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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

PROTECT SEATTLE NOW,

Plaintiff,

v.

WASHINGTON STATE DEPARTMENT OF  
TRANSPORTATION

Defendant.

Case No.:

COMPLAINT FOR DISCLOSURE  
UNDER THE PUBLIC RECORDS ACT

Protect Seattle Now (“PSN”) alleges as follows:

I. INTRODUCTION

1. This is a case about a state agency concealing public information about the financing for a risky and expensive project, only a short time before the public votes on the project. It is the eve of a Seattle referendum related to the proposed tunnel replacement for the Alaskan Way Viaduct. The primary election day is August 16, 2011, and much is at stake for Seattle taxpayers. Tunnel construction projects suffer cost overruns of 34% on average, and the funding for the tunnel is already \$700 million short of the most recent costs estimates that are publicly available. A state law, RCW 47.01.402, imposes liability for cost overruns—every penny in excess of the state’s spending cap of \$2.8 billion—on Seattle taxpayers.

2. PSN, wanting to know more about the project’s financing before the election, has asked the Washington State Department of Transportation (“WSDOT”) to disclose the financial

1 report that would show how much the tunnel would cost over the years of construction, how  
2 much money would need to be financed with bonds, the cost of interest on the bonds, and  
3 projected revenues available to meet the debt-service payments. WSDOT has already shared this  
4 report with a federal agency, and yet WSDOT refuses to comply with the Public Records Act  
5 (PRA), Chapter 42.56 RCW, and disclose this public information to the public. PSN now seeks  
6 judicial review of WSDOT's concealment. "The people," says the PRA, "do not give their public  
7 servants the right to decide what is good for the people to know and what is not good for them to  
8 know." RCW 42.56.030.

## 9 II. THE PUBLIC RECORD AT ISSUE

10 3. The public record that WSDOT refused to disclose is the Preliminary Finance  
11 Plan for the Alaskan Way Viaduct Replacement Program that WSDOT has submitted to the  
12 Federal Highway Administration ("Finance Plan"). Based on information and belief, the Finance  
13 Plan consists of approximately 60 pages without attachments.

## 14 III. JURISDICTION AND VENUE

15 4. This Court has jurisdiction under RCW 42.56.550 to review WSDOT's refusal to  
16 disclose the Finance Plan.

17 5. Venue is proper in this Court pursuant to RCW 42.56.550 and RCW 4.92.010(1)  
18 and (2).

19 6. The events that are the subject of this case occurred within the Seattle case-  
20 assignment area for King County Superior Court.

## 21 IV. PARTIES

22 7. Plaintiff PSN is an association of organizations and individual citizens. Its  
23 purposes are, among other things, to educate the public about the tunnel's financial and  
24 environmental risks, adverse traffic consequences, and lack of transit funding; to take political,  
25 legal, and any other steps necessary to give the public the right to vote on the project; and to  
26

1 campaign in favor of a “reject” vote on Seattle Referendum No. 1. PSN’s principal place of  
2 business is in Seattle.

3 8. Defendant WSDOT is the state agency responsible for, among other things,  
4 constructing highways in the state of Washington, and it is the lead agency for the Alaskan Way  
5 Viaduct Replacement Project. WSDOT’s office for the Alaskan Way Viaduct Replacement  
6 Project is located at 999 Third Ave, Suite 2424, Seattle, Washington, where it also maintains the  
7 Finance Plan.

## 8 V. FACTUAL BACKGROUND

### 9 A. A Mega-Project with Significant Financial Risk for Taxpayers

10 9. A deep-bore tunnel costing billions of dollars is one of the alternatives for  
11 replacing the central portion of the Alaskan Way Viaduct between South King Street and the  
12 Battery Street Tunnel in Seattle.

13 10. WSDOT has estimated that the overall Viaduct replacement program would cost  
14 \$4.2 billion if the tunnel were constructed, and \$3.1 billion of that would be directly connected to  
15 the tunnel and its connecting roads.

16 11. By a 2009 law, the legislature capped the legislature’s contribution to the Viaduct  
17 deep-bore tunnel project to \$2.4 billion, leaving \$700 million unfunded for the tunnel portion of  
18 the replacement project. *See* RCW 47.01.402(2), (6)(b). The Federal Highway Administration  
19 (“FHWA”) is currently considering whether to grant approximately \$450 million in federal funds  
20 towards the project, but those funds would be used by the state only to meet its \$2.4 billion  
21 pledge.

