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NO. 89629-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

v.

DEPARTMENT OF LABOR AND INDUSTRIES, et al.,

Appellant,

v.

SEATTLE TIMES COMPANY,

Respondent,

and

CHRISTOPHER SAVOY, et al., Defendants.

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**Seattle Times' Brief of Respondent**

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## **I. COUNTER STATEMENT OF FACTS**

### **A. Lead Exposure Complaint Made to L&I in October 2012.**

On or about October 24, 2012, masonry worker George Dunn contacted the Labor and Industries (“L&I”) to report unsafe work conditions including lead exposure at Wade’s Eastside Gun Shop (“Wade’s), an indoor gun range and store in Bellevue where he was working on a remodel. CP 766. Inspections were conducted between October and November 2012. CP 65, 67, 69, 72, 74, 76, 107, 109, 111, 114, 116, 118, 141-43, 148.

### **B. Seattle Times Makes Public Records Act Request to L&I in January 2013.**

In January 2013, Seattle Times’ reporter Keith Ervin received confirmation from an L&I public information officer that a safety and health inspection at Wade’s had been conducted and blood testing of some workers showed elevated blood levels for lead. CP 45. On January 31, 2013, Ervin sought made a Public Records Act (“PRA”) request to L&I for records regarding investigations of excessive toxic lead exposure of workers at Wade’s. CP 44-45, 52.

What the Times and the public would not learn for many months thereafter was that toxic levels of more than three times the permissible limit were found at the worksite and in workers’ and their families’ blood and in the air and soil as far as 50 feet outside the building from unfiltered

air vents. CP 564-65, see also CP 56-60, 84-85, 100, 126-27. Workers carried the lead home to their families on their clothing and tools, resulting in documented elevated lead levels in the blood of at least three children and two women in workers' homes. CP 56-60, 84-85, 100, 126-27. People became seriously ill. It has been characterized by public officials as an outbreak of lead poisoning and the worst known case of lead contamination at an indoor gun range in U.S. history. CP 56-85, 126-27. At least seven businesses were investigated and eventually cited by L&I in many separate citations. CP 62-82, 87-135, 139-50, 801, 812. Workers, their families, and patrons at the gun range continued to be exposed to toxic levels of lead without notice while the Times and public waited for responsive records from L&I for many months. Wade's serves as a training range for numerous local, state and federal law enforcement agents as well as members of the general public. CP 556-57.

L&I responded to Ervin's PRA request on February 7, 2013, with a single page letter that stated some records responsive to the request were enclosed but "the remaining records you are requesting are part of open investigations and are not available until they are closed.\* Investigations of this type can take up to six months to complete." CP 54. The asterisk was a footnote that read only "RCW 49.17.260 42.56.280". Id. This was the only identification of withheld records or the exemptions alleged to

exempt them at that time or at any time in the trial court proceeding that followed. L&I stated in the letter that it estimated it would produce the remaining records by August 9, 2013. CP 54.

The records released with the February 7, 2013, letter was a three-year-old inspection file of Wade's for a previous violation in 2010. CP 45, 54, 754.

**C. Investigations Conclude Before March 22, 2013.**

The investigation of Wade's and several contractors was concluded by March 22, 2013, when L&I sent the original complainant Dunn the findings of the investigation referencing a specific citation number. CP 557-59, 564-65, 754-66. The letter reported on L&I's findings that exhaust fans did not have filters, that lead surface contamination from the vents was found as far as 50 feet from the vents, and that lab tests on samples collected from the vents contained 40 percent lead. CP 564-65. The letter noted "other health hazards were found during the inspection. **Please see a copy of the Citation and Notice report #316563311.** Further, **other inspections were conducted** at the site and results of **those inspections are included** in separate reports." CP 565 (emphasis added). Under "enclosure" it listed "Citation and Notice." **Id.**

The letter to Dunn was mandated by L&I's Compliance Manual, which states that complainants "must be sent a copy of the inspection

results” (CP 755, 762 at E.4.b) and the letter “must” include “a copy of any citation issued.” CP 764 at F.2. The letter must be logged in to the WIN tracking log. CP 764 last para. L&I’s own Manual makes clear the letter to the complaint must be sent within 15 days of the conclusion of an investigation and issuance of a citation or a decision not to investigate. CP 755, 762, 764. The WIN tracking log for this case shows a letter with “Inspection Reports with C&N” [Citation and Notice] was issued to Dunn. CP 766. The March 22, 2013, letter to Dunn is the only letter sent to Dunn and the only letter produced to the Times. CP 755.

An investigation concludes prior to the citation. A citation is akin to the charging and sentencing phases in a criminal matter. Likewise, with this state agency, it completed its investigation phase before its referral for a charging decision, and before its ultimate charging decision: issuing a citation. CP 754-55, 759-64, 774-75. The citation notes a “Closing Conference” that occurs weeks before citations were officially issued to the businesses. While L&I contends the March 2013 Dunn letter contains a typographical error and that the letter did not include a citation, the body of the letter states that it does include a citation. The letter also discusses inspection results it said were enclosed, and lists a Citation and Notice as an enclosure. CP 564-65. In the face of the above-described evidence cited to the trial court, the trial court disbelieved L&I’s contention that

investigation was not closed in March 2013. See CP 468-72, 857-64. L&I admits that by May 10, 2013, it had actually issued citations to all seven of the businesses that were cited, (see CP 801, 812, see also CP 46, 62-82, 87-135, 139-150), all with “Closing Conferences” weeks before the agency issued the citations, meaning the investigations of these businesses must have concluded sooner. One citation issued in March and the others in May. CP 801, 812; see also RP 9/12/13 at 11:21-22 (L&I’s attorney admitting during oral argument that the last investigation was completed in May).

- On March 29, 2013, L&I issued a Citation to a contractor at Wade’s noting three violations for lack of employee safety and training regarding lead hazards following a March 22, 2013, “Closing Conference.” CP 87-91. L&I chose not to fine the contractor for the violations. Id.
- On May 7, 2013, L&I issued the results of a health inspection of another Wade contractor following a Closing Conference on April 25, 2013. CP 92-93. L&I noted no violations. Id.
- On May 7, 2013, L&I issued another health inspection report for another Wade contractor following a Closing Conference of April 24, 2013. CP 94-95. L&I noted no violations. Id.
- On May 10, 2013, L&I issued a Citation to S.D. Deacon noting nine violations, seven of them serious, following a May 1, 2013, Closing Conference. CP 96-103. The Citation noted lead exposure of workers, failure to require respirators and train employees for lead handling, and allowing workers to wear lead-contaminated clothing and equipment home. Id. L&I fined Deacon \$10,750. Id.
- On May 10, 2013, L&I issued a Citation to Wade’s for 18 violations, 13 of which were labeled “serious” with four of those being labeled

“repeat serious”. CP 104-124. The Citation resulted following a May 1, 2013, Closing Conference. The Citation noted that lead exposure levels in workers’ blood tests during the two testing dates in November 2012 at Wade’s were more than three times the permissible lead levels, that counters where employees ate and drank had more than three times permissible lead levels, and lead-contaminated clothing was hung on hooks in a closet with other clothing. CP 107, 109, 111, 114-15. L&I fined Wade’s \$23,480. CP 105.

