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SUPREME COURT
STATE OF WASHINGTON
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No. _____

~~SUPREME COURT OF THE STATE OF WASHINGTON~~ Case # 1033702 SUPREME COURT OF THE STATE OF WASHINGTON

CITIZEN ACTION DEFENSE FUND, a Washington
nonprofit,

Appellant,

v.

WASHINGTON STATE OFFICE OF FINANCIAL
MANAGEMENT in the OFFICE OF THE GOVERNOR, an
agency of the State of Washington,

Respondent.

PETITION FOR REVIEW

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I. IDENTIFY MOVING PARTY

Petitioner Citizen Action Defense Fund (“CADF”) is a Washington non-profit corporation. CADF was the Plaintiff and Respondent below.

II. CITATION TO COURT OF APPEALS DECISION

Division II of the Court of Appeals issued an opinion on July 16, 2024, (“the Opinion”), attached as Appendix A, overturning the trial court’s decision, attached as Appendix B, finding that the Office of Financial Management (“OFM”) had violated the Public Records Act (“PRA”) by withholding records of negotiation with a third party after the parties had signed agreements.

III. ISSUES PRESENTED FOR REVIEW

This case presents two questions meriting review.

1. In a negotiation, what event or action ends the deliberative process and requires an agency to disclose records that were part of that negotiation?

2. Does an agency waive the deliberative process exemption as to negotiation documents where it publishes the agreement it reached and referenced negotiation documents in so doing?

IV. STATEMENT OF THE CASE

There are two groups of facts that define this case. The first and most simple set relates to the parties' actions that led to this petition. The second set relates to the procedural steps and timeline for approval of the state collective bargaining agreements. This set is relevant because the parties agree that OFM's denial of the request was appropriate only if this Court finds that the records sought are covered by RCW 42.56.280, the "deliberative process" exemption, and relate to an ongoing deliberation.

Petitioner asked Respondent for records on October 20, 2022. CADF requested the state and unions' opening offers in negotiations for the statewide collective bargaining agreements for 2023-2025. CP 6, 13. The agency responded on October 26, 2022, refusing to disclose the records. CP 13. OFM refused to

produce the records and claimed they were exempt from disclosure under RCW 42.56.280, commonly referred to as the “deliberative process exemption.”

To justify this decision, OFM claimed that:

[a]lthough the tentative agreements have been signed, and will be available on our website soon, underlying negotiation-related material continues to be exempt until final legislative approval of funding (typically this means when the budgets are signed by the governor).

Until that time, the agreements are not final and the records you have requested are exempt as part of a deliberative process under RCW 42.56.280.

CP 6,7 & CP 13. The parties quickly focused on the issue that is now before this Court—when a record stops being “predecisional,” and therefore nonexempt under §280. At the trial court, CADF pointed out that OFM’s message above misstates the facts. CP 22. OFM represents the interests of the State of Washington as the governor’s designee, in negotiations with unionized state employees. *See* RCW 41.80.010(1) (“For the purpose of negotiating collective bargaining agreements under this chapter, the [state] employer shall be represented by

the governor or governor's designee[.]") As OFM states on its website, "OFM manages the collective bargaining process on behalf of the Governor with union-represented state employees. Every two years the State negotiates with unions to modify and reach new collective bargaining agreements."¹ As of the date of Petitioner's initial request, OFM and representatives from each relevant union had signed the negotiated agreements. CP 7, 13.

After negotiations end, the Governor must present the negotiated, signed agreements ("signed agreements") to the legislature as one budget proposal which it must approve or reject as a whole. RCW 41.80.010(3). Governor Inslee introduced his proposed budget in legislation identified as the 2023-25 Operating Appropriations Bill (HB 1140 / SB 5187) on January

¹ About the Collective Bargaining Process. OFM.Wa.Gov, Office of Financial Management, <https://ofm.wa.gov/state-human-resources/labor-relations/collective-bargaining-agreements/about-collective-bargaining-process>. Accessed 20 Feb. 2023.

5 and 6, 2023. The Governor’s budget was available to the public and Legislature on OFM’s website since December 14, 2022.²

When OFM posted the proposed budget, it also posted a letter from Michaela Doelman, Chief Human Resources Officer for the State Human Resources Division, to the Director of OFM, David Schumacher, along with the signed agreements for each bargaining unit. CP 67.³ In the letter, Ms. Doelman makes direct mention of what was “offered” to employees. *Id.* Petitioner filed the complaint on December 15, 2022.

² See Budget and Policy Highlights. Office of the Governor, <https://ofm.wa.gov/sites/default/files/public/budget/statebudget/highlights/budget23/202325PolicyBudgetHighlights.pdf> Accessed 20 Feb. 2023; Governor Jay Inslee’s Proposed Operating Budget. Office of Financial Management, <https://app.leg.wa.gov/committeeschedules/Home/Document/247189#toolbar=0&navpanes=0>. Accessed 20 Feb. 2023.

³ Official 2023-2025 Collective Bargaining Submittal. Michaela Doelman, September 20, 2022, https://ofm.wa.gov/sites/default/files/public/legacy/agencycommunications/FY2023/2023-25_October12022_OfficialSubmittal_EE_FINAL_Updated.pdf Accessed 20Feb. 2023.

There were no differences between the signed agreements and the Governor's presentation to the Legislature. OFM finished negotiating the agreements in October.

V. GROUNDS FOR REVIEW

Review should be granted under RAP 13.4(b)(1), (2), and (4). The Opinion conflicts with this Court's decision in *PAWS* and other seminal PRA cases. This conflict is made obvious when comparing the Opinion to Division I's decisions on the same issues, decisions that the Opinion brushes aside as non-binding. The Opinion also creates an expansive exemption from disclosure under the PRA, an issue of substantial public importance.

A. *PAWS* and Related Cases Outlined a Disclosure-Oriented Process.

PAWS summarized the many ways the PRA expresses the simple premise at the center of the law: the people have a right to know. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 251-252, 884 P.2d 592 (1994) ("*PAWS*"). But *PAWS* does not just restate the statute, it explains the goals.

“Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests.” *Id.* According to *PAWS*, the goal is accountability in a way that empowers the people. Disclosure is necessary to that goal, but it is not sufficient. As *PAWS* notes, timely disclosure is also part of the PRA’s system of oversight. *See e.g., PAWS* at 256, (holding that records are only exempt under §280 where the withholding agency can prove that they are “predecisional”); *PAWS* at 257 (citing *Brouillet v. Cowles Pub’g Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990)) (“*Cowles*”), for the rule that once policies are implemented, there is no exemption under §280). *See also*, RCW 42.56.100 (requiring agencies provide the fullest and most timely assistance to requesters).

PAWS applied these principles to two categories of records: “pink sheets” and “unfunded grant proposals.” The Plaintiff animal rights group asked the University of Washington (“UW”)

for these records when trying to show the cruelty of animal research.

The grant proposals described research that scientists at UW wanted to perform that had been approved by the university but still needed financial support. *PAWS* at 247-249. They were the result of several rounds of internal review and discussion within UW. *Id.* Then, after the UW had finalized the proposals, they were sent to the National Institute for Health (NIH) to request funding. There, a group of NIH scientists reviewed them to allocate grant funds. This review included incorporating the scientists' opinions and recommendations into a document, the "pink sheet," which was returned to the grant requester when NIH decided to pass on the proposal. *Id.* The UW is permitted to resubmit the proposal, a step it commonly takes. *Id.*

UW refused to disclose both categories, asserting several grounds for withholding them. Relevant here, UW argued the documents were protected by the deliberative process exemption. This Court held that the grant proposals were not

exempt, pointing out “[the exemption’s] purpose is to ‘protect the give and take of deliberations necessary to formulation of agency policy.’” *PAWS*, 125 Wn. 2d at 256 (citing *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 134, 580 P.2d 246 (1978) (cleaned up)). But also held that the pink sheets were exempt as deliberative unless the proposal was funded. *PAWS*, 125 Wn.2d at 257.

