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

IN RE THE MATTER OF:)
) NO. 05-2-01083-9
THE PORT OF TAHUYA DISSOLUTION,)
)

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 19th day of June, 2006, Mason County Cause No. 05-2-01083-9 came on for presentation of an order before the Honorable Toni A. Sheldon, Judge of the Superior Court sitting at the Mason County Courthouse, in the City of Shelton, County of Mason; and the parties being represented by their respective attorneys as follows:

SUSAN R. SAMPSON, Attorney at Law, Susan R. Sampson, Inc. PS, 1400 Talbot Road S., Suite 400, Renton, Washington 98055-4282, appearing on behalf of Brad Carey;

ROBERT I. GOODSTEIN, Attorney at Law, Robert I. Goodstein Law Group, PLLC, 1001 Pacific Avenue, Suite 400, Tacoma, Washington 98402-4440, appearing on behalf of the Jim Christen and Brad Smith, Petitioners.

1 Court convened with all
2 parties present on Monday,
3 June 19, 2006 at 2:46 p.m.

4 THE COURT: The next matter is the Port of Tahuya.
5 Counsel.

6 MR. GOODSTEIN: Good afternoon, your Honor. May it
7 please the Court, we were here last week and we have two
8 orders of business. One is an order on a hearing of May 24th.
9 When we last appeared before the Court, the Court requested
10 that we interlineate two changes to what we had signed as an
11 agreed upon order. The first area of change was in section
12 2.5 where you asked that we insert after Mason County Superior
13 Court the language, in an interest bearing account for the
14 benefit of the Port of Tahuya under Tax ID number. And I have
15 received the Tax ID number, which I'm going to interlineate
16 now, your Honor. It's 91-1783164.

17 The other request that the Court made is to add to the
18 order in a separate paragraph section 2.10, language that
19 said, for any unresolved claim against the Port of Tahuya the
20 original notice of claim shall be filed with the Court in this
21 case. Having made those changes, I understand there is no
22 objection. And I will sign the presentation and the original.
23 And I'd ask that Ms. Sampson do the same. And I'll date it
24 with today's date. And I will tender it up to the Court, if
25 the Court wishes.

1 THE COURT: You may. With respect to this proposed
2 order, there was one additional paragraph. And basically it
3 was the reason that the Court did not sign this order when we
4 last met that made the Court feel uncomfortable about the
5 proposed language, to the point of even feeling blind-sided, I
6 would say. And I had to take some time to sit back and decide
7 why I felt that way.

8 And that's with respect to paragraph 2.2. The Port of
9 Tahuya is solvent. The Court in hearing the part of the case
10 that the Court heard -- I didn't hear that first hearing.
11 That was Judge Sawyer's hearing. But in hearing the part of
12 the case that the Court heard, it was always implied that
13 because of the order and the language of the order entered by
14 agreement before Judge Sawyer, that it was implied that the
15 Port was solvent. If it wasn't solvent, a whole different set
16 of processes would need to have taken place and be provided
17 for under RCW 53.48.060 and subsequent.

18 So with respect to the order that Judge Sawyer entered on
19 January 23, 2006 from the January 9, 2006 hearing, it was
20 assumed by this Court, and implied in Judge Sawyer's order,
21 that the Port was solvent. So with that comment, I am going
22 to change your paragraph 2.2 to reflect the following.

23 That by the agreed findings entered on January 23, 2006
24 from the January 9, 2006 hearing, the Port of Tahuya was found
25 to be solvent. An order has been signed.

1 Now with respect to the other matter which is with regard
2 to electronic documents. Ms. Sampson, you may begin.

3 MS. SAMPSON: Thank you, your Honor. May it please
4 the Court. My name is Susan Sampson representing Brad Carey.
5 We sought an order of protection for records, in particular
6 electronic records. Specifically the relief we have requested
7 is an order to former commissioners who may have Port
8 documents in their possession. Particularly documents in
9 electronic format, not to delete or destroy such documents
10 prior to copies being delivered to the State Archivist in
11 native format, whether that be electronic or paper.

