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

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FREEDOM FOUNDATION,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH  
SERVICES,

Respondent.

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**RESPONDENT'S OPENING BRIEF**

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ROBERT W. FERGUSON  
Attorney General

MARGARET C. McLEAN  
Assistant Attorney General  
WSBA No. 27558

SUSAN SACKETT DANPULLO  
Senior Counsel  
WSBA No. 24249

Labor and Personnel Division  
PO Box 40145  
Olympia, WA 98504  
(360) 664-4167

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## I. INTRODUCTION

The Department of Social and Health Services worked diligently to comply with the Public Records Act in this matter in the midst of ongoing and active litigation against it by both Service Employees International Union 775 and the Freedom Foundation. Within five days of the Freedom Foundation's public records request, the Department provided a reasonable estimate of the time it believed it would need to gather the requested records, and it produced the records to the Freedom Foundation immediately upon the expiration of a Supreme Court order prohibiting release. The Department acted within the scope of the PRA in providing third party notice of its intent to produce information to the Freedom Foundation, and provided the fullest assistance to the Freedom Foundation in fulfilling its request. This Court should affirm.

## II. STATEMENT OF THE CASE

### A. **The Department's Estimate of Time To Respond To the Public Records Request**

On April 25, 2017, the Department received a public records request from the Freedom Foundation for "the times, date, and locations of all contracting appointments" and "state-sponsored or facilitated opportunities for individual providers to view the initial safety and orientation training videos" for the calendar year of 2017. Clerk's Papers (CP) at 42-43.

Individual Providers (IPs) provide personal care services to qualifying Medicaid clients. On May 1, 2017, the Department's public records office held an internal meeting to discuss an estimate of the time needed to gather, review, and produce responsive records. CP at 160. Because the records were not located in a central location, the Department realized it would need to contact and hear back from its three regional offices, as well as 14 different Area Agency on Aging offices to gather the requested information.<sup>1</sup> CP at 137, 159, 171. The Department provided notice to the Freedom Foundation that it would take 30 business days, or until June 13, 2017, to produce the records "[d]ue to workload, the number of other pending requests and the scope of [Freedom Foundation's] request." CP at 21.

The estimate of time also took into account the status of other public records requests the Department was processing. On April 25, 2017, the Department received 79 other public records requests. CP at 230. Between April 25, 2017 and June 13, 2017, the Department received 2,767 public records requests. CP at 135–36, 475. Of the 2,767 requests, the Freedom Foundation made three of those requests. CP at 475. During this same time,

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<sup>1</sup> Although the Freedom Foundation's Opening Brief at page 15 refers to the Department's need to contact 17 Areas Agencies on Aging, the Department in fact contacted 14 Area Agencies on Aging, in addition to three Department regional offices. This appears to be a scrivener's error.

the Department closed 2,698 public records requests. *Id.* The Freedom Foundation also made numerous requests prior to April 25, 2017, that the Department was processing. CP at 476. The Department only keeps track of the time the public records coordinators spend on each request. In this case, the coordinators spent 10.5 hours working on the Freedom Foundation's April 25, 2017 public records request, which does not include the time spent by the Area Agency on Aging offices or the three regional offices in locating and providing information to the public disclosure coordinators. CP at 158–59.

The Freedom Foundation complains that the estimate of time was not reasonable because the Department had previously gathered the same information for the period of November 1, 2015 to December 31, 2016 (2016 records request), and knew where the information was located. Because of turnover within the Department, the employees who had worked on the 2016 records request were not available or no longer worked at the Department. CP at 172. As a result, the Department was unable to simply duplicate what had been completed for the 2016 request. *Id.* Additionally, as discussed in detail below in the procedural history, there was ongoing litigation regarding the Freedom Foundation's 2016 records request.

**B. Procedural Background**

**1. January 12, 2016 Freedom Foundation Public Records Request**

On January 12, 2016, the Freedom Foundation submitted a public records request to the Department seeking “the times and locations of contracting appointments” and “state-sponsored or facilitated opportunities for individual providers to view the initial safety and orientation training videos” between November 1, 2015 and December 31, 2016. CP at 40; *SEIU 775 v. State Dep’t of Soc. and Health Serv.*, 198 Wn. App. 745, 748, 396 P.3d 369 (2017). The Department provided third party notification of the 2016 records request to Service Employees International Union 775 (SEIU 775), which then sought a preliminary and permanent restraining order in Thurston County Superior Court, and appealed the order denying the requested relief. *See SEIU 775*, 198 Wn. App. at 747-48.

