

No. 91048-1

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SUPREME COURT OF THE STATE OF WASHINGTON

SEIU Healthcare 775NW,
Appellant/Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES ("DSHS"),
Respondent,

and

FREEDOM FOUNDATION,
Respondent/Cross-Appellant.

**REPLY OF CROSS-APPELLANT/RESPONDENT
FREEDOM FOUNDATION**

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I. ARGUMENT

A. The trial court erred by finding SEIU had standing.

1. SEIU lacks standing to represent IPs, and argue the alleged interest of welfare recipients pursuant to RCW 42.56.230(1).

Ameriquest Mortg. Co. v. State Att’y Gen., 148 Wn.App. 145, 166, 199 P.3d 145 (2009) states that persons with standing under RCW 42.56.540 may base a claim on exemptions unrelated to that person. However, §540 cannot bypass the constitutional justiciability requirements for a party whose *sole* basis for standing is *associational* standing (not §540). *International Ass’n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 213-14, 45 P.3d 186 (2002).

SEIU cites *Ameriquest*, 148 Wn. App. at 166 to support the claim that it may argue any basis for an injunction because it satisfied the associational standing criteria vis-à-vis IPs. SEIU Reply, 18. But *Ameriquest* says nothing about associational standing.¹ Further, SEIU does not satisfy the *Spokane Airports* requirements for three additional reasons not asserted in FF’s Opening Brief (“FF Brief”). First, the scope of SEIU’s representation of IPs cannot exceed its statutory limits. SEIU represents IPs “[s]olely for the purposes of collective bargaining...” RCW 74.39A.270.

¹ SEIU seeks to protect the alleged interests of welfare recipients, whether or not SEIU acknowledges it. See SEIU Reply, 18.

This lawsuit falls squarely outside that scope.² Second, SEIU claims to bring its suit on behalf of all IPs pursuant to RCW 74.39A.270 and 41.56. CP 597. But *not all IPs in Washington are SEIU members*. Many are agency fee payers, completely opted out of membership post-*Harris v. Quinn*, or never signed a membership card. Thus, SEIU cannot represent all IPs because not all IPs are SEIU members. Conversely (third), if SEIU may represent all IPs, the third *Spokane Airports* requirement is not satisfied because proper relief requires the participation of nonmember IPs who oppose SEIU. CP 157-80.³

2. The trial court erred by granting standing to SEIU to bring suit pursuant to RCW 42.56.070(9).

SEIU argues this Court must “re-write the PRA and contravene settled case law” to hold that the PRA does not authorize third parties to challenge disclosure based on RCW 42.56.070(9) even when elements for an injunction can be met.⁴ SEIU Reply, 27. Yet, the “settled case law”

² This is especially important given the First Amendment impingements created by forcing all IPs to be represented by an exclusive representative. See *Harris v. Quinn*, 134 S.Ct. 2618 (2014). Such an infringing relationship must not be extended beyond statutory bounds. To do so multiplies the First Amendment infringing, as well as the already-existent tensions between those who do not want to be represented by SEIU, but are forced to be by statute.

³ See Nathaniel B. Edmonds, *Associational Standing for Organizations with Internal Conflicts of Interest*, 69 U. Chi. L. Rev. 351 (2002). Further, internal conflict should not be surprising in an organization which *forcibly* represents over 30,000 people, a majority of whom never voted in an election and, with the thousands who have become IPs after 2003 (many who simply desire to care for a loved one), *none* of whom participated in an election.

⁴ Perhaps more importantly, the PRA does not grant *courts* the jurisdiction to do so.

requires that an *exemption* applies. See *Ameriquest Mortg. Co. v. State Att’y Gen.*, 177 Wn. 2d 467, 486-87, 300 P.3d 799 (2013) (holding that a non-agency party must, inter alia, prove an *exemption*). As argued by SEIU, there is a difference between an “exemption” and a “prohibition.” SEIU itself argues that “...none of the cases cited by FF require that in a case involving a prohibition, as opposed to an exemption, a third party is required to meet the elements of RCW 42.56.540.” SEIU Reply, 23-24. This absence is unsurprising because the PRA does not grant jurisdiction to courts to issue an injunction based on §070(9) (or standing to private parties to seek such injunctions) and no court has done so. The lack of case law supporting SEIU’s view is telling.⁵

SEIU argues that provisions which prohibit disclosure cannot reasonably be read through the “prism” of the PRA’s remedial scheme related to exemptions for a number of reasons. SEIU Reply, 24. SEIU is correct insofar as the PRA does not envision a scenario wherein a private third party seeks an injunction based on §070(9). FF’s Brief, 8-13.

The PRA provides two remedies to those wishing to challenge an agency’s decision. RCW 42.56.540 requires a movant to prove the two substantive requirements listed in §540,⁶ and an *exemption*. *Ameriquest*, 177

⁵ Even the cases cited by SEIU speak of “exemptions,” not “prohibitions.”⁵ *Id.* at 3.

⁶ Namely, the record must specifically pertain to the party, and disclosure would not be in the public interest and would substantially harm that party or a vital government function.

Wn. 2d at 486-87. RCW 42.56.550, allows a person denied public records to file a motion forcing the agency to show cause why it refused disclosure.⁷

SEIU cannot have it both ways. It may not treat prohibitions and exemptions identically in order to grasp standing under RCW 42.56.540, and then characterize prohibitions as vastly different when applying the rules of statutory construction. The PRA supplies these words different meanings or it does not. If different, that difference supports FF's contention that this court may not issue, and no private third party may seek, an injunction based on §070(9). If the same, the "commercial purposes" provision must be read narrowly, as are the PRA's exemptions.

B. The trial court did not err when it consolidated the preliminary and permanent injunctions under CR 65(a)(2).

There are at least four reasons why this Court should uphold the trial court's decision to merge the preliminary and permanent injunction hearings when it did. *See* FF Brief 13-28. A court may deny discovery on a disputed issue if the declaration contains enough detail to provide the court with a sufficient basis for its decision, even if the declaration is attacked. *Ameriquest*, 177 Wn.2d at 493-94. (*See* FF Brief, 18-20.) This is a discovery ruling by the trial court and may only be reversed upon a finding of abuse

⁷ Further, §550(6) assumes that challenge to an agency's response is premised on the agency's citation of an applicable *exemption*. "Actions under this section must be filed within one year of the agency's claim of *exemption* or the last production of the record on a partial or installment basis." RCW 42.56.550(6) (emphasis added).

of discretion. *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423-24, 138 P.3d 1053 (2006).⁸ SEIU failed to meet this high burden.

