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NO. 95441-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE ASSOCIATED PRESS, NORTHWEST NEWS NETWORK,
KING-TV (“KING 5”), KIRO 7, ALLIED DAILY NEWSPAPERS OF
WASHINGTON, THE SPOKESMAN-REVIEW, WASHINGTON
NEWSPAPER PUBLISHERS ASSOCIATION, SOUND PUBLISHING,
INC., TACOMA NEWS, INC. (“THE NEWS TRIBUNE,”) and THE
SEATTLE TIMES,

Plaintiffs/Respondents/Cross-Appellants

v.

THE WASHINGTON STATE LEGISLATURE; THE WASHINGTON
STATE SENATE, THE WASHINGTON STATE HOUSE OF
REPRESENTATIVES, Washington state agencies; and SENATE
MAJORITY LEADER MARK SCHOESLER, HOUSE SPEAKER
FRANK CHOPP, SENATE MINORITY LEADER SHARON NELSON,
and HOUSE MINORITY LEADER DAN KRISTIANSSEN,

Defendants/Appellants and Cross-Respondents

**OPENING BRIEF OF THE ASSOCIATED PRESS, NORTHWEST
NEWS NETWORK, KING-TV, KIRO 7, ALLIED DAILY
NEWSPAPERS OF WASHINGTON, THE SPOKESMAN-REVIEW,
WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION,
SOUND PUBLISHING, INC., TACOMA NEWS, INC. and THE
SEATTLE TIMES**

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I. INTRODUCTION

The Defendants/Appellants/Cross-Respondents shall be referred to herein as “Defendants”. The Media Plaintiffs, who are Respondents and Cross-Appellants on this appeal shall be referred to as the Media. This lawsuit, and appeal, includes print, broadcast and radio news organizations that have banded together as Plaintiffs to bring this case and secure the public’s right to records from Legislators and the State Legislature. The records sought are and were of incredible public interest: sexual harassment complaints and investigations of harassment at the State Legislature, and emails, texts and official appointment calendars of Legislators during a legislation session when the Legislators were to be addressing K-12 educational funding to avoid the State being held in contempt and fined millions of dollars.

The Defendants admit that records exist that would be responsive to the Media’s PRA requests at issue in this appeal if the Defendants are agencies subject to the Public Records Act (“PRA”). The Defendants further admit that they have not provided an explanation of the records that exist or cited to any exemption other than to claim the Defendants are not subject to the PRA. The trial court held that four of the Defendants are subject to the PRA, and thus have violated the PRA, but that the others were not agencies under the Act. Should the Media prevail on any part of

their claim, then the Defendants subject to the PRA must be deemed to have violated the PRA as they did not provide responsive records, did not provide a detailed statement of the records that exist and were not provided, or have not identified any exemption that is claimed to apply to the records in question.

II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED FOR REVIEW

The issues are those certified by the trial court:

(1) whether the Legislature, House of Representatives, and Senate are not "agencies" as defined by the Public Records Act ["PRA"], and are only subject to the act in a limited capacity; and

(2) whether each individual state legislator and his or her office is an "agency" as defined by the act and thus broadly subject to the act.

CP 853-855.

The trial court correctly determined that the individual state legislators and their state legislative offices are agencies under the PRA and thus broadly subject to the Act. The trial court erred in ruling that no part of the Legislature, House of Representatives, and Senate are "agencies" as defined by the PRA, and are only subject to the Act in a limited capacity.

III. COUNTER STATEMENT OF THE CASE

The Media Appellants here made PRA requests to the State Legislative Office of each State Senator and State Representative seeking their

calendars or schedules for specified times and their text messages received or sent by them for a specified time related to their legislative duties. See CP 42-52. The calendars and schedules related to the then-most-recent legislative session when the Legislature was trying to pass a budget and attempting to comply with the Washington State Supreme Court's decision in *McCleary v. State* in order to stop the levying of fines against the State related to the budget and funding of K-12 education.

The Media also made PRA requests to the Legislature, Senate and the House, by copy to the State Legislative Office of each of the Senators and Representatives as well as the leadership of both bodies, seeking documentation of staff complaints made against lawmakers over the past five years prior to the request, reports on all legislative investigations made within that same time frame of inappropriate or abusive behavior by lawmakers toward staff or each other, and actions taken by each chamber against lawmakers because of interactions with staff. See CP 53-63. The requests all made clear they were not directed to the Office of the Chief Clerk of the House or the Office of the Secretary of the Senate and explained why the PRA applies to them and to the requested records. CP 42-63.

The requests were made for the specific records requested due to the intense public interest and desire for scrutiny of the Legislature and

Legislators at the time. First, the Legislature was charged with passing a budget and funding education to avoid the State facing millions of dollars in fines and being held in contempt by the State Supreme Court related to K-12 funding, and the Media was justifiably interested in the appointment calendars and work-related texts and emails to learn where the individual Legislators were if they were not at the Capital so hearings could be held and votes could be taken, and also who was influencing their legislative decisions and actions. Second, the Media learned, through their own sources, that numerous women had alleged harassment at the State Capital and reported having been forced to resign when the accused individuals were not disciplined or held accountable. The accusations came during the nationwide wave of the “Me Too” movement across the country where previously silent, and powerless, subordinates began reporting on the years of harassment they had faced in the workplace, including within the government. More than 175 women who work in or with the Washington State Legislature signed a letter in November 2017 entitled “Stand With Us” that read in relevant part:

Over the last few weeks, people from every walk of life have stepped forward and created a broad public dialogue about what we’ve always known in our own workplaces: inappropriate, sexually harassing behavior and assault are pervasive. And sexually harassing behavior, manipulation and coercion cut across all industries and professions.

As women serving and working in the legislative and political realm, we add our voices to the chorus of “enough.” We stand together to change a culture that, until now, has too often functioned to serve and support harassers’ power and privilege over protection of those who work with them.

At some point in our lives, every one of us has experienced, witnessed, and counseled others through unwanted advances or a range of dehumanizing behavior – from innuendo to groping, from inappropriate comments and jokes to unwanted touching and assault.

