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IN THE WASHINGTON COURT OF APPEALS  
DIVISION II

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FREEDOM FOUNDATION,  
Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,  
Respondent.

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**APPELLANT FREEDOM FOUNDATION'S  
OPENING BRIEF**

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred in finding that the time estimate for production was reasonable where the estimate was not based on an individualized assessment of the requirements of the request and the work load facing relevant staff members.
2. The trial court erred in finding that DSHS did not unlawfully distinguish between requesters where it is undisputed that two parties made identical public records requests, but one received the records months before the other.
3. The trial court erred in holding that disparity of treatment between requesters was justified based on the status of one requester as an “affected party” where the requesters were similarly situated and where no law requires providing advance copies of records to allegedly affected parties.
4. The trial court erred in finding that DSHS provided the fullest and timeliest assistance to the Freedom Foundation where the undisputed facts show that DSHS intentionally delayed the disclosure of records that were ready for production.

### **A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Does an agency violate RCW 42.56.550, requiring that agencies

provide a reasonable time estimate for disclosure of public records, where the agency's estimate is not grounded in an individualized, fact-based analysis of the requirements of the specific public records request at issue?

2. Does an agency violate RCW 42.56.080(2), which prohibits agencies from distinguishing between requesters, where the agency received identical public records request in the same week, yet provided vastly different responses to those requests?

3. Does RCW 42.56 provide any justification to an agency for providing advance copies of records to a requester to whom the records do not pertain based, on a claimed status as an "affected party?"

4. Does an agency violate its obligation to provide the fullest and timeliest assistance to a requester where undisputed facts show that DSHS intentionally delayed disclosure of records that were ready for production?

## **II. STATEMENT OF THE CASE**

On April 25, 2017, the Freedom Foundation ("the Foundation") submitted a public records request to DSHS for the following records:

1. *The times, dates, and locations of all contracting appointments for individual providers, as defined by RCW 74.39A.240(3), held or to be held between January 1 and December 31, 2017.*
2. *The Times, dates, and locations of all state-sponsored or facilitated opportunities for individual providers to view the*

*initial safety orientation training videos held or to be held between January 1 and December 31, 2017.*

CP 42-43. This request is the basis for the instant litigation.

The Foundation requested the same records on January 12, 2016, which led to a long but successful (for the Foundation) legal battle. CP 125. In that case, both the Superior Court and the Court of Appeals denied SEIU 775's request for an injunction preventing DSHS from disclosing the times dates and locations of contracting appointments to the Foundation. The Supreme Court unanimously denied SEIU 775's request for discretionary review. *SEIU 775 v. State Dep't of Soc. & Health Servs.*, 198 Wn. App. 745 (2017), *review denied sub nom. SEIU 775 v. State*, 402 P.3d 828 (Wash. 2017). Pending review of that case, and solely to preserve the fruits of that appeal, the Court of Appeals stayed release of the 2016 records on May 15, 2016. *Id* at 749. On June 9, 2017, the Court of Appeals ruled that the appellate stay in the 2016 case did not prohibit the immediate disclosure of records responsive to the Foundation's PRR at issue in this case.<sup>1</sup> CP 119. On June 13, 2017, however, a Washington Supreme Court Commissioner granted a temporary injunction barring release of the Foundation's request at issue here, postponing production until July 10, 2017. CP 121-123. On July 10, 2017, that injunction expired.

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<sup>1</sup> For a graphic depiction of the timeline regarding these two requests, see C.P. XX.