SEIU attempts to distinguish the instant case from *Ameriquest* by labeling FF's declarations "self-serving." SEIU Reply, n. 33. SEIU notes *Ameriquest* was not a "commercial purposes" case and that the declarant in *Ameriquest* was an agency employee. *Id.* But SEIU does not explain why these distinctions are legally significant. The circumstances of the instant case are legally identical to *Ameriquest*, where a party provided a declaration to justify the agency's decision not to apply an exemption. Similarly, FF's Declarations justify the agency's decision to not apply an exemption (or prohibition). The agency's declaration in *Ameriquest* is no less "self-serving" than FF's Declarations.⁹ In fact, the agency in *Ameriquest* was more motivated than FF to submit a "self-serving" declaration because an unfavorable ruling may have resulted in agency liability. *See* RCW 42.56.060. No possible liability exists for FF. It is also irrelevant if *Ameriquest* is not a "commercial purposes" case. This Court may only reverse the court's discovery rulings upon a clear showing of abuse of discretion. SEIU has not met this high burden.

⁸ This requires a "clear showing that the court's exercise of discretion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Boy Scouts of Am.*, 157 Wn.2d at 423-24.

⁹ They both were submitted to justify an agency's decision. The issue is not if declarations are "self-serving," but what legal effect their contents have.

Additionally, the record reflects that the trial court's October 10, 2014 discovery Order was substantive, not procedural. SEIU Reply, n. 1; RP 10/10/14 at 26-29.¹⁰ The trial court explained that "there is less merit to the idea that the opportunity for discovery should be used to expand this issue unduly" and "I would concur with the arguments made by the [FF] that there are areas in which the topics exceed the boundaries of what this Court believes to be pertinent to the questions, especially considering the limitation evidenced from our Supreme Court decisions." RP 10/10/14 at 25-26.¹¹ The trial court only permitted *limited* discovery on subjects one, two, and three of SEIU's 30(b)(6) notice and stated subjects four, five, and six were "entirely inappropriate..." *Id.* at 27, 29.¹²

Even if the court's discovery ruling was merely procedural, SEIU has not appealed the trial court's decision to limit the scope of the discovery (discovery allowed to SEIU to respond to FF's declarations) on an expedited basis.¹³

¹⁰ The trial court's Order specifically incorporated the proceeding transcript. CP 419.

¹¹ Further, the trial court granted in part FF's Motion for a Protective Order (*see* Order's caption. CP 417), which specifically requested "that the scope of the deposition and any written discovery be limited to certain matters." CP 96. The trial court's discovery ruling here was clearly substantive.

¹² The trial court then noted SEIU's obvious intent for discovery by stating, "I do not want this to turn into some grudge match between two politically opposite parties. We are litigating a public records request. We are not litigating the politics of the SEIU, on the one hand, and the [FF] on the other." CP 447. Yet, this is exactly what SEIU intends to attempt. Its discovery requests illustrate this.

¹³ Also, in the alternative (if the trial court's discovery ruling was merely procedural), this Court may limit the proper scope of discovery itself based on SEIU's discovery requests

Lastly, SEIU argues that the propriety of the trial court's consolidation will depend on if "there was any set of facts, alleged and potentially provable by SEIU, that would have entitled it to the injunctive relief it sought." SEIU Reply, 2. This assumes the only justification for upholding the trial court's decision is a 12(b)(6) analysis. But this is not the case. There are at least four independent reasons this Court should uphold the trial court's decision. *See* FF Brief, 13-28.

The simple procedural facts are these: The trial court considered FF's declarations, RP 10/16/14 at 75, limited the scope of SEIU's proposed discovery *Id.* at 48-49, considered the merits of the evidence SEIU submitted after acquiring FF's discovery responses, *Id.* at 75, and ruled. Any facts denied by FF were denied in FF's declarations, which the trial court was justified in relying on when determining how to weigh the evidence—a discovery decision within the trial court's sound discretion that will not be overturned absent an abuse of discretion and, further, specifically authorized by RCW 42.56.550(3) ("The court may conduct a hearing based solely on affidavits.").¹⁴ Alternatively, even under a CR 12(b)(6) analysis, the trial court could believe SEIU's allegations and still rule against it

(before they were limited), CP 813-27, and the parties' briefing related to the trial court's discovery ruling. CP 80-92; 93-112; 113; 114-20; 417-52; 725-64.

¹⁴ SEIU argues "FF's denial of various of those alleged facts...is yet further evidence that such disputed material facts do, indeed, exist." SEIU Reply, 3.

because such allegations do not constitute “commercial purposes.” *See, e.g.*, RP 10/16/14 at 74.

C. The trial court erred by issuing a temporary restraining order based solely on CR 65(a)(2).

The trial court did not address the requirements necessary to issue a TRO. Any proper treatment must analyze of the likelihood of SEIU’s success on the merits. This includes proving likely success on the *Tyler Pipe* elements *and* the PRA’s injunction requirements. RCW 42.56.540; *Ameriquest*, 177 Wn.2d at 487.

Under *Tyler Pipe*, SEIU must establish (1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right by the entity against which he seeks the injunction; and (3) the acts about which it complains are either resulting or will result in actual and substantial injury. *Tyler Pipe Indus. v. Dep’t of Revenue*, 96 Wn. 2d 785, 792, 638 P.2d 1213 (1982).¹⁵ In a PRA case, SEIU must show it is likely to prove (1) it has a clear legal or equitable right, (2) it has a well-grounded fear of immediate invasion of that right, and (3) the acts about which it complains are either

¹⁵ “The plaintiff must satisfy these three basic requirements regardless of whether the injunction he seeks is temporary or permanent.” *Nw. Gas Ass’n v. Washington Utilities & Transp. Comm’n*, 141 Wn. App. 98, 115, 168 P.3d 443, 452 (2007) (citing *Federal Way Family Physicians v. Tacoma Stands Up for Life*, 106 Wn.2d 261, 265, 721 P.2d 946 (1986)).

resulting or will result in actual and substantial injury. *Ameriquest*, 177 Wn.2d at 487. The trial court did not discuss *any* of these requirements.