On April 7, 2016, the Court of Appeals enjoined the Department from producing the records to the Freedom Foundation, “pending further order of this court.” CP at 398. On April 25, 2017, the Court of Appeals issued a published opinion holding that the 2016 records were subject to disclosure to the Freedom Foundation. *SEIU 775*, 198 Wn. App. at 745. The Court of Appeals sent the decision to the parties via email at 9:36 a.m. CP at 404.

At 9:43 a.m., the Freedom Foundation sent an email demanding release of the 2016 records by 4:30 p.m. that day. CP at 406-07. On April 26, 2017, the Court of Appeals clarified that its April 6, 2016, order enjoining the Department from releasing records remained in effect until it issued a mandate. CP at 418; *accord* RAP 8.3. SEIU 775 timely filed a petition for discretionary review of the published Court of Appeals' decision, and the Supreme Court denied the petition on October 4, 2017. CP at 420. At the time of the underlying litigation in this appeal, the Court of Appeals had not yet issued the mandate for the 2016 records. Mandate, *SEIU 775*, 198 Wn. App. 745 (2017) (48881-7-II) (see Appellate Court Case Summary for Case Number 488817 [https://dw.courts.wa.gov/index.cfm?fa=home.casesummary&casenumber=488817&searchtype=aNumber&crt\\_itl\\_nu=A02&filingDate=2016-03-2500:00:00.0&courtClassCode=A&casekey=171949718&courtname=COA, Division II, mandate filed on December 15, 2017\).](https://dw.courts.wa.gov/index.cfm?fa=home.casesummary&casenumber=488817&searchtype=aNumber&crt_itl_nu=A02&filingDate=2016-03-2500:00:00.0&courtClassCode=A&casekey=171949718&courtname=COA, Division II, mandate filed on December 15, 2017).)

**2. April 25, 2017 Freedom Foundation Public Records Request**

On April 25, 2017, shortly after the Freedom Foundation sent an email demanding the immediate release of the 2016 records, it sent a new public records request to the Department for the same information for the

period of January 1, 2017 to December 31, 2017 (2017 records request). CP at 42–43.

On April 26, 2017, SEIU 775 filed an emergency motion with the Court of Appeals seeking clarification of whether the injunction prohibiting the release of the 2016 records remained in effect, and whether the April 25, 2017 request was also enjoined from release. CP at 422-37. The Court of Appeals issued a ruling addressing only the 2016 records requests. CP at 418. As a result, the Department filed a motion to clarify whether the Court of Appeals' stay, covering the 2016 records sought by the Freedom Foundation pending the issuance of a mandate, also applied to release of the same type of records for 2017. CP at 439–45. On May 15, 2017, the Court of Appeals issued a stay prohibiting release of the 2017 records until it received briefing from the parties and made a decision on the Department's motion. CP at 60–61.

On June 9, 2017, the Court of Appeals clarified that the Department was not enjoined from releasing the 2017 records sought by the Freedom Foundation. CP at 119. The parties received the ruling from the Court of Appeals via email at 1:13 p.m. Freedom Foundation emailed counsel for the Department at 2:29 p.m. the same day demanding that the Department produce the requested 2017 records in two hours, by 4:30 pm. The email stated, “[i]f we do not have the schedules by that time, we will seek fees.

There is no order preventing their release, and [the Department] has had more than enough time to run the queries for the schedules.” CP at 307–09.

On the following business day, June 12, 2017, SEIU 775 notified the parties of its intent to seek emergency relief in the Supreme Court regarding the 2017 records sought by Freedom Foundation, and filed its motion that same day. CP at 447-48. On June 13, 2017, the day the records were scheduled to be released to Freedom Foundation, the Supreme Court issued a ruling enjoining the Department from releasing the 2017 records to the Freedom Foundation until the deadline for SEIU 775 to file a motion for discretionary review of the Court of Appeals’ decision on the stay related to the 2017 records. The Supreme Court’s stay of release of the 2017 records expired on July 10, 2017, when SEIU 775 had not filed a motion for discretionary review of the Court of Appeal’s stay decision. The Department produced the records to Freedom Foundation on July 11, 2017. CP at 121–23, 163.

Despite this background and prior to the records request being denied or otherwise closed, the Freedom Foundation served the instant lawsuit on the Department on June 13, 2017. CP at 450. The Department produced the 2017 records to the Freedom Foundation on July 11, 2017, the first day after the expiration of the Supreme Court’s stay. CP at 163.

