

EXPEDITE  
 No hearing set  
 Hearing is set  
 Date: July 20, 2020  
 Time: 9:00 a.m.  
 Judge: Price

**SUPERIOR COURT OF WASHINGTON  
 FOR THURSTON COUNTY**

ENERGY POLICY ADVOCATES, a Washington Nonprofit Corporation,  Plaintiff,  v.  OFFICE OF THE ATTORNEY GENERAL,  Defendant.	) ) ) ) ) ) ) ) ) ) ) ) ) )	Case No. 20-2-00570-34
--	--	------------------------

**PLAINTIFF’S OPPOSITION TO  
 MOTION TO SEAL DECLARATION OF WILLIAM SHERMAN**

NOW COMES the Plaintiff, Energy Policy Advocates, by and through undersigned counsel, and opposes the Attorney General’s Motion to Seal the Declaration of William Sherman. In opposition, the Plaintiffs state as follows:

1. By order entered June 19, 2020, this Court permitted the sealing of approximately 70+ pages of records described in the Declaration of Christina Buesch, which records the Court ordered will be reviewed *in camera*. The Court did not contemplate in its order or at the June 19, 2020 hearing on the affidavits in this matter that any documents other than the public records at issue in this case would be filed under seal or reviewed *in camera*.

1  
2  
3 2. On May 5, 2020, the defense submitted unredacted declarations from Ms. Beusch and Ms.  
4 Emily Kok in an attempt to justifying its redactions in this matter, which is expressly  
5 permitted by RCW 42.56.550 (3). Following a hearing on the merits of its affidavits on June  
6 19, 2020, the defense now seeks to supplement the record with an additional declaration,  
7 which it purports to seek to file under seal. In fact, however, the defense is attempting to  
8 supplement the evidence before this Court in an untimely manner, and its motion creates an  
9 issue of *ex parte* communications not contemplated by the Public Records Act.  
10

11 3. Although the Public Records Act contemplates that records may be reviewed *in camera*, there  
12 is no provision permitting affidavits to be reviewed *in camera*. See RCW 42.56.550 (3).  
13

14 4. General Rule 15 governs the sealing of court records. As a preliminary matter, “seal” is a  
15 defined term in the Rule. “To seal means to protect from examination by the public and  
16 unauthorized court personnel.” GR 15(b)(4). Sealing is not synonymous with *in camera*  
17 review or *ex parte* filings, because sealing protects a record from examination *by the public*.  
18 Sealed records remain accessible to counsel for the parties so that they can make the  
19 appropriate legal arguments to rebut evidence presented to the Court.  
20

21 5. GR 15(c)(2) permits sealing only in 6 circumstances:

22 A) The sealing or redaction is permitted by statute; or

23 B) The sealing or redaction furthers an order entered under CR 12(f) or a protective  
24 order entered under CR 26(c); or

25 C) A conviction has been vacated; or

26 D) The sealing or redaction furthers an order entered pursuant to RCW 4.24.611; or

27 E) The redaction includes only restricted personal identifiers contained in the court  
28

1  
2  
3 record; or

4 F) Another identified compelling circumstance exists that requires the sealing or  
5 redaction.

6 6. None of the GR 15(c)(2) factors are present with respect to the declaration of William  
7 Sherman.<sup>1</sup> The sealing is not permitted by statute, which contemplates *in camera* review only  
8 of records themselves. This is not a criminal case, a protective order case, or a product liability  
9 case governed by RCW 4.24.611. Nor is there any “compelling” need for a late-filed, *ex parte*  
10 affidavit.  
11

12 7. Worse, although the defense characterizes its motion as a motion to seal, the relevant  
13 document is in fact being withheld not just from the public, but from opposing counsel as  
14 well. Thus, the defense is attempting to make its arguments in secret, without any opportunity  
15 for the Plaintiff to meaningfully challenge or rebut the declaration of Mr. Sherman.  
16

17 8. Rule 2.9(A) of the Code of Judicial Conduct prohibits this Court from considering Mr.  
18 Sherman’s declaration *ex parte*. In relevant part, the Code states that “A judge shall not  
19 initiate, permit, or consider *ex parte* communications, or consider other communications made  
20 to the judge outside the presence of the parties or their lawyers,” with only 5 limited  
21 exceptions:<sup>2</sup>  
22

23 1) “*Ex parte* communication for scheduling, administrative, or emergency purposes,  
24

25 <sup>1</sup> The GR 15(c)(2) factors are an exclusive list. *Expressio unius est exclusio alterius* reflects the  
26 longstanding principle that, when a statute or rule specifically designates the things or classes of  
27 things on which it operates, an inference arises in law that all things or classes of things omitted  
28 from it were intentionally omitted. See *State v. Swanson*, 116 Wn. App. 67, 75, 65 P.3d 343  
(2003).

