

1 EXPEDITE
2 Hearing is set:
3 Date:
4 Time: .
5 Judge/Calendar:

6 SUPERIOR COURT OF THE STATE OF WASHINGTON
7 FOR THURSTON COUNTY

8 THE EVERGREEN FREEDOM
9 FOUNDATION, a Washington Non-Profit
10 Corporation,

11 Plaintiff,

12 v.

13 GARY LOCKE, in his official capacity as
14 Governor of the State of Washington, and the
15 WASHINGTON STATE DEPARTMENT
16 OF COMMUNITY, TRADE AND
17 ECONOMIC DEVELOPMENT, a state
18 agency,

19 Defendants.

NO. 04-2-00240-7

**DECLARATION OF JASON
MERCIER RE: EXAMPLES OF
CTED BAD FAITH**

20 I, Jason Mercier, declare and state as follows:

- 21 1) I am over the age of eighteen, competent to testify, and familiar with the matters herein.
22 2) The dates below are a true and accurate timeline that represent facts relevant to the
23 complaint for bad faith violations of the Public Disclosure Act.

24 **December 19, 2003** - Governor Locke signs Boeing agreement. Boeing's Chief
25 Counsel, Lynn Ristig, sends a fax to Nancy Krier identifying by name which exhibits
26 are not subject to disclosure. They include "*Exhibit D-1, in its entirety, and the redacted portions of Exhibits C-10, D-3, and E.*" The fax goes on to say, "*The Relevant Exhibits should not be disclosed without prior written authorization from Boeing.*" This reference to documents not being released prior to Boeing approval and those to

1 documents already containing redactions, implies that the state is already in possession
2 of all the exhibits and the Boeing fax simply confirms the reasons why redactions are
3 already present. In Boeing's December 19, 2003, fax to Nancy Krier, there is no claim
4 Boeing needs to review Schedules 1-3 of the agreement, or that there are any
5 exemptions to disclosure.

6 **Week of December 29, 2003** – In response to a request for copy a of the Boeing
7 agreement on December 22, 2003, EFF receives a copy of the contract from CTED.
8 However, in a cover letter dated December 23, 2003, CTED states, "*This Agreement is
9 being provided without its supplemental documents at this time. The supplemental
10 documents will become available once CTED has received them from The Boeing
11 Company and reviewed them for redaction. At this time, The Boeing Company has not
12 yet informed us when we can expect to receive the supplemental documents.*"

13 This statement contradicts the information in the December 19, 2003, fax Nancy Krier
14 received from Boeing regarding which documents have been redacted.

15 The Boeing contract clearly indicates which documents CTED should have included at
16 this time. Article 1 Section 1.2 clearly states that the agreement EFF requested on
17 December 19, 2003, consists of the contract, "*the Project Olympus Submittal and any
18 exhibits, attachments, schedules or appendices attached hereto or referenced herein all
19 of which are incorporated by reference.*"

20 **January 14, 2004** - CTED finally sends EFF copies of some of the supplemental
21 documents, but withholds other supplemental documents from disclosure stating, "*This
22 Agreement is being provided with the following information redacted or withheld:
23 portions of attached exhibits at C-10, D-3 and E, and all of Exhibit D-1 ("Relevant
24 Exhibits".)*" CTED claims these public records contain trade secrets and are exempt
25 from disclosure. However, on December 19, 2003, Boeing discussed that these
26 redactions had already occurred in the fax to Nancy Krier, meaning the documents
received on January 14 should have been available and sent on December 23, 2003.
Again, CTED makes no mention of Schedules 1-3 needing to be reviewed by Boeing,
yet the Department fails to provide them.

Also not included are Exhibit F, Exhibit G, and a copy of a required executive order
cited in the contract. No reason is given for these exhibits not being provided. Despite
not including these documents, CTED concludes its cover letter stating, "***This letter
represents the agency's final response to your public records request.***" This statement
clearly indicates that in the Department's mind this request is closed and no further
documents responsive to EFF's December 22, 2003, request will be provided.

January 29, 2004 – Responding to EFF letters asking for remaining supplemental
documents not provided despite CTED's January 14, 2004 letter stating, "***This letter
represents the agency's final response to your public records request,***" CTED faxes

1 and sends a letter to EFF stating that, “*it will require up to an additional 10 business*
2 *days from the date of this letter to compile, review, and prepare any records that may*
3 *be responsive [to our January 26, 2004 letter].”* These documents were first requested
4 on December 22, 2003, and, based on Boeing’s December 19, 2003, fax to Nancy
5 Krier, should have been provided with the contact on December 23, 2003.