- The March 2013 through May 10, 2013, citations discussed above were released to the Times on May 16, 2013. CP 129. The inspection files were not released, just the formal citations.
- On May 22, 2013, L&I issued a Citation to another Wade contractor noting five violations, three of them serious, following a Closing Conference of April 25, 2012. CP 47, 129-135. L&I fined the contractor \$2550. CP 131. The Citation noted a failure to provide adequate protections and medical assessments for lead exposure of workers during construction work at Wade’s. **Id.** The Citation amended a previously-issued May 7, 2013, Citation that had not previously been provided to the Times. CP 132, **see** CP 46, 62-82, 87-124, 129-135 .L&I did not provide the May 22, 2013, amended citation to the Times until July 12, 2013. CP 47, 129. Again, just the citation was produced, not the inspection file documents.
- On August 5, 2013, L&I reduced the penalty previously assessed to Wade’s to \$17,920 and issued a “Corrective Notice of Redetermination” and Settlement Agreement. CP 47, 139-150. The document stated it was revised following an informal conference on July 17, 2013. CP 139. L&I did not release these documents to the Times until August 8, 2013. CP 47, 139-150. Just the revised Citation and settlement agreement was produced and not the inspection file documents.

With its July 12, 2013, production, L&I told the Times it was evaluating whether or not the remaining records, of these now-closed investigations, were exempt. CP 129. Again, L&I did not cite any exemption or identify any of the withheld records. **Id.**

**D. L&I Determines Records are Not Exempt and Notifies Subjects of Investigations of PRA Requests.**

On July 25, 2013, L&I determined the remaining withheld and as-yet-unidentified records were not exempt and, unbeknownst to the Times, it notified Plaintiffs Wade's and S.D. Deacon and others of the Times' and others' PRA requests. CP 154-58, see also CP 14-15. This was L&I's first notice to the subjects of the investigations that it had received PRA requests from the Times and others. L&I waited until July 25, 2013—175 days from the Times' request and 125 days after the closure notice of March 22, 2013, to notify the seven businesses it investigated of the nine PRA requests the agency had received. CP 154-58. L&I gave those noticed 15 days, until August 9, 2013, to file and serve a "motion for court protection". Id. L&I has never provided an explanation why it waited 175 days to notify the subjects of the investigations regarding the PRA requests.

**E. All Material Alleged to be "Confidential" Segregated in Separate Envelopes from Beginning of Investigations.**

L&I argues that it needed time to review records because the subjects had marked records confidential and such records were located throughout the files. The records subsequently produced by L&I disprove this claim. According to the L&I Compliance Manual, all material that could remotely be deemed confidential or that had been designated as

confidential by anyone was kept in a “Confidential Envelope” and listed separately on the index under this Confidential Envelope section. See CP 756, 769, 771. As the L&I Index for Wade’s file shows, only 275 pages of the 894 page file were in the “Confidential Envelope,” meaning 618 pages of non-confidential records were already segregated and presumably disclosable..” CP 771. Pursuant to L&I Compliance Manual policy, each of the seven inspections that resulted in Citations had a benefit of a “Confidential Envelope” and other sections of the File, listing the records by numbered pages. None of these indexes, which listed the records in the files, were provided to the Times prior to the court-ordered production discussed further below. Despite L&I’s claims that it needed to review all 5,431 pages of records not yet produced, the Manual policy and indexes show any allegedly “confidential” records, numbering just a few hundred pages and not thousands, were segregated into these Confidential envelopes and listed individually on the indexes with numbered page and document numbers. See, e.g. CP 771. (Further L&I would ultimately determine that all of the records contained in the files, including the 275 records in the Wade’s Confidential Envelope were not exempt and were disclosable, indicating that very few records the agency collects are ultimately exempt.)

**F. L&I Refuses to Release Records on August 9, 2013, Despite No Motion to Block Release.**

August 9, 2013, came and went without any motion for court protection being served and filed. When the Times inquired about the status of the production on August 9th, L&I told the Times it understood one or more parties planned to seek judicial relief and so it refused to release the records. CP 825.

Deacon sent L&I a letter on August 8, 2013, indicating an intention to file a lawsuit and seeking withholding of just seven specifically identified records. CP 822. Deacon did not file suit by August 9, 2013. It filed some days later, but L&I has not stated when it was served. Deacon did not name the Times in its suit, and dismissed the suit sometime thereafter without pursuing a motion to block release.

Wade's filed a Complaint on August 9, 2013, but did not file a motion to block release of the records, and Wade's did not immediately serve any defendant but L&I. CP 1-8. Wade's indicated it planned to file a motion by August 19, 2013—10 days after L&I's required deadline. CP 802, 819. It did not actually file a motion by August 19, 2013.

On August 19, 2013, Times' investigative editor James Neff wrote to the attorney for L&I telling him that L&I was violating the PRA by withholding records without a judicial order blocking their release, and

citing him to the case of Kitsap County Prosecuting Attorney's Guild v. Kitsap County, 156 Wn. App. 110, 231 P.2d 319 (2010). CP 160. L&I's attorney informed Neff that L&I would not release the records, that it would note a hearing at a time and date "convenient to the parties" and thus was voluntarily withholding the as-yet-unidentified responsive records from the Times. CP 160.

L&I admitted at oral argument on September 12, 2013, that L&I privately and secretly agreed to extend the deadline to delay release until September 13, 2013, to give Wade's and Deacon more time to note their motions. RP 9/12/13 at 12:20-23.

Wade's named the Times as a defendant in its lawsuit but did not serve the Times until the end of August 2013.

#### **G. The Times Sues L&I for PRA Violations.**

On September 4, 2013, the Times filed an Answer to the Wade's Complaint and a formal Cross-Claim against L&I, demanding production of the records and an award of fees, costs and statutory penalties for L&I's violation of the PRA in its handling of the request, and on the same day the Times also filed a Motion for Production of Records and Award of Fees, Costs and Penalties Against Department of Labor and Industries requesting oral argument. CP 17-42, 161-207.

On September 9, 2013—a month after L&I’s original deadline—Deacon filed a Cross-Claim in the Wade’s lawsuit objecting to release of just the same seven identified documents listed in its August 8, 2013, letter. CP 214.

On September 9, 2013—a month after L&I’s deadline—Wade’s filed a declaration from its attorney objecting to release of records although it did not at that time file any motion seeking to block release. CP 243-49. In the declaration, the attorney alleged that L&I PRA officer Madelyn Mackey told them L&I had decided not to release the records on August 9, 2013, and that Wade’s need only “provide formal notice of our intent to seek injunctive relief.” CP 245.

On September 11, 2013, Deacon filed a motion for Temporary Restraining Order (“TRO”), noted for hearing later that day. CP 324. The Times’ counsel confirmed by email with L&I’s counsel that L&I was not appearing for the TRO hearing. CP 266. L&I’s attorney admitted that L&I had “bent over backwards to give Wade’s an opportunity to seek a TRO.” CP 266. The TRO being sought was by Deacon and for just the seven identified records. Id. At the TRO hearing, Wade’s attorney orally asked to join in the TRO. No motion was filed. The hearing judge continued the hearing until September 12, 2013, to be heard the Times’ motion against L&I the next day. On September 12, 2103, Wade filed a “Memorandum”

in support of the oral request it had made during the September 11, 2013, hearing noted by Deacon. CP 383-84. It included a September 9, 2013, declaration by another of its lawyers, Christopher Pirnke, again repeating that they were told by Mackey on August 8, 2013, that L&I had decide to postpone release of the records on its own and that Wade's needed to merely provide notice of an intent to file a lawsuit. CP 426, 443-44; see also RP 9/12/13 at 12:20-23.