On April 25, 2017, the same day that the Court of Appeals ruled in the Foundation’s favor as to its 2016 PRR, the Foundation made the instant request, PRR 1203. CP 42-43. DSHS’s Administrative Policy as well as the PRA require the agency to respond to PRRs within five days with a so-called “five-day letter.” CP 238-251; RCW 42.56.520(1). On May 1, 2017, DSHS Public Records Officer Natasha House held a meeting to discuss the agency’s response to the Foundation’s request which was due the following day. DSHS immediately determined that the requested records were located with the various Area Agencies on Aging (“AAA”), sub-departments of DSHS. CP 293. The only other topic discussed was the means by which potentially-affected third parties might enjoin disclosure. CP 160, 171. In other words, once the DSHS staff determined the AAA offices possessed the requested records, the entire meeting shifted to address ways to delay and avoid production. No meeting participant inquired about how long it would take AAA offices to produce the Foundation’s requested records. CP 160-161. No meeting participant inquired how long it had taken to produce the identical records when responding to the Foundation’s identical 2016 request. *Id.* Instead, the meeting participants discussed one thing when deciding how to calculate their estimated disclosure date – how other parties could intervene to enjoin the disclosure of nonexempt public records to the Foundation. The DSHS team discussed the identity of potentially-affected

third parties, the amount of time DSHS would give those parties to seek an injunction, and whether that amount of time was enough to enable the third parties to seek an obtain an injunction. CP 171. They decided to send notice to SEIU 775 and the Training Partnership. *Id.*

**Timeline for litigation  
regarding Freedom Foundation  
PRR requests for contracting  
schedules**

**Instant Case**

- **April 25, 2017:** FF submits PRR 1203, requesting contracting schedules for 2017.
- **May 1, 2017:** DSHS Meeting to discuss FF request 1203
- **May 2, 2017:** DSHS responds to FF w/ 5-day notice letter, informs FF that it will take DSHS 30 business days or until June 13, 2017
- **May 2, 2017:** DSHS notifies Training Partnership & SEIU 775 of PRR # 1203.
- **May 8, 2017:** Training Partnership requests copies of records responsive to FF PRR.
- **May 12, 2017:** DSHS responds to Training Partnership, and produces 1<sup>st</sup> installment, promises remainder on June 2, 2017.
  
- **June 2, 2017:** DSHS informs SEIU TP of Div. II stay. DSHS informs SEIU TP that DSHS would have produced 2<sup>nd</sup> installment, absent Div. II's May 15 stay.
- **June 9, 2017:** DSHS produces another installment to Training Partnership. FF requests that DSHS produce responsive records, but DSHS refuses & cites previous estimate of June 13, 2017.
  
- **July 12, 2017:** DSHS produces 1<sup>st</sup> installment of PRR # 1203 to FF

**2016 Case**

- **January 12, 2016:** FF requests contracting schedules for 2016.
- **March 10, 2016:** SEIU 775 files complaint enjoining DSHS from fulfilling Jan. 12 request.
- **March 25, 2016:** Trial court denies SEIU MOT's Preliminary and Permanent Injunction, "Plaintiff has failed to satisfy its burden of proving that an exemption under the PRA applies..."
  
- **April 25, 2017:** COA Order affirming "trial court's denial of SEIU's request for an injunction to prevent DSHS from disclosing the records the Foundation requested."
  
- **May 15, 2017:** Div. II stays April 25, 2017 PRR, pending Supreme Court review of 2016 case.
- **May 24, 2017:** SEIU Petition for Review by the Supreme Court, seeking review of COA order.
  
- **June 9, 2017:** Div. II dissolves stay. DSHS is not enjoined from releasing records of the new FF PRR.
- **June 13, 2017:** WA SC Commissioner stays PRR 1203 until July 10, 2017
- **July 10, 2017:** time expired for SEIU to file Motion for Discretionary Review to enjoin release of 2<sup>nd</sup> records request to FF.

CP 45.

