

Aug 30, 2016, 4:51 pm

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No. 93306-5

(Court of Appeals Case No. 46797-6-II)

COURT OF APPEALS, DIVISION I, STATE OF WASHINGTON

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SERVICE EMPLOYEES INTERNATIONAL UNION 775NW,  
Appellant,

v.

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

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**RESPONDENT FREEDOM FOUNDATION'S  
RESPONSE TO  
DEPARTMENT OF SOCIAL AND HEALTH SERVICES'  
ANSWER TO PETITION FOR REVIEW**

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## **I. IDENTITY OF PARTY**

Respondent Freedom Foundation (the “Foundation”) responds to Respondent Department of Social and Health Services’ (“DSHS”) Answer to SEIU 775NW’s (“SEIU”) Petition for Review by the Supreme Court. The Foundation takes the position that review should be denied. DSHS, while a co-respondent, takes the position that review should be granted on a limited set of issues.

## **II. STATEMENT OF RELIEF SOUGHT**

The Foundation respectfully requests that this Court deny SEIU’s Petition for Review.

## **III. STATEMENT OF THE CASE**

For the background facts on this case, the Foundation incorporates by reference its Statement of the Case in its Answer to SEIU’s Petition for Review filed on August 1, 2016.

DSHS presents three issues for review under RAP 13.4(b)(4), the “substantial public interest” basis for review. The three issues DSHS believes are a matter of “substantial public interest” are:

1. Did the Court of Appeals correctly determine that the [Public Records Act’s (“PRA” or “Act”)] commercial purposes prohibition on releasing lists of individuals, RCW 42.56.070(9), applies only where there is a direct 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 identities 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 obtain other information the requester may have or may obtain?

DSHS Answer at 2.

#### **IV. GROUNDS FOR RELIEF AND ARGUMENT**

##### **A. The Issue of What Constitutes a “Commercial Purpose” Rarely Arises**

DSHS’s first issue involves the “direct economic benefit” test adopted by the Court of Appeals for determining what a “commercial purpose” is for a public records request. DSHS Answer at 7-10. DSHS correctly states that the Court of Appeals decision is a case of first impression. But there is much more to this story.

**1. In the 43 years of the existence of the “commercial purpose” provision, it appears that only a handful of parties have ever litigated it, and that has been in the last year or so.**

The commercial purposes provision of the PRA took effect in 1973. *See* 1973 Session Laws, c. 1, § 26. In the 43 years of its existence, only one

appellate decision has addressed the commercial purposes issue. This is not a matter of “substantial public interest.”

DSHS also notes that one pending case in the Court of Appeals and six in Thurston County Superior Court involve this topic. *See* DSHS Answer at 6, n.3. DSHS is technically correct but additional facts paint the full picture. DSHS’s citation to these pending cases omits the fact that the Foundation is a party to all of them. The pending cases merely show that SEIU, a handful of affiliated unions, DSHS, and the Foundation care about this topic and are litigating the “commercial purposes” issue—but no one else in the past 43 years appears to be caring enough about this obscure provision. The rest of the world cares very little about this topic; the three parties in the instant case and a few SEIU affiliates do, but this is not a basis for accepting review as a matter of “substantial public interest.”

**B. Agencies Already Have Guidance on How to Determine If a Requestor Has a “Commercial Purpose” for a Request**

**1. Several Attorney General’s Opinions address the “commercial purposes” provision.**

While the Court of Appeals decision is the first published Washington case directly on this topic, there is plenty of other guidance on this. Several formal Attorney General’s Opinions address the issue of direct economic benefit for the commercial purpose provision of the PRA. *See*

1998 Op. Att’y Gen. No. 12; 1975 Op Att’y Gen. No. 15.<sup>1</sup> The Court of Appeals explicitly based its opinion on these formal Attorney General’s Opinions. *See SEIU Healthcare 775 NW v. DSHS*, 193 Wn. App. 377, \_\_\_ P.3d \_\_\_, 2016 WL 1447304 \*11 (2016) (“*SEIU 775*”):

[T]he AGO is charged with advising state agencies on PRA issues, and it necessarily has developed some expertise in this area. In addition, the legislature has not amended the PRA in response to the 1975 and 1998 opinions discussed above. Therefore, we interpret “commercial purposes” consistent with these AGO opinions.

*Id.*

**2. The Attorney General’s Model Rules on Public Records address the issue of what an agency must do to determine if a requestor has a “commercial purpose.”**

Speaking of the Attorney General’s role in advising state agencies on the PRA, the Attorney General has adopted model rules on public records. *See* ch. 44-14 WAC. *See also* RCW 42.56.570(2) (Legislature directs Attorney General to adopt Model Rules on Public Records). “The purpose of the model rules is to provide information to records requestors and state and local agencies about ‘best practices’ for complying with the Public Records Act.” WAC 44-14-00001.<sup>2</sup>

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<sup>1</sup> Additional Attorney General’s Opinions address the general issue of “commercial purposes.” *See* 1973 Op. Att’y Gen. No. 113; 1975 Op. Att’y Gen. No. 38.

<sup>2</sup> The Model Rules are non-binding. WAC 44-14-00003.



