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Division II
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No. 49224-5-II

95262-1

IN THE WASHINGTON COURT OF APPEALS DIVISION II

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

v.

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

and

FREEDOM FOUNDATION,
Petitioner/Respondent/Defendant.

**PETITION FOR DISCRETIONARY REVIEW
BY THE SUPREME COURT**

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I. IDENTITY OF PETITIONER

Freedom Foundation (“Foundation”) is a Respondent and Defendant below. The Foundation is a Washington nonprofit organization devoted to informing public employees about their legal rights regarding union membership and dues payment obligations. At issue in this case are numerous public records requests the Foundation submitted to Washington State agencies for the names, birthdates, and work email addresses of unionized public employees (not union members, but employees who work within a bargaining unit for which a union acts as an exclusive bargaining representative). The Foundation requested these records for one, sole purpose: to facilitate its educational outreach to public employees about their rights. The Foundation asks this Court to review the Court of Appeals’ published decision set forth in Part II.

II. DECISIONS BELOW

The Foundation seeks review of the Court of Appeals’ published opinion in *Washington Public Employees Association, et al. v. Washington State Center for Childhood Deafness and Hearing Loss, et al.* (“WPEA”), No. 49224-5-II (October 31, 2017) (Appendix at A:1-13), which reversed the Thurston County Superior Court’s July 29, 2016 Order Denying Plaintiff Unions’ Motions for Permanent Injunction (App. A:14 – A:52).

III. ISSUES PRESENTED FOR REVIEW

The following issues merit Supreme Court review pursuant to RAP 13.4(b)(1), RAP 13.4(b)(2), RAP 13.4(b)(3), and RAP 13.4(b)(4):

1. Whether a public employee may have a constitutional privacy interest in the public records disclosure of her name and birthdate when this Court has held that “an individual has no constitutional privacy interest in a *public* record.”

2. Whether a constitutional privacy interest under Article I §7 may be grounded in an individual’s subjective privacy expectation?

3. Whether the PRA constitute an “authority of law” under Article I § 7.

4. Whether the Court of appeals violates the separation of powers by substituting its judgment for that of the legislature, which has determined that public employees’ names and birthdates are disclosable and that access to this information advances the PRA’s purpose.

IV. STATEMENT OF THE CASE

In April 2016, Freedom Foundation submitted Public Records Act (“PRA”) requests to various state agencies for the names, birthdates, and state-issued work email address of state civil service employees in unionized bargaining units. *WPEA*, App. A:4. These employees work within bargaining units represented by unions, but they are not all union

members, and none of the information the Foundation requested would indicate whether individual employees were union members. *Id.* For over two years, “[o]ne of the Foundation’s central purposes [has been] to educate public employees... about their constitutional rights to drop their membership in and payment of fees to public sector unions.” *SEIU Healthcare 775NW v. DSHS, et al.*, 193 Wn. App. 377, 385–86, *review denied*, 186 Wn.2d 1016 (2016). The court below also recognized this, stating that “the Foundation’s campaign is to inform eligible state employees that they have a constitutional right to opt-out of paying union dues.” App. A:4. These First Amendment rights for public civil service employees are set forth in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), and its progeny.

For over two years, the Foundation has conducted this outreach, primarily (though not exclusively) to Individual Providers and Family Childcare providers, whose First Amendment rights regarding compulsory union fees were recently articulated in *Harris v. Quinn*, 134 S.Ct. 2618 (2014). The Foundation’s educational outreach includes written, email, telephone, social media, and door-to-door communications, in various combinations. When public employees ask the Foundation to stop communicating with them, the Foundation does so. The Foundation has never and will never sell or give the public employee information it obtains

through the PRA to any third party, and it will never use that information for any purpose other than its educational outreach program. After two-plus years and tens of thousands of outreach communications, no single instance of harassment, targeting, or any other misconduct has ever occurred. In this case, unions representing various public employee bargaining units brought five virtually identical lawsuits to enjoin release of the requested records pursuant to RCW 42.56.540 in Thurston County Superior Court. The agencies determined that they would disclose the requested public records absent a court order.

The cases and extensive motions practice ensued. In various combinations, the seven unions in five suits argued eight (8) “grounds for preventing grounds for preventing the disclosure of employees' names and corresponding birthdates, including that such disclosure would violate employees’ right to privacy under Article I § 7 of the Washington Constitution. *WPEA*, App. A:3-4, n. 2.

On July 29, 2016, the Superior Court denied the unions’ Joint Motion for Permanent Injunction. App. A-14. The Unions appealed to the Court of Appeals, Division II, which stayed the release of public employees’ names and corresponding birthdates, pending appeal. The Court of Appeals consolidated the cases, received briefing and oral argument, and published an opinion on October 31, 2017 reversing the Superior Court. In so doing,

the Court of Appeals erred. This Petition timely followed.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. Introduction & Summary of Argument

This case addresses whether the disclosure of a public employee's name and birthdate under the PRA violates the employee's right to privacy under Article I §7 of the Washington Constitution. This Court's holdings make clear that when Article I §7 applies to questions of whether an individual must disclose private information to the government, the state needs only a rational basis to compel disclosure. *Ino Ino, Inc. v. City of Bellevue*, 132 Wash. 2d 103, 124, 937 P.2d 154, 167, *amended*, 943 P.2d 1358 (1997). More recently, this Court held that "an individual has no constitutional privacy interest in a *public* record." *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 883, 357 P.3d 45 (2015) (emphasis in original).

In the case at bar, the Court of Appeals held that "state employees have a constitutionally protected expectation of privacy in their full names associated with their corresponding birthdates." *WPEA*, App. A:13. This decision squarely conflicts with this Court's decision in *Nissen*. Moreover, to the extent a constitutional privacy interest can exist within a record that is already *public*, the Court of Appeals disregarded correct Article I § 7 analysis and the rational basis test set forth in *Ino Ino*. Accordingly, review by this Court is appropriate under RAP 13.4(b)(1).

For the same reason, the *WPEA* holding directly conflicts with the decision issued by the Court of Appeals only one year ago. *West v. Vermillion*, 196 Wn. App. 627, 638-639, 384 P.3d 634, 638 (2016), *review denied*, 187 Wn.2d 1024, 390 P.3d 339 (2017) (“The language of this [*Nissen*] holding does not limit it to only certain constitutional privacy interests nor to only those privacy interests enumerated under certain constitutional provisions. Instead, *Nissen* was clear that an individual does not have a constitutional privacy interest in public records.”). Accordingly, review by this Court is appropriate under RAP 13.4(b)(2).

The Court of Appeals’ decision also raises a significant question of law under the Washington Constitution – whether Article I § 7 creates a broad, entirely subjective, and potentially unbounded exemption to undisputedly public records under the PRA. If allowed to stand, *WPEA* will invite opponents of government transparency to assert Article I § 7 privacy claims based on speculative, unfounded, unrealized, and unlikely harms (as the union appellants have done here) anytime they wish to withhold otherwise nonexempt public records for untoward reasons. Thus, *WPEA*’s unprecedented and withering application of Article I § 7 to the state’s most robust democratic safeguard, the PRA, makes review by this Court appropriate under both RAP 13.4(b)(3) and (4).

Finally, *WPEA*’s misapplication of Article I § 7 substituted the court’s

judgment for that of the legislature, which is empowered to craft exceptions to the PRA, and thus violated the separation of powers. For this reason too, review by this Court is appropriate under both RAP 13.4(b)(3) and (4).

B. The Decision below

In *WPEA*, the Court of Appeals decided that public employee names and birthdates were not disclosable under the PRA because such disclosure would violate the privacy rights of the public employees under Article I, §7. First, the court held that Article I §7 could prohibit production of public records to a requestor. *WPEA*, App. A:7.¹ Next, the court engaged in a two-step analysis to determine whether names and birthdates fell within the protection of Article I §7. This analysis originates from *State v. Puapuaga*, 164 Wn.2d 515, 192 P.3d 360 (2008) which addressed the search of a citizen – not the government’s production of its records. *Puapuaga*, 164 Wn.2d 515 at 522. To determine whether a privacy interest exists in particular information, *Puapuaga* requires courts to first look whether or not the asserted privacy interest is historically recognized. *Id.* Then, if the history is unclear, a court may look to whether the expectation of privacy is one that a citizen of this state is entitled to hold. *Id.* Here, the lower court created

¹ The PRA states that public records can be withheld from production if they fall within any “other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070(1). Although here, the court may have ruled that Article I § 7 supersedes the PRA. *WPEA*, App. A:7.

a new standard in which either historical treatment or a reasonable expectation of privacy can create a constitutional privacy interest under Article I §7. *WPEA*, App. A:7. Using this newly created standard, the lower court determined that public employees had a reasonable expectation of privacy in their names and birthdates *because of additional information that might be identified and potential abuses that might ensue as a result.* *WPEA*, App. A:8-9. *Puapuaga* next directs courts determine whether the intrusion into that privacy is justified by valid law. App. *WPEA*, A:10. The court held that production of names and birthdates in response to a public records request was not justified by valid law because, while the PRA provided permission, it does not provide “justification” as required by Article I §7. *WPEA*, App. A:10.

C. The Court of Appeals’ holding directly conflicts with the Supreme Court’s decision in *Nissen*.

The Court of Appeals’ holding that public employees can have a privacy interest in a public record directly conflicts with this Court’s decision in *Nissen*, 183 Wn.2d at 883. *WPEA*, App. A:9. In *Nissen*, the court held that “an individual has no constitutional privacy interest in a public record [.]” *Nissen*, 183 Wn.2d at 883 (citing *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 457 (1977)).

Just like this case, *Nissen* concerned a request for *public* records. *Nissen*,

163 Wn.2d at 882-883. There, the public records sought were created and stored on a public employee's personal cell phone. *Nissen*, 183 Wn.2d at 896-70. Obviously comingled with these public records were purely personal text messages and other purely personal information. *Id.* In distinguishing between purely personal information and public records both housed on a nongovernmental device, the Court rejected Pierce County's argument that all the employee's text messages (including public records) were nondisclosable due to Article I § 7's right to privacy. *Nissen*, 183 Wn.2d at 883, n. 9. To that effect, the county tried to force the Court into a false, all-or-nothing choice, treating all the texts on the employee's phone equally, and thus exempting public records housed on that device from disclosure under the PRA. The county argued that:

The only way a court could conclude that the [employee's] private communications device records ... were not exempt would be to conclude ... that public employees have no constitutional protections with regard to their private communications devices under the Fourth Amendment or article I, § 7 of the Washington Constitution[.]

