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SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THURSTON COUNTY

THE EVERGREEN FREEDOM  
FOUNDATION, a Washington Non-Profit  
Corporation,

Plaintiff,

v.

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

Defendants.

NO. 04-2-00246-7

FINDINGS OF FACT, AND  
CONCLUSIONS OF LAW

**(PROPOSED)**

COMES NOW Plaintiff Evergreen Freedom Foundation as a party that prevailed in  
obtaining public records denied by defendants and replies to defendants' motion for findings of  
fact, conclusions of law, and order of dismissal. Plaintiff submits for presentation a contested  
finding of fact, conclusion of law, and order of fees and penalties.

1 **PROCEDURAL HISTORY**

2 This matter is a Public Records Act action filed pursuant to RCW 42.17. This reply is  
3 supported by a declaration of Jason Mercier that states the timeline of the public records  
4 request, summarized herein.

- 5 1) On December 19, 2003 Governor Locke signs the 7E7 Boeing agreement. EFF makes  
6 the initial public records request for a copy of the agreement by phone to the  
7 Governor’s Office. EFF makes a follow-up request by email to CTED on December  
8 23, 2003.
- 9 2) On December 29, 2003 EFF receives a copy of the Agreement without the  
10 supplemental appendices. Article 1 Section 1.2 of the Agreement clearly states that the  
11 Agreement includes the appendices: “*The Agreement includes this document, the*  
12 *Project Olympus Submittal and any exhibits, attachments, schedules or appendices*  
13 *attached hereto or referenced herein all of which are incorporated by reference.*”<sup>1</sup>
- 14 3) EFF sent a series of follow-up communications to CTED specifically requesting the  
15 supplemental appendices on January 7<sup>th</sup>, 9<sup>th</sup>, and 12<sup>th</sup>, 2004.
- 16 4) On January 14, 2003 CTED sent by letter some supplemental documents and denied  
17 other documents citing exemptions to disclosure of public records under RCW 42.17.  
18 CTED stated the letter constituted the agency’s “*final response*” to the public records  
19 request by EFF.  
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25 <sup>1</sup> Previously submitted as Exhibit 4 to Declaration of Counsel. (Supporting petitioner’s complaint for  
26 violation of Public Records Act.)

- 1 5) EFF continues to send follow-up requests for the supplemental appendices on January  
2 22<sup>nd</sup>, 23<sup>rd</sup>, and 26<sup>th</sup>, 2004.
- 3 6) On January 29, 2004 CTED states it will take an additional 10 days to provide the  
4 supplemental appendices.
- 5 7) On January 30, 2004 EFF hand-delivers its first ultimatum letter stating that CTED  
6 must immediately provide the supplemental appendices requested on December 19,  
7 2003 or EFF will take legal action.
- 8 8) On February 4, 2004 CTED's director Martha Choe authors a guest editorial for the  
9 King County Journal stating that the appendices have been released.
- 10 9) On February 5, 2004 EFF hand-delivers its final ultimatum letter stating that CTED  
11 must immediately provide the supplemental appendices requested on December 19,  
12 2003 or EFF will file a lawsuit on the following day at noon.
- 13 10) On February 6, 2004 EFF filed this action for public records violations.
- 14 11) On February 12, 2004 CTED delivers **over 250 pages of supplemental appendices**  
15 sought by EFF in its complaint and requested on December 19, 2003.
- 16 12) On February 17, 2004 at EFF's request, settlement talks fail to provide any additional  
17 public records.
- 18 13) On February 18, 2004 EFF files a show cause hearing in part to determine if the  
19 redacted portions of the public records were wrongfully denied.
- 20 14) On February 24, 2004 three days prior to the show cause hearing, **CTED reverses its**  
21 **claim that exhibits D-1 and D-3 are exempt from disclosure and releases them in**  
22 **their entirety.**
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1 15) On February 27, 2004 Judge Pomeroy orally rules that the remaining 9 pages of the  
2 Agreement that have been redacted are trade secrets. This ruling from the bench was  
3 followed by a letter opinion dated March 5, 2004.

