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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

PUGET SOUND ADVOCATES FOR RETIREMENT ACTION; M.G.;
T.S. ON BEHALF OF S.P.; and E.S. ON BEHALF OF R.S.; and
SEIU 775, a labor organization,

Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND
HEALTH SERVICES; and SEATTLE TIMES COMPANY,

Respondents.

**BRIEF OF RESPONDENT DEPARTMENT OF SOCIAL AND
HEALTH SERVICES**

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I. INTRODUCTION

On November 14, 2016, a Seattle Times reporter submitted a public record request to the Department of Social and Health Services (DSHS) for a list of Individual Providers (IPs) and their dates of birth. The public record request was submitted *after* the day of the 2016 General Election, but before the election was certified and before Initiative 1501 (I-1501) took effect. I-1501 enacted new restrictions on public disclosure. I-1501 took effect three weeks later, on December 8, 2016.

DSHS processed the request, applying the law as it existed at that time, to determine whether the requested record should be released, withheld, or redacted. DSHS determined that the record should be released because no existing statute required or permitted withholding it. The Seattle Times agreed that DSHS need not fulfill the public record request until there was a final determination in other pending litigation regarding other public record requests that similarly requested a list of the names and dates of birth of IPs.

Anticipating dismissal of the other litigation, Appellants initiated this litigation in March 2017. Appellants sought to enjoin DSHS from releasing the *names* of the IPs, but did not request an injunction regarding their dates of birth. Consequently, DSHS produced a list of dates of birth to the Seattle Times on April 6, 2017. A series of court orders has prohibited

DSHS from releasing the list of names, and those names have not been released. DSHS is ready to release that list if and when the Court permits it to do so.

II. RESTATEMENT OF THE ISSUES

(1) Does the constitutional privacy right announced in *Washington Public Employees Association v. Washington State Center for Childhood Deafness & Hearing Loss*, 1 Wn. App. 2d 225, 404 P.3d 111 (2017), prevent DSHS from disclosing a list of names of IPs where their dates of birth have already been disclosed?

(2) Does I-1501, which took effect *after* this public record request was submitted and processed, exempt the list of names from disclosure and thereby prohibit its release?

III. STATEMENT OF THE CASE

A. The Public Record Request

On November 14, 2016, Seattle Times reporter Christine Willmsen submitted a public record request to DSHS requesting “[a] list of current individual providers (also known as state paid caregivers) and their dates of birth from the Aging and Long-term Support Administration.” CP 127-30. DSHS decided that the list should be disclosed if the requestor certified that the request was not for a commercial purpose, as required in RCW 42.56.070(8). CP 132-36. The Seattle Times returned a Commercial

Purpose Declaration, and on November 28, 2016, DSHS estimated that a responsive record would be released on approximately January 11, 2017. CP 138-39.

However, the Seattle Times agreed that DSHS need not fulfill the request until there was final appellate determination in other pending litigation, *Puget Sound Advocates for Retirement Action, et al. v. State of Washington, Department of Social and Health Services, et al.*, (Thurston County Case No. 16-2-04312-34 and Washington State Court of Appeals, Division II, Case No. 49977-1-II) that similarly involved Appellants, DSHS, and public record requests for a list of names and dates of birth of IPs. CP 44. When the requestors in that appeal subsequently voluntarily withdrew their public requests, the parties filed a stipulated motion to dismiss, and the appeal was dismissed on March 28, 2017. CP 44, 59-60.

Anticipating dismissal of the other litigation, Appellants initiated this litigation. CP 44. Appellants filed a Complaint for Injunctive Relief on March 24, 2017, and a Motion for Temporary Restraining Order (TRO) on March 31, 2017. CP 5-14, 21-62. The trial court issued a TRO on April 3, 2017, enjoining DSHS from releasing any names of IPs in response to the Seattle Times' public record request. CP 63-65.

Appellants did not include the IPs' dates of birth in the Complaint for Injunctive Relief or the Motion for TRO. Because the TRO did not enjoin release of the IPs' birthdates, DSHS produced a list of birthdates to the Seattle Times on April 6, 2017.

Appellants filed a Motion for Preliminary Injunction on April 7, 2017, which was granted on April 14, 2017, again enjoining DSHS from releasing any names of IPs in response to the Seattle Times public record request. CP 66-115, 170-72.

