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

BRIAN GREEN, Plaintiff/Appellee

v.

PIERCE COUNTY, Defendant/Appellant

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**APPELLANT'S OPENING BRIEF**

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## I. INTRODUCTION

Because the Legislature found that "[i]nmates and other parties use [public record requests] to target and endanger individuals and families" of correctional officers, CP 290, RCW 42.56.250(8) was enacted to exempt from disclosure under the Public Records Act ("PRA") the photographs and birthdate data contained in personnel files of law enforcement agency workers. Plaintiff Brian Green is such a prior inmate pursuing such a PRA request to obtain such statutorily protected records to use against *every* correctional employee who was working during *his* incarceration at the Pierce County Detention and Corrections Center ("PCDCC").

Plaintiff claims those undisputed statutory protections do not apply to him because he is exempt "news media" since – like the vast majority of Americans – he has a social media account where he posts his opinions and where he "intend[s] to ... convey[]" the photographs and birthdates of his correctional workers "to a broad segment of the public ...." CP 107.<sup>1</sup> In short, the type of requester the statute was intended to protect against now asks the Court to *sub silentio* repeal its protections against the very type of PRA abuse it was meant to prevent – i.e. retaliation against

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<sup>1</sup> This is not Plaintiff's only effort to use the PRA to retaliate against public servants. For example, after the County sought to compel discovery to explore any factual basis for his "news media" claim, Plaintiff used the PRA to request again such things as photographs and birthdate information in law enforcement personnel files – but this time for *the Deputy Prosecutor defending the County* in this case before the trial court. See CP 443-45.

targeted law enforcement workers by making their photographs and birthdates widely available and thus putting them and their families at risk.

Plaintiff seeks this status despite the fact that, at the time of his PRA request to the Pierce County Sheriff's Department ("Sheriff"), he made no showing to meet his burden of demonstrating the requirements of the narrow "news media" privilege applied to him.<sup>2</sup> He again failed to show he met the privilege after he filed suit and by the time of the merits hearing. Despite these failures and his refusal to provide answers to relevant and necessary discovery testing his claim of being "news media" and supporting other County defenses, the trial court erroneously denied the County's motion to compel discovery, summarily ruled Plaintiff is "news media," and held the County violated the PRA by protecting exempt records.

Because Legislative language and intent should be given meaning and enforced, especially when necessary to protect from harm those whom we expect to protect us, that Order should be reversed and this suit dismissed.

## II. ASSIGNMENTS OF ERROR

1. In entering its April 5, 2019 Order, the trial court erred by ruling Brian Green – a prior inmate who "intend[s] to ... convey[] ... to a broad segment of the public" photographs and birthdates of the correctional

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<sup>2</sup> The statute adopts the definition of "news media" given in the News Media Shield law RCW 5.68.010(5) which defines a "news media" privilege from compelled disclosure as limited to those who fall into one of three narrow categories – none of which apply here.

workers who were on duty during his incarceration – was privileged "news media" and that the County therefore wrongly withheld those otherwise protected personnel records from him. CP 415-29, 432-46.

2. In entering its April 5, 2019 Order the trial court abused its discretion by ruling without explanation "that additional discovery or development of the record is not necessary to resolve this matter" and denying the County's Motion to Compel discovery. *See id.*; CP 432.

#### Issues Pertaining to Assignments of Error

1. Was it error to rule Plaintiff met his burden of proving his request for photographs and birthdates located in personnel files of a law enforcement agency came within the exception to the categorical protection of RCW 42.56.250(8) despite his failure to show that either he or his alleged YouTube account was "news media" under RCW 5.68.010(8)?

2. Was it error to deny the County's Motion to Compel when the rules of civil procedure control discovery in a PRA action, the discovery sought was relevant to the subject matter as well as reasonably calculated to lead to the discovery of admissible evidence, and its denial was prejudicial to the County's defense?

### III. STATEMENT OF THE CASE

#### A. AFTER KILLINGS, LEGISLATURE PROTECTS LAW ENFORCEMENT WORKERS' PHOTOGRAPHS AND BIRTHDATES

In November 2009, four City of Lakewood Police officers were

targeted and shot to death at a Pierce County coffee shop. CP 301. It was later reported that many of the family and friends of the murderer helped him evade capture and that during that time the Lakewood Police Department had been barraged with information requests on officers and their families – including from members of the murderer's family. CP 290.

Acting on the recommendations of the Governor's task force on the Lakewood Police murders, the Legislature took testimony and concluded that: "The public disclosure process, specifically background information and photographs, in the hands of an inmate is used as a weapon to get back" at correctional staff. *Id.* Legislation was found necessary because both "[i]nmates and other parties<sup>3</sup> use [requests] to target and endanger individuals and families." *Id.* (emphasis added).<sup>4</sup> Specifically, the Legislature noted "the name and date-of-birth" are "the two necessary identifiers" that allow requestors "to match ... criminal justice employees" with other databases. CP 291. Indeed, the Washington Supreme Court later "acknowledg[ed] that there are legitimate concerns about the misappropriation of

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<sup>3</sup> The Legislature in an earlier session already had protected against PRA requests for "any nonexempt public record by persons serving criminal sentences in state, local, or privately operated correctional facilities." See RCW 42.56.565 (2009)(emphasis added).

<sup>4</sup> Indeed, this Court has found: "Such disclosure to the public would not be voluntary or within the employees' control" but once in "the public domain, these employees would potentially be subject to an ongoing risk of identity theft and other harms from the disclosure of this personal information, such as their ... personal telephone numbers." See *Washington Pub. Employees Ass'n v. Washington State Ctr. for Childhood Deafness & Hearing Loss*, 1 Wn.App.2d 225, 404 P.3d 111 (2017), *overruled on other grounds*, 2019 WL 5444797 (Wash. Oct. 24, 2019).

birth dates" because "disclosing birth dates with corresponding employee names may allow PRA requesters or others to obtain residential addresses and to potentially access financial information, retirement accounts, health care records or other employee records." *See Washington Pub. Employees Ass'n v. Washington State Ctr. for Childhood Deafness & Hearing Loss*, 2019 WL 5444797, at \*3, 5 (Wash. Oct. 24, 2019).<sup>5</sup> This same risk exists from release of officer photographs. Levit and Rosch, *The Cybersleuth's Guide to the Internet: Internet For Lawyers*, 407-08 (2017) (Google's "Search by Images" allows use of a person's photograph alone to "practically create[] a dossier of [the subject], using images instead of text.")

Thus, on March 31, 2010, RCW 42.56.250 was amended in pertinent part to protect both "[p]hotographs and month and year of birth in the personnel files of employees and workers of criminal justice agencies." Because the statute arose in response to the murders of police, its purpose "is all about officer safety." Senate Bill Report, E2SHB 1317, 61st Legislature, 2010 Reg. Sess; CP 288-291. However, the Legislature noted it was "easier for the *newspaper industry* to purchase records than for employees

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<sup>5</sup> Though the majority of that Court confirmed "DSHS *correctly* regarded RCW 42.56-.250[8] as *applicable*" to "employees working at the" Juvenile Rehabilitation Administration which served "high-risk youth who are committed to ... custody by county juvenile courts," the Court held it was "not applicable to the remaining *state employees outside of this DSHS classification*" because "this court cannot interpret the PRA to imply broad exemptions *that have not been expressly delineated.*"(emphasis added). *Id.* at 10, 21-22.

to defend requests in court systems," and expressed its desire that "*Newspapers* shall have access to photographs and the full date of birth of criminal justice agency employees." *Id.* (emphasis added). The statute therefore provides a narrow exception to these protections for "news media, *as defined in RCW 5.68.010(5)*, [to] have access to the photographs and full date of birth." *See id.*; RCW 42.56.250(8)(emphasis added).

This "news media" definition incorporated into the PRA statute was from a separate "Shield Law" that set out when "compulsory process may compel the news media to testify, produce, or otherwise disclose" certain information. *See* RCW 5.68.010(5). Its definition for that privilege narrowly limits "news media" to one of three separate distinct categories: *i.e.* a) a "newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, or any *entity* that is in the *regular business* of news gathering and disseminating news or information to the public by any means;" b) any "employee, agent, or independent contractor of any *entity*" previously listed "who is or has been engaged in *bona fide* news gathering *for such entity*, and who obtained or prepared the news or information that is sought *while serving in that capacity*," or c) "[a]ny parent, subsidiary, or affiliate of the *entities*" listed in the other two subsections. *Id.* (emphasis added).

B. PRIOR INMATE TARGETS HIS CORRECTIONAL WORKERS WITH PRA REQUEST

On November 26, 2014, Plaintiff Brian Green was arrested for obstructing a law enforcement officer at the County-City Building and incarcerated at the PCDCC for approximately 24 hours (November 26 through 27, 2014). CP 234.<sup>6</sup> On December 14, 2017, Mr. Green made a Public Record request to the Sheriff's Department targeting its correctional staff and deputies who had been working at the time of his incarceration. CP 6, 15. His request was personal to him as it sought information related only to the 24 hours of *his* prior PCDCC incarceration. CP 4-6.

Specifically, Plaintiff sought from the Sheriff:

Any and all records of official photos and/or birth date and/or rank and/or position and/or badge number and/or hired and/or ID Badge for all detention center and/or jail personnel and/or deputies on duty November 26 & 27 2014.

CP 7, 15. Though the signature line on his request gave himself the title "Investigative Journalist," his request indicated that "[n]one of the following request(s) for documents will be used for commercial purposes." CP 15. Indeed, the request was made from Mr. Green's personal email for his musical band, briangreenband@tds.net, and gave no indication of any association with a news media entity or whether use of the title "Investigative Journalist" carried any significance related to the request. CP 6-15.