12 Mr. Carey has filed a declaration in support of this motion
13 indicating discussions and observations from the point-of-view
14 of both a citizen and a commissioner; that many documents that
15 he observed being created have not been produced and delivered
16 to the Archivist for filing. He can see that because
17 eventually on about May 8th of this year he received paper
18 copies of documents from the Port, some electronics. But
19 notably, in particular, noticed that there were no electronic
20 submissions from Commissioner Christen. Mr. Carey has had
21 discussions in particular with former Commissioner Christen
22 about how he was not keeping documents.

23 And Mr. Christen has supplied a declaration to the Court
24 today which in paragraph number two seems to admit that there
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are at least two categories of documents that he has not delivered to the State for archiving yet.

THE COURT: And I don't have any documents filed today. Did you say it was filed today?

MR. GOODSTEIN: Your Honor, if it please the Court. You'll recall this was done on a motion to shorten time. We received pleadings and Mr. Carey's declaration in our office on Friday. We have prepared a very brief response, which I don't believe will interfere with our ability to go forward today. And we do have a very brief declaration that was signed this morning by Mr. Christen which also, I don't believe, will cause us a delay if -- unless the Court wishes to consider it after the fact. So I can hand those up right now.

THE COURT: If you'll hand them up now. I realize that we set it on on a shortened time. It's just that I haven't read them yet. So I need to take a moment to do that. I have then now read the declaration and the memorandum that have just been filed at this time. You may continue, counsel.

MS. SAMPSON: Thank you, your Honor. Referring to the declaration of Mr. Christen in paragraph two, there are two areas in which his declaration does indicate that he has not preserved documents and delivered them to the State Archivist yet. He states that documents that on -- on his computer that were official Port records have been printed off

1 have either been placed in the files previously released to
2 the Archivist -- those would be the files that Mr. Carey
3 delivered to the State -- or have been made available to the
4 State Archivist.

5 We can't discern from this declaration the whereabouts of
6 those documents or how they're being made available. Secondly
7 Mr. Christen incites his intent to copy the disk with all the
8 e-mails that are official Port records remaining on his
9 computer. Those documents exist, they do belong to the Port.
10 The intent has not been acted upon yet.

11 So for these reasons a protective order is appropriate to
12 assure that the documents are not lost or destroyed prior to
13 their being delivered to the State for archiving because in
14 part, such archiving was required by the January 23 order,
15 based on the January 9th hearing. Thank you.

16 THE COURT: Counsel.

17 MR. GOODSTEIN: Your Honor, I believe I can be
18 brief. Our -- first of all, as far as I know, the
19 ex-Commissioners, all of them of the Port of Tahuya, are very
20 conscious of the requirements of the Public Disclosure Act
21 and -- and do not take the responsibility under those Acts
22 lightly.

23 I would contend two things, your Honor, in my memorandum
24 for response. One, the requested order is -- is -- is a tad
25 broad and over-reaching. And number two, I believe is

1 fundamentally unnecessary because there is another way to make
2 sure this occurs.

3 I would note for the Court's attention several cases that I
4 think speak to the obligations that are in question here
5 because this becomes rapidly more complex when one starts to
6 delve into the Public Disclosure Act. First of all with
7 regard to the duties of the Port with regard to the collection
8 of records, I would cite the Court to several cases. Eugster
9 v. City of Spokane, 121 Wn. App. 799 (2004) that holds for the
10 proposition that the Public Disclosure Act does not authorize
11 a public entity or any party, to obtain public records from
12 non-public agencies. Certainly the commissioners in their
13 individual capacity and their individual machines are not
14 public agencies in the first instance.

15 Second in the case of Smith v. Okanogan County, 100 Wn.
16 App. 7 (2000) case citing Sperr v. City of Spokane, 123 Wn.
17 App. 132, holding for the proposition that the Public
18 Disclosure Act does not require an agency to explain, conduct
19 research, or create a document that does not exist and is not
20 in its possession. In general, a document which is not
21 possessed by an agency is not by definition a public record.