Appellants filed a Motion for Permanent Injunction on May 12, 2017. CP 180-93. The trial court denied the Permanent Injunction on June 9, 2017. CP 211-12. However, the trial court enjoined DSHS from releasing the record until June 29, 2017, or until any further orders of this Court. CP 211-12. The Notice of Appeal was filed on June 19, 2017. CP 213-19. Appellants filed an Emergency Motion for Stay and Injunctive Relief with this Court on June 22, 2017, which was granted by Commissioner Bearse on June 23, 2017, staying release of the names of IPs. DSHS thus has been judicially restrained from releasing the requested list of names since the beginning of this litigation.

While this appeal has been pending, this Court issued its decision in *Washington Public Employees Association v. Washington State Center for Childhood Deafness & Hearing Loss*, 1 Wn. App. 2d 225,

404 P.3d 111 (2017). That opinion held that article I, section 7 in the Washington Constitution “protects from public disclosure state employees’ full names associated with their corresponding birthdates.” *Washington Pub. Emps. Ass’n*, 1 Wn. App. 2d at 229.¹

B. Initiative 1501

I-1501, an initiative to the people, addressed “the protection of seniors and vulnerable individuals from financial crimes and victimization.” CP 141-50. The initiative appeared on the ballot for the November 8, 2016, General Election. CP 141-50. On December 7, 2016, the Secretary of State certified the results of the General Election, and the Governor proclaimed that the proposed law as set forth in I-1501 had been approved by the voters of Washington. CP 141-50.

Under Article II, section (1)(d) of the Washington Constitution, an initiative to the people takes effect on the thirtieth day after the election at which it is approved, unless the initiative contains a later effective date. Because I-1501 contained no later effective date, it took effect on December 8, 2016. CP 142. I-1501 was not yet in effect on November 14, 2016, the day that the Seattle Times submitted its public

¹ A Petition for Discretionary Review is currently pending, No. 95262-1.

record request to DSHS, or during the following three weeks when DSHS processed the request.

I-1501 included two new restrictions on public disclosure relevant to this appeal: RCW 42.56.640 (Section 8 of the initiative); and RCW 43.17.410 (Section 10 of the initiative).

IV. ARGUMENT

A. Standard of Review

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 Public Records Act (PRA). *Robbins, Geller, Rudman & Dowd, LLP v. Gresham*, 179 Wn. App. 711, 719–20, 328 P.3d 905 (2014). Review in these cases, including application of an exemption, is de novo. *Id.* The burden of proof is on the party seeking to prevent disclosure to show that an exemption applies. *Ameriquest Mortg. Co. v. Office of Att’y Gen.*, 177 Wn.2d 467, 486, 300 P.3d 799 (2013). In this case, that burden falls on the Appellants.

1. A Permanent Injunction requires demonstration that Plaintiffs have a clear legal or equitable right, a well-grounded fear of the invasion of that right, and actual or substantial injury

To obtain permanent injunctive relief, a plaintiff must establish three basic requirements: (1) it has a clear legal or equitable right; (2) it has a well-grounded fear of immediate invasion of that right by the entity against

which it 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., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). If a plaintiff fails to satisfy any of these three requirements, the injunction generally should be denied. *Federal Way Family Physicians, Inc. v. Tacoma Stands Up for Life*, 106 Wn.2d 261, 265, 721 P.2d 946 (1986).

Overlaying that general standard for an injunction is the standard in RCW 42.56.540, which specifically governs the court's power to restrain the production of a record under the PRA. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 407 n.2, 259 P.3d 190 (2011). "Under RCW 42.56.540, a court may enjoin production of requested records if an exemption applies and 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." *Gresham*, 179 Wn. App. 711, 719, 328 P.3d 905 (2014).

2. The PRA is a broadly worded mandate for the release of records, with exemptions for release narrowly construed

State agencies have a duty under the PRA to produce nonexempt public records. RCW 42.56.070(1). Each agency shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of RCW 42.56 or another statute, which exempts or prohibits disclosure of specific information or records.

RCW 42.56.070(1). The foundation of this duty is the principle that the PRA is to be liberally construed in favor of disclosure, with exemptions narrowly construed. RCW 42.56.030; *West v. Port of Olympia*, 183 Wn. App. 306, 311, 333 P.3d 488 (2014). DSHS did not identify a statutory exemption applicable to the list requested by the Seattle Times, and therefore determined that the list should be released.

B. No Constitutional Violation has been Asserted Against DSHS, and DSHS Takes No Position on Whether or How the WPEA Decision Would Apply in this Case.

Appellants argue that this Court's recent holding in *WPEA* now prohibits DSHS from releasing a list of names and dates of birth of IPs on the basis that disclosure will violate Article I, Section 7 of the Washington Constitution. Opening Br. of App. at 3, 9-11. This Court held in *WPEA* that "state employees have a constitutionally protected expectation of privacy in their full names associated with their corresponding birthdates." *WPEA*, 1 Wn. App. 2d at 238.