PAWS, like almost every PRA opinion from this Court, reiterated the requirement that exemptions be read narrowly, when ordering disclosure of unfunded grant proposals. *PAWS*, 125 Wn.2d at 260. In upholding that principle, *PAWS* applied *Cowles*’ holding that the deliberative process exemption did not apply to records related to policy implementation in a new way. Instead of using the timing as an indicator to show whether a record relates to policy decision or a policy implementation, a potential reading of *Cowles*, *PAWS* made clear that the timing is decisive; once a decision is made, the records that led to it become records about implementation and nonexempt. See *PAWS* at 256, 257 (requiring withholding agencies to prove a

document is still predecisional to invoke the deliberative process exemption and citing *Cowles*, 114 Wn.2d at 799-800 for the proposition that “Once the policies or recommendations are implemented, the records cease to be protected under this exemption” to justify its categorical treatment of completed policy making processes).

B. Division I Properly Applied This Jurisprudence.

The Opinion directly rejects a decision out of Division I on similar facts. In *West v. Port of Olympia*, 146 Wn. App. 108, 117, 192 P.3d 926, 931 (2008), Division I held that when a government agency had executed a lease prior to a records request, documents related to the lease were not exempt under §280. This decision overturned the trial court’s finding that the agency had a continuing obligation to negotiate with the same party, which might be adversely affected by disclosure. In so holding, Division I also clarified a case, *American Civil Liberties Union v. City of Seattle*, 121 Wn. App. 544, 89 P.3d 295 (2004) (“*ACLU*”). In *ACLU*, requester ACLU sought records related to collective bargaining

with the City's police officer's union. Seattle City Council was the legislative body that had to approve the signed agreement between the City and the union. *ACLU*, 121 Wn. App. At 553-554. Division I held "that the exemption applied only until the *results of the policy-making process were presented* to the city council for adoption." *West*, 146 Wn. App at 118 (summarizing the holding from *ACLU*) (emphasis added).

C. Division II Rejected Those Proper Applications of *PAWS*.

Division II misunderstood *PAWS* in two ways that Division I did not. First, it treated the decision as a monolith, rather than carefully reviewing which documents the court was discussing at each point. Second, it did not even reference the extensive discussion of legislative goals *PAWS* presented. These flaws demonstrate conflict with *PAWS* and with Division I, meriting review.

i. The Opinion Does Not Differentiate Between Types of Records Reviewed in *PAWS*.

The Opinion points to the *PAWS* decision to withhold “pink sheets” as if those were the only records at issue. Opinion at 8. But though the pink sheets received more discussion, *PAWS* largely upheld the order that the Court of Appeals had issued requiring disclosure of the unfunded grant proposals.

Based on this Court’s conclusion, the unfunded grant proposals represented the culmination of the UW’s arduous decision-making process. There was always a chance the agency would have to reenter that process, this time relying on the information provided in the pink sheets, to try again to persuade the NIH to fund the research at issue. But *PAWS* shows that this potential reopening of consideration did not change the fact that the agency had reached a decision. It had stopped deliberating.

If the Court of Appeals had properly applied that logic here, it would have seen that the signed agreements were the end of the agency’s deliberative process, just like the grant proposals in *PAWS*

and the signed CBA in *ACLU*. When the grant proposals were written, no research had begun, no actions had been taken. But the plan for what the agency wanted to do if the funding agency approved was complete. This description fits the signed agreements perfectly. The statutory language in RCW 41.80 supports this view as well. The law does not allow the parties to modify the agreements based on the legislature's actions, nor does it allow the legislature to modify them. RCW 41.80.10(3)(b) (empowering the governor to ask the legislature to fund the agreements, but not granting any opportunity to seek the legislature's input; mandating that if the legislature does not fund the proposed budget portion, "either party may reopen all or part of the agreement.") In signing the agreements, OFM and the agencies agree that, if the funding materializes, this is what they will do. If it does not, they must "reopen" negotiations for new agreements. If either the union or the employer refused to act as the signed agreements dictate, once funding is appropriated, then they would be violating an agreement by which they are already bound. See RCW 41.80.130 (establishing

a procedure to enforce a collective bargaining agreement). Surely by the time an agency binds itself to a plan to spend hundreds of thousands of taxpayer dollars, it has made a decision that the public has a right to scrutinize.

ii. The Opinion Ignored *PAWS*' Thorough Treatment of the Rules of Construction for PRA Exemptions.

Unlike *PAWS*' careful observance of the mandate to transparency, the Opinion below read the deliberative process exemption in the broadest possible manner. The trial court and Court of Appeals were asked when a decision is made for the purposes of "predecisional" documents. That question should have been answered in the way that comports with the mandate to read exemptions narrowly, finding that a decision occurs at the earliest reasonable time, thereby reaching the narrowest reading of the exemption. The trial court followed the mandate, but the Court of Appeals did not. Instead, the Opinion fixated on the word "implemented" in *PAWS*, misreading it to require that a decision be implemented to be complete. Opinion at 8. But *PAWS* uses that

word when applying *Cowles*. *PAWS* 125 Wn.2d at 257. *Cowles*, in turn, cites *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 133, 580 P.2d 246 (1978), *Cowles* 114 Wn.2d 799-800, which finally gives the complete quote: “opinions or recommendations actually implemented as policy lose their protection when adopted by the agency.” Once the policy discussion is over, the exemption expires. Once the agency adopts the policy, the exemption expires. Here, any policy formulation occurred before the governor requested funds to enact that policy.

But Division II brushed aside comparisons, saying it is not bound by its sister courts, but by its reading of this Court’s *PAWS* decision. While technically true, this statement of fact does not justify the Opinion. *PAWS* did not mandate withholding records that were sent to a third party for funding after an extensive pre-submission discussion. But it did order that the preference for narrow exemptions be the guiding spirit for all PRA cases. And if the sister court found a narrower reading, while applying the same case law, then it has strong reason to consider that court’s

conclusion. Even if Division II's interpretation is a reasonable reading of §280, it is still wrong because Division I's interpretation is reasonable and a narrower exemption. This Court should review to reverse.

D. OFM Waived Any Exemption by Referencing the Records in Public Action

Once a publicly available agency document references a document which would have been otherwise exempt under §280, the exemption no longer applies. In her letter to Director Schumacher, Ms. Doelman describes OFM's goals in negotiation in detail. *See* Maynard Declaration, Exhibit D. She talks about what the agency "prioritized," "sought," and most tellingly, "offered." These references to the actions or positions OFM took in negotiation waive any privilege §280 might have provided for documentation of those actions or positions. In the only case applying this portion of §280, *Zink v. City of New Mesa*, Division III held that when the city issued a building permit denial which referenced complaints received from neighbors, §280 did not

prevent disclosure because the complaints were “publicly cited by an agency in connection with an agency action.” *Zink v. City of Mesa*, 140 Wn. App. 328, 344, 166 P.3d 738, 746 (2007) (citing RCW 42.56.280). Here, the letter describes itself as the “Official 2021 Collective Bargaining Submittal” and purports to describe the “priorities and outcomes of collective bargaining.” This Court must decide whether these references to what OFM offered and did in negotiation trigger the exception included in §280.

E. The Opinion Blows a Hole in the PRA.

If allowed to stand, the Opinion will make all agencies actions, which could later be changed or renegotiated opportunities, to keep the public in the dark. Compare the records here with the myriad of multi-year contracts the Department of Enterprise Services (“DES”) creates every year. DES includes a provision in its contracts that terminates the contract, regardless of the term of the agreement, if there is a change in available funds. “A change of available funds as used in this section

includes but is not limited to a change in Federal or State funding, whether as a result of a legislative act or by order of the President or the Governor.”⁴ This looming potential modification to the term of the contract, under the reasoning of Division II, could reasonably be viewed as a part of the decision. The Contract, therefore, would not be considered executed until the full term had expired or the contract had been terminated some other way.

This hypothetical demonstrates both the absurdity of the Opinion and the danger it poses. Of course, a decision was already made when the contract was entered. The contracts term

⁴ See e.g., Statewide Contract No. XXX – IT services, Washington Department of Enterprise Services. Available at <https://apps.des.wa.gov/contracting/14822%20Project%20Management%20Contract%20Accenture%20-%20signed.pdf> (last visited Aug. 7, 2024); Statewide Contract No. 24723—Janitorial Services, §16.2, Washington Department of Enterprise services. Available at <https://apps.des.wa.gov/contracting/24723Solicitation.pdf> (last visited Aug. 7, 2024).

is merely contingent on the funding, which is outside the contracting agency's control.