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<sup>6</sup> Criminal charges were filed, but later dismissed without prejudice. CP 234-35.

A Sheriff's Public Disclosure Unit Assistant ("PDU") timely responded to the request, and on December 26, 2017, provided 11 pages of responsive records with a cover letter notifying Plaintiff: "The records do not include the dates of birth or the official photos of our Corrections Staff. Per RCW 42.56.250(9)<sup>7</sup>, *photographs and dates of birth in personnel files of employees and workers of criminal justice agencies* are exempt." CP 7, 17 (emphasis in original). The notice further advised him that it was the final definitive response and that his request was closed. *Id.*

On December 28, 2017, Mr. Green emailed the PDU: "I am working on a story concerning the Pierce County Jail." CP 20. Though Plaintiff signed the email again using the title "Investigative Journalist," its address again was from his music band's email account, and lacked any indication of any association with a news media entity. *Id.* On January 3, 2017, the PDU again responded that the withheld items were protected under RCW 42.56.250(8) and specifically explained the statute incorporates the definition of "news media" in RCW 5.68.010(5). CP 23. She further quoted the applicable statutory sections and requested information concerning the entity for which Plaintiff was working as a "Investigative Journalist" because that information had not been provided. *Id.*

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<sup>7</sup> RCW 42.56.250 was amended by HB 2020 effective July 28, 2019; subsection (8) was formerly subsection (9).

On January 4, 2018, Plaintiff responded by asserting the following:

- "I am a journalist that primarily covers local court cases on my Youtube [sic] channel. My channel is called 'Liberty's Champion.'"<sup>8</sup>
- Provided the website link to the "Libertys Champion" YouTube account.
- "I appear in many of the videos giving commentary on events. My channel has nearly 6,000 subscribers."
- "My Youtube [sic] channel meets the definition of RCW 5.68.010(5) because *it is* a news *agency* that is in the regular business of gathering and disseminating news via the internet."

CP 27 (emphasis added). Though Plaintiff called the account "*My channel*" and "*My Youtube [sic] channel*," he did not at that time claim to own it and provided: 1) no documentation or proof of any ownership of the social media account, 2) no physical address for "Libertys Champion," and 3) no assertion this social media account was any type of "entity" as expressly required by the statute. *Id.*<sup>9</sup> He also did not claim that he himself was "news media" under any of the definitions of RCW 5.68.010(5).

Upon receipt of these representations, the PDUA independently reviewed the cited YouTube account and conducted a Google search for any

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<sup>8</sup> The website account actually is entitled "Libertys" Champion – without an apostrophe "s." See <https://www.youtube.com/channel/UCTjBAvhF0o9561-i7XKo6rA>.

<sup>9</sup> If this was Plaintiff's social media account, he would be among the 80% of Americans who have at least one such account. As of August 2019, "79 percent of the population in the United States had a social networking profile," see "Percentage of U.S. population with a social media profile from 2008 to 2019," and YouTube had "1.9 billion" separate accounts. See "Percentage of U.S. population with a social media profile from 2008 to 2019," <https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/>. Internet users "in 2018 had an average of 8.5 social media accounts." See "Average number of social media accounts per internet user from 2013 to 2018," <https://www.statista.com/statistics/788084/number-of-social-media-accounts/>.

information regarding Plaintiff as a "journalist."<sup>10</sup> See CP 198; 245-246. The only information found did not involve journalism but was a website devoted to Plaintiff's musical band. *Id.* Accordingly, on January 8, 2018, the PDUA responded to explain she had again reviewed RCW 5.68.010 defining "news media" and that it did not appear he came within it. CP 30. 245-46. The PDUA advised Plaintiff she was still unable to send the protected information and still considered his request closed. *Id.*

#### C. PRIOR INMATE SUES PIERCE COUNTY TO OBTAIN PROTECTED LAW ENFORCEMENT WORKERS' RECORDS

On November 28, 2018, Plaintiff served the instant suit on the County, and then filed it with the Court on December 14, 2018. CP 1, 3, 286. Mr. Green is the only named Plaintiff. CP 1, 3. On January 8, 2019, the County timely filed its Answer which, among other defenses, asserted:

- 2.3 The Plaintiff lacks capacity to sue, either individually or in a representative capacity.
- 2.4 At the time of request, Plaintiff failed to establish valid exception to the claimed exemption and sought no further clarification of the denial.
- 2.5 Plaintiff's claim(s) is/are barred by the statute of limitations.

CP 43. On January 9, 2019, the day after filing its Answer, the County served Plaintiff with its First Set of Discovery Requests. CP 82. The

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<sup>10</sup> It is undisputed the account in question showed no distinguishing characteristics identifying it as a news entity, and that the site looks like many other YouTube accounts that also do not claim to be news media entities. CP 305. It is undisputed the account's "HOME" page does not list Plaintiff as a journalist and that its "ABOUT" page neither states the account is a news media entity nor identifies Plaintiff as its "owner." CP 308.

County's discovery concerned the statutory definition of "news media" as being limited to "entit[ies] ... in the regular business of news gathering" and those who work for them, and was based on evidence the YouTube account is likely monetized and generating revenue, as well as sought information supportive of the County's other defenses. CP 86-117.<sup>11</sup>

Thus, most of the County's discovery requests sought to explore the factual basis for the claim "Libertys Champion" was "news media" and that Plaintiff was associated with it. For example, discovery sought among other things any revenue information for "Libertys Champion" and other income type documents that report or show wages, tax information, and signed agreements and contracts between it and YouTube. CP 47, 49-55, 89-116. Plaintiff's discovery responses, however, were untimely and thus as a matter of law any objection to the discovery was considered waived. CP 83-84.<sup>12</sup> Nevertheless, when he did respond, Plaintiff refused to answer many of the County's discovery requests by untimely objecting on the ground of relevance and – among other things – on his assertion "Libertys Champion" is not commercial. CP 89-116. However, Plaintiff did assert he owned the account in question and claimed for the first time

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<sup>11</sup> The YouTube account at issue may be monetized and commercial because it shows advertisements on videos. CP 46-47, 57-58, 61-73, 238-41.

<sup>12</sup> See e.g. *Rivers v. Wash. State Conf. of Mason Contrs.*, 145 Wn.2d 674, 41 P.3d 1175 (2002)(affirming that failure to timely assert objections to written discovery constituted a waiver); CR 37(d)(2)-(3).

"Libertys Champion" was "not formally structured as *any type of business entity* listed in this interrogatory" but was a non-commercial "structure-less volunteer organization." CP 89-92; 158-59 (emphasis added).

The County immediately moved to compel answers and in opposition Plaintiff declared he does not make any profit from his YouTube account. CP 159. Plaintiff did not deny his YouTube account generates revenue but for the first time asserted that "Libertys Champion" was a "not-for-profit organization." CP 121, 123-24, 161. However, he had previously admitted there is no corporate registration – non-profit or otherwise – for "Libertys Champion." *See* CP 089-90 ("Libertys Champion is structureless because it is not formally structured as any type of business entity....") Finally, Plaintiff attacked *ad hominem* the Deputy Prosecutor defending the County and claimed the discovery request for business and financial information for "Libertys Champion" account somehow was "nothing more than an attempt to punish me for bringing this lawsuit for exercising my statutory rights under the Public Records Act." CP 159-161.

The day after Plaintiff filed his declaration and opposition to the County's Motion to Compel, he made a new PRA request to the Pierce County Prosecutor's Office now targeting the Deputy Prosecutor who was defending the County in this case and sought information related to him during the time period of Plaintiff's PRA lawsuit. CP 295. Like his request for

personal records at issue that targeted correctional staff working at the time of his incarceration, Plaintiff's request sought the *same personal information* as to the County's trial court defense counsel in this case – *i.e.* the latter's official photograph and date of birth information. *Id.*<sup>13</sup>

The County filed a reply in support of its Motion to Compel, but at the later hearing, the trial court declined to rule on the motion because of Plaintiff's opposition and instead directed Plaintiff to file his merits brief focusing on his qualification as news media under RCW 5.68.010(5), and reserved ruling on the County's Motion to Compel pending the outcome on the merits. CP 432; VRP 3-9. In response to Plaintiff's merits brief, the County argued: 1) Plaintiff did not establish at the time of the request or later that he was news media; 2) the YouTube account is not an entity that

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<sup>13</sup> Though Plaintiff later withdrew his PRA request for the prosecutor's personnel records when the Deputy Prosecutor at issue and his Guild filed a RCW 42.56.565 action, when the Prosecutor and Guild then voluntarily dismissed their original action Plaintiff *refiled the same PRA requests* along with several others targeting both him *and his Guild*. See *Pierce County Prosecuting Attorney's Association, et al. v. Brian Green, et al.*, Pierce Cy Cause # 19-2-11698-1. Indeed, Plaintiff has continued throughout this litigation to misuse the legal process to target and harass the County's previous defense counsel in other ways as well. See Court of Appeals Division II record: Respondent's Motion for Sanction Against Mr. Cornelius Pursuant to RAP 18.9(A); Declarations by Joseph Thomas and Brian Green; Appellant's Response to Motion for Sanctions Pursuant to RAP 18.9(a); Declaration of Frank Cornelius in Opposition to Motion for Sanctions; Respondent's Reply to Motion for Sanctions Against Mr. Cornelius Pursuant to RAP 18.9(A); Second Declarations of Joseph Thomas and Brian Green; Respondent's Motion to Modify Commissioner Schmidt's July 3, 2019 ruling Denying Sanctions Against Mr. Cornelius; Declarations of Joseph Thomas and Brian Green; Appellant's Response to Motion to Modify Commissioner's Ruling Denying Sanctions; Declaration of Frank Cornelius in Opposition to Respondent's Motion to Modify Commissioner Schmidt's July 3, 2019 Ruling Denying Sanctions Against Mr. Cornelius. See ER 201 ("Judicial notice may be taken at any stage of the proceeding").

can be news media; 3) Plaintiff cannot be an employee, agent, or independent contractor of himself or a non-entity YouTube account; and 4) the Tradename Registration Act and PRA 1-year statute of limitations barred Plaintiff's claims because Plaintiff's YouTube account is likely monetized. CP 296-326. The County also argued Plaintiff's PRA request targeting defense counsel was intended to intimidate and that this pattern of using the PRA for personal retaliatory reasons showed the PRA request at issue was – like his others – not "bona fide" news gathering as required. CP 302.