22 12. In an attempt to fill the remaining \$700 million shortfall:

23 12.1. The legislature has allowed another \$400 million in financing with tolls,  
24 but the necessary tolling levels (up to \$9 per day roundtrip, \$2,250 per year for an average from  
25 the south) would cause so much traffic diversion that WSDOT’s Viaduct Project Administrator,  
26 Ron Paananen, suggests that other tax revenues should be identified to fill this \$400 million gap.

1           12.2. The Port of Seattle pledged \$300 million, but this contribution is  
2 contingent on future approval by the Port Commission, with neither the Port nor the WSDOT  
3 having yet publicly stated whether the Port’s property-tax levy or more bonds would be  
4 necessary or sufficient to fulfill this pledge.

5           13. Cost overruns plague mega construction projects like this one.

6           13.1 The Seattle bus tunnel cost 56.5% more than early estimates.

7           13.2. The King County Brightwater project, budgeted at \$1.8 billion, has  
8 experienced cost overruns estimated at 20 percent after two tunnel-boring machines became  
9 stuck underground.

10           13.3. An Oxford University researcher determined that 90% of mega  
11 infrastructure projects worldwide were completed with cost overruns, at an average of 30% over  
12 budget, 34% for tunnel projects.

13           14. The legislature protected state taxpayers from the funding uncertainty and  
14 financial risks of the project, choosing to go one step further than its \$2.4 billion funding cap by  
15 imposing all liability for cost overruns on Seattle taxpayers: “Any costs in excess of two billion  
16 eight hundred million dollars shall be borne by property owners in the Seattle area who benefit  
17 from replacement of the existing viaduct with the deep bore tunnel.” RCW 47.01.402(6)(b).

18           15. Thus, if the Port of Seattle decides to withhold its \$300 million or the project’s  
19 costs exceed the legislature’s earlier expectations, Seattle taxpayers will be liable.

20           16. Despite passing off the risks, the state legislature recognized that transparency  
21 would be a critical ingredient for managing the project and making a final decision whether to  
22 proceed with it, and WSDOT has assumed the responsibility of stewarding project information.  
23 RCW 47.01.402(5) provides:

24           *It is important that the public and policymakers have accurate and timely access*  
25           *to information* related to the Alaskan Way viaduct replacement project as it  
26           *proceeds to, and during, construction of all aspects of the project, specifically*  
          including but not limited to *information regarding costs*, schedules, contracts,  
          project status, and neighborhood impacts. Therefore it is the intent of the  
          legislature that the state, city, and county departments of transportation establish a

1 single source of accountability for integration, coordination, tracking, and  
2 information of all requisite components of the replacement project, which must  
3 include . . . single point of contact for the public, media, stakeholders, and other  
4 interested parties.

5 (Emphasis added.) WSDOT’s Seattle office for the Alaskan Way Viaduct Replacement Project is  
6 this “single point of contact” for this public “information regarding costs.”

7 **B. The Finance Plan**

8 17. However, WSDOT has disclosed only a general summary of the project cost and  
9 anticipated revenues on its website; it has not shared any version of the project’s finance plan.

10 18. A finance plan for a megaproject such as the deep-bore tunnel typically includes  
11 statements about the project’s overall expected costs, the timing of expenditures during the  
12 construction process, expected agency revenues over a certain timespan, funding gaps during  
13 construction, the amount of bonds needed to make up funding gaps, and the interest costs from  
14 borrowing such bonds. The public is currently in the dark on all of these aspects of the tunnel  
15 project.

16 19. WSDOT prepared a finance plan—the public record that is the subject of this  
17 dispute—as part of its application to the FHWA for federal approval of the deep-bore tunnel and  
18 for a grant of federal-aid highway dollars. Since at least one month ago, the FHWA has  
19 possessed a copy.

20 **C. Seattle Referendum No. 1**

21 20. On February 28, 2011, the Seattle City Council approved Ordinance No. 123542,  
22 which adopts three memoranda of agreements between the City and WSDOT to help WSDOT  
23 design and construct the deep-bore tunnel.

24 21. The legal effect of the agreements was broken into two phases: the pre-  
25 construction phase and the construction phase, because state and federal environmental law  
26 precludes the City and WSDOT from making a final decision about whether to construct the  
27 deep-bore tunnel before the Final Environmental Impact Statement (“FEIS”) and federal Record

1 of Decision (“ROD”) are issued. The FEIS was released on July 7, 2011, and the FHWA intends  
2 to issue a ROD no earlier than August 17, 2011.

3 22. In Section 6 of Ordinance No. 123542, the Seattle City Council granted itself the  
4 authority to issue a “notice to proceed” to WSDOT, after the ROD issues, which would put into  
5 effect the construction phase of the three memoranda of agreements.

