

1 EFFECTIVE November 1, 2015

2 **SUPERIOR COURT OF WASHINGTON  
FOR THURSTON COUNTY**

3  
4 State of Washington Plaintiff/Petitioner,

5 vs.

6 Grocery Manufacturers Association  
Defendant/Respondent.

7  
8 Grocery Manufacturers Association Plaintiff/Petitioner,

9 vs.

10 Bob Ferguson, Attorney General  
Defendant/Respondent.

**NO. 13-2-02156-8  
14-2-000327-5**

**CIVIL NOTICE OF ISSUE (NTIS)  
Clerk's Action Required**

11 **TO: THURSTON COUNTY CLERK** and to all other parties listed herein:

12 **PLEASE TAKE NOTICE** that an issue of law in this case will be heard on the date below and the Clerk  
13 is directed to note this issue on the calendar checked below.

14 **Calendar Date: January 29, 2016 Day of Week: Friday**

15 Filing Deadlines: By 12:00 noon, 5 court days preceding the scheduled hearing date [LCR 5]  
16 **SCHEDULING:** The number of hearings is limited. You will be notified by Email if the calendar is full when we  
17 schedule your hearing.  
Court Address: 2000 Lakeridge Drive SW, Building 2, Olympia WA 98502.

18  **CIVIL MOTIONS (Friday – 9:00 am)**

**ASSIGNED JUDGE:**

- 19  Judge Gary Tabor  
20  Judge Carol Murphy  
21  Judge Anne Hirsch  
22  Judge Mary Sue Wilson

23 Approval required if hearing is set before any Judge other  
24 than the Assigned Judge:

Approved by:

\_\_\_\_\_  
Judicial Assistant Initials

25  **CIVIL MISCELLANEOUS (Friday–9:00 am)**  
(DOL Revocations / RALJ / Firearm Restoration)

26  **UNLAWFUL DETAINERS (Friday – 10:00 am)**

**SUPPLEMENTAL PROCEEDINGS (Friday–9:00 am)**

**Type of Motion:**

- 27  Default  
 Discovery  
 Summary Judgment/Dismissal  
 Change Venue  
 Continue Trial  
 Show Cause  
 Present Order

TRO/Preliminary Injunction

28  Other: Motion To Lift Protective Order As To  
Documents Filed In Connection With The State's  
Motion For Summary Judgment And Any Cross  
Motion

**Certificate of Service**

I certify that on January 22, 2016 I  deposited in the United States mail,  delivered through a legal messenger service,  personally delivered, a copy of this document to the attorney(s) of record for  Plaintiff/  
Petitioner  Defendant/Respondent  All Other Parties of Record.

Attorney for  Plaintiff/Petitioner  
 Defendant/Respondent  
 Other: \_\_\_\_\_

*Diane Gray, Legal Assistant*

*served electronically*

**PRESENTING PARTY:**

Sign: *Callie A. Castillo*

Print/Type Name: Callie A. Castillo

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1  EXPEDITE  
2  No Hearing Set  
3  Hearing is Set:  
4 Date: January 29, 2016  
5 Time:  
6 The Honorable Anne Hirsch

7 **STATE OF WASHINGTON**  
8 **THURSTON COUNTY SUPERIOR COURT**

9 STATE OF WASHINGTON,  
10 Plaintiff,  
11 v.  
12 GROCERY MANUFACTURERS  
13 ASSOCIATION,  
14 Defendant.

NO. 13-2-02156-8

PLAINTIFF STATE OF  
WASHINGTON'S/DEFENDANT  
FERGUSON'S MOTION TO LIFT  
PROTECTIVE ORDER AS TO  
DOCUMENTS FILED IN  
CONNECTION WITH THE  
STATE'S MOTION FOR  
SUMMARY JUDGMENT AND  
ANY CROSS MOTION

15 GROCERY MANUFACTURERS  
16 ASSOCIATION,  
17 Plaintiff,  
18 v.  
19 BOB FERGUSON, ATTORNEY  
20 GENERAL,  
21 Defendant.