After Plaintiff replied, the trial court struck the hearing and oral argument on the merits and issued a written order denying the County's ability to obtain discovery and finding Plaintiff's YouTube account and Plaintiff were both "news media." CP 415-29; 432-46. The trial court thus held the County liable for withholding the records in violation of the PRA. *Id.* However, the trial Court conceded its "order involves a controlling question of law as to which there is a substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation." *Id.* at 445.

Though Plaintiff opposed the granting of discretionary review, this Court's Commissioner Eric Schmidt granted the County's motion because: "Whether Liberty's Champion and Green are 'news media' for the purposes of receiving pictures and birthdates of employees of criminal justice

agencies, under RCW 5.68.010(5), is a matter of first impression,<sup>14</sup> and a controlling question of law as to which there is substantial ground for a difference of opinion." *See* 7/3/19 Ruling Granting Review.

#### IV. ARGUMENT

##### A. DE NOVO STANDARD OF REVIEW

RCW 42.56.550(3) provides: "Judicial review of all agency actions taken under RCW 42.56.030 through 42.56.520 shall be *de novo*." *See also Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 428, 327 P.3d 600 (2013)("Agency action taken or challenged under the PRA is reviewed *de novo*."); *Ameriquest Mortg. Co. v. State Attorney Gen.*, 148 Wn. App. 145, 154, 199 P.3d 468 (2009), *aff'd on other grounds*, 170 Wn.2d 418, 241 P.3d 1245 (2010); *Dawson v. Daly*, 120 Wn.2d 782, 788, 845 P.2d 995 (1993). Thus the appellate court stands in the same position as the trial court. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994).

Likewise, the appellate court also reviews the determination of a statute's meaning *de novo*, with the primary purpose of giving effect to intent

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<sup>14</sup> Though *Republic of Kazakhstan v. Does 1-100*, 192 Wn. App. 773, 368 P.3d 524 (2016) is the only Washington appellate decision that has interpreted RCW 5.68.010, it did not interpret or apply the statute's "news media" definition. This is so because it had no need to do so and the issue was never raised. In that case, unlike here, the news media entity was a legal entity subject to legal process (*i.e.* a "limited liability company") that published a weekly online "newspaper." *See* 192 Wn. App. at 776. Accordingly, the issue under RCW 5.68.010 was not subsection (5) but instead subsection 1(a) and the identification of a confidential source under the Shield Law. *Id.* 786.

of legislature. *See State v. Sunich*, 76 Wn. App. 202, 884 P.2d 1 (1994)(citing *State v. Kuhn*, 74 Wn. App. 787, 790, 875 P.2d 1225 (1994)), *review denied*, 127 Wn.2d 1017, 904 P.2d 299 (1995)).

**B. RCW 42.56.250(8) PROTECTS PHOTOGRAPHS AND BIRTH DATE DATA OF CRIMINAL JUSTICE AGENCY WORKERS**

The PRA does not require disclosure where a public record falls within a statutory exemption. *Gendler v. Batiste*, 174 Wn.2d 244, 251, 274 P.3d 346 (2012)(citing RCW 42.56.070 (1)). Since "in certain circumstances, information is exempted from public inspection," a "records request is satisfied when an agency receives a public records request, identifies a legitimate exemption under the PRA *at that time*, and clearly notifies the requester that the request will be treated in accordance with that exemption." *Gipson v. Snohomish Cy*, No. 96164-6, 2019 WL 5076603, \*4, 9 (Wash. Oct. 10, 2019)(emphasis in original). In short: "An exempt record, like a nonexistent record, *is not available for inspection*, and an agency is *not obligated to produce it*." *Id.* at \*7 (emphasis added).

RCW 42.56.250(8) is such an exemption and unambiguously protects from disclosure: "Photographs and month and year of birth in the personnel files of employees and workers of criminal justice agencies ...." Here it is undisputed the photographs and birthdates Plaintiff seeks from the personnel files of criminal justice agency workers and employees at the

PCDCC fall within this expressly delineated exemption. *See Washington Pub. Emps. Ass'n, supra.* at \*7 ("DSHS *correctly* regarded RCW 42-.56.250[8] as applicable" to protect birthdates of "employees working at the" Juvenile Rehabilitation Administration)(emphasis added). The *only* substantive question as to that protection is whether Plaintiff *at the time of the request met his burden* of proving he came within its narrow exception by being the limited type of "news media" that alone is granted access.

As to that issue, RCW 42.56.250(8) expressly states in pertinent part: "The news media, *as defined in RCW 5.68.010(5)*, shall have access to the photographs and full date of birth." As shown below, neither the website account named "Libertys Champion" nor Plaintiff were shown at the time of the request – or later at the merits stage - to come within that definition and thus neither were entitled to protected employee records.

1. The "News Media" Exception to RCW 42.56.250(8)'s Categorical Protection Is Limited to Three Narrow Categories

The Court's goal in statutory interpretation is to effectuate the legislature's intent. *Burns v. City of Seattle*, 161 Wn.2d 129, 164 P.3d 475 (2007). To determine legislative intent, the court looks first to the language of the statute. *State v. Van Woerden*, 93 Wn.App. 110, 116, 967 P.2d 14 (1998). Where that language is clear on its face "only a plain language analysis of a statute is appropriate," *See Cerrillo v. Esparza*, 158

Wn.2d 194, 202, 142 P.3d 155 (2006), and requires no construction. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). In such cases courts "should resist the temptation to rewrite an unambiguous statute to suit our notions of what is good public policy, recognizing the principal that the drafting of a statute is a legislative, not a judicial, function." *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) (quotation marks omitted)(quoting *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229(1999)); *State v. Cromwell*, 157 Wn. 2d 529, 598, 140 P.3d 593 (2006) (same).

Here, the plain language of RCW 42.56.250(8) requires that a requestor seeking protected personnel records must come within the specific and narrow definition of "news media, *as defined in RCW 5.68.010(5)*" – which is a separate statute protecting news media from court compelled disclosure. That definition limits "news media" *in this specific context* to three separate and distinct categories: a) a "newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audio-visual production company, or any *entity* that is in the regular business of news gathering and disseminating news or information to the public;" b) "employee, agent, or independent contractor of any *entity*" previously listed "who is or has been engaged in *bona fide* news gathering *for such entity*, and who obtained or prepared the news or information that is

sought *while serving in that capacity*," or c) "parent, subsidiary, or affiliate of the *entities*" listed in the other two subsections. *See* RCW 5.68.010(5) (emphasis added).<sup>15</sup> Neither Plaintiff nor the social media account "Liberty Champion" were shown to meet those definitions.<sup>16</sup>

2. Plaintiff Failed to Meet His Burden of Proving a "News Media" "Entity" Requested Disclosure of the Protected Employee Records

A requestor claiming the news media exception to the RCW 42.56.250 (8) categorical exemption has the burden of establishing that the shield law exception applies. *See Republic of Kazakhstan v. Does 1-100*, 192 Wn. App. 773, 781, 368 P.3d 524 (2016)("[t]he *burden of showing* that [the news media shield law] privilege applies in any given situation *rests entirely upon the entity asserting the privilege.*")(citing *Guillen v. Pierce County*, 144 Wn.2d 696, 716, 31 P.3d 628 (2001), *reversed in part on other grounds*, *Pierce County v. Guillen*, 537 U.S. 129, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003)). *See e.g. also Resident Action Council*, 177 Wn.2d at 433 (where a record is exempt from disclosure the "burden shifts to the party seeking disclosure" to show the exception) (citing *Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 567-68, 618 P.2d 76 (1980)). For example,

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<sup>15</sup> Plaintiff did not claim that RCW 5.68.010(5)(c) applies to the facts of this case and thus the County does not analyze that issue.

<sup>16</sup> Apart from standards set by statute, "[t]here is no constitutional right to have access to particular government information, or to require openness from the bureaucracy" because the "Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion)(Rejecting claim "the public and the media have a First Amendment right to government information").

the PRA recognizes its provisions can limit who may obtain public records and thereby make identification of the requestor necessary before disclosure is allowed. *See e.g.* RCW 42.56.080(2) (providing in relevant part that persons requesting records may be required to provide information "to establish whether inspection and copying would violate ... other statute which exempts or prohibits disclosure of specific information or records to certain persons.")<sup>17</sup>

Thus, without information at the time of the request that established Plaintiff was "news media" *as defined in RCW 5.68.010(5)*, it would be improper and a violation of RCW 42.56.250(8) for the County to release photographs and month and year of birth in the personnel files of employees and workers of the Pierce County Sheriff.<sup>18</sup> As shown below, the order at issue should be reversed because Plaintiff did not meet his burden to prove an exception to the protection applied to a YouTube account or him.

a. Plaintiff Did Not Meet His Burden to Show That Social Media Account "Libertys Champion" Was "News Media"

At the time of his request, Plaintiff claimed a YouTube account named

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<sup>17</sup> Other statutes outside the PRA also may give certain access to records based on a requestor's identity that might be otherwise exempt or not a public record. For example, an agency employee has the right under RCW 49.12 *et seq.* to inspect the employee's own personnel file, but the identity of the employee requesting inspection must be known. *See Wood v. Lowe*, 102 Wn. App. 872, 878, 10 P.3d 494 (2000) (discussing interaction between PRA and RCW 49.12 *et seq.*).