DSHS' administrative policy dictates that there are two circumstances in which the agency should notify third parties about a public

records request. Those are a) where required by law or other agency rule, or b) where the identified party may have a reasonable basis to claim that information in the records is exempt from production. CP 238-251. Here, no party has asserted that the notice was required by law. Also, DSHS could not have reasonably believed that either SEIU 775 or the Training Partnership had any such reasonable basis to claim the records were exempt, because the Court of Appeals had ruled that the Foundation was entitled to the exact records it was now requesting just days before, in a case SEIU 775 brought to enjoin disclosure of the same records to the same recipient. CP 47-58. According to DSHS, it never discussed the impact of this ruling on the Foundation's April 25 request; instead DSHS focused on the timeline for obtaining a court order to prevent disclosure. CP 173-174. Though DSHS's own Policy did not require it to do so, DSHS decided to notify SEIU 775 and the Training Partnership. It is clear that in the May 1 meeting, DSHS discussed the interests of these potentially-affected third parties in public records the Court of Appeals had *just* declared disclosable over the objections of one of those potentially-affected third parties. Yet, DSHS neither discussed the impacts that delayed production would have on the requester's rights and interests nor did it discuss producing the records to the requester in installments. CP 162.

On May 2, 2017, DSHS notified SEIU 775 and the Training Partnership of the Foundation's April 25 request, CP 273-274; 294-295, and sent a five-day letter to the Foundation. In the letter to the Foundation, Ms. House wrote that "due to workload, the number of other pending requests and the scope of your request, we estimate it will take up to 30 business days or until about June 13, 2017, to find, review, copy and produce any available records. Records will be provided in installments as appropriate." CP 311-312. In the letters to SEIU 775 and the Training Partnership, Ms. House included a copy of the Foundation's request and wrote that after careful review, the agency had decided that it must comply with this request. CP 273-274, 294-295. However, she offered effusive legal direction to the third parties, explaining in substantial detail the method for obtaining a PRA injunction. *Id.* Ms. House also told SEIU 775 and the Training Partnership that, absent a court order to stop disclosure before May 16, 2017 DSHS "will proceed with processing [PRR 1203]." *Id.*

Over the next few days, the AAA offices responded to DSHS' request for records responsive to PRR 1203. CP 275-285. On May 8, the Training Partnership responded to DSHS's notification by submitting its own PRR, which DSHS labeled as PRR 395. In that request, the Training Partnership requested copies of all documents responsive to the Foundation's request, PRR 1203. Based on the language of the Training

Partnership's request, it too would have considered DSHS's production estimate of 30 business days unreasonable. Indeed, the Training Partnership expressed surprise that a copy of the records was not included with DSHS'

*May 2 notice*, stating:

The Training Partnership is typically provided a copy of the documents in question via email or CD, so we have the opportunity to review the documents in question in advance of the deadline set by DSHS for obtaining a court order. No copy of the documents were provided with the letter received today. Indeed the letter does not mention that a copy of the documents will be provided. Please ensure that in the future, a copy of the disputed documents is also provided.

CP 296. Additionally, the Training Partnership explicitly stated that it was not affected by the Foundation's request because it takes no part in the appointments that were the subject of the Foundation's request. *Id.* They were merely a requester of records, just like the Foundation.

On May 9, 2017, one day after the Training Partnership's request, the lead coordinator for PRR 1203 sent a spreadsheet to Ms. House, containing all the responses from AAA offices which had collected responsive records. CP 285. This took approximately two business days. On May 12, 2017 DSHS sent a five-day letter to the Training Partnership and attached the spreadsheet of responses to PRR 1203. CP 170. The Foundation did not receive this installment on May 12, 2017. The May 12, 2017 letter also promised the Training Partnership another installment on

June 2, 2017 – long before the estimated date it provided to the Foundation (June 13, 2017). In addition to this first installment of records, DSHS also informed the Training Partnership that the deadline for providing “demonstrated notice of your intent” to enjoin disclosure was postponed until May 26. CP 297. None of the records included in that five-day letter were sent to the Foundation, despite DSHS’ previous promise to provide “installments as appropriate” and despite the fact that it had produced the same records to a different requester.