### III. COUNTERSTATEMENT OF THE ISSUES

- A. Should the Freedom Foundation's lawsuit be dismissed as untimely when the Department did not take final action on the request until after the lawsuit was filed?
- B. Did the Department reasonably estimate it would take up to 30 business days to respond to a public records request when it considered the number of competing public records requests, the need to provide third party notification, the location of the records in multiple different offices around the state, and the need to assemble and possibly redact information?
- C. Did the Department provided the fullest assistance to the Freedom Foundation when it continued processing the public records request despite multiple stays and ongoing litigation, and produced the records once the stays prohibiting release were lifted?

### IV. ARGUMENT

#### A. Standard of Review

In a PRA lawsuit, appellate review of an agency's action is de novo. *Hikel v. City of Lynnwood*, 197 Wn. App. 366, 371, 389 P.3d 677 (2016). In an action to enforce the PRA, the burden of proof is on the agency to show that the agency's estimated response time was reasonable. *Andrews v. Washington State Patrol*, 183 Wn. App. 644, 651, 334 P.3d 94 (2014), citing to RCW 42.56.550(2).

#### B. Freedom Foundation's Lawsuit Is Untimely Because It Was Filed Prior To the Agency Taking Final Action

An agency's decision to deny a public records request becomes final for purposes of judicial review two business days after the agency denies the public records request or takes final action. RCW 42.56.520(4). A

lawsuit may not be filed prior to an agency's denial of a public record. *Doe v. Benton Cty.*, 200 Wn. App. 781, 788–89, 403 P.3d 861 (2017), *review denied*, 190 Wn. 2d 1006, 412 P.3d 1264 (2018), citing *Hobbs v. Washington State Auditor's Office*, 183 Wn. App. 925, 935, 335 P.3d 1004 (2014).<sup>2</sup> “In other words, there is no cause of action under the PRA until *after* the agency has engaged in some final action denying access to a record.” *Id.* A denial of a request for public records can occur, “when an agency (1) does not have the record, (2) fails to respond to a request, (3) claims an exemption of the entire record or a portion of it, or (4) fails to provide the record after the reasonable estimate expires.” *Doe*, 200 Wn. App. at 788.

In this case, the Freedom Foundation filed suit on June 12, 2017, prior to any final action and a day *before* the Department had estimated the records would be available. The Department was served with the lawsuit on June 13, 2017, the day that the records were to be released and the day that the Supreme Court issued a stay prohibiting release of the records. The

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<sup>2</sup> *Hikel* provides for a cause of action when no estimate of time is provided in a response to a public records request. But, it also notes that the PRA does not provide for penalties unless some “final agency action” denies the public records request. The *Hikel* court noted its disagreement with *Hobbs*, 138 Wn. App. at 940–41.

Department had not denied Freedom Foundation's request, by action or inaction, nor had it taken any final action on the request.

This suit should be dismissed as there was no final agency action at the time this suit was filed, and the Department produced the responsive records immediately upon the expiration of the Supreme Court's order enjoining it from releasing them.

**C. The Department Provided a Reasonable Estimate of Time To Produce Records To the Freedom Foundation Based on Factors Established in Case Law**

The Department met its obligation under the PRA to respond to Freedom Foundation's public records request within five days and provided a reasonable estimate of time for production of the records. An agency must respond to public records requests promptly, within five business days of receiving the request, and the agency must respond in one of the following ways: (1) provide the records; (2) provide an Internet link for the records; (3) acknowledge the request and give a reasonable estimate of time it will need to provide the records; or (4) deny the request. *Doe*, 200 Wn. App. at 788; *see also* RCW 42.56.520(1).

The PRA allows agencies to consider several factors when determining if additional time is required to respond to a public records request. Specifically, RCW 42.56.520(2) provides that the need for additional time may be based on: 1) the need to clarify the intent of the

request; 2) the need to locate and assemble the information requested; 3) the need to notify third persons or agencies affected by the request; or 4) the need to determine whether any information requested is exempt and that a denial should be made as to all or part of the request.