<sup>18</sup> The PRA protects an agency from state law liability to others for the release of records only if it exercises "good faith in attempting to comply with the provisions of this chapter." *See* RCW 42.56.060.

"Libertys Champion" supposedly met "the definition of RCW 5.68.010(5)." CP 27. However, "Brian Green" – not a website account "Libertys Champion" – is the *only* named Plaintiff. *See* CP 3 (Complaint). Thus, Plaintiff has no standing to assert a non-party's supposed shield law privilege to obtain records protected under the PRA. *See e.g., Jevne v. Pass, LLC*, 3 Wash.App.2d 561, 567-68, 416 P.3d 1257 (2018)(Plaintiff had no standing to assert rights of third party unincorporated association).

Further, at the time of the request Plaintiff did not show the account was either an "entity" nor one of the specifically listed legal business entities such as a "newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company" under RCW 5.68.010(5)(a). Rather, at the time of request he identified it merely as "a news media *agency* that is in the regular business of gathering and disseminating news ...." CP 27. Only when Plaintiff filed suit, did he for the first time claim the account was an "*entity* that is in the *regular business of news gathering and disseminating news or information to the public by any means*" under that statute. CP 181-83 (emphasis added). However, the record proves otherwise.

- 1) No Factual or Legal Basis Exists for Finding YouTube Account Is a "News Media" "Entity" Under Shield Law

A social media account with the YouTube website is not itself *any kind* of "entity" – much less the specific kind of "entity" the statute requires.

At the time of the request, Plaintiff's initial gratuitous characterization of the YouTube account was as an "agency." CP 27. Even *after* filing suit, he described it first as "an independent media *outlet*" and then as somehow a "not-for-profit *organization*." CP 121, 123-24, 161 (emphasis added). Nevertheless, Plaintiff provided no evidence showing exactly *what* or *who* the account allegedly was an "organization" *of* – though he nonsensically did assert the supposed "organization" of unknowns somehow was "structureless." CP 89-92; 158-159. He has conceded this oxymoron "structureless organization" has no corporate registration – non-profit or otherwise – and is "structureless because it is not formally structured as any type of business entity...." *See* CP 089-90. Still later in litigation, Plaintiff settled on characterizing the account an "unincorporated association" – but again without identifying anything in the record showing exactly *what* or *who* it was an "association" *of*. CP 159, 174, 181, 305. In any case, as a matter of law, our Supreme Court has long recognized that even a real "unincorporated association" of actual individuals "*is not* ordinarily a *legal entity* distinct from its component individuals ...." *Schroeder v. Meridian Imp. Club*, 36 Wn.2d 925, 930, 221 P.2d 544 (1950). In the trial court Plaintiff

chose not to address how the Supreme Court precedent of *Schroeder* could be avoided, but instead argued because the term "entity" in RCW 5.68.080(5) was not defined, it should be defined very broadly to include anything "being, existence" – which is *one* of the definitions found in *Merriam Webster Online Dictionary*. CP 181.

However, in analyzing the issue, it first must be recognized the statutory term "entity" was incorporated from a shield law against *court compelled disclosure*. Such *evidentiary "[p]rivileges* instead are *narrowly construed* to serve their purposes so as to exclude the least amount of relevant evidence." *Lowy v. PeaceHealth*, 174 Wn.2d 769, 787, 280 P.3d 1078 (2012) (*quoting State v. Burden*, 120 Wn.2d 371, 376, 841 P.2d 758 (1992))(emphasis added). This statutory definition of "news media" *as an evidentiary privilege* existed *before* it was incorporated into RCW 42.56.250(8), and the Legislature is presumed to have known the rule of narrow interpretation of such evidentiary privileges would apply. *See e.g. Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 811, 123 P.3d 88 (2005) ("We presume that the legislature knows the existing state of the case law in the areas in which it legislates")(citing *Price v. Kitsap Transit*, 125 Wn. 2d 456, 463, 886 P.2d 556 (1994)).

Second: "[A] proviso in a statute *must be* construed in the light of the body of the statute, and in such a manner as to carry out the legislature's

intent as manifested by the entire act and laws in *pari materia* therewith. Provisos operate as limitations upon or exceptions to the general terms of the statute to which they are appended and as such, generally, should be *strictly construed with any doubt to be resolved in favor of the general provisions, rather than the exceptions.*"<sup>19</sup> *Wash. State Leg. v. Lowry*, 131 Wn.2d 309, 327, 931 P.2d 885 (1997)(citing *State v. Wright*, 84 Wn. 2d 645, 652, 529 P.2d 453 (1974))(emphasis added). Here, the primary purpose of RCW 42.56.250 is to establish certain "employment and licensing information is exempt from public inspection and copying under this chapter," while subsection (8) defines an exception for "news media, *as defined in RCW 5.68.010(5)*," which "shall have access to the photographs and full date of birth." RCW 42.56.250(8)(emphasis added). Thus, for this reason as well, the definition of "news media" in RCW 5.68.010 (5) must be "strictly construed with any doubt to be resolved in favor of the general provisions, rather than the exceptions." *See Lowry, supra*.

Third, not only do our Courts hold abstract things such as "unincorporated associations" are *not* "entities," *see Schroeder, id.*, but even things existing in nature that meet Plaintiff's suggested broad interpretation of "being, exist[ing]" such as "animals, inanimate objects, and forces of

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<sup>19</sup> "Provisos serve the purpose of restricting the operative effect of statutory language to less than what its scope of operation would be otherwise." Singer, Singer, 2A Statutes and Statutory Construction, § 47.8 at 311-12 (7th ed. 2007).

nature ... are *not* considered 'entities.'" *Price*, 125 Wn.2d at 461 (emphasis added). Indeed, Plaintiff's citation to *Webster's Dictionary* failed to include the secondary definition of "entity" – *i.e.* an "independent, separate, or self-contained existence." CP 307 fn. 14. This more workable meaning of "entity" is confirmed by *Black's Law Dictionary*, since – as the Supreme Court explained in *State v. Taylor*, 150 Wn.2d 599, 602, 80 P.3d 605 (2003) - when a Court must give an undefined "term its plain and ordinary meaning ascertained from a standard dictionary," "we turn to Black's Law Dictionary ...."<sup>20</sup> *Black's Law Dictionary* defines "entity" as "[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members." *Black's Law Dictionary*, 553 (7th Ed. 1999)(emphasis added). Other than governmental entities, entities that have a separate identity require corporate registration and include corporations and limited liability companies. CP 319-326 (¶7). As a matter of law, "an entity ... must be a juridical being ...." *Price, supra*.

## 2) No Legislative Purpose, Policy or History Supports Finding YouTube Account Is a "News Media" "Entity"

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<sup>20</sup> Plaintiff mistakenly argued to the trial court that using *Black's Law Dictionary* "instead of a standard English dictionary as the canon of plain and ordinary meaning require" somehow "breaks the canon of construction to give undefined terms 'their plain, ordinary, and popular meaning." CP 330. Well established precedent of the Supreme Court and this Court hold otherwise. *See e.g. Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 519–20, 91 P.3d 864 (2004), *as amended* (July 30, 2004)(noting "we look to a dictionary in use at the time the statute was adopted to give them their plain and ordinary meanings," and thus relied on how "Black's Law Dictionary defines" the term); *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 395, 325 P.3d 904 (2014)(same); *In re Estate of Wegner v. Tesche*, 157 Wn.App. 554, 564, 237 P.3d 387 (2010)(same).

Though in this context the intended meaning in RCW 5.68.010(5) (a) of the term "entity" is unambiguous, even where statutory "language is susceptible to two constructions, one which will carry out and the other defeat the manifest object, it should receive the former construction." *Roy v. Everett*, 118 Wn.2d 353, 358-59, 951 P.2d 749 (1998)(quoting *PUD 1 v. Public Empl. Relations Comm'n*, 110 Wn.2d 114, 120, 750 P.2d 1240 (1988), and *Roza Irrig. Dist. v. State*, 80 Wn.2d 633, 637-38, 497 P.2d 166 (1972)). See also *Roy*, 118 Wn.2d at 358, citing *State v. Leech*, 114 Wn.2d 700, 708-09, 790 P.2d 160 (1990)(rejecting a statutory construction where "a literal interpretation would yield absurd results"). Here it is undisputed the requestor is a prior inmate seeking to obtain statutorily protected photographs and birthdates from the personnel records of every correctional employee who was working during his incarceration at the PCDCC and "intend[s] to ... convey[]" them "to a broad segment of the public ...." CP 107. Because Plaintiff's interpretation of "entity" would allow the very type of requester the statute intended to protect against, to obtain and use protected records in the manner it intended to prevent – *i.e.* making photographs and birthday data widely available – his interpretation of "entity" would defeat the manifest object of RCW 42.56.250(8).

Because the common meaning of the term "entity" advocated by

County will instead carry out the statute's manifest object – i.e. preventing "[i]nmates and other parties [from] us[ing] [public record requests] to target and endanger individuals and families" of correctional officers, *see* CP 290, the term "entity" should receive the construction advocated here. As is clearly apparent, Plaintiff's definition of "entity" would be so broad in its application that it would have the absurd result of rendering both the RCW 42.56.250(8) PRA exemption and the RCW 5.68.010(5) Shield Law privilege meaningless because it would transform each of the billions of social media accounts, or any other type of abstract or intangible thing, into "news media." Thus under Plaintiff's reading nearly everyone with a social media account – *i.e.* 80% of Americans, *see* p. 9 fn. 7 *supra*. – would be entitled both to *compel disclosure* of law enforcement agency personnel records that the Legislature intended RCW 42.56.250(8) to protect, *as well as resist* under the Shield Law *court compelled disclosure*. As a result, photographs and birthdates of law enforcement agency workers would be protected only from disclosure to the random 20% of Americans who just happen to have not yet gotten an easily available social media account. However, Courts "will not interpret a statute in a manner that leads to an absurd result." *Hangartner v. City of Seattle*, 151 Wn. 2d 439, 448, 90 P.3d 26, 30 (2004). *See also Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 221, 173 P.3d 885 (2007)(statutory "[c]onstrutions that would yield

'unlikely' or 'absurd' results should be avoided"); *State v. Keller*, 143 Wn. 2d 267, 277, 19 P.3d 1030 (2001) (same).