Between May 15, 2017 and June 9, 2017 there was a stay on production of the records requested under PRR 395 and 1203. As explained above, this was due to ongoing litigation regarding a different public records request.<sup>2</sup> DSHS sent the Training Partnership a letter on June 2, 2017 stating that they could not release records as they had intended on that date, due to the stay. CP 298. The letter does not claim that DSHS could not send the second installment of records because they had not compiled that installment yet.

On June 9, 2017, the Court of Appeals dissolved the stay on PRR 1203. CP 119. The same day, DSHS produced the final installment to the

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<sup>2</sup> SEIU 775, the plaintiff seeking an injunction in the other case, asked the appellate court to stay release in this case, rather than the case that was before the appellate court. Remarkably, SEIU 775 obtained this stay, until the appellate court correctly acknowledged that it had no jurisdiction to enjoin public records requests not before it.

Training Partnership. CP 299. In the letter accompanying this production, Ms. House explained that this spreadsheet was identical to the records that DSHS would produce to the Foundation, showing that the production was ready to be delivered to the Foundation on the 9th. *Id.* (“*This spreadsheet will be produced to the requester on June 13, 2017 unless an order preventing disclosure is received by the close of business June 12, 2017*”) (emphasis added). Also on June 9, 2017, the Foundation sent an email to Ms. House, notifying her that the stay had been dissolved and asking her to immediately produce the records responsive to PRR 1203. The Foundation noted that DSHS had taken ample time to gather, review and produce the requested schedules. CP 307-309. Indeed, the records were ready to produce – but DSHS refused to produce them *to the Foundation*. DSHS responded that day, refusing to produce the records based on its previous estimated response date. *Id.* Later on June 9, 2017, the Foundation reiterated its demand that records be produced by 4:30 p.m. that day. *Id.* The Foundation reminded DSHS that it bore a duty of fullest assistance to the Foundation, and that giving an “unreasonable production time estimate” constitutes a viable cause of action under RCW 42.56.550. DSHS responded that there would be no change to their planned release date of June 13, 2017. CP 307-309. However, on June 13, as discussed above, the Supreme Court Commissioner stayed production of PRR 1203 until July 10, 2017 to

preserve the potential fruits of appeal for the ongoing litigation of the Foundation's 2016 request. On July 10 the Supreme Court upheld the lower court in affirming findings that DSHS must produce the records in question. Finally, on July 11, 2017, DSHS produced the records the Foundation requested.<sup>3</sup>

### **III. ARGUMENT**

#### **A. The Standard of Review**

This Court's review of the trial court's decision is de novo, giving no deference to the lower court's findings of fact or law. The PRA states that "[j]udicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo." RCW 42.56.550(3). Furthermore, where the record consists only of affidavits, memoranda of law, and other documentary evidence, an appellate court stands in the same position as the trial court in reviewing agency action challenged under the PRA. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994) (lead opinion). Here, the trial court's decision was based solely on documentary evidence. Therefore, this court may make its own conclusions of both law and fact.

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<sup>3</sup> On August 16 and 25, 2017, DSHS supplemented its response. DSHS explained that it had found further responsive records stored elsewhere while fulfilling a different PRR. CP 320.

**B. The Statutory Requirement that Agencies Provide Reasonable Estimates of the Time Required to Respond to Each Request is Meaningless if No Individualized Analysis is Required.**

If the PRA's requirement that estimates be reasonable is to have any impact at all on the conduct of agencies, it must stand to reason that the estimates must be based on an individualized analysis of the request at issue. In the present case, DSHS did not examine the request at issue here before setting an estimate. In doing so, the agency ignored obvious indicators that the request could easily be completed in less than 30 business days. Under the PRA, a government agency must respond to a public records request within five business days by either (1) providing the records or access to the records, (2) acknowledging receipt of the request, seeking any needed clarification, and providing a reasonable estimate of the time needed to respond to the request, or (3) denying the request. RCW 42.56.520(1). If the requester believes that the agency has not made a reasonable estimate of the time needed to respond to the request, the superior court, on motion of the requester, may require the agency to show cause that its estimate is reasonable. RCW 42.56.550(2). The agency then bears the burden of proving its time estimate was reasonable. RCW 42.56.550(2).