**H. Installments Pre-Court-Order were Old Inspections or Materials Routinely Released without a PRA Request.**

The Times did not receive any records from the 2012 Wade's inspection file until September 13, 2013. CP 754. Installment 1, released by L&I on February 7, 2013, was a three-year-old inspection file of Wade's for a previous violation in 2010. CP 45, 54, 754. Installment 2 and 3 were copies of more recent "Citation and Notice of Assessment" documents for Wade's and several contractors that were adding a second story to his gun range and store. CP 46, 62-82, 87-124, 129-135, 754 L&I routinely releases these citations to the public and doesn't generally require a public records request and document review before doing so. CP 754, 759-60. L&I sent out a news release announcing its citation of Wade's at the same time that it provided the Times with the Citations. **Id.** The news release included details from its inspection file but the agency

did not provide any underlying records to the Times prior to the Court Order at issue in this case discussed below. Id.

**I. The September 12, 2013, Hearing and Order Granting the Times' Motion against L&I.**

At the September 12, 2013, hearing on the Times' motion against L&I and the Deacon TRO motion, which was joined orally by Wade's, L&I's attorney represented that the records were ready to be released to the Times the following day in total. RP 9/12/13 at 13:3-6. L&I's attorney admitted that the agency's review and copying of the records for release to the Times "We had that pretty much done around the 25<sup>th</sup> of July." RP 9/12/13 at 14:9-10.

L&I did not argue for any exemptions, and did not add any exemptions to the two statutes stated without explanation in its February 7, 2013, letter to the Times. CP 317-20. The trial court heard argument on the exemptions alleged by Deacon and Wade's and held the exemptions had not been proven. In a lengthy oral ruling, the trial court explained its determinations. RP 9/12/13 at 26-34.

As to the Times' motion against L&I, the trial court stated in relevant part:

I see absolutely no basis for withholding of records. What I see here is an unwarranted delay without appropriate citation of any exemptions that I can detect on the record. The exemptions that L and I cited in the past when it was conducting the investigation,

essentially expired. And there is no basis that I know of other than hoping that the parties involved in L and I's investigation get going on coming into court for L and I to have withheld documents today.

So first of all, the Times is clearly entitled to the Documents it's asked for from L and I, and I'm ordering their production forthwith.

RP 9/12/13 at 27:22-28:10. The trial court further ruled that the Times would be awarded its fees, costs and statutory penalties from L&I pursuant to subsequent briefing and a hearing. RP 9/12/13 at 28-29. The written Order Granting the Times' Motion against L&I held that L&I

violated the PRA by failing to produce non-exempt responsive public records, by failing to identify responsive public records even if claimed to be exempt, failing to identify exemptions alleged to apply to these records or to explain how they apply to these records, and favoring the interests of the subjects of the records over the interests of the requestor and public in delaying production and voluntarily withholding records with no judicial order in place requiring such action.

CP 471. The Court found that neither Deacon or Wade's met its burden of proving the records exempt and "ORDERS those records produced promptly to Seattle Times." CP 471. The Court declared the Times the prevailing party entitled to an award of fees, costs and penalties from L&I, to be determined pursuant to a briefing schedule set forth in the Order. CP 471-42.

**J. L&I Delays Release and Seeks to Assert New Exemptions and Make Redactions in Defiance of Court's Order.**

While L&I had told the trial court the records were ready to be released immediately following the hearing, and all review had completed as of July 25, 2013 (RP 9/12/13 at 13:3-6, 14:9-10), L&I did not begin releasing the records until a day after the hearing, September 13, 2013. CP 559, 567. On that day, L&I produced 1,968 pages of unredacted records and a number of other records it redacted in violation of the Court's 9/12/13 Order. CP 559, 567. L&I in the cover letter stated an intention to delay further release until October 4, 2013, because L&I required additional time to determine "whether any of the information requested is statutorily exempt from disclosure." CP 567 (emphasis added). The Times' attorney immediately threatened L&I with a motion for contempt for violating the trial court's order compelling immediate release without redaction. CP 757; RP 10/31/13 at 18:8-18. L&I nonetheless delayed production for an additional seven days, eight days after the court's order, until September 20, 2013, when it relented and released an additional 3,445 new unredacted records. CP 559, 570. This installment included the pages previously produced on September 13, 2013, in redacted form in violation of the Court's order. The Times' calculation of 5,431 pages of records over these two days does not double count any records. CP 780-

81. The redacted copies produced on September 13, 2013, were not counted, and only the unredacted copies produced on September 20, 2013, were counted. **Id.**

**K. October 31, 2013, Hearing Setting Amount of Fee, Cost and Penalty Award.**

A hearing was held on October 31, 2013, to determine the amount of the penalty, fee and cost award against L&I. L&I conceded that several of the aggravating factors from **Yousoufian v. Office of Ron Sims** (**“Yousoufian V”**), 168 Wn.2d 44, 229 P.2d 735 (2010), had been met, including that the request was clear (CP 730), and that L&I’s withholding post August 9, 2013, was unreasonable and illegal (CP 733-34), and perhaps more importantly that **“Lead exposure is a public health concern. The Times is an important partner in educating the public on the dangers of lead exposure.”** CP 737 (emphasis added). Yet L&I failed to explain why it waited months to notify the seven businesses investigated of the PRA requests or why it delayed release of records months after investigations had concluded and no exemptions could apply.

The trial court applied and discussed each of the 16 **Yousoufian V** factors and explained her setting of penalties. The trial court found all but one of the aggravating factors, dishonesty, to have been shown. She found a delayed response (RP 10/31/13 at 19:18-20:6), a lack of strict

compliance by the agency with PRA procedural requirements (**Id.** at 20:7-8), a lack of proper training of staff (**id.** at 20:18-25), an unreasonable explanation for noncompliance (**id.** at 21:1-10), public importance of the records and foreseeability of that importance to the agency (**id.** at 21:25-22:5), and personal economic loss to the requestor (**id.** at 6-11: “This hit the Times in its operational heart.”).

The court found “an effort to put the interests of private parties in this case first . . . a wanton non-compliance with the PRA by the agency. . . intentionality, given, I think, the conscious decision to ‘bend over backward’ on behalf of private parties here at the cost of the public interest.” **Id.** at 21:14-22. The trial court stated that it “need[s] to award a penalty that’s necessary in an amount to deter future misconduct by the agency. L&I is not a small agency. It has a substantial budget and my award will take that into account.” **Id.** at 22:12-16.

The court found none of the mitigating factors to have been shown. **Id.** at 22:17-23:15.

The trial court awarded a total of \$502,827.40 in penalties calculated per day per record for the 5,431 records produced after the court’s September 12, 2013, order. The penalties were calculated as follows:

- From January 31, 2013, to March 22, 2013, a total of \$5,431 calculated at two cents per record per day;

- From March 22, 2013, to July 25, 2013, a penalty of \$169,718.75 calculated at 25 cents per record per day;
- From July 25, 2013, to August 9, 2013, a penalty of \$814.65 calculated at one penny per record per day;
- From August 9, 2013, to September 12, 2013, a penalty of \$184,654 calculated at one dollar per record per day;
- From September 12, 2013, to September 13, 2013, a penalty for the records produced on September 13, 2013, of \$9,840 calculated at five dollars per record per day and from September 12, 2013, to September 20, 2013, a penalty for the records produced on September 20, 2013, of \$137,800 calculated at five dollars per record per day.