Our political world is one of explicit and implicit power differentials. We have no clear hierarchy like a more traditional workplace. We have no safe, neutral place to report our experiences. And there are currently few possibilities for meaningful consequences for inappropriate behavior. For some of us, speaking out about harassment means choosing between our personal safety and our professional futures or policy successes. We know that countless times, women have calculated the risk, remembered what happened to other women who spoke up and seen the lack of meaningful pathways for change. And too often, the safe choice has been to “deal with” these situations ourselves.

The state legislature should be leading the way. We say we have a zero-tolerance policy. That needs to be real. Today, we challenge the leadership and members of both chambers and both parties to lead the way in our state by working together with us to change the culture from one which silently supports and perpetuates harassment to one which supports and preserves safety. We must all make a tangible commitment to end sexual harassment in all its forms in Olympia. Let’s make sure legislators, staff and lobbyists understand what sexual harassment is and how the inherent power disparities impact all of us. We need to make clear that we are all expected to intervene and stop harassment and coercive behavior. We must build a safe process for legislators, staff and lobbyists to report and relate our experiences, and create a range of meaningful consequences when lines are crossed.

Today, we stand together and commit: you can come to us if you are in a position of risk. We will help. We will work to protect you. And we will continue to call on leadership to create and use both structures and individual influence to change this culture.

Now is the time. Stand with us.

CP 355-357.

Senate and House Counsel responded jointly to all four of the PRA requests sent by the Media claiming to respond on behalf of the Office of the Chief Clerk of the House and the Secretary of the Senate and claiming, as they had done in response to several earlier requests by the Media, that the PRA does not apply to these records or these offices or entities.

Finding that answer unacceptable, as well as legally incorrect, the Media brought this lawsuit. The trial granted summary judgment in this matter finding the individual state legislative offices of legislators are subject to the PRA and that those four defendants violated the PRA, but that the Legislature, House and Senate were not agencies under the PRA and that they were only subject to the PRA in a limited capacity. The trial court seemingly held that records related to sexual harassment complaints and responses, thus, were not subject to disclosure, or able to be obtained through the PRA, unless those records were in the possession of an

individual State Legislative Office of an individual legislator who had been asked for them.

The parties each sought discretionary review of the portion of the holding that went against them, and the trial court certified both issues as appropriate for direct discretionary review, which review was granted by this Court. This appeal follows. The records requested by the Media have still not been disclosed to the Media, and the public remains without access to the records requested.

The Defendants do not dispute, and have not disputed, that if the Defendants are subject to the PRA that these records are public records and are not exempt. The Defendants further do not dispute that unless the Defendants are deemed to be agencies and to have access to the records requested, including the specific sexual harassment complaints and investigations, that the public will not have a means to obtain those records and such records will fall, in effect, into an inaccessible black hole.

IV. ARGUMENT AND AUTHORITY

A. Initiative I-276.

In November 1972, the people of the State of Washington passed Initiative I-276 by a vote of 959,143 for to 372,693 against. CP 228-249. The Initiative required all state, county, and city governments to allow and

provide access to their records and required disclosure of all political campaign and lobbying contributions and expenditures as well as full access to information concerning the conduct of government. Id. The measure became the Public Disclosure Act and was codified at RCW 42.17 et seq. in 1973. The Initiative came a year after the Legislator's efforts, it describes in its briefing, to create a repository of certain legislative records with the office of the Chief Clerk and Secretary—clearly indicating that the Legislator's 1971 action was not sufficient in the public's mind since it passed a much broader Initiative the next year. The public record portion of the law was later re-named the Public Records Act and moved to RCW 42.56, et. seq.

Initiative I-276 contained the following declaration of policy:

SECTION 1. Declaration of Policy. It is hereby declared by the sovereign people to be the public policy of the State of Washington:

(1) That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided.

(2) That the people have the right to expect from their **elected representatives at all levels of government** the utmost of integrity, honesty and fairness in their dealings.

(3) That the people shall be assured that the private financial dealings of their **public officials**, and of candidates for those offices, present no conflict of interest between the public trust and private interests.

(4) That our representative form of government is founded on a belief that those entrusted with the offices of government have nothing to fear from full public disclosure of their financial and

business holdings, provided those officials deal honestly and fairly with the people.

(5) **That public confidence in government at all levels is essential and must be promoted by all possible means.**

(6) That public confidence in government **at all levels** can best be sustained by assuring the people of the impartiality and honesty of the officials in all public transactions and **decisions.**

(7) That the concept of attempting to increase financial participation of individual contributors in political campaigns is encouraged by the passage of the Revenue Act of 1971 by the Congress of the United States, and in consequence thereof, it is desirable to have implementing legislation at the state level.

(8) That the concepts of disclosure and limitation of election campaign financing are established by the passage of the Federal Election Campaign Act of 1971 by the Congress of the United States, and in consequence thereof it is desirable to have implementing legislation at the state level.

(9) That small contributions by individual contributors are to be encouraged, and that not requiring the reporting of small contributions may tend to encourage such contributions.

(10) That the public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private.

(11) That, mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, **full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.**

The provisions of this act shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying, and the financial affairs of elected officials and candidates, and **full access to public records so as to assure continuing public confidence in fairness of elections and governmental processes, and so as to assure that the public interest will be fully protected.**

CP 228-249.

Initiative I-276 mandated that “Each agency, in accordance with

published rules, shall make available for public inspection and copying all public records.” Initiative I-276 defined public record as follows: “‘Public record’ includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.” Initiative I-276 defined “agency” as follows: “‘Agency’ includes all state agencies and all local agencies. ‘State agency’ includes **every state office, public official, department, division, bureau, board, commission or other state agency**. ‘Local agency’ includes every county, city, city and county, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public ‘agency.’” (emphasis added).

Initiative I-276, by its definition of “agency” to include “every state office, public official, department, division, bureau, board, commission or other state agency” showed its intention that it apply to the Washington State Legislature, Washington State Senate, Washington State House of Representatives and the individual Washington State Senators and Washington State Representatives.

