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NO. 93306-5

SUPREME COURT OF THE STATE OF WASHINGTON

SEIU HEALTHCARE 775 NW,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES and FREEDOM FOUNDATION,

Respondents.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

MORGAN B. DAMEROW
Assistant Attorney General
WSBA No. 27221

JANETTA E. SHEEHAN
Assistant Attorney General
WSBA No. 22575

ALBERT H. WANG
Assistant Attorney General
WSBA No. 45557
Attorneys for Respondent DSHS

Labor and Personnel Division
PO Box 40145
Olympia, WA 98504-0145
(360) 664-4177
OID No. 91032



ORIGINAL

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I. INTRODUCTION

This appeal raises two issues of first impression for this Court. First is the scope of the Public Records Act's (Act) prohibition on disclosing lists of individuals where the list will be used for a "commercial purpose." RCW 42.56.070(9). The Court of Appeals decision in this case is the only decision from any Washington appellate court addressing the scope of the commercial purpose prohibition and an agency's obligation under the Act to determine whether a request may be for a commercial purpose.

The second issue is whether the Act's exemption for records that identify welfare recipients, RCW 42.56.230(1), applies in this case. Service Employees International Union Healthcare 775NW (SEIU) argues that this exemption protects information in any record that a requester may use together with information from other sources to reveal the identity of welfare recipients. The Washington State Department of Social and Health Services (DSHS) did not apply the exemption so broadly in responding to the public records request from the Freedom Foundation, concluding instead that nothing within the four corners of the responsive lists revealed personal information about welfare recipients.

DSHS would have released the lists had it not been restrained by order of the superior court. The agency is still prepared to produce the lists if the restraining order is lifted or if directed to do so by this Court.

II. ISSUES PRESENTED FOR REVIEW

For the reasons set forth in Section IV, below, three issues raised in SEIU's Petition for Discretionary Review are appropriate for review under RAP 13.4(b):

1. Did the Court of Appeals correctly determine that the Act's commercial purpose prohibition on releasing lists of individuals, RCW 42.56.070(9), applies only where there is a direct economic benefit from the use of those records?
2. Did the Court of Appeals correctly determine that RCW 42.56.070(9) requires an agency, on a case by case basis, to conduct an investigation when there is some indication—based on the identity of the requestor, the nature of the records sought, and any other information that may be available to the agency—that the requested list may be used for a commercial purpose?
3. Did the Court of Appeals correctly determine that an agency applying the exemption in RCW 42.56.230(1) must look to information contained within the four corners of the requested records, not to other information the requester may have or may obtain?

III. RESTATEMENT OF THE CASE

On July 2, 2014, the Freedom Foundation made a request for public records from DSHS. Clerk's Papers (CP) at 612-13. The Freedom Foundation requested seven categories of records, but only one is at issue:

“6. The business/work contact information (including e-mail addresses) for all in-home care providers (individual providers) and translators (language access providers).” CP at 613.

After reviewing the request and receiving clarification from the Freedom Foundation, DSHS determined it had two lists responsive to the request relevant to Individual Providers (IPs). DSHS applied the exemption for home addresses and other contact information under RCW 42.56.250(3) to these lists. After applying that exemption, the first list contains the names of approximately 30,968 IPs. CP at 876. The second list provides the names of 95 additional IPs. CP at 876. Both lists also contain the IPs’ unique provider numbers. CP at 876. DSHS did not identify any exemption that would block disclosure of the requested records in their entirety.

IPs are individuals who have contracted with DSHS to provide personal care or respite care under a variety of programs including Medicaid. IPs are selected by and receive daily direction from the care recipient, but they are paid for their work directly by DSHS, under the terms contained in the bargaining agreement negotiated pursuant to RCW 41.56.026. The IPs’ bargaining representative is SEIU. CP at 597.

