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NO. 95262-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON PUBLIC EMPLOYEES ASSOCIATION
UFCW LOCAL 365, et al.,
Respondents/Plaintiffs,

v.

STATE OF WASHINGTON, et al.,
Respondents/Defendants,

And

FREEDOM FOUNDATION,
Petitioner/Respondent/Defendant.

MEMORANDUM OF *AMICI CURIAE* ALLIED DAILY NEWSPAPERS
OF WASHINGTON; SEATTLE TIMES COMPANY; WASHINGTON
COALITION FOR OPEN GOVERNMENT; WASHINGTON
NEWSPAPER PUBLISHERS ASSOCIATION; AND WASHINGTON
STATE ASSOCIATION OF BROADCASTERS
IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION AND IDENTITY OF AMICUS CURIAE

Amici curiae, identified and described in the attachment hereto, are members and representatives of the news media throughout the state, as well as the Washington Coalition for Open Government. Collectively, they are dedicated to assuring government remains transparent and accountable to those it serves, and to fostering an informed citizenry, which is the cornerstone of democracy.

It is urgent that this Court review the published decision below (“Decision”).¹ The Decision creates, essentially out of whole cloth, a new constitutional privacy right entitling public servants to hide from the public records containing their dates of birth (“DOB”). No prior decision supports this supposed constitutional right. The Decision’s cursory privacy analysis, if accepted, would lead to widespread suppression of information that for decades have been available in Washington for the asking.

Amici raise two points in support of review. First, the Decision is fatally flawed because there is *no* expectation of privacy in DOBs contained in public records. To the contrary, DOBs have long been available in all manner of public records, from birth certificates to voter

¹ *Wash. Public Emps. Ass’n v. Wash. State Ctr. for Childhood Deafness & Hearing Loss*, 1 Wn. App. 2d 225, 404 P.3d 111 (Oct. 31, 2017).

registration databases to public agency employee files. DOBs have never been “private affairs” subject to Const. art. 1 § 7.

Second, the Decision ignores the important public interest in assuring access to DOBs contained in agency records. DOBs are a critical tool for assuring public oversight over government. The press and others rely on DOBs to determine, among other things, who is responsible for performing various public duties. Availability of DOBs has facilitated news investigations informing the public about how agencies function and how tax dollars are being spent. This legitimate public concern defeats any claim that public employee DOBs are “private.”

II. DATES OF BIRTH ARE NOT “PRIVATE AFFAIRS” BUT HAVE LONG BEEN A MATTER OF PUBLIC RECORD

The Decision holds disclosure of public employees’ DOBs violates Const. art. 1 § 7, which provides “[n]o person shall be disturbed in his private affairs . . . without authority of law.” Central to the Decision is the assertion that public employees are entitled to “the expectation of privacy” that their “names associated with their corresponding birthdates” will not be disclosed because doing so “reveals personal and discrete details of the employees’ lives.” 1 Wn. App. 2d at 234.²

² The Decision also asserts that constitutional privacy may be established by “the historical treatment of the interest asserted,” but neither Respondents nor the Court of Appeals raised any historic reason for prohibiting DOB disclosure. To the contrary, as discussed herein, DOBs historically are public.

But neither public servants, nor anyone else, is entitled to any reasonable expectation of privacy in their DOBs. Birthdates are “matters of public record,” *King Cty. v. Sheehan*, 114 Wn. App. 325, 343, 57 P.3d 307 (2002), and “facts that are of a public nature[.]” *State v. C.N.H.*, 90 Wn. App. 947, 950, 954 P.2d 1345 (1998); *see also State v. McKinney*, 148 Wn.2d 20, 60 P.3d 46 (2002) (information in state driver’s license records not protected by art. 1 § 7).³ Indeed, the Restatement of Torts, which is the basis for the scope of any alleged privacy rights in public records,⁴ specifically recognizes that disclosure of DOBs does not implicate privacy:

[T]here is no liability for giving publicity to facts about the plaintiff’s life that are matters of public record, ***such as the date of his birth***, the fact of his marriage, his military record, the fact that he is admitted to the practice of medicine or is licensed to drive a taxicab[.]

Restatement (Second) of Torts § 652D (emphasis added); *Sheehan*, 114 Wn. App. at 342-43.

³ In *State v. Jordan*, 126 Wn. App. 70, 74, 107 P.3d 130 (2005), the Court of Appeals held a guest had no art. 1 § 7 expectation of privacy in his date of birth as it appeared on a motel registry. This Court reversed, but on entirely different grounds that did not rest at all on the alleged privacy of DOBs. *See* 160 Wn.2d 121, 129, 156 P.3d 893 (2007) (registry disclosure invaded privacy because “presence in a motel or hotel may in itself be a sensitive piece of information”).