Pierce County's Supplemental Brief at 11, *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 883, WL 1871717 (Wn). Instead, this Court wisely treated the public records on the employee's phone differently from the purely personal information on that device:

The County and Lindquist suggest that various provisions of the state and federal constitutions categorically prohibit a public

employer from obtaining public records related to private cell phone use without consent. ***Because an individual has no constitutional privacy interest in a public record***, Lindquist's challenge is necessarily grounded in the constitutional rights he has in personal information comingled with those public records.

Nissen, 183 Wn.2d at 883 (emphasis added). Any *constitutional* privacy interest ends at the point at which information becomes a public record. In this case, no one disputes that the public employee names and birthdates requested are public records within the possession of the government. Thus, *Nissen* settles the matter: “an individual has no constitutional privacy interest in a public record.” *Id.* The Superior Court correctly understood this. App. A:21 The Court of Appeals adopted and expanded upon the very Pierce County argument this Court rejected in *Nissen*.

The *WPEA* court labeled *Nissen*'s constitutional holding mere dicta, App. A:9, but it has not done so previously. See *West v. Vermillion*, 196 Wn. App. at 637-39 (referring repeatedly to *Nissen*'s “no constitutional privacy interest in a *public* record” as a holding with binding effect). In *West*, a city council member resisted disclosure of public records contained in his personal email account. Division II held that “*Nissen* was clear that an individual does not have a constitutional privacy interest in public records.” Division II then ordered the council member to disclose the emails sought. *West*, 196 Wn. App. at 638, 642. Here, the Court of Appeals made new law, that directly conflicts with this Court's holding in *Nissen* and the

Court of Appeal's previous decision in *West*.

D. The Court of Appeals' holding that a public employee is entitled to hold an expectation of privacy in her name and birthdate is based on a misapplication of this Court's decisions in *Puapuaga* and *Ino Ino*.

After setting aside binding precedent, *West* and *Nissen*, the Court of Appeals misapplied this Court's Article I § 7 analysis set forth in *Puapuaga*. Then, even if a discernable constitutional privacy interest in names and birthdates could be found, the lower court should have justified any intrusion upon that interest under the rational basis test in *Ino Ino*. The Court of Appeals did not, and compounded its error. *WPEA*, App. A:7-9.

Division II should never have reached *Puapuaga* because this Court has already defined the appropriate standard for questions of confidentiality under Article I §7. In *Ino Ino, Inc. v. City of Bellevue*, 132 Wn. 2d at 124, this Court held that when evaluating the constitutional rights to confidentiality², "the state constitution offers no greater protection than the

²There have been very few cases applying Article I §7 outside the search and seizure context, but even the cases addressing an individual's "interest in avoiding disclosure of intimate personal matters" are confined to avoiding disclosure of personal matters *to the government*. In fact, "The few decisions applying article 1, section 7 outside the search and seizure context have attributed to the provision no broader scope than federal constitutional privacy law." *Bedford v. Sugarman*, 112 Wn. 2d 500, 506, 772 P.2d 486, 489 (1989); *See also State v. Maxon*, 110 Wn.2d 564, 571, 756 P.2d 1297 (1988) (holding that Article I, §7 did not create a parental communications evidentiary privilege); *Peninsula Counseling Ctr. v. Rahm*, 105 Wn.2d 929, 936-37, 719 P.2d 926 (1986)(holding that requiring mental health facilities to disclose the names and diagnoses of patients receiving federal funds to the federal government was not a violation of Article I, §7).

federal constitution, which requires only application of a **rational basis test.**” Wn. (emphasis added). The *WPEA* court completely ignored this standard, as discussed below.

Instead of applying *Ino Ino*, the Court of Appeals turned to this Court’s decision in *Puapuaga*, 164 Wn.2d 515. Not only is *Puapuaga* inapplicable because it is a case involving a government search of an individual, the Court of Appeals fundamentally misapplied its test. The court stated that: “Private affairs are determined by considering **either** (1) the historical treatment of the interest asserted, **or** (2) whether the expectation of privacy is one that a citizen of this State is entitled to hold.” *WPEA*, App. A:7 (internal citations omitted and emphasis added). For support, Division II cited *SEIU Local 925 v. Freedom Foundation*, (“*SEIU 925*”) 197 Wn. App 203, 389 P.3d 641 (2016). This is not the standard, as *Puapuaga* makes clear. *SEIU 925* bears this out, as it relied **exclusively** on the historical treatment of the information at issue to conclude that the records sought (quasi-public employees’ names and contact information) were not protected under Article I §7. *SEIU 925*, 197 Wn. App at 223-26. The court explicitly rejected several arguments by the objector that concentrated solely on an individual’s expectation of privacy. *Id.* *SEIU 925* does not support the decision below and, in fact, militates against it.

SEIU 925 supportively cited *Puapuaga*, 164 Wn.2d at 522, which also

treated historical evidence of a privacy interest as conclusive when determining the viability of a privacy interest. *SEIU 925*, 197 Wn. App at 222. This judicial trend makes sense, as an expectation of privacy that is not rooted in historic recognition is likely subjective. Subjective expectations of privacy are insufficient under Article I § 7 and the Fourth Amendment. See, e.g., *Katz v. United States*,³ 389 U.S. 347, 361, 88 S. Ct. 507, 516 (1967); *United States v. Heckenkamp*, 482 F.3d 1142 (9th Cir. 2007); *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001); *United States v. Slanina*, 283 F.3d 670 (5th Cir. 2002); *Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir.2001).

Puapuaga explicitly states: “If history does not show whether the interest is one entitled to protection under article I, section 7, we **then** ask whether the expectation is one that a citizen of this state is entitled to hold.” *Puapuaga*, 164 Wn. 2d at 522; see also *State v. Surge*, 160 Wn.2d 65, 72, 156 P.3d 208 (2007). *Puapuaga* treats the “privacy expectation” inquiry as a backup, utilized only if the historical treatment is unclear.⁴ That’s why, in

³ Although the cases quoted here refer to Fourth Amendment jurisprudence, they are the most apt. The Court of Appeals standard is based on a search and seizure standard, as this Court demonstrated in *Bedford*, supra. The confusion in knowing which standard to apply is evident even in trying to refute the lower court’s assertion, demonstrating yet again how inappropriately suited for the facts of the case at bar the Division II standard is.

⁴ There, this Court held that the “[H]istory shows the interest is one not entitled to protection.” *Puapuaga*, 164 Wn. 2d at 523; See also *State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003) (holding that an arrestee has no reasonable expectation of privacy in personal items once they have been viewed by state officials during a valid inventory search).

Puapuaga, the court never reached the arguments regarding privacy expectations, but rather stated that “[c]ontrary to Puapuaga's contention, the private affairs inquiry in this case is resolved by reviewing historical treatment of the privacy interest asserted.” *Puapuaga*, 164 Wn. 2d at 523. The history was dispositive in that case, as it should have been here. The Court of Appeals departed from *Puapuaga*'s test, and substituted its own.

Applying the proper test, it is obvious that there is no privacy interest at stake here. The Court of Appeals conceded that there is no historical preservation of the privacy of names and birthdates. *WPEA*, App. A:8. Instead, the court exclusively relied upon the sensitive nature of information that is *not at issue* in the Foundation's public records request, such as one's whereabouts or co-guests at a motel, patient names and diagnoses in mental facilities, trade secrets, and personal financial data, etc.⁵ The Court of Appeals did not say that names and birthdates were intimate details, but rather that disclosure of names and birthdates might lead to discovery of *other* details that *might be* intimate. By relying exclusively on the privacy interest held in information that is not in dispute, the court essentially agreed that names and birthdates are not constitutinally private.

A person's birthdate has been a matter of public record since time

⁵ Most of which are already exempt from disclosure under the PRA. See RCW 42.56.230; RCW 42.56.080; RCW 42.56.250; WAC 44-14-06002.

immemorial.⁶ Names and birthdates are not only intuitively less private than medical history or financial data, but have also been held to be so by the Court of Appeals. In *King County v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307 (2002) the Court of Appeals found that only highly sensitive, personal information warrants protection under the PRA's "right to privacy⁷," and that birthdates (presumably in connection with corresponding names) are not highly sensitive information. *Sheehan*, 114 Wn. App. at 343 (2002).

Instead of relying on this Court's guidance, the Court of Appeals created a new system in which **either** history **or** subjective privacy expectations suffice. But divorcing the historical treatment from the citizen's expectation creates untenable doctrine.

In attempting to apply its new test, the Court of Appeals stated that a "constitutional challenge allows us to consider the nature and extent of the information that may be obtained **as a result** of the governmental conduct." *WPEA*, App. A:8 (emphasis added). The lower court's concerns were *based entirely on the harms that could result from misuse of information not requested in this case. Id.* This argument employs linkage analysis the courts has explicitly and repeatedly repudiated. *SEIU 925*, 197 Wn. App at

⁶ HL Brumberg, D Dozor, and SG Golombek, *History of the birth certificate: from inception to the future of electronic data*, 32 J. Perinatology 407-11 (2012), available at <https://www.nature.com/articles/jp20123.pdf>.

⁷ *Sheehan*'s analysis of the statutory right to privacy is similar to the historical inquiry under this Court's Article I § 7 analysis. *Sheehan*, 114 Wn. App at 342-344.

219 (“A reviewing court should not look beyond the four corners of the records at issue to determine if they were properly withheld under a PRA exemption.”); *SEIU 775NW v. DSHS*, 193 Wn. App. at 411; *Koenig v. City of Des Moines*, 158 Wn.2d 173, 183 (2006) (“[N]o statutory language or case law [] support[s] the notion [that] we may look beyond the four corners of the records at issue to determine whether they were properly withheld.”); *Sheehan*, 114 Wn. App. at 345-46 (rejecting what the court characterized as a “linkage” argument— “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.”). No case, until now, employs this connect-the-dots analysis. Such attenuated, hypothetical rationale for ignoring the PRA’s mandate clearly evidences the unsustainability of the court’s novel test.