It took DSHS four days to produce an installment of the records to the Training Partnership, but DSHS estimated it would take thirty business

days (43 calendar days) to produce the same records to the Foundation. How could an estimate of 30 days be reasonable when production only took four?

In determining whether the agency has carried its burden to prove that its time estimate was reasonable, courts consider the scope, type and volume of the records requested. *West v. Dep't of Licensing*, 182 Wn. App. 500, 513-514, 331 P.3d 72 (2014). The scope, type and volume factors here all militate in favor of finding the estimate unreasonable. PRR 1203 asked for records from a single calendar year relating to a single activity, making the scope narrow. The type of records requested was similarly straightforward: calendars reflecting agency-hosted meetings. The agency certainly had easy access to this type of record, as proven by AAA personnel's rapid responses to DSHS. CP 275-285 (showing that 9 out of 17 offices had already submitted records within the first week). Finally, the volume of the requested information, as evidenced by the final production of records, was a short spreadsheet. CP 333-356<sup>4</sup>. DSHS's claim that its estimated production date only included the time necessary to produce responsive records is simply not true. No evidence supports this claim; rather, all evidence points to the contrary.

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<sup>4</sup> Please note that, while the CP version of the production appears to be several pages, many pages represent only one data column, meaning that the actual production was even smaller than the 23 pages that appear here.

DSHS's attempts to meet its burden of showing reasonableness are unpersuasive and insufficient. First, DSHS claims that the request for the Foundation required substantial time because of the need to review the documents for necessary redactions. CP 153. The facts do not support this assertion. As explained above, the request at issue here was identical to the previous year's request, which had been litigated and ruled upon by two courts at the time of the 2017 request. Both courts held that the records requested in 2016, which were identical to the records at issue here, were not exempt from disclosure under the PRA. *SEIU 775 v. State Dep't of Soc. & Health Servs.*, 198 Wn. App. 745 (2017). DSHS was quite attentive to the litigation of the 2016 request, as evidenced by Ms. House's repeated reviews of the court record. CP 289-292. If DSHS knew that the records subject to 2016 request were not exempt from disclosure, it also knew that the records at issue here were completely disclosable. The assertion that the estimate was based on a perceived need for review of the records for necessary redactions is clearly false.

Second, DSHS now claims that its estimate was justified because it would need to contact seventeen Area Agencies on Aging ("AAA") to collect responsive records. However, the time necessary for that activity was not discussed prior to sending the estimate to the Foundation. CP 137 and 160. The agency attempted to argue its estimate was reasonable based

on factors it admits it did not consider before issuing the estimate. The public records officer did not ask any of the sub-offices in which records were housed about the time needed for collection prior to issuing its estimate. Simply put, DSHS's estimate could not be based on information it did not have at the time it made the estimate.

DSHS conducted no individualized analysis of the Foundation's request. None of the relevant, easily-accessible information was relied upon or supports the exorbitantly long estimate. DSHS did not ask any AAAs how long collection of records would take. If it had, the AAAs would have told DSHS that it would take only a few days, as evidenced by the fact that almost half of the AAAs had sent their responsive records in 5 business days. Additionally, DSHS did not consider how long the identical 2016 had actually taken. This information was readily available to DSHS in its employee tracking system, yet was never mentioned during the meeting held to set the estimate. Additionally, DSHS's overall public records request workload did not significantly change between May 2 (when it estimated thirty business days to the Foundation) and May 12 (when it produced the requested records to the Training Partnership). And yet, DSHS produced for the Training Partnership in 4 calendar days what it said it could only produce to the Foundation in 30 business days. The only difference being the identity of the requester.