⁴ This is true under both the Public Records Act (“PRA”) and art. 1 § 7. *See Sheehan*, 114 Wn. App. at 342 (noting PRA privacy provision, now codified at RCW 42.56.050, is derived from Restatement § 652D); *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 129 Wn. App. 832, 861-62, 120 P.3d 616 (2005) (asserted constitutional privacy right to nondisclosure of public records “does not yield a different result than the privacy definition in the [PRA]” under RCW 42.56.050), *rev’d in part on other grounds*, 164 Wn.2d 199, 189 P.3d 139 (2008).

In Washington, DOBs are not “private affairs.” They are publicly disclosed, and readily available, from numerous sources. For example, state law *requires* that the DOB of all registered voters be available for public inspection and copying. RCW 29A.08.710(2).⁵ Birth certificates, which include both the child and parents’ DOBs, are public records, available from the Department of Health and other sources.⁶ And, in stark contrast to the blanket suppression the Decision below appears to require, the Legislature has expressly recognized that public employees DOBs *are* publicly disclosable. RCW 42.56.250(4).⁷ The birth *year* of criminal justice agency employees is exempt from disclosure – but even then, the employees have no expectation of privacy, because the full DOB is available to members of the news media. RCW 42.56.250(9).

The Decision below simply ignores that, as a historical and legislative matter, DOBs have long been publicly available in Washington. The Decision itself cites no evidence suggesting otherwise. The notion

⁵ The statewide voter registration database is available from the Secretary of State’s website upon request. See <https://www.sos.wa.gov/elections/vrdb/extract-requests.aspx>. Searchable versions are readily found online, enabling anyone to look up the DOB of any state voter. See, e.g., www.soundpolitics.com/voterlookup.html.

⁶ See RCW 70.58.080(1)(a), .104; <https://www.doh.wa.gov/LicensesPermitsandCertificates/BirthDeathMarriageandDivorce/OrderCertificates>.

⁷ This provision, as amended in 2006, exempted certain personal identifiers of public employees from PRA disclosure. The exempt identifiers include home addresses and phone numbers, among other things, but *not* DOBs. This was intentional: the same statute exempts from disclosure the DOBs of public employees’ dependents and agency volunteers. RCW 42.56.250(4); Laws of 2006, ch. 209, § 6. Because these records are not expressly exempt, they are subject to disclosure upon request. RCW 42.56.080(2).

that there is any expectation of privacy in DOBs – much less one of constitutional magnitude – has no basis whatsoever.

III. ACCESS TO DATES OF BIRTH IN PUBLIC RECORDS SERVES THE PUBLIC INTEREST

The Decision below declares that disclosure of DOBs is “not in the public interest because [DOBs] do not inform the public of facts related to a government function.” 1 Wn. App. 2d at 237. This assertion is entirely conclusory, unsupported by any evidence or authority. It is also wrong.

Public employee records, including DOBs and other identifying information, facilitate public oversight of government. Among other things, they are a critical tool for accurate newsgathering, used to verify individuals’ identities; to confirm those serving the public are who they say they are; to distinguish among individuals with similar names; and to cross-reference public employees who appear in multiple public records.

Accordingly, journalists working for *amici* and their members have routinely requested, and for years have received from agencies throughout the state, databases of records about public employees that include DOBs. For example, *amicus* Seattle Times reported that over a decade ago that “[h]aving the dates of birth of public-school coaches in Washington was a vital part of our ‘Coaches Who Prey’ investigative series” about abusive high school coaches and teacher, because “the dates of birth helped the

Times track coaches who had moved from one district to another[.]”⁸ As this Court has noted, the “Coaches Who Prey” series identified at least 98 Washington State school employees “who were reprimanded, warned, or let go in the past decade because of sexual misconduct” yet “continued coaching or teaching afterward.” *Bellevue John Does*, 164 Wn.2d at 237 (Madsen, J., dissenting) (citation omitted).

Similarly, a 2010 news investigation, relying on state pension data that contains employee DOBs, found 40 university or community-college administrators in Washington “retired” and were then quickly rehired, in a way that enabled them to “double dip” and collect both a salary and a pension.⁹ A 2011 analysis of payroll data, which includes public employee DOBs, showed a surge in Seattle employees earning six-figure incomes.¹⁰

Access to DOBs in public records also facilitates other public interest investigations. For example, the Seattle Times has reported that its in-depth coverage of the disputed gubernatorial election of 2004 “used

⁸ *Watching out for your interests requires access to public records*, Seattle Times (October 26, 2007), <https://www.seattletimes.com/seattle-news/watching-out-for-your-interests-requires-access-to-public-records>. The “Coaches Who Prey” series is available at <http://old.seattletimes.com/news/local/coaches>.