VI. PRAYER FOR RELIEF

Petitioner asks this Court to grant review of both questions.

I certify that this pleading is in 14-point Times New Roman font and contains 3,032 words, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images, as calculated using Microsoft Word, the word processing software used to prepare this brief, in compliance with the RAP 18.17(b).

RESPECTFULLY SUBMITTED on August 15, 2024.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that August 15, 2024, I electronically filed with the Court the foregoing document and this declaration of service and served the same by email upon the following:

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EXHIBIT A

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Washington State
Court of Appeals
Division Two

July 16, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CITIZEN ACTION DEFENSE FUND, a
Washington nonprofit organization,

Respondent,

v.

WASHINGTON STATE OFFICE OF
FINANCIAL MANAGEMENT in the OFFICE
OF THE GOVERNOR, an agency of the State
of Washington,

Appellant.

No. 58331-3-II

PUBLISHED OPINION

CRUSER, C.J.—State representatives from the Washington State Office of Financial Management (OFM) negotiated collective bargaining agreements (CBAs) with union representatives for the 2023-25 biennium. In October 2022, Citizen Action Defense Fund (CADF) submitted a request under the Public Records Act (PRA)¹ seeking the original proposals made by the state and the unions for the 2023-25 collective bargaining cycle. OFM denied the request, stating that the records were exempt from disclosure under the deliberative process exemption statute, RCW 42.56.280. CADF filed a lawsuit against OFM in December 2022, alleging a violation of the PRA. The case proceeded to a bench trial where the superior court found that the records were not pre-decisional at the time OFM denied the request, meaning that the deliberative

¹ Ch. 42.56 RCW.

process exemption did not apply and OFM violated the PRA. The court ordered OFM to produce the records and pay statutory penalties as well as attorney fees and costs. OFM appeals.

We hold that the superior court erred in concluding that the requested records were not pre-decisional at the time OFM denied the PRA request. While the tentative agreements were signed by state and union representatives prior to CADF's request, they were not yet final for purposes of the deliberative process exemption because the agreements had not been presented to the governor for approval, nor had they been funded by the legislature. Accordingly, we reverse.

FACTS

I. COLLECTIVE BARGAINING NEGOTIATIONS

Negotiations between representatives for the State of Washington and representatives for the various collective bargaining units representing state employees for the 2023-25 biennium CBAs began prior to June 2022. As required by RCW 41.80.010(3)(a), the tentative CBAs were sent to the director of OFM prior to October 1, 2022. At that time, the tentative agreements were signed by representatives from the State and the unions. On December 12, 2022, after finding that the CBAs were financially feasible for the State, the director of OFM sent the agreements to the governor. As required by statute, the governor then presented the proposed budget to the legislature, requesting the necessary funds for implementation. RCW 41.80.010(3). The governor

did so for the proposed 2023-25 budget prior to the start of the legislative session in early January 2023.²

On April 23, 2023, the legislature passed a bill approving the funds for the proposed budget.³ After vetoing certain provisions, the governor signed the budget bill on May 16, 2023.⁴ According to the Labor Relations and Compensation Policy section chief at OFM, after the legislature approves the funding and the bill is signed by the governor, the final CBAs are then signed by lead negotiators, union leadership, and the governor. “These final signatures take the place of the signatures of the union and State lead negotiators on the [tentative agreements].” Clerk’s Papers (CP) at 214. The new CBAs took effect on July 1, 2023, and remain in effect through June 30, 2025.⁵

II. PUBLIC RECORDS REQUEST

On October 20, 2022, the executive director of CADF requested that OFM provide “ ‘a copy of the state’s and union[s’] original offer[s].’ ” CP at 113 (quoting CP at 114 (an earlier

² See WASH. OFF. OF FIN. MGMT., A GUIDE TO THE WASHINGTON STATE BUDGET PROCESS (Aug. 2023), <https://ofm.wa.gov/sites/default/files/public/publications/WaStateBudgetProcessGuide.pdf> [<https://perma.cc/7U6Y-NYYR>]; WASH. OFF. OF GOVERNOR, PROPOSED 2023-25 BUDGET AND POLICY HIGHLIGHTS (Dec. 2022), <https://ofm.wa.gov/sites/default/files/public/budget/statebudget/highlights/budget23/202325PolicyBudgetHighlights.pdf> [<https://perma.cc/DB4W-L8FX>].

³ See *2023-25 Enacted Budgets*, WASH. OFF. OF FIN. MGMT., <https://ofm.wa.gov/budget/state-budgets/2023-25-enacted-budgets> [<https://perma.cc/X7AW-Z2UK>]; *2023 Budget Summary*, WASH. ST. FISCAL INFO., <https://fiscal.wa.gov/budgetsummary> [<https://perma.cc/C2HC-MFJT>].

⁴ See *2023-25 Enacted Budgets*, WASH. OFF. OF FIN. MGMT.; LAWS OF 2023, ch. 475, governor’s veto message [<https://perma.cc/9B6H-VGUM>].

⁵ See WASH. OFF. OF FIN. MGMT., A GUIDE TO THE WASHINGTON STATE BUDGET PROCESS (Aug. 2023).

request for the records sent from a different organization)). CADF argued that the deliberative process exemption did not apply. On October 26, counsel from OFM responded that the deliberative process exemption did apply, as the original offers were “negotiation-related material created as part of the collective bargaining process,” and the exemption applied “*until those negotiations are complete and the agreements are final.*” *Id.* at 111 (emphasis in original). Counsel explained that the collective bargaining process is not complete “until the final approval of the contracts by the legislature and the signing of that approval into law by the governor.” *Id.*

III. PROCEDURAL HISTORY

On December 15, 2022, after OFM denied CADF’s request for the parties’ original offer letters in CBA negotiations, CADF filed a lawsuit against OFM alleging violations of the PRA. CADF asked the court to order OFM to provide the records, and award attorney fees and costs, as well as statutory penalties. OFM denied the allegations.

The superior court held a hearing on the merits of the PRA lawsuit. CADF argued that after deliberation between the state and union representatives concludes, the records become disclosable. According to CADF, “once the parties have signed that agreement and it is then submitted to OFM, . . . then that agreement is final.” Verbatim Rep. of Proc. (VRP) (Mar. 31, 2023) at 13-14. The State’s argument relied, in part, on *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994) (*PAWS*) (plurality opinion) (holding that records cease to be protected under the deliberative process exemption once the proposed policies are implemented or funded). The State explained, “In *PAWS*, it was the funding that triggered the end of that deliberative process,” and as such, the requested records are protected under the exemption until they are funded. VRP (Mar. 31, 2023) at 32.

The superior court ruled in CADF's favor, ordering OFM to produce the requested records, pay statutory penalties amounting to \$1,104.00, and pay attorney fees and costs amounting to \$33,172.51. The superior court found that "the requested documents were wrongfully withheld because the deliberative process exemption did not apply, as the documents were no longer pre[-]decisional at the time of CADF's request." CP at 192. As to the remaining *PAWS* factors, the superior court found that "pre[-]decisional disclosure would be injurious to the deliberative process, would inhibit the flow of opinions, and contain policy recommendations and opinions, not facts." *Id.* at 191. The court found, however, that even though OFM successfully established these three *PAWS* factors, the deliberative process exemption did not apply as the deliberative process concluded when the CBAs were signed by the State's and unions' representatives, and therefore, the records were no longer pre-decisional at the time OFM denied CADF's request.

ANALYSIS

OFM argues that CBAs are not final until the tentative agreements are approved for funding by the legislature and signed by the governor. According to OFM, "[t]he deliberative process exemption of the PRA continues until the statutory processes finalizing the tentative CBAs is complete, at which point the bargaining process ends." Br. of Appellant at 22. As such, because the 2023-25 CBAs had not yet been approved by the legislature or signed by the governor at the time of CADF's request in October 2022, OFM contends that the requested records were covered by the deliberative process exemption and the superior court erred in holding otherwise.

In response, CADF maintains that the requested offer letters were not pre-decisional at the time of CADF's request. CADF argues that the bargaining process is entirely separate from the legislative process of granting budget proposals. As such, according to CADF, at the time of the

request, the deliberative process was complete and therefore the exemption to disclosure no longer applied to the requested records.

