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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
8 IN AND FOR THE COUNTY OF WHITMAN

9 ELSEVIER, INC., a foreign corporation,  
10  
11 Plaintiff,

12 v.

13 WASHINGTON STATE UNIVERSITY,  
14 Defendant.

No.

PLAINTIFF ELSEVIER, INC.'S MOTION  
FOR PRELIMINARY AND/OR  
PERMANENT INJUNCTION

15 I. RELIEF REQUESTED

16 Plaintiff Elsevier, Inc. requests, pursuant to CR 65, the issuance of a preliminary,  
17 and/or permanent, injunction enjoining defendant Washington State University ("WSU") from  
18 disclosing, pursuant to a Public Records Request (the "Request," the content of which is  
19 reflected in Exhibit A to the accompanying James Tonna Declaration) of Dr. Theodore C.  
20 Bergstrom, except in redacted form. Two proposed forms of injunctive relief accompany this  
21 motion. The first grants a preliminary injunction. The second would grant a permanent  
22 injunction, should that be determined to be appropriate under CR 65(a)(2) based on a lack  
23 of disputed facts.

24 The two proposed orders allow disclosure of the requested documents, including  
25 total contract value and list prices, and redact only specifically negotiated customer-specific

1 individual pricing and formulae for modifying them (e.g., in the case of partial cancellation).  
2 The documents in their proposed redacted form are Exhibit 1 to the two proposed injunction  
3 forms.

## 4 II. STATEMENT OF FACTS

5 Pertinent facts are set forth in the following paragraphs of the Declaration of  
6 Elsevier's Vice President of Sales and Marketing, James Tonna:

7 2. My responsibilities include supervising sales and marketing efforts for  
8 Elsevier's Academic and Government customers throughout the United States. I have 11  
9 years experience in sales and marketing of health and medical information to medical,  
10 scientific and other users. I am familiar with marketing conditions and sales efforts of my  
11 employer and its competitors. I am also familiar with the contracts (and related  
12 documentation) entered into with defendant Washington State University ("WSU") which  
13 are the subject of the Request for disclosure under the Washington Public Records Act at  
14 issue in this litigation.

15 3. Elsevier, Inc., does sales and marketing for its affiliated corporation, Elsevier,  
16 B.V., which is based in The Netherlands. These related companies (collectively referred to  
17 as "Elsevier") have a 124 year history and operate worldwide. Elsevier employs 8,000  
18 people in 24 countries and is the world's leading publisher of science and health information.  
19 It serves more than 30 million scientists, students, and health and information professionals  
20 worldwide.

21 4. Elsevier's primary business is providing information and services to scientific,  
22 technical, and medical professionals, and others. It has accumulated, working with 7,000  
23 journal editors, 70,000 editorial board members, 300,000 reviewers, and 600,000 authors  
24 publishing 2,000 journals, 19,000 books, and 2000-plus books each year, a vast library of  
25 medical and health information.

1           5.       While Elsevier has a leading market position, it also faces substantial  
2 alternative vendors in a competitive marketplace. Elsevier has achieved its preeminent  
3 market success, in significant part, by developing proprietary pricing methods and formulae.

4           6.       Elsevier publishes list prices for access to hundreds of medical journals and  
5 other periodical/research sources. However, Elsevier does not follow a "one size fits all"  
6 marketing strategy. Rather, it has over its long history developed pricing formulae and  
7 methods that allow it to flexibly meet the specific requirements of customers small and large,  
8 including the largest users such as major universities, including Washington State  
9 University.

10          7.       Elsevier's worldwide sales force consists of over 200 representatives. They  
11 are trained to negotiate with each customer and to tailor pricing and related terms and  
12 conditions to the particular customer's requirements. Contracts typically are for an annual  
13 (or other) period in which electronic and other access will be provided to a library that fits the  
14 user's needs. In so negotiating, representatives are often called upon to negotiate pricing  
15 adjustments, and to provide for modification to pricing terms during the term of the contract,  
16 in various circumstances (e.g., the cancellation, addition or substitution of access to specific  
17 journals or sources).