Id. at 24:1-18; see also CP 861-63. The court issued a detailed order specifying the differing penalty ranges based on different time periods based on assessment of the agency's culpability at each phase and the attorney fee and cost award. See CP 857-64. The Order was subsequently amended on November 1, 2013, awarding additional fees and costs through the date of the hearing for a total fee award of \$42,681 and costs of \$1000.86. CP 866 (Judgment). (L&I has failed to designate the November 1, 2013, Updated Order in, or attach it to, L&I's Notice of Appeal or to designate it as Clerk's Papers).

**L. L&I Chose not to Lodge Records to Review or to Dispute Number of "Pages" or "Documents" at Issue.**

The Times invited L&I to lodge the records with the trial court for an in camera review if it disputed the Times' characterization of the number of pages or number of "documents" contained with the 5,431 unique and

unredacted pages it received from L&I after the Court's September 12, 2013, Order to disclose, or if the agency disputed that the records existed on or before January 31, 2013, and were responsive to the request.

The Times has held off providing all 5,431 pages to the Court to review since L&I should not dispute these points. If L&I disputes what was provided or how many "records" or "documents" are contained within, the Times or L&I can provide the Court with the complete set for the Court's in-camera review.

CP 560. L&I did not dispute the number of pages or documents contained and did not request in camera review. CP 722-40. L&I made vague allegations that not all records "existed" as of January 31, 2013, but declined to offer any specifics, or more importantly provide the records, to support this claim. CP 724. Times' investigations editor Neff testified in a declaration that at least 80 percent of the 5,431 pages were records clearly shown to have existed on or before January 31, 2013, (CP 755), a fact L&I did not seek to disprove through filing or identification of any of the records. CP 722-40.

L&I did not raise the issue of the number of responsive pages or number of responsive "documents" until the appeal. The only records it has identified in its appellate briefing, as alleged proof records did not exist on January 31, 2013, are the standard press released copies of

citations produced before the trial court's September 2013, Order<sup>1</sup> – and **no penalty was sought or awarded for these records**; penalties were awarded for the records produced between September 13 and 20, 2013. L&I did not identify, describe, or file below a single record from the 5,431 records produced pursuant to the September 12, 2013, Order that it contends was not responsive or did not exist as of January 31, 2013, nor has it identified or described a single such record on appeal.

**M. L&I Did Not Cite RCW 42.56.240(1) Below.**

L&I did not cite RCW 42.56.240(1) as an exemption at any time in the trial court or pre-trial, and raised it for the first time in its Brief of Appellant. See CP 49, 54, 317-20; RP 9/12/13; RP 10/31/13.

**N. Times Offered Proof of the Economic Loss to the Times and the Harm to the Public from L&I's Delay.**

Times' editor Neff testified in a declaration that the Times was forced to divert personnel from their assigned tasks as reporters, researchers and editors to become litigants in a PRA lawsuit, helping craft declarations and locating material for court filings. Neff testified that he, Ervin, and their researchers and editors spent 84 hours working on the lawsuit, taking that time away from their reporting, editing and research. CP 561. Neff testified that the Times and its readers were further deprived of the important public records at issue in this case for 232 days from

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<sup>1</sup> Brief of App. at p. 25 n. 16 and p. 26.

request and at least 182 days after the investigation concluded. **Id.** “The Times cannot recapture that missed opportunity to timely report on the lead-poisoning events, and we cannot fully appreciate the harm the public has suffered being kept in the dark these many months due to L&I’s improper withholding.” **Id.**

Neff concluded “requestors such as the Times, which must make a choice between pulling its staff away from their day-to-day duties to become litigants or simply walking away from their rights under the PRA, may be less able to justify the decision to pursue the public’s right to know if Courts do not award sufficient penalties to actually punish and deter agencies for breaking the law and compensate requestors for their efforts and the costs of waging that important fight.” CP 562.

## **II. ARGUMENT AND AUTHORITY**

### **A. L&I Waived its Arguments that it Did Not Violate the PRA or that the Times’ was Not Entitled to Any Award.**

While L&I argues in its Brief of Appellant that it did not violate the PRA and that the Times is not entitled to **any** award, L&I waived those arguments and conceded below that it **had** violated the PRA and that the Times was entitled to fees and costs for the fees incurred related to its claims against L&I, arguing only that such violation did not occur until August 9, 2013, instead of January 2013 or March 2013, and thus that penalties should be imposed solely for August 9, 2013, to September 20,

2013, and that only fees related to the Times' action against L&I should be awarded. In its Response to the Times' Motion for a Determination of its Fee, Cost and Penalty Award, L&I conceded:

- “In hindsight, the Department should have released the records at the latest by August 19<sup>th</sup> when Wade’s failed to file its preliminary injunction, but the Department did not intend to purposely delay or withhold records from the Times”. CP 733:21-23.
- “August 9, 2013 is the date of the PRA violation.” CP 734:13-15.
- “Here, the Department violated the PRA on August 9, 2013, when it failed to make an installment of records to the Times.” CP 738:10-12.
- “The Times did file a cross-claim against the Department in this lawsuit and the Department is liable for reasonable attorney fees associated with the Times’ cross-complaint.” CP 739:5-7.
- “The violation of the PRA occurred on August 9, 2013 when the Department failed to provide the next installment of records to the Times mistakenly relying on the representations of Wade’s Eastside Gun Shop and S.D. Deacon Corp. of Washington.” CP 739:21-24.

At oral argument on October 31, 2013, at the hearing to determine the amount of the penalty and fee and cost award, L&I’s attorney admitted that when Wade’s said it needed an additional week after August 9, 2013, to file its motion:

That’s where we broke down. The Department – it failed to release records on the 9<sup>th</sup>, there was no motion for protective order in, you know, at that time, and the Department gave them some additional time. That was to our detriment because they never ended up filing it until end of September. . . . Again, the Department shouldn’t have – should have just released the

**records on the 9<sup>th</sup>** . . . I think that's where it breaks down, and **that's where the penalties should begin.**

RP 10/31/13 at 13:4-19.

This is not one of those cases when we've willfully, negligently done anything wrong, **other than on the 9<sup>th</sup> of August we should have released that next – released the records.**

RP 10/31/13 at 16:14-17.

Appellate courts will not typically allow a litigant to concede a fact or take one position in the court below and then seek to appeal and argue the opposite of the concession or position asserted below. In **Procter & Gamble Co. v. King County**, 9 Wn.2d 655, 660, 115 P.2d 962 (1941), the Supreme Court did not allow a county in an excise tax collection case that admitted in the trial court that a company did not do business in the state to appeal seeking reversal of that determination. In **Hart v. Hogan**, 173 Wn. 598, 608-09, 24 P.2d 99 (1933), a defendant husband in a car accident case admitted in his Answer to owning the car driven by his wife during an accident. The Supreme Court prevented the husband from arguing on appeal the vehicle was actually community property, rather than his individual property, in an effort to avoid liability. 173 Wn. at 608-09.

The principle behind this doctrine, as with most waiver doctrines, is that a litigant should inform the trial court of its defenses, provide

authority and evidence to support those defenses, and give the trial court the opportunity to address them rather than seek to set up an error and then complain of it on appeal. See, In re K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995); see also RAP 2.5(a).