We agree with the State and hold that the records at issue in this case were pre-decisional at the time the PRA request was denied. At the time OFM denied the PRA request, the tentative CBAs had not been sent to the governor or legislature for approval, much less received the approval and funding necessary for their implementation. The parties' signatures on the tentative CBAs in October 2022 did not effectively "execute" the agreements, as the new CBAs were not approved and funded by the legislature until April 23, 2023.⁶ Accordingly, we hold that the records pertaining to the CBA negotiations were exempt from disclosure at the time OFM denied CADF's request on October 26, 2022 under RCW 42.56.280, the deliberative process exemption to the PRA. This result is compelled by our supreme court's decision in *PAWS* and a plain reading of RCW 41.80.010.

I. OFM'S DENIAL OF THE PRA REQUEST

A. Standard of Review

We review a superior court's decision on whether an agency violated the PRA, as well as the decision of whether particular records are exempt from disclosure under the PRA, *de novo*. *Am. Civ. Liberties Union of Wash. v. City of Seattle*, 121 Wn. App. 544, 549, 89 P.3d 295 (2004) (*ACLU I*).

⁶ See 2023-25 Enacted Budgets, WASH. OFF. OF FIN. MGMT.

B. Legal Principles

1. *The Public Records Act and the Deliberate Process Exemption*

The PRA “requires all state and local agencies to disclose any public record upon request, unless the record falls within certain very specific exemptions.” *PAWS*, 125 Wn.2d at 250. The Act’s purpose is to hold public officials and institutions accountable. *ACLU I*, 121 Wn. App. at 548-49. “The Act’s provisions must be liberally construed to promote the public policy, and exemptions from it must be strictly construed. When an agency refuses to disclose information, it bears the burden of proving that its refusal is valid based on one of the exemptions included in the Act.” *Id.* at 549.

The PRA contains an exemption known as the deliberative process exemption. The deliberative process exemption provides:

Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended are exempt under this chapter, except that a specific record is not exempt when publicly cited by an agency in connection with any agency action.

RCW 42.56.280. “The purpose of this exemption is to permit ‘frank and uninhibited discussion during the decision-making process.’ ” *West v. Port of Olympia*, 146 Wn. App. 108, 116, 192 P.3d 926 (2008) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 132, 580 P.2d 246 (1978)).

In *PAWS*, the supreme court considered whether the deliberative process exemption applies to university grant proposals. The grant proposals in question included documents known as “pink sheets,” which are “formal written evaluation[s]” of the grant proposals provided by “scientists with expertise in the area of the proposed research.” *PAWS*, 125 Wn.2d at 248. The court held that “[w]hile the unfunded grant proposal itself does not reveal or expose the kind of deliberative or policy-making process contemplated by the exemption, the so-called ‘pink sheets’ do.” *Id.* at 257.

The court held that the “pink sheets” were exempt from disclosure under the deliberative process exemption because they “foster a quintessentially deliberative process.” *Id.*

The court issued a four-part test that an agency must meet in order to rely on the deliberative process exemption. *Id.* at 256-57. An agency must show that:

[1] the records contain pre[-]decisional opinions or recommendations of subordinates expressed as part of a deliberative process; [2] that disclosure would be injurious to the deliberative or consultative function of the process; [3] that disclosure would inhibit the flow of recommendations, observations, and opinions; and finally, [4] that the materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based. . . . Subjective evaluations are not exempt under this provision if they are treated as raw factual data and are not subject to further deliberation and consideration.

Id. (internal citation omitted).

“Once the policies or recommendations are implemented, the records cease to be protected under this exemption.” *Id.* at 257. The deliberative process exemption expires when the decision at issue is implemented. *Id.* In *PAWS*, the supreme court held that “[o]nce the proposal becomes funded, it clearly becomes ‘implemented’ for purposes of this exemption.” *Id.*

The parties in this case also cite to two cases from Division One of this court. In *ACLU I*, Division One was asked to determine whether lists of negotiation issues that the city and the police union prepared in anticipation of negotiating a new labor contract were the type of record that could be initially withheld under the deliberative process exemption. *ACLU I*, 121 Wn. App. 549-50. In applying the first factor of the four-factor *PAWS* test, the court was unable to determine whether the records in question (the lists) were pre-decisional. *Id.* at 550. The court remanded the case to the superior court to resolve that question. *Id.* But the court went on to discuss the other three *PAWS* factors. As it related to the question of whether disclosure of the lists—assuming they

were, in fact, pre-decisional—would be injurious to the deliberative process (the second *PAWS* factor), the court stated:

The problem with the ACLU's position on this issue is that it fails to recognize that labor negotiations are an ongoing process in which the City's negotiators, like the Guild's representatives, must respond to the ever-changing tableau of collective bargaining. The City's negotiators are not free to adopt their own strategies and priorities for the city council. Rather, they must confer with the governing body on a regular basis to adopt and respond to the proposals and counterproposals that emerge from sessions at the bargaining table. This ongoing process involves negotiators and City officials in what is the essence of the deliberative process. *Until the results of this policy-making process are presented to the city council for adoption*, politicization and media comments will by definition inhibit the delicate balance—the give-and-take of the City's positions on issues concerning the police department.

Id. at 553-54 (emphasis added). Thus, the court held, disclosure would be injurious to the deliberative process. *Id.* at 553.

Later, in *West*, Division One interpreted *ACLU I* and held “the *ACLU* court impliedly held that the [deliberative process] exemption applied only until the results of the policy-making process were presented to the city council for adoption.” 146 Wn. App. at 118. In *West*, a PRA request was made seeking records pertaining to lease negotiations between the Port of Olympia and Weyerhaeuser. *Id.* at 112. Division One held that the lease had been executed by the time PRA request was made and the Port therefore erred in relying on the deliberative process exemption in withholding the records. *Id.* at 118.⁷ The *West* court’s discussion of *ACLU I* occurs solely in the context of discussing the *superior court*’s reliance on *ACLU I* in making its decision on the merits of the PRA lawsuit.

⁷ It is noteworthy that the court in *West* does not explain its holding that the lease had been “executed” in that case. The factual recitation does not enlighten the reader about what occurred that led the court to conclude that the lease had been executed. *West*, 146 Wn. App. at 112-15.

The discussion in *West* about *ACLU I* came about only because the *superior court* in that case relied on *ACLU I* in making its decision on the merits of the PRA lawsuit and the *West* court disagreed with the superior court's interpretation of the case. But because our review of whether an agency violated the PRA is de novo, we need not *even address* the superior court's reasoning in support of its merits decision. Furthermore, because the *West* court held that the lease had already been executed without relying on this language from *ACLU I*, this portion of *West* is, arguably, dictum.

2. *Collective Bargaining Agreements*

The deliberative process exemption to the PRA applies to “[p]reliminary drafts, notes, recommendations, and intra-agency memorandums.” RCW 42.56.280. CBA negotiations involve such documents. *ACLU I*, 121 Wn. App. at 548-50. RCW 41.80.010 addresses “[n]egotiation and ratification of collective bargaining agreements [and] [f]unding to implement modification of certain collective bargaining agreements.” (Boldface omitted.) In relevant part, the statute reads:

(3) The governor shall submit a request for funds necessary to implement the compensation and fringe benefit provisions in the master collective bargaining agreement or for legislation necessary to implement the agreement. Requests for funds necessary to implement the provisions of bargaining agreements shall not be submitted to the legislature by the governor unless such requests:

(a) Have been submitted to the director of the office of financial management by October 1 prior to the legislative session at which the requests are to be considered; and

(b) Have been certified by the director of the office of financial management as being feasible financially for the state.

The legislature shall approve or reject the submission of the request for funds as a whole. The legislature shall not consider a request for funds to implement a collective bargaining agreement unless the request is transmitted to the legislature as part of the governor's budget document submitted under RCW 43.88.030 and 43.88.060. If the legislature rejects or fails to act on the submission, either party may reopen all or part of the agreement or the exclusive bargaining representative may seek to implement the procedures provided for in RCW 41.80.090.

RCW 41.80.010(1-3).