18          8.       In such negotiations, Elsevier representatives apply pricing formulae and  
19 methods which are not generally known (to our competitors or potential customers), which  
20 proprietary information reflects Elsevier's pricing/business methods and constitutes data  
21 unique to its products and services. Such information is an outgrowth of Elsevier's long  
22 experience developing and marketing its offerings and represents the valuable efforts of  
23 thousands of its employees over many decades.

24          9.       Elsevier has in substantial part achieved and is able to maintain its position  
25 as one of the world's largest providers of medical and scientific information because its

1 pricing methods and formulae, and their manifestation in the customer-specific pricing  
2 contained in individually negotiated contracts, are not generally known to its competitors,  
3 reflecting Elsevier's continuing efforts to maintain the confidentiality and secrecy of such  
4 valuable commercial information.

5 10. If Elsevier's pricing formulae and customer-specific pricing became a matter  
6 of public record, the result could be harm to both Elsevier and its customers, particularly  
7 larger customers such as WSU who typically have more complex and extensive  
8 requirements. Such disclosure could disadvantage Elsevier in that, if its pricing to customer  
9 X was known to customers Y and Z, the latter could demand the same pricing, without fully  
10 appreciating the unique circumstances that may apply and/or perhaps other commitments  
11 made by such customer that led to such price terms. In such circumstances, Elsevier would  
12 be under substantial competitive pressure to adopt a "one size/price fits all" marketing/sales  
13 approach.

14 11. That is, Elsevier's ability to particularize pricing to meet individual customers'  
15 needs and circumstances would be diminished. The flip-side would be likely damage to  
16 large customers, such as WSU, whose access to individually negotiated and advantageous  
17 pricing, that may be appropriate in view of greater use of a broader library and other specific  
18 needs and circumstances, could be curtailed.

19 12. On May 7, 2009, Elsevier received notice from WSU of a Public Records Act  
20 Request by Dr. Theodore Bergstrom. A true and correct copy of that Request is Exhibit A to  
21 this Declaration. The Request seeks disclosure of Elsevier-WSU contracts and related  
22 documentation. Disclosure of that material, in un-redacted form, would cause substantial  
23 and irreparable harm to Elsevier because it would reveal customer-specific pricing  
24 information and Elsevier's proprietary pricing formulae and methods, leading to private gain  
25  
26

1 to Elsevier's competitors, and to public loss to WSU and other large (typically public) users,  
2 for reasons discussed in prior paragraphs.

3 13. Elsevier has communicated with the requester, Dr. Bergstrom, offering to  
4 produce all requested materials in un-redacted form, subject only to proper confidentiality  
5 provisions. A true and correct copy of that request is Exhibit B to this Declaration. Elsevier  
6 believes that this approach could facilitate Dr. Bergstrom's contemplated research project,  
7 while protecting Elsevier's proprietary pricing formula and methods.

8 14. Dr. Bergstrom, however, rejected Elsevier's proposal on June 8, 2009.

9 15. Elsevier has therefore started this action. It has no objection to release of the  
10 Elsevier-WSU contracts and related documentation, including total contract pricing and list  
11 prices, but seeks to redact confidential and protected pricing terms. A copy of the requested  
12 materials, in a properly redacted form, is attached as Exhibit 1 to the proposed forms of  
13 order submitted to the Court with this motion.

### 14 III. ISSUES PRESENTED

15 1. Does Elsevier have a clear legal right to protect the confidentiality of  
16 proprietary pricing data, formulae and methods that would be disclosed by WSU's release of  
17 portions of documents sought by the Request?

18 2. Does Elsevier have a well-grounded fear of an immediate invasion of that  
19 right?

20 3. Will the disclosure of the documents sought by the Request in an un-redacted  
21 form result in actual and substantial harm to Elsevier?

22 4. Is it likely that Elsevier will prevail on the merits, so that a preliminary  
23 injunction is proper?

24 5. In the absence of disputed fact issues, is a permanent injunction properly  
25 issued now?

1 IV. AUTHORITY AND ARGUMENT

2 Each of the required elements supports Elsevier's request for preliminary and/or  
3 permanent injunctive relief.

4 A. WASHINGTON PUBLIC POLICY IS EXPRESSLY PROTECTIVE OF  
5 TRADE SECRETS AND OTHER CONFIDENTIAL COMMERCIAL  
6 INFORMATION.