The trial court did not find the requirements of a TRO were met, contrary to SEIU's claim. The TRO states the trial court found a sufficient showing was made under the "applicable law as described in oral ruling, dated October 3, 2014..." CP 79. Thus, the transcript must be consulted to determine what "applicable law" the court applied. The court concluded it "clearly" did not give the CR 65(a)(2) notice required by *Nw. Gas* and *Ameriquest*. RP, 10/3/2014 at 41. The court then labeled SEIU's commercial purposes argument a "novelty." *Id.*" RP, 10/3/2014 at 41. The trial court failed to do the required analysis or hold the requirements are likely to be satisfied. (The trial court mentioned *Tyler Pipe* on the previous page of the transcript, but failed to do a *Tyler Pipe* analysis. *Id.* at 40.) The trial court claimed only two factors justified its TRO—CR 65(a)(2) and the "novelty" of SEIU's argument. The "novelty" of an argument is not a proper basis for a TRO. This leaves CR 65(a)(2) the only *possible* basis for the TRO. Thus, CR 65(a)(2) alone compelled the trial court to grant a TRO even though SEIU did not prove it is likely to prevail on the merits.

SEIU also argues it need not satisfy §540's requirements when it seeks an injunction to enforce a PRA "prohibition."¹⁶ SEIU Reply, 23. SEIU observes that FF's cited cases fail to show a third party must prove the elements of §540 when seeking a prohibition, but this is just a clever way of admitting it can find no cases *at all* were a private third party sought an injunction based on a prohibition.¹⁷ Moreover, SEIU cites no case law supporting its claim that the PRA contemplates a balancing test that does not apply to a prohibition; or why such a balancing test would not also apply to exemptions—which are construed narrowly. SEIU cites *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 807-808, 246 P.3d 768 (2011) for the idea that §540 is a "procedural statute." Even so, *Ameriquest* shows §540 provides two *substantive* elements in addition to proving an exemption. *Ameriquest*, 177 Wn.2d at 487.

Importantly, and contrary to SEIU's claim, SEIU Reply, 24-25, the PRA itself views "prohibitions" *as* "exemptions." The PRA does not define "exemption" or "prohibition," but the PRA *itself* refers to the "commercial purposes" provision in §070(9) *as an exemption*. RCW 42.56.070(1) states,

¹⁶ This despite SEIU's Complaint being entitled "Complaint for Declaratory and Injunctive Relief under RCW 42.56.540," CP 596, its lone claim for the trial court's jurisdiction pursuant to §540, CP 597, and the fact that §540 is the only provision cited in its "Requested Relief." CP 601.

¹⁷ Of course FF cannot find a subset of a type of case that does not exist at all. It also stands to reason, then, that SEIU cannot cite to a case showing that a party seeking a prohibition need *not* show the elements of §540.

“Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific *exemptions* of *subsection (6) of this section...” (Emphasis added.) (*Subsection (6) was recodified as §070(9).) The term “exemptions” in §070(1) cannot refer to the provisos in §070(9) because they are included in the first part of §070(1) requiring agencies to disclose records. The only portion of §070(9) that §070(1) could refer to as an “exemption” is the “commercial purposes” provision.¹⁸ Thus, the PRA itself views the commercial purposes provision as an exemption.

SEIU knows it failed to satisfy §540, which is why it must argue §540 does not apply. But SEIU lacks standing without §540. Section 540 is the *only* PRA provision which allows a court to issue an injunction (§550 does not). Without §540, SEIU must prove the PRA implies a separate cause of action for an injunction—which it has not done, or attempted to do. *Any* injunction sought by *any* party must be done through §540, which SEIU failed to satisfy (at *any* level—temporary, preliminary, or permanent).¹⁹

D. The trial court did not err by denying an injunction based on RCW 42.56.070(9).

¹⁸ Otherwise, the sentence in §070(1) is meaningless.

¹⁹ SEIU claims a court that does not find the requirements of an injunction met under the PRA can deny the injunction, with the losing party seeking relief from the Court of Appeals to preserve the fruits of the appeal. SEIU Reply, 25-26. But this is not so under *Ameriquist* and *Northwest Gas*. Under those cases, a trial court must issue a TRO in any and all PRA cases, even when a party fails to prove it is likely to succeed on the merits.

FF's definition of "commercial purposes" aligns with the language and policy of the PRA.²⁰ SEIU's definition, SEIU Reply, 5, is too broad and violates both the PRA's language and policy. Again, the PRA itself refers to the "commercial purposes" provision in §070(9) *as an exemption*.

SEIU argues FF's fundraising to non-IPs mentioning its various projects is imputed to the purpose of its records request. SEIU Reply, 5-6. Even if this is "commercial" activity (which it is not), it does not mean the purpose of *FF's request* is to facilitate fundraising. The opposite is true. It is the purpose of fundraising to facilitate the purpose of informing IPs of their constitutional rights and holding the State accountable.²¹ FF's purpose is not to raise funds for the sake of raising funds. That's absurd. (Incidentally, that is the purpose of *profit-seeking* businesses.) FF raises money to fund its purpose, which is an end game, not the beginning. Wash. Op. Atty. Gen. No. 2 at 2 (1998) supports this definition of "purpose."²²

²⁰ Contrary to SEIU's mischaracterization, SEIU Reply, fn. 12, FF's definition does not mandate disclosure if there is a second noncommercial purpose even if there is also a commercial purpose. Under FF's definition, *each intended use* of the list would undergo a "commercial purposes" analysis. If a particular intended use's primary purpose is the achievement of financial profit, then the entire request is denied—even if there are other intended non-commercial uses.

²¹ For example, FF must raise money to pay employees to send out the mailers, as well as pay for the mailers themselves (and, apparently, litigate PRA cases).

²² Citing Black's Law Dictionary, the Opinion states that a purpose is defined as "that which one sets before him to accomplish: *an end*, intention, or aim, object, plan, project. [The] term is synonymous with *ends sought*, an object to be attained, an intention, etc." The AGO also cites Webster's Dictionary, defining "purpose" as "[t]he object toward which one strives or for which something exists." Raising money itself is not an end.

This is why FF's definition of "commercial purposes" contains limiting language (e.g., "primary" and "direct"). A definition without it encompasses too much. For example, no newspaper would *ever* be able to acquire a list of names because its use of the list would be used for articles that are meant to induce people to buy and subscribe to the newspaper. This clearly constitutes an intent to "promote, support and/or advance an entity's general business purposes" and "requesting the list for purposes of...self-promoting, or inducing any person to economically support" it. SEIU Reply, 5. Thus, not only is FF's intention for the list not "commercial," the "purpose" of it is also not commercial.