Division II’s analysis is both contrary to existing law and unworkable. Without historical analysis, which leads to different result than the court reached in this case, this vast new constitutional exemption will subsume the PRA. This Court should grant review to correct this aberration.

E. The Court of Appeals’ holding that the PRA does not constitute “authority of law” under Article I §7 conflicts with other appellate court decisions.

The Court of Appeals created a new standard by holding that a law must do more than “permit” intrusion to “justify” encroaching on a privacy

interest. *WPEA*, App. A:10. This standard is not substantiated by any case law and ignores decades of Washington case law. This Court's decision in *Ino Ino*. shows that disclosure of private information may be compelled wherever a legitimate public interest in disclosure exists. 132 Wash. 2d at 124. *Ino Ino* should have been applied here, but it was not.

As previously stated, Article I § 7 cannot naturally interact with the PRA because it limits government *searches*, not instances where the information is a government record within the government's possession. *Bedford v. Sugarman*, 112 Wn. 2d 500, 506, 772 P.2d 486, 489 (1989). Additionally, in *Sheehan*, 114 Wn. App. at 344, the Court of Appeals explained that a privacy interest can only overcome the PRA where there is a **lack** of legitimate public interest present.⁸ Here in comparison, the court held that “[T]he purpose of the PRA is not served by the public disclosure of this information [public employee names and birthdates].”⁹

⁸ *Sheehan* stated in full:

In interpreting Washington's Public Disclosure Act, our courts may look to the federal courts and their interpretation of FOIA. *Bonamy v. City of Seattle*, 92 Wn.App. 403, 960 P.2d 447 (1998). However, it is important to bear in mind that the “ ‘state act is more severe than the federal act in many areas.’ ” *PAWS II*, 125 Wn.2d at 266, 884 P.2d 592, quoting *Hearst*, 90 Wn.2d at 129, 580 P.2d 246. Most significantly, unlike federal cases interpreting FOIA, “the use of a test that balances the individual's privacy interest against the interest of the public in disclosure is not permitted.” *Dawson*, 120 Wn.2d at 795, 845 P.2d 995; *Brouillet v. Cowles Pub'g Co.*, 114 Wn.2d 788, 798, 791 P.2d 526 (1990). Under Washington's Act, both a privacy interest and a lack of legitimate public interest must be present to establish this exemption. *Dawson*, 120 Wn.2d at 798, 845 P.2d 995.

⁹ Ignoring the fact that the legislature clearly thought otherwise. See section 5 below.

Applying the *Ino Ino* standard, rational basis, it is obvious that the PRA's disclosure requirements serve a legitimate state interest. The people have a right to know who their public servants are, and birthdates are essential to disambiguating and identifying those public servants. The legislature acknowledged this state interest by creating specific PRA exceptions for certain individuals' birthdates, but not public employees' birthdates. *See* § F, below. Additionally, the names and contact information of some quasi-public employees have already been held to fall within the intended application of the PRA – against an Article I § 7 challenge. *SEIU* 925, 197 Wn. App at 221. This Court should review the lower court's decision to depart from clear and binding Article I § 7 precedent.

F. The Court of Appeals' decision violates the separation of powers.

To conclude that Article I § 7, the public's constitutionally guaranteed protection *from the government*, applies to the PRA, a law compelling the government to disclose its records *to the public*, the Court of Appeals reasoned that disclosing public employees' names and birthdates could “potentially” subject them to “an ongoing risk of identity theft and other harms.” App. A:8-9. The Court cited no support because there was none. *Id.* The lower court may have relied on the unions' unsupported assertions that disclosure of public employees' names and birthdates “exposes employees

to the risk of their private affairs and intimate details being exposed to the public,” App. A:8, but the court concedes these harms are entirely speculative. Moreover, the Court declared that the PRA does not justify the disclosure of public employees’ names and birthdates, despite the fact that the legislature has explicitly made the opposite determination.

Indeed, the legislature has clearly spoken. RCW 42.56.250(8) exempts from disclosure the “month and year of birth in the personnel files of employees and workers of criminal justice agencies.” RCW 42.56.250(3) exempts the birthdates of public employees’ dependents. The PRA nowhere exempts public employees’ birthdates from disclosure. This omission is purposeful.¹⁰ The legislature chose to create partial birthdate exemptions for specific public employees and employees’ dependents, but not others. They have declared by these various actions that public employees’ birthdates are disclosable and that access to such information advances the PRA’s purpose.

The Court of Appeals’ decision undermines that choice and violates the separation of powers. The court may disagree with the legislature’s treatment of public employees’ birthdates in the PRA, but “courts must

¹⁰ See *In re Detention of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002) (“Under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. Omissions are deemed to be exclusions.” (internal citations omitted)).

afford great deference to legislative actions to prevent substitution of judicial judgment for the decisions of elected officials and to preserve the separation of powers.” *Leavitt v. Jefferson Cty.*, 74 Wn. App. 668, 674, 875 P.2d 681, 685 (1994) (citing *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 243, 821 P.2d 1204, 1207 (1992)). Here, the Court of Appeals assumed a distinctively legislative role, which implicates the separation of powers.

VI. CONCLUSION

This Court should grant review of the published opinion of the Court of Appeals. This Court should affirm the trial court’s decision and award costs on appeal to the Foundation.

RESPECTFULLY SUBMITTED on November 30, 2017.



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DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on November 30, 2017, I electronically filed with the Court the foregoing document and appendix and served the same by email upon the following:

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No. 49224-5-II

**THE COURT OF APPEALS
OF THE STATE OF WASHINGTON**

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

v.

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

and

FREEDOM FOUNDATION,
Petitioner/Respondent/Defendant.

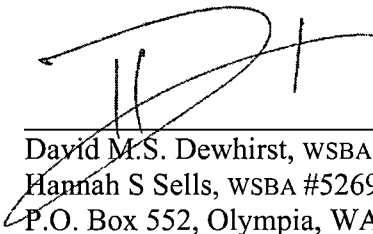
**APPENDIX TO PETITION FOR
DISCRETIONARY REVIEW BY THE SUPREME COURT**

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APPENDIX PAGE NUMBERS	DESCRIPTION
App. A:1-13	Published Opinion by Division II of the Court of Appeals in <i>Washington Public Employees Association, UFCW Local 365, et al. v. Washington State Center for Childhood Deafness & Hearing Loss, et al.</i> , No. 49224-5-II, (Oct. 31, 2017)
App. A:14-52	Thurston County Superior Court July 29, 2016 Order Denying Plaintiffs' Motion for Permanent Injunction

RESPECTFULLY SUBMITTED on November 30, 2017.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON October 31, 2017

DIVISION II

WASHINGTON PUBLIC EMPLOYEES
ASSOCIATION, UFCW LOCAL 365, a labor
organization, and PROFESSIONAL &
TECHNICAL EMPLOYEES LOCAL 17, a
labor organization,

Petitioners,

v.

WASHINGTON STATE CENTER FOR
CHILDHOOD DEAFNESS & HEARING
LOSS, and EVERGREEN FREEDOM
FOUNDATION d/b/a FREEDOM
FOUNDATION, et al.

Respondents.

No. 49224-5-II

PUBLISHED OPINION

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 76, a
labor organization, and UNITED
ASSOCIATION, LOCAL 32, a labor
organization,

Petitioners,,

v.

STATE OF WASHINGTON, WASHINGTON
STATE DEPARTMENT OF LABOR &
INDUSTRIES, and EVERGREEN FREEDOM
FOUNDATION d/b/a FREEDOM
FOUNDATION,

Respondents.

No. 49230-0-II

No. 49224-5-II

TEAMSTERS LOCAL UNION NO. 117, a
labor organization,

Petitioner,

v.

STATE OF WASHINGTON; CHRISTOPHER
LIU, in his capacity as DIRECTOR,
DEPARTMENT OF ENTERPRISE
SERVICES; DICK MORGAN, in his capacity
as SECRETARY, DEPARTMENT OF
CORRECTIONS; and EVERGREEN
FREEDOM FOUNDATION d/b/a FREEDOM
FOUNDATION,

Respondents.

No. 49234-2-II

SERVICE EMPLOYEES INTERNATIONAL
UNION HEALTHCARE 1199NW, a labor
organization,

Petitioner,

v.

STATE OF WASHINGTON; DEPARTMENT
OF SOCIAL AND HEALTH SERVICES, an
agency of the State of Washington;
DEPARTMENT OF HEALTH, an agency of
the State of Washington; and EVERGREEN
FREEDOM FOUNDATION d/b/a FREEDOM
FOUNDATION, an organization,

Respondents.

No. 49235-1-II

No. 49224-5-II

WASHINGTON FEDERATION OF STATE
EMPLOYEES,

Petitioner,

v.

STATE OF WASHINGTON; et al; and THE
EVERGREEN FREEDOM FOUNDATION
d/b/a FREEDOM FOUNDATION,

Respondents.

No. 49248-2-II

SUTTON, J. — We are asked to determine whether the right to privacy guaranteed in Washington Constitution article I, section 7 protects state employees' full names associated with their corresponding birthdates from public disclosure. Several unions representing state employees¹ appeal the superior court's order denying their motions for a permanent injunction preventing the state agencies from disclosing information about their employees in response to a public records request by the Freedom Foundation.

We hold that article I, section 7 protects from public disclosure state employees' full names associated with their corresponding birthdates. Based on our holding, the trial court erred by denying the unions' motions for a permanent injunction preventing the release of the state employees' names associated with their corresponding birthdates.²

¹ The unions representing those state employees are: Teamsters Local Union No. 117; Washington Public Employees Association, UFCW Local 365; Professional & Technical Employees Local 17; Washington Federation of State Employees; International Brotherhood of Electrical Workers, Local 76; United Association, Local 32; and Service Employees International Union Healthcare 1199NW (collectively referred to as the "unions").