7 There is a strong public policy in Washington against the disclosure of not only trade  
8 secrets, but other information that may be categorized as "competition sensitive." RCW  
9 4.24.601 provides:

10 The legislature also recognizes that protection of trade secrets, other  
11 confidential research, development, or commercial information concerning  
12 products or business methods promotes business activity and prevents unfair  
13 competition. Therefore, the legislature declares it a matter of public policy  
14 that the confidentiality of such information be protected and its unnecessary  
15 disclosure be prevented.

16 (Emphasis added).

17 RCW 4.24.611 states it affirmatively:

18 . . .

19 (3) Except as provided in subsection (4) of this section, members of the  
20 public have a right to the protection of trade secrets as defined in RCW  
21 19.108.010, other confidential research, development, or commercial  
22 information concerning products or business methods.

23 (Emphasis added).

24 The Washington State Public Records Act (the "PRA"), Chapter 42.56 RCW, echoes  
25 this policy of protecting competition-sensitive information. The very first section of the Public  
26 Records Act granting right to disclosure, RCW 42.56.070, recognizes the existence of  
27 exemptions:

28 (1) Each agency . . . shall make available for public inspection and  
29 copying all public records, unless the record falls within the specific

1       exemptions of subsection (6) of this section, this chapter, or other statute  
2       which exempts or prohibits disclosure of specific information or records.<sup>1</sup>

3       (Emphasis added).

4       Against this policy backdrop, we develop the specific statutory bases that exempt  
5       from disclosure, Elsevier's proprietary pricing data, formulae and methods that are reflected  
6       in customer-specific and individually negotiated pricing terms set forth in the Elsevier-WSU  
7       documents covered by the Request.

8       The PRA mandates the disclosure of public records.<sup>2</sup> The PRA recognizes there is a  
9       balance between the interest of the public to remain informed and to control the instruments  
10      the public has created, and the interest of the individual citizen in protecting his or her  
11      privacy rights. A corporation similarly has an interest in privacy protections in the spirit of  
12      fair and open competition.

13      This balance is reflected in the PRA's hundreds of exemptions which are further  
14      supplemented by other statutes. See RCW 42.53.210 *et seq.*, especially RCW 42.56.510  
15      ("Nothing in RCW 42.56.250 and 42.56.330 shall affect a positive duty of an agency to  
16      disclose or a positive duty to withhold information which duty to disclose or withhold is  
17      contained in any other law."). The exemptions most relevant to the Elsevier-WSU contract  
18      documents are subparts (1) and (11) of RCW 42.56.270 ("Financial, Commercial, and  
19      Proprietary Information," a copy of which is Exhibit A hereto). They pertinently state:

20      The following financial, commercial, and proprietary information is exempt  
21      from disclosure under this chapter:

22      <sup>1</sup> The Uniform Trade Secrets Act (USTA), RCW Ch. 19.108, qualifies as one such "other statute".  
23      See *Evergreen Freedom Foundation v. Locke*, 127 Wn. App. 243, 248, 904 P.2d 1124 (2005),  
24      citing *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 250, 884  
25      P.2d 592 (1994).

26      <sup>2</sup> RCW 42.56.010 states: "Public record" includes any writing containing information relating to the  
conduct of government or the performance of any governmental or proprietary function prepared,  
owned, used, or retained by any state or local agency regardless of physical form or  
characteristics.

1 (1) Valuable formulae, designs, drawings, computer source code or  
2 object code, and research data obtained by any agency within five years of  
3 the request for disclosure when disclosure would produce private gain and  
4 public loss;

5 ...

6 (11) Proprietary data, trade secrets, or other information that relates to: (a) A  
7 vendor's unique methods of conducting business; (b) data unique to the  
8 product or services of the vendor ....