6 **February 4, 2004** – Martha Choe authors an opinion-editorial for the King County
7 Journal. In part, the article reads, “*The appendices were released three weeks later*
8 *following final review by Boeing and the state Attorney General’s office . . . All parties*
9 *have had the opportunity to seek additional information --- just as the Evergreen*
10 *Freedom Foundation did.”*

11 **February 12, 2004** – Despite concluding a January 14, 2004, letter stating “***This letter***
12 ***represents the agency’s final response to your public records request,***” CTED hand
13 delivers more than 250 pages of additional information to EFF at 5:21 p.m. These pages
14 encompass Schedules 1-3. Some redaction of schedules is present. At no point prior did
15 Boeing or the State claim that Schedules 1-3 were subject to redaction and needed to be
16 reviewed prior to release. However, in a February 12, 2004, fax from Boeing to
17 Jennifer Jolly, Boeing indicates that it had just then completed review of the Schedules
18 and sent them back to the State. This is despite the fact that the State sent these
19 documents to Boeing on **October 3, 2003, and November 10, 2003**. At no point prior
20 were exemptions for these documents stated. CTED concludes its February 12, 2004,
21 letter once again stating “***This letter represents the agency’s final response to your***
22 ***public records request . . .***”

23 **February 17, 2004** – In hopes of avoiding litigation, EFF requests and holds settlement
24 discussions with CTED to obtain missing documents and to fully disclose the redacted
25 documents. EFF’s request is refused and CTED does not offer any counter-settlement
26 proposal because Boeing is not present. This meeting proved to be a waste of time and
resources as CTED fully knew that they were not going to agree to anything with
Boeing absent. EFF attended this meeting in good faith to resolve concerns that
documents requested on December 22, 2003, had yet to be provided.

27 **February 24, 2004** – Three days prior to the February 27, 2004, show cause hearing, at
28 5:30 p.m., CTED faxes over Exhibits D-1 and D-3 in their entirety now claiming that
29 although Boeing and the state claimed the documents contained trade secrets since
30 December 19, 2003, as of February 24, 2004, the documents no longer contained
31 “*protected information.*” These exhibits detail the Employment Resource Center that
32 legislators were set to appropriate money for and served as the primary basis for our
33 disclosure lawsuit. In her March 24, 2004, filing, Nancy Krier states that the “*passage*
34 *of time --- not the filing of this lawsuit*” resulted in these exhibits being made available.
35 The only thing that changed from December 19, 2003, to February 24, 2004, except for
36 EFF’s February 6, 2004, lawsuit filing, is the fact that some legislators indicated they

1 would not appropriate the funds for this training center without first seeing the details
2 (nothing that would affect a claim of trade secrets).

3 **March 24, 2004** – In a filing before the court, CTED hopes to set up a distinct
4 procedure to address records requests from EFF relating to the Boeing agreement. This
5 is just another example of bad faith, as the proposed procedures contradict the stated
6 legislative intent of RCW 42.17.251.

7 *Intent -- 1987 c 403: "The legislature intends to restore the law relating to the release
8 of public records largely to that which existed prior to the Washington Supreme Court
9 decision in "In Re Rosier," 105 Wn.2d 606 (1986). The intent of this legislation is to
10 make clear that: (1) Absent statutory provisions to the contrary, agencies possessing
11 records should **in responding to requests for disclosure not make any distinctions in
12 releasing or not releasing records based upon the identity of the person or agency
13 which requested the records, and (2) agencies having public records should rely only
14 upon statutory exemptions or prohibitions for refusal to provide public records.
15 Further, to avoid unnecessary confusion, "privacy" as used in RCW 42.17.255 is
16 intended to have the same meaning as the definition given that word by the Supreme
17 Court in "Hearst v. Hoppe," 90 Wn.2d 123, 135 (1978)." [1987 c 403 § 1.]***

18 **March 24, 2004** – In a filing before the court, Nancy Krier indicates that EFF waived
19 its claim for fees and penalties in regard to CTED's bad faith. At no point has EFF
20 waived its claim for fees and penalties relating to all the documents CTED has provided
21 since its January 14, 2004, letter stating "***This letter represents the agency's final
22 response to your public records request.***" Also, at no point has EFF waived its claim
23 for fees and penalties relating to CTED's bad faith for not providing all the documents
24 on December 23, 2003.

- 25 3) I declare under penalty of perjury, under the laws of the State of Washington that the
26 foregoing is true and correct.
- 4) Executed in Olympia, Washington, this 25 day of March 2004.

Jason Mercier