In 1977, the Legislature amended the definition of “agency” in the Act to remove the words “public official” but kept the remaining parts of the

definition. The bill summary made clear the edit was “to be more specific in encompassing all governmental units at each level of state and local government.” CP 250-292.

B. The 1992 Amendment

In 1992, the Legislature amended the Act to add the following mandate, now found at RCW 42.56.030, and in 1992 found at RCW 42.17.251:

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**. The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

(emphasis added).

C. The 1995 Amendment, ESSB 5684.

In 1995, the Legislature amended the Act again through ESSB 5684 which was enacted into law. CP 121-177. The 1995 amendment continued to require all state and local agencies to produce public records, and continued to define public records as “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” CP 132 at ¶(36).

The word “agency” was not amended, and continued to be defined as” **all state agencies** and all local agencies.” CP 123-124 at ¶(1) (emphasis added). “State agency” continued to be defined as “**every state office, department, division, bureau, board, commission, or other state agency.**” CP 123-124 at ¶(1) (emphasis added). The amendment created a definition for the words “**State Office**” – which the Act defined as a “State Agency.” The amendment defined “State Office” for purposes of the definition of “agency” as follows: “**‘State office’ means state legislative office** or the office of governor, lieutenant governor, secretary of state, attorney general, commissioner of public lands, insurance commissioner, superintendent of public instruction, state auditor, or state treasurer.” CP 132 at ¶(39) (emphasis added).

The same 1995 amendment also added a definition for “State Legislative Office” – a term contained within this new definition of “State Office.” “**State legislative office**” was defined as “**the office of a member of the state house of representatives or the office of a member of the state senate.**” CP 132 at ¶(38).

So the 1995 amendment made clear that “**the office of a member of the state house of representatives or the office of a member of the state senate**” was a “**state agency,**” and the amendment continued to require “**state agencies**” to **comply with the Act and produce public**

records, which continued to be defined as “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” CP 132 at ¶(36). In other words, the 1995 amendment further established that the individual offices of each Senator and Representative were state agencies under the Act and that those agencies had to respond to and produce records under the Act under the broad definition of “public records” that applies to all other state agencies.

The primary basis for Defendants’ position in this lawsuit is one other change made in this same 1995 amendment. The amendment added a specific definition for public records possessed by two newly-addressed entities—the “office of the secretary of the senate and the office of the chief clerk of the house of representatives.” These offices did not individually and in isolation directly fall within the newly-created definition of “State Office” because they were not the “state legislative office or the office of governor, lieutenant governor, secretary of state, attorney general, commissioner of public lands, insurance commissioner, superintendent of public instruction, state auditor, or state treasurer.” They may have qualified, as a part of the Senate and House, as a “State Agency” as either a “department, division, bureau, board, commission, or other

state agency”, but the amendment assigned certain custodian of record duties to these two offices to gather specified types of records and assign them to the Secretary of State or State Archives, and so the amendment sought to limit the scope of public records to be requested from those two specific new offices such that they would not need to gather up all the individual Senators’ and Representatives’ materials as those would be produced by the Senators and Representatives themselves as “State Agencies”. See also CP 342-352.

The sentences added to the definition of “public record” for the office of the clerk and secretary read as follows:

For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.

CP 132 at ¶(36).

The 1995 amendment did not change the definition of “State Agency”, and “State Agency” was defined in this same amendment to still include “State Office,” and “State Office” was defined to include “State Legislative Office,” and “State Legislative Office” was defined as “the office of a member of the state house of representatives or the office of a member of the state senate.” CP 123-124, 132. So while the 1995

amendment created specific obligations for the newly-addressed offices of the chief clerk of the house and secretary of the senate, it did not in any way reduce the public record obligation on individual Senators or Representatives or their respective individual State Legislative Offices, nor did it alter the obligation of the Legislature, Senate and House as State Agencies to comply with the public records law.

The history behind the 1995 Amendment is instructive for understanding why the Amendment read as it did. The 1995 Legislative Session began at the conclusion of one of the largest electoral campaign scandals to the State Legislature in all of its history. CP 343. Staff members and Legislators had been investigated and prosecuted for the improper use of public funds for political campaigns. Id. It was a common practice at the time for paid Legislative staff members to work on political campaigns during State paid work time, using State-provided resources. Id. The practice was blatantly illegal. At the end of the investigation four staff members, two from the House and two from the Senate, took a plea deal and admitted to guilt to save all the others who could have been punished. CP 344. At this time the Legislature and Legislative staff were being faced with numerous public records requests from the media and the public for records that would show these improper campaign activities, and staff of the Chief Clerk of the House and of the Secretary of the

Senate did not have access to the records of individual Legislators in order to provide them and were trying to force Legislators to provide the records to those offices so the records could be produced. Id.

The 1995 Amendment was an attempt to address the very serious public mistrust in the Legislature and its practices related to use of public funds and State-paid staff time to work on political campaigns, a means of assuring the accountability and transparency of individual Legislators and their personal staff, and protecting the administrative staff of the Chief Clerk of the House and Secretary of the Senate from having to attempt to compel Legislators to give them records to produce in response to public records requests. Id. The Amendment made clear that the individual State Legislative Offices of the Legislators were themselves “State Agencies” for purposes of the public records law, and that the individual State Legislative Offices were responsible for providing their own public records upon request. Id. The Amendment then provided that certain records in the custody and control of the Clerk of the House and the Secretary of the Senate would be provided by these offices—and that public records to be provided by these two offices were to have a narrower definition since the State Legislative Offices of each Legislator would clearly be defined as a State Agency and would be subject to the Public Records Act and required to provide the far more broadly defined scope of

“public record” that all State and Local Agencies face. Id. The text of the Amendment itself—which includes both the introduction of the definition as a State Agency of the State Legislative Office of each Senator and Representative as well as the narrower definition of public records for the Secretary and Clerk—clearly shows this intent, as well as result, of the Amendment. That version became law and was understood by all involved to have the effect just described. It was not until twelve years later that the Legislature and some Legislators sought to revise history and pretend the Amendment did something it did not. CP 345.