9 Each exemption is discussed in detail below.

10 **B. PROPRIETARY PRICING FORMULAE AND DATA REFLECTED IN THE**  
11 **ELSEVIER-WSU CONTRACT DOCUMENTS ARE EXEMPT UNDER RCW**  
12 **42.56.270(1).**

13 In interpreting an earlier iteration of RCW 42.56.270(1), the Supreme Court of  
14 Washington held that the clear purpose of the exemption is to prevent private persons from  
15 using the PRA to appropriate potentially valuable intellectual property for private gain.  
16 *Progressive Animal Welfare Soc'y v. U of W*, 125 Wn.2d 243, 255, 884 P.2d 592 (1994).  
17 Although the terms "valuable formulae" and "research data" have not been defined within  
18 the PRA, the Supreme Court of Washington provided an expansive definition in *Servais v.*  
19 *Port of Bellingham*, 127 Wn.2d 820, 904 P.2d 1124 (1995):

20 We define "research data" as "a body of facts and information collected for a  
21 specific purpose and derived from close, careful study, or from scholarly or  
22 scientific investigation or inquiry."

23 ...The term "research data" must then be limited by the question whether  
24 private gain and public loss would result if the requested documents were  
25 disclosed.

26 *Id.* at 832.

Here, WSU, in keeping with its educational purposes, has negotiated contracts with  
Elsevier to provide its scholastic community with access to hundreds of scientific  
publications. Those contracts reflect specifically negotiated pricing subject to modification  
according to specified and proprietary formulae. The issues are thus whether (a) these



1 customer-specific pricing provisions reflecting Elsevier's proprietary pricing methods qualify  
2 as "valuable formulae" and "research data", as to which (b) disclosure would create an  
3 opportunity for private gain and public loss.

4 Addressing the "valuable formulae" and "research data" issues, the *Servais* court  
5 held that a cash flow analysis created for the Port of Bellingham should not be disclosed.  
6 The trial court made several findings of fact that are analogous to our case:

- 7 1. That the data withheld by the Port of Bellingham is financial data.
- 8 2. That the Port of Bellingham commissioned this data in order to  
9 provide for a public gain; (a) namely, to negotiate from a position of a  
10 well-informed landlord; and (b) to have the necessary information to  
11 value the expected long-term leases.
- 12 3. That any [well-informed landlord] would keep this type of information  
13 private and confidential so that it could deal from its own position of  
14 strength.

15 127 Wn.2d at 825 (emphasis added).

16 Here, the unique pricing provisions and proprietary pricing formulae in the WSU-  
17 Elsevier contracts are also financial data. Like the Port of Bellingham, WSU entered into  
18 these contracts for public gain, i.e., for advantageous access to academic research based  
19 on specifically negotiated price terms and conditions. Having secured that benefit, WSU's  
20 advantage in further or subsequent purchases of such services could be ill-served by an  
21 unrestricted disclosure.

22 This brings us to the matter of private gain and public loss. In another contract case,  
23 an advocacy organization was precluded from un-redacted access to the contract  
24 agreement between the Department of Community, Trade and Economic Development, and  
25 the Boeing Company. *Evergreen Freedom Foundation v. Locke*, 127 Wn. App. 243, 110  
26 P.3d 858 (2005). The court held to be exempt, as confidential financial or proprietary  
information and valuable formulae, contract aspects such as Boeing's needs to effectuate

1 the goals of the agreement, specifications for its design and consultation needs, and  
2 anticipated costs of project components. Citing to *Servais*, supra, the court held that:

3 Public release of these details could arguably lead to private gain and public  
4 loss. Private parties could interfere with, or compete with, project plans to  
5 benefit their own company. Such private interference would, in turn, harm  
6 the public if it compromised the viability of the Department's agreement with  
7 Boeing. Thus, the trial court did not err in allowing the Department's redaction  
8 of these documents under this statute.

9 Again, by analogy, should the customer-specific pricing provisions in the Elsevier-  
10 WSU contracts be disclosed without redaction, such public disclosure of Elsevier's pricing  
11 formulae could limit its ability to accommodate the particular requirements of large  
12 customers such as WSU. See Tonna Declaration. That is, it could be forced into more  
13 nearly a "one size fits all" pricing methodology. This could disadvantage both Elsevier (in  
14 reducing its ability to compete by accommodating customers' individual circumstances) and  
15 large users such as WSU with more complex requirements, and consequently produce both  
16 private gain for its competitors and public loss.