Having conceded it violated the PRA by its failure to provide records to the Times by August 9, 2013, when Wade's and S.D. Deacon's did not file a motion to block release, and having conceded that penalties should start as of August 9, 2013, and having conceded that it was liable for the reasonable fees and costs associated with the Times' cross-complaint against L&I and the related motions, L&I should be deemed to have waived the argument it seeks to raise now that no violation occurred even as of August 9, 2013, and that the Times is not entitled to any award of any kind.

While L&I argued in a single sentence at CP 739 that only fees associated with the L&I claim should be awarded, L&I did not identify any time entry, or even suggest an amount to be reduced, that it contended was not related to the claims against L&I. All of the billing records were filed with declarations of counsel, and yet L&I failed to challenge any entry. L&I cannot belatedly raise such claims on appeal having failed to meet its burden below. L&I similarly should not be allowed to concede

liability for penalties after August 9<sup>th</sup> as it did, and then complain now when the trial court agreed.

**B. L&I Waived its Arguments that Records were Not Responsive or as to the Number of Records.**

Similarly, L&I—which possessed all the records both pre-and post-trial court hearings and orders—was invited by the Times to lodge the records with the trial court if it disputed the Times’ statements regarding the number of pages at issue, that the records were responsive, and that the records existed on or before January 31, 2013. CP 560. L&I did not file or identify a single record from the 5,431 records produced between September 13 and 20, 2013 that it contends was not responsive or had not existed as of January 31, 2013. L&I had nearly six weeks between the September 20, 2013 production and the October 31, 2013, penalty hearing to file such records or their identification, and it could have filed such records or their identification with a motion for reconsideration following the November 1, 2013 Order and presented whatever proof it claimed to have. Instead, L&I offered nothing to refute the Times’ evidence and now seeks to make these arguments, without proof, on appeal. This Court should deem these arguments waived. The failure to make these arguments and offer proof and a substantive argument on the issue in the trial court precludes L&I from presenting them on appeal. See, e.g., RAP

2.5(a); Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 509-10, 182 P.3d 985 (2008) (rejecting attempt by injured bystander to raise liability based on “rescue doctrine” when it was raised in just a few sentences of a brief, did not contain headings showing the argument was being asserted as a separate theory, and bystander had not cited any of the cases argued on appeal); see also Smith v Shannon, 100 Wn.2d 26, 37-38, 666 P.2d 351 (1983) (precluding patient from raising on appeal trial court’s failure to measure defendant doctor’s conduct against standard of reasonable prudence rather than customary medical practice); Ainsworth v. Progressive Casualty Ins., -- Wn. App. --; 322 P.3d 6, 21 (2014) (refusing to allow insurance company to argue lost wages was not “actual damages” for purposes of award in insurance coverage case when insurance company had not adequately raised the issue below); In re K.R., 128 Wn.2d at 147.

While an appellate court has discretion to decide in rare circumstances that an issue raised for the first time on appeal should be considered, such decisions are not made, and should not be made, in cases like this where the complaining party, L&I, deliberately avoided offering the evidence upon which it bases the claim below and offered no real briefing or argument below or on appeal. L&I’s arguments for a rejection of the number of responsive records produced between September 13 and

20, 2013, should be rejected and deemed waived. In the alternative, the Court should find L&I's has failed to prove this claim and refute the Times' evidence.

**C. L&I Waived its Argument that RCW 42.56.240(1) Justified Exemption of the Records.**

L&I cited just two statutes in its letter stating why it was not producing records to the Times: RCW 49.17.260 and 42.56.280. CP 54. As L&I acknowledges, it did not cite RCW 42.56.240(1) at that time. Its statement that the investigations were "open" is not a statement of a statutory exemption nor an explanation how an exemption applies. But more importantly, L&I did not argue below, at any time, that the records had been exempt based on RCW 42.56.240(1). See CP 317-20, 722-40; RP 9/12/13; RP 10/31/13.

While the Supreme Court has rejected the notion that a party cannot argue new exemptions **in the trial court** beyond those it cited in its initial denial letter, **Sanders v. State**, 169 Wn.2d 827, 240 P.3d 120 (2010), at no time has the Supreme Court held that a party could fail to argue exemptions in the trial court and then—when records are declared non-exempt and ordered release and agencies have been held not to have met their burden of proving exemptions—appeal and raise wholly new exemptions to void a penalty award. L&I lost below, so it is seeking to

reverse the trial court's finding that records were not exempt and parties failed to meet their burden of proving them exempt. While a party that prevails below may raise other alternative grounds why a trial court decision could be upheld, and an appellate court can **uphold** a decision on grounds other than that stated below, a party that loses below cannot raise new previously-unclaimed exemptions to try for a reversal of the trial court decision. L&I's belated attempts to assert Section 240(1) should be rejected and that argument waived. See Section B above and authorities cited therein regarding waiver.

Even if the claim were considered, L&I has failed to prove it could have exempted the records here in their entirety for nearly nine months, or justified the complete lack of identification of any records, citation of exemptions, or explanation how any exemption applies. Section 240(1) does not allow categorical exemption of records when a subject has been identified, is aware of the investigation, and the matter has been referred for a charging decision. **Sargent v. Seattle Police**, 179 Wn.2d 376, 314 P.3d 1093 (2013); **Seattle Times Co. v. Serko**, 170 Wn.2d 581, 243 P.3d 919 (2010); **Cowles v. Spokane Police**, 139 Wn.2d 472, 987 P.2d 620 (1999).

Here, L&I conducted on-site investigations at Wade's and elsewhere in November 2012, more than two months before the Times'

request. The businesses were aware of the investigations. Results of those inspections had been referred for a charging decision long before the charging decision was made. L&I has not established the investigations were “open” when records were initially denied nor for the entire nine month period for which they were denied. L&I offered no evidence on appeal or below showing when the matters were referred for a charging decision nor how it was “essential to effective law enforcement” to silently withhold all of the records it withheld for nearly nine months.

**D. The Records Were Not Exempt under RCW 42.56.280 or 49.17.260 and L&I has Not Shown Otherwise.**

Again, L&I failed to offer any argument or evidence that the records were exempt under the two exemptions cited in its February 7, 2013, letter without explanation: RCW 49.17.260 and RCW 42.56.280. It did not brief the issue below, did not orally argue it, and has offered no evidence in its Brief of Appellant beyond two conclusory sentences that cite no authority. Brief of App. at 17 lines 1-6. Those arguments have thus been waived below, are not appropriately supported on appeal, and must not be allowed to be addressed on Reply. See Section B above and authorities cited therein re: waiver.

L&I bears the burden of proving exemptions. The requestor bears no such burden. Case law interpreting Section 280, which L&I neglects to

cite, shows the exemption cannot apply to the records here, and certainly not all of the records here. L&I offers no explanation or argument why RCW 49.17.260 applies, or how it applies to all the records withheld, or how it applied after an investigation was concluded and referred for a citation decision. The provision did not apply to exempt these records, and L&I did not prove and has not proved that it did. Attempts by L&I to assert this now, presumably in a Reply Brief, must be barred and disregarded.

**E. L&I Provided an Inadequate Response and Explanation.**

L&I did not cite Section 240(1) at all in its February 7, 2013, letter or any of its communications below. It failed to explain how Section 280 or RCW 49.17.260 applied to the records withheld and never stated what records existed and were being withheld. This is particularly egregious given that we now know that pursuant to the Compliance Manual L&I maintains an index of every record placed in an inspection file identifying it with a description as well as a document number and that the allegedly “confidential” records are all kept in a confidential envelope and listed in the confidential envelope section of the index. L&I could have made copies of the file indexes for the Times, providing at least some identification of the records that existed and were being withheld. Instead

it stated simply that no record would be produced as the investigations were deemed to be “open.”