DSHS notified SEIU of the record request, as authorized in RCW 42.56.540, and informed SEIU that DSHS would release the records

unless SEIU obtained a court order by that date enjoining their release. CP at 610-13. On behalf of its members, SEIU objected to the release of the records and filed a Complaint on October 1, 2014, to enjoin DSHS from releasing the two lists. CP at 596-602. On October 3, the trial court granted a Temporary Restraining Order and scheduled a hearing on Preliminary Injunction for October 16. CP at 78-79.

SEIU attempted to obtain discovery from the Freedom Foundation through both written discovery and depositions. In an expedited discovery hearing, the court denied SEIU's request to conduct depositions but authorized limited written discovery on an accelerated basis.¹ CP at 446-49. During the discovery hearing, the trial court proposed to consolidate the hearing for temporary injunction with the hearing for a permanent injunction, on the theory that denying the preliminary injunction would result in the release of records, making the permanent injunction moot. CP at 275-77.

At the beginning of the hearing on October 16, 2014, the trial court formally notified the parties that it was consolidating the hearing for preliminary and permanent injunction under CR 65(a)(2). CP at 296-98. At the close of the hearing, the trial court denied SEIU's requests for a preliminary injunction and a permanent injunction and continued the

¹ Freedom Foundation provided its discovery responses on October 14, 2014. CP at 834-77.

temporary restraining order to give SEIU an opportunity to file an appeal. CP at 290, 337-68. These rulings were memorialized in a written Order entered on October 22, 2014. CP at 288–91.²

SEIU timely filed its appeal with Division II of the Court of Appeals and obtained an Order extending the temporary restraining order. The Freedom Foundation cross-appealed directly to the Supreme Court. This Court denied the cross-appeal, remanding the matter to Division II of the Court of Appeals. On April 12, 2016, the Court of Appeals issued its decision affirming that SEIU was not entitled to a preliminary or permanent injunction under RCW 42.56.540. The court held that the commercial purpose prohibition in RCW 42.56.070(9) requires a direct economic benefit from the use of the records and that agencies are required to investigate and, based on the identity of the individual, the nature of the records sought, and any other information that may be available to the agency, determine whether the request is for a commercial purpose. Further, the Court found RCW 42.56.230(1) did not exempt the requested lists. SEIU sought and was denied a motion for reconsideration. It subsequently filed a timely appeal. The temporary restraining order remains in place pending action by this court.

² The Order notes that the parties were given advance notice the preliminary and permanent injunction hearings would be consolidated. CP at 290.

As soon as it finished collecting and processing the requested lists, DSHS stated its intent to release them unless a court order prevented it from doing so. It has been under court order not to release the lists from October 3, 2014, to the present. DSHS is prepared to release all records covered by the temporary restraining order when that order is dissolved, or to take any other action ordered by the Court.

IV. REASONS WHY REVIEW SHOULD BE GRANTED

The criteria for accepting a petition for review are set forth in RAP 13.4(b). SEIU asserts that the Court should accept review under RAP 13.4(b)(4), arguing that this case involves an issue of substantial public interest that should be determined by the Supreme Court. Petition at 7-8. SEIU is correct in its assertion that this is a matter of first impression in regards to the Act's prohibition on the release of public records when the intended use is for a commercial purpose. The meaning of the commercial purpose prohibition in RCW 42.56.070(9) directly impacts the public's ability to obtain public records.³ It is unique in the

³ At present there is one case before the Division II of Court of Appeals, and six cases in Thurston County Superior Court, involving the issue of Commercial Purpose under RCW 42.56.070(9). *SEIU 925 v. State of Washington Department of Social and Health Services*, No. 48522-2-II (Ct. of App. Div. II, filed May 8, 2015); *Teamsters Local Union No. 117 v. State of Washington, et al.*, No. 16-2-01547-34 (Thurston County Superior Court, filed April 20, 2016); *Washington Federation of State Employees v. State of Washington, et al.*, No. 16-2-01749-34 (Thurston County Superior Court, filed April 27, 2016); *Washington Public Employees Association, et al. v. State of Washington, et al.*, No. 16-2-01573-34 (Thurston County Superior Court, filed April 25, 2016); *IBEW Local 76, et al. v. State of Washington, et al.*, No. 16-2-01826-34 (Thurston County Superior

Act as the only provision that explicitly permits agencies to inquire of the purpose behind the request and potentially withhold records based on the intended use. This case is also unique because the Court of Appeals read that provision as creating an affirmative obligation for agencies to *investigate* whether a commercial purpose exists. SEIU's Petition for Review should be granted on this basis.