D. 2003 Attempted Bill, SB 5638.

In 2003, lawmakers in the Senate introduced a bill—SB 5638—that would have clearly exempted lawmakers from the public records law. CP 186 at ¶(36).¹ The bill sought to amend the definition of “public record” to add the words “state legislative offices” to the sentence that read

For the office of the secretary of the senate, and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representative.

Id. This would have made the “state legislative offices” subject to the

¹ See also legislative history at <http://app.leg.wa.gov/billsummary?BillNumber=5638&Year=2003> (last visited November 2, 2017).

narrower definition of “public record” that covers the offices of the chief clerk of the house and secretary of the senate. The definitions for State Agency, State Office and State Legislative Office were not changed. CP 179, 186. The Bill Digest was clear that the goal of the Bill was to amend the Act to change the application of public records laws to state legislative offices. CP 189.

The Senate Bill report for the Bill was even more clear regarding the understanding of the legislators at the time, and the goal of the proposed bill. It read in relevant part as follows:

A public record, for public disclosure purposes, includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency. For the office of the Secretary of the Senate, and the office of the Chief Clerk of the House (**but not offices of members of the House or Senate**), public records means legislative records; all budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the Legislature; and any other record designated a public record by any official action of the Senate or the House. **In other words, it appears that there could be a different standard for public disclosure of records in the possession of individual legislators than there is for records in the possession of the Senate and House of Representatives as institutions.**

CP 190 (emphasis added). The Bill Summary stated the goal of the Bill was to create the “same standard for disclosure of public records applies to each senator and representative as applies to the Secretary of the Senate and the Chief Clerk of the House.” Id.

The 2003 Bill is evidence the Legislators and the Legislature did not believe the 1995 amendment had removed the Senate, House or the individual State Legislative Offices of the Senators and Representatives from the definition of State Agency and the broad definition of public record that applies to all State Agencies. Had they believed they were already subject to the narrower definition of “public records” that applies to the offices of the clerk and secretary the Bill would not have been necessary. The fact it was introduced is compelling evidence that eight years after the 1995 amendment the Legislators understood the 1995 amendment did not do what they now claim it did.

The 2003 Bill did not pass and did not become law.

E. 2005 Bill Attempt, SSB 1758.

In 2005, the Senate again tried to pass a Bill with identical language to the 2003 Bill again trying to add the words “state legislative offices” to the sentence discussing the obligations of the office of the clerk and the secretary, again trying to make Senators and Representative and their State Legislative Offices not covered by the broad definition of public records. CP 226 at p. 34 line 2. The Senate amended HB 1758 to try and insert this language, but it was rejected by the House and the

Senate withdrew this amendment before it the Bill was passed.² The 2005 attempted Bill amendment again illustrates that the Legislators did not believe the 1995 amendment removed them from the reach of the public records law or the broad definition of public records for all State Agencies. Had the Legislators believed themselves already subject to the narrower definition of public records that applied to the offices of the clerk and secretary, they would not have felt the need to again try and add the words “state legislative offices” into this definitional section.

F. 2005 Amendment, SHB 1133 Retaining Same Definitions as Campaign Finance and Ethics Laws.

In 2005, then Representative Toby Nixon, now President of the Washington Coalition for Open Government, introduced a Bill, HB 1133, to separate the public record portion of RCW 42.17 into its own chapter. CP 347. Representative Nixon made clear that he wanted to organize public record exemptions topically to make them easier for the public to locate them. CP 348. The separation was not meant to change in any way the meaning of either law, and the Bill and resulting law as passed, specifically confirmed that. The Bill went through

² See complete legislative history available at [http://app.leg.wa.gov/billsummary?BillNumber=1758&Year=2005\(last](http://app.leg.wa.gov/billsummary?BillNumber=1758&Year=2005(last) visited November 2, 2017).

modifications and was passed as SHB 1133 and signed into law. CP 360-594. The Amendment made clear that its purpose was not to change the law, but only to separate the provisions related to the PRA into its own chapter. CP 391 lines 22-26. Perhaps most importantly, the new PRA did not contain its own definitions but specifically stated “The definitions in RCW 42.17.020 apply throughout this chapter.” CP 391 lines 29-30. Thus the 2005 Amendment that created the separate Public Record Act specifically imported, and retained, the same definitions of State Agency, State Office, and State Legislative Office that had been part of the PRA since 1995.

G. 2007 Amendment, SHB 1445.

In 2007, the House introduced HB 1445 to make some minor edits to the PRA. It included a definition section but repeated only three definitions: “agency”, “public record” and “writing”. CP 606 lines 7-CP 607 line 19. It kept the original definition for “state agency” from its predecessor location of RCW 42.17.020, and did not create a separate one for “state office” – which continued to be a subpart of “state agency”. Id. There was no indication in the Amendment, or any of the legislative history, that the definition of State Agency or State Office was to mean anything other than it had meant for the past 12 years since the 1995 Amendment.

The Defendants now try and claim this separation of the PRA in 2005, and the transfer of just three definitions in 2007 without providing definitions for any of the terms those definitions include, is meant to show the Legislature meant to exempt itself from the PRA. The Amendment does not support that claim, nor does the legislative history. The definitions of “State Office” and “State Legislative Agency” now found in RCW 42.17A apply with equal force to the PRA which does not contain its own definitions of the terms, particularly since from 1995 to 2007 the PRA specifically applied those definitions.

H. Defendants’ Incorrect Characterization of the Amendments.

The Defendants’ litigation and theory of their case has been akin to litigation whack-a-mole: raising one argument, only to change position when that argument was effectively knocked over the head. First, the Defendants argued that the 1995 Amendment was THE occasion when they exempted themselves from the Act. The language of the 1995 amendment clearly showed that the Legislature and State Legislative Offices of the individual members of the state House of Representatives and state Senate were “agencies” under the law with the 1995 Amendment and thus subject individually to the same broad public record obligations as all other state agencies. The same 1995 Amendment creating the special duties of the office of the clerk and secretary, added language showing the

individual State Legislative Offices were agencies. Yet, years later, the Legislators, Legislature and legislative staff began citing to the 1995 Amendment as the alleged even that exempted them from the PRA.