C. Application

We hold that the deliberative process exemption had not yet expired when CADF’s public records act request was denied by OFM. This is so because the tentative CBA had not yet even been submitted to the governor as contemplated by RCW 41.80.010(3), much less approved and funded by the legislature, at the time the request was denied. Thus, the superior court erred when it found that the deliberative process exemption expired.

The State, relying on RCW 41.80.010(3), argues that before a CBA can be implemented, it must go through several steps. First, it must be presented to the director of OFM and certified to be financially feasible for the State. RCW 41.80.010(3). As the State notes, this is not a mere formality—the OFM director can reject the agreement.⁸ Following certification by the OFM director, the governor “shall submit a request for funds necessary to implement the compensation and fringe benefit provisions in the master collective bargaining agreement or for legislation necessary to implement the agreement.” RCW 41.80.010(3). Finally, the legislature must “‘approve or reject the submission of the request for funds.’” Br. of Appellant at 10 (quoting RCW 41.80.010(3)(b)). Failure by the legislature to fund the tentative CBA results in the non-implementation of the CBA. RCW 41.80.010(3)(b).

CADF contends that the deliberative process exemption expired when the tentative CBA was signed by the unions’ representatives and the State’s negotiators, the same point at which the superior court held that the exemption expired. Alternatively, CADF contends that it expired when

⁸ See *Serv. Emps. Int’l Union Healthcare 1199NW v. State – Off. of Governor*, No. 22289-U-09-5685 (Wash. Pub. Emp’t Rels. Comm’n Apr. 1, 2009), <https://decisions.perc.wa.gov/waperc/decisions/en/172027/1/document.do>.

the tentative agreement was posted on the OFM website. In support of its argument, CADF posits that the legislative approval contemplated by RCW 41.80.010(3) is, essentially, a rubber stamp “legislative” function that is wholly unrelated to the collective bargaining process. *See* Br. of Resp’t at 18-24. Because the legislature was not directly involved in the bargaining process, CADF argues, the deliberate process concluded before the tentative CBA was presented to the legislature for approval and funding.

PAWS governs our decision. The issue in this case centers on the first factor in *PAWS*—whether the records were pre-decisional. To determine whether the records were pre-decisional, we must determine when the deliberative process exemption expired. Pursuant to *PAWS*, the deliberative process exemption applies until the proposal (in this case, the tentative CBA) is implemented. *PAWS*, 125 Wn.2d at 256-57. Implementation occurs when a proposal is approved by the entity tasked with granting such approval. *Id.* at 257. “Once the proposal becomes funded, it clearly becomes ‘implemented’ for purposes of this exemption.” *Id.* Applying *PAWS* to RCW 41.80.010(3), implementation occurs when the legislature approves the request to fund the CBA.

CADF relies on *West*, arguing, “Here, the policymaking has also been completed and for the same reason [as in *West*.] The agreements were only waiting for a yay or nay from the [l]egislature, all deliberation and bargaining were complete.” Br. of Resp’t at 23. But CADF fails to appreciate the factual differences between *West* and this case. *West* involved a port commission, an agency that performs both executive and legislative functions. *See e.g.*, RCW 53.04.010(1) (authorizing port commissions to acquire, construct, maintain, operate, develop, and regulate within a variety of facilities and situations); RCW 53.08.080 (authorizing port districts to “lease all lands, wharves, docks and real and personal property owned and controlled by it, for such

purposes and upon such terms as the port commission deems proper”). Moreover, in *West* the lease had already been executed when the Port of Olympia denied the release of records related to the lease negotiations. *West*, 146 Wn. App. at 112. The *West* court held that the superior court erred because it concluded that disclosing the records would harm *future* lease negotiations with other potential lessees. *Id.* at 118. But because the lease had *been executed* (and thereby implemented) at the time the PRA request was received, the records were no longer pre-decisional.⁹ *Id.* at 117.

Here, RCW 41.80.010(3) sets out a specific procedure for the implementation of CBAs negotiated between unions and state agencies. In collective bargaining agreements with state agencies, the statute contemplates a multi-step process in which both the governor and the legislature play a role outside of the bargaining conducted between the union and agency representatives.

In this case, whether we deem the expiration of the deliberative process exemption to have occurred at the time the tentative CBA was *presented* to the legislature or at the time it was approved and funded by the legislature, neither of those events had occurred when OFM denied CADF’s PRA request. While the tentative agreements had been signed at that point by state and union representatives, they had not yet been presented to the governor for approval or presented to the legislature for funding. The director of OFM sent the tentative agreements to the governor on December 14, 2022. The governor presented the agreements to the legislature as part of the

⁹ The opinion in *West*, in so many words, faulted the superior court for focusing on the second *PAWS* factor—that disclosure would be injurious to the deliberative or consultative function of the process—without first considering whether the documents in question were actually pre-decisional.

proposed budget bill at the beginning of the legislative session which began in January 2023.¹⁰ The legislature funded the budget bill, thereby funding the CBAs, on April 23, 2023.¹¹ The governor signed the budget bill on May 16, 2023, notably after vetoing other aspects of the bill.¹²

Insofar as CADF argues that the tentative CBA was implemented by the mere *signing* of the agreement by each parties' bargaining representative, CADF cites no authority for this proposition and it is belied by the plain language of RCW 41.80.010. Where, as here, "no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

We additionally note that we are not bound by Division One's decisions in *ACLU I* and *West*, and to the extent that those decisions can be read as shortening the period of time in which the deliberate process exemption applies by setting its expiration at an earlier point than that set by *PAWS* (when the proposal is *presented* to the legislative authority as opposed to when the proposal is formally implemented by the legislative authority), we are bound by *PAWS*. Pursuant to *PAWS*, the deliberative process exemption expires when the proposal is *implemented*, not merely *presented*.

¹⁰ See WASH. OFF. OF FIN. MGMT., A GUIDE TO THE WASHINGTON STATE BUDGET PROCESS (Aug. 2023).

¹¹ *2023-25 Enacted Budgets*, WASH. OFF. OF FIN. MGMT.

¹² The governor's partial veto demonstrates that even after the legislature funds a budget bill containing CBAs, the governor is still able to veto aspects of that bill prior to signing, meaning that portions of the budget bill (including proposed CBAs) could be vetoed, thereby preventing their implementation. *2023-25 Enacted Budgets*, WASH. OFF. OF FIN. MGMT.

The original offer letters that were the subject of this PRA request were pre-decisional at the time of CADF's request. The CBAs were tentative, and they had not been presented to the governor for approval or to the legislature for funding. As such, the superior court erred in finding that the deliberative process had concluded by the time CADF submitted the public records request in October 2022.

II. ATTORNEY FEES, COSTS, AND STATUTORY PENALTIES


After concluding that OFM violated the PRA, the superior court ordered OFM to pay \$1,104 in statutory penalties, and \$33,172.51 in attorney fees and costs. Because the superior court erred in finding that OFM violated the PRA, it follows that the court erred in awarding attorney fees and costs to CADF and ordering OFM to pay the statutory penalties for withholding the records. Accordingly, we reverse the superior court's order that OFM must pay CADF attorney fees and costs, as well as statutory penalties.

CONCLUSION


We hold that the superior court erred in finding that the deliberative process exemption had expired when OFM denied CADF's request for the original offer letters pertaining to the collective

No. 58331-3-II

bargaining process. We reverse.


CRUSER, C.J.

We concur:


MAXA, J.


CHE, J.

EXHIBIT B

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2023 APR 28 AM 11:21

LINDA MYHRE ENLOW
THURSTON COUNTY CLERK

☐ Expedite
☐ No hearing set
☒ Hearing is set
Date: April 28, 2023
Time: 9:00 a.m.
Judge/Calendar:
Honorable Mary Sue Wilson

22-2-03426-34
OR 24
Order
14399023



SUPERIOR COURT
APR 27 '23 PM 12:30

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

CITIZEN ACTION DEFENSE FUND, a
Washington nonprofit,

Plaintiff,

v.

WASHINGTON STATE OFFICE OF
FINANCIAL MANAGEMENT in the OFFICE
OF THE GOVERNOR, an agency of the State of
Washington,

Defendant.