SEIU also claims FF's alleged "association" with businesses illustrate its commercial intent. SEIU Reply, 10-12.²³ But this is a non sequitur. Because businesses may donate to FF, it does not mean FF intends to use the names of IPs for commercial purposes, whatever its definition.²⁴

SEIU claims the trial court did not "seriously address" its contention that donations from businesses to FF means FF's intent for the list is commercial. SEIU Reply, 11-12. That the trial court disagreed with SEIU

²³ That SEIU alleges this is a testament to the fact that FF's use itself is not commercial. SEIU must try to impute the commercial activities of others to FF's requests, even though they have no bearing on FF's requests.

²⁴ SEIU's examples are not evidence of an alleged "fallacy of this supposed separation between business interests and FF's interests..." SEIU Reply, 11. Second, any reference to "free enterprise" refers to the fact that right to work legislation also affects the private sector, which is not affected by FF informing IPs of their constitutional rights and ensuring the State is protecting workers' First Amendment constitutional rights.

does not mean it did not consider SEIU's argument. First, case law and the PRA itself (RCW 42.56.550(3)) show the trial court was entitled to rely on FF's Declarations stating that it was not requesting the list on behalf of any third party. Second, FF's rhetorical question about what commercial entities would benefit from public sector worker choice, SEIU Reply, 10, can be answered without discovery because it is categorically not possible. Third, and most importantly, SEIU proposes to use this "factual dispute" to justify invasive discovery of a disfavored requester. SEIU's desire to access FF's donors shows this. Yet, even if this reasoning is not a non sequitur, SEIU has not met the high burden necessary to infringe FF's and its donors' constitutional rights. *See* Surreply, CP 117-20. Alternatively, to the extent the PRA mandates or authorizes discovery into a requester's private relationships, such as those sought by SEIU in the instant case, it violates (at least) the First Amendment to the United States Constitution.²⁵

SEIU also states it need only prove the elements of §540 for a preliminary injunction. SEIU Reply, 12. *Blanchard v. Golden Age Brewing Co.*, 188 Wn. 396, 415-16, 63 P.2d 397 (1936) does not stand for this. Again, this argument violates *Ameriquest*, 177 Wn.2d at 487 and *Nw. Gas*

²⁵ Even aside from the constitutional implications, surely the PRA, passed originally by the people by initiative to ensure State accountability, does not empower the State to require a requester to expose her most private and treasured relationships, affiliations, and associations as a precondition to exercising her rights under the PRA—even to show the requester's intentions for a list are not commercial.

Ass'n v. Washington Utilities & Transp. Comm'n, 141 Wn. App. 98, 115, 168 P.3d 443, 452 (2007), which require SEIU to show it is likely to prove §540's elements, which it did not attempt to do in briefing or at the hearing.

SEIU's second attempt to explain its cited authority is unavailing. SEIU dismisses subsequent case law treating *Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712 (1997), SEIU Reply, 7-8, but fails to explain why those cases are unhelpful. The subsequent case law shows that *Newman's* categorical prohibition is disfavored. FF Brief, 37-39.

Even assuming otherwise, however, *Newman* and its progeny are easily distinguishable from the instant case. The circumstances justifying a categorical prohibition do not exist in the instant case. For example, the policy underlying the categorical prohibition in those cases was based on two concerns; the fact that police would have difficulty segregating sensitive and nonsensitive information in an ongoing investigation and, second, the law enforcement agency, rather than the court, was the institutionally better suited agency to determine if the exemption applied. *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 388, 314 P.3d 1093 (2013). In the instant case, there is no reason to believe the agency would have difficulty discerning commercial from noncommercial purposes, nor has such been shown (or even argued) by SEIU. Second, an agency is not institutionally better suited than a court to determine if a requester's intent

is commercial. Importantly, this Court also established a bright line test which clearly defined the prohibition’s scope. *Id.* (citing *Cowles Pub. Co. v. Spokane Police Dep’t, City of Spokane*, 139 Wn.2d 472, 479-80, 987 P.2d 620 (1999)). This bright line “provide[d] notice to both parties and reasonably accommodates the competing interests of public access and effective investigation.” *Sargent*, 179 Wn.2d at 390. Such a test for the application of a prohibition is especially important in light of the PRA’s policy strongly favoring disclosure.²⁶

SEIU’s definition of “commercial purposes,” however, is far from a bright line test. SEIU’s definition would muddy the waters of the PRA and be extremely difficult for *any* State entity to interpret and apply, including the courts—whose dockets would repeatedly be filled with cases litigating what uses constitute “commercial purposes.”²⁷

SEIU cites federal case law as a guide to interpret the PRA, but fails to address the significant fact that that the PRA’s policy differs greatly from those federal laws. FF Brief, 39-45. “...Washington courts do not consider

²⁶ SEIU contends that the Legislature would have specifically referenced “profit-making” motives if it intended to include them. SEIU Reply, 10. But this simply begs the question. Why would the legislature use different language if it believed “commercial purposes” already had a narrow definition?

²⁷ SEIU cites Wash. Op. Atty. Gen. No. 15 at 6 (1975) for the proposition that “commercial purposes” includes encouraging people to financially support certain entities and cease financially supporting others. SEIU Reply, 6-7. But this AGO does not say this. It merely states that commercial purposes should include more than simply the buying and selling of goods. SEIU misrepresents the Attorney General’s Opinion.

FOIA cases interpreting PRA provisions that do not correspond to analogous FOIA provisions.” *Francis v. Washington State Dep't of Corr.*, 178 Wn. App. 42, 58, 313 P.3d 457, 465 (2013), *as amended on denial of reconsideration* (Jan. 22, 2014), *review denied sub nom. Francis v. Dep't of Corr.*, 180 Wn. 2d 1016, 327 P.3d 55 (2014).²⁸

E. The trial court did not err in holding the names of IP's are not exempt pursuant to RCW 42.56.230(1).

The PRA does not exempt IP names through RCW 42.56.230(1) for at least five independent reasons (discussed in FF Brief, 55-75). Courts cannot look beyond the four corners of the records at issue to determine if they are disclosable. *See Koenig v. Des Moines*, 158 Wn.2d 173, 183, 142 P.3d 162 (2006). This includes *any* document not disclosed in the contested disclosure, any database or research tool, the internet, websites, libraries, archives, or anything else beyond the actual records to be disclosed. Any method doing so constitutes the connect-the-dots method rejected by this Court. *See, e.g. Koenig v. Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006); *King Cnty. v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307 (2002).