² The unions also argue seven other grounds for preventing the disclosure of employees' names and corresponding birthdates: (1) RCW 42.56.230(3)—invasion of privacy under the Public Records Act (PRA); (2) RCW 42.56.070(8)—commercial purposes exemption under the PRA; (3)

FACTS

The Freedom Foundation (Foundation) is a non-profit political organization. One aspect of the Foundation's campaign is its worker education project to inform eligible state employees that they have a constitutional right to opt-out of paying union dues. In 2016, to further its project, the Foundation sent Public Records Act (PRA), ch. 42.56 RCW, requests to various state agencies³ requesting disclosure of union represented employees' full names, birthdates, and work email addresses.

The agencies reviewed the Foundation's PRA requests, determined that all the requested records were disclosable and indicated that, absent a court order, they intended to release the requested records including the employees' full names associated with their corresponding birthdates and the employees' work email addresses.

The unions filed motions for temporary and permanent injunctions to prevent the disclosure of the requested records. The superior court granted the motions for a temporary injunction to prevent the agencies from disclosing most of the requested records. After a hearing on the motions for a permanent injunction, the superior court concluded that no exemptions under the PRA applied to the requested records and it denied the motions for a permanent injunction.

RCW 42.56.230(7)—personal information proving age under the PRA; (4) RCW 42.56.250—PRA exception for criminal justice agencies; (5) article I, section 5 of the Washington Constitution—freedom of association; (6) unfair labor practices; and (7) misuse of state resources. Because we reverse the trial court's order based on article I, section 7, we do not address the unions' remaining arguments.

³ For clarity, we refer to the individual agencies collectively as "agencies" unless an agency is specifically identified.

The unions appealed and filed an emergency motion for a stay with this court. A commissioner of this court granted the motion for a stay only as to the state employees' full names associated with their corresponding birthdates.

ANALYSIS

I. PRA INJUNCTIONS—LEGAL PRINCIPLES

We review challenges to an agency action under the PRA de novo. RCW 42.56.550(3); *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 428, 327 P.3d 600 (2013). “Where the record consists only of affidavits, memoranda of law, and other documentary evidence, an appellate court stands in the same position as the trial court in reviewing agency action challenged under the PRA.” *Robbins, Geller, Rudman & Dowd, LLP v. Office of the Attorney Gen.*, 179 Wn. App. 711, 719-20, 328 P.3d 905 (2014).

The PRA mandates the broad disclosure of public records. *Resident Action Council*, 177 Wn.2d at 431. RCW 42.56.030 expressly requires that the PRA be “liberally construed and its exemptions narrowly construed . . . to assure that the public interest will be fully protected.” When evaluating a PRA claim, we must “take into account the policy of [the PRA] that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3).

Under RCW 42.56.070(1), a government agency must disclose public records upon request unless a specific exemption in the PRA applies or some other statute applies that exempts or prohibits disclosure of specific information or records. *Ameriquest Mortg. Co. v. Office of the Attorney Gen.*, 177 Wn.2d 467, 485-86, 300 P.3d 799 (2013). RCW 42.56.540 allows one to seek an injunction to prevent the disclosure of public records under the PRA. RCW 42.56.540 states:

The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court . . . finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital government functions.

Thus, for a person named in a record to obtain an injunction preventing disclosure of public records under the PRA, the person must show that (1) the record in question specifically pertains to that person, (2) an exemption applies, (3) the disclosure would not be in the public interest, and (4) disclosure would substantially and irreparably harm that party or a vital government function. *Ameriquest*, 177 Wn.2d at 487.

In addition to the requirements in RCW 42.56.540, a party generally must establish three common law requirements to obtain permanent injunctive relief: (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the act complained of will result in actual and substantial injury. *Huff v. Wyman*, 184 Wn.2d 643, 651, 361 P.3d 727 (2015). As we recently recognized:

It is unclear how these [common law] requirements relate to the injunction requirements of RCW 42.56.540, and no case has applied these general requirements in a RCW 42.56.540 case. However, the first two requirements for a permanent injunction relate to the existence of an exemption and the third requirement is consistent with a similar requirement in RCW 42.56.540.

Service Employees International Union (SEIU) Healthcare 775NW v. Dep't of Soc. & Health Servs., 193 Wn. App. 377, 393, 377 P.3d 214, *review denied*, 186 Wn.2d 1016 (2016). We review orders on injunctions under the PRA de novo. *Robbins*, 179 Wn. App. at 720.

II. CONSTITUTIONAL EXEMPTION

The state constitution may exempt certain records from production because it supersedes contrary statutory laws. *White v. Clark County*, 188 Wn. App. 622, 631, 354 P.3d 38 (2015), *review denied*, 185 Wn.2d 1009 (2016). Article I, section 7 provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” CONST. art. 1 § 7. We recently addressed the application of article I, section 7 to the PRA in *SEIU Local 925 v. Freedom Foundation*. We explained,

Interpreting and applying article I, section 7 requires a two-part analysis. The first step requires determining whether the State unreasonably intruded into a person’s private affairs. If a person’s private affairs are not disturbed, our analysis ends and there is no article I, section 7 violation. If, however, a private affair has been disturbed, the second step is to determine whether authority of law, such as a valid warrant, justifies the intrusion.

197 Wn. App. 203, 222, 389 P.3d 641 (2016) (internal citations and quotation marks omitted). The person challenging disclosure bears the burden of demonstrating the disturbance to his or her private affairs. *SEIU 925*, 197 Wn. App. at 223.

Private affairs are determined by considering either (1) the historical treatment of the interest asserted, or (2) whether the expectation of privacy is one that a citizen of this State is entitled to hold. *SEIU 925*, 197 Wn. App. at 222. When we analyze whether the expectation of privacy is one that a citizen of this state is entitled to hold, we review “(1) the nature and extent of the information that may be obtained as a result of the governmental conduct and (2) the extent that the information has been voluntarily exposed to the public.” *SEIU 925*, 197 Wn. App. at 222. We also stated,

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Private affairs are those that reveal intimate or discrete details of a person's life. What a person voluntarily exposes to the general public is not considered part of a person's private affairs.

SEIU 925, 197 Wn. App. at 222-23 (internal citations omitted). A non-exclusive list of intimate or discrete details includes: (1) one's whereabouts or co-guests at a motel, (2) patient names and diagnoses in mental health facilities, (3) trade secrets and related commercial information, (4) personal financial data, and (5) information regarding personal sexual matters. *SEIU 925*, 197 Wn. App. at 227.

Here, the unions do not argue that there is any historical protection for state employees' full names associated with their corresponding birthdates. However, a constitutional challenge allows us to consider "the nature and extent of the information that may be obtained as a result of the governmental conduct." *SEIU 925*, 197 Wn. App. at 222. The unions argue that by publically disclosing the requested information, a person could discover personal financial information, commit identity theft, or find confidential information such as the identified state employees' personal addresses and personal telephone numbers. Therefore, they argue that government disclosure exposes state employees to the risk of their private affairs and intimate details being exposed to the public.

We recognize that people do expose their names and corresponding birthdates to some extent. However, these disclosures are typically at the person's discretion and control. Public disclosure of state employees' full names associated with their corresponding birthdates reveals personal and discrete details of the employees' lives. Such disclosure to the public would not be voluntary or within the employee's control. Once disclosed to the public domain, these employees would potentially be subject to an *ongoing* risk of identity theft and other harms from the disclosure

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of this personal information, such as their personal addresses and personal telephone numbers. A citizen of this state would reasonably expect that personal information, such as the public disclosure of his or her full name associated with his or her corresponding birthdate, that would potentially subject them to identity theft and other harms, would remain private. Therefore, we hold that, under article I, section 7, a state employee is entitled to an expectation of privacy in his or her full name associated with his or her corresponding birthdate.

The Foundation argues that our Supreme Court's opinion in *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015), categorically precludes the unions from making any claim that information contained in public records is constitutionally protected. The Foundation relies on a single sentence in *Nissen* in which the court stated, "Because an individual has no constitutional privacy interest in a *public* record, Lindquist's challenge is necessarily grounded in the constitutional privacy interest he has in personal information comingled with those public records." *Nissen*, 183 Wn.2d at 883 (foot note omitted). But we do not read *Nissen* to impose a *categorical* prohibition against claiming that information contained within public records may be constitutionally protected.

The sentence that the Foundation relies on is dicta. The issue *Nissen* addressed in its analysis was the extent to which private devices could be searched for public records. *Nissen* offers no comment on the extent to which article I, section 7 creates an expectation of privacy to information contained within public records. Moreover, the court's statement in *Nissen* was made within the context of rejecting the county's claim that article I, section 7 categorically prohibited searching a government employee's private devices for public records. We read the statement on which the Foundation relies as a statement that there is no *categorical* constitutional protection

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related to a public records request; consequently, there can be no *categorical* prohibition to claiming an expectation of privacy in information contained within public records. Because we perform an individualized analysis of the information requested in this case, our decision does not create a categorical constitutional protection and, therefore, it is not in conflict with our Supreme Court's opinion in *Nissen*.

The Foundation also notes that the statement in *Nissen* was recently adopted in *West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016), *cert. denied*, 2017 WL 2869953 (2017). However, nothing in *West* expands the holding in *Nissen* to the situation presented here. Like *Nissen*, *West* addressed the extent to which an agency employee is required to search their personal devices for public records. *West*, 196 Wn. App. at 635-36. *West* does not address whether there can be an expectation of privacy in information contained within public records. Rather, it recognizes the holding in *Nissen* that there is no categorical constitutional protection for public records that are contained on private devices. Accordingly, *West* does not support the Foundation's argument that there is a categorical prohibition against claiming a constitutionally protected expectation of privacy in information contained in public records.

Because we conclude that employees have a constitutionally protected expectation of privacy in their full names associated with their corresponding birthdates, we must next determine whether "authority of law . . . justifies the intrusion." The Foundation argues that the PRA is the authority of law which justifies intrusion into the employees' privacy.

No court has addressed when the PRA would *justify*, rather than allow, an intrusion into a constitutionally protected privacy interest. "Justify" means "to prove or show to be valid, sound, or conforming to fact or reason" and "to show to have had a sufficient legal reason." WEBSTER'S

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THIRD NEW INTER-NATIONAL DICTIONARY 1228 (2002). Therefore, showing the intrusion is justified requires more than simply showing that the intrusion is permitted.