No. 22-2-03426-34

~~PROPOSED~~ ORDER ON PRA FINAL
HEARING

msw

THIS MATTER comes before the Court for PRA Final Hearing on Plaintiff Citizen Action Defense Fund's ("CADF") action against Defendant Washington State Office of Financial Management ("OFM"). Having considered Plaintiff's Opening Brief, Defendant's Responding Brief, Plaintiff's Reply Brief, and any other filings and pleadings on the docket, as well as the arguments of counsel at the hearing on March 31, 2023, the Court makes the following Findings of Fact and Conclusions of Law:

~~PROPOSED~~ ORDER ON PRA FINAL
HEARING
No. 22-2-03426-34

msw
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CITIZEN
ACTION

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FINDINGS OF FACT

1. OFM represents the interests of the State of Washington, as the Governor's designee, in negotiations with unionized state employees.
2. In 2022, OFM and public sector unions initiated negotiations that culminated in the statewide 2023-2025 collective bargaining agreements.
3. Prior to October 20, 2022, OFM and representatives from each relevant union had signed the negotiated agreements.
4. On October 20, 2022, CADF requested the opening offers for the state and the unions in negotiating the statewide 2023-2025 collective bargaining agreements from OFM.
5. OFM responded on October 26, 2022, asserting that the requested records were currently exempt from disclosure under RCW 42.56.280, commonly referred to as the "deliberative process exemption."
6. OFM withheld 1,331 documents (5,679 pages) responsive to CADF's request.
7. The Public Records Act ("PRA") provides the Court discretion to award penalties of up to \$100.00 per day, per record to a prevailing party. RCW 42.56.550.
8. These records have been withheld for 184 days as of the date of the presentation hearing in this matter on April 28, 2023 (October 26, 2022 – April 27, 2023).
9. Neither party requested in-camera review of the withheld documents.
10. The parties agree that the issue before the Court is purely a legal question.

CONCLUSIONS OF LAW

1. The PRA broadly favors disclosure. *King County v. Sheehan*, 114 Wn.App. 325, 338, 57 P.3d 307 (2002).
2. Exemptions to the PRA must be narrowly construed in favor of disclosure. RCW 42.56.030.
3. It is the burden of the agency to establish that an exemption from public disclosure applies. RCW 42.56.550(1).

- 1 4. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592
2 (1994) (“PAWS”) is the landmark case on the deliberative process exemption.
- 3 5. In *PAWS*, the court laid out a four-part test to determine whether a record is exempt from
4 disclosure under the deliberative process exemption as follows:
- 5 In order to rely on this exemption, an agency must show that the records contain
6 predecisional opinions or recommendations of subordinates expressed as part of a
7 deliberative process; that disclosure would be injurious to the deliberative or consultative
8 function of the process; that disclosure would inhibit the flow of recommendations,
9 observations, and opinions; and finally, that the materials covered by the exemption
10 reflect policy recommendations and opinions and not the raw factual data on which a
11 decision is based. *PAWS*, 125 Wn.2d at 256.
- 12 6. In *American Civil Liberties Union of Washington v. City of Seattle*, 121 Wn. App. 544, 89
13 P.3d 295 (2004) (“*ACLU I*”), the Court of Appeals, Division 1, considered the deliberative
14 process exemption, but remanded the matter back to the trial court for an in-camera
15 inspection of the records. Here, neither party has requested an in-camera inspection, so
16 the Court has not reviewed the initial offers that comprise the public records at issue in
17 this case.
- 18 7. In *American Civil Liberties Union of Washington v. City of Seattle*, No. 62561-6-I, 2009
19 WL 2152626 (Wash. Ct. App. July 20, 2009) (unpublished) (“*ACLU II*”), the Court of
20 Appeals, Division I, held that issue lists in initial offers could be exempt under the
21 deliberative process exemption; based on the information presented by the parties, the
22 Court finds the issues lists discussed in *ACLU I* and *II* parallel to the initial offers
23 requested here by CADF.
- 24 8. The Court finds that the initial collective bargaining offers requested by CADF contain
opinions and recommendations, and that OFM has established that predecisional
disclosure would be injurious to the deliberative process, would inhibit the flow of
opinions, and contain policy recommendations and opinions, not facts. However, the

1 deliberative process exemption is a time limited exemption, which no longer applies when
2 there is a final decision at the time of a PRA request.

3 9. In *PAWS*, the decision at issue was approval or rejection of a grant request, and the action
4 was a funding decision. The Court finds that *PAWS* is distinguishable because the very
5 action in that case was whether or not a proposal would be funded. In *West v. Port of*
6 *Olympia*, 146 Wn.App. 108, 192 P.3d 926 (2008), the Court of Appeals, Division I,
7 determined that after the Port of Olympia executed a lease agreement, the lease
8 negotiations were no longer exempt under the deliberative process exemption.

9 10. Neither RCW 41.80.010(3) nor 43.88.583 state that the Governor or the Legislature
10 approve collective bargaining agreements; the statutes are more direct that the collective
11 bargaining agreements are negotiated and agreed to by other entities, not the Legislature.
12 The Court finds that funding is separate from approval of the terms of a collective
13 bargaining agreement.

14 11. "Tentatively agreed to," as a description of collective bargaining agreements, makes the
15 most sense in reference to agreements that have not yet been approved by union
16 membership or signed by the State's negotiation representative; "tentative" does not imply
17 that the funding step is the approval of the agreement.

18 12. The Court finds that OFM has failed to meet its burden to establish the first part of the
19 *PAWS* test, to show that the records were predecisional.

20 13. The Court finds that at least by the time the collective bargaining agreements are posted
21 on OFM's website, the deliberative process has concluded.

22 14. The Court finds that the requested documents were wrongfully withheld because the
23 deliberative process exemption did not apply, as the documents were no longer
24 predecisional at the time of CADF's request.

15. The Court has discretion to determine what constitutes a "record" for purposes of applying
penalties. See RCW 42.56.550(4); *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor &*
Indus., 185 Wn.2d 270, 297, 372 P.3d 97 (2016).

1 16. The Legislature gave courts additional discretion by removing the mandatory minimum
2 penalty. Laws of 2011, ch. 273, § 1; *Wade's Eastside Gun Shop, Inc.*, 185 Wn.2d at 278-
3 79.

4 17. The Supreme Court in *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 459, 229 P.3d
5 735 (2010) ("*Yousoufian*") set forth sixteen factors that courts should consider in assessing
6 penalties against an agency. The seven mitigating factors that may serve to decrease the
7 penalty are:

8 (1) a lack of clarity in the PRA request, (2) the agency's prompt response or legitimate
9 follow-up inquiry for clarification, (3) the agency's good faith, honest, timely, and strict
10 compliance with all PRA procedural requirements and exceptions, (4) proper training and
11 supervision of the agency's personnel, (5) the reasonableness of any explanation for
12 noncompliance by the agency, (6) the helpfulness of the agency to the requestor, and (7)
13 the existence of agency systems to track and retrieve public records.

14 *Yousoufian v. Ron Sims*, 168 Wn.2d 444, 467, 229 P.3d 735 (2010).

15 The nine aggravating factors that support an increased penalty are:

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

25 *Id.* at 467-68.

26 18. The Court has "considerable discretion" to determine PRA penalties. *Yousoufian*, 168
27 Wn.2d at 468.

28 19. The Court has considered the record and the arguments made by the parties regarding the
29 amount of statutory penalties to be awarded and the aggravating and mitigating factors.

1 20. The Court finds that there are no aggravating factors that weigh in favor of increasing the
2 statutory penalties.

3 21. The Court finds that the following mitigating factors apply:

4 a. the agency's prompt response;

5 b. the agency's good faith, honest, timely, and strict compliance with all PRA
6 procedural requirements; and

7 c. the reasonableness of the explanation for noncompliance.

8 22. In light of the *ACLU I*, *ACLU II*, *PAWS*, and *West* cases, the Court specifically finds that it
9 was a good-faith basis on OFM's part to rely upon the deliberative process exemption.

10 23. The Court finds that OFM applied the deliberative process exemption, which it reasonably
11 believed covered all of the withheld documents at once; the Court therefore exercises its
12 discretion and finds that the withheld documents constitute a single record.

13 24. The Court has determined that a statutory penalty of \$6 per day per withheld record is
14 appropriate.