In Sanders, 169 Wn.2d 827, the Supreme Court held that the Attorney General’s Office (“AGO”) violated the PRA even though it provided a lengthy index of every record withheld identifying the name and author and date of each document and exemption statute(s) alleged to apply but failed to explain how the cited exemptions applied to the record described. The trial court imposed a penalty of \$5 per day for each of two categories of records which each held just a “few” records each. The Supreme Court grouped four additional documents into a third category, also imposing a \$5 per day penalties. Both the trial court and the Supreme Court imposed an additional \$3 per day per category for each of the three categories solely for the inadequate explanation, making penalties for the “few” records times three categories \$8 per category. (Sanders recovered only five percent of the records he had challenged.) See also Citizens for Fair Share v. Department of Corrections, 117 Wn. App. 411, 431, 72 P.3d 206 (2003) (holding agency “violated the [PRA] by failing to name and recite to [requestor] its justification for withholding” portion of records and therefore finding requestor to be prevailing party).

Here, unlike in Sanders, the agency provided no identification of the withheld documents, no explanation of exemptions, and failed to cite

exemptions it seeks now to raise on appeal. The response here is far less adequate than that provided by the AGO in Sanders, and yet Sanders was found to merit basically an additional \$9 per day (\$3 times three categories) just for the inadequate explanation.

Here, L&I silently withheld 5,431 unique, non-duplicative records for nine months after the agency refused to identify them and did not cite or explain exemptions. No records were shown to be exempt. The trial court's penalties encompassed both the inadequate response and remaining violations. The trial court awarded one penny a day, two pennies a day, twenty-five cents a day pre-litigation, and then \$1 and \$5 a day as litigation commenced. L&I cannot establish under Sanders that its response to the Times was adequate. Its claim that an un-cited investigative records exemption excuses it from identifying records is a claim that has been waived, and has no merit in any event. As in Sanders, the agency owed the requestor a clear statement of what existed, what exemptions barred the records' release, and how those exemptions applied to the denied records. None of this was provided. The penalties imposed by the trial court appropriately took into account the inadequate L&I response and was not an abuse of discretion.

**F. L&I Silently Withheld 5,431 Records for Nine Months.**

L&I did not identify the records that existed when it told Ervin on February 7, 2013, he could not have any responsive records beyond a three-year-old inspection file. We now know that there were 5,431 unique records, listed on internal indexes that L&I could have identified as existing with relative ease. A failure to specifically identify each responsive record that exists is a silent withholding and a violation of the PRA. Sanders, 169 Wn.2d 827; Progressive Animal Welfare Society v. University of Washington (“PAWS II”), 125 Wn.2d 243, 884 P.2d 592 (1995). Here L&I refused to state what existed—never “identifying” the records and only producing the records when compelled by a court order, which it defied, and then complied with after being threatened with a motion for contempt.

**G. L&I Favored the Interests of the Subjects of the Records Over the Interests of the Requestor and Voluntarily Withheld Non-Exempt Public Records without a Court Order Requiring Denial.**

L&I admitted it favored the interests of those it investigates—the subjects of the records—over the interests of the requestor and public. It tried to justify its cooperation with the subjects and its delays of the records’ release, and its voluntarily withholding of non-exempt records by arguing the agency needed the cooperation of those it regulates. At the hearing on September 12, 2013, L&I’s attorney argued that

- “since the Department relies on the businesses to cooperate with them when they’re doing a safety and health investigation, we informed the—the entities that there were records out here that we did not think were confidential, we would release them unless we received a , you know, a protective order preventing us from releasing them. And I believe we gave them until August 9th.... The Department, you know, knowing that August is a busy month, agreed and extended the deadline to provide records ... until September 13<sup>th</sup>, so there is a one month extension there, in which case we presumed that we would then hear the motion, the show cause motion, and everything would be you know, would be done . . .” RP 9/12/13 at 12:7-13:1.
- “Again, we rely on their turning over documents and cooperating with L and I when we do these investigations.” RP 9/12/13 at 14:21—23.
- “And again, I can’t stress this enough, that the Department relies on, when they’re doing an investigation, on businesses to turn over their records. And the Department, at that time, in order to make it easier for them, they’ll provide them with notice that we intend to release them and they can seek some protection then. Without that it makes our job much more difficult...:” RP 10/31/13 at 15:14-22.

L&I admitted it secretly gave Wade’s and Deacon a one-month extension beyond August 9, 2013, to file a motion—after telling the Times the records were not exempt and would be released, absent a court motion on August 9, 2013. RP 9/12/13 at 12:20-23; CP 245, 426. The Times informed L& counsel the agency was breaking the law but L&I nonetheless said it would give Wade’s and Deacon the additional month’s secrecy. CP 160. AAG Barnes admitted to “bending over backwards” to give Wade’s time to obtain a TRO (CP 266), and he told Neff he was holding off noting any motions and would do so when it was convenient

for Wade's and Deacon. CP 160. Throughout it all, L&I forgot who it was supposed to represent, who it was supposed to serve, and it favored the interests of those it was supposed to regulate and police—over the interests of the requestor and public—in order to make the agency's "job easier."

The Court of Appeals in Kitsap County Prosecutors, a case Neff cited to L&I on August 19, 2013, when he told them L&I was violating the PRA, held that an agency that voluntarily withholds non-exempt records when a judicial order has not been entered blocking their disclosure violates the PRA and is obligated to pay the requestors' fees, costs and statutory penalties when PRA litigation ensues. 156 Wn. App. 110. Like here, in Kitsap County the agency gave objectors notice and an opportunity to sue to block release of records. And, also like here, when the objectors filed suit but failed to immediately secure a court order blocking release, the agency voluntarily delayed production to allow the litigation to proceed. The Court of Appeals held that the agency violated the PRA and it had to pay the requestor fees, costs and statutory penalties.

**Id.**

In Doe I v. State Patrol, 80 Wn. App. 296, 908 P.2d 914 (1996), another case similar to here, an Assistant Attorney General agreed to withhold disclosure for an additional two weeks to give the subject of

records a chance to seek a TRO blocking release. On appeal, the agency had argued it was but a stakeholder and so could not be found to have violated the Act. The Court of Appeals disagreed, finding the agency had favored the interests of the subject over the interest of the requestor throughout that two-week voluntary delay and thus had violated the duty of fullest assistance included within the PRA and was obligated to pay the requestor's fees and costs in the PRA suit. Id.

Here, L&I knew legally it could not agree to withhold non-exempt records. It knew it should not "bend over backwards" as it did to aid those it regulates while ignoring its obligations to the requestor and public. No judicial order was sought until more than a month after the deadline, no order was entered, and L&I voluntarily withheld the records for more than nine months, more than a month after its self-stated deadline.

L&I has not established any basis for overturning the trial court's finding that L&I favored the interests of Wade's and Deacon over the interest of the Times and public. L&I admitted as much several times at oral argument and in its communications.

#### **H. L&I Has Not Appealed the Correct Order.**

The Notice of Appeal filed by L&I states it is appealing a Final Judgment, October 31, 2013, Order, and a September 12, 2013, Order. CP 868-69. As the Final Judgment states, the trial court issued a "November

**1, 2013, Updated Order following hearing on October 31, 2013”**

awarding the Times its fees and costs and the statutory penalty. CP 871 (emphasis added). L&I did not attach the November 1, 2013, Order, nor reference it in its Notice of Appeal. CP 868-87. L&I has also not designated the November 1, 2013, Order as Clerks’ Papers.

