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**SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THURSTON COUNTY**

FREEDOM FOUNDATION, a Washington  
nonprofit organization,

Plaintiff,

v.

ROBERT FERGUSON, Washington Attorney  
General, and the Washington State OFFICE OF  
THE ATTORNEY GENERAL,

Defendant.

No.

**COMPLAINT FOR PUBLIC  
RECORDS ACT VIOLATIONS,  
CHAPTER 42.56 RCW**

**INTRODUCTION**

1. Defendants Washington Attorney General Bob Ferguson and the Washington Office of Attorney General are violating Washington’s Public Records Act, Chapter 42.56 RCW (“PRA”), to cover up a relationship between the Office of the Attorney General (Defendants collectively referred to as “AGO”) and the Departments of Justice of two other

1 states, as well as two powerful, private, politically active unions: the Service Employees  
2 International Union and the American Federation of County, State, and Municipal  
3 Employees. This relationship also includes the law firm of Altshuler Berzon LLP.

- 4 2. Plaintiff Freedom Foundation (“Foundation”) made two different PRA requests, the first  
5 of which sought records possessed by the AGO which contained the term “Janus.”<sup>1</sup> The  
6 AGO produced several highly redacted emails between the AGO and the third parties  
7 mentioned above. The AGO wrongly claims the attorney work product privilege exempts  
8 the contents of the emails from disclosure due to the “Common Interest Defense Doctrine.”  
9 Several emails included a reference in the subject line to a “confidential common interest  
10 agreement.”
- 11 3. The Foundation subsequently submitted a second PRA request for a copy of the “Common  
12 Interest Agreement,” but the AGO *withheld the entire agreement*, again claiming it was  
13 exempt from disclosure under the Common Interest Defense Doctrine.
- 14 4. The AGO violated the PRA by withholding the entire “Common Interest Agreement,”  
15 redacting entire emails, and failing to actually explain why the Common Interest Defense  
16 Doctrine applies or what possible “common interest” the AGO could possibly have with  
17 two of the most powerful and politically active unions in the United States.
- 18 5. The Common Interest Defense Doctrine does not apply and, even if it did, it would not  
19 exempt the entire Common Interest Agreement from disclosure or justify the redaction of  
20 entire emails. Defendants Bob Ferguson and the AGO are illegally ignoring the PRA to  
21 hide a political relationship between two powerful special interest groups. This Court  
22 should order the records to be disclosed immediately.

23  
24 <sup>1</sup> See *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018).

1 **PARTIES**

2 6. Plaintiff Freedom Foundation is a non-profit organization in the State of Washington.

3 7. The Office of the Attorney General is an agency of the State of Washington subject to the  
4 Public Records Act pursuant to RCW 42.56.010(1) and possesses the requested documents  
5 in Thurston County, Washington.

6 8. Defendant Washington Attorney General Bob Ferguson is the head of the Washington  
7 Office of the Attorney General and is sued in his official capacity.

8 **JURISDICTION AND VENUE**

9 9. This Court has jurisdiction pursuant to RCW 42.56.550.

10 10. Venue is appropriate in Thurston County pursuant to RCW 42.56.550.

11 **FACTS**

12 **A. The Foundation’s Public Records Requests**

13 11. On June 29, 2018, the Foundation submitted a request for the following records pursuant  
14 to the Public Records Act (“PRA”), Chapter 42.56 RCW, to the AGO (“Request 1”):

15 Any documents, emails or other records containing the term “Janus”  
16 that have been created or received by the Office of the Attorney  
General on or after June 27, 2018.

17 12. In response, the AGO produced a number of documents, including three pages of highly  
18 redacted emails. Some unredacted email subject lines referenced a “confidential common  
19 interest agreement.” The email senders and recipients included employees of the AGO, the  
20 law firm Altshuler Berzon LLP, the California Department of Justice, the Oregon  
21 Department of Justice, the Service Employees International Union, and the American  
22 Federation of State, County and Municipal Employees. The content of the emails was  
23 almost completely redacted.  
24

1 13. The AGO claimed the redactions were authorized by RCW 42.56.290, which reads:

2 Records that are relevant to a controversy to which an agency is a  
3 party but which records would not be available to another party  
4 under the rules of pretrial discovery for causes pending in the  
5 superior courts are exempt from disclosure under this chapter.

6 14. The AGO claimed the redacted email text was not subject to disclosure due to “Attorney  
7 Work Product Privilege – Common Interest or Joint Defense Protection.”