The Model Rules directly address DSHS's concern about how an agency can determine whether a requestor has a "commercial purpose" for a request:

An agency may require a requestor to sign a declaration that he or she will not put a list of individuals in the record to use for a commercial purpose. This authority is limited to a list of individuals, not a list of companies. A requestor who signs a declaration promising not to use a list of individuals for a commercial purpose, but who then violates this declaration, could arguably be charged with the crime of false swearing. RCW 9A.72.040.

WAC 44-14-06002(6) (citing 1998 Op. Att'y Gen. No. 12 and 1988 Op. Att'y Gen. No. 2 in footnotes). The basis of the Model Rule provision allowing an agency to require an declaration of non-commercial purpose is RCW 42.56.080, which provides (emphasis added):

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 *except* to establish whether the inspection and copying would violate RCW 42.56.070(9) [the commercial purpose provision].<sup>3</sup>

That is, DSHS can simply require a records requestor to sign a declaration attesting that he or she will not use the records for a commercial purpose. DSHS cannot be sued for any reason for doing so. *See* RCW 42.56.060 (providing immunity to agency and agency employees for releasing a public record in good faith). DSHS has clear guidance and is

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<sup>3</sup> Counsel for the Foundation knows from personal knowledge that this was the basis for allowing an agency to obtain a declaration because he was the primary drafter of the Model Rules when he was at the Attorney General's Office.

immune from suit. DSHS does not need any further “certainty” from this Court, which has limited resources to review issues that apparently are only important to a handful of people.

The Court of Appeals held that an agency might, in some circumstances, be required to go beyond the four corners of the request and determine if a requestor has a commercial purpose. *SEIU 775*, 2016 WL 1447304 \*12. But the Court of Appeals was clear that the reason was that the PRA itself did not provide specific directions on what an agency must do:

*The PRA offers no guidance* regarding when an agency must investigate further and the level of such investigation before disclosing a list of individuals. We hold that the agency must investigate when it has some indication that the list might be used for commercial purposes. Whether an agency must investigate will depend on a case-by-case determination based on the identity of the requester, the nature of the records requested, and any other information available to the agency.

*Id.* (emphasis added).

The *PRA* is the cause of any uncertainty. This Court does not “fix” a statute by tinkering with it. *See State v. Reis*, 183 Wn.2d 197, 215, 351 P.3d 127 (2015) (“It is not this court's job to remove words from statutes or to create judicial fixes[.]”). This is especially true when the problem sought to be fixed only affects a handful of people in the state. While the Foundation appreciates that DSHS would like to have the Supreme Court

“fix” this issue, that is not this Court’s job. Quite simply, the Court lacks the resources to answer every detailed question state agencies have.

**C. The “Linkage” Argument Has Been Repeatedly Rejected**

The last issue (perhaps) raised by DSHS for review by this Court as a matter of “substantial public interest” is the “linkage” argument under the PRA. The “linkage” argument is that “any information, no matter how public it may be, is nondisclosable if it could somehow lead to other, private information being tracked down from other sources.” *SEIU 775*, 2016 WL 1447304 \*15 (quoting *King County v. Sheehan*, 114 Wn. App. 325, 345-6, 57 P.3d 307 (2002) (“*Sheehan*”). The “linkage” argument has been soundly rejected. *See Koenig v. City of Des Moines*, 158 Wn.2d 173, 182-3, 142 P.3d 162 (2006).

The Foundation describes this issue as “perhaps” being raised because, while DSHS identifies it as one of its issues for review (DSHS Answer at 2), DSHS’s analysis of it does not seem to note any concern with the Court of Appeals refusal to overturn *Sheehan* and *Koenig* by allowing the “linkage” argument. In its very short briefing of the issue, DSHS does two things. First, DSHS notes that SEIU made the “linkage” argument to the Court of Appeals and that court rejected it. DSHS Answer at 10. Second, and this is the confusing part, DSHS merely explains that it did not apply the “linkage” argument when it decided to not claim certain records were

exempt from disclosure. *Id.* at 11. DSHS does not take a position on whether it was a good idea to not apply the “linkage” argument to the request but just notes that it did not apply it. To the extent DSHS is suggesting that this Court should accept review to overrule *Sheehan* and *Koenig* and reinstate the “linkage” argument as a way to prevent the disclosure of public records, the Foundation has two responses. First, the issue has not been properly raised because DSHS does not analyze the issue. Second, *Sheehan* and *Koenig* should not be overturned because they were well reasoned. The reasons why these two cases were well reasoned is aptly described in the Court of Appeals decision. *See SEIU 775*, 2016 WL 1447304 \*15.

## V. CONCLUSION

“Commercial purpose” litigation is extremely rare, apparently only recently affecting a handful of parties in the 43 years of the existence of the law. The “linkage” argument, if DSHS is actually raising it, should not be reviewed by this Court because *Sheehan* and *Koenig* were well reasoned.

Instead of a “substantial public interest,” this case involves only the interests of a few parties. The Court has more important cases to decide.

Respectfully submitted this 30th day of August, 2016.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on August 30, 2016, I served a copy of the foregoing by email pursuant to an e-service agreement:

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**Subject:** No. 93306-5 - Foundation Response to DSHS Answer to Petition for Review

Please find attached for filing the Freedom Foundation's Response to DSHS's Answer to Petition for Review in No. 93306-5.

Thank you.

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