Therefore, if the term "entity" in the statute had the absurdly unbounded meaning imposed on it by Plaintiff, it has been shown it "is doubtful that the legislature intended the word ... to have such broad application," so a Court would "resort to a second principle of statutory construction, *Noscitur a sociis* ['it is known from its associates']" to define it. *See State v. Roadhs*, 71 Wn. 2d 705, 708, 430 P.2d 586, 588 (1967); *Black's Law Dictionary*, p. 956 (5th ed. 1979). This principle of statutory construction "requires that more general terms in a statute or ordinance be interpreted *in a manner consistent with and analogous* to the more specific terms in the statute or ordinance." *Id.* (citing 2 *Horack, Sutherland's Statutory Construction* § 4908 (3d ed. 1943); *Black's Law Dictionary*, p. 1209 (4th ed. 1951)(emphasis added)). The rationale for this rule is that because "a single word in a statute should not be read in isolation," the "meaning of words may be indicated or controlled by those with which they are associated." *In re Marriage of Tahat*, 182 Wn.App. 655, 671, 334 P.3d 1131 (2014). This "coupling of words denotes an *intention* that they should be understood *in the same general sense*." *In re Marriage of McLean*, 132 Wn.2d 301, 316, 937 P.2d 602 (1997)(emphasis added).

In RCW 5.68.010(5)(a), the general phrase "any entity that is in the

regular business of news gathering and disseminating news or information to the public," is included at the end of a list of *more specific institutional news business legal entities: i.e.* "newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company ...." Where, as here, "general words follow specific words in a statutory enumeration," the application of the principle of *Noscitur a sociis* is referred to as "*ejusdem generis*" – *i.e.* "of the same kind." Singer, Singer, 2A Statutes and Statutory Construction, § 47.17 (7<sup>th</sup> ed. 2007). Because "specific words or terms *modify and restrict* the interpretation of general words or terms where both are used in sequence," then "general words are construed to embrace only objects *similar in nature* to those objects enumerated by the preceding specific words." *Tahat*, 182 Wn.App. at 671 (citing *In re Guardianship of Knutson*, 160 Wn.App., 854, 867 n. 13, 250 P.3d 1072 (2011); *State v. Reader's Digest Ass'n. Inc.*, 81 Wn.2d 259, 279, 501 P.2d 290 (1972)). Absent such a rule, all the words in the statute would not be given effect because by giving general words "their full and natural meaning, they would include the objects designated by the specific words, making the latter superfluous." *See* Singer, Singer, *id.*, § 47.17; *see also Burns v. City of Seattle*, 161 Wn.2d 129, 150, 164 P.3d 475 (2007)(if "legislature intended 'any other fee or charge of

whatever nature or description' to be understood in an unrestricted sense, it would have no need to specifically mention 'franchise fee.'").

Applying this canon, the general phrase "entity that is in the regular business of news gathering and disseminating news or information to the public by any means," is "modif[ied] and restrict[ed]" by the *specific kinds of separate institutional news businesses* preceding it in the enumerated list. Because the term "entity" must be "interpreted in a manner *consistent with and analogous to* the more specific terms" – which here describe types of institutional news businesses that are separate legal entities – the meaning of the general term "entity" can "embrace only objects *similar in nature* to those" separate institutional news businesses. *See e.g. Roadhs*, 71 Wn. 2d at 708; *Tahat*, 182 Wn. App. at 671. The specific kinds of entities listed in RCW 5.68.010(5)(a) do not include anything *similar in nature* to a "structureless organization" or "unincorporated association" – or a natural living person for that matter. Because application of this canon requires that the meaning of "entity" in RCW 5.68.010(5)(a) be *consistent with and analogous* to those previously listed, its meaning is limited to a separate institutional legal business engaged in the news industry and excludes a "structureless organization," "unincorporated association" or natural living person. If it "does not mean this, it means nothing" and "Courts will presume that the legislature did not engage in vain and useless acts

and that some significant purpose or object is implicit in every legislative enactment." *See Oak Harbor Sch. Dist. v. Oak Harbor Educ. Ass'n*, 86 Wn.2d 497, 500, 545 P.2d 1197, 1199 (1976)(citing *Kelleher v. Ephrata School Dist. No. 165*, 56 Wn.2d 866, 355 P.2d 989 (1960)).

That the exception to the protection is available only to news media institutions that are separate legal business entities is shown by the fact the Legislature required such "entity" be "in the regular *business* of news gathering and disseminating news or information." RCW 5.68.010(5)(a) (emphasis added). Further, legislative history shows it was concerned that "*Newspapers*" and "the newspaper *industry*" obtain such records – not "structureless organizations" or video bloggers. CP 290. Indeed, in an interview with *The Columbia Journalism Review* published less than a week after RCW 5.68-.010(5) was enacted, the "primary author of" that statute explained the definition of "entity" under the Shield Law requires even a real journalist to "incorporate yourself, *then* you're an entity ...." *Columbia Journalism Review*, "A New Shields Law in Washington State," 5/4/2007, [https://archives.cjr.org/behind\\_the\\_news/a\\_new\\_shield\\_law\\_in\\_washington.php](https://archives.cjr.org/behind_the_news/a_new_shield_law_in_washington.php) (emphasis added). *See also Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564, 96 S.Ct. 2295 49 L.Ed.2d 49 (1976)("statement of one of the legislation's sponsors...deserves to be accorded substantial weight in interpreting the statute")(citing *National*

*Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 640, 87 S.Ct. 1250 18 L. Ed.2d 357 (1967), *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395, 71 S.Ct. 745, 95 L.Ed. 1035 (1951); *In re Marriage of Kovacs*, 121 Wn.2d 795, 807-08, 854 P.2d 629 (1993)("remarks of [author], a prime sponsor and drafter of the bill, are appropriately considered to determine the purpose of revisions to the language of the proposed act.").

Requiring exempted "news media" to be a separately existing news business entity also is necessary for RCW 42.56.540 to operate. For law enforcement agency workers to protect their photographs and birthdate data by a separate action under that statute, they must serve notice on the requester. *See e.g. Burt v. Washington State Dep't of Corr.*, 168 Wn.2d 828, 837, 231 P.3d 191 (2010)(inmate requester "should have been joined as a party and given notice and an opportunity to respond in writing to the request for the injunction" by employees); WAC 44-14-04003(12)("requestor has an interest in any legal action to prevent the disclosure of the records he or she requested," and "[i]f an injunctive action is filed, the third party or agency should name the requestor as a party or, at a minimum, must inform the requestor of the action to allow the requestor to intervene."). However, legal existence is mandatory for service of process. *See Roth v. Drainage Imp. Dist. No. 5 of Clark Co.*, 64 Wn.2d 586, 590, 392 P.2d 1012 (1964)(drainage district that was overseen by the local

county could not be sued in its individual capacity because the drainage district had no separate existence outside of the local county); *see also Nolan v. Snohomish Co.*, 59 Wn.App. 876, 883, 802 P.2d 792 (1990), *rev. denied*, 116 Wn.2d 1020, 811 P.2d 219 (1991)(county council not a proper party because "in a legal action involving a county, the county itself is the only legal entity capable of suing and being sued" so it "follows that a county council is not a legal entity separate and apart from the county itself"); *Kain v. Grant County*, 47 Wn.App. 153, 734 P.2d 514 (1987)(service on county commissioners, rather than auditor, held insufficient); *Foothills Dev. Co. v. Clark Cy. Bd. Of Cy. Comm'rs*, 46 Wn.App. 369, 377, 730 P.2d 1369 (1986)(board of county commissioners properly dismissed since it "is not a separate entity that has the capacity to be sued").

Thus, if a news media "entity" requester can be an oxymoron "structureless organization" – or a single anonymous video blogger – another absurd result would be that correctional officers could not prevent disclosure of their records despite their clear statutory protection because there is no one and nothing upon whom notice of a suit can be served. However, because Plaintiff's "reading of the statute is obviously nonsensical, this court must construe the statute's ambiguity in the way that makes the most sense in light of the legislative purpose embodied by the overall statutory scheme." *See e.g. Snohomish Cty. Fire Prot. Dist. No. 1 v. Washington*

*State Boundary Review Bd. for Snohomish Cty.*, 121 Wn. App. 73, 79–80, 87 P.3d 1187 (2004), *aff'd*, 155 Wn.2d 70, 117 P.3d 348 (2005)(citing *Esparza v. Skyreach Equip., Inc.*, 103 Wn.App. 916, 938, 15 P.3d 188 (2000), *rev. denied* 144 Wn.2d 1004 (2001). *See also Gipson, supra.* at \*4 (rejecting Plaintiff's interpretation of a PRA statute because "[s]uch a reading of the PRA is unworkable," while instead adopting the interpretation of the municipal defendant which "furthers public policy.")