8 15. On October 23, 2018, the Foundation issued a second public records request to the AGO  
9 pursuant to the PRA, Chapter 42.56 RCW, requesting (“Request 2”):

10 A copy of the common interest agreement involving (1) the  
11 Washington Office of the Attorney General, (2) the Oregon  
12 Department of Justice, (3) the California Department of Justice, (4)  
13 the Service Employees International Union (SEIU), (5) the  
14 American Federation of State, County and Municipal Employees  
15 (AFSCME), and (6) Altshuler Berzon LLP.

16 16. On November 19, 2018, the AGO completely denied Request 2, admitting the existence of  
17 the Common Interest Agreement but refusing to produce even a redacted version. The  
18 AGO again cited RCW 42.56.290 as justification for its lack of disclosure.

19 17. The AGO claimed RCW 42.56.290 protects “attorney work product, communication  
20 between attorneys that reveals opinions or mental impression of attorney, or information  
21 prepared, collected, or assembled in litigation or in anticipation of litigation.”

22 18. On November 20, 2018, the Foundation requested a “review of denial” under the AGO’s  
23 rules, WAC 44-06-120, pointing out the following:

- 24
- a. The PRA is to be “liberally construed and its exemptions narrowly construed.”  
RCW 42.56.030.
  - b. RCW 42.56.100 requires agencies to “provide for the fullest assistance to  
inquirers.”

1 c. Specific parameters in the PRA regarding the disclosure of material prepared by  
2 attorneys, RCW 42.56.904, states that

3 ...specific descriptions of work performed [may] be redacted only  
4 if they would reveal an attorney’s mental impressions, actual legal  
5 advice, theories, or opinions...with the burden upon the public  
6 entity to justify each redaction and narrowly construe any exception  
7 to full disclosure.

8 19. The Foundation also informed the AGO that it is “hard to believe that there is nothing in  
9 the document other than attorneys’ legal opinions. At a minimum, things like the title of  
10 the document, a listing of parties to the agreement, the date it was executed, etc., should all  
11 be subject to disclosure.”

12 20. On December 14, 2018, the AGO completely denied Request 2, again withholding the  
13 entire Common Interest Agreement and again citing RCW 42.56.290 and adding that  
14 “[w]ho may be [] parties to a common interest agreement and to potential litigation, what  
15 interest they may or may not share, how they choose to collaborate, etc. reflect the attorney  
16 strategy regarding potential litigation. For these reasons, the record is privileged and will  
17 be withheld.”

18 **B. The AGO’s Common Interest Defense**

19 21. The emails produced pursuant to Request 1 indicate they were sent between individuals at  
20 several different entities, including: the Washington AGO, the California Department of  
21 Justice, the Oregon Department of Justice, Service Employees International Union, the  
22 American Federation of State, County and Municipal Employees, and the law firm of  
23 Altshuler Berzon LLP.

24 22. The AGO claims the emails produced pursuant to Request 1 are protected by the work  
product privilege under the common interest doctrine, which is an exception to the general

1 rule that the voluntary disclosure of a privileged attorney-client or work product  
2 communication to a third party waives the privilege.

3 23. The email communications are clearly between the AGO and third parties. Thus, the  
4 legality of the AGO's redaction of the text in the emails depends upon the validity of the  
5 AGO's appeal to the common interest doctrine as it is applied under RCW 42.56.290.

6 24. Similarly, the emails indicate that the Common Interest Agreement responsive to Request  
7 2 was sent between the AGO and third parties and is, indeed, an agreement between the  
8 AGO and third parties.

9 25. Thus, the legality of the AGO's wholesale withholding of the entire Common Interest  
10 Agreement also depends upon the validity of the AGO's appeal to the common interest  
11 doctrine as it is applied under RCW 42.56.290.

12 26. The common interest (or joint defense) privilege applies only where: (1) The  
13 communication was made by separate parties in the course of a matter of common interest  
14 or joint defense; (2) the communication was designed to further that effort; and (3) the  
15 privilege has not been waived. *Kittitas County v. Allphin*, 135 Wn. App. 355, 368, 381 P.3d  
16 1202 (2016).

17 27. If the AGO withholds or redacts information from requested records, it is required to  
18 explain each withholding or redaction in writing, identify the statute allowing for such  
19 redaction or withholding, explain how such statute applied to the record in question, and  
20 provide a detailed withholding index as described by *Progressive Animal Welfare Society*  
21 *v. University of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1995) and *Rental Housing*  
22 *Ass'n of Puget Sound, v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009).

1 28. The AGO cited RCW 42.56.290 and the common interest doctrine to justify its redaction  
2 of the emails and complete withholding of the Common Interest Agreement, but did not  
3 explain how or why the common interest doctrine applies to the requested records.

4 29. The AGO did not explain what common interest or common defense the AGO could  
5 possibly have with the Justice Departments of multiple other states, a private law firm, and  
6 private labor organizations. Neither did the AGO explain why the redacted  
7 communications or withheld Common Interest Agreement further that common interest or  
8 common defense.