17 **C. ELSEVIER-WSU CUSTOMER-SPECIFIC PRICING TERMS ARE EXEMPT**  
18 **AS RCW 42.56.270(11) PROPRIETARY DATA, TRADE SECRETS, OR**  
19 **OTHER INFORMATION.**

20 Just as the terms "valuable formulae" and "research data" have not been defined  
21 within the PRA, the meaning of "proprietary data, trade secrets, or other information" has not  
22 been defined within that statute. Nonetheless, proprietary data and trade secrets have been  
23 defined within the Washington Uniform Trade Secret Act ("UTSA"). Under the UTSA:

24 (4) "Trade secret" means information, including a formula, pattern,  
25 compilation, program, device, method, technique, or process that:

26 (a) Derives independent economic value, actual or potential, from not  
being generally known to, and not being readily ascertainable by  
proper means by, other persons who can obtain economic value  
from its disclosure or use; and

1 (b) Is the subject of efforts that are reasonable under the  
2 circumstances to maintain its secrecy.

3 RCW 19.108.010

4 As developed in § IV.D below, withholding Elsevier's pricing formulae reflected in  
5 pricing terms of its contracts with WSU, is appropriate under the trade secret exception.  
6 But, a prior point is that the RCW 42.56.270(11) exemption protects commercial information  
7 that may not qualify as a trade secret, i.e., it broadens what is already a broad protection for  
8 trade secrets in Washington. Specifically, it pertinently protects:

9 Proprietary data, trade secrets, or other information that relates to: (a) a  
10 Vendor's unique methods of conducting business; (b) data unique to the  
11 product or services of the vendor; ....

12 (Emphasis added.)

13 As the Tonna Declaration develops, Elsevier's proprietary pricing formulae—and  
14 associated flexibility allowing it to accommodate the individual requirements of large (and  
15 small) users such as WSU—reflect its unique methods of conducting business, producing  
16 price data unique to its product and services. Thus, exemption under RCW 42.56.270 is  
17 proper.

18 **D. THE UTSA PROVIDES AN INDEPENDENT/ADDITIONAL BASIS FOR**  
19 **PROTECTING ELSEVIER'S PRICING FORMULAE AND METHODS.**

20 Here, as the Tonna Declaration also develops, the Request effectively seeks (in the  
21 words of UTSA 19.108.10(4)) pricing "information, including a formula, pattern, compilation,  
22 ... [and] process" that "[d]erives independent economic value, actual or potential, from not  
23 being generally known to ... other persons who can obtain economic value from its  
24 disclosure or use", and which "is the subject of efforts that are reasonable under the  
25 circumstances to maintain its secrecy." Specifically, the Elsevier-WSA's customer-specific  
26 pricing terms/formulae are not readily ascertainable from another source. They are  
proprietary to Elsevier, reflecting years of substantial intellectual and financial investment in

1 the publishing world, the value of which is reflected by Elsevier's market preeminence and  
2 successful 124 year history.

3 Consequently, protection is independently proper under the UTSA which qualifies as  
4 an "other statute" allowing exemption from disclosure under the PDA. See RCW 42.56.510;  
5 *Progressive Animal Welfare Soc'y*, supra; *Evergreen Freedom Foundation*, supra. As the  
6 *Evergreen* court stated:

7 Arguably, the redacted information would fall under this exception ... It  
8 discusses and details the program components that Boeing is clearly  
9 attempting to keep confidential. And the disclosure of certain program details  
10 could potentially make the overall Agreement less profitable and less viable.  
11 But having determined that the Department was exempt from disclosing the  
12 remaining disputed portions of the Agreement under [earlier exemptions], we  
13 do not rely on the UTSA to affirm the trial court's decision on the propriety of  
14 the redactions.