When interpreting a statute, the courts must determine and enforce the legislature's intent. *Hobbs*, 183 Wn. App. at 935. In doing so, the court must give effect to the plain meaning of the statutory language as an expression of the legislative intent. *Id.* When interpreting the PRA, the court is to "consider the PRA in its entirety to effectuate the PRA's overall purpose." *Id.*

The PRA clearly contemplates that agencies may need additional time, beyond five days, to provide requested records based upon the need "to locate and assemble the information requested" and/or "to notify third persons or agencies affected by the request." RCW 42.56.520(2); *see also*, *Ockerman v. King Cty. Dep't of Env'tl. Serv.*, 102 Wn. App. 212, 219, 6 P.3d 1214 (2000). A reasonable estimate of time may also be based on the number of competing public records requests, including the number of requests from the same requester. *Rufin v. City of Seattle*, 199 Wn. App. 348, 398 P.3d 1237 (2017), *review denied*, 189 Wn.2d 1034, 407 P.3d 1154 (2018). The Department was unable to find any case where an agency's estimate of time was determined to be "unreasonable."

The Freedom Foundation's argument claiming that there was no individualized reasonable estimate of time focuses on two main issues. First, that it took the Department four days to produce an "installment" of records to the SEIU Healthcare NW Training Partnership (Training Partnership). Appellant Freedom Foundation's Opening Brief (Opening Br.) at 13. Second, that the Department did not consider the amount of time it had taken to gather and prepare the same records for the Freedom Foundation's 2016 records request. *Id.* at 16. As described through the cases below, the Department's estimate of time was reasonable and was individualized.

An example of a reasonable estimate of time was demonstrated in *Hikel*. The public records person assigned to gathering records was working on 114 other public record requests, including seven requests from the plaintiff. The court considered the number of requests along with other factors in determining the issues in the case, including reasonable estimates of time to respond. *Id.* at 370-71. The only violation the *Hikel* court found was a violation of RCW 42.56.520(1) because the five-day response letter did not contain any estimate of time to respond. *Hikel*, 197 Wn. App. at 380.

In *Rufin*, the requested records were time sensitive. In one of Rufin's records requests, which was made on March 4, 2012, Rufin stated, "TIME IS OF THE ESSENCE, as these items may become important exhibits in a

trial scheduled for the end of March.” *Rufin*, 199 Wn. App. at 353. Although the City estimated the records would be available in “20 days”, the records were not produced until 65 days after the request was made. *Id.* at 358. The court stated that an agency need not meet its estimated time of responding to a PRA request, as long as it responds with “reasonable thoroughness and diligence.” *Id.* at 357, citing to *Andrews*, 183 Wn. App. 653. The court held that the City responded diligently to Rufin’s March 4 request. *Rufin*, 199 Wn. App. at 358. In making that determination, the court considered that the person gathering the records was working on two other requests made by Rufin, along with, “a number of other requests, one of which was very complex.” The court stated that, “[u]nder these circumstances, producing records within 65 days is not unreasonable.” *Id.*

In *Ockerman* there was no single file where the requested records were located and documents relevant to the records request were in different locations and had to be gathered together and assembled. *Ockerman*, 102 Wn. App. at 218. Based upon the facts of the case, the court found that King County made a reasonable estimate of time. *Id.* This was true even though Ms. Ockerman, the spouse of the plaintiff, had made a similar request a month prior and it only took King County two days to respond to her request. *Id.* at 218–19.

Here, the Department's estimate of time was an individualized reasonable estimate based on all the facts of this case and constituted a thorough assessment of the relevant factors. First, on April 25, 2017, the date of the Freedom Foundation's 2017 request, the Department received 79 public records requests in addition to the Freedom Foundation's request. The Department anticipated that it would continue receiving and processing public records requests on an ongoing basis. Next, based on the May 1, 2017, meeting, the Public Records Officer learned that not all of the records were located in one place, or even within the Department. Instead, the records were located in at least three regional offices and 14 Area Agency on Aging offices, which are non-Department locations. Finally, during the relevant time, April 25, 2017 to June 13, 2017, the date of estimated production of the records, the Department received 2,767 public records requests, three of which were from the Freedom Foundation. Based on the specific facts of this case, an estimated 30 business days to respond to the Freedom Foundation's 2017 records request, was a reasonable estimate.

The Freedom Foundation argues that because the Department produced an installment of records to the Training Partnership within four business days, the estimate of time was not reasonable. However, this argument is irrelevant to what the Department knew on the date that it

estimated its response time. Further, the Department had not planned to provide the records to the Freedom Foundation piecemeal, but rather planned on gathering all of the requested information to provide at one time records.