6 23. On May 20, 2011, Judge Laura Gene Middaugh of King County Superior Court  
7 ordered that Section 6 of Ordinance No. 123542 be referred to the voters of Seattle. The end  
8 result, Seattle Referendum No. 1, is now circulating on city voters’ ballots. Ballots must be  
9 postmarked no later than August 16, 2011.

10 24. Whether the deep-bore tunnel would be adequately financed, and whether its real  
11 costs exceed those previously publicized, have become the most hotly debated issues in the run  
12 up to the upcoming Primary Election Day.

#### 13 D. The State Is Broke

14 25. Since Judge Middaugh’s ruling, the state’s financial picture grew cloudier, with  
15 gas-tax revenues continuing to plummet, calling into question the state’s ability—and  
16 willingness—to pay for the project if Seattle voters approve Referendum No. 1.

17 26. In June 2011, the state Office of Financial Management (OFM) slashed its  
18 projections, which were only nine months old, for Washington drivers’ consumption of gasoline  
19 in 2027 by 21%, or 700 million gallons *for one year*. Back-of-the-envelope calculations suggest  
20 that between 2012, when construction on the tunnel would start, and 2042, when WSDOT would  
21 finish servicing the debt on bonds for the project, the State would take in \$4.06 billion less in  
22 gas-tax revenues than it expected just nine months ago.

23 27. And since OFM released these revised projections, the Obama Administration and  
24 the auto industry agreed on new fuel-efficiency standards of 54.5 miles per gallon, which will  
25 accelerate the decrease in gasoline consumption.

26 28. Regardless of the desirability of less fuel consumption, the state will have less

1 money available than the legislature expected in 2009 to finance bonds for the deep-bore tunnel,  
2 let alone to fulfill WSDOT's wish and make up the \$400 million that would have to be foregone  
3 if the tunnel were not tolled.

4 **E. PSN's Public-Records Request**

5 27. On July 19, 2011, after receiving a tip that the Finance Plan existed, PSN sent a  
6 letter, though its attorney Gary Manca, to WSDOT. The letter cites the PRA and asks for a copy  
7 of the Finance Plan. A true and correct copy of this public-records request is attached as Exhibit  
8 A.

9 28. In a letter dated July 25, 2011, WSDOT did not deny that the Finance Plan is a  
10 "public record" within the meaning of RCW 42.56.010(2). Rather, WSDOT invoked RCW  
11 42.56.280, the "deliberative process" exemption to the PRA, to deny PSN the opportunity to  
12 inspect or copy any portion of the Finance Plan. WSDOT's letter did not contain any explanation  
13 for how RCW 42.56.280 applied to the Finance Plan, and WSDOT did not redact and disclose  
14 any portion of the Finance Plan. A true and correct copy of WSDOT's denial letter is attached as  
15 Exhibit B.

16 29. In the past, WSDOT has publicly shared finance plans for the Viaduct and other  
17 highway projects before they were completely final.

18 29.1. For example, in June 2006—when the deep-bore tunnel was not under  
19 consideration—WSDOT published a "Viaduct Project Draft Financial Plan," which is still  
20 available online at [http://www.wsdot.wa.gov/NR/rdonlyres/376A80FF-D279-4B5E-9617-](http://www.wsdot.wa.gov/NR/rdonlyres/376A80FF-D279-4B5E-9617-A3A727A2E582/0/Tab2_AWV_Finance_Plan_Web.pdf)  
21 [A3A727A2E582/0/Tab2\\_AWV\\_Finance\\_Plan\\_Web.pdf](http://www.wsdot.wa.gov/NR/rdonlyres/376A80FF-D279-4B5E-9617-A3A727A2E582/0/Tab2_AWV_Finance_Plan_Web.pdf).

22 29.2. Also in June 2006, WSDOT published the "SR 520 Project Draft Finance  
23 Plan," available online at [http://www.wsdot.wa.gov/NR/rdonlyres/66F8BB4E-7E44-417C-B977-](http://www.wsdot.wa.gov/NR/rdonlyres/66F8BB4E-7E44-417C-B977-EE96132C7006/0/Tab3_SR520_Finance_Plan_Web.pdf)  
24 [EE96132C7006/0/Tab3\\_SR520\\_Finance\\_Plan\\_Web.pdf](http://www.wsdot.wa.gov/NR/rdonlyres/66F8BB4E-7E44-417C-B977-EE96132C7006/0/Tab3_SR520_Finance_Plan_Web.pdf).

25 29.3. For the 520 project again, WSDOT released in January 2008 the "2007 SR  
26 520 Finance Plan," available at <http://www.wsdot.wa.gov/NR/rdonlyres/EB60EF6F-B282-487A->

2 29.4. In 2009, WSDOT disclosed an internal email discussing the deep-bore  
3 tunnel's potential financing, and this email acknowledged that inadequate present revenues  
4 would mean WSDOT would have to sell \$2 billion in bonds, thus increasing total project costs,  
5 with interest, to at least \$6.14 billion. A true and correct copy of this email, dated August 3,  
6 2009, is attached as Exhibit C.

7 30. Weeks before an election on its project, however, WSDOT chose to withhold the  
8 Finance Plan. This public record that WSDOT has chosen to conceal from the public eye is  
9 precisely the sort of information about this project's costs that the legislature believed to be so  
10 important when enacting RCW 47.01.402(5). And the ongoing election only increases the  
11 importance of this information. As Seattle voters contemplate whether the tunnel is a good deal  
12 for Seattle and whether to green light the City Council to go ahead with it, nothing looms larger  
13 than the project's costs, the state's projected revenues, and Seattle taxpayers' liability for all  
14 costs above the state's cap.

15 VI. CAUSE OF ACTION – VIOLATION OF PUBLIC RECORDS ACT

16 31. Paragraphs 1 through 30 are re-alleged as if set forth fully here.

17 32. State law provides that the PRA “shall be liberally construed and its exemptions  
18 narrowly construed to promote this public policy and to assure that the public interest will be  
19 fully protected.” RCW 42.56.030. The PRA also provides that “[c]ourts shall take into account  
20 the policy of this chapter that free and open examination of public records is in the public  
21 interest, even though such examination may cause inconvenience or embarrassment to public  
22 officials or others.” RCW 42.56.550(3).

23 33. The Finance Plan is a “public record” as defined by RCW 42.56.010(2).

24 34. WSDOT is an “agency” within the meaning of RCW 42.56.010(1).

25 35. Because more than two business days have passed since WSDOT denied PSN's  
26 public-records request, WSDOT's denial is a final agency action under RCW 42.56.520.



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1. In accordance with RCW 42.56.550(1), an order for WSDOT to show cause why it has denied PSN an opportunity to inspect or copy the requested public record.

2. An order requiring WSDOT to grant to PSN the right to immediately copy or inspect the requested public record.

3. As provided in RCW 42.56.550(4), an award of penalties against WSDOT from \$5 to \$100 per day for each day that PSN was denied an opportunity to inspect or copy any non-exempt information in the public record.

4. As required under 42.56.550(4), an award of all costs, including reasonable attorney fees, incurred in connection with this action.

5. Such other relief as the court deems just and equitable.

DATED this 4th day of August 2011.

MANCA LAW, PLLC

By: \_\_\_\_\_  
Gary W. Manca, WSBA No. 42798  
Attorney for Protect Seattle Now

**EX. A**

# MANCA LAW

A Professional Limited Liability Company

434 Northeast Maple Leaf Place, Suite 201  
Seattle, Washington 98115

(206) 992-3264  
gm@manca-law.com

## ***VIA EMAIL***

July 19, 2011

Fred Chang  
Public Records Coordinator  
Washington State Department of Transportation  
999 Third Avenue, Suite 2424  
Seattle, WA 98104

Re: Public Records Request

Dear Mr. Chang,

Pursuant to the state Public Records Act (PRA), chapter 42.56 RCW, I submit the following request for public records:

A copy of the Preliminary Finance Plan for the Alaskan Way Viaduct Replacement Program that WSDOT has submitted to the Federal Highway Administration.

I understand from a letter sent from Rick Phillips, WSDOT Records Officer, to Glen Milner on July 7, 2011 that WSDOT has concluded that RCW 42.56.280 applies and therefore exempts the Preliminary Finance Plan from disclosure under the PRA. Because WSDOT has already reviewed the public record that I am requesting and has concluded that it is exempt from disclosure, I expect a prompt response to this request, no later than July 22, 2011. Given the circumstances, WSDOT's ordinary 30-day window for responding to PRA requests is unnecessary and would be unreasonable.

If WSDOT changes its mind and chooses to disclose the Preliminary Finance Plan, then, in lieu of a paper copy, I would prefer a PDF file or other electronic version. I am willing to pay costs of copying to the extent required by the Public Records Act. If copying costs would exceed \$100.00, please let me know before you process the request.

Thank you for your assistance with this matter.

Sincerely,



GARY W. MANCA

**EX. B**



**Washington State  
Department of Transportation**  
Paula J. Hammond, P.E.  
Secretary of Transportation

**Records and Information Services**  
PO Box 47410  
Olympia, WA 98504-7410  
360-705-7761 / Fax 360-705-6848  
TTY: 1-800-833-6388  
[www.wsdot.wa.gov](http://www.wsdot.wa.gov)

July 25, 2011

Gary Manca  
Manca Law  
434 Northeast Maple Leaf Place, Suite 201  
Seattle, WA 98115

Dear Mr. Manca:

This letter is in regards to your request for records (PDR-11-1245) dated July 19, 2011. The items listed below:

*A copy of the Preliminary Finance Plan for the Alaskan Way Viaduct Replacement Program that WSDOT has submitted to the Federal Highway Administration.*

is exempt from public inspection or copying pursuant to:

RCW 42.56.280: 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.

Pursuant to RCW 42.56.520, within ten business days, you may petition in writing, a request for review of this decision. Please submit the request for review to:

Chris Barnes  
Records and Information Services  
PO Box 47410  
Olympia, Washington 98504-7410

If we can be of further assistance, you may contact Chris Barnes at 360-705-6863.

Sincerely,

A handwritten signature in blue ink that reads "Rick Phillips".

Rick Phillips, Director  
WSDOT Records Officer  
Washington State Department of Transportation

RP:cb

**EX. C**

**Graves, Natalie (Consultant)**

---

**From:** Arnis, Amy  
**Sent:** Monday, August 03, 2009 12:37 PM  
**To:** Grotefendt, Amy (Consultant); WSDOT MediaContacts  
**Cc:** Paananen, Ron; Dye, Dave; Brown, Lloyd; Van Ness, Kristy (Consultant); Lenz, KaDeena (Consultant); White, John; Greco, Theresa  
**Subject:** RE: Viaduct - 7/31

Mr. Anderson emailed me today with follow-up questions. My response to his questions are below. Amy Grotefendt reviewed/edited before I transmitted.

Mr. Anderson: Below are responses to your questions. Thank you.

You mentioned \$2.4 billion is currently funded by the state for the tunnel, although the DOT is still using, online, \$2.8b as its cost. Could you tell me which is correct? [The difference between the \\$2.4B and \\$2.8B is the \\$400m that is to be financed from tolls. We are currently working on the tolling scenarios for the tunnel. That work will be completed by the end of the year. The \\$400m funding contribution supported by tolls will also have interest cost, but we do not have an estimate for those costs at this time since that work is underway.](#)

And is, again, \$1.9 billion the interest amount - and is that based on \$2.4b and not 2.8b? [The 2.4B](#)

Also, that interest cost is just for the state's portion, correct? [Yes.](#)

Thus, is \$4.24 billion still the total estimated cost (amount being contributed from all sources, city, state, US, etc.)? [Yes, it is the estimated cost for the entire program of investments including the bored tunnel, the new south mile of the corridor near the stadiums, the north and south portals, investments in transit and city streets, seawall replacement, the new grade-separated street from Elliott and Western to the waterfront, and the new Alaskan Way boulevard.](#)

And, adding the \$1.9 interest to that, is the cost thus \$6.14 billion - not counting any interest that the other contributors may incur? [Yes \(also not counting the borrowing costs to support the \\$400m in funding from tolls, as mentioned above\).](#)

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**From:** Grotefendt, Amy (Consultant)  
**Sent:** Friday, July 31, 2009 9:27 AM  
**To:** WSDOT MediaContacts  
**Cc:** Paananen, Ron; Dye, Dave; Arnis, Amy; Brown, Lloyd; Van Ness, Kristy (Consultant); Lenz, KaDeena (Consultant); White, John; Greco, Theresa  
**Subject:** Viaduct - 7/31

Seattle Weekly

Amy Arnis spoke with Rick Anderson at the Seattle Weekly about the financing costs associated with the replacement of the Alaskan Way Viaduct. Currently \$2 billion of the \$2.4 billion in funding for the project will be financed. If financed at an average interest rate of 5.8 percent, the total cost would be approximately \$3.9 billion.

Amy discussed how the state sells bonds as the project is under construction to match the expenditures and look for opportunities to use cash to lower the borrowing costs. Typically the bonds are sold as 25-year debt so the bonds would be paid back by 2042 (last sale occurring in 2017). This is typical financing and is funded by the gas tax revenue as authorized by the Washington State Legislature. If the gas tax revenue does not come in as planned, the legislature will need to take action to remedy the situation. Rick said it is interesting that most government agencies don't talk about financing and it might actually behoove the state to tell people how the bonds are being paid for by gas tax. He plans to write a blog posting and potentially a story.