⁹ Justin Mayo & Nick Perry, *Retired, then rehired: How college workers use loophole to boost pay*, SEATTLE TIMES (June 26, 2010), <https://www.seattletimes.com/seattle-news/retired-then-rehired-how-college-workers-use-loophole-to-boost-pay>.

¹⁰ Justin Mayo & Bob Young, *1 in 5 city of Seattle workers earning six figures*, SEATTLE TIMES (Sept. 17, 2011), <https://www.seattletimes.com/seattle-news/1-in-5-city-of-seattle-workers-earning-six-figures>.

the names and dates of birth of registered voters to compare with the names and dates of birth of felons” and that DOB information was essential “to report several stories pointing out flaws in the appeals of the election outcome, and in the election process itself[.]”¹¹

These and similar publications are indisputably in the public interest. Assuring such oversight is the very reason the PRA exists. *Daines v. Spokane Cty.*, 111 Wn. App. 342, 347, 44 P.3d 909 (2002) (PRA’s purpose “is to keep public officials and institutions accountable to the people”); *see also Sheehan*, 114 Wn. App. at 347 (public has legitimate interest in knowing the identity and information about “public employees, paid with public tax dollars.”). This type of oversight helps protect citizens from abuse, safeguards the public purse, and keeps government workers honest. Yet under the ill-considered holding of the Decision below, all of this reporting would have unconstitutionally violated the privacy rights the subjects supposedly had in their DOBs.

In short, public employee DOBs are a matter of considerable public concern – a point the Decision ignores completely. Where, as here, a matter is of “legitimate concern to the public,” there is no privacy

¹¹ *Watching out for your interests requires access to public records*, Seattle Times (October 26, 2007), <https://www.seattletimes.com/seattle-news/watching-out-for-your-interests-requires-access-to-public-records>.

invasion, constitutional or otherwise. *See* RCW 42.56.050; *Bellevue John Does*, 129 Wn. App. at 861-62.

IV. CONCLUSION

The Decision below embraces an exceedingly expansive, poorly considered view of constitutional privacy that threatens to suppress access to important public records. It raises an important constitutional question that merits this Court's review. RAP 13.4(b). The Decision conflicts with earlier cases recognizing DOBs are a matter of public record. *Id.* It also conflicts with this Court's recognition that access to public records is foundational to "the sovereignty of the people and the accountability to the people of public officials,"¹² and that when it comes to public institutions, "secrecy fosters mistrust."¹³ For all of these reasons, review is needed.

RESPECTFULLY SUBMITTED this 8th day of February, 2018.

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¹² *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 251, 260, 884 P.2d 592 (1994).

¹³ *Dreiling v. Jain*, 151 Wn.2d 900, 903, 93 P.3d 861 (2004).

ATTACHMENT

IDENTITY AND DESCRIPTION OF *AMICI CURIAE*

- 1. Allied Daily Newspapers of Washington**, a Washington not-for-profit association representing 27 daily newspapers serving Washington and the Washington bureaus of the Associated Press.
- 2. Seattle Times Company**, publisher of *The Seattle Times*, *Yakima Herald-Republic* and *Walla Walla Union-Bulletin* and their respective websites.
- 3. Washington Coalition for Open Government**, an independent, nonprofit, nonpartisan organization dedicated to promoting and defending the public's right to know in matters of public interest and in the conduct of the public's business. WCOG's mission is to help foster open government processes, supervised by an informed and engaged citizenry, which is the cornerstone of democracy. WCOG represents a cross-section of the Washington public, press, and government.
- 4. Washington Newspaper Publishers Association**, founded in 1887, two years before statehood, represents more than 80 weekly and small daily newspapers across the state of Washington and more than a dozen affiliated organizations. It advocates for freedom of speech, transparent government and a free press.
- 5. Washington State Association of Broadcasters**, a not-for-profit trade association the membership of which is made up of 28 television stations and 182 radio stations licensed by the Federal

Communications Commission to communities within the state of Washington. The radio and television station members of WSAB are engaged in newsgathering and reporting on issues and events of public interest to their viewers and listeners, providing their primary source of news and information.

DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the state of Washington that on this 8th day of February, 2018, she electronically filed the foregoing document with the Washington State Supreme Court, which will send notification of such filing to the attorneys of record listed below. The attorneys of record listed below were also served with the foregoing document via first class mail.

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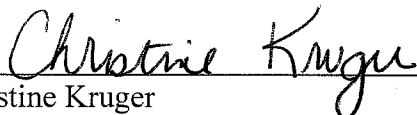
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