penalties under the same provision that the Seattle Times would invoke.

In this context, it is critical to understand the full implications of a per-page or per-record penalty. In our reply brief at 22, we noted that the maximum possible penalty in this case under the Seattle Times' theory would be over \$126 million. But that is a proverbial drop in the bucket compared with potential penalties that could be awarded. In the spring of 2015, for example, a single requester filed multiple requests to multiple state and local agencies asking for huge numbers of public records. *See* Jerry Cornfield, *AG Response Due on Massive Public Records Request*,

Everett Herald (Feb. 12, 2015).<sup>3</sup> The State estimated one of his requests would have generated at least 600 million responsive records, and another would have generated well over a billion responsive records. And these estimates were of *records*, not *pages*; a single record may correspond to many pages. Even had it been possible to respond to these requests, the possibility of per-record or per-page penalties would not just be expensive, it would be financially catastrophic. At a penny per record per day, the State potentially could be penalized at the rate of six million dollars a day—that number would be doubled, tripled, or more if a per-page penalty were calculated. At five dollars per record per day—the minimum daily penalty imposed by the Legislature between 1992 and 2011, the potential per-record penalty for this single request would be *three billion dollars a day*. No reasonable person can suggest that the voters or the Legislature ever contemplated such penalties.

The voters, and then the Legislature, set the level of deterrence they believed was appropriate when they crafted provisions imposing a daily penalty. Until now, those provisions have not been understood to authorize a per-record or per-page penalty. When the Legislature found a need to increase the penalty in 1992, it did so by increasing the per-day penalty, not by adding a per-page penalty. Laws of 1992, ch. 139, § 8.

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<sup>3</sup> Available at <http://heraldnet.com/article/20150212/BLOG13/150219679>.

When the Legislature decided to eliminate a mandatory penalty, it did so by amending the per-day penalty without otherwise changing it. Laws of 2011, ch. 273, § 1. The Legislature has never indicated any intent to increase the penalty based on the number of records, the number of pages, or the number of words. It has never indicated any intent to encourage requests for large numbers of records by tying the amount of penalty to the size of the request. And when this Court identified factors relevant to determining the amount of penalty in *Yousoufian V*, 168 Wn.2d at 467-68, it did not tie the penalty to the size of the request.

As we explained in our reply brief at 23, the existing penalty provisions provide substantial deterrence. Applying the daily penalty provided in RCW 42.56.550(4), the Department has an annual potential exposure of \$219 million in penalties if it fails to comply with the Act. Reply Br. at 23. Adding mandatory attorney fees, the amount approaches half of L&I's annual operating budget. CP 605-06.

The Legislature could impose a per-page penalty if it chose. But the Legislature apparently has been satisfied with the level of deterrence provided by the Act's penalty provision as it has been understood for four decades. The Court should not expand the penalty provision beyond that historical understanding.

**B. The Investigative Exemption Authorized L&I to Temporarily Withhold Records**

The trial court erred in awarding penalties from January 31 to July 25, 2013, because it was permissible under RCW 42.56.240(1) and RCW 49.17.260 for L&I to temporarily withhold the investigative records until the investigation was concluded and the records could be reviewed for exemptions under the Public Records Act. *See* App's Br. 15-28; Reply 5-14.

The Court should also reject Allied's new argument on the categorical investigative exemption, as it was never raised by the parties to this dispute. Allied would limit the temporary categorical investigative exemption only to unsolved crimes, not to an administrative agency's investigation of possible regulatory violations by people who are aware of the investigation. Amici Br. 12-15. This argument was not made by the Seattle Times, which argued instead that the investigative records exemption did not apply once the matter had been referred for a decision whether to issue a citation. Resp't's Br. at 29. This Court does not consider new arguments raised by amici. *Madison v. State*, 161 Wn.2d 85, 104 n.10, 163 P.3d 757 (2007).

Even so, the categorical exemption articulated in *Newman v. King Cnty.*, 133 Wn.2d 565, 947 P.2d 712 (1997), is not limited to unsolved

crimes. In *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 314 P.3d 1093 (2013), which involved an internal police investigation, the Court observed that RCW 42.56.240(1) identifies two categories of agencies that may compile information subject to the exemption in RCW 42.56.240(1): the first category includes “investigative, law enforcement, and penology agencies”; the second includes “state agencies vested with the responsibility to discipline members of any profession.” *Id.* at 393. The Court held that “the *Newman* categorical exemption concerns the first category of investigative agencies.” *Id.* at 393. When the Department of Labor and Industries (L&I) investigates alleged workplace safety violations, its investigations fall squarely within the first category. L&I is an investigative agency authorized to impose substantial civil penalties and to refer violations for criminal prosecution. RCW 49.17.070 to .130, .170 to .190.