- b. Plaintiff Also Did Not Meet His Burden to Show He Himself Was a "News Media" "Entity" Under RCW 5.68.010(5)(a) or (5)(b)

Plaintiff also cannot assert *he personally* was exempted "news media" because, first of all: "With any request, the receiving agency determines any applicable exemptions *at the time* the request is received." *See Gipson, supra.* \*3 (emphasis in original). *See also Washington State Bar Ass'n, Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws* § 5.3, at 5–31 (2006)(the validity of an exemption is determined *at the time the request is made*)(emphasis added); *BIAW v. McCarthy*, 152 Wn. App. 720, 740, 218 P.3d 196 (2009)(PRA precludes destruction of a public record "[i]f a *public record request is made at a time* when such record exists")(quoting RCW 42.56.100)(emphasis added); *Gendler v. Batiste*, 158 Wn.App. 661, 673, 242 P.3d 947 (2010)("no duty under the PRA ... to ... produce a record that does not

exist *at the time the request is made*")(citing *Sperr v. City of Spokane*, 123 Wn.App. 132, 136-37, 96 P.3d 1012 (2004) and *Smith v. Okanogan County*, 100 Wn.App. 7, 13–14, 994 P.2d 857 (2000))(emphasis added).

As a result, an agency's response that concludes a PRA request comes within an exemption does not become retroactively invalid when circumstances justifying an exception to the exemption are disclosed *later in litigation*. See e.g. *Thomas v. Pierce Cty. Prosecuting Attorney's Office*, 190 Wn. App. 1036, \*9 (2015)(in PRA action "Plaintiffs never told the PCPAO *at the time they requested the documents* that they had a substantial need" so as to overcome the attorney work-product protection) (emphasis added); *Koenig v. Pierce Cty.*, 151 Wn. App. 221, 233, 211 P.3d 423, 429 (2009), *as amended* (July 20, 2009), *as amended on denial of reconsideration* (Oct. 26, 2009)(where the PRA "exemption is applicable, the office invoking it need not take steps to provide the documents unless the requester makes an affirmative showing" of the exception). Rather, a "records request is satisfied when an agency receives a public records request, identifies a legitimate exemption under the PRA *at that time*, and clearly notifies the requester that the request will be treated in accordance with that exemption." *Gipson, supra*. \*4 ("the determination of an exemption *at the time the request was made* is treated like a record that does not exist.")(emphasis in original).

Here, prior to bringing this action, Plaintiff did not claim *he personally* was "news media" under RCW 5.68.010(5). CP 21. Rather, at the time he made the request, he did so by an *email from his email address for his musical band*, and simply signed his name under the self-given title of "Investigative Journalist." CP 27.<sup>21</sup> The undefined title of "Investigative Journalist" is not one of the three narrow categories of news media entities listed in RCW 5.68.010(5). Likewise, after his request was denied on the specific basis of the protections of RCW 42.56.250(8) and closed, he again did not claim to be "news media" but only alleged he was "working on a story concerning the Pierce County Jail." CP 20. A self-described "investigative journalist" who is "working on a story" also is not listed in the statutory categories of news media entities. *See* RCW 5.68.010(5).

Indeed, even when thereafter the County's PDUA explained to him that RCW 5.68.010(5) defines "news media" and provided him verbatim the three specific categories of "news media" that are in that statute, Plaintiff's response *still* did not claim *he* was "news media" nor allege facts that would qualify *him* as such under RCW 5.68.010(5)(a)-(c). CP 27-28.

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<sup>21</sup> The County's independent inquiries at the time also did not disclose the missing statutory requirements for "news media." As previously noted, the County's review of the cited YouTube account revealed no distinguishing characteristics identifying it as a news entity. CP 305, 308. A further Google search for information about Plaintiff as a "journalist" found nothing, while a general search of his name found only information on a website devoted to Plaintiff's musical band and not to journalism or news. CP 198; 245-246.

Instead, Plaintiff simply claimed "My *Youtube* [sic] *channel meets the definition* of RCW 5.68.010(5) because *it* is a news agency that is in the regular business of gathering and disseminating news via the internet." CP 27 (emphasis added). As for himself, Plaintiff claimed only he was "a journalist that primarily covers local court cases on my YouTube channel." He did not claim he was an "employee, agent, or independent contractor of" any "news media" entity – much less that he was seeking protected information about *his* jailors for "bona fide news gathering ... while serving in that capacity." *Compare id. with* RCW 5.68.010(5)(b). He likewise did not claim he was the "owner" of the account – much less was in the actual statutory category of its "parent, subsidiary, or affiliate ...." *Id.* (5)(c).

It was only when he filed suit that Plaintiff for the first time *claimed* he personally met the definition of "news media" under RCW 5.68.010(5)(a)-(b). *See* CP 10. However, a plaintiff cannot wait until after suit is filed to *claim* he meets the exception to the statutory protection. Rather, to sue on a claim that disclosure of protected documents was required by an exception, a requester must have raised the claim of the exception at time of the request. *See e.g. Thomas*, 190 Wn.App. at \*9 ("Plaintiffs never told the PCPAO *at the time they requested the documents* that they had a substantial need" and thus that they came within the exception to the work product protection)(emphasis added); *Koenig*, 151 Wn.App. at 233 (where the

PRA "exemption is applicable, the office invoking it need not take steps to provide the documents unless the requester makes an affirmative showing" of the exception). To require anything less would impose strict liability on responders based on whether requesters chose to disclose operative facts or claims prior to the agency's final PRA response.

1) Plaintiff Was Not Himself a "News Media" "Entity" as Defined in RCW 5.68.010(5)(a)

In any case, for many of the same reasons that a YouTube account is not a news media "entity," a person claiming to have such an account also is not a news media "entity." To include Plaintiff in that definition because he used a YouTube or other social media account would have the same absurd result as would holding the account itself to be "news media"— *i.e.* it would render the PRA protection of RCW 42.56.250(8) meaningless by transforming nearly everyone of the billions with a social media account (*e.g.* 80% of Americans, *see p. 9 fn. 7 supra.*) into "news media" and entitling them all to *compel* and *disclose* protected personnel records of law enforcement agency employees *as well as* allow them to *resist court compelled disclosure* under the Shield Law. Even more concerning, it has been shown Plaintiff is the *very type of requester* the Legislature intended to protect against (*i.e.* a prior inmate) who seeks statutorily protected personnel records of a law enforcement agency (*i.e.* photographs and birthdate

data of targeted correctional staff and jail deputies) and who intends to misuse them in the way the statute was meant to prevent (i.e. to "convey[]" them "to a broad segment of the public"). *See* CP 107.

However, as previously discussed, Courts "will not interpret a statute in a manner that leads to an absurd result." *Hangartner*, 151 Wn.2d at 448. Because it "is doubtful that the legislature intended the word" entity "to have such broad application" so as to apply to the individual video blogger Brian Green any more than it does to his alleged social media account, the canon of statutory construction again must be applied that "more general terms in a statute or ordinance be interpreted *in a manner consistent with and analogous* to the more specific terms in the statute or ordinance." *See Roadhs*, 71 Wn.2d at 708. Because it has been shown the term "entity" in RCW 5.68.010(5)(a) is "modif[ied] and restrict[ed]" by the *specific kinds* of institutional news business entities preceding it in the enumerated list, it again must be "interpreted in a manner *consistent with and analogous to* the more specific terms" which describe institutional legal entities engaged in the business of news that are not individual persons. Thus, the meaning of the general term "entity" can "embrace only objects *similar in nature to* those" artificial institutional business entities. *Id.*; *Tahat*, 182 Wn.App. at 671. The specific kinds of entities listed in RCW 5.68.010(5)(a) do not include anything *similar in nature* to a natural person who is a social media

video blogger. Indeed, the statute's only mention of access to such protected documents by individual "persons" instead is in RCW 5.68.010(5)(b) – which applies *only* to an "employee, agent, or independent contractor of any entity listed in (a) of this subsection ...." *See also discussion infra.* at \_\_; *Leishman v. Ogden Murphy Wallace PLLC*, \_\_ Wn.App. \_\_, 448 P.3d 169, 173 (2019)(neither government agency nor its contractor is a "person" under RCW 4.24.510 because such was not "[t]he purpose of the statute")(quoting *Segaline v. State, Dep't of Labor & Indus.*, 169 Wn.2d 467, 470, 238 P.3d 1107 (2010)).

That these established principles preclude unincorporated natural persons from being "entities" is confirmed by the statute's legislative history. As previously noted, the Legislature expressed concern only that institutional businesses such as "*Newspapers*" and "the newspaper *industry*" have access to the protected records. CP 290. Further, the "primary author" of the statute specifically explained its definition of "entity" includes only "bloggers *to the extent that they are an entity*" because the Legislature needed a "workable definition so you wouldn't provide a privilege to *virtually anybody in the state who has a MySpace account*" and thus a person must "incorporate yourself, *then you're an entity* ...." *See Columbia Journalism Review, supra.* (emphasis added). As the statute's primary author stated in another way, no one wanted "ordinary people in their

pajamas to be able to claim journalistic" privileges. See Susan Walsh, "What Legal Protections Do Reporters Have?" [www.knkx.org/post/unpacking-government-what-legal-protctions-do-reporters-have](http://www.knkx.org/post/unpacking-government-what-legal-protctions-do-reporters-have) (2017).

This reading is further reinforced by the fact RCW 5.68.010(5)(a) requires a news media "entity" be in "the *regular business* of news gathering and disseminating news or information to the public . . ." The term "regular" means "arranged in or constituting a constant or definite pattern;" "done or happening frequently;" "conforming to or governed by an accepted standard or procedure or convention;" and "used, done, or happening on a habitual basis." *The New Oxford American Dictionary*, 1470 (3<sup>rd</sup> Ed. 2010). Plaintiff offered no evidence at the time of his request, or thereafter, that he *regularly* engaged in news gathering and disseminating.<sup>22</sup>

Likewise, the term "business" is defined by *Black's Law Dictionary*, 192 (7<sup>th</sup> Ed. 1999) as: "A *commercial enterprise* carried on *for profit*; a particular occupation or employment *habitually engaged in for livelihood or gain*" (emphasis added). "Occupation" and "employment" and "livelihood" also denote compensation. If properly formed, a "nonprofit" can be a noncommercial entity that is a "business." CP 323-325 (§11-13). A

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<sup>22</sup> Though not argued or cited on the merits by Plaintiff, his limited examples of the account's video uploads provided in response to the County's Interrogatory No. 11 are all dated *after service of the subject lawsuit* and pertain mostly if not all to *Respondent's personal life or general interests*, and do not establish that a separate entity is engaged in the "regular business" of news gathering and disseminating news. See CP 104-106.