9 **CAUSES OF ACTION – VIOLATIONS OF THE PUBLIC RECORDS ACT**

10 30. Plaintiff realleges the preceding paragraphs and incorporates them by reference here.

11 31. Defendants are an agency of the State of Washington subject to the Public Records Act  
12 pursuant to RCW 42.56.010(1).

13 32. The records requested in Requests 1-2 are public records as defined by RCW 42.56.010(3)  
14 because they are writings containing information relating to the conduct of government or  
15 the performance of any governmental function and were prepared, owned, used, or retained  
16 by Defendants.

17 33. The requested records are subject to production unless exempt from disclosure under a  
18 specific statute. RCW 42.56.010.

19 34. If Defendants withhold or redact information from requested records, they is required to  
20 explain each withholding or redaction in writing, identify the statute allowing for such  
21 redaction or withholding, explain how such statute applied to the record in question, and  
22 provide a detailed withholding index as described by *Progressive Animal Welfare Society*  
23 *v. University of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1995) and *Rental Housing*  
24

1 *Ass'n of Puget Sound, v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009).

2 35. RCW 42.56.550 provides that any person having been denied an opportunity to inspect or  
3 copy a public record by an agency, the Superior Court in the county in which a record is  
4 maintained may require the responsible agency to show cause why it has refused to allow  
5 inspection or copying of a specific public record or class of records. The burden of proof  
6 is on the agency to establish that refusal to disclose is in accordance with a statute that  
7 exempts or prohibits disclosure of specific information on records.

8 **CLAIM I**

9 ***Defendant violated the PRA by redacting portions of***  
10 ***emails requested by the Foundation in Request 1.***

11 36. Plaintiff realleges all preceding paragraphs and incorporates them here by reference.

12 37. Defendants violated the PRA by redacting portions of emails responsive to Request 1  
13 without adequately explaining how the statute they claim exempts the redacted records  
14 from disclosure actually applies.

15 38. Defendants also violated the PRA by redacting records that are not exempt from disclosure  
16 under the PRA.

17 **CLAIM 2**

18 ***Defendants violated the PRA by withholding public records***  
19 ***requested by the Foundation in Request 2.***

20 39. Plaintiff realleges all preceding paragraphs and incorporates them here by reference.

21 40. Defendants violated the PRA by withholding the Common Interest Agreement requested  
22 by the Foundation in Request 2 because they did not adequately explain how the statute it  
23 claims exempts the record from disclosure actually applies.

24 41. Defendants also violated the PRA by withholding the Common Interest Agreement because



1 it is not exempt from disclosure under the PRA.

2 **PRAYER FOR RELIEF**

3 WHEREFORE, Plaintiff Freedom Foundation prays for judgment against Defendants as  
4 follows:

5 42. Order Defendants to promptly provide Plaintiffs the records requested in its PRA requests  
6 described herein (Request 1-2);

7 43. Issue an injunction prohibiting Defendants from failing to provide Plaintiffs with requested  
8 records based on RCW 42.56.290 or any other exemption Defendants claim in this case;

9 44. Award Plaintiff Freedom Foundation all costs, including reasonable attorneys' fees  
10 incurred in connection with this action and efforts to obtain the records, as provided in  
11 RCW 42.56.550(4);

12 45. Award Plaintiff Freedom Foundation monetary penalties pursuant to RCW 42.56.550(4)  
13 of \$100 per page per day from the date of the request until the date Defendants provide all  
14 the requested records in unredacted form or with redactions as approved by the Court after  
15 evaluating claimed exemptions and in camera review;

16 46. Other such relief as the Court deems just.

17 Respectfully submitted this 14th day of February, 2019.

18  
19 By: 

20 James G. Abernathy, WSBA #48801  
21 c/o Freedom Foundation  
22 P.O. Box 552 Olympia, WA 98507  
23 p. 360.956.3482 f. 360.352.1874  
24 jabernathy@freedomfoundation.com

1 **DECLARATION OF SERVICE**

2 I, Jennifer Matheson, hereby declare under penalty of perjury under the laws of the State  
3 of Washington that on February 14, 2019, I caused the foregoing Complaint to be filed with the  
4 clerk, and caused a true and correct copy of the same to be served via legal messenger on February  
5 14, 2019, to the following:

6 **ROBERT FERGUSON**  
7 Office of Attorney General  
8 1125 Washington Street SE  
9 Olympia, WA 98501  
*Defendant and Legal Designee and Counsel*  
*for State Defendant Office of the Attorney General*

10 Dated: February 14, 2019

11 By:   
12 \_\_\_\_\_  
13 Jennifer Matheson