WPEA is the first Washington appellate decision holding that a privacy interest under Washington Constitution article I, section 7 prevents release of information in response to a public disclosure request.²

² The Court of Appeals considered the constitutional privacy argument in *SEIU Local 925 v. Freedom Foundation*, 197 Wn. App. 203, 221-23, 389 P.3d 641 (2016), but found in that case that the union had failed to meet its burden of proof.

Even had *WPEA* been decided at the time DSHS processed the public record request at issue here, individual constitutional rights generally are personal, and DSHS would have been unable to assert an employee's constitutional right in the employee's stead. *See In re Marriage of Akon*, 160 Wn. App. 48, 59, 248 P.3d 94 (2011). *See also Rakas v. Illinois*, 439 U.S. 128, 138, 99 S.Ct. 421, 428, 58 L. Ed. 2d 387 (1978) (same, under Fourth Amendment). Moreover, no party in this litigation is asserting that DSHS violated any person's privacy under article I, section 7 by releasing information not protected by court order; Appellant's constitutional claim is only that article I, section 7 bars release of the names in conjunction with birth dates. Consequently, DSHS has taken no position on the scope or applicability of article I, section 7 to this case.

C. The Exemptions Enacted in I-1501 Cannot be Applied to the Seattle Times Public Record Request Because They Were Not in Effect When the Request was Submitted

Appellants argue that the initiative's purpose would be served by applying it "retroactively to a request made after the people passed the Act, but before its technical effective date." Opening Br. of App. at 3. This argument fails for a number of reasons. First, the initiative actually had not "passed" when the public record request was submitted. The public record request was submitted on November 14, 2016. The initiative was declared "approved" when the election results were certified three and a half weeks

later, on December 7, 2016. Second, the initiative was not yet in effect when the public record request was submitted. The public record request was submitted on November 14, 2016. The initiative took effect December 8, 2016. Third, if, as Appellants suggest, the initiative had already “passed” and the subsequent effective date was only a “technical effective date,” then Appellants are essentially arguing that the new laws took effect the day of the election, simply because the initiative’s approval rate was high. Such an assertion has no basis in the law.

1. The law that was in effect the day the public record request was submitted, not some later date, is determinative

Appellant assert two statutory bases for a permanent injunction preventing DSHS from disclosing the names of IPs to the Seattle Times: new exemptions established in I-1501 codified as RCW 42.56.640 and RCW 43.17.410. Neither statute was in effect at the time DSHS received the request, identified a responsive record, and gave notice of its intent to release that record.

Appellants assert that RCW 42.56.640³ and RCW 43.17.410⁴

³ RCW 42.56.640(1) states, “sensitive personal information of in-home caregivers for vulnerable populations is exempt from inspection and copying under this chapter.” “In-home caregivers for vulnerable populations” includes IPs. “Sensitive personal information” includes names.

⁴ RCW 43.17.410 states, “neither the state nor any of its agencies shall release . . . sensitive personal information of in-home caregivers for vulnerable populations, as those terms are defined in RCW 42.56.640.”

exempt IP's names from release in response to the Seattle Times public record request. Opening Br. of App. at 9. The new statutes became effective on December 8, 2016, and therefore were not in effect when the Seattle Times submitted its request three and a half weeks earlier, on November 14, 2016. DSHS did not consider those exemptions to be applicable when the request was received. Appellants essentially argue that the Court should apply the law that came into effect at a future date, rather than apply the law in effect at the time the public record request was submitted. Or put another way, Appellants argue that the law in effect at the time the record would be *released*, rather than the law in effect at the time the public record request was *submitted*, should determine whether the record should be released.

RCW 42.56.520 requires the agency to respond to the requestor within five business days by either providing the requested record, providing an internet link where the record can be accessed, providing a reasonable estimate of time necessary to respond, or denying the request. "Denials of requests must be accompanied by a written statement of the specific reasons therefor." RCW 42.56.520. The burden of proof is 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. RCW 42.56.550. As there was no applicable exemption in effect the day that the public record request was

received, DSHS determined that it had no basis to deny the request. DSHS complied with RCW 42.56.520 by sending the Seattle Times a letter on November 21, 2016, which acknowledged receipt of the November 14, 2016 request, and requesting that the Seattle Times complete and return a required Commercial Purpose Declaration. CP 132-36.