In 2003 and 2005—realizing they were subject to the public records requirements for all State Agencies and not the narrower definition of records for the office of the clerk and secretary, the Senate tried—twice—to amend the law and claim the narrower definition for their State Legislative Offices, but could not get the measure past the House either time. The fact they tried in 2003 and 2005 to exempt themselves shows what should be clear from the legislative history of the bills, and the language of the laws as passed—the Legislators and Legislature had not removed themselves from the reach of the PRA.

Then the Defendants argued that the 2005 Amendment that moved the PRA to its own chapter was THE event that allegedly showed they had exempted themselves from the definition of agency and the PRA. When it was established that the 2005 Amendment still was importing ALL the definition from RCW 42.17.020 into the new RCW 42.56, the Defendants latched onto yet another argument. Now they argue that the 2007 Amendments, that restated just the umbrella “state agency” definition and did not offer any definition for terms like “state office” contained within the definition of state agency was THE event when they finally exempted

themselves from the law.

The trial court here correctly found that since the 2007 Amendment, and the law as written today, does not define the term “State Office” or any subparts of State Agency, that the Court should use the definitions that had previously been given to that term, and had been used for 12 years for the PRA from 1995 to 2007 – rather than reject that definition and adopt a definition not reflected in the statute or any of the legislative history.

For years after 1995, the Legislature produced public records of the type sought in these PRA requests without question or complaint. CP 342-347. Rowland Thompson, Executive Director of Allied Daily Newspapers of Washington, who was present at the Capital all that time, confirmed based on personal knowledge the events where this was done, and the background that led to the 1995 Amendment in the first place. CP 342-352. The Defendants moved to strike portions of his testimony, and the trial court denied their motion. The Defendants have not assigned error to this finding by the trial court or the order denying the motion to strike. The Defendants cannot rebut that testimony, nor did they do so below. It is a verity on appeal. In 1995, 2003 and 2005, and all years in between and for many years after, the Legislature, Legislators, and Legislative staff all understood the public records laws applied to State Legislative Offices of every Senator and Representative and to the Senate and House as a whole

the same as every legislative body of every local agency such as school boards and city and county councils, and that records held by the various subparts of the Legislature were similarly subject to disclosure. Id.

Nowhere in the legislative history, or language of the Amendments themselves, can the Defendants identify ANY statement to the public, or to each other, that the separation bill in 2005 or the minor Amendment in 2007 were meant to suddenly make Legislators and the Legislature removed from the PRA. And it is reasonable that IF such action was the intent, that there would have been some hint of that fact, some discussion of it, before, during, and after it was passed. But there is none. This is because the Amendments were never intended to change the scope of the PRA or the reach of the law to individual legislators or the many departments, offices, and subparts of the Legislature. Defendants next fall on an argument, without substance, that legislators and parts of the Legislature cannot be “agencies” or that laws cannot be written that apply to the Legislature or Legislature for separation of power reasons. These arguments will be addressed in turn.

I. Other Relevant Statutory Definitions of State Agency.

First, there is no support for Defendants claim that “agencies” cannot include the individual state office of legislators or all or part of the legislative branch. Several other statutes in Title 42 support the

interpretation urged by Media in this appeal, and contradict that suggested by Defendants.

For example, the Ethics in Public Service Act at RCW 42.52 et seq., defines “agency” as follows:

any state board, commission, bureau, committee, department, institution, division, or tribunal in the legislative, executive, or judicial branch of state government. **“Agency” includes all elective offices, the state legislature**, those institutions of higher education created and supported by the state government, and those courts that are parts of state government.

RCW 42.52.010(1) (emphasis added).

The Campaign Disclosure and Contribution laws, previously located at RCW 42.17 with the public record law, and now found at RCW 42.17A et seq., define “State Agency” the same as the PRA and the same the as joint 1995 amendment to both laws:

(2) “Agency” includes all state agencies and all local agencies. “State agency” includes every state office, department, division, bureau, board, commission, or other state agency. “Local agency” includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

RCW 42.17A.005(2). It defines “State Office” the same as the 1995 amendment:

“State office” means state legislative office or the office of governor, lieutenant governor, secretary of state, attorney general, commissioner of public lands, insurance commissioner,

superintendent of public instruction, state auditor, or state treasurer.

RCW 42.17A.005(44). “‘Legislative office’ means the office of a member of the state house of representatives or the office of a member of the state senate.” RCW 42.17A.005(29).

The Public Record Act defines “Agency” and “State Agency” as follows:

“Agency” includes all state agencies and all local agencies.
“**State agency**” **includes every state office**, department, division, bureau, board, commission, or other state agency. “Local agency” includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

RCW 42.56.010(1) (emphasis added). And a “public record” for all “State Agencies” and all local agencies is the broad definition written and demanded by the people when they wrote and passed it in 1972:

“Public record” includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. ...

RCW 42.56.010(3)(in part). In 1995 – when adding the offices of the chief clerk and secretary, the Legislature created a narrower definition just for those offices as

For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means

legislative records as defined in [RCW 40.14.100](#) and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives....

RCW 42.56.010(3) (in part). That language **does not apply** to the State Offices and State Agencies to whom the Media's PRA requests were made here

“State agency” is defined by 19 U.S. Code § 2571(16) as “any department, agency, or other instrumentality of the government of any State or of any political subdivision of any State.” This definition is broad enough and would encompass the individual State Offices of the Legislators as well as the various parts of the Legislature, House and Senate, all of which qualify as an “instrumentality” of the State of Washington or a political subdivision of the State.

The “Access Washington” website, created and administered by the State of Washington, lists the Legislature in its directory of “State Agencies, Boards and Commissions”. It is found under L in this Directory at <http://access.wa.gov/index.html> (last visited 1/17/18). The Senate is found under this directory of “State Agencies, Boards and Commissions” under S at <http://access.wa.gov/agency.html#S> (last visited 1/17/18). The House of Representatives is found under this directory of “State Agencies,

Boards and Commissions” under H at <http://access.wa.gov/agency.html#H> (last visited 1/17/18).