The PRA has a comprehensive stated purpose:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

RCW 42.56.030. Public disclosure of state employees' full names associated with their corresponding birthdates does not inform the people of facts about an "instrument" they have created or provide information that allows the people to maintain control over those instruments. And public disclosure of this information would reveal discrete personal details of state employees not connected to their role as public servants. Thus, the purpose of the PRA is not served by the public disclosure of this information. Therefore, although the PRA may allow the disclosure of the information, the PRA does not justify the intrusion into the state employees' constitutionally protected expectation of privacy in their full names associated with their corresponding birthdates.

III. OTHER REQUIREMENTS FOR AN INJUNCTION

Because we hold that the unions have met their burden to show that state employees have a constitutionally protected expectation of privacy in their full names associated with their corresponding birthdates, we also address whether the unions have also satisfied the two remaining requirements for a PRA permanent injunction. In addition to demonstrating that the information is exempt, the unions must also show that the disclosure would not be in the public interest and would substantially and irreparably harm that party or a vital government function. *Ameriquest*, 177 Wn.2d at 487. Moreover, as stated above, to obtain permanent injunctive relief, a party

No. 49224-5-II

generally must establish three elements: (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the act complained of will result in actual and substantial injury. *Huff*, 184 Wn.2d at 651.

Here, the unions meet the remaining PRA requirement because the public disclosure of birthdates of individually identified state employees is not in the public interest. The birthdates of individually identified state employees are not in the public interest because they do not inform the public of facts related to a government function. Moreover, the disclosure would substantially and irreparably harm the identified state employees. Public disclosure of state employees' personal information, which will make the information available to anyone, invades their constitutionally protected expectation of privacy, and exposes them to an ongoing risk of identity theft and other potential personal harms.

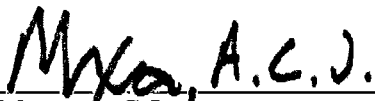
The unions have also met their burden to satisfy the three general requirements for a permanent injunction. The state employees have a clear and equitable right because they have a constitutionally protected expectation of privacy in their full names associated with their corresponding birthdays. And, the state employees have a well-grounded fear of immediate invasion of that right because the agencies who have received the PRA requests have indicated that they will disclose the requested records unless prevented by court order. And, as discussed above, public disclosure of this information will result in actual and substantial injury, will invade their constitutionally protected expectation of privacy, and will expose them to an ongoing risk of identity theft and other potential personal harms.

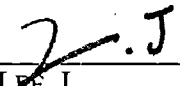
No. 49224-5-II

We hold that state employees have a constitutionally protected expectation of privacy in their full names associated with their corresponding birthdates. Because the employees have a constitutionally protected expectation of privacy, and the unions have satisfied the requirements for an order granting permanent PRA injunctions, the trial court erred by denying the unions' motions for permanent injunctions. Accordingly, we reverse and remand for further proceedings consistent with this opinion.


SUTTON, J.

We concur:


MAXA, A.C.J.


LEE, J.

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2016 JUL 29 PM 3:44

Linda Myhré Entow
Thurston County Clerk

<input type="checkbox"/> Expedite
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Date: July 29, 2016
Time: 1:30 PM
Judge/Calendar:
Hon. Mary Sue Wilson

16-2-01826-34
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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

TEAMSTERS LOCAL UNION NO. 117,

Plaintiff,

v.

STATE OF WASHINGTON; et al,

Defendants.

No. 16-2-01547-34

~~Proposed~~ ORDER DENYING
PLAINTIFFS' MOTIONS FOR
PERMANENT INJUNCTION

WASHINGTON FEDERATION OF STATE
EMPLOYEES,

Plaintiff,

v.

STATE OF WASHINGTON; et al,

Defendants.

No. 16-2-01749-34

ORDER DENYING PLAINTIFF'S MOTION FOR
PERMANENT INJUNCTION

Nos. 16-2-01547-34 | 16-2-01749-34 | 16-2-
01573-34 | 16-2-01875-34 | 16-2-01826-34



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APPENDIX TO PETITION FOR
DISCRETIONARY REVIEW BY THE SUPREME COURT A-014

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WASHINGTON PUBLIC EMPLOYEES
ASSOCIATION, et. al.,

Plaintiffs,

v.

STATE OF WASHINGTON; et al,

Defendants.

No. 16-2-01573-34

SEIU 1199 NW,

Plaintiff,

v.

STATE OF WASHINGTON; et al,

Defendants.

No. 16-2-01875-34

IBEW LOCAL 76, et. al.,

Plaintiff,

v.

STATE OF WASHINGTON; et al,

Defendants.

No. 16-2-01826-34

This matter came before the Court on Plaintiff Unions' Motion for Permanent Injunction. The Court heard oral argument on the matter and considered the following when reaching its decision:

1. Plaintiff Unions' Motions for Permanent Injunction, Replies in Support, and supported declarations, exhibits, and appendices;
2. Defendant Freedom Foundation's Response to Plaintiff Unions' Motion for Permanent Injunction, Surreply, and supported declarations, exhibits, and appendices;

1 3. Defendant State of Washington (all of the Defendant agencies) Response to Plaintiff
2 Unions' Motion for Permanent Injunction, Surreply, and supported declarations, exhibits, and
3 appendices;

4 4. _____

5 5. _____

6 6. _____

7 7. _____

8
9
10 Being fully advised on the matter, the Court DENIES Plaintiff Unions' Motion for Permanent
11 Injunction, and makes the following findings of fact and conclusions of law:

12 1. Plaintiffs have failed to establish that they have a clear legal or equitable right to the relief
13 requested, because the requested public records are not exempt from disclosure under RCW
14 42.56.230, RCW 42.56.250(8), RCW 42.56.230(7)(a), any "other statute" by way of RCW
15 42.56.070(1), or any other Public Records Act exemption, disclosure is not prohibited by RCW
16 42.56.070(9), and release of the requested public records would not violate any individual's
17 constitutional rights.

18 ~~2. Plaintiffs have failed to establish that they have a well-grounded fear of immediate invasion~~
19 ~~of their rights.~~ *MSW*


20 ~~3. Plaintiffs have failed to establish that the acts complained of are either resulting or will~~
21 ~~result in actual and substantial injury and harm to the Plaintiffs.~~ *MSW*

22 ~~4. Plaintiffs have failed to establish that they would be injured by the results of this~~
23 ~~disclosure.~~ *MSW*

2. This order incorporates the court's oral ruling announced on July 29, 2016.

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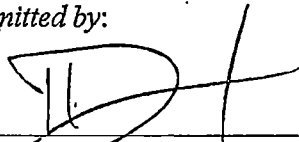
IT IS SO ORDERED this 29th day of July, 2016.


JUDGE MARY SUE WILSON
THURSTON COUNTY SUPERIOR COURT

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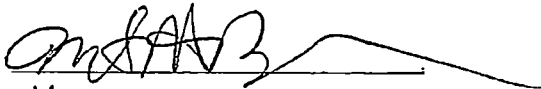
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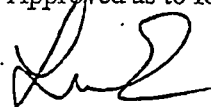
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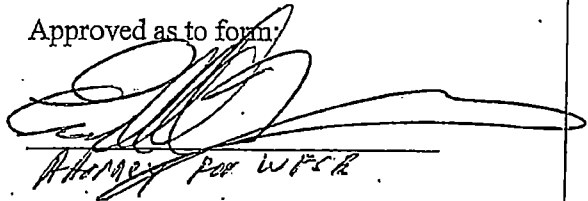
Laura Ewan #45201
for Teamsters Local 117

Approved as to form:



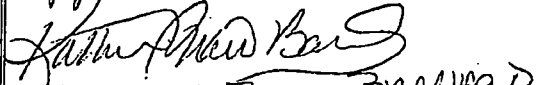
Kristen Kussmann
for SEIU 1199NW

Approved as to form:

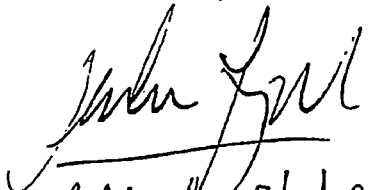


Attorney for WPCA

Approved as to form



KATHLEEN FAIR BARNARD
for WPEA + PTE



John Ford
AAG for state

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

TEAMSTERS LOCAL 117, Plaintiff,)	
vs.)	
STATE OF WASHINGTON, et al., Defendants.)	Cause No. 16-2-01547-34
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WA FEDERATION OF STATE EMPLOYEES, Plaintiff,)	
vs.)	
STATE OF WASHINGTON, et al., Defendants.)	Cause No. 16-2-01749-34
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WA PUBLIC EMPLOYEES ASSOCIATION, Plaintiff,)	
vs.)	
STATE OF WASHINGTON, et al., Defendants.)	Cause No. 16-2-01573-34
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SEIU 1199 NW, Plaintiff,)	
vs.)	
STATE OF WASHINGTON, et al., Defendants.)	Cause No. 16-2-01875-34
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IBEW LOCAL 76, et al., Plaintiff,)	
vs.)	
STATE OF WASHINGTON, et al., Defendants.)	Cause No. 16-2-01826-34
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VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 27th day of May,
2016, the above-entitled and numbered cause came on for
hearing before the Honorable Mary Sue Wilson, Judge,
Thurston County Superior Court, Olympia, Washington.

Kathryn A. Beehler, CCR No. 2448
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A P P E A R A N C E S

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1 July 29, 2016

Olympia, Washington.

2 AFTERNOON SESSION

3 Hon. Judge Mary Sue Wilson, Presiding

4 Kathryn A. Beehler, Official Reporter

5 --o0o--

6 THE COURT: All right, everybody. Please be
7 seated. So I do want to thank the representative
8 from the media. It looks like you might have another
9 person who has joined you, but thank you for being
10 nonobtrusive throughout this proceeding. I also
11 thank the members of the audience for respecting the
12 decorum in the court. I know this case is of
13 interest to a lot of people. And it's certainly a
14 case that presents some interesting questions and
15 questions that I don't think our courts have directly
16 addressed, although there is a lot of case law on our
17 state Public Records Act. So here we go.

18 In front of the court are five cases that have
19 been scheduled for hearing and decisions at the same
20 time. I introduced the cases at the outset. These
21 all originate from public records requests that were
22 submitted by the Freedom Foundation to several dozen
23 state agencies, and those records requests all seek
24 the names, first, last, and middle initial, of
25 various categories of state employees, the dates of

1 birth of the same individuals, and work e-mails of
2 the same individuals.