11 **E. A PRELIMINARY OR PERMANENT INJUNCTION SHOULD BE ENTERED.**

12 RCW 7.40.010 provides that when it appears that a party is entitled to relief  
13 demanded and the relief "assists in restraining the commission or continuance of some act,"  
14 which would "produce great injury to the plaintiff," an injunction may be entered. Similarly  
15 CR 65 allows the court to grant preliminary and/or permanent injunctive relief. Additionally,  
16 such relief is expressly provided for in the UTSA:

17 The examination of any specific public record may be enjoined if, upon  
18 motion and affidavit by an agency or its representative or a person who is  
19 named in the record or to whom the record specifically pertains, the superior  
20 court for the county in which the movant resides or in which the record is  
21 maintained, finds that such examination would clearly not be in the public  
22 interest and would substantially and irreparably damage any person, or would  
23 substantially and irreparably damage vital governmental functions. An agency  
24 has the option of notifying persons named in the record or to whom a record  
25 specifically pertains, that release of a record has been requested. However,  
26 this option does not exist where the agency is required by law to provide such  
notice.

23 RCW 42.56.540.

24 (1) Actual or threatened misappropriation may be enjoined. Upon application  
25 to the court, an injunction shall be terminated when the trade secret has  
26 ceased to exist, but the injunction may be continued for an additional

1 reasonable period of time in order to eliminate commercial advantage that  
2 otherwise would be derived from the misappropriation.

3 RCW 19.108.020.

4 While injunctive relief is an "extraordinary" remedy, a party seeking relief by  
5 preliminary or permanent injunction is entitled to such relief if it can demonstrate (1) that it  
6 has a clear legal or equitable right, (2) that it has a well-grounded fear of immediate invasion  
7 of that right, and (3) that the acts complained of are either resulting in or will result in actual  
8 and substantial injury. *Tyler Pipe Industries Inc. v. State Department of Revenue*, 96 Wn.2d  
9 785, 792, 638 P.2d 1213 (1982). The purpose of a preliminary injunction is to preserve the  
10 status quo, preventing a complaining party from suffering harm during the pendency of the  
11 litigation. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir.  
12 1984).

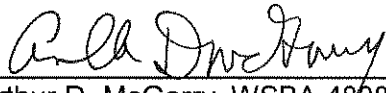
### 13 V. CONCLUSION

14 The court should enter a preliminary, or permanent, injunction in the form proposed  
15 by Elsevier.

16 DATED this 9th day of June, 2009.

17 OLES MORRISON RINKER & BAKER LLP

18  
19 By

  
20 Arthur D. McGarry, WSBA 4808  
21 Hillary A. Madsen, WSBA 41038  
22 Attorneys for Elsevier, Inc.  
23  
24  
25  
26

**42.56.250 Employment and licensing.** The following employment and licensing information is exempt from public inspection and copying under this chapter:

(1) Test questions, scoring keys, and other examination data used to administer a license, employment, or academic examination;

(2) All applications for public employment, including the names of applicants, resumes, and other related materials submitted with respect to an applicant;

(3) The residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, and emergency contact information of employees or volunteers of a public agency, and the names, dates of birth, residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, and emergency contact information of dependents of employees or volunteers of a public agency that are held by any public agency in personnel records, public employment related records, or volunteer rosters, or are included in any mailing list of employees or volunteers of any public agency. For purposes of this subsection, "employees" includes independent provider home care workers as defined in RCW 74.39A.240;

(4) Information that identifies a person who, while an agency employee: (a) Seeks advice, under an informal process established by the employing agency, in order to ascertain his or her rights in connection with a possible unfair practice under chapter 49.60 RCW against the person; and (b) requests his or her identity or any identifying information not be disclosed;

(5) Investigative records compiled by an employing agency conducting a current investigation of a possible unfair practice under chapter 49.60 RCW or of a possible violation of other federal, state, or local laws prohibiting discrimination in employment; and

(6) Except as provided in RCW 47.64.220, salary and employee benefit information collected under RCW 47.64.220(1) and described in RCW 47.64.220(2). [2006 c 209 § 6; 2005 c 274 § 405.]

**42.56.260 Real estate appraisals.** Except as provided by chapter 8.26 RCW, the contents of real estate appraisals, made for or by any agency relative to the acquisition or sale of property, until the project or prospective sale is abandoned or until such time as all of the property has been acquired or the property to which the sale appraisal relates is sold, are exempt from disclosure under this chapter. In no event may disclosure be denied for more than three years after the appraisal. [2005 c 274 § 406.]