The website Data.wa.gov—created and maintained by the State of Washington—also lists the House, Senate and Legislature in its “Listing of all Washington State Agencies and their Abbreviations”. **See** <https://data.wa.gov/dataset/Washington-State-Agencies-Listing/hsx3-pn9g/data> (last visited 1/17/18). The Legislature is listing #111 abbreviation LEG, the House is listing #88 abbreviation HOUSE, and the Senate is listing #167 abbreviation SENATE.

The Office of Financial Management (“OFM”) lists the House and Senate as “Agencies” in its “Agency Activity Inventory” which OFM states “summarizes activities of each budgeted **agency** within Washington state government.” (emphasis added). **See** OFM website at <https://ofm.wa.gov/budget/agency-activities-and-performance/2015-17-agency-activity-inventory> (Last visited 1/17/18). See House listing at <https://ofm.wa.gov/sites/default/files/public/legacy/budget/activity/15-17/011inv.pdf> (last visited 1/17/18) and Senate listing at <https://ofm.wa.gov/sites/default/files/public/legacy/budget/activity/15-17/012inv.pdf> (last visited 1/17/18). It lists them as “Agencies” and assigns them an “Agency Code” number and abbreviation in its Agency Codes and Authorized Abbreviations at

<https://ofm.wa.gov/sites/default/files/public/legacy/policy/75.20.htm> (last visited 1/17/18).

Not surprisingly, since OFM and Data.wa.gov and the Access Washington websites list them as State Agencies, Wikipedia also lists the Senate, House, and Legislature in its list of “Washington State agencies” at https://en.wikipedia.org/wiki/List_of_Washington_state_agencies (last visited 1/17/18).

The PRA is to be broadly construed in favor of disclosure. The State describes the Senate, House, and even the Legislature as a whole many times as “State Agencies”. Reasonable people, including those who passed the initiative that became the PRA, do not draw the distinction the Defendants do between administrative agencies or executive agencies or legislative agencies and recognize the broader concept of “State Agencies” encompassing all three.

J. The Organizational Structure of the Senate and House Further Illustrates Why Relief Should be Granted for the Media on All Their Claims.

The Legislature publishes an Organizational Chart for the Senate on the Legislature’s website at <http://leg.wa.gov/Senate/Administration/Documents/Orgchart2012.pdf> (last visited 1/16/18). CP 746, 773. The website reports the Chart has been unchanged since July 12, 2012. *Id.* The Senate Organizational Chart

shows that the Washington State Senate Members are in charge of, and superior to, the Facilities and Operations Committee—where all sexual harassment complaints are supposed to go when dealing with a complaint against a member of the Senate. Id.; see also CP 350 at ¶16. The Chart further shows that the Washington State Senate Members are above, and in charge of, the Senators’ personal staff—who, as the Chart shows, are not supervised by the office of the Secretary of the Senate or subordinate to such office—and that the Washington State Senate Members are further above, and in charge of, the Republic Caucuses and Democratic Caucuses and each of their sub-entities—Administration, Communications, and Policy. CP 773.

The House of Representatives does not publish an Organizational Chart, but its structure is nearly identical to that of the Senate except that it has the Office of the Speaker where the Facilities and Operations Committee is for the Senate, and the Speaker has his or her own attorney so there is an additional counsel box for the Speaker’s Attorney. Like with the Senate, the Washington State House of Representative Members are above, and in charge of, the Representatives’ personal staff—who are not supervised by the office of the Chief Clerk of the House—and, like with the Senate, the Washington State House of Representative Members are further above, and in charge of, the Republic Caucuses and Democratic Caucuses and each of

their sub-entities. See CP 342-352.

The Senate's Organizational Chart, prepared by the Legislature and posted to its website, also supports the Media's argument that the individual Senators, through their State Legislative Offices, should be deemed to have custody and control over any record in the hands of any of the sub-entities they are above (which is all of them), including specifically the Office of the Secretary of the Senate. Thus, while a request to the Office of the Secretary of the Senate might be limited to the records possessed by that Office, and by the PRA definitions of records to be produced by that Office, this does not mean a request to the State Legislative Office of a Senator or all the Senators, or to the Senate as a whole, or the Facilities and Operations Committee, or any other subpart of the multi-faceted entity that is the Senate and Legislature can appropriately be limited to just the records subject to production by the Senate Secretary.

Similarly, the individual Representatives, through their State Legislative Offices, should be deemed to have custody and control over any record in the hands of any of the sub-entities they are above (which like the Senate is all of them), including specifically the Office of the Chief Clerk of the House. Thus, while a request to the Office of the Chief Clerk of the House might be limited to the records possessed by that Office, and by the PRA definitions of records to be produced by that Office, this does not mean

a request to the State Legislative Office of a Representative or all the Representatives, or to the House as a whole, or the Office of the Speaker, or any other subpart of the multi-faceted entity that is the House and Legislature can be appropriately be limited to just records subject to production by the House Clerk.

Defendants, and the trial court, are wrong to conclude that the public cannot obtain public records from the Senate or House or any of its departments or divisions or committees other than through the Senate Secretary or House Clerk. At a minimum, a request, like the Media's here, that went to the State Legislative Offices of all 49 Senators and 98 Representatives, should be deemed a request to those members and, as the Members in their Organizational structure are above all other offices and sub-parts of the Senate and House, the Senators and Representatives should be held to have custody and control over any record residing or under the control of anyone within the Senate or House and ordered to produce it.

The Senators and Representatives have control over the rules by which the Senate and House Operate. The Senators and Representatives assign the duties and responsibilities to the Offices of the Chief Clerk of the House and the Secretary of the Senate and each department and division and committee of the Senate and House. The Senators and Representatives cannot effectively remove records from their custody and control by

directing that they be held by an entity they supervise and directly control. Even if the Senators and Representatives expanded, or in the future expand, the duties and responsibilities of the Secretary and Clerk this does not elevate those Offices above the Members, or lead to an exclusion of public access to records.