<sup>2</sup> The Rule 2.9(A) factors are an exclusive list according to the same principles of *expressio unius est exclusio alterius* that govern GR 15(c)(2).

1  
2  
3 which does not address substantive matters...” provided that certain conditions are met;

4 2) “A judge may obtain the written advice of a disinterested expert on the law applicable  
5 to a proceeding before the judge, if the judge affords the parties a reasonable opportunity to  
6 object and respond to the advice received;”

7  
8 3) “A judge may consult with court staff and court officials whose functions are to aid  
9 the judge in carrying out the judge’s adjudicative responsibilities, or with other judges,  
10 provided the judge makes reasonable efforts to avoid receiving factual information that is not  
11 part of the record, and does not abrogate the responsibility personally to decide the matter;”

12  
13 4) “A judge may, with the consent of the parties, confer separately with the parties and  
14 their lawyers in an effort to settle matters pending before the judge;”

15 5) “A judge may initiate, permit, or consider any *ex parte* communication when  
16 expressly authorized by law to do so.”

17  
18 9. As with General Rule 15, none of the Code of Judicial Conduct’s exceptions to the prohibition  
19 on *ex parte* communications apply to the declaration of Mr. Sherman. As the Court of Appeals  
20 held in *Randy Reynolds & Assocs., Inc. v. Harmon*, 404 P.3d 602, 607 (Wash. App. 2017),  
21 “Improper *ex parte* communication under the CJC may provide grounds for a new trial...”  
22 This Court should refuse the defense’s invitation to consider *ex parte* arguments, which would  
23 only render any eventual judgment infirm.

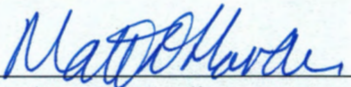
24  
25 10. Because the defense has already submitted the document to the Court *ex parte*, the Plaintiff is  
26 entitled to view it and rebut it. Nothing in GR 15 permits the defense to “withdraw” the  
27 declaration, as it has requested in its motion, and the defense has cited no authority to retract  
28 something it has already filed with the Court.

1  
2  
3 11. To the contrary, GR 15's only mention of returning documents to the parties is found at GR  
4 15 (i), which states that even trial exhibits may only be returned "if all parties so stipulate in  
5 writing." A hearing on affidavits pursuant to RCW 42.56.550 (3) is the Public Records Act  
6 equivalent of a civil trial, and the affidavits themselves operate as evidence in the same  
7 manner as trial exhibits. This Court is without authority to return evidence to the parties absent  
8 a signed stipulation; the Plaintiff respectfully declines to stipulate and instead requests that this  
9 Court allow it the opportunity to fully and fairly rebut all evidence placed before this Court.  
10

11 Respectfully submitted this 12th day of July, 2020.

12  
13 ENERGY POLICY ADVOCATES

14 By Counsel

15 

16 Matthew D. Hardin

17 WSBA#53772

18 324 Logtrac Road

19 Stanardsville, VA 22973

(434) 202-4224

20 [MatthewDHardin@protonmail.com](mailto:MatthewDHardin@protonmail.com)

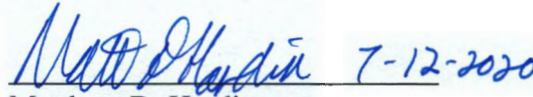
21 *Attorney for the Plaintiff*

CERTIFICATE

I certify that, pursuant to an e-service agreement by the parties to this matter, I e-mailed a copy of the foregoing to:

1. Jennifer S. Steele, Public Records Counsel – [Jennifer.Steele@atg.wa.gov](mailto:Jennifer.Steele@atg.wa.gov)
2. Angelina Boiko, Legal Assistant – [Angelina.Boiko@atg.wa.gov](mailto:Angelina.Boiko@atg.wa.gov)
3. CPR Reader Mailbox – [cprreader@atg.wa.gov](mailto:cprreader@atg.wa.gov)

I also mailed a copy of the foregoing via First Class Mail, postage prepaid, addressed to the attention of Ms. Steele at the Office of the Attorney General, 800 Fifth Avenue, Suite 2000, Seattle, WA 98104.

  
Matthew D. Hardin 7-12-2020