3 Of these five cases, the court heard motion for
4 preliminary injunction in three of the cases, 1547,
5 1749, and 1826 on May 27th, and the parties know that
6 the court issued a preliminary injunction in that
7 case based upon finding that there was a likelihood
8 of success on the merits with regard to the
9 commercial purposes. And I therefore, ultimately,
10 issued a preliminary injunction which is in effect
11 until later today, depending on the decision today.

12 In the other two cases, 1573 and 1875, the court
13 heard the unions' motion for preliminary injunction
14 on June 3rd, and the court reached a different
15 decision there; that based upon the statutory right
16 of privacy, the court believed there was likelihood
17 of success as to the names and the dates of birth,
18 not as to the work e-mails. I understand that as a
19 result of that preliminary injunction, after the
20 unions sought interlocutory review and a stay that
21 was not granted, the work e-mails associated with the
22 employees covered in those last two cases were
23 released.

24 Ultimately, partially by agreement of the parties
25 and by ruling of the court, I extended the

1 preliminary injunctions in all five cases based upon
2 their original scope to today at 5:00 p.m. to allow
3 limited discovery and to allow consolidated briefing
4 by the parties. And ultimately, the parties did
5 submit briefing after doing some discovery.

6 So I start from a public records case where the
7 request is by a party who asserts that they are the
8 subject of the records request and seeks an
9 injunction for the release of those records with the
10 following policies and principles that are based in
11 the statute, the Public Records Act, as well as the
12 cases that interpret that Act. The Act strongly
13 favors disclosure, and our courts have told us that
14 exemptions and prohibitions are read narrowly.

15 The recent decision of *SEIU 775* from the Court of
16 Appeals Division II tells us that the terms
17 "exemptions" and "prohibitions" are different terms,
18 but their meaning is not any different, that the
19 difference in the terms as used in the Public Records
20 Act is immaterial.

21 Also, courts have told us that exemptions must be
22 explicit, and it is not the court's role to imply
23 exemptions. And so where the court does not find an
24 express exemption or prohibition in the statute, then
25 the court does not create one or imply one based upon

1 language.

2 Ultimately, in a case such as this where we have
3 unions that are seeking to have records exempted from
4 disclosure, the burden is on the plaintiffs, in this
5 case the unions. And the court applies the
6 traditional injunction standards, which is three
7 questions: Is there a clear legal or equitable
8 right; if so, is there a well grounded fear of
9 immediate invasion of that right; and if so, is there
10 the risk of actual or substantial injury from the
11 invasion of the right.

12 Under the Public Records Act, the injunction
13 standard asks whether the records pertain to the
14 individuals who are seeking the injunctive relief –
15 I will note that there is no real dispute here that
16 the unions properly represent the individuals whose
17 records are sought – and number two, whether there is
18 an exemption or a prohibition that applies. If the
19 court finds that an exemption or prohibition applies,
20 then the court determines whether disclosure would be
21 in the public interest and whether disclosure would
22 substantially or irreparably harm the person who is
23 the subject of the request or a vital governmental
24 function.

25 Now, before I get to my decision, I wanted to

1 start with highlighting some of the materials that
2 were provided to the court that have informed the
3 court's decision. And under the Public Records Act,
4 the law allows the court to make decisions based upon
5 written submittals. These various pieces of material
6 were largely submitted by way of sworn statements and
7 other materials that were attached to sworn
8 statements.

9 The Unions' declarations assert that the
10 Freedom Foundation does not hide or disguise why it
11 wants the information. And when I read the materials
12 that are submitted, it indicates that the Foundation
13 seeks the items that I've referenced to inform state
14 employees of their constitutional right to not be a
15 member of unions, and they also don't hide the fact
16 that they seek to leverage their efforts to get more
17 people to support their perspective.

18 There are a number of submittals from the unions
19 that indicate that various members do not want the
20 information that is sought released, that express
21 concerns about the risk of identity theft when their
22 full names and dates of birth are provided, that are
23 concerned about fraud, and that subjectively describe
24 that the release of the information that is sought,
25 the names and the dates of birth, would be highly

1 offensive to various individuals.

2 There are sample letters in the record of the
3 Freedom Foundation's outreach to donors. There is an
4 eight-page letter that appears several times that
5 expressly indicates that the Foundation's goal is to
6 de-fund the unions; that the canvassers, on behalf of
7 the Foundation, have reached thousands of homes, and
8 that they have convinced hundreds of people to drop
9 their union membership. And the same letter that
10 describes the effort also seeks donations to support
11 the ongoing effort.

12 There is a declaration from a Dorothy Voss who
13 explains that people can use dates of birth and names
14 in combination with other information and may be able
15 to access things such as retirement accounts and
16 healthcare accounts with such information.

17 There are statements from a number of state
18 employees who work in areas, such as adult protective
19 services work or investigation of reports of
20 vulnerable people, who sometimes interact with
21 individuals who may have mental illnesses or other
22 reasons to be resistant of the state employees'
23 efforts and work, and these state employees are
24 concerned that if the clients that they work with in
25 the public were to access their names and dates of

1 birth and work e-mail, that they would be subject to
2 harassment and perhaps other risks.

3 As I've said, I counted several dozen statements
4 from state employees who do not want the information
5 that is sought released, that worry about identity
6 theft; that worry about harassment from individuals,
7 either from the Foundation and don't want them to
8 contact them, or worry about contents from other
9 categories of people, such as clients they work with
10 in their business life.

11 There is a statement in the record from a
12 Danielle Green that indicates that she is a member of
13 the union and has had multiple contacts at her home
14 and letters from the Foundation and has expressed
15 that she does not want those continued contacts.

16 And then there are materials submitted by
17 Anna Maria Magdalena who recites various pieces of
18 information regarding agencies or subparts of
19 agencies, Eastern State Hospital, Western State
20 Hospital, the Child Treatment Center, and the Special
21 Commitment Center. Her statements describe the
22 nature of those agencies or subagencies, the work
23 that they do, and the amount of work that they do
24 that is connected with adults and juveniles who have
25 some connection with the criminal justice system.

1 We then have materials that were submitted by the
2 Freedom Foundation. I would just say that the
3 Foundation has been largely consistent in its
4 description of its efforts and has not denied or
5 disguised its intended efforts to reach out to
6 various state employees and to give them information
7 about their constitutional rights and then to use
8 that outreach and describe that outreach elsewhere to
9 leverage – and they use that term "leverage" in a
10 number of places – their success in communications
11 with state workers to seek to raise additional funds
12 and to attract supporters to their efforts.

13 I would say that Mr. Nelson's most recent
14 declaration is a summary of the information that the
15 Foundation has provided, that the information is
16 sought in order to contact the employees; and
17 Mr. Nelson indicates that the information obtained
18 will not be sold or given to third parties; that the
19 Foundation will not use the records for commercial
20 purposes; and that the sole purpose is to inform
21 state workers of their constitutional rights; that
22 the Foundation does not coerce anyone to decline or
23 resign from union membership; that the Foundation
24 does not harass anyone that it encounters; that the
25 Foundation instructs and educates its canvassers to

1 interact in a cordial and friendly manner, to avoid
2 hostile or confrontational exchanges, to not enter
3 homes that they visit, and to leave when asked.
4 Also, he indicates that the Foundation does not
5 solicit state employees it contacts for charitable
6 donations. And when people ask the Foundation to no
7 longer be communicated with, that they honor that
8 request and stop further communications.

9 The Foundation also describes that the intent of
10 gathering the information requested is to create
11 accurate employee lists, to avoid duplicative
12 communications, and to ensure that the educational
13 materials they send out are only to the recipients
14 they intend. They specifically say that they intend
15 to use the publicly available voter registration
16 database that contains names, birth dates, and
17 mailing addresses, and compare those to the names,
18 birth dates, and e-mail addresses they get through
19 this request, if they get this information, to make
20 sure that they're contacting the same people and the
21 intended people who are state employees.

22 So that is the backdrop that the court has in
23 terms of the what is requested, the information as to
24 how it is intended to be used, and the information
25 that the unions have provided to the court in terms

1 of understanding the concerns that are raised about
2 this information.

3 So at this time I am going to turn to each of the
4 arguments that are made by the unions. And as I said
5 a moment ago, the court's role here is to apply the
6 test that the statute gives us. And the first test
7 in determining whether or not a permanent injunction
8 should issue is whether or not there is an exemption
9 or prohibition that applies. And if I find any
10 exemptions or prohibitions apply, then I will turn to
11 ask whether disclosure would be in the public
12 interest and whether disclosure would substantially
13 or irreparably harm a person or a vital governmental
14 function.

15 But the first entry point today is, is there an
16 exemption or prohibition that applies. And as I said
17 a few minutes ago, our case law tells us that
18 exemptions and prohibitions must be found explicitly
19 in the Public Records Act or in other statutes and
20 that they are to be read narrowly. So I am going to
21 take each of the arguments that the unions have made
22 in turn with regard to exemptions and prohibitions.

23 An argument that was fashioned a little bit
24 different this time around than previously, that I
25 understand to be both a standalone argument for

1 exemption or prohibition as well as a court, please
2 consider the policy of this as you construe the other
3 asserted exemptions, is that disclosure here would
4 violate the intent or purpose of the Public Records
5 Act or should not be allowed because it is not
6 consistent with the Public Records Act which, in
7 general terms, the Public Records Act was enacted in
8 the early '70s in our state to allow the public to
9 basically watch what government is doing.

10 I will note that I don't find any general
11 authority for the court to find a specific exemption
12 based upon this. The courts have been consistent in
13 their inquiry that they need a specific explicit
14 exemption. And to the extent that this argument
15 sounds like an argument that the reason for the
16 request should be considered by this court, the case
17 law and the statute is clear that except for in
18 certain circumstances such as commercial purposes
19 evaluation, the court is not supposed to inquire into
20 the motive of the requester.