The PRA explicitly provides a cause of action for unreasonable time estimates, meaning the people took prompt government responses seriously. RCW 42.17.340(2) and 42.56.550(2). The legislature also put the burden on the agency to prove that its estimate was reasonable. *Id.* DSHS has not and cannot carry that burden.

**C. The Freedom Foundation and the Training Partnership Were Similarly Situated Requesters, Making Disparity in Treatment Unlawful Under RCW 42.56.080(2) and 42.56.100.**

No legal authority gives affected parties the right to receive requested records before the records are disclosed to another requester. Furthermore, the Training Partnership was not affected by the Foundation's request. Therefore, the Training Partnership and the Freedom Foundation were due the same full and timely assistance by DSHS.

**a. An Affected Party Is Not Owed a Higher Degree of Assistance Than Other Requester of Records Under the PRA**

The PRA mentions parties affected by a request only once. "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." RCW 42.56.540 (emphasis added). Agencies have a duty to only one group under the PRA: the requester. RCW 42.56.100. There is no competing duty to parties affected by the request.

The PRA empowers agencies to give notice to affected parties, but notice and advanced production are very different things. No case has ever held that affected parties have a right to advanced disclosure of records, even where notice is appropriate. In fact, the Court of Appeals has always considered parties named in public records to be public records requesters, subject to the same statutory guidelines. *See Parmelee v. Clarke*, 148 Wn. App. 748, 757 (2008) (holding that an inmate who sought information about his own incarceration was still subject to the PRA's rules); *see also City of Fife v. Hicks*, 186 Wn. App. 122, 144, 345 P.3d 1, 11 (2015) (treating a person who requested information about himself as a requester subject to the PRA's exemptions and rules). No authority suggests that a person is not a public records requester simply because they might be named in the record or affected by disclosure.

**b. The Training Partnership Is Not Affected by the Request at Issue**

There are factual and legal reasons Training Partnership is not an affected party. Factually, while SEIU 775 may have been an affected party, the SEIU Training Partnership was not. The Training Partnership is a distinct entity from SEIU 775, as evidenced by the fact that DSHS sent them separate notifications regarding the Foundation's request. CP 273-274; 294-295. Furthermore, The Training Partnership notified DSHS on May 11,

2017, that the Foundation’s request did not pertain to the Training Partnership activities, showing that the Training Partnership did not meet the criteria set in RCW 42.56.540. CP 303-304. In contrast, SEIU 775 litigated the identical 2016 request based on its position as an affected party.<sup>5</sup> While SEIU 775 may have been an affected party, the Training Partnership was clearly not. The Training Partnership was not an affected party, but rather a requester. DSHS shared records with the Training Partnership in response to the Training Partnership’s records request, not because of some affected party status. CP 297.<sup>6</sup>

As to the legal issue, “affected party” is not defined by the PRA. However, pursuant to RCW 42.56.570(2) and (3), the legislature directed the attorney general to adopt advisory model rules on public records compliance setting forth the “best practices” for compliance with the PRA. *Forbes v. City of Gold Bar*, 171 Wash. App. 857, 863, 288 P.3d 384, 387

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<sup>5</sup> In that case, SEIU 775 argued that as their representatives were present at contracting appointments, SEIU 775 was affected directly by the disclosure of the times, dates and locations of contracting appointments. *SEIU 775 v. DSHS*, No. 16-2-01007-2 (Thurston, March 25, 2016). Here, the Training Partnership has no such relationship with contracting appointments and in fact explicitly stated that it had no connection to those appointments.

<sup>6</sup> Furthermore, DSHS would not produce records to TP due to a stay, even though DSHS asserts that litigation does not prevent disclosure to an affected party. DSHS Response to Foundation’s Motion for Summary Judgment at 5 (affected parties are entitled to records without concern for “potential appellate or trial court litigation, redactions or injunctions”). However, DSHS did not produce records to TP because of a stay. On June 2, the estimated production date for TP’s request, DSHS told TP “On May 15, 2017, the Court of Appeals entered a temporary stay ... Therefore, we cannot produce the records you have requested [.]” CP 298. DSHS refusal to share records with TP during the stay shows that TP was a requester.