The fact that the suspected violators are aware of the investigation does not mean that the records are not exempt. Amici Br. 12-14. The cases cited by Allied refer to the scenario where the case has been referred to the prosecutor. See *Cowles Pub'g Co. v. Spokane Police Dep't*, 139 Wn.2d 472, 987 P.2d 620 (1999); *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 243 P.3d 919 (2010); *Sargent*, 179 Wn.2d 376. None of these cases stand for the proposition that because a violator is aware of an investigation, the temporary categorical exemption does not apply. If an employer who is

being investigated for a workplace safety violation can obtain the records during the investigation, the employer can ascertain L&I's investigative strategy and thwart the investigation by erasing evidence or other actions. The employer would know who has been interviewed and who has not, and could exert pressure on employees—who may be economically dependent on the employer—to change statements.

Under the workplace safety act, L&I may privately question any employer, owner, operator, agent, or employee. RCW 49.17.070(1)(b). This privacy allows for open communication and reduces the prospect of retaliation against an employee or a subcontractor. Such privacy is meaningless if an employer can tell from investigative records who has been interviewed and who has not.

Finally, allowing potential violators and others to see an open investigation file can result in premature opinions as to culpability, which can cause unnecessary harm both to private employers and their employees. The investigation at issue here involved a multi-employer worksite, and L&I did not find that all employers violated the Washington Industrial Safety & Health Act. CP 62-82, 85, 87-124, 126-27, 130-35, 137, 812. In its intertwined investigations, L&I worked diligently to make sure employers who were responsible for lead contamination and exposure were held accountable, and those who had no culpability were not unfairly

cited. It is this investigative process that the investigative exemption was designed to protect.

**C. L&I Reasonably Gave the Companies Who Claimed an Exemption 15 Calendar Days To Take Court Action**

L&I acted reasonably in notifying the companies who had claimed exemptions that L&I was planning on releasing the records, unless they took action. CP 801-02. Contrary to Allied's allegations, L&I did not wait months to notify the companies, nor did it give them months to act. Amici Br. 15. Rather, L&I notified the companies as soon as it completed its review of the records, and in advance of the date it had told the requesters that the records would be ready. CP 801-02. L&I gave them 15 days to act, and it allowed further delay only because the companies were unable to serve all the necessary parties in order to get an injunction. CP 388-451, 801-02.<sup>4</sup>

In this case, Seattle Times was not the only requester—there were nine separate requesters requesting various parts of the investigative files at issue here. CP 430-41. Despite diligent efforts to locate and serve all requesters, some of whom were from other states, Wade's attorneys were

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<sup>4</sup> Allied criticizes L&I's decision to give the companies 15 days to file a court motion. It points to the model rules, which reference "[t]he practice of many state agencies . . . to give ten days' notice" to obtain an order. Amici Br. at 16 (citing WAC 44-14-04003(11)). The model rules are not mandates, but advisory. RCW 42.56.570(2). And in this context, the rule recognizes "[m]ore notice might be appropriate in some cases." WAC 44-14-04003(11).

not able to complete service within the 15 days L&I had provided. CP 392-95, 425-28, 450-51. Under *Burt v. Dep't of Corr.*, 168 Wn.2d 828, 833-37, 231 P.3d 191 (2010), a requester is a necessary party to an injunction action under RCW 42.56.540. Rather than deprive the companies of “a realistic opportunity to apply to the trial court for such an order,” *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 758, 958 P.2d 260 (1998), L&I extended the time to obtain an injunction and promptly notified the Seattle Times of the extension. CP 802.

Allied criticizes L&I’s decision to give the companies an opportunity to seek a protective order when L&I did not think the records were exempt. Amici Br. at 17. But it is the Legislature that made the decision to provide for the notification of third persons who are affected by a record request, and it is a legislative policy decision that there should be an opportunity for such persons to take action to prevent release of the records. RCW 42.56.520, .540. This policy choice was recognized in *Confederated Tribes*, 135 Wn.2d at 758.

L&I notified the companies in part because it needs “cooperation from both employers and employees” when investigating workplace violations. App’s Br. at 29. Although Allied does not think a desire to maintain an appropriate culture of cooperation with employers is a valid moti-

vation to provide such notice, Allied is not charged with creating safe workplaces across the state, as L&I is. RCW 49.17.010. As part of its duty “to create, maintain, continue, and enhance the industrial safety and health program of the state” L&I should be empowered to foster reasonable working relationships with employers to enhance the efficacy of investigations and, more fundamentally, to achieve voluntary cooperation in creating safe workplaces for employees. *See* RCW 49.17.010. Interactions between government and the private sector need not be antagonistic to be effective.