22 All of that notwithstanding, we do recognize that in
23 particular, the -- the Attorney General's new guidance and
24 rules which are by his own definition informative, but not the
25 law. He does indicate -- and I don't know whether the Court

1 has had the opportunity to look at the -- at the Rule or not.
2 I've attached a copy of the pertinent part to my memorandum in
3 response.

4 And I draw your attention, Judge, to page 10 of the
5 attached guidance which says in pertinent part for the record,
6 bottom of the page, sometimes the agency employees work on
7 agency business from home computers. These home computer
8 records, including e-mail, were used by the agency and relate
9 to the conduct of government so they are public records,
10 citing the RCW. However the Act does not authorize unbridled
11 searches of agency property. If agency property is not
12 subject to unbridled searches, then neither is the home
13 computer of an agency employee. Yet because the home computer
14 documents relating to the agency business are public records,
15 they are subject to disclosure unless exempt.

16 Agency records. The agency should instruct employees that
17 all public records, regardless of where they were created,
18 should eventually be stored at the agency; in this case,
19 agency computers. The agency should ask employees to keep
20 agency related documents on home computers in separate folders
21 and to routinely copy them, and so on and so forth.

22 So it's clear from the Attorney General's interpretation
23 that you can have agency records on home computers. But the
24 proper way for dealing with that is to transfer those records
25 back to the agency.

1 It seems to me here that the cure for this purported
2 problem -- and I would say that it appears that
3 ex-Commissioner Carey's declaration in support of the motion
4 is -- is directed primarily at Mr. Christen, would be simply
5 for the Court to order the Port, through counsel if necessary,
6 to produce affidavits to the effect that they have turned over
7 all of the records, as is appropriate, rather than putting the
8 Court through the exercise of entering an order that we
9 believe might include things that are not public record.

10 It's also clear in the Attorney General's opinion that
11 things like personal notes, calendars and what not -- and
12 there was case law that supports this -- are outside of the
13 definition of a public record. The definition of a public
14 record are things that are used by the agency in the conduct
15 of its business. And there are a number of AG opinions and
16 court cases that suggest that things like personal calendars
17 and individual notes which are designed essentially to aid in
18 keeping the individual informed, but are not part of the
19 agency's business, are not in fact public record.

20 So we believe that the ask here, in terms of the proposed
21 order, is broad and over-reaching. And -- and I hesitate,
22 with all due respect, to suggest to the Court that the Court
23 need not be in the business of -- of entering protective
24 orders in this particular case when it can be satisfied short
25 of a showing of misfeasance or malfeasance on the part of

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individual ex-commissioners that they have not provided the documentation to the Port.

It's very simple. We have Commissioner Christen sitting here. He has submitted his affidavit. We have ex-Commissioner Olsen sitting here, we have ex-Commissioner Gilbert sitting here. There's another ex-commissioner that I'm aware of, Commissioner McPhee who was on the Commission when I was first retained, all of whom are capable of -- of appearing before the Court in their capacity right now for those who are here, or in the capacity of an affidavit, and indicating that they have or have not further records.

The rest of Mr. Carey's statement is a conjecture that certain records are not being provided. I can't respond to that other than to indicate to the Court that Mr. Christen himself has requested through letter of ex-commissioners and ex-attorneys of the Port to provide what they -- any public records that they have. And in fact in one of his -- in his affidavit and Exhibits attached to his motion for reconsideration, which is not being heard today, he attaches a set of those letters from Commissioner Christen asking for ex-commissioners to turn over their records.

So I believe the Port as an entity has done what it can do under the law to attempt to obtain anything that constitutes a record of -- of the Port. And we'd ask for the Court to consider alternative methods of dealing with the speculation,

1 because that is what it is, that there are records that are
2 either missing or unavailable on people's computers by either
3 obtaining an affidavit or simply asking them to appear and
4 make statements. To do otherwise, I think, puts us in the
5 realm of then having to go through arguments about what is or
6 is not public record in terms of things like notes, calendars,
7 dates and times, and what not.