Even if this Court finds that the estimate of time is not reasonable, the Freedom Foundation is not entitled to penalties under the PRA. In *Hobbs*, the court determined that no sanctions were appropriate where an agency diligently makes every reasonable effect to comply with the public records request, and has not taken final action, before a lawsuit is filed. *Hobbs*, 183 Wn. App. at 940–41. In *Hikel* the court determined that the “PRA does not provide a freestanding penalty for procedural violations,” such as failing to provide an estimate of time to produce the records. *Hikel*, 197 Wn. App. at 379. Such procedural violations are considered an aggravating factor when setting penalties for withholding records. *Id.* As in *Hikel*, the Freedom Foundation was never denied access to the records. The *Hikel* court determined that the plaintiff was only entitled to reasonable attorney’s fees and cost for vindicating “the right to receive a response.” *Id.* at 379–80.

In the present case, the Freedom Foundation received a timely five-day letter with a reasonable estimate of time.<sup>3</sup> The Freedom Foundation's lawsuit did not yield more than it has already received. There is no dispute that the 2017 records were produced to the Freedom Foundation on the first day after that the Supreme Court's order enjoining release of the 2017 records expired. There was never a denial of the records, and therefore no penalty is appropriate or allowed. Further, the Freedom Foundation did not vindicate a "right to a response." Thus, the Court should not find any violation or award any attorney's fees or costs.

**D. The Department Provided the "Fullest Assistance" To the Freedom Foundation in Responding To Its Public Records Request**

When interpreting the PRA, the Court is to "consider the PRA in its entirety to effectuate the PRA's overall purpose." *Hobbs*, 183 Wn. App. at 935. Further, when construing statutes, the Court "cannot 'simply ignore' express terms. [The court] must interpret a statute as a whole so that, if possible, no clause, sentence, or word shall be superfluous, void, or insignificant." *Ralph v. State Dep't of Nat. Res.*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014); *see also*, *Ockerman*, 102 Wn. App. 219.

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<sup>3</sup> The Freedom Foundation does not assign error to the trial court's findings of fact, including findings that the Department timely issued a five-day letter to the Freedom Foundation estimating the amount of time needed to respond to its request.

Requiring agencies responding to public records requests to provide “the fullest assistance to inquirers and the most timely possible action on request for information” is not violated when an agency fails to meet the initial and extended estimate of time to produce records, or where an agency does not send a follow-up letter extending the time estimated to produce the records. *Andrews*, 183 Wn. App. 644. The Court of Appeals there stated that, “a flexible approach that focuses on the thoroughness and diligence of an agency’s response is most consistent with the concept of ‘fullest assistance.’” *Id.* at 646.

Additionally, fullest assistance does not require that an agency provide the records in installments, even if requested to do so by the requester. *Ockerman*, 102 Wn. App. at 212. In *Ockerman*, the court stated that the statute, former RCW 42.17.320 (current RCW 42.56.520), was unambiguous, and there was simply nothing in the statute that required an agency to provide the requested records piecemeal. *Ockerman*, 102 Wn. App. at 217, 219.

The Freedom Foundation claims that the Department did not provide it the fullest assistance because it treated the third party, the Training Partnership, and the Freedom Foundation differently. *See generally* Opening Br. at 17–23. The Freedom Foundation’s claim is misplaced because the Freedom Foundation and the Training Partnership

are not “similarly situated” requesters. The Department determined that the Training Partnership was an affected third party, as discussed above, and not just another requestor of the same information. Because the Freedom Foundation’s arguments related to the “fullest assistance” rely on the mistaken premise that the Freedom Foundation and the Training Partnership are similarly situated requestors, all of its arguments fail.

Additionally, the Freedom Foundation argues that the Department could not reasonably believe that either SEIU 775 or the Training Partnership could be an affected third party because the Court of Appeals had already ruled that the 2016 records were disclosable “just days before” the notice of the 2017 records request was sent to SEUI 775 and the Training Partnership. Opening Br. at 7. While the Court of Appeals had issued its decision, that decision was not final because no mandate had issued. Knowing that litigation was still pending on the 2016 records request, it was reasonable for the Department to notify affected third parties of the 2017 records request. The Freedom Foundation’s argument that the notice was only meant to delay production of the records is inaccurate and unsupported by the record.

The present case is similar to the *Doe* case. In *Doe*, the requester objected to the County providing third party notice to Doe and others, claiming in part that such notice was just to delay or deny release of the

records. *Doe*, 200 Wn. App. at 786, 788. The court stated that an agency has wide discretion to decide to notify persons to whom a record pertains that the records have been requested. *Id.* at 789. If the agency provides notice, it does so before the records are released. *See generally, Doe* at 790-91. It reasonably follows that the agency may provide a copy of the records at issue to the third party prior to release, so that the third party may determine whether to seek an injunction. To determine otherwise would make the provision for providing third party notice meaningless and increase unnecessary litigation.