A notice of appeal must designate the decision or part of the decision which the party wants reviewed and a party filing the notice of appeal should attach to the notice of appeal a copy of the signed order or judgment from which the appeal is made. RAP 5.3(a). L&I has identified and attached the correct Judgment. It has not identified or attached the Order upon which the Judgment was based and from which the findings and conclusions it seeks to challenge arise.

To challenge the November 1, 2013, order, L&I must establish that this Court should review the Order L&I has omitted and failed to identify. **See Foster v. Gilliam**, 165 Wn. App. 33, 44, 268 P.3d 945 (2011) (holding that notice of appeal that attached judgments against some parties but not all did not bring up for review omitted judgment); see also RAP 2.4(b). L&I failed to make this argument or showing in its Brief of Appellant raising the possibility of waiver on yet another issue.

**I. The Penalties Awarded Below are Allowed under the PRA and L&I has not Shown an Abuse of Discretion.**

L&I argues that trial court judges can never award PRA penalties per page, per record, or per category, and can only award penalties per request. Under L&I's theory, no agency, no matter how large and no matter how egregious the conduct, could ever be fined more than \$36,500 a year for the denial of all records responsive to a PRA request. At \$100 per day times 365 days times one "request" that is the most any requestor could ever achieve and any agency ever be made to pay.

There is no support for L&I's theory. First, the statute itself speaks of a penalty for each day "said public record" is denied. RCW 42.56.550(4). Second, the Supreme Court has specifically approved of awarding penalties per categories or per groups, and has awarded penalties itself per groups and per categories, and lower appellate courts have similarly approved penalties awarded per category and per group. Third, there is no support for, or rational distinction between, allowing penalties per category or group but disallowing them per "record" or "document" or "page." L&I's argument pits it against three Supreme Court cases, the 2010 decision in Sanders v. State, 169 Wn.2d 827, 240 P.3d 120 (2010), the 2005 decision in Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 98 P.3d 463 (2005) ("Yousoufian II") and the 2010 decision in

Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 451, 229 P.3d 735 (2010) (“Yousoufian V”).

The Yousoufian cases I-V all dealt with the same PRA request which the Supreme Court has held was a request for “two distinct groups of records”: studies concerning how a fast food tax would be used to finance a stadium and file materials relating to a “Conway Study” analyzing the impacts of sports stadiums and other such studies.

Yousoufian V, 168 Wn.2d at 451. The trial court had allocated the records produced into 10 separate groups. Id. at 456-457. The trial court had imposed a penalty per day per group, and this per day per group amount was twice overturned by the Supreme Court as too low. Yousoufian II, 152 Wn.2d at 440; Yousoufian V, 168 Wn.2d at 468-70 (originally \$15 per day per group). Finally, the Supreme Court itself set the appropriate per day per group penalty at \$45 per day for each of the 8,252 penalty days occurring after adding up all of the days denied for each of the 10 groups. Yousoufian V, 168 Wn.2d at 470. As the penalties were imposed per day per group, this was the equivalent of \$450 per day for some periods when all 10 groups of records had been denied. The requestor claimed there were just over 200 “documents” in the 10 categories, meaning the penalties mathematically could have been approximately \$2 per record per day (450 divided by 200 = 2.25).

In Yousoufian II, the first appeal, the Supreme Court held the penalty was too low, the Supreme Court held a trial court was not **required** to impose penalties “per record” in the face of a challenge by the requestor arguing per day per record penalties should have been imposed not merely per day per group. Yousoufian II, 152 Wn.2d at 436. An important background fact for Yousoufian II was at the time of the appeal the mandatory minimum was \$5 per day, meaning the requestor sought to **require** a trial court to impose a minimum of \$5 per day per record. **Id.** The Supreme Court did not forbid the imposition of penalties per record per day but it held a trial court was not required to impose the minimum \$5 penalty on a per record basis.

While the agency had not perfected the appeal of the issue of “per category” penalties in Yousoufian II, the Supreme Court in the final decision in Yousoufian V stepped into the shoes of the trial court, applied its own guidelines and decided in that case the appropriate penalty was \$45 per day per 10 groups. One cannot realistically argue the Supreme Court’s choice of that dollar figure did not factor in that the penalties were applied per group, nor can one argue the Supreme Court’s action was meant to suggest “per group” penalties were disallowed. Yousoufian V declared clearly that trial courts have “considerable discretion” under the PRA’s penalty provision in deciding an appropriate penalty; and that the

multi-factored Yousoufian V test was drafted by the Supreme Court to provide additional guidance for how such discretion was to be exercised. Yousoufian V, 168 Wn.2d at 463-69. Yousoufian II did not hold that courts could not award penalties per record. It merely held a court was not required to do so. In Yousoufian V, when deciding penalties itself in a case where penalties would be imposed per day per 10 groups, the Supreme Court picked a \$45 per day penalty in a case where most of the records had been produced before a requestor sued and within a few months of his request. These two cases together cannot be read to preclude penalty imposition on a per record or any other basis, as L&I apparently claims.

The Supreme Court stated clearly in Sanders that per group or category penalties are appropriate and itself awarded a per group penalty in Sanders. Sanders involved a denial of “a few” non-exempt documents—about five percent of the withheld records—and an additional four documents the Supreme Court determined were not exempt on appeal. Sanders also found that while the agency had provided detailed indexes of all records existing and withheld that the agency had not provided a sufficient explanation of how the exemptions applied. 169 Wn.2d at 841, 859-61. The Supreme Court upheld the trial court’s right to group the “few” documents into two separate categories and to impose

penalties per day per category, and the Supreme Court chose to group the four documents it identified as non-exempt on appeal and treated them as a third category for purposes of penalties. Id. at 859-64 The Supreme Court further upheld the trial court's right to increase the penalty imposed per day per category \$3 for the agency's failure to explain how exemptions had applied in its detailed index, and the Supreme Court imposed the same additional \$3 per day for the one additional category of records it held not exempt on appeal. Id. The Supreme Court declared the trial court's action below to be in line with the mandates of Yousoufian V. Id. The Supreme Court chose to impose penalties of \$8 per day for a group of four documents and upheld the trial court's decision to impose that same \$8 per day for each of two separate groups of "a few" documents. Both cases stand for the proposition that trial courts are afforded broad discretion to decide PRA penalties. Both cases stand for the proposition that the Yousoufian factors are provided for guidance but that these are not the exclusive factors to decide an appropriate penalty and that an appropriate penalty is to be determined given the circumstances of each case. (In Sanders, the four-document category with an \$8 per day penalty would have been the same as a \$2 per record per day penalty).

In **Bricker v. L&I**, 164 Wn. App. 16, 262 P.3d 121 (2011), the Division Two Court of Appeals upheld a trial judge's decision to impose \$90 a day for 16 documents grouped into one category and an additional \$15 a day for three additional documents grouped into a separate category. (Mathematically, this equals \$5 per record per day for the \$15 three document category and \$5.625 per document per day for the \$90 16 document category.) The per record amount in **Bricker** is as high or higher than the highest per record amount imposed against L&I in the Times' case illustrating the reasonableness of the penalty assessment made in the Times case, especially as it is against a repeat violation agency, such as L&I which was the same defendant as in **Bricker**.