SEIU similarly asserts that the Court should review this matter based on the Act's exemption for records that identify welfare recipients under RCW 42.56.230(1). DSHS did not find this exemption applicable, based on its understanding of court decisions requiring agencies to look only to the four corners of the record to determine whether an exemption applies. If DSHS's understanding of this exemption is incorrect, this would be an issue of substantial public interest that should be determined by the Supreme Court.

A. The Meaning of the Commercial Purpose Prohibition in RCW 42.56.070(9) Is a Question of First Impression.

This is the first appellate case that addresses the interpretation of RCW 42.56.070(9), which provides in pertinent part: "This chapter shall not be construed as giving authority to any agency . . . to give, sell or

Court, filed May 4, 2016); *SEIU 1199NW v. State of Washington, et al.*, No. 16-2-01875-34 (Thurston County Superior Court, filed May 10, 2016); *Teamsters Local Union No. 117 v. State of Washington, et al.*, No. 16-2-02756-34 (Thurston County Superior Court, filed July 13, 2016).

provide access to lists of individuals requested *for commercial purposes*, and agencies . . . *shall not do so* unless specifically authorized or directed by law” (Emphasis added). The Act does not define “commercial purposes.”

The Act establishes a presumption that all public records must be made available upon request unless the record falls within a specific statutory exemption or prohibition. RCW 42.56.070(1), .550. It is well established that exemptions are to be construed narrowly and construed in favor of disclosure where possible. *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 903, 346 P.3d 737 (2015).

There is nothing in the statute that establishes whether RCW 42.56.070(9), which is written in the language of a prohibition (an agency “shall not” release a list of individuals requested for commercial purposes unless otherwise authorized by law), is intended to be narrowly construed as exemptions to the Act are. The Court of Appeals found that RCW 42.56.070(9) is to be narrowly construed to keep with the overall policy of the Act favoring disclosure.

This Court does not appear to have applied that same narrow construction to *prohibitions* on disclosure. In *Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 525, 326 P.3d 688 (2014), for example, the Court stated that “other statutes” incorporated in

RCW 42.56.070(1) “may *exempt or prohibit* disclosure of certain records or information,” but the next sentence appears to exclude *prohibitions* on disclosure from the rule of narrow construction: “[a]ll *exceptions*, including ‘other statute’ exceptions, are construed narrowly.” *Id.* (emphasis added).

As a general rule, agencies “shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request.” RCW 42.56.080; *King County v. Sheehan*, 114 Wn. App. 325, 336, 57 P.3d 307 (2002). The commercial purposes prohibition in RCW 42.56.070(9) is an explicit exception to that general rule. RCW 42.56.080. But the Act does not provide any guidance as to how an agency is to determine the intended use behind a public records request. The Court of Appeals identified three factors agencies must consider when there is some indication that the requested list will be used for a commercial purpose: the identity of the requestor, the nature of the records requested, and any other information available to the agency. Decision at 24. Notably, the Court of Appeals left unresolved the extent of independent research an agency must undertake to answer the third question, its authority to compel responses, and whether a requestor’s failure to respond permits the agency to draw

the inference that the request is for a commercial purpose. Those unresolved issues create uncertainty that this Court should resolve.

B. Applying Established Case Law, the Court of Appeals Affirmed the Trial Court and Held That the Requested Lists Are Not Exempt Under RCW 42.56.230(1) Because They Do Not Identify Personal Information of Welfare Recipients.

SEIU argues the lower courts erred in denying SEIU's request for preliminary and permanent injunction, because the records contained the names of IPs. SEIU argues that the list of IPs is exempt from disclosure because it creates a substantial risk of identifying welfare recipients and therefore constitutes disclosure of personal information in a file maintained for welfare beneficiaries, information exempted under RCW 42.56.230(1). Pet. for Rev. at 17.