"regular business" then would be a commercial or noncommercial enterprise properly formed and carried out as a consistent practice. As previously noted, the Legislature's concerns involved "Newspapers" and "the newspaper *industry*" – not video bloggers active whenever they feel offended. CP 290. An activity that does not act to earn a financial profit and is not a legally formed nonprofit is not a "business" that can be a "regular business" under the statute. CP 323-325 (§§11-14). Activities natural persons engage in that are not for profit are at most hobbies. CP 324 (§14).<sup>23</sup>

2) Plaintiff Also Was Not Himself a "News Media" "Entity" as Defined by RCW 5.68.010(5)(b)

RCW 5.68.010(5)(b) separately provides that a "person" may be "news media" *if they are an "employee, agent, or independent contractor of any entity listed in (a) ... who is or has been engaged in bona fide news gathering for such entity, and who obtained or prepared the news or information that is sought while serving in that capacity ...."* (emphasis added). It has been shown above that neither the YouTube account at issue nor Mr. Green are "entities" as defined in RCW 5.68.010(5)(a). *Supra.* at \_\_\_.

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<sup>23</sup> If the legislature did not intend news gathering and dissemination to be a "business," then the term "business" would have been unnecessary. As a matter of law: "each word of a statute is to be accorded meaning." *See State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196, 201 (2005)(quoting *State ex rel. Schillberg v. Barnett*, 79 Wn.2d 578, 584, 488 P.2d 255 (1971)). Because "the drafters of legislation ... are presumed to have used no superfluous words" a Court "must accord meaning, if possible, to every word in a statute." *Id.* (quoting *In re Recall of Pearsall–Stipek*, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000); *Greenwood v. Dep't of Motor Vehicles*, 13 Wn.App. 624, 628, 536 P.2d 644 (1975)).

Because no "entity" under RCW 5.68.010(5)(a) is present, Plaintiff was not an "employee," "agent," or "independent contractor" of such an "entity." Thus, Plaintiff also was not "news media" under subsection (b).

Further, even a person employed by a proper "entity" is required by the statute to be "engaged in *bona fide news gathering*." See RCW 5.68.010(5)(b). *Black's Law Dictionary* defines "bona fide" as: "1. Made in good faith; without fraud or deceit. 2. Sincere; genuine." *Black's Law Dictionary*, 168 (7<sup>th</sup> Ed. 1999). Published self-aggrandizing or promotion materials, or distorted video stories involving Plaintiff's personal life do not rise to the level of *bona fide news gathering*. See *In re Madden*, 151 F.3d 125, 130 (3d Cir. 1998) (no privilege for reporting "hype" rather than "news"); *In re Napp Technologies, Inc. Litigation*, 768 A.2d 274 (N.J. Super. 2000) (information obtained by public relations firm in course of investigation relating to press release for company was not protected); *In re Fitch, Inc.*, 330 F.3d 104, 109 (2<sup>nd</sup> Cir. 2003) (gathering information for publication that is advantageous only to the one claiming privilege is not newsgathering to disseminate information to the public).

Here, the PRA request at issue is personal to Plaintiff and specifically targets correctional staff and jail deputies working at the time of *his* incarceration at the Pierce County Jail. CP 4-7. Plaintiff made no attempt either at the time of his request, or in his merits briefing, to prove he was

engaged in *bona fide* news gathering or that this highly personal PRA request was *bona fide* news gathering – rather than simply to share his personal stories and grievances on a social media site. Indeed, his pattern of using the PRA to retaliate against public employees for their role in his own perceived personal grievances – both before and after the instant PRA request<sup>24</sup> – rebut any claim his request is "bona fide news gathering."

### C. DENIAL OF DISCOVERY WAS REVERSABLE ERROR

The County was prevented from pursuing discovery that explored Plaintiff's claims and supported the County's defenses because the trial court summarily and without explanation denied the County's Motion to Compel. *See* CP 432-46. It did so despite Washington Supreme Court and Division Two precedent expressly holding that the rules of civil procedure control discovery in a PRA case, and that all relevant information likely to lead to admissible evidence is discoverable. *See e.g. Neighborhood Alliance of Spokane Co. Spokane Co.*, 172 Wn.2d 702, 716-718, 261 P.3d 119 (2001); *City of Lakewood v. Koenig*, 160 Wn.App. 883, 890, 250 P.2d 113 (2011) ("we hold under PRA, that an agency is entitled to obtain discovery

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<sup>24</sup> For example, before his instant PRA request Plaintiff in *Green v. Lewis County*, 4 Wn. App.2d 1048 (2018), used the PRA to target his opponent in the Lewis County Sheriff's election so as to obtain a questionnaire provided by the existing Sheriff to a newspaper reporter who Plaintiff alleged had written a series of "prejudicial media hit pieces" that reflected badly on Green during his campaign. Likewise, after the instant request, Plaintiff is now using the PRA to retaliate against the County's trial court deputy prosecutor in this case as well as against the latter's supporting Guild in order to obtain the same type of protected personnel records that are at issue here. *See supra.* p. 1 fn. 1, p. 13 fn. 13.

under civil rules").

If Plaintiff treated his use of the subject YouTube account for tax purposes like a hobby, that fact would be relevant because it would support the YouTube postings at issue being recreational and not made "in the regular business" of news gathering. *See* RCW 5.68.010(5)(a); *discussion supra*. at \_\_\_. If, on the other hand, Plaintiff's use was commercial, such would be relevant because the County would have several additional valid defenses – such as RCW 42.56.550 (statute of limitations) and RCW 42.56.070(8)(*i.e.* prohibiting disclosure of "lists of individuals requested for commercial purposes"). *See e.g.* CP 43.

A statute of limitations defense would be available to defeat any PRA claim if the YouTube account was monetized and attempting to generate revenue so that it was "commercial." Specifically, if Plaintiff "owns" the YouTube account and is attempting to generate revenue and/or is generating any revenue, Plaintiff would be considered a sole proprietor. *See Black's Law Dictionary*, 1398 (7<sup>th</sup> Ed. 1999) ("sole proprietorship" is "(1) A business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity. (2) Ownership of such a business."). Any business in Washington that uses a trade name that does not include the true or real name of all persons conducting the business must register the trade name with the Washington State Department of

Revenue. *See* RCW 19.80.010; RCW 19.80.005(4). If a person fails to register the trade name, *no lawsuit in any court can be maintained. See* RCW 19.80.040 ("No person or persons carrying on, conducting, or transacting business under any trade name shall be entitled to maintain *any suit in any of the courts* of this state until such person or persons have properly completed the registration as provided in RCW 19.80.010.")(emphasis added). *See also* RCW 19.08.010. Other business entities must also register and "must set forth the entity's name as required by the department." *See* RCW 19.80.010(5).

Here, there is no record of incorporation for "Libertys Champion," and Plaintiff did not plead in his Complaint or otherwise show that the account is properly and timely registered with the Washington State Department of Revenue.<sup>25</sup> Under RCW 42.56.550, an action under the PRA must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis. RCW 42.56.550 (6); *see, also, Greenhalgh v. Department of Corrections*, 170 Wn.App. 137, 282 P.3d 1175 (2012) (One-year limitations period governing prisoner's suit under

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<sup>25</sup> Because under ER 201 the Court may take judicial notice "at any stage of the proceeding," it can note that the Washington State Department of Revenue reflects no registration of Libertys Champion as any cognizable entity under Washington law, and similarly reflects no registration of the Plaintiff as an "owner." *See* Wash. State Dept. of Revenue Business Search website, [https://secure.dor.wa.gov/gteunauth/\\_/#1](https://secure.dor.wa.gov/gteunauth/_/#1) (last accessed October 18, 2019).

PRA against Dept. of Corrections began to run when prisoner received response that identified documents exempt from production). The PRA request here was closed in late December 2017, *see* CP 17, and thus any claim would be barred if "Libertys Champion" was commercial and not registered with the Department of Revenue by or before late December 2018.<sup>26</sup>

Further, generation of revenue by the account also potentially raises the separate defense of RCW 42.56.070(8). That statute exempts lists from disclosure under the PRA, which would include but not be limited to photographs and date of birth information for criminal justice workers and jail deputies, if direct use of the requested material involved generation of revenue or financial benefit to a requestor. *See Seiu Healthcare 775NW v. State, Dep't of Soc. & Health Servs.*, 193 Wn.App. 377, 405, 377 P.3d 214 (2016)("agency must investigate when it has some indication that the list might be used for commercial purposes"). Thus, in such cases "agencies may inquire as to future uses of the requested documents" and "Courts employ a case-by-case review based on the identity of the requester, the nature of the records requested, and any other information available to the agency." *Washington Pub. Employees Ass'n*, at \*7 (citing *Seiu Healthcare*

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<sup>26</sup>Though Plaintiff has pled in his complaint that the PRA request instead was closed in early January 2018, *see* CP 9, the statute of limitations analysis above still would bar Plaintiff's suit even if the closing date allegedly was a few weeks after December 2017.

775NW, *supra.*).