4 **Show Cause Hearing**

5 Plaintiff made motion for a show cause hearing accompanied by a motion to compel  
6 production of documents for in-camera review. Defendant moved to strike Plaintiff's  
7 declarations in support. The Boeing Company moved unopposed to intervene. The parties  
8 appeared through counsel of record and the Court considered oral argument of the parties. The  
9 following documents and evidence were submitted:

10  
11 BY PLAINTIFF:

- 12 1) Complaint for Violation of Public Disclosure Act RCW 42.17 with declaration of  
13 Counsel and attached Exhibits 1-11.  
14  
15 2) Motion and memorandum to Compel Production of redacted public records for in-  
16 camera review.  
17  
18 3) Response to motion to strike.

19 BY DEFENDANT (STATE):

- 20 1) Answer and Affirmative Defenses.  
21  
22 2) Motion to Strike Declarations and memorandum.  
23  
24 3) Declaration of Nancy Krier.  
25  
26 4) Reply Memorandum to motion to show cause with supporting declarations.  
5) Memorandum in support of Boeing Company's motion to intervene.

1 BY BOEING COMPANY:

- 2 1) Motion and Memorandum to Intervene with declarations and exhibits.  
3 2) Memorandum opposing plaintiff's motion for show cause hearing and to compel  
4 production of public records for in-camera inspection with attached declarations.  
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6  
7 The Court orally ruled that the remaining redacted documents are trade secrets and granted  
8 plaintiff's motion for an in camera review. The Court also ruled that four of the five  
9 declarations were to be stricken. The remaining declaration of Philip Talmadge was not to be  
10 stricken.

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12 **IN CAMERA REVIEW**

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14 On March 5, 2004 the Court reviewed the remaining redacted documents. Those  
15 documents consisted of nine pages: Exhibit C-10-1; E-1-1; Legal Questionnaire (Schedule 2),  
16 pages 10 and 13; November 10, 2003 Restatement of Commitments (Schedule 3), pages 3, 4,  
17 6, 11, 12. Following the in camera review, the Court issued a letter opinion that the public  
18 records are trade secrets consistent with its February 27, 2004 oral ruling and are exempt from  
19 disclosure. The Court requested that an order be presented consistent with its ruling.  
20

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22 **FINDINGS OF FACT**

- 23 1) Plaintiff Evergreen Freedom Foundation submitted a public records request to the  
24 Governor's Office on December 19, 2003 for the Boeing 7E7 Agreement and to CTED  
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1 on December 23, 2003. The Agreement includes appendices and exhibits referenced  
2 therein pursuant to Article I, Section 1.2 of the Agreement.

3 2) Defendants Governor Locke Office and Department of Community, Trade and  
4 Economic Development are state agencies subject to the Public Disclosure Act RCW  
5 42.17.  
6

7 3) Prior to the filing of an action for a violation of public records, EFF specifically  
8 requested the supplemental appendices and exhibits in follow-up communications with  
9 CTED on January 7th, 9th, 12<sup>th</sup>, 22<sup>nd</sup>, 23<sup>rd</sup>, 26<sup>th</sup>, of 2004.

10 4) Prior to the filing of an action for a violation of public records, on January 30, 2004,  
11 EFF hand-delivered an ultimatum for CTED to disclose the public records consisting of  
12 the supplemental appendices and exhibits or EFF will take legal action.  
13

14 5) On February 4, 2004 CTED's director Martha Choe authors a guest editorial for the  
15 King County Journal stating that the appendices have been released.

16 6) On February 5, 2004 EFF hand-delivers a final ultimatum letter for CTED to disclose  
17 the appendices and exhibits or EFF would file an action on February 6, 2004 at noon.

18 7) On February 6, 2004 EFF filed a lawsuit alleging defendants wrongfully withheld  
19 public records constituting appendices and exhibits of the Boeing Agreement.  
20

21 8) On February 12, 2004 CTED disclosed public records of over 250 pages that  
22 constituted appendices and exhibits (Schedules 1, 2, and 3) to the Boeing Agreement.

23 9) On February 24, 2004 CTED disclosed public records previously claimed as exempt  
24 and entirely redacted constituting Exhibit D-1 and D-3.  
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1 10) The Court finds that Defendants acted in bad faith for publicly claiming that the  
2 appendices were released and yet continuing to deny the requested appendices until  
3 after EFF was forced to file a lawsuit.

4 11) The Court held a show cause hearing on February 27, 2004 for the remaining nine  
5 pages of public records denied to plaintiff and found they are trade secrets exempt from  
6 disclosure.