15 25. IT IS THUS ORDERED that OFM shall produce the withheld responsive record, as the
16 deliberative process exemption does not apply.

17 26. IT IS FURTHER ORDERED that OFM must pay to CADF statutory penalties of \$6 per
18 day the record is withheld until the responsive record is produced, excluding the day the
19 record is produced; if the responsive record is disclosed on April 28, 2023, the statutory
20 penalty total is \$1,104.00 (October 26, 2022 – April 27, 2023).

21 27. IT IS FURTHER ORDERED that CADF is entitled to costs and reasonable attorney fees,
22 pursuant to RCW 42.56.550(4). CADF has submitted materials for the Court's
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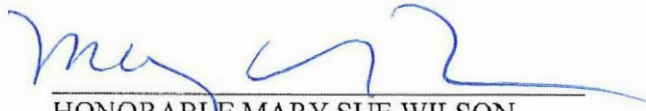
consideration regarding reasonable attorneys' fees and costs, which is attached as Exhibit A to this order.

28. CADF is awarded reasonable attorneys' fees in the amount of \$32,115.13.

29. CADF is awarded costs in the amount of \$1,057.38.

30. OFM shall pay to CADF total costs and reasonable attorney fees of \$33,172.51. This amount does not include the statutory penalty of \$6 per day the record is withheld.

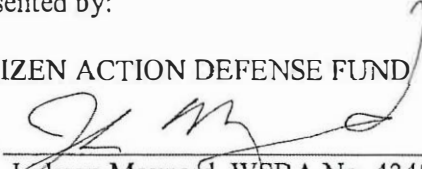
DATED this 28 day of April, 2023.


HONORABLE MARY SUE WILSON
Superior Court Judge

Presented by:

CITIZEN ACTION DEFENSE FUND

By:


Jackson Maynard, WSBA No. 43481
jackson@citizenactiondefense.org
300 Dechustes Way SW
Tumwater, WA 98501
(360) 878-9206

Agreed as to form:

By:

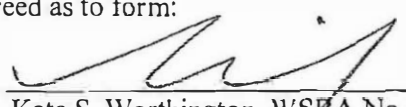

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(360) 664-4167

EXHIBIT A

☐ Expedite
☐ No hearing set
☒ Hearing is set
Date: April 28, 2023
Time: 9:00 a.m.
Judge/Calendar:
Honorable Mary Sue Wilson

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

CITIZEN ACTION DEFENSE FUND, a
Washington nonprofit,

Plaintiff,

v.

WASHINGTON STATE OFFICE OF
FINANCIAL MANAGEMENT in the OFFICE
OF THE GOVERNOR, an agency of the State of
Washington,

Defendant.

No. 22-2-03426-34

**DECLARATION OF JACKSON
MAYNARD**

I, Jackson Maynard, am over the age of 18 and competent to testify about the matters set forth below:

1. I am the Executive Director of and Counsel for the Citizen Action Defense Fund ("CADF").
2. I have been an attorney for 21 years and bill at a reasonable rate of \$350.00 per hour.
3. We have initiated a lawsuit against the Washington State Office of Financial Management ("OFM").
4. We have retained Hannah Marcley as our outside counsel in this matter.

DECLARATION OF JACKSON MAYNARD
No. 22-2-03426-34

1 5. Hannah Marcley has been an attorney for 5 ½ years and, per our agreement, bills at a rate
2 of \$125.00 per hour.

3 6. The subsequent attachments contained in this affidavit accurately reflect the fees and costs
4 associated with this matter.


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6 Signed April 27, 2023 in Tumwater, Washington.

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9 JACKSON MAYNARD
10 GENERAL COUNSEL
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Shawn.Horlacher@atg.wa.gov
Kate.Worthington@atg.wa.gov
LPDArbitration@atg.wa.gov

Dated this 27th day of April, 2023.


JACKSON MAYNARD
GENERAL COUNSEL

Attachment 1

Summary of Fees

Name and Title	Hourly Rate	Hours	Subtotal
Jackson Maynard <i>Executive Director/Counsel</i>	\$350.00	78.00	\$27,300.00
Hannah Marcley <i>Outside Counsel</i>	\$125.00	38.52	\$4,815.13
Grand Total:			\$32,115.13

Summary of Costs

Name	Hourly Rate	Hours	Subtotal
Paige Jaramillo <i>Paralegal</i>	\$30.00	25.91	\$777.30
Filing Fee(s)	n/a	n/a	\$240.08
Copy Fee(s)	n/a	n/a	\$40.00
Grand Total:			\$1,057.38

Attachment 2

Itemized Billing - Jackson Maynard

Date	Description	Time
10/26/2022	Review issues re: public records dispute with OFM and research of caselaw cited by OFM in response	3:00:00
11/23/2022	Review and preparation of draft lawsuit on Public records matter	6:00:00
12/14/2022	Final review and preparation of complaint as well as summons for OFM/PRA case	2:00:00
12/15/2022	Filing of complaint and summons	1:00:00
1/4/2023	Review answer in OFM/PRA case	1:00:00
1/6/2023	Scheduling conference in OFM PRA suit	2:00:00
1/18/2023	Review proposed order language; prepare email correspondence to opposing counsel; telephone call with H. Marcley re: case status and strategy; preparation of interrogatory	1:30:00
1/18/2023	Receipt and review of correspondence from opposing counsel; preparation of final version of proposed order; receipt and review of correspondence from the court and preparation of response to same; filing of proposed order with clerk electronically	1:15:00
2/13/2023	OFM/PRA: Receipt and review of interrogatory; preparation of email to outside counsel re: same	0:30:00
2/20/2023	OFM/PRA: receipt and review of draft motion for summary judgement	0:30:00
2/21/2023	OFM/PRA Suit: Continued review and editing of summary judgement motion	1:30:00
2/22/2023	OFM/PRA suit: Final review and editing of motion for summary judgment- preparation of emails to P. Jaramillo and H. Marcley re: same	2:00:00
2/24/2023	OFM/PRA: Review and editing of draft motion and declaration; preparation of email to H. Marcley and P. Jaramillo re: same	2:00:00
2/27/2023	Attendance at telephone conference with P. Jaramillo and H. Marcley review final issues in motion	:15
2/28/2023	OFM/PRA Preparation of draft proposed order, review and editing of opening brief, review and editing of declaration	4:00:00
3/1/2023	OFM/PRA: Final review and editing of opening brief, declaration, proposed order.	1:00:00
3/8/2023	OFM/PRA: Receipt and review of email from court re: scheduling; and preparation of email re: same	0:15:00
3/15/2023	PRA/OFM: Review of states response; preparation of outline of reply	5:30:00
3/16/2023	OFM/PRA: Preparation of reply; research and drafting	3:30:00
3/16/2023	OFM/PRA: Review and editing of reply	1:30:00
3/18/2023	OFM/PRA: Preparation and editing of reply brief	2:00:00
3/19/2023	OFM/PRA: review and editing of reply brief; preparation of final draft	2:00:00
3/22/2023	OFM/PRA: Preparation and filing of final draft of reply brief	1:00:00
3/27/2023	OFM/PRA: Prepare revised hearing notebooks and deliver same	1:30:00
3/27/2023	OFM/PRA: Prepare for argument review caselaw	3:00:00
3/28/2023	OFM/PRA Prepare hearing notebook	2:00:00
3/28/2023	OFM/PRA: Review all cases and finalize outline	4:00:00
3/29/2023	OFM/PRA: Review and practice argument	8:00:00
3/30/2023	OFM/PRA: Review and practice argument	8:00:00
3/31/2023	OFM/PRA: Attend court argument	3:00:00
3/31/2023	OFM/PRA: Research potential next steps to comply with court ruling	1:00:00

4/4/2023	Conference with P. Jaramillo and others re: court ruling, potential revisions to proposed order, and materials requested by the court for presentation hearing and research re: same	2:30:00
	CUMULATIVE HOURS:	78:00:00
	TOTAL: <i>\$350.00/hr x 78 hours</i>	\$27,300.00



DIOGENES LAW, PLLC

GOVERNMENTS' POWER IS NOT THEIR OWN

Detailed billing report - 11/01/2022 - 11/30/2022
Client being billed – Citizen Action Defense Fund
Case – CADF v. OFM

Total: 01:18:20

Billable: 01:18:20 Amount: 195.83 USD

Date	Description	Duration	User
11/29/2022	Synthesizing feedback – complaint	00:05:33 9:16:14AM- 09:21:47AM	Hannahatlaw 13.88 USD
11/22/2022	Outlining complaint	01:12:47 09:50:40PM- 11:03:27PM	Hannahatlaw 181.96 USD

Please make checks payable to Diogenes Law, PLLC. Send checks to address below.