Allied engages in false rhetoric to say that L&I “stalled disclosure as long as possible” for “months.” Amici Br. 18. No such stalling occurred. Once the investigations concluded, L&I diligently worked to review the records, and then to provide “a realistic opportunity” for affected private employers to exercise their statutory prerogative. Providing the “fullest assistance” to the requester does not preclude fairness to affected parties, as Allied seems to suggest. Amici Br. at 18.

### III. CONCLUSION

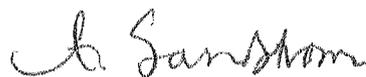
The Court should reaffirm that RCW 42.56.550 authorizes a penalty of up to \$100.00 per-day for each day a person filing a public record request is wrongfully denied the right to inspect or copy nonexempt records that are responsive to the request, and hold that RCW 42.56.550 does

not authorize a per-page or per-record penalty calculation.

The Court should reverse the superior court and remand with directions to dismiss the Seattle Times' action or, alternatively, to revise the award of penalties consistent with the per-day calculation authorized in RCW 42.56.550.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of April, 2015.

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NO. 89629-1

**SUPREME COURT OF THE STATE OF WASHINGTON**

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SEATTLE TIMES COMPANY, a  
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CHRISTOPHER SEAVOY and  
JANE DOE SEAVOY, husband and  
wife and the marital community  
comprised thereof; et al.

Defendants.

CERTIFICATE OF  
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor & Industries' Answer to Amicus Curiae Brief of Allied Daily Newspapers, et al and this Certificate of Service in the below described manner:

**Via Email filing to:**

Ronald R. Carpenter  
Supreme Court Clerk  
Supreme Court  
[Supreme@courts.wa.gov](mailto:Supreme@courts.wa.gov)

**Via E-mail per Electronic Service Agreement to:**

Michele Earl-Hubbard  
Allied Law Group LLC  
[info@alliedlawgroup.com](mailto:info@alliedlawgroup.com)  
[michele@alliedlawgroup.com](mailto:michele@alliedlawgroup.com)

**Via E-mail per Previous Electronic Service Agreement to:**

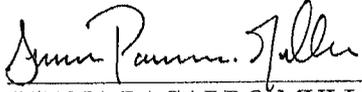
Christopher Pirnke  
Inslee Best  
[cpirnke@insleebest.com](mailto:cpirnke@insleebest.com)

**Via First Class United States Mail, Postage Prepaid to:**

Patrick Reddy  
Emery Reddy, PLLC  
600 Stewart Street, Suite 1100  
Seattle, WA 98101

Katherine George  
Harrison-Benis  
2101 Fourth Avenue, Suite 1900  
Seattle, WA 98121

DATED this 21<sup>st</sup> day of April, 2015.

  
SHANA PACARRO-MULLER  
Legal Assistant

## OFFICE RECEPTIONIST, CLERK

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**To:** Pacarro-Muller, Shana (ATG)  
**Cc:** Sandstrom, Anastasia (ATG)  
**Subject:** RE: 89629-1; Wade's Eastside Gun Shop Inc., et al v. DLI v. Seattle Times Co and Christopher Seavoy and Jane Doe Seavoy

Rec'd 4/21/2015

**From:** Pacarro-Muller, Shana (ATG) [mailto:ShanaP@ATG.WA.GOV]  
**Sent:** Tuesday, April 21, 2015 3:49 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Sandstrom, Anastasia (ATG)  
**Subject:** 89629-1; Wade's Eastside Gun Shop Inc., et al v. DLI v. Seattle Times Co and Christopher Seavoy and Jane Doe Seavoy

**RE: *Wade's Eastside Gun Shop Inc., et al v. DLI v. Seattle Times Company and Christopher Seavoy and Jane Doe Seavoy***  
**Case Number: 89629-1**

Dear Mr. Carpenter:

Attached for filing is the Department's Answer to Amicus Curiae Brief of Allied Daily Newspapers, et al and the Certificate of Service regarding the above referenced matter.

Thank you,

***Shana Pacarro-Muller***

Legal Assistant Supervisor

Supporting Marta Lowy, Anastasia Sandstrom & Lisa Brock

Office of the Attorney General

Labor & Industries Division

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Seattle, WA 98104

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