7 12) The Court finds that attorney fees and penalties are proper for EFF pursuant to RCW  
8 42.17.340 as the prevailing party obtaining public records sought in its complaint. The  
9 public records constitute over 250 pages withheld and 4 pages entirely redacted and  
10 denied.

11 13) The Court finds that RCW 42.17.340 requires fees and penalties be awarded to a party  
12 that prevails in any action to obtain public records. The Washington State Court of  
13 Appeals has held that a requesting party "prevails" if the "prosecution of the action  
14 could reasonably be regarded as necessary to obtain the information," and "the  
15 existence of the lawsuit had a causative effect on the release of the information."  
16 *Coalition on Government Spying v. King County Department of Public Safety*, 59 Wn  
17 App. 856, 801 P.2d 1009 (1990).

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22 **CONCLUSIONS OF LAW**

- 23 1) The Court has jurisdiction pursuant to RCW 42.17.340.  
24 2) The Boeing Company is granted intervention pursuant to CR 24(a).

- 1 3) Four of the declarations submitted by counsel for plaintiff are stricken and the  
2 declaration of Philip Talmadge is not stricken.
- 3 4) The redacted nine pages of appendices are public records. The redacted nine pages are  
4 trade secrets consistent with this court's oral ruling on February 27, 2004 and written  
5 letter of opinion on March 5, 2004 and exempt from disclosure pursuant to RCW  
6 42.17.310(1)(h).
- 7 5) Public records consisting of Exhibit D-1, and D-3 were redacted in their entirety and  
8 wrongfully denied to plaintiff until after plaintiff filed this action.
- 9 6) Public records consisting of Schedules 1, 2, and 3 were wrongfully withheld from  
10 plaintiff until after plaintiff filed this action.
- 11 7) The wrongful denial and withholding of public records constitutes bad faith violations  
12 of the Public Disclosure Act RCW Ch. 42.17. Plaintiff is entitled to costs, fees, and  
13 penalties at a hearing to be determined pursuant to RCW 42.17.340.  
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### 16 **ORDER**

17 It is hereby ordered adjudged and decreed that:

- 18 1) The Boeing Company's Motion to Intervene is GRANTED.
- 19 2) The Plaintiff's motion to compel production for in camera review is GRANTED.
- 20 3) The Defendant's (STATE) motion to strike declarations is GRANTED in part with  
21 regard to the declarations of Boldt, Mielke, McMahan, and Talcott, but DENIED with  
22 regard to Philip Talmadge.  
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1 4) Defendant shall not be required to disclose the nine redacted pages at issue in the show  
2 cause hearing.

3 5) The Plaintiff is entitled to costs, fees, and penalties to be determined upon motion and  
4 hearing as a prevailing party pursuant to RCW 42.17.340.

5 6) This lawsuit shall be dismissed upon entry of a judgment of fees and penalties.  
6

7 DONE IN OPEN COURT this \_\_\_\_\_ day of \_\_\_\_\_ 2004.  
8

9 \_\_\_\_\_  
10 The Honorable Christine Pomeroy

11 Presented by:

12 EVERGREEN FREEDOM FOUNDATION  
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14 Timothy D. Ford, WSBA #29254  
15 Attorney for Plaintiff  
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**CERTIFICATE OF SERVICE**

I, Timothy D. Ford, hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_, 2004, a true and correct copy of the following documents was caused to be served by plaintiff EVERGREEN FREEDOM FOUNDATION on the following parties via hand-delivery, facsimile, and/or mail:

- 1) FINDINGS OF FACT, & CONCLUSIONS OF LAW
- 2) Certificate of Service.

Nancy Krier, AAG  
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1125 Washington St SE  
Po Box 40100  
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(360) 664-0174 fax

THE BOEING COMPANY  
Richard Oehler  
Perkins Coie LLP  
1201 Third Ave, Suite 4800  
Seattle, WA 98101-3099  
  
(206) 359-4849 fax

DATED this \_\_\_\_ day of \_\_\_\_\_, 2004.

EVERGREEN FREEDOM FOUNDATION

By: \_\_\_\_\_  
Timothy D. Ford, WSBA #29254  
Attorney for EVERGREEN FREEDOM FOUNDATION  
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