²⁸ The federal FOIA cases construe FOIA's provisions related to fee waivers for requests and the award of attorneys' fees. *Nat'l Sec. Archive v. U.S. Dep't of Def.*, 530 F. Supp. 2d 198, 201 (D.D.C. 2008); *VoteHemp, Inc. v. Drug Enforcement Admin.*, 237 F.Supp.2d 55, 64-65 (D.D.C. 2002). The federal Lanham Act cases SEIU cites are even more irrelevant because the entire Lanham Act is a statute related to subjects not even remotely analogous to the PRA: namely, preventing confusion about sponsorship, approval, and association between entities. *Brach Van Houten Holding, Inc. v. Save Brach's Coal. for Chicago*, 856 F. Supp. 472, 476 (N.D. Ill. 1994).

Every version of SEIU’s “tantamount” argument constitutes this connect-the-dots argument. Thus, SEIU urges this Court to overthrow the settled case law which defeats its argument. This Court should decline this invitation. The settled case law on this issue properly aligns with the PRA’s language and policy favoring openness and disclosure. *Sheehan* and *Koenig* were decided not long ago when the same research technology existed as today. Most importantly, the principle of *Sheehan* and *Koenig* still applies, i.e. “[i]t is a fact of modern life in this age of technology the names can be used to obtain other personal information from various sources, but we conclude that this is not sufficient to prevent disclosure of the names of police officers under the act.” *Sheehan*, 114 Wn. App. at 346.²⁹

F. The trial court abused its discretion by allowing SEIU to compel written discovery of requester Freedom Foundation.

A private third party should not be allowed to issue invasive discovery requests to a requester. The dangers of doing so are well illustrated by the instant case’s expensive and prolonged litigation, as well as SEIU’s smothering discovery requests which infringe constitutional

²⁹ SEIU’s claim that disclosure would contravene the privacy rights of welfare recipients “without benefiting the purposes which the PRA was designed to further...” is untenable in light of the fact that the State and SEIU are not ensuring the protection of the constitutional rights of already existing IPs. Government accountability is at the heart of FF’s request.

rights. This sort of bludgeoning by a private third party is encouraged if they are allowed to issue discovery requests to requesters.

Division Two explained why a *government agency* is discouraged from “bludgeoning” a requester with abusive discovery. First, that court cited a federal FOIA case when it stated, “The government will not be permitted to use discovery to frustrate the purposes of FOIA. Discovery must be relevant to the subject matter involved in the pending action, and in the usual FOIA case, the government will be in possession of all such evidence.” *City of Lakewood v. Koenig*, 160 Wn.App. 883, 890-91, 250 P.3d 113 (2011) (citing *Weisberg v. Webster*, 749 F.2d 864, 868 (D.C. Cir. 1984)).

Then Division Two explained why application of the normally liberal discovery rules in a PRA case would not lead to abusive discovery. The court stated, “Though agencies could try to use discovery to ‘bludgeon’ requesters...there are several protections to prevent such harm.” *Id.* at 891. First, there is the normal requirement that a discovery request must be relevant to the subject matter. The second, and more compelling, reason is that “an agency’s misuse of discovery would only increase a requester’s attorney fees should the requester prevail. *See* RCW 42.56.550(4).” *Id.* The court concluded, “[a]n agency would abuse the discovery process at its own peril.” *Id.* However, no such incentive exists where the injunction is sought

by a private third party.³⁰ Without this disincentive, nothing stops a private third party seeking an injunction from issuing abusive discovery requests (except the difficult-to-win CR 11 sanction provision). This is especially true in the instant case due to SEIU's pecuniary interest in protracted litigation. Every day IPs believe they live in a pre-choice (pre-*Harris v. Quinn*) world is another day SEIU collects what are essentially unconstitutional compulsory fees.³¹ The State is not safeguarding this choice for the 30,000+ existing IPs in Washington.

G. Freedom Foundation may cross-appeal the trial court's rulings because it is an aggrieved party pursuant to RAP 3.1.

SEIU argues FF may not cross-appeal the trial court's rulings because it is not aggrieved by its judgments. *See* RAP 3.1. FF cross-appeals three judgments: (1) the October 3, 2014 Order granting a TRO, CP 78-79; RP 10/3/14 at 36-42; (2) the October 10, 2014 Order on Motions for Expedited Discovery and a Protective Order, CP 417-20, 446-49; and (3) the October 22, 2014 Order Denying Preliminary and Permanent Injunction, CP 879-971; RP 10/16/14 at 46-88.

³⁰ This argument is made in the alternative, if this Court rules the PRA does not award attorneys' fees and litigation costs to a requester from a private third party seeking an injunction, although FF argues otherwise.

³¹ IPs have a constitutional right to choose if they fund a union. A right to choose is meaningless if someone does not know she has it.

In the October 22 Order Denying the Preliminary and Permanent Injunctions, the court extended its October 3 Order Granting a TRO until November 5, 2014, CP 881, thus affording SEIU the opportunity to seek and obtain an order from the Appellate Commissioner staying the expiration of that same TRO until the conclusion of this appeal. App. 1. Thus, the records remain undisclosed more than a year after the request because of a TRO granted solely based on CR 65(a)(2). FF is an aggrieved party pursuant to RAP 3.1 because its rights under the PRA have been negatively affected by the TRO and will continue to be if this case is remanded. *See State v. Taylor*, 150 Wn.2d 599, 603, 80 P.3d 605 (2003); *see also Polygon Nw. Co. v. Am. Nat. Fire Ins. Co.*, 143 Wn.App. 753, 768, 189 P.3d 777, rev. denied 164 Wn.2d 1033 (2008).

H. Freedom Foundation’s cross-appeal of judgments in each of the three orders identified in its Notice and briefing are reviewable as a matter of right under RAPs 2.2 and 2.4.

SEIU next attempts to argue FF’s cross-appeals are interlocutory and unreviewable by this Court. However, no legal authority supports this claim. And, as stated above, FF is aggrieved by the three trial court decisions it cross-appeals to this Court. Not only did the trial court’s final judgment extend the TRO to invite a stay, but the issue whether to allow invasive discovery into a requester’s intent inhered in the trial court’s denial of the preliminary and permanent injunctions. RP 10/16/14 at 71-75. In that

ruling, the court accepted FF's previous argument that permitting broad discovery of a requestor's alleged "commercial" intent runs afoul of the PRA's clear language and policy. RP 10/16/14 at 71. But the damage was done; FF had already been compelled to produce hundreds of its internal documents and communications.³² SEIU cites *State Bank of Goldendale v. Beeks*, 119 Wash. 42, 45, 204 P. 771, 772 (1922), for the apparent proposition that a trial court's refusal to strike interrogatories is not appealable.³³ Even if *Beeks* were controlling case law, it supports the notion that FF's current challenge to the trial court's grant of discovery is appealable. *Id.* ("With regard to the appeal from the order refusing to strike the interrogatories, we agree with the respondent that such an order is interlocutory, and not appealable *in advance of an appeal from the final judgment in an action.*") (Emphasis added). FF is not seeking interlocutory review, but a review of a final judgment. Thus, all three orders are appealable as a matter of right under RAP 2.2(a)(1).³⁴

³² At the October 10, 2014 discovery hearing, the trial court limited the subject matter SEIU could obtain through written discovery to **three** specific questions SEIU had included on its 30(b)(6) Deposition Notice (which the court then quashed). RP 10/10/14 at 26-29. Later that day, SEIU served FF with **seven** broad interrogatories, and several of those interrogatories far exceeded the limited scope articulated by the court. CP 232-240.