21 Even with that said, I will notice that when I
22 read the unions' presentations, they want to focus
23 the court's attention on what I consider to be one of
24 two motives or one of two purposes. There is much in
25 the introduction of each of the unions' briefs that

1 argues that the goal of the Foundation, as taken from
2 Foundation materials, is to de-fund and bankrupt
3 public sector unions, and they want me to connect
4 that to the information that is sought in this
5 request.

6 I will note that the Foundation has been
7 consistent that there are two purposes of its efforts
8 here. And the first purpose of obtaining this
9 information is in order to contact state employees
10 and tell them about their constitutional rights. And
11 there hasn't been any question in my understanding on
12 the part of the unions or the State that that is an
13 improper purpose. It is clear from the 775 Court of
14 Appeals decision that the Court of Appeals recognizes
15 that as a proper purpose, in fact, a political
16 purpose of communicating with people about their
17 constitutional rights.

18 So, ultimately, my view of the record is that it
19 shows that there are two motives here. One motive is
20 political speech, and a second motive is fundraising.
21 So even if I were to say that the purpose of the
22 Public Records Act somehow enters into the analysis –
23 and it certainly does with each of the exemptions –
24 at least one of the purposes of the Foundation is a
25 purpose that I find to be consistent with the goals

1 of the Public Records Act, and that is communicating
2 with members of the public, including state
3 employees, about constitutional rights. So I will
4 move on. I will note that I have considered this
5 argument as part of, basically, a policy overlay in
6 considering the interpretation of the other
7 exemptions that are urged.

8 Second, I think in this round of briefing, it was
9 the first time that the unions argued that there may
10 not have been specific records that were sought when
11 the Foundation asked for names, birth dates, and
12 e-mail addresses. Typically, this argument is
13 asserted by the government, and it is typically
14 asserted when the government isn't clear about what
15 is asked for. Here, it is obvious that the
16 government agencies understand what records are being
17 sought, and they have indicated that they are
18 prepared to release them if they are not enjoined
19 from releasing them.

20 So given that this is raised at this late hour,
21 and given that the agency that houses records
22 contains the information that is sought, I'm not
23 finding that there is any basis, based upon no
24 specifically identifiable record being sought, to
25 foreclose disclosure.

1 So the next issue that I want to address is the
2 commercial purposes exemption, and this is based in
3 42.56.070(9). Ultimately, it indicates that the
4 Public Records Act should not be used to provide
5 records that will be requested for commercial
6 purposes. And as the Court of Appeals recognized in
7 its April *SEIU 775* decision, this is a situation
8 where the agency, and ultimately, impliedly, the
9 court, can inquire as to the reasons or the motives
10 of the requester. That has been done here.

11 I've recited that the Foundation indicates that
12 the primary purpose, if you will, for requesting the
13 information is to apprise state workers of their
14 constitutional rights. And they don't hide a
15 secondary purpose, once they have been successful in
16 that effort, is to describe that effort publicly to
17 donors and potential donors with an effort to raise
18 funds.

19 Ultimately here, I find that the 775 decision
20 answers the question for this court and that I cannot
21 find that the intended use of the records that are
22 sought are for commercial purposes. I read the Court
23 of Appeals' decision as indicating that the court is
24 to look at the direct use, and indirect uses are not
25 part of the analysis. I believe that the direct

1 purpose here, as within the 775 case, is to contact
2 state employees, advise them of their constitutional
3 rights. That's not a commercial purpose; that's a
4 political speech purpose; and it's not barred by the
5 commercial purposes exemption.

6 Much has been made about the additional materials,
7 if you will, in the record that indicate that the
8 Foundation intends to leverage their successes here
9 to get donors to support their efforts and to attempt
10 to have the unions be less successful in obtaining
11 financial support. I think, well, this case is a
12 little bit different than the prior case in that
13 here, in addition to lists, what is sought are names,
14 dates of birth, and work e-mails. Beyond that, I
15 think the purposes are the same and the effort is the
16 same. And I do find that while the word "leverage"
17 was not used by the Court of Appeals, it clearly
18 addressed this and indicated that that sort of effort
19 that the Foundation might take would be too
20 attenuated – and I read that as concluding an
21 indirect effort or an indirect use of the records
22 that were obtained – to constitute a commercial
23 purpose.

24 So based upon the analysis by the Court of Appeals
25 and my application of it to the request here, I am

1 finding that the records that are requested by the
2 Foundation for the purposes that the Foundation has
3 described do not come within the commercial purposes
4 prohibition, and I will not issue an injunction based
5 upon that ground.

6 I think the next significant argument that the
7 unions make relates to the right of privacy, if you
8 will, that is captured in RCW 42.56.230(3), personal
9 information in files maintained for employees,
10 appointees, or elected officials of any public
11 agency, to the extent that disclosure would violate
12 their right of privacy.

13 This statute has been interpreted consistent with
14 the concept of the right of privacy embodied in the
15 Restatement of Torts. And since the 1980s, our
16 appellate courts have consistently used the analysis
17 in the Restatement of Torts and endorsed it as the
18 way to determine whether or not something is within
19 the right of privacy that is recognized here. The
20 courts recognize, and most recently in the *Predisik*
21 Supreme Court case, that it is a fact-specific
22 analysis, and the court determines whether or not the
23 specific information sought would be highly offensive
24 from an objectively reasonable analysis.

25 Ultimately, the analysis by our courts have

1 centered on like as sexually explicit descriptions as
2 highly offensive. And I find no authority that would
3 suggest that names and birth dates would fit into the
4 category that is described by the case law and that
5 comes within the Restatement of Torts.

6 I was drawn to the linkage argument, because I
7 think that one unique aspect of this case is that the
8 request is for the full names, with middle initials,
9 with dates of birth, and with an acknowledgement by
10 the Foundation that the purpose of getting the
11 information is to connect it with other information
12 and to be able to identify residential addresses.
13 And all parties acknowledged that subsection .250(3)
14 of the Act makes residential addresses of state
15 employees are exempt.

16 So I was drawn to that, but it is accurate to say
17 that there is consistent rejection of a linkage
18 argument by our courts. And despite the unions'
19 arguments, I really understand that the argument of
20 thinking about the request, and specifically what is
21 sought, is another way of talking about linking the
22 requested pieces of material. The Court of Appeals,
23 in the *King County vs. Sheehan* case, and the Supreme
24 Court in the *Koenig* case, clearly rejected the
25 linkage argument and told courts that the agencies

1 and the courts are to look at the four corners of the
2 request and the records that are requested.

3 I also think that that is the correct answer when
4 I think about my obligation to harmonize the statutes
5 and not to render portions of the statutes illogical
6 or superfluous. So here is where I take a moment to
7 speak to the people in the room who I presume are
8 some of the people who have said they wish that their
9 names, dates of birth, and work e-mails addresses
10 would not be released to the Foundation. What I
11 would say is that the Legislature has specifically
12 identified for whom such pieces of information are
13 not disclosable. And in 42.56.250(3), the
14 Legislature has indicated that names and dates of
15 birth of dependents of state employees are exempt
16 from disclosure; however, with regard to state
17 employees, names and dates of birth are specifically
18 omitted, and personal electronic mail addresses are
19 listed, but work e-mail addresses are not.

20 So it is this court's conclusion that the
21 Legislature has defined where names, dates of birth,
22 and work e-mail addresses would be exempt, and they
23 know how to do it, and the Legislature has not done
24 that. So in harmonizing the statute, I find that I
25 cannot conclude, under .230 or .250, that the

1 requested information is exempt under a different
2 ground.

3 There is also the argument related that Article I,
4 Section 7 of the State Constitution creates a
5 constitutional right of privacy. I again find that
6 the appellate cases have answered this question for
7 us. I read the 2015 State Supreme Court *Nissen* case
8 as clearly rejecting the argument that is made here.
9 Public records that are records within government's
10 possession are public records, and the court has said
11 there is not a Constitutional right into that. So to
12 the extent that the Plaintiffs urge the court to
13 apply a constitutional test to analyze that release
14 should only happen if release is necessary to further
15 governmental interest that justifies the intrusion, I
16 find that that test does not have application here in
17 public records law, and that this is not a seeking of
18 information that is with the private person, which is
19 what the constitution addresses, but it is seeking
20 information and records that are in the government's
21 possession and are therefore public records.

22 There is also the argument under 42.56.230(7),
23 which is the driver's license provision. The union
24 has argued this provision that provides, "Any record
25 used to prove identity, age, residential address,

1 Social Security Number, or other personal information
2 required to apply for a driver's license or
3 Identocard." The court finds that the plain reading
4 of this statute is that the documents that a person
5 is required to provide, such as a birth certificate
6 or a passport, to document when they are applying for
7 a license or Identocard document, is exempt from
8 public disclosure. And I think that is appropriate
9 plain reading of the statute.

10 So I am going to go to the other state law
11 arguments, and I am going to put them together.
12 There are three arguments that are made. There is
13 the argument that the release or the disclosure of
14 the records that are sought would amount to a misuse
15 of state resources in violation of state ethics law.
16 The argument is made that because the Foundation is
17 clear that it intends to contact state employees and
18 urge the employees to consider their constitutional
19 rights, consider disassociating with the union, and
20 then ultimately engage in political speech with a
21 work e-mail, that that would be an improper use of
22 state resources, since employees themselves may not
23 use their e-mail at work to take political actions or
24 engage in political speech.

25 Similarly, the argument is that because we know

1 that the Foundation will talk to employees who are
2 members of unions and encourage them to consider
3 discontinuing their union membership, that that would
4 amount to an unfair labor practice in violation of
5 41.80.110(1)(a), that prohibits interfering with or
6 coercing union rights and membership.

7 Ultimately, my view of these laws is, they have
8 prohibitions on actions, but they don't speak to
9 records. And the recent State Supreme Court case of
10 *John Doe vs. Washington State Patrol* is instructive
11 here. It is very clear that the "other statutes"
12 reference in the Public Records Act needs to address
13 exemption or prohibitions on disclosure of records to
14 be eligible for the "other records" or "other
15 statutes" exemption. And neither of the laws that
16 are cited related to misuse of state resources or
17 unfair labor practices comes within that purview.

18 Finally, similarly, there is an argument that the
19 release of these records would constitute an unlawful
20 interference with union members' constitutional right
21 of freedom of association. And while I understand
22 the argument that is made, there again, there is no
23 citation to a constitutional provision or a statute
24 that identifies a specific records prohibition or
25 exemption, and so I don't believe that it can come

1 within the other records statute.