RCW 42.56.230(1) exempts from disclosure any "personal information in any files maintained for . . . welfare recipients." While the records at issue do not contain any personal information of welfare beneficiaries, SEIU asserts that their release is "tantamount to the release of the identities of Medicaid beneficiaries." Pet. for Rev. at 17. In part, this argument is based on the fact that IPs tend to reside with their clients, that their clients tend to be Medicaid beneficiaries, and that accordingly a person can use the names of IPs to find Medicaid beneficiaries. Pet. for Rev. at 17.

Currently, when an agency determines whether an exemption applies, it looks to information within the four corners of the record. *Predisik*, 182 Wn.2d at 906; *Koenig v. City of Des Moines*, 158 Wn.2d 173,187,142 P.3d 162 (2006), *Sheehan*, 114 Wn. App. at 341. Guided by that principle, DSHS did not identify RCW 42.56.230(1) as an exemption applicable to the records in question, because no personal information of welfare beneficiaries was contained within the four corners of the requested records.

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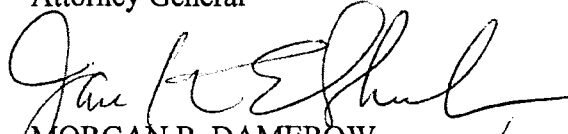
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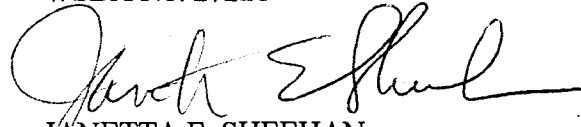
V. CONCLUSION


Because three issues in SEIU's Petition for Discretionary Review meet the criteria for review under RAP 13.4(b)(4), the State agrees that the Court should accept review of those issues.

RESPECTFULLY SUBMITTED this 1st day of August, 2016.

ROBERT W. FERGUSON
Attorney General


MORGAN B. DAMEROW *for*
Assistant Attorney General
WSBA No. 27221


JANETTA E. SHEEHAN
Assistant Attorney General
WSBA No. 22575


ALBERT H. WANG
Assistant Attorney General
WSBA No. 45557

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WASHINGTON STATE
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES AND
FREEDOM FOUNDATION,

Respondents.

CERTIFICATE OF
SERVICE

I certify that I served a copy of the Respondent's, WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Answer to Petition for Review, Respondent DSHS' Response To Motion For Injunctive Relief Preserving The Status Quo And For Expedited Consideration Of The Motion, Respondent DSHS' Response To Motion To Allow Additional Evidence On Review and this Certificate of Service on all parties or their counsel of record on August 1, 2016 as follows:

XX Via e-service Agreement.

TO: Dmitri Iglitzin
Jennifer Robbins
Schwerin Campbell Barnard Iglitzin & Lavitt
18 W Mercer St. Ste. 400
Seattle, WA 98119
Email: iglitzin@workerlaw.com
robbins@workerlaw.com

Michele Earl-Hubbard
Allied Law Group LLC
PO Box 33744
Seattle, WA 98133
Email: Michele@alliedlawgroup.com
David Dewhirst
James Abernathy
Freedom Foundation
PO Box 552
Olympia, WA 98507
DDewhirst@myfreedomfoundation.com
JAbernathy@myfreedomfoundation.com

I certify under penalty of perjury under the laws of the State of
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Dated this 1 day of August, 2016 at Olympia, WA.


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Good Afternoon:

Please find attached for filing the following documents:

Respondent DSHS Response to Motion for Injunctive Relief Preserving the Status Quo and for Expedited Consideration of the Motion;
Answer to Petition;
Respondent DSHS' Response to Motion to Allow Additional Evidence on Review.
Certificate of Service

Thank you,

Diane Newman

Legal Assistant
Labor and Personnel Division
Attorney Generals' Office
(360) 664-4174