³³ The Washington Supreme Court handed down the *Beeks* decision (1922) 54 years before the adoption of RAP 2.2 (1976).

³⁴ Further, an order can only be interlocutory *before* a final judgment. "The order . . . was interlocutory, and, *until the case terminated in a final judgment*, the court retained jurisdiction, which carried with it the right to vacate any previous order improvidently made." *Alwood v. Aukeen Dist. Court*, 94 Wn. App. 396, 400, 973 P.2d 12, 14 (1999)

The scope of FF's cross-appeal is also appropriate under RAP

2.4(a). That Rule states, in pertinent part:

The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal... The appellate court will, at the instance of the respondent, review *those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent.*

(Emphasis added.). First, FF designated both the October 3 and October 10 Orders in its Notice of Appeal. *See* CP 455-590. Second, if this Court adopts SEIU's extreme "commercial purpose" definition and determines that fact issues exist as to the nature of FF's intent, then the TRO would continue to extend until SEIU was afforded the opportunity to invasively discover even more information about the FF's intent.³⁵ *See* RP 10/3/14 at 38-41. FF would be prejudiced by the continuing TRO (its rights under the TRO) and the invasive discovery. FF's cross-appeals of the October 3, 2014 and October 10, 2014 Orders are within the proper scope of appellate review under RAP 2.4(a).

I. Freedom Foundation is entitled to its attorneys' fees and costs associated with the dissolving the TRO, which is still in effect.

"Attorney's fees are recoverable as a cost of dissolving a wrongfully issued temporary injunction or restraining order." *Seattle Firefighters*

(citing *Balfour-Guthrie Inv. Co. v. Geiger*, 20 Wn. 579, 580 56 P. 370 (1899).) (Emphasis added.)

³⁵ *See* Appellant SEIU 775's Brief at 28-32.

Union v. Hollister, 48 Wn.App. 129, 138, 737 P.2d 1302 (1987). Not only is FF entitled to attorneys' fees and costs according to the law, it is also good policy under the PRA to require a private third party who acquires a wrongfully issued an injunction to pay the attorneys' fees and costs of the requester who had to expend resources to exercise her rights under the PRA. This is especially true when a TRO is issued based on CR 65(a)(2), rather than the requirements of *Ameriquest*, 177 Wn.2d at 487 and *Tyler Pipe Indus. v. Dep't of Revenue*, 96 Wn. 2d at 792.

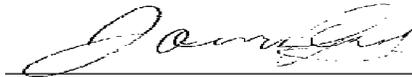
II. CONCLUSION

For the foregoing reasons, this Court should uphold the trial court's decision to deny a preliminary and permanent injunction when it did. This Court should reverse the trial court's decision with respect to 1) its issuance of a TRO based solely on CR 65(a)(2), 2) SEIU's associational standing, 3) SEIU's standing to bring suit pursuant to RCW 42.56.070(9), and 4) its decision to allow SEIU's second set of discovery requests. This Court should also grant the Foundation payment of its attorneys' fees and costs.

RESPECTFULLY SUBMITTED this 29th day of July, 2015:

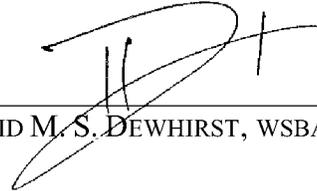
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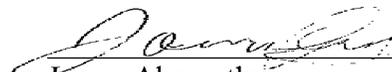
DECLARATION OF SERVICE

I, James G. Abernathy, hereby declare under penalty of perjury under the laws of the State of Washington that on July 29, 2015, I caused the foregoing Reply Brief of Respondent/Cross-Appellant Freedom Foundation and the attached Appendix to be filed with the Washington Supreme Court via email to supreme@courts.wa.gov and a true and correct copy of the same to be sent via email, per agreement of counsel, to the following:

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RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

SEIU Healthcare 775NW,
Appellant/Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES (“DSHS”),
Respondent,

and

FREEDOM FOUNDATION,
Respondent/Cross-Appellant.

**APPENDIX TO REPLY OF
CROSS-APPELLANT/RESPONDENT FREEDOM FOUNDATION**

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APPENDIX PAGE NUMBER	DESCRIPTION
1	Ruling of Division II Clerk Granting/Continuing trial court's TRO
2-4	RCW 42.56.070
5	RCW 42.56.540
6	RCW 42.56.550
7-9	RCW 74.39A.270
10-11	Civil Rule 65

RESPECTFULLY SUBMITTED this 29th day of July, 2015:

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General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> **OFFICE HOURS:** 9-12, 1-4.

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CASE #: 46797-6-II

SEIU Healthcare 775 N.W., Appellant v State of WA DSHS, et al Respondents

Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

The trial court's October 16, 2014, order is stayed pending a decision by this court and trial court's October 3, 2014, temporary restraining order enjoining DSHS from fulfilling the Freedom Foundation's PRA request is continued pending a decision by this court. Where, as here, the fruits of an appeal will be totally destroyed in the absence of a stay, a stay should be granted unless the appeal is totally devoid of merit. *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291-92, 716 P.2d 956 (1986). This court cannot say, at this stage of the appeal, that it is totally devoid of merit.

Very truly yours,

David C. Ponzoha
Court Clerk

RCW 42.56.070

Documents and indexes to be made public.

(1) Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of *subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be explained fully in writing.

(2) For informational purposes, each agency shall publish and maintain a current list containing every law, other than those listed in this chapter, that the agency believes exempts or prohibits disclosure of specific information or records of the agency. An agency's failure to list an exemption shall not affect the efficacy of any exemption.