In this case, any generation of revenue by the account at issue would be a direct financial benefit to Mr. Green if he were the owner. Though Plaintiff claims he makes no profit and that the account is not commercial, CP 92, 159, he does not deny the account generates revenue. CP 107-08. Indeed, as elsewhere noted, the YouTube account at issue may be monetized and commercial because it shows advertisements on videos. CP 57-58, 61-73, 238-41. Thus, if the account generates revenue, RCW 42.56.070(8) is at issue. Though the County's discovery requests focused on these issues that could independently defeat Plaintiff's claims, *see* CP 89, 107-15, the Court refused to consider the County's motion to compel that discovery so that it could be reviewed on a "case by case basis." CP 415, 418. However, the "right to discovery and the rules of discovery are integral to the civil justice system." *Lowy v. PeaceHealt*, 174 Wn.2d 769, 776, 280 P.3d 1078 (2012).

Full and complete answers to the County's discovery requests could have confirmed that the YouTube account is either a hobby (and thus not in the "regular business" of news gathering), or monetized and commercial (and thus barred by the statute of limitation and the exemption against producing lists for commercial purposes.). The trial court's denial of the County's Motion to Compel discovery was thus prejudicial to the County's

ability to fully defend itself and was an abuse of discretion. *See e.g. Clarke v. State Attorney General's Office*, 133 Wn.App. 767, 777, 138 P.3d 144 (2006) (court that denies discovery "abuses its discretion when it bases its decision on unreasonable or untenable grounds")(quoting *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 665, 989 P.2d 1111 (1999)).

Because the manner in which Plaintiff treats his YouTube activities for tax purposes is indicative of what type of business that activity involves and whether that activity is a business or something different like a hobby, *see* CP 324, the trial court abused its discretion by ruling without explanation "that additional discovery or development of the record is not necessary to resolve this matter ..." *See* CP 432.

## V. CONCLUSION

The record is undisputed that Plaintiff Brian Green is a prior inmate who is attempting to use the PRA to obtain protected photographs and birthdates of his prior correctional workers so he can make them widely available – and that his doing so would put those targeted law enforcement agency workers and their families at risk. The statutory language, history and policy of RCW 42.56.250(8) is equally clear that the Legislature intended to protect against just such attempts. The sole question as to the applicability of that statute that is raised by the trial court order is whether the narrow "news media" exception to that categorical protection will be

misinterpreted into meaninglessness by transforming each of the billions of social media users into "news media" so that the exception swallows up the Legislature's intended rule.

Further, even under such a mistaken statutory reading, the record shows Plaintiff did not meet his burden of proving at the time of the request – or by the time of his merits submissions – that he met even this erroneous definition of "news media." Finally, when the burden of proof instead was improperly shifted to the County to affirmatively prove Plaintiff was *not* news media, the denial of meaningful discovery on that and other dispositive issues created yet further grounds for reversal of that Order.

Accordingly, Defendant Pierce County respectfully requests this Court apply the protections of RCW 42.56.250(8) as the Legislature intended, reverse the trial court's order, and dismiss with prejudice the instant PRA suit that improperly seeks a *de facto* judicial repeal of that statute.

DATED this 1st day of November, 2019.

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing APPELLANT'S OPENING BRIEF was electronically filed this 1<sup>st</sup> day of November, 2019, with the Clerk of the Court, and I delivered a true and accurate copy by electronic mail pursuant to the agreement of the parties of the following:

**Joseph Thomas:** joe@joethomas.org

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## **RCW [42.56.250](#)**

### **Employment and licensing.**

The following employment and licensing information is exempt from public inspection and copying under this chapter:

(1) Test questions, scoring keys, and other examination data used to administer a license, employment, or academic examination;

(2) All applications for public employment other than for vacancies in elective office, including the names of applicants, resumes, and other related materials submitted with respect to an applicant;

(3) Professional growth plans (PGPs) in educator license renewals submitted through the eCert system in the office of the superintendent of public instruction;

(4) The following information held by any public agency in personnel records, public employment related records, volunteer rosters, or included in any mailing list of employees or volunteers of any public agency: Residential addresses, residential telephone numbers, personal wireless telephone numbers, personal email addresses, social security numbers, driver's license numbers, identicard numbers, and emergency contact information of employees or volunteers of a public agency, and the names, dates of birth, residential addresses, residential telephone numbers, personal wireless telephone numbers, personal email addresses, social security numbers, and emergency contact information of dependents of employees or volunteers of a public agency. For purposes of this subsection, "employees" includes independent provider home care workers as defined in RCW [74.39A.240](#);

(5) Information that identifies a person who, while an agency employee: (a) Seeks advice, under an informal process established by the employing agency, in order to ascertain his or her rights in connection with a possible unfair practice under chapter [49.60](#) RCW against the person; and (b) requests his or her identity or any identifying information not be disclosed;

(6) Investigative records compiled by an employing agency in connection with an investigation of a possible unfair practice under chapter [49.60](#) RCW or of a possible violation of other federal, state, or local laws or an employing agency's internal policies prohibiting discrimination or harassment in employment. Records are exempt in their entirety while the investigation is active and ongoing. After the agency has notified the complaining employee of the outcome of the investigation, the records may be disclosed only if the names of complainants, other accusers, and witnesses are redacted, unless a complainant, other accuser, or witness has consented to the disclosure of his or her name. The employing agency must inform a complainant, other accuser, or witness that his or her name will be redacted from the investigation records unless he or she consents to disclosure;

(7) Criminal history records checks for board staff finalist candidates conducted pursuant to RCW [43.33A.025](#);

(8) Photographs and month and year of birth in the personnel files of employees and workers of criminal justice agencies as defined in RCW [10.97.030](#). The news media, as defined in RCW [5.68.010](#)(5), shall have access to the photographs and full date of birth. For the purposes of this subsection, news media does not include any

person or organization of persons in the custody of a criminal justice agency as defined in RCW [10.97.030](#);

(9) The global positioning system data that would indicate the location of the residence of a public employee or volunteer using the global positioning system recording device; and

(10) Until the person reaches eighteen years of age, information, otherwise disclosable under chapter [29A.08](#) RCW, that relates to a future voter, except for the purpose of processing and delivering ballots.

## **RCW 5.68.010**

### **Protection from compelled disclosure—Exceptions—Definition.**

(1) Except as provided in subsection (2) of this section, no judicial, legislative, administrative, or other body with the power to issue a subpoena or other compulsory process may compel the news media to testify, produce, or otherwise disclose:

(a) The identity of a source of any news or information or any information that would tend to identify the source where such source has a reasonable expectation of confidentiality; or

(b) Any news or information obtained or prepared by the news media in its capacity in gathering, receiving, or processing news or information for potential communication to the public, including, but not limited to, any notes, outtakes, photographs, video or sound tapes, film, or other data of whatever sort in any medium now known or hereafter devised. This does not include physical evidence of a crime.

(2) A court may compel disclosure of the news or information described in subsection (1)(b) of this section if the court finds that the party seeking such news or information established by clear and convincing evidence:

(a)(i) In a criminal investigation or prosecution, based on information other than that information being sought, that there are reasonable grounds to believe that a crime has occurred; or

(ii) In a civil action or proceeding, based on information other than that information being sought, that there is a prima facie cause of action; and

(b) In all matters, whether criminal or civil, that:

(i) The news or information is highly material and relevant;

(ii) The news or information is critical or necessary to the maintenance of a party's claim, defense, or proof of an issue material thereto;

(iii) The party seeking such news or information has exhausted all reasonable and available means to obtain it from alternative sources; and

(iv) There is a compelling public interest in the disclosure. A court may consider whether or not the news or information was obtained from a confidential source in evaluating the public interest in disclosure.

(3) The protection from compelled disclosure contained in subsection (1) of this section also applies to any subpoena issued to, or other compulsory process against, a nonnews media party where such subpoena or process seeks records, information, or other communications relating to business transactions between such nonnews media party and the news media for the purpose of discovering the identity of a source or obtaining news or information described in subsection (1) of this section. Whenever a subpoena is issued to, or other compulsory process is initiated against, a nonnews media party where such subpoena or process seeks information or communications on business transactions with the news media, the affected news media shall be given reasonable and timely notice of the subpoena or compulsory process before it is executed or initiated, as the case may be, and an opportunity to be heard. In the event that the subpoena to, or other compulsory process against, the nonnews media party is in connection with a criminal investigation in which the news media is the express target, and advance notice as provided in this section would pose a clear and substantial threat to the integrity of the investigation, the governmental authority shall so

certify to such a threat in court and notification of the subpoena or compulsory process shall be given to the affected news media as soon thereafter as it is determined that such notification will no longer pose a clear and substantial threat to the integrity of the investigation.

(4) Publication or dissemination by the news media of news or information described in subsection (1) of this section, or a portion thereof, shall not constitute a waiver of the protection from compelled disclosure that is contained in subsection (1) of this section. In the event that the fact of publication of news or information must be proved in any proceeding, that fact and the contents of the publication may be established by judicial notice.

(5) The term "news media" means:

(a) Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, or any entity that is in the regular business of news gathering and disseminating news or information to the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, internet, or electronic distribution;

(b) Any person who is or has been an employee, agent, or independent contractor of any entity listed in (a) of this subsection, who is or has been engaged in bona fide news gathering for such entity, and who obtained or prepared the news or information that is sought while serving in that capacity; or

(c) Any parent, subsidiary, or affiliate of the entities listed in (a) or (b) of this subsection to the extent that the subpoena or other compulsory process seeks news or information described in subsection (1) of this section.

(6) In all matters adjudicated pursuant to this section, a court of competent jurisdiction may exercise its inherent powers to conduct all appropriate proceedings required in order to make necessary findings of fact and enter conclusions of law.

**PIERCE COUNTY PROSECUTING ATTORNEY CIVIL DIVISION**

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