Further, on the Legislative website, it further lists nine separate “Legislative Agencies” within the Washington State Legislature. See <http://leg.wa.gov/legislature/Pages/LegislativeAgencies.aspx> (last visited 1/16/18). CP 747-748 at ¶7. These nine legislative agencies are further under the control of the Senators and Representative, but also are offices, committees, boards and centers that are a part of, and serve, the Senate, House and Legislature and the Legislators. They are the following:

- **Office of the State Actuary (OSA)** (<http://leg.wa.gov/OSA/Pages/default.aspx>) whose duties are described as "Monitors the balance between the cost of future retirement benefits and the projected value of retirement fund assets. Performs actuarial services for the Department of Retirement Systems. Provides actuarial assistance and advice to the Legislature."
- **Joint Legislative Audit and Review Committee (JLARC)** (<http://leg.wa.gov/JLARC/Pages/default.aspx>) whose duties are described as “Conducts performance audits, program evaluations, special studies, and sunset reviews for the Legislature and the citizens of Washington State.”
- **Office of the Code Reviser/Statute Law Committee (SLC)** (<http://leg.wa.gov/CodeReviser/Pages/default.aspx>) whose duties

are described as “Codifies, indexes, and publishes the Revised Code of Washington. Provides a central bill drafting service.”

- **Legislative Ethics Board** (LEB) (<http://leg.wa.gov/LEB/Pages/default.aspx>) whose duties are described as “Enforces state ethics laws and rules with respect to members and employees of the Legislature.”
- **Legislative Evaluation and Accountability Program Committee** (LEAP) (<http://leap.leg.wa.gov/>) whose duties are described as “Serves as the Legislature's independent source of information and technology with respect to budgets and revenue.”
- **Select Committee on Pension Policy** (SCPP) (<http://leg.wa.gov/SCPP/Pages/default.aspx>) whose duties are described as “Reviews and recommends changes to Washington public retirement benefits.”
- **Legislative Support Services** (LSS) (<http://lss.leg.wa.gov/>) whose duties are described as “Provides legislative information services to the public, the legislative Gift Center, and media and facilities support to the Legislature.”
- **LEG-TECH** (Legislative Service Center) (<http://leg.wa.gov/legtech/Pages/default.aspx>) whose duties are described as “Provides the IT infrastructure used by legislative agencies for law-making, research, communication, administrative and accounting responsibilities.” And
- **Joint Transportation Committee** (JTC) (<http://leg.wa.gov/JTC/Pages/default.aspx>) whose duties are described as “Serves as the joint House and Senate fact-finding committee on highways, streets, and bridges.”

These nine legislative agencies are further evidence that the Senate, House and Legislature as a whole is a multi-faceted entity, with parts individually meeting the definition of “State Agency” under the PRA. The

records sought by the Media could be held, at the Senators' and Representatives' choosing, within any number of its sub-parts, but this does not change the fact the Senators and Representatives and their leadership have custody and control of any such record. The Senate, House, Legislature and the individual State Legislative Offices of the Senators and Representatives cannot hide their records of sexual harassment complaints and any investigations into them in a black hole inaccessible to the public by shifting the repository of such records or the duties of Legislative staff.

K. The Duties and Powers of the Clerk and Secretary are Overstated by the Defendants.

Defendants acknowledge that the Senate and House pass their own Rules that govern the operations of the Senate and House and the duties and powers of the Clerk and Secretary. For example, the 2018 House Rules define the role of the Chief Clerk at Rule 5 in full available at <http://leg.wa.gov/House/Pages/HouseRules.aspx#anchor5> (last visited

1/17/18), as follows:

Rule 5 - Chief Clerk

The chief clerk shall perform the usual duties pertaining to the office, and shall hold office until a successor has been elected.

The chief clerk shall employ, **subject to the approval of the speaker**, all other house employees; the hours of duty and assignments of all house employees shall be under the chief clerk's directions and instructions, and they may be dismissed by the chief clerk **with the approval of the speaker**. The speaker shall sign and the chief clerk shall countersign all payrolls and vouchers for all expenses of the house and

appropriately transmit the same. In the event of the chief clerk's death, illness, removal, or inability to act, the speaker may appoint an acting chief clerk who shall exercise the duties and powers of the chief clerk until the chief clerk's successor shall be elected.

The Clerk's power over staff is specifically limited and requires approval of the Speaker for hiring and firing staff. It further describes his or her role as performing the "usual duties" pertaining to the office, allowing for changes at the whim of the House, of those duties and the role of such office.

The Senate is similar. At Senate Rule 3 it defines the role of the Secretary of the Senate in full, available at http://leg.wa.gov/Senate/Administration/Pages/senate_rules.aspx#rule3, as follows:

Rule 3.

1. The senate shall elect a secretary, who shall appoint a deputy secretary, both of whom shall be officers of the senate and shall perform the usual duties pertaining to their offices, and they shall hold office until their successors have been elected or appointed.
2. The secretary is the Personnel Officer of the senate and shall appoint, **subject to the approval of the senate**, all other senate employees and the hours of duty and assignments of all senate employees shall be under the secretary's directions and instructions and they may be dismissed at the secretary's discretion.
3. The secretary of the senate, prior to the convening of the next regular session, shall prepare the office to receive bills which the holdover members and members-elect may desire to prefile commencing with the first Monday in December

preceding any regular session or twenty days prior to any special session of the legislature.

The Secretary's power over staff is specifically limited and requires approval of the Senate for hiring staff. The Rules further describes his or her role as performing the "usual duties" pertaining to the office, allowing for changes at the whim of the Senate, of those duties and the role of such office.

The 1995 Amendment created a new role for the Clerk and Secretary specifically to protect those offices from becoming the necessary repository, and collector, of all records from the individual Senators and Representatives over whom they had no power to compel compliance. This narrow and specific role did not exempt the Senators and Representatives from their own duties to comply with the PRA, nor did it exempt the remainder of the Senate, House and the many sub-parts of these two agencies and the many sub-parts that make up the Washington State Legislature.