NO. 14-2-00027-5

22 **I. INTRODUCTION AND REQUEST FOR RELIEF**

23 In the interest of open justice, the State of Washington asks this Court to lift the  
24 protective orders in this case as to any records filed in connection with the State's motion for  
25 summary judgment and any cross-motion by Grocery Manufacturers Association (GMA). Just  
26 like in the underlying issue at the heart of this case, GMA and others may not hide their

1 behavior behind screens of secrecy.<sup>1</sup> The public's right to open records outweighs any interest  
2 GMA, its contractors, or the No on 522 committee may claim regarding the alleged  
3 confidentiality of these documents. The records in this case should be accessible to the public.

## 4 II. STATEMENT OF FACTS

5 This case was filed on October 16, 2013. At that time, the State received public records  
6 requests for any document that supported the State's allegations. Documents GMA provided  
7 during the investigation were released. Those documents were also used as part of the State's  
8 response to GMA's motion for a judgment on the pleadings. *See* Dalton Decl. filed with State's  
9 Opp'n to GMA's Mot. for J. on Pleadings (Mar. 17, 2014).

10 On October 17, 2014, Judge Christine Schaller (formerly assigned to this matter) signed  
11 an Agreed Protective Order Regarding Treatment of Certain Documents or Information  
12 Produced During Discovery (Order). Pursuant to CR 26(c), the protective order provides that  
13 parties could mark certain documents and/or information as "confidential" if the party has a  
14 reasonable, good faith belief and legal basis for so designating those documents and/or  
15 information. Order at 2. The protective order provides a method for the parties to object to any  
16 designation of "confidential," including a CR 26(i) conference and motion to the Court.  
17 Order at 3. It further states "when 'confidential' material (or any pleading, motion, or  
18 memorandum referring to such material) is to be filed with the Court, the filing must be under  
19 seal and the party making the filing must submit an appropriate motion and proposed order in  
20 accordance with the applicable rules." Order at 5.<sup>2</sup>

21 The State is filing its motion for summary judgment asking this Court to affirm all of its  
22 claims against GMA. In accordance with the protective order, the State will file any supporting  
23 documents marked "confidential" under seal. But the State simultaneously asks this Court to

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24 <sup>1</sup> The court also entered protective orders for third party discovery. The State asks that the protective  
25 orders as to the No on 522 committee, Winner & Mandabach, and Biotechnology Industry Association also be  
26 lifted in the same manner.

<sup>2</sup> The protective orders for the third-parties are virtually identical to that of GMA's.

1 lift the protective orders as to these documents and any other records filed in connection with  
2 the motion, including those submitted in response or reply.<sup>3</sup> The State also asks the Court to  
3 deny any subsequent request of GMA to seal the records under GR 15.

### 4 III. EVIDENCE RELIED UPON

5 The State of Washington relies on all of the pleadings and papers filed in this action.

### 6 IV. ARGUMENT

7 "Justice in all cases shall be administered openly, and without unnecessary delay."  
8 Const. art. I, § 10. Documents filed with the court are presumptively open to the public unless  
9 *compelling* reasons for closure exist. *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 535, 114 P.3d  
10 1182 (2005). As our State Supreme Court has said,

11 The open operation of our courts is of utmost public importance. Justice must be  
12 conducted openly to foster the public's understanding and trust in our judicial  
13 system and to give judges the check of public scrutiny. Secrecy fosters mistrust.  
14 This openness is a vital part of our constitution and our history. ***The right of the  
public, including the press, to access trials and court records may be limited  
only to protect significant interests, and any limitation must be carefully  
considered and specifically justified.***

15 *Dreiling v. Jain*, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004) (emphasis added).