Here, the Department provided the Training Partnership with notice and a copy of the records prior to the disclosure to the Freedom Foundation because it was an affected party and the records related to orientation training pertained to that organization. In its initial notification to the Training Partnership, the Department was unable to produce an advance copy of the information at issue because it had not yet collected it. CP at 167-68, 294-95. The Freedom Foundation mischaracterizes the exchanges between the Department and the Training Partnership as evidence of delay and more assistance.

Instead, the Training Partnership rightfully pointed out that it would be unable to determine if it believed an injunction was appropriate without seeing what information the Department intended to disclose. CP at 296.

Despite the Freedom Foundation's claims to the contrary, neither this exchange between the Training Partnership and the Department, nor the Department's use of its public records tracking system to process the records being produced to the Training Partnership, changed the underlying relationship of the Training Partnership to the information being provided. In fact, this type of third party notification is contemplated and authorized by the PRA and is consistent with the Department's obligations under the Act.

The Department also provided the fullest assistance to the Freedom Foundation when it produced the information on July 11, 2017, the day after the Supreme Court's stay expired. On the afternoon of Friday, June 9, 2017, the Court of Appeals ruled that the Department was not enjoined from producing the 2017 records to the Freedom Foundation. The Department continued processing the requested information, including notification of third parties. However, on the morning of Monday, June 12, 2017, SEIU 775 notified the parties of its intent to file a motion with the Supreme Court seeking review of the Court of Appeals' decision that the stay did not extend to the 2017 records request. SEIU 775 filed its motion on June 12, 2017 and the next morning the Supreme Court issued its ruling further prohibiting the Department from releasing the 2017 requested records, despite the Freedom Foundation's strong objections.

Had the Department produced the records on June 9, 2017, as the Freedom Foundation asserts it should have, it would have destroyed the fruits of any appeals that SEIU 775 was pursuing, including their previously filed petition for discretionary review. Additionally, the records were not ready to be produced on June 9, 2017, because the Department had not yet completed third party notification to the Training Partnership of its intent to release the information absent an injunction. CP at 161–63. The Department acted diligently in gathering and producing requested information to the Freedom Foundation. A brief delay, prior to the date estimated for production, for the purposes of allowing the Supreme Court to rule on the issue of injunctive relief and to allow the third party to review the records the Department planned on producing to the Freedom Foundation on June 13, 2017 did not violate the fullest assistance provision of the PRA.

## **V. CONCLUSION**

This lawsuit should be dismissed as it was filed prior to the Department taking final agency action in responding to the request. Alternatively, the Department acted diligently and reasonably in gathering information from multiple locations, handling numerous other competing public records requests, complying with various court orders prohibiting release of the information, and providing appropriate third party

notification, and this Court should find that the agency complied with the requirements of the PRA.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of August, 2018.

ROBERT W. FERGUSON  
Attorney General

*Susan Sackett DanPullo*  
MARGARET C. McLEAN  
Assistant Attorney General  
WSBA No. 27558  
*for WSBA #24249*

*Susan Sackett DanPullo*  
SUSAN SACKETT DANPULLO  
Senior Counsel  
WSBA No. 24249

Labor and Personnel Division  
7141 Cleanwater Drive SW  
PO Box 40145  
Olympia, WA 98504-0145  
(360) 664-4167

**PROOF OF SERVICE**

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

Electronic Mail to:

Hannah Sells  
[hsells@myfreedomfoundation.com](mailto:hsells@myfreedomfoundation.com);  
[legal@freedomfoundation.com](mailto:legal@freedomfoundation.com)

David Dewhirst  
[ddewhirst@myfreedomfoundation.com](mailto:ddewhirst@myfreedomfoundation.com)

Kristin Nelsen  
[knelsen@myfreedomfoundation.com](mailto:knelsen@myfreedomfoundation.com)

Jennifer Matheson  
[jmatheson@freedomfoundation.com](mailto:jmatheson@freedomfoundation.com)

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

DATED this   1   day of August, 2018, at Olympia, WA.

  
\_\_\_\_\_  
JAMIE MERLY

**WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL**

**August 01, 2018 - 4:15 PM**

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- knelsen@freedomfoundation.com
- legal@freedomfoundation.com

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Phone: (360) 664-4181

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