2 Finally, this takes us to the criminal justice
3 agency argument. Here, given my ruling that there is
4 no exemption or prohibition that would prohibit the
5 general requested information, the question is, what
6 is the scope of the criminal justice agency
7 employees' exemption, which for those agencies or
8 those employees that work for criminal justice
9 agencies, the month and year of their birth would be
10 exempt. I don't think there is a dispute amongst any
11 of the parties that that would be the scope of the
12 exemption. The dispute is whether or not certain
13 agencies are captured by this exemption.

14 This requires the court to consider the exemption
15 in 42.56.250(8) and the definition in 10.97.030(5) of
16 "criminal justice agency" and (6) of the
17 "administration of criminal justice." The argument
18 made by the union is that the Special Commitment
19 Center, the Western State Hospital, Eastern State
20 Hospital, and the Child Treatment Study Facility are
21 all criminal justice agencies, as defined by the
22 statutes.

23 Here the court is finding that they are not
24 clearly within the statute. The question for the
25 court is whether the unions have carried their burden

1 of arguing this. And while I don't dispute that each
2 of the four subagencies have a role in interacting
3 with people who are charged with offenses, either
4 adults or children, or people who have completed
5 their criminal sentence and then are committed to the
6 Special Commitment Center, I find that it is
7 reasonable to interpret the two statutes as not
8 capturing the work of those four agencies. And so I
9 am finding, not based upon the budget issue but on
10 the nature of the work of those subparts of DSHS,
11 that it is not unreasonable to accept the State's
12 argument that these four subparts of DSHS are not the
13 functional equivalent of a criminal justice agency as
14 captured by (5) and (6).

15 So that concludes the court's decision. I am
16 denying the unions' request for permanent injunction
17 on the grounds that I have not found that any of the
18 asserted exemptions or prohibitions apply, and so I
19 have not reached the question of public interest or
20 harm. I do, again, want to emphasize that as a
21 Superior Court, the court is bound by the appellate
22 cases in our state, and our appellate courts have
23 been clear that the Public Records Act that we have
24 is broadly construed to promote disclosure, and
25 exemptions are narrowly construed.

1 And to the extent that changing time and risks of
2 identity theft have maybe given rise to concerns that
3 I don't take issue with that are in the record, I
4 think the proper place for those issues to be raised
5 is to the Legislature in urging that the Legislature
6 revisit the scope of the exemptions.

7 So Ms. Ewan?

8 MS. EWAN: Yes, Your Honor. Briefly, if I may
9 address the court.

10 THE COURT: Yes.

11 MS. EWAN: All of the parties here anticipated
12 the possible outcome of your ruling today. And while
13 we will be seeking an emergency stay from the Court
14 of Appeals, we understand that the records in
15 question here will be disclosed at 5 o'clock today.
16 While we are all prepared -- we have paralegals back
17 at our offices waiting to file that emergency stay
18 right now, we understand we have to put together an
19 order based on the judge's ruling.

20 We would then ask that the court use its equitable
21 powers to enjoin disclosure of the documents until
22 Monday at 5:00 p.m. to be able to allow us to file
23 that appeal with the Court of Appeals and be able to
24 preserve the fruits of that appeal.

25 THE COURT: I understand your request. I'm

1 not surprised about it. Mr. Logerwell, can you
2 address the court as to whether Ms. Ewan's
3 representation that the State stands ready to release
4 records at 5 o'clock today is, in fact, what the
5 State stands ready to do, or is the State not ready
6 to release the records today, and might the State not
7 be releasing the records until sometime next week, as
8 a practical matter, given that it's now 3:20 on a
9 Friday?

10 MR. LOGERWELL: As a practical matter, I think
11 that's correct; that we wouldn't be releasing them
12 until Monday, I think. I mean, we stand prepared to
13 release them by 5:00 p.m. today. Given that it is
14 3:20, I think that it's going to be hard to get done.
15 So it is kind of in the middle of those two.

16 Does that make sense.

17 THE COURT: I --

18 MR. LOGERWELL: I mean, without disclosing too
19 much, we have advised our agencies to stand ready to
20 receive word from us and release, if so ordered by
21 the court. Hopefully that will be able to get done,
22 because we don't want to face a lawsuit by the
23 Freedom Foundation on a per-page per-day basis. But
24 it hard for me, sitting here right now, to guarantee
25 that I can just grab my cell phone today and, boom,

1 the records are all released.

2 THE COURT: All right.

3 Mr. Dewhirst, your opinion?

4 MR. DEWHIRST: We would be ready to not hold
5 the agencies accountable until noon on Monday, which
6 is something that I believe happened when you allowed
7 the work e-mail addresses to be released in the other
8 cases. That would allow time for the plaintiffs to
9 seek emergency relief. And the court commissioner
10 was able to respond before to those requests before
11 noon on the following Monday. And so we would be
12 willing to just enter that agreement with the State
13 right now, and that may avoid the problem that you're
14 talking about.

15 THE COURT: I appreciate that Mr. Dewhirst,
16 and I was aware of the developments in the context of
17 the June 3rd preliminary injunction, only because if
18 you're the trial court, you get notice when there's
19 been an action. And so somewhere shy of noon on
20 Monday I received the commissioner's ruling.

21 Now, the question for me is whether the
22 commissioner will be able to act in the exact same
23 timeframe as the commissioner did then. Given your
24 willingness to extend the courtesy, would you be
25 willing to extend the courtesy through all of Monday,

1 so that the State knows the timeframe they're working
2 on and can prepare to release on Tuesday, and the
3 unions know that they're seeking a decision from the
4 court by close of business Monday.

5 MR. DEWHIRST: Well, Your Honor, you're asking
6 me the question, but I feel like I really don't have
7 a choice. But having said that, yes, we'd be happy
8 to do that. And so we would expect production on
9 Tuesday morning if there's not a Court of Appeals
10 stay preventing the release of the records.

11 THE COURT: And this is all by the parties'
12 agreement, and then the court is not exercising any
13 equitable powers to issue anything other than signing
14 an order today that denies the request for a
15 permanent injunction; that the parties will work
16 together for the court to prepare, and then we'll
17 have the natural expiration of the two preliminary
18 injunctions upon the signing of the denial of the
19 permanent injunction.

20 So I'm just stating what I understand is, as a
21 result of Mr. Logerwell's description and
22 Mr. Dewhirst's description, that I'm not addressing
23 or ruling on Ms. Ewan's request.

24 All right. How long do you all need to prepare a
25 proposed order?

1 MR. DEWHIRST: I have one prepared. As long
2 as it takes for them to discuss it.

3 MS. BARNARD: Your Honor, do you want to take
4 a recess while we do that? I haven't even seen the
5 order.

6 THE COURT: Really the question is, is it a --
7 yes. We'll take a recess. So I'll be back in in ten
8 minutes and hope that you'll all have an order. All
9 right. Thank you. Let the clerk know if that's not
10 possible.

11 (A recess was taken.)

12 THE COURT: All right. Welcome back,
13 everybody. Please be seated. It's cleared out now.
14 Anything to tell me about the order I'm looking at?
15 All right. So the question I have for you all is, in
16 the proposed order, I didn't make 2, 3, and 4 in the
17 findings.

18 MR. DEWHIRST: Okay. You just ruled on the
19 equitable right prong?

20 THE COURT: Right. So my conclusion is, if I
21 don't find a basis, I don't keep going. And I think
22 that's the correct legal framework. Nobody else
23 objected to me including items 2, 3, and 4 on page 3.
24 But having brought it to your attention --

25 MS. BARNARD: Yeah. Your Honor, we weren't

1 sure about that, because you did mention that you
2 weren't making those findings under the PRA test, but
3 you didn't explicitly address the rest of that. But
4 we were -- we had some concerns, but we thought maybe
5 it wasn't important. But if you are saying you
6 didn't make those findings, we would prefer that you
7 remove them.

8 THE COURT: Mr. Dewhirst?

9 MR. DEWHIRST: If you didn't make them, just
10 cross them out, please.

11 THE COURT: All right.

12 MR. DEWHIRST: So, Your Honor, my
13 understanding -- oh. Can I actually ask one more
14 thing?

15 THE COURT: You can always ask.

16 MR. DEWHIRST: So my understanding is that
17 Number 1 will stay. In the free space on the next
18 page, I don't know if the parties have an objection --
19 we've done this every time -- to incorporate the oral
20 ruling into the order. Is there anything -- I don't
21 know if you have an objection to that, to
22 incorporating the court's oral ruling?

23 MR. DAMEROW: The State has no objections,
24 Your Honor.

25 MS. EWAN: The union -- at least Teamsters 117

1 does not have any objection.

2 MR. YOUNGLOVE: No objection.

3 MS. BARNARD: No objection.

4 THE COURT: I think judges actually have
5 varying views of that. But where the parties all
6 agree, I don't see a reason not to do it.

7 MR. DEWHIRST: Would you like me to write it
8 in or --

9 THE COURT: Judges who don't do it will say,
10 well, this is my order, and my oral ruling is still
11 part of what you submit. But that is --

12 MR. DEWHIRST: Do you have feelings on that
13 for the future, Your Honor?

14 THE COURT: If there's a party objecting, then
15 I just sign the order that the parties --

16 MR. DEWHIRST: Okay.

17 THE COURT: -- agree is the proper order. But
18 my analysis is my basis for this, and so I don't see
19 a substantive reason to object.

20 So do you have specific language?

21 MR. DEWHIRST: "This order incorporates the
22 oral ruling delivered on this date."

23 THE COURT: They are all looking at their
24 phones. So that's all right with you all?

25 MS. EWAN: Yes.

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THE COURT: All right. Thank you to all of you. I really appreciate your efforts, in particular sticking to the briefing page limits and coordinating your efforts. And you are all good writers in terms of presenting the law that has bearing on this. So thank you, and until the next time, we'll be in recess.

MR. DEWHIRST: Thank you, Your Honor.

MR. DAMEROW: Thank you, Your Honor.

(Conclusion of the July 29, 2016, Proceedings.)

FREEDOM FOUNDATION

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