Thank you,
Hannah S. Marcley
WSBA 52692

P.O. Box 7307
Arlington, VA 22207



(360) 464-4027



diogeneslaw.com



DIOGENES LAW, PLLC

GOVERNMENTS' POWER IS NOT THEIR OWN

Detailed billing report - 12/01/2022 - 12/31/2022
Client being billed – Citizen Action Defense Fund
Case – CADF v. OFM

Total: 01:24:23

Billable: 01:24:23

Amount: 210.96 USD

Date	Description	Duration	User
12/15/2022	finalizing complaint	00:30:59 8:40AM-09:11AM	Hannahatlaw 77.46 USD
12/12/2022	Summons	00:14:39 9:45AM – 10:00AM	Hannahatlaw 36.63 USD
12/06/2022	Finalizing complaint	00:38:45 10:31AM - 11:09AM	Hannahatlaw 96.88 USD

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Hannah S. Marcley
WSBA 52692

P.O. Box 7307
Arlington, VA 22207



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DIOGENES LAW, PLLC

GOVERNMENTS' POWER IS NOT THEIR OWN

Detailed billing report - 01/01/2023 - 01/31/2023
Client being billed – Citizen Action Defense Fund
Case -- CADF v. OFM

Total: 00:35:33

Billable: 00:35:33 Amount: 88.88 USD

Date	Description	Duration	User
01/20/2023	Interrogatories	10:42AM – 10:45AM	Hannahatlaw 9.29 USD
01/13/2023	Scheduling conference follow up	01:40PM – 01:51PM	Hannahatlaw 27.50 USD
01/09/2023	Scheduling Conference Follow Up	10:35AM- 10:43AM	Hannahatlaw 21.96 USD
01/03/2023	Prep for Scheduling Conference	00:38:45 1:19PM – 1:31PM	Hannahatlaw 30.13 USD

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Thank you,
Hannah S. Marcley
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GOVERNMENTS' POWER IS NOT THEIR OWN

Detailed billing report - 01/01/2023 - 01/31/2023
Client being billed – Citizen Action Defense Fund
Case – CADF v. OFM

Total: 24:57:55

Amount: 3744.79 USD

Date	Description	Duration	User
02/13/2023	Opening Brief - MSJ	4:36PM – 5:35PM 5:41PM – 6:21 PM 7:50PM – 8:40PM	Hannahatlaw 349.76 USD
02/17/2023	Opening Brief - MSJ	12:00PM – 12:18 PM 12:40 PM – 12:54 PM	Hannahatlaw 78.83 USD
02/20/2023	Opening Brief – MSJ	10:36 AM – 11:16 AM 12:04 PM – 1:53 PM 2:13 PM – 6:11 PM 8:13 PM – 10:50 PM	Hannahatlaw 1363.16 USD
02/24/2023	MSJ – Penalty Calculations	9:51 AM – 10:24 AM	Hannahatlaw 627.60 USD



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		1:13 PM – 1:32 PM 2:08 PM – 3:27 PM 3:31PM – 3:42 PM 3:46 PM – 4:28 PM 8:13 PM – 9:06 PM	
02/27/2023	MSJ – penalty calculations	11:12 AM-11:30AM 12:18PM – 12:47PM 1:21PM – 2:28PM 2:38PM – 3:21PM 3:33PM – 3:58PM 4:04PM – 5:08PM 5:30PM-5:42PM	Hannahatlaw 715.09 USD



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02/28/2023	MSJ – penalty calculations	8:48AM – 10:36AM 10:54AM – 11:49AM 12:26PM – 1:48PM	Hannahatlaw 610.38 USD
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Please make checks payable to Diogenes Law, PLLC. Send checks to address below.

Thank you,
Hannah S. Marcley
WSBA 52692

P.O. Box 7307
Arlington, VA 22207



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Detailed report



03/01/2023 - 03/31/2023

Total: 03:49:52 Billable: 03:49:52 Amount: 574.67 USD

Date	Description	Duration	User
03/19/2023	MSJ Reply edits	00:16:38	Hannahatlaw
	CADF - CADF v OFM 2022	01:46:06PM - 02:02:44PM	41.58 USD
03/17/2023	MSJ Reply edits	00:44:09	Hannahatlaw
	CADF - CADF v OFM 2022	03:52:21PM - 04:36:30PM	110.38 USD
03/17/2023	MSJ Reply edits	01:10:33	Hannahatlaw
	CADF - CADF v OFM 2022	02:22:20PM - 03:32:53PM	176.38 USD
03/17/2023	MSJ Reply edits	00:26:22	Hannahatlaw
	CADF - CADF v OFM 2022	12:52:49PM - 01:19:11PM	65.92 USD
03/17/2023	MSJ Reply edits	00:14:55	Hannahatlaw
	CADF - CADF v OFM 2022	12:35:16PM - 12:50:11PM	37.29 USD
03/17/2023	MSJ Reply edits	00:57:15	Hannahatlaw
	CADF - CADF v OFM 2022	10:59:06AM - 11:56:21AM	143.12 USD

Itemized Billing - Paige Jaramillo

Date	Description	Time
2/22/2023	Edit MSJ	1:30:00
2/22/2023	Draft Declaration for JM	0:45:00
2/24/2023	Draft Proposed Order/Review Brief Edits	1:15:00
2/27/2023	Call w/ Jackson & Hannah re: Draft (CADF v. OFM)	0:15:00
2/28/2023	Final edits to brief/proposed order	2:30:00
3/1/2023	Final read through & edits to Opening Brief/Proposed Order	4:30:00
3/8/2023	Download cases for OFM suit - Research	1:00:00
3/8/2023	Download cases for OFM suit - Research	1:15:00
3/15/2023	Prepare shell for reply brief	0:15:00
3/15/2023	Read through State's Response (OFM)	1:00:00
3/16/2023	Edit Reply Brief	2:00:00
3/22/2023	Final Read Through/Edits to Reply (OFM)	1:15:00
3/24/2023	Prep Hearing Notebooks	3:00:00
3/24/2023	Drop Off Hearing Notebooks to Judge/AG's offices	0:45:00
3/24/2023	Coordinate w/ clerk's office to confirm filing of reply	0:15:00
3/31/2023	CADF v. OFM Hearing	2:30:00
3/31/2023	Call w/ Jackson re: Hearing	0:10:00
4/3/2023	Research re: motion for fees & costs	0:30:00
4/3/2023	Draft motion for fees and costs - CADF v. OFM	0:45:00
4/3/2023	Update proposed order - CADF v. OFM	0:30:00
	CUMULATIVE HOURS:	25:55:00
	TOTAL: \$30.00/hr x 25.91 hours	\$777.30

MAYNARD LAW PLLC

August 15, 2024 - 9:38 AM

Filing Petition for Review

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: Case Initiation
Appellate Court Case Title: Citizen Action Defense Funds, Respondent v. WA State
Financial Management, Appellant (583313)

The following documents have been uploaded:

- PRV_Petition_for_Review_20240815093618SC108200_5308.pdf
This File Contains:
Petition for Review
The Original File Name was 240814 OFM PRA Appeal FINAL.pdf

A copy of the uploaded files will be sent to:

- jackson@citienactiondefense.com
- lpdarbitration@atg.wa.gov
- paige@citizenactiondefense.org
- sam@citizenactiondefense.org
- sara.wilmot@atg.wa.gov
- susan.danpullo@wsp.wa.gov

Comments:

Sender Name: Jackson Maynard - Email: jackson@maynardlawpllc.com

Address:

111 21ST AVE SW

OLYMPIA, WA, 98501-2809

Phone: 850-519-3495

Note: The Filing Id is 20240815093618SC108200