(3) Each local agency shall maintain and make available for public inspection and copying a current index providing identifying information as to the following records issued, adopted, or promulgated after January 1, 1973:

(a) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(b) Those statements of policy and interpretations of policy, statute, and the Constitution which have been adopted by the agency;

(c) Administrative staff manuals and instructions to staff that affect a member of the public;

(d) Planning policies and goals, and interim and final planning decisions;

(e) Factual staff reports and studies, factual consultant's reports and studies, scientific reports and studies, and any other factual information derived from tests, studies, reports, or surveys, whether conducted by public employees or others; and

(f) Correspondence, and materials referred to therein, by and with the agency relating to any regulatory, supervisory, or enforcement responsibilities of the agency, whereby the agency determines, or opines upon, or is asked to determine or opine upon, the rights of the state, the public, a subdivision of state government, or of any private party.

(4) A local agency need not maintain such an index, if to do so would be unduly burdensome, but it shall in that event:

(a) Issue and publish a formal order specifying the reasons why and the extent to which compliance would unduly burden or interfere with agency operations; and

(b) Make available for public inspection and copying all indexes maintained for agency use.

(5) Each state agency shall, by rule, establish and implement a system of indexing for the identification and location of the following records:

(a) All records issued before July 1, 1990, for which the agency has maintained an index;

(b) Final orders entered after June 30, 1990, that are issued in adjudicative proceedings as defined in RCW 34.05.010 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(c) Declaratory orders entered after June 30, 1990, that are issued pursuant to RCW 34.05.240 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(d) Interpretive statements as defined in RCW 34.05.010 that were entered after June 30, 1990; and

(e) Policy statements as defined in RCW 34.05.010 that were entered after June 30, 1990.

Rules establishing systems of indexing shall include, but not be limited to, requirements for the form and content of the index, its location and availability to the public, and the schedule for revising or updating the index. State agencies that have maintained indexes for records issued before July 1, 1990, shall continue to make such indexes available for public inspection and copying. Information in such indexes may be incorporated into indexes prepared pursuant to this subsection. State agencies may satisfy the requirements of this subsection by making available to the public indexes prepared by other parties but actually used by the agency in its operations. State agencies shall make indexes available for public inspection and copying. State agencies may charge a fee to cover the actual costs of providing individual mailed copies of indexes.

(6) A public record may be relied on, used, or cited as precedent by an agency against a party other than an agency and it may be invoked by the agency for any other purpose only if:

(a) It has been indexed in an index available to the public; or

(b) Parties affected have timely notice (actual or constructive) of the terms thereof.

(7) Each agency shall establish, maintain, and make available for public inspection and copying a statement of the actual per page cost or other costs, if any, that it charges for providing photocopies of public records and a statement of the factors and manner used to determine the actual per page cost or other costs, if any.

(a) In determining the actual per page cost for providing photocopies of public records, an agency may include all costs directly incident to copying such public records including the actual cost of the paper and the per page cost for use of agency copying equipment. In determining other actual costs for providing photocopies of public records, an agency may include all costs directly incident to shipping such public records, including the cost of postage or delivery charges and the cost of any container or envelope used.

(b) In determining the actual per page cost or other costs for providing copies of public records, an agency may not include staff salaries, benefits, or other general administrative or overhead charges, unless those costs are directly related to the actual cost of copying the public records. Staff time to copy and mail the requested public records may be included in an agency's costs.

(8) An agency need not calculate the actual per page cost or other costs it charges for providing photocopies of public records if to do so would be unduly burdensome, but in that event: The agency may not charge in excess of fifteen cents per page for photocopies of public records or for the use of agency equipment to photocopy public records and the actual postage or delivery charge and the cost of any container or envelope used to mail the public records to the requestor.

(9) This chapter shall not be construed as giving authority to any agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall not do so unless specifically authorized or directed by law: PROVIDED, HOWEVER, That lists of applicants for professional licenses and of professional licensees shall be made available to those professional associations or educational organizations recognized by their professional licensing or examination board, upon payment of a reasonable charge therefor: PROVIDED FURTHER, That such recognition may be refused only for a good cause pursuant to a hearing under the provisions of chapter 34.05 RCW, the Administrative Procedure Act.

[2005 c 274 § 284; 1997 c 409 § 601. Prior: 1995 c 397 § 11; 1995 c 341 § 1; 1992 c 139 § 3; 1989 c 175 § 36; 1987 c 403 § 3; 1975 1st ex.s. c 294 § 14; 1973 c 1 § 26 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.260.]

Notes:

***Reviser's note:** Subsection (6) of this section was renumbered as subsection (7) by 1992 c 139 § 3; and subsection (7) was subsequently renumbered as subsection (9) by 1995 c 341 § 1.

Part headings -- Severability -- 1997 c 409: See notes following RCW 43.22.051.

Effective date -- 1989 c 175: See note following RCW 34.05.010.

Intent -- Severability -- 1987 c 403: See notes following RCW 42.56.050.

Exemption for registered trade names: RCW 19.80.065.

RCW 42.56.540

Court protection of public records.

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 for the county in which the movant resides or in which the record is maintained, 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 governmental functions. An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested. However, this option does not exist where the agency is required by law to provide such notice.

[1992 c 139 § 7; 1975 1st ex.s. c 294 § 19; 1973 c 1 § 33 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.330.]

RCW 42.56.550

Judicial review of agency actions.

(1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

(2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

(3) Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take into account the policy of this chapter 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. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

(4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

(5) For actions under this section against counties, the venue provisions of RCW 36.01.050 apply.

(6) Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.

[2011 c 273 § 1. Prior: 2005 c 483 § 5; 2005 c 274 § 288; 1992 c 139 § 8; 1987 c 403 § 5; 1975 1st ex.s. c 294 § 20; 1973 c 1 § 34 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.340.]

Notes:

Intent -- Severability -- 1987 c 403: See notes following RCW 42.56.050.

Application of chapter 300, Laws of 2011: See note following RCW 42.56.565.

CR 65
INJUNCTIONS

(a) Preliminary Injunction.

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subsection shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or the adverse party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the applicant's claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 14 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. Except as otherwise provided by statute, no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof. Pursuant to RCW 4.92.080 no security shall be required of the State of Washington, municipal corporations or political subdivisions of the State of Washington. The provisions of rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and Scope. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Statutes. These rules are intended to supplement and not to modify any statute prescribing the basis for obtaining injunctive relief. These rules shall prevail over statutes if there are procedural conflicts.

[Originally effective July 1, 1967; amended effective July 1, 1974; January 1, 1981; September 1, 1989; April 28, 2015.]