L. Legislative Intent.

A court's "fundamental objective" when interpreting a statute "is 'to discern and implement the intent of the legislature.'" (quoting State v. J.P., 149 Wash.2d 444, 450, 69 P.3d 318 (2003)); Estate of Bunch v. McGraw Residential Center, 174 Wn.2d 425, 432, 275 P.3d 1119 (2012).

Legislative intent is implemented “by giving effect to the plain meaning of a statute,” and the plain meaning “may be gleaned ‘from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.’ ” Flight Options, LLC, 172 Wn.2d 487, 500 (quoting Dep’t of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)); Estate of Bunch, 174 Wn.2d at 432. If a “statute is ‘susceptible to two or more reasonable interpretations,’ the statute is ambiguous.” Estate of Bunch, 174 Wn.2d at 432 (quoting Burton v. Lehman, 153 Wash.2d 416, 423, 103 P.3d 1230 (2005)). “However, a statute is not ambiguous merely because two or more interpretations are conceivable.” Id. If a statute is ambiguous, the Court “may look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent.” Rest. Dev., Inc. v. Cananwill, Inc., 150 Wash.2d 674, 682, 80 P.3d 598 (2003).

Here, the Media’s requests were made to the State Legislative Offices of every Senator and Representative, including those of the Defendants, and to the Legislature, Senate and House as State Agencies. CP 42-63. The Media’s requests were not made to the offices of the chief clerk or secretary. The clear language of the Statute indicates legislative intent that that narrower definition of public records **only** applied to the offices of the

chief clerk and secretary. The inclusion in the 1995 amendment of the definition of State Office and State Legislative Office, and the omission of those terms from the sentence with offices of chief clerk and secretary shows the Legislature meant just the clerk and secretary to have the narrower scope. Further, the fact the Senate twice tried to explicitly add “state legislative offices” into that same limiting sentence years after the 1995 amendment is further evidence of legislative intent of the 1995 amendment that the 1995 amendment had no already limited the scope for requests to state legislative offices. The fact those 2003 and 2005 attempts failed illustrate a lack of legislative intent to exclude the legislators from the PRA. And the fact so many other statutes in Title 42 which define Agency and State Agency also include state legislative offices and the Legislature itself is additional evidence establishing legislative intent that the legislators and the Legislature not be exempted from the PRA. The numerous other references to the Senate, House, and Legislature as State Agencies, cited herein, by the State provides further evidence discrediting the Defendants’ claim that only “executive” entities can be “agencies”.

The Media made their requests to the Senate, House and State Legislative Offices of each Senator and Representative. The requests were not made to the offices of the chief clerk of the house or the secretary of the senate. The PRA applies to the Plaintiff Media’s Requests, and

Defendants were obliged to provide records and appropriately respond, which they did not do.

M. The Records Requested are Public Records.

There can be—and has been no dispute—that if the Defendants are agencies then the records requested are public records. A "public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. RCW 42.56.010(3). Text messages sent and received via a personal cell phone are public records when they are sent and received within the scope of the official's official role. See Nissen v. Pierce County, 183 Wn.2d 863, 333 P.3d 577 (2015).

The records requested here pertain to the calendars and text messages of sitting Senators and Representatives during Legislative Session and related to their legislative duties and the complaint, investigation, and response to harassment claims at the Legislature. There can be no realistic dispute that the records fall within the definition of "public records".

N. The PRA Requests All Went to the Individual 147 Legislators at their State Legislative Offices.

The Media made four separate PRA requests that are the subject of this lawsuit. Two of the requests went to the State Legislative Office of each and every one of the 49 State Senators at his or her official email address.

CP750-754, 761-765. Two of the requests went to the State Legislative Office of each and every one of the 98 State Representatives at his or her official email address. CP 755-760, 766-771. It is undisputed that all four of the PRA requests went directly to the individual Senators or Representatives at their State Legislative Offices.

O. The Two Named Senators and Two Named Representatives are Parties to this Lawsuit.

The Media have PRA claims against all of the 147 State Legislative Offices of the 49 Senators and 98 Representatives who did not fully comply with the four PRA requests. The Media chose to sue just four of them **at this time** to establish that the Legislature, Senate and House, and the State Legislative Offices of all of the Senators and Representatives were subject to the PRA and prove that they all needed to comply and produce the records sought. The four State Legislative Offices that were sued were sued in their capacity as Senators or Representatives, and thus the Court absolutely had, and has authority to enter relief against them and their State Legislative Offices as well as against the Senate, House and Legislature. The Prayer for Relief included relief for all of the Defendants, including the two Senators and two Representatives.

P. A Law is Not Unconstitutional Merely Because it Applies to Legislators or the Legislature.

The Defendants finally argue that the Legislators and Legislature

cannot be subjected to the PRA because it would violate separation of powers doctrines. As the numerous laws discussed here, as well as the Defendants' own brief shows, many laws have been passed that apply to elected officials as well as other branches of government, including the Legislature. It is not unconstitutional to allow the public to pass an Initiative that applies to all elected officials and branches of government. It is not unconstitutional for the Legislature to amend a statute such that it applies to legislators or the Legislature. The Defendants have failed to establish that their view of the appropriate interpretation of "agency" was meant by the people, or any amending Legislature, to have the narrow scope they now seek for it. The Defendants have failed to show that the Constitution will be violated if these Defendants are forced to provide the Media with their texts, emails, and calendars and the records of sexual harassment complaints and investigations at the State Legislature.

Q. The Media is Entitled to an Award of Fees and Costs under the PRA and as a Prevailing Party in this Appeal.

RCW 42.56.550(4) of the PRA provides:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action [.]

Washington courts recognize that “[s]trict enforcement of this provision discourages improper denial of access to public records.” Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 101, 117 P.3d 1117 (2005)**Error! Bookmark not defined.**; see also Am. Civil Liberties Union of Washington (“ACLU”) v. Blaine Sch. Dist. No. 503, 95 