**42.56.270 Financial, commercial, and proprietary information.** The following financial, commercial, and proprietary information is exempt from disclosure under this chapter:

(1) Valuable formulae, designs, drawings, computer source code or object code, and research data obtained by any agency within five years of the request for disclosure when disclosure would produce private gain and public loss;

(2) Financial information supplied by or on behalf of a person, firm, or corporation for the purpose of qualifying to

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submit a bid or proposal for (a) a ferry system construction or repair contract as required by RCW 47.60.680 through 47.60.750 or (b) highway construction or improvement as required by RCW 47.28.070;

(3) Financial and commercial information and records supplied by private persons pertaining to export services provided under chapters 43.163 and 53.31 RCW, and by persons pertaining to export projects under RCW 43.23.035;

(4) Financial and commercial information and records supplied by businesses or individuals during application for loans or program services provided by chapters 43.325, 43.163, 43.160, 43.330, and 43.168 RCW, or during application for economic development loans or program services provided by any local agency;

(5) Financial information, business plans, examination reports, and any information produced or obtained in evaluating or examining a business and industrial development corporation organized or seeking certification under chapter 31.24 RCW;

(6) Financial and commercial information supplied to the state investment board by any person when the information relates to the investment of public trust or retirement funds and when disclosure would result in loss to such funds or in private loss to the providers of this information;

(7) Financial and valuable trade information under RCW 51.36.120;

(8) Financial, commercial, operations, and technical and research information and data submitted to or obtained by the clean Washington center in applications for, or delivery of, program services under chapter 70.95H RCW;

(9) Financial and commercial information requested by the public stadium authority from any person or organization that leases or uses the stadium and exhibition center as defined in RCW 36.102.010;

(10)(a) Financial information, including but not limited to account numbers and values, and other identification numbers supplied by or on behalf of a person, firm, corporation, limited liability company, partnership, or other entity related to an application for a horse racing license submitted pursuant to RCW 67.16.260(1)(b), liquor license, gambling license, or lottery retail license;

(b) Internal control documents, independent auditors' reports and financial statements, and supporting documents: (i) Of house-banked social card game licensees required by the gambling commission pursuant to rules adopted under chapter 9.46 RCW; or (ii) submitted by tribes with an approved tribal/state compact for class III gaming;

(11) Proprietary data, trade secrets, or other information that relates to: (a) A vendor's unique methods of conducting business; (b) data unique to the product or services of the vendor; or (c) determining prices or rates to be charged for services, submitted by any vendor to the department of social and health services for purposes of the development, acquisition, or implementation of state purchased health care as defined in RCW 41.05.011;

(12)(a) When supplied to and in the records of the department of community, trade, and economic development:

(i) Financial and proprietary information collected from any person and provided to the department of community,

[Title 42 RCW—page 93]

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trade, and economic development pursuant to RCW 43.330.050(8); and

(ii) Financial or proprietary information collected from any person and provided to the department of community, trade, and economic development or the office of the governor in connection with the siting, recruitment, expansion, retention, or relocation of that person's business and until a siting decision is made, identifying information of any person supplying information under this subsection and the locations being considered for siting, relocation, or expansion of a business;

(b) When developed by the department of community, trade, and economic development based on information as described in (a)(i) of this subsection, any work product is not exempt from disclosure;

(c) For the purposes of this subsection, "siting decision" means the decision to acquire or not to acquire a site;

(d) If there is no written contact for a period of sixty days to the department of community, trade, and economic development from a person connected with siting, recruitment, expansion, retention, or relocation of that person's business, information described in (a)(ii) of this subsection will be available to the public under this chapter;

(13) Financial and proprietary information submitted to or obtained by the department of ecology or the authority created under chapter 70.95N RCW to implement chapter 70.95N RCW;

(14) Financial, commercial, operations, and technical and research information and data submitted to or obtained by the life sciences discovery fund authority in applications for, or delivery of, grants under chapter 43.350 RCW, to the extent that such information, if revealed, would reasonably be expected to result in private loss to the providers of this information;

(15) Financial and commercial information provided as evidence to the department of licensing as required by RCW 19.112.110 or 19.112.120, except information disclosed in aggregate form that does not permit the identification of information related to individual fuel licensees;