RCW 74.39A.270

Collective bargaining — Circumstances in which individual providers are considered public employees — Exceptions.

(1) Solely for the purposes of collective bargaining and as expressly limited under subsections (2) and (3) of this section, the governor is the public employer, as defined in chapter 41.56 RCW, of individual providers, who, solely for the purposes of collective bargaining, are public employees as defined in chapter 41.56 RCW. To accommodate the role of the state as payor for the community-based services provided under this chapter and to ensure coordination with state employee collective bargaining under chapter 41.80 RCW and the coordination necessary to implement RCW 74.39A.300, the public employer shall be represented for bargaining purposes by the governor or the governor's designee appointed under chapter 41.80 RCW. The governor or governor's designee shall periodically consult with the authority during the collective bargaining process to allow the authority to communicate issues relating to the long-term in-home care services received by consumers. The department shall solicit input from the developmental disabilities council, the governor's committee on disability issues and employment, the state council on aging, and other consumer advocacy organizations to obtain informed input from consumers on their interests, including impacts on consumer choice, for all issues proposed for collective bargaining under subsections (5) and (6) of this section.

(2) Chapter 41.56 RCW governs the collective bargaining relationship between the governor and individual providers, except as otherwise expressly provided in this chapter and except as follows:

(a) The only unit appropriate for the purpose of collective bargaining under RCW 41.56.060 is a statewide unit of all individual providers;

(b) The showing of interest required to request an election under RCW 41.56.060 is ten percent of the unit, and any intervener seeking to appear on the ballot must make the same showing of interest;

(c) The mediation and interest arbitration provisions of RCW 41.56.430 through 41.56.470 and 41.56.480 apply, except that:

(i) With respect to commencement of negotiations between the governor and the bargaining representative of individual providers, negotiations shall be commenced by May 1st of any year prior to the year in which an existing collective bargaining agreement expires; and

(ii) The decision of the arbitration panel is not binding on the legislature and, if the legislature does not approve the request for funds necessary to implement the compensation and fringe benefit provisions of the arbitrated collective bargaining agreement, is not binding on the authority or the state;

(d) Individual providers do not have the right to strike; and

(e) Individual providers who are related to, or family members of, consumers or prospective consumers are not, for that reason, exempt from this chapter or chapter 41.56 RCW.

(3) Individual providers who are public employees solely for the purposes of collective bargaining under subsection (1) of this section are not, for that reason, employees of the state, its political subdivisions, or an area agency on aging for any purpose. Chapter 41.56 RCW applies only to the governance of the collective bargaining relationship between the employer and individual providers as provided in subsections (1) and (2) of this section.

(4) Consumers and prospective consumers retain the right to select, hire, supervise the work of, and terminate any individual provider providing services to them. Consumers may elect to receive long-term in-home care services from individual providers who are not referred to them by the authority.

(5) Except as expressly limited in this section and RCW 74.39A.300, the wages, hours, and working

conditions of individual providers are determined solely through collective bargaining as provided in this chapter. No agency or department of the state may establish policies or rules governing the wages or hours of individual providers. However, this subsection does not modify:

(a) The department's authority to establish a plan of care for each consumer or its core responsibility to manage long-term in-home care services under this chapter, including determination of the level of care that each consumer is eligible to receive. However, at the request of the exclusive bargaining representative, the governor or the governor's designee appointed under chapter 41.80 RCW shall engage in collective bargaining, as defined in RCW 41.56.030(4), with the exclusive bargaining representative over how the department's core responsibility affects hours of work for individual providers. This subsection shall not be interpreted to require collective bargaining over an individual consumer's plan of care;

(b) The department's authority to terminate its contracts with individual providers who are not adequately meeting the needs of a particular consumer, or to deny a contract under RCW 74.39A.095(8);

(c) The consumer's right to assign hours to one or more individual providers selected by the consumer within the maximum hours determined by his or her plan of care;

(d) The consumer's right to select, hire, terminate, supervise the work of, and determine the conditions of employment for each individual provider providing services to the consumer under this chapter;

(e) The department's obligation to comply with the federal medicaid statute and regulations and the terms of any community-based waiver granted by the federal department of health and human services and to ensure federal financial participation in the provision of the services; and

(f) The legislature's right to make programmatic modifications to the delivery of state services under this title, including standards of eligibility of consumers and individual providers participating in the programs under this title, and the nature of services provided. The governor shall not enter into, extend, or renew any agreement under this chapter that does not expressly reserve the legislative rights described in this subsection (5)(f).

(6) At the request of the exclusive bargaining representative, the governor or the governor's designee appointed under chapter 41.80 RCW shall engage in collective bargaining, as defined in RCW 41.56.030(4), with the exclusive bargaining representative over employer contributions to the training partnership for the costs of: (a) Meeting all training and peer mentoring required under this chapter; and (b) other training intended to promote the career development of individual providers.

(7) The state, the department, the area agencies on aging, or their contractors under this chapter may not be held vicariously or jointly liable for the action or inaction of any individual provider or prospective individual provider, whether or not that individual provider or prospective individual provider was included on the referral registry or referred to a consumer or prospective consumer. The existence of a collective bargaining agreement, the placement of an individual provider on the referral registry, or the development or approval of a plan of care for a consumer who chooses to use the services of an individual provider and the provision of case management services to that consumer, by the department or an area agency on aging, does not constitute a special relationship with the consumer.

(8) Nothing in this section affects the state's responsibility with respect to unemployment insurance for individual providers. However, individual providers are not to be considered, as a result of the state assuming this responsibility, employees of the state.

[2011 1st sp.s. c 21 § 10; 2007 c 361 § 7; 2007 c 278 § 3; 2006 c 106 § 1; 2004 c 3 § 1; 2002 c 3 § 6 (Initiative Measure No. 775, approved November 6, 2001).]

Notes:

Effective date -- 2011 1st sp.s. c 21: See note following RCW 72.23.025.

Effective date -- 2007 c 361 §§ 7 and 8: "Sections 7 and 8 of this act take effect March 1, 2008."

[2007 c 361 § 14.]

Construction -- Severability -- Captions not law -- Short title -- 2007 c 361: See notes following RCW 74.39A.009.

Effective date -- 2006 c 106: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 17, 2006]." [2006 c 106 § 2.]

Severability -- 2004 c 3: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2004 c 3 § 8.]

Effective date -- 2004 c 3: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 9, 2004]." [2004 c 3 § 9.]

Findings--Captions not law--Severability -- 2002 c 3 (Initiative Measure No. 775): See RCW 74.39A.220 and notes following.