At the time that the public record request was received, and DSHS was required to respond, not only had I-1501 not yet taken effect, but the 2016 General Election had not even been certified. The results of I-1501, along with all other candidate races and ballot measures, were not yet final. RCW 42.56.520 does allow an agency to take additional time to respond to a request in order to clarify the request, locate and assemble the records, notify third persons affected by the request, or determine whether any information is exempt. The PRA does not allow an agency to take additional time to wait for the results of an election and base its response on potential changes in the law. An agency delaying release of records without authority faces potential penalties for the delay. *Wade's Eastside Gun Shop, Inc., v. Dep't of Labor and Indus.* 185 Wn.2d 270, 283-98, 372 P.3d 97 (2016).

Some public record requests include large quantities of responsive records. Some public record requests include a broad range, or many types, of responsive records. Some public record requests require a significant amount of time to research, locate, properly identify, and properly redact

the responsive records. RCW 42.56.520(2) acknowledges that additional time may be necessary to respond to a public record request based on the need to clarify the request, locate and assemble the information requested, notify third parties affected by the request, or determine whether any of the information is exempt from disclosure. RCW 42.56.080(2) specifically allows agencies to respond to large record requests by producing the records on a partial or installment basis. If the law that is in effect on the date of *release*, rather than the date of the *request*, determines whether the records are subject to release, then a change in the law could discontinue release of records part way through production. For example, if an agency were producing a large quantity of records in installments that happened to be in alphabetical order, and the Legislature passed a bill exempting the relevant records, then the requestor would receive records for the first half of the alphabet but not for the second half of the alphabet. This would not be consistent with the directives in RCW 42.56 that public records be available for inspection and copying, and that agencies shall promptly make public records available.

RCW 42.56.100 supports the argument that the law in effect *at the time of the request* governs release of the record. RCW 42.56.100 states, "If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency . . . shall retain

possession of the record, and may not destroy or erase the record until the request is resolved.” This statute requires that, once a public record request is received, agencies must preserve all responsive records, even if they were scheduled for destruction in the near future. An agency’s obligation to produce a record is not based on the date of production but on the date of the request. If, as Appellants argue, an agency’s obligation to produce is based on the date of production, then an agency could destroy the record in the time period between receipt of the request and some future production date, relieving the agency of the obligation to produce. It would be inconsistent to conclude that receipt of a public record request requires *preservation* of the responsive record, but does not actually require *production* of the record.

Finally, if the date of *release* is determinative, rather than the date of the request, a person or entity affected by a public record request, and desiring to prevent release of responsive records, could delay their release in order to effectuate a change in the law. RCW 42.56.520(2) and RCW 42.56.540 acknowledge that an agency has the option, and in some cases the legal obligation, to notify third persons or agencies named in a responsive record, to whom a responsive record specifically pertains, or who are otherwise affected by a request. In this case, DSHS did notify Appellant SEIU 775 of the Seattle Times public record request, that the

responsive record included identifying information of individuals represented by SEIU 775, and that DSHS believed that the information requested was subject to disclosure. CP 52-57. The person or entity can seek to enjoin release of the record through the process provided in RCW 42.56.540 and subsequent appeals, and simultaneously obtain temporary relief by way of a TRO, preliminary injunction or stay. The person or entity desiring to prevent release could pursue changes in the law through the legislative or initiative process while the appeals are pending to enact new exemptions preventing release of the responsive record. This outcome would be inconsistent with the purpose and spirit of the PRA.

2. No court of record has found the newly enacted exemptions to be retroactive

DSHS has a duty to make public records available to requestors. RCW 42.56.070(1). Appellants argue that the specific PRA exemption (RCW 42.56.640) and RCW 43.17.410 as an “other statute” under RCW 42.56.070(1), apply retroactively, prohibiting release of the record in this case. When DSHS reviewed the request and identified the responsive record, no court of record had found that RCW 42.56.640 and RCW 43.17.410 apply retroactively.

If the Court finds it necessary to consider retroactivity because the request was filed before the effective date of I-1501, the normal rules of statutory construction apply. “The rules of statutory construction apply to

initiatives as well as to legislative enactments.” *Hi-Starr, Inc., v. Liquor Control Bd.*, 106 Wn.2d 455, 460, 722 P.2d 808 (1986). Generally, statutes apply prospectively unless there is some legislative indication to the contrary. *Dragonslayer Inc., v. Gambling Comm’n*, 139 Wn. App. 433, 448, 161 P.3d 428 (2007).