(2012). These rules, included in the Washington Administrative Code, provide some clarity:

Notice to affected third parties. Sometimes an agency decides it must release all or a part of a public record affecting a third party. The third party can file an action to obtain an injunction to prevent an agency from disclosing it, but the third party must prove the record or portion of it is exempt from disclosure. RCW 42.17.330/42.56.540. ***Before sending a notice, an agency should have a reasonable belief that the record is arguably exempt. Notices to affected third parties when the records could not reasonably be considered exempt might have the effect of unreasonably delaying the requester's access to a disclosable record.***

WAC 44-14-04003 (Emphasis added). Pursuant to this provision, to qualify as an affected third party, one must have standing to challenge the release of the records. At the time of disclosure to the Training Partnership, DSHS knew that the records did not “specifically pertain” to the Training Partnership and knew that the records were not exempt. This unnecessary notice had the precise result warned against by the above rule: delaying access to a disclosable record.

Additionally, DSHS’s administrative policy dictates that there are two circumstances in which the agency should notify third parties about a public records request. Those are a) where required by law or other agency rule, or b) where the identified party may have a reasonable basis to claim that information in the records is exempt from production. CP 238-251.

Applying the above standards to this case, there was no reason to give notice to the Training Partnership. The Training Partnership was not

affected by the disclosure, according to the Training Partnership's response to the notice provided by DSHS:

The Training Partnership does not schedule or establish a specific physical location for the viewing of the video. As I understand it, DSHS does not "sponsor or facilitate" any schedule or physical location for the viewing of the Training Partnership's safety and orientation training video.

CP 303-304. In short, the Training Partnership is entirely uninvolved in IPs' contracting appointments and therefore, could not be affected by the Foundation's request. Additionally, there was no reason to believe the records were *exempt* from production. *Prior* to the instant request, two Washington courts had already held that the records were *not* exempt. *SEIU 775 v. State Dep't of Soc. & Health Servs.*, 198 Wn. App. 745 (2017), *review denied sub nom. SEIU 775 v. State*, 402 P.3d 828 (Wn. 2017). As WAC 44-14-04003 warned, "notices to affected third parties when the records could not reasonably be considered exempt might have the effect of *unreasonably* delaying the requester's access to a disclosable record."

**c. Because the Training Partnership and the Foundation Were Similarly Situated, Disparity in Treatment Was Unlawful.**

Agencies must provide the fullest and timeliest assistance to all records requesters, without discriminating between them. *See* RCW 42.56.100 ("[agencies] rules and regulations shall provide for the fullest

assistance to inquirers and the most timely possible action on requests for information.”); RCW 42.56.080(2) (“Agencies shall not distinguish among persons requesting records).

Here, DSHS’s disparate treatment proves that it violated both statutory prohibitions. How can production in 30 business days be the fullest and timeliest assistance to one requester, while production in just 4 days was the fullest and timeliest assistance to the other? DSHS’s Public Records Officer fundamentally misunderstands the Public Records Act, stating “It is our job to provide the fullest assistance to requesters *and affected parties.*” CP 154.

In *Kitsap County Prosecuting Attorney’s Guild v. Kitsap County*, this Court held that State agencies may not resist disclosure of public records until a suit is filed. *Kitsap County Prosecuting Attorney’s Guild v. Kitsap County*, 156 Wn. App 110 (2010). In that case, the County delayed disclosure to notify affected employees and to allow the employees to seek an injunction. This Court endorsed the trial court’s finding that the delay in disclosure without a court order violated the PRA. *Id.* at 223.