8 So on balance, the Port I think has no objection to
9 producing public records. It believes it has already done so.
10 And if there's any concern on the Court's part, that's better
11 remedied by an affidavit exercised at this juncture.

12 THE COURT: Let me inquire about that proposed
13 solution. And that is how far back are we going to be asking
14 the former commissioners? Back to the onset of the beginning
15 of the computer age, a little over 20 years ago? I didn't
16 understand how we would make a cutoff date.

17 MR. GOODSTEIN: I don't understand that either,
18 your Honor. I assume since this is directed at electronic
19 media, it would be directed to those ex-commissioners who had
20 access to electronic media. There's also a question raised
21 in -- in even Mr. Christen's affidavit or declaration that --
22 that he believes ex-Commissioner Carey may have done work
23 on -- on Harold Carey's computer and -- and would -- would
24 seek that that be included in the exercise as well.
25

1 So it does get quickly very complicated for the Court to go
2 through the exercise, short of a showing of some misfeasance
3 or malfeasance. And that's why we recommend the affidavit
4 route. And you can set the time bar. I believe the concern
5 is -- is within the last four or five years. So we can name
6 the individual commissioners from which we can obtain these
7 affidavits. But that seems to me a more prudent exercise at
8 this particular juncture.

9 THE COURT: All right, Ms. Sampson.

10 MS. SAMPSON: Yes. Thank you, your Honor. I would
11 like to respond briefly. The concern for the records is not
12 mere speculation. Mr. Carey has forwarded his concerns
13 have -- being the individual who collected as many documents
14 as were available on May 8th and prepared an index for them and
15 delivered them to Olympia. It is obvious to him that some are
16 missing, and he has named them in particular in his
17 declaration, including for example, minutes for several
18 meetings in August of 2005 that Mr. Christen prepared.
19 Because of the specific threat to these records is why we are
20 asking for a protective order.

21 With respect to concerns for calendars and notes, that's
22 not what we've asked for. We have asked for documents that
23 are Port documents in the possession of the individuals. We
24 have relied upon the definition of public record out of the
25 Public Disclosure Statute.

1 With respect to how far back should this go, I assume most
2 people's experience with computers is like mine; given
3 periodic crashes, there isn't an archive that is going to go
4 back generations. If a commissioner has Port documents in his
5 or her possession, they should be turned over to the
6 Archivist, no matter how old they are.

7 With respect to a search of electronic media. In
8 Mr. Christen's case, he purchased the computer that Mr. Carey
9 has attested about on January of 2004. So it's only a two
10 year search for Port records.

11 With respect to electronic media from the others who are
12 present in the courtroom, it was evident to Mr. Carey as he
13 stated in his declaration when he gathered Port documents to
14 take to the Archivist that former Commissioner Olsen did
15 deliver her electronic media for delivery for archiving. The
16 others did not.

17 Altogether then the facts and the admissions in the
18 declaration of Mr. Christen indicate that there are documents
19 that have not been preserved that are recoverable and they
20 should be protected. Thank you.

21 THE COURT: The Court has ordered that documents be
22 provided to the Archivist. And will at this point put in
23 place a two step order with regard to any electronic media.

24 First of all that the Court will require that any public
25 records of the Port of Tahuya that are held in an electronic

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format on any computer belonging to a former Port Commissioner shall not be deleted prior to a copy being provided to the State Archivist, either by an electronic format or means, or in a paper copy.

And that secondly, once a declaration has been filed by a former Port Commissioner to indicate that they have complied with the Court's order to provide any public record of the Port of Tahuya that they may have had in an electronic format to the Archivist, then this restraint automatically is eliminated.

MS. SAMPSON: Thank you, your Honor.

MR. GOODSTEIN: Your Honor, I'd like to try to prepare an order now, if we can on those two matters.

THE COURT: And our Clerk has some blank order forms that you can use for that purpose.

MR. GOODSTEIN: Thank you.

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