Because I-1501 lacks an explicit statement of retroactivity, to overcome the presumption of prospective application, the Court therefore must find some legislative intent that I-1501 be applied retroactively, by looking to the language of the initiative or to some other indication that the average informed voter would have understood the initiative as applying retroactively. *See Am. Legion Post No. 149 v. Dep’t of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008); *State v. Rose*, 191 Wn. App. 858, 868, 365 P.3d 756 (2015), *review denied*, 185 Wn.2d 1030; *Dragonslayer*, 139 Wn. App. at 448. DSHS did not identify an explicit statement on retroactivity, nor an intent of retroactive application within I-1501, allowing it to withhold the record.

Appellants cite *McGee Guest Home, Inc. v. Dep’t of Soc. and Health Serv.*, 142 Wn.2d 316, 324-25, 12 P.3d 144 (2000) for the proposition that I-1501 can be applied retroactively because “the voters so intended.” Opening Br. of App. at 12. Appellants argue that “voters intended to prohibit state agencies from disclosing Individual Provider names.”

Opening Br. of App. at 12. Appellants conflate the voters' intent *to prohibit disclosure* with the voters' intent *to apply these new laws retroactively*. See Opening Br. of App. at 14-19. Appellants point out the intent section of the initiative, the new exemptions created in the initiative, explanations in the voters' pamphlet, and the initiative's high approval rate. Opening Br. of App. at 14-19. But just as Appellants explain, these facts demonstrate that the voters intended to prohibit state agencies from disclosing IP names. They do not show that voters intended to apply the new laws retroactively. Without any indication that the voters intended to apply the initiative retroactively, the presumption of prospective application remains.

The presumption of prospective application is reversed in favor of retroactive application if the amendment is clearly curative or remedial. *Dragonslayer*, 139 Wn. App. at 449. An amendment is curative if it clarifies or makes a technical correction to an ambiguous statute. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992). An amendment is remedial if it relates to practice, procedure, or remedies, and does not affect a substantive or vested right. *Id.* at 462-63.

DSHS was unable to conclude that the new statutes – RCW 42.56.640 and RCW 43.17.410 – are curative. DSHS also could not conclude that the new statutes were remedial. During the preceding year, a list of names of IPs was held to be nonexempt from disclosure to a PRA

request. *SEIU Healthcare 775NW*, 193 Wn. App. 377, 377 P. 3d 214 (2016), review denied 186 Wn.2d 1016 (2016). In *Dragonslayer*, a public record request was submitted prior to the Legislature's amendment of a PRA statute. The court commented that the amendment to the PRA exemption was not remedial because it would affect the requestor's vested right in the record. *Dragonslayer*, 139 Wn. App. at 449. The presumption that the new PRA exemptions established in I-1501 apply prospectively, to public record requests received on or after December 8, 2016, remains.

The agency cannot be faulted for not having applied the new law before it came into effect. See *Hallin v. Trent*, 94 Wn.2d 671, 676, 619 P.2d 357 (1980) (a statute has "no force whatever for any purpose" until the date it becomes operative) (quoting *Walker v. Lanning*, 74 Wash. 253, 256, 133 P. 462 (1913)). Accord *Doss v. State Farm Ins. Co.*, 57 Wn. App. 1, 786 P.2d 801 (1990). Any retroactive application did not come into being until December 8, 2016, when the initiative took effect. At the time DSHS made its determination whether the requested list should be released, redacted, or withheld, it properly applied the PRA as it existed *before* December 8, 2016. So even if I-1501 had retroactive effect, the agency was not permitted to apply the retroactive change in the law before it took effect. *Hallin*, 94 Wn.2d at 676.

D. Applicability of the Other Statute -- RCW 43.17.410

Appellants argue that RCW 43.17.410 affirmatively prohibits DSHS from releasing the names of IPs, even at the time DSHS planned to release the record. Opening Brief of App. at 26.

However, the argument regarding RCW 42.56.640 applies similarly to RCW 43.17.410. At the time the request was received and DSHS determined that it had a public record responsive to the request, RCW 43.17.410 was not yet in effect. DSHS had no authority on which to withhold the record and instead had a duty to produce the record.

If this Court finds that I-1501 applies retroactively, then RCW 43.17.410 does bar release on or after December 8, 2016, the effective date of the initiative.

V. CONCLUSION

DSHS determined that the list responsive to the Seattle Times request should be released and would have done so absent court orders restraining or enjoining its release. DSHS stands ready to release the requested list in the

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absence of an injunction or other court order preventing its release, or as otherwise directed by the Court.

RESPECTFULLY SUBMITTED this 2 day of February, 2018.

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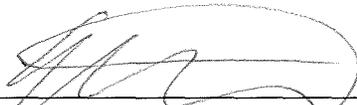
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 2 day of February, 2018, at Olympia, WA.



ELIZABETH DOKKEN

**WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL - LABOR AND
PERSONNEL DIVISION**

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