In **Sargent** the Supreme Court did not object to the trial court's award of \$100 per day, the maximum penalty, only remanded to the trial court to apply the **Yousoufian V** factors that had not been mentioned. **Sargent**, 179 Wn.2d 376.

All of the Supreme Court's decisions on penalties from **Yousoufian II** and thereafter illustrate the intention to grant deference to trial courts to determine the appropriate penalty given the unique circumstances of each case. Here, the trial court carefully walked through each of the **Yousoufian V** factors, making findings on each during the hearing. L&I conceded many of the aggravating factors were present. L&I had every

opportunity to present the evidence it wished, and chose what it wished to provide. The trial court found all but one of the aggravating factors were shown and none of the mitigating factors. The trial court was offered proposals to calculate penalties per request, per category, per document or per record counting a page as a record. The Times did not insist on a per page or per record method, and offered many different methods, some with higher and some with lower overall penalties. The Times and trial court understood it was the trial court that was enabled to exercise discretion and identify an appropriate penalty amount, and the trial court exercised that discretion appropriately here.

The trial court selected a per record basis, counting each page as a record, affording certainty as to the date a record was provided, rewarding the agency for production of records, but penalizing the agency for the volume of records it sought to withhold in defiance of the court's order.

The amounts per day the trial court assigned were miniscule by comparison to other cases. Two cents a day per record was assessed for the initial phase from request until L&I gave notice to the complainant that the investigation was over and citations and fines were being issued. This phase included L&I's refusal to identify any of the records being denied or to cite and explain exemptions. A penalty of twenty-five cents a day per record was assessed for the period from the closure of the investigation

until the date L&I finally notified the subjects and invited them to file suit and block release.

A penalty of one penny a day was assessed per record for the 15 days the agency announced it would give the subjects to block release.

When that period expired and no party brought such a motion but L&I nonetheless withheld the records, the court imposed a penalty of \$1 a day per record from that expired deadline until the date the court issued its order to release the records—a period of just over a month. Finally, when the court ordered records produced, and L&I defied the order and delayed production and sought to redact information, the court assessed a penalty of \$5 per record per day for the nine days L&I delayed and defied the court's order until the records were produced.

L&I cannot show that a trial court abuses its discretion when it awards penalties on a per record basis as the trial court did here, and it cannot show that having selected that method that penalties of a penny, two cents, and a quarter a day pre-litigation and then \$1 and \$5 for the brief period during the litigation was an abuse of discretion.

L&I withheld, without identification, exemption or explanation, 5,431 records related to one of the worst lead exposures at an indoor gun range in U.S. history, and it withheld them for nine months. It delayed for months after investigations had closed, and delayed for months after

determining records were not exempt. It admitted it had “bent over backwards” to help the subjects of the records delay production and secure TROs and that it secretly extended the deadline for court action because August was “a busy month” and cooperating with the businesses it investigates and regulates makes its job “easier”. CP 266, 160, 426, RP 9/12/13 at 21:20-23. Despite promising the court that records were ready, and had been since July 25, 2013, and would be released immediately following the court’s order, L&I delayed production after the Order, seeking to give itself another month to decide whether to redact information based on exemptions it had never cited, and had never argued to the court. It relented only when threatened with a motion for contempt, producing records after nine days in defiance of the court’s order.

It was further documented that L&I has a more than \$600 million biennial budget and has had at least two recent PRA judgments against it, including **Bricker** where it was fined \$90 per day and where the court found L&I provided inadequate training to staff. L&I was thus a documented serial record violator that had violated the court’s own order in this case. The trial court considered all of the factors and the record in the case in fashioning an appropriate penalty. L&I has not established an abuse of discretion, and has waived most of its current arguments focused on penalties.

The trial court in this case dealt with a delayed disclosure of 5,431 pages of records of incredible public importance. They related to investigations by L&I of extensive lead poisoning and lead contamination at an indoor gun range that harmed and placed at risk workers, customers, their families and all those with whom they came into contact. It revealed emissions containing 40 percent lead spreading fifty feet from the building from rain and unfiltered vents, workers transporting the lead home on their shoes, clothing and tools and infecting the blood at serious and toxic levels of their spouses and children. L&I did not identify any of the responsive records for nine months and it did not state or explain exemptions. When inspections ended and subjects were cited and fined, L&I still did not release records. It waited months after investigations ended to notify affected businesses and give them the right to sue to block release, and it voluntarily and secretly extended the date when it agreed to withhold records until September 2013—nearly a year after its investigation began and many months after it had concluded. When the Times sued and obtained a court order requiring L&I to release the records, L&I still delayed, defying the court order and trying to assert new exemptions it had not bothered to identify or argue to the court and it tried to redact information it had been ordered to release. It relented nine days later after

the Times made clear it would file a motion for contempt if records were not produced and the Order obeyed.

This trial court, faced with all of the above evidence, was afforded many different methods by which to calculate penalties, and it selected one that led to a smaller per record penalty than in Sanders, Yousoufian V or Bricker, except, as discussed above, for the nine days for which the trial court fined L&I \$5 per record for defying its order.

L&I has shown no abuse of discretion in the trial court's award, and it should be affirmed.

**J. The Times is Entitled to an Award of Fees and Costs under the PRA and as a Prevailing Party in this Appeal.**

RCW 42.56.550(4)**Error! Bookmark not defined.** of the PRA provides:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action [.]

Washington courts recognize that “[s]trict enforcement of this provision discourages improper denial of access to public records.” Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 101, 117 P.3d 1117 (2005); see also Am. Civil Liberties Union of Washington (“ACLU”) v. Blaine Sch. Dist. No. 503, 95 Wn. App. 106, 115, 975 P.2d

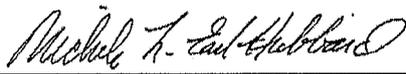
536 (1999). The PRA does not allow for court discretion in deciding **whether** to award attorney fees to a prevailing party. **Progressive Animal Welfare Society v. University of Washington** (“PAWS I”), 114 Wn.2d 677, 687-88, 790 P.2d 604 (1990); **Amren**, 131 Wn.2d at 35. The only discretion the court has is in determining the *amount* of reasonable attorney’s fees. **Amren**, 131 Wn.2d at 36-37..

The Supreme Court in **Limstrom v. Ladenburg**, 136 Wn.2d 595, 616, 963 P.2d 869 (1998), remanded back to the trial court to determine whether a violation of the PRA occurred, but awarded attorney fees— “[including] fees on appeal”—to the requester. Should the Times prevail on appeal in any respect, it should be awarded its fees and costs on appeal pursuant to the PRA and RAP 18.1.

### III. CONCLUSION

For the foregoing reasons, the Seattle Times respectfully request that the Court affirm the trial court and grant the Times reasonable fees and costs for the work on the appeal.

Respectfully submitted this 11th day of July, 2014.

By:   
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**CERTIFICATE OF SERVICE**

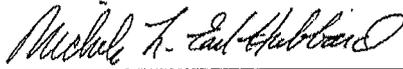
I certify under penalty of perjury under the laws of the State of Washington that on July 11, 2014, I delivered a copy of the foregoing Seattle Times' Brief of Respondent by email pursuant to an electronic service agreement among the parties to the following:

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Dated this 11th day of July, 2014.

  
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Please find the Seattle Times Brief Respondent in case No. 89629-1 Wade's v. L&I. This is filed by Michele Earl-Hubbard WSBA # 26454, attorney for the Seattle Times.

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