

FILED
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No. 96544-7

SUPREME COURT OF THE STATE OF WASHINGTON

THE CHURCH OF THE DIVINE EARTH,

Appellant,

v.

CITY OF TACOMA,

Respondent.

***AMICUS CURIAE* MEMORANDUM OF FREEDOM
FOUNDATION IN SUPPORT OF PETITION FOR DIRECT
REVIEW**

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DIRECT REVIEW

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I. IDENTITY AND INTERESTS OF *AMICUS CURIAE*

The Freedom Foundation (the “Foundation”) is a nonprofit organization operating in Washington, Oregon, and California. The Foundation’s mission is to advance individual liberty, free enterprise and limited, accountable government. To support those aims, the Foundation regularly engages in litigation over the constitutionality of state action. These cases seek individual or class-wide relief, depending on the situation. The Foundation has been and is currently involved in litigation with the State of Washington related to the Public Records Act (“PRA”), including an appeal accepted for review by this Court on a closely related issue.

II. FAMILIARITY WITH ISSUES

Amicus Foundation have obtained copies of the briefing submitted to this Court by the parties and are familiar with its contents, as well as the proceedings before the trial court. *Amicus* Foundation will focus on the impact that will be felt by individuals who are interested in government accountability, should this Court not take direct review of these issues.

III. ISSUE ADDRESSED BY *AMICUS*

Whether *Dawson v. Daly* created a categorical exemption in the PRA for employee evaluations, regardless of content, and therefore rendered same exempt from the brief explanation requirement of RCW 42.56.210(3)?

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IV. ARGUMENT IN SUPPORT OF DIRECT REVIEW

This case is of vital importance when viewed in light of this Court’s grant of discretionary review of *Freedom Foundation v. University of Washington and Service Employees International Union Local 925*, Supreme Court No. 96262-6. The two of the issues presented for review are (1) “Whether a court may rely on conclusory descriptions of the content of records to determine whether the records contain information relating to the conduct of the government?” and (2) “Whether a court’s reliance on an interested party’s conclusory descriptions of records, rather than relying on the agency’s determination, is permissible under RCW 42.56?”

Substantially similar issues are at play in both cases, demonstrating that the issue of conclusory descriptions given in connection with PRRs under the Public Records Act has become a widespread conundrum throughout the State of Washington. Presently, the State is utilizing *Dawson* as another opportunity to rely on vague, conclusory descriptions in denying the disclosure of public records.

This is because Washington State Supreme Court precedent and the Revised Code of Washington (RCW) *may* currently be at odds with one another. To wit, State agencies, cities, and trial courts are interpreting *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993) in a manner which allows a city – like the City of Tacoma (“Tacoma” or the “City”) – to simply

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cite *Dawson* and provide no information about the public record requested, or the reasons the “private nature” exemption is being asserted.

In *Dawson*, however, this Court acknowledged that under RCW 42.17.255 (now codified as RCW 42.56.050), “...a person’s privacy is violated ‘only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.’” *Dawson*, 120 Wn.2d 782, 795 (1993). The PRA was drafted to specifically state that “[c]ourts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3).

This Court continued to analyze these two (2) elements separately, and determined for purposes of the first element that employee evaluations (there a prosecutor’s employee evaluation) contain personal information, the disclosure of which would be highly offensive. *Dawson*, at 797. The Court then determined under the second element that “[w]hile we recognize that the public has some degree of interest in disclosure of the evaluation of prosecutors, in light of the potential harm disclosures could cause, we hold that *legitimate public concern* is lacking in this case.” *Id.* at 799 (emphasis in original). It would seem plain from the foregoing excerpt that the Court’s analysis of the second element was subsumed into, or at least informed by,

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its analysis of the first element. Governments can and do construe this as saying that whenever disclosure of certain information would be highly offensive to a reasonable person, that information is not of legitimate concern to the public.

That, however, is not the standard. *Dawson* does not stand for the proposition that any employee evaluation is exempt from disclosure. The Court should take this opportunity to clarify its jurisprudence. The statutory elements are drafted with the conjunctive “and.” *See* RCW 42.56.050. The Legislature certainly knows the significance of that word, and certainly could have used the disjunctive “or” if it had so chosen – but instead, it created a conjunctive test requiring each element to be separately met before the compelling interest in disclosure can be overridden.

If there is a legitimate public concern, it does not matter if disclosure of the material would be highly offensive to the reasonable person; the records still must be disclosed. Indeed, the Legislature so valued that transparency that even when a matter is *not* one of legitimate public concern, the public employee can only overcome disclosure upon a showing that it would be “*highly* offensive.” Ordinary details or even “marginally offensive” information concerning a public employee cannot meet this test, and again, a legitimate public concern trumps all.

The trial court’s ruling in the above-captioned case is contrary to

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these principles, and to the Legislature's stated policy that courts must liberally construe the PRA to favor disclosure. *See* RCW 42.56.030. The statute, in its entirety, provides:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed **and its exemptions narrowly construed** to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030 (emphasis added).

The above language encapsulates the issue with conclusory descriptions of documents which are being excluded from public disclosure: If no explanation is provided for the exemption which the document purportedly meets, then how do the people remain informed? And more immediately, how does a court determine if the exemption has been narrowly construed? Or shall the public servant's determination be deemed privileged and effectively unreviewable? Transparency is the most basic form of government accountability, and is at the heart of the PRA's purpose.

Similarly, the trial court ignores the Legislature's specific requirement in RCW 42.56.210(3) regarding "certain personal and other records exempt" that "[a]gency responses refusing, in whole or in part,

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inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.”

Ultimately, this case presents an issue of great importance to the citizens of Washington State and to *amicus* Foundation, as they proceed forward with several Public Records Act cases at all levels of Washington State Courts.

V. CONCLUSION

For the reasons stated above, *amicus* Foundation respectfully ask the Court to grant Petitioner’s Motion for Direct Review of the Superior Court’s ruling, pursuant to RAP 4.2(a)(3), (4).

RESPECTFULLY SUBMITTED this 13 day of February, 2019.

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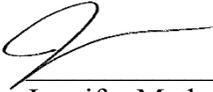
DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on February 13, 2019, I filed with the Clerk the foregoing *Amicus Curiae* Memorandum in Support of Petition for Direct Review, and served the same by email to the following:

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Jennifer Matheson

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FREEDOM FOUNDATION

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