(16) Any production records, mineral assessments, and trade secrets submitted by a permit holder, mine operator, or landowner to the department of natural resources under RCW 78.44.085;

(17)(a) Farm plans developed by conservation districts, unless permission to release the farm plan is granted by the landowner or operator who requested the plan, or the farm plan is used for the application or issuance of a permit;

(b) Farm plans developed under chapter 90.48 RCW and not under the federal clean water act, 33 U.S.C. Sec. 1251 et seq., are subject to RCW 42.56.610 and 90.64.190;

(18) Financial, commercial, operations, and technical and research information and data submitted to or obtained by a health sciences and services authority in applications for, or delivery of, grants under RCW 35.104.010 through 35.104.060, to the extent that such information, if revealed, would reasonably be expected to result in private loss to providers of this information; and

(19) Information gathered under chapter 19.85 RCW or RCW 34.05.328 that can be identified to a particular business. [2008 c 306 § 1. Prior: 2007 c 470 § 2; (2007 c 470 § 1 expired June 30, 2008); 2007 c 251 § 13; (2007 c 251 § 12

expired June 30, 2008); 2007 c 197 § 4; (2007 c 197 § 3 expired June 30, 2008); prior: 2006 c 369 § 2; 2006 c 341 § 6; 2006 c 338 § 5; 2006 c 302 § 12; 2006 c 209 § 7; 2006 c 183 § 37; 2006 c 171 § 8; 2005 c 274 § 407.]

**Effective date—2008 c 306 § 1:** "Section 1 of this act takes effect June 30, 2008." [2008 c 306 § 2.]

**Effective date—2007 c 470 § 2:** "Section 2 of this act takes effect June 30, 2008." [2007 c 470 § 4.]

**Expiration date—2007 c 470 § 1:** "Section 1 of this act expires June 30, 2008." [2007 c 470 § 3.]

**Effective date—2007 c 251 § 13:** "Section 13 of this act takes effect June 30, 2008." [2007 c 251 § 18.]

**Expiration date—2007 c 251 § 12:** "Section 12 of this act expires June 30, 2008." [2007 c 251 § 17.]

**Captions not law—Severability—2007 c 251:** See notes following RCW 35.104.010.

**Effective date—2007 c 197 § 4:** "Section 4 of this act takes effect June 30, 2008." [2007 c 197 § 11.]

**Expiration date—2007 c 197 § 3:** "Section 3 of this act expires June 30, 2008." [2007 c 197 § 10.]

**Effective date—2006 c 369 § 2:** "Section 2 of this act takes effect July 1, 2006." [2006 c 369 § 3.]

**Effective date—2006 c 341 § 6:** "Section 6 of this act takes effect July 1, 2006." [2006 c 341 § 7.]

**Findings—Intent—2006 c 338:** See note following RCW 19.112.110.

**Effective date—Severability—2006 c 338:** See RCW 19.112.903 and 19.112.904.

**Effective date—2006 c 302 §§ 10 and 12:** See note following RCW 66.28.180.

**Construction—Severability—Effective date—2006 c 183:** See RCW 70.95N.900 through 70.95N.902.

**Effective date—2006 c 171 §§ 8 and 10:** "Sections 8 and 10 of this act take effect July 1, 2006." [2006 c 171 § 13.]

**Findings—Severability—2006 c 171:** See RCW 43.325.001 and 43.325.901.

**42.56.280 Preliminary drafts, notes, recommendations, intra-agency memorandums.** 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. [2005 c 274 § 408.]

**42.56.290 Agency party to controversy.** Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts are exempt from disclosure under this chapter. [2005 c 274 § 409.]

**42.56.300 Archaeological sites.** (1) Records, maps, or other information identifying the location of archaeological sites in order to avoid the looting or depredation of such sites are exempt from disclosure under this chapter.

(2) Records, maps, and other information, acquired during watershed analysis pursuant to the forests and fish report under RCW 76.09.370, that identify the location of archaeological sites, historic sites, artifacts, or the sites of traditional religious, ceremonial, or social uses and activities of affected Indian tribes, are exempt from disclosure under this chapter