Here, rather than blatantly stating that DSHS was stalling so that SEIU 775 or the Training Partnership could seek an injunction, DSHS gave an unreasonable estimate to the requester while ensuring that the Training Partnership had the time and tools to prevent disclosure. The effect on the

timeliness of disclosure is the same and should also be condemned by this Court. This delay violated the PRA's mandate that requesters be treated equally and be given the fullest and most timely assistance the agency can provide.

**d. DSHS's Refusal to Produce Available Records on June 9, 2017 Was Contrary to the Letter and Spirit of the PRA.**

On June 9, 2017, there was no reason for DSHS to withhold records from the Foundation. All the records had been collected and reviewed. There was no judicial stay in place. CP 119. Nonetheless, DSHS refused to produce the records to the Foundation. It is undisputed that the records were available because, on June 9, DSHS produced its final installment to the Training Partnership. CP 299. In the letter accompanying this production, Ms. House explained that this spreadsheet was exactly the same as the document that would be sent to the Foundation. *Id.* (“*This* spreadsheet will be produced to the requester on June 13, 2017, unless an order preventing disclosure is received by the close of business June 12, 2017.”) (emphasis added). Also on June 9, 2017, the Foundation sent an email to Ms. House, notifying her that a previously extant stay had been dissolved and asking her to immediately produce the records. CP 307-309. DSHS responded,

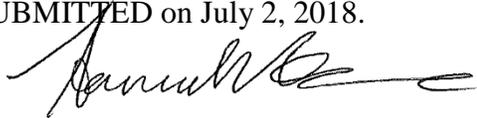
saying “DSHS previously sent a letter estimating its response date. We will let you know if there are changes to that estimated frame.” *Id.*

That was inexcusable and abusive delay – exactly the behavior the Washington Supreme Court held violated the PRA in *Wade’s Eastside Gun Shop, Inc. v. Dep’t of Labor and Indus.*, 185 Wn.2d 270, 289 (2016). In that case, like this one, changing circumstances throughout the time between the request and the subsequent disclosure affected the ability of the agency to lawfully withhold records at different points. During a period where the facts showed that the records were disclosable, the requester asked again for the records. *Id.* The agency refused, pointing to its original time estimate. The Court held that “[w]hile agencies may provide a reasonable estimate of when they can produce the requested records, they cannot use that estimated date as an excuse to withhold records that are no longer exempt from disclosure” and upheld a per day penalty for the related delay in production. *Id.* (internal citations omitted). Similarly, on June 9, DSHS could and should have produced the records to the Foundation, but it chose instead to adhere to its estimated production date. This decision caused an additional 32-day delay in production to the Foundation, in violation of the RCW 42.56.520(1) and RCW 42.56.550(4). As the Supreme Court stated in *Wade’s*, “Such delay is contrary to the letter and the spirit of the PRA.” *Wade’s*, 185 Wn.2d at 289.

#### IV. CONCLUSION

For the foregoing reasons, the Court should reverse the lower court and find that DSHS violated multiple provisions of the PRA. DSHS gave an unreasonable estimate by making an estimate that was not based on available facts and proved to be drastically longer than necessary. DSHS unlawfully distinguished between requesters, because the Training Partnership was a requester and not an affected party. Even if the Training Partnership was an affected party, the PRA makes clear that DSHS bore a duty only to the requester, not an affected party. DSHS did not provide the fullest and timeliest assistance to the Foundation, contrary to RCW 42.56.100. Finally, DSHS's many violations of the PRA resulted in a delayed production of records in violation of RCW 42.56.520 and RCW 42.56.550(4).

RESPECTFULLY SUBMITTED on July 2, 2018.



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**DECLARATION OF SERVICE**

I, Hannah Sells, hereby declare under penalty of perjury under the laws of the State of Washington that on July 2, 2018, I caused the foregoing document to be filed with the clerk, and caused a true and correct copy of the same to be delivered via e-mail pursuant to an e-service agreement to the following:

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Dated: July 2, 2018



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Hannah Sells

# FREEDOM FOUNDATION

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