16 This standard applies to records previously sealed for discovery purposes under  
17 CR 26(c). Information that is obtained during pretrial discovery does not become part of the  
18 court's decision-making; therefore, article I, section 10 does not apply and the lower standard  
19 of "good cause" can be applied for purposes of CR 26(c) protective orders. *See Dreiling*, 151  
20 Wn.2d at 909-10. The same cannot be said for materials attached to a summary judgment  
21 motion. *Id.* at 910.

22 Summary judgment effectively adjudicates the substantive rights of the parties,  
23 just like a full trial. ***Accordingly, when previously sealed discovery documents***

24 <sup>3</sup> The Supreme Court specifically affirmed this practice in *Rufer v. Abbott Laboratories*, 154 Wn.2d 530,  
25 550, 114 P.3d 1182 (2005). "Parties should continue to comply with pretrial confidentiality orders by filing any  
26 documents falling within the pretrial confidentiality order's scope under seal. ***Upon the filing of records under  
seal, the parties will now know that the court, upon motion, will open such records unless the party wishing to  
keep them sealed demonstrates an overriding interest.***" *Id.* (emphasis added).

1            ***are attached in support of a summary judgment motion, they lose their***  
2            ***character as the raw fruits of discovery. Such documents may not be kept***  
3            ***from public view without some overriding interest.***

4            *Dreiling*, 151 Wn.2d at 910 (emphasis added) (internal quotation marks omitted).

5            “To balance the constitutional requirement of the open administration of justice against  
6            potentially conflicting rights,” courts must apply five factors set forth in *Seattle Times Co. v.*  
7            *Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982), prior to sealing any records. *Rufer*, 154 Wn.2d at  
8            544; *Dreiling*, 151 Wn.2d at 913-15. The *Ishikawa* factors are as follows:

- 9            1. The proponent of closure and/or sealing records must make some showing of the need  
10            for closure.
- 11            2. Anyone present when the closure and/or sealing motion is made must be given an  
12            opportunity to object.
- 13            3. The court, the proponents, and the objectors should carefully analyze whether the  
14            requested method for curtailing access would be both the least restrictive means  
15            available and effective in protecting the interests threatened.
- 16            4. The court must weigh the competing interest of the parties and the public.
- 17            5. The order must be no broader in its application or duration than necessary to serve its  
18            purpose.

19            *Id.* (citing *Ishikawa*, 97 Wn.2d at 37-39). The burden of justifying closure rests on the party  
20            seeking to infringe on the public’s right to open access to justice. *Dreiling*, 151 Wn.2d at 914.  
21            Also, because Washington courts disfavor blanket protective orders, “parties requesting closure  
22            bear the respective burden for *each document* they seek to protect, unsubstantiated allegations  
23            will not satisfy the rule.” *Rufer*, 154 Wn.2d at 545 (emphasis added) (internal quotation marks  
24            omitted).

25            Here, there is no reason to protect these records from public scrutiny. At this stage in  
26            the litigation, the documents are presumed public and GMA, and others, must carry the burden  
             of demonstrating a *compelling* need otherwise. They will not be able to carry that burden. As  
             alleged in the State’s complaint, GMA violated Washington law when it solicited and accepted  
             contributions from its member companies to defeat a Washington ballot measure, I-522, and

1 then intentionally concealed the source of those contributions from the public eye. The  
2 documents attached to the State's motion for summary judgment (and those to be attached in  
3 response or reply) bring GMA's deception to light. GMA, its contractors, and the No on 522  
4 committee should not hide behind any designation as "confidential" in order to escape public  
5 scrutiny of its actions. The public has a right to know.

6 **V. CONCLUSION**

7 The State respectfully asks that the protective orders in this case be lifted as to the  
8 documents attached to its motion for summary judgment, as well as any subsequent documents  
9 filed in response or reply thereto.

10 DATED this 22nd day of January 2016.

11 ROBERT W. FERGUSON

12 *Attorney General*

13 

14 LINDA A. DALTON, WSBA 15467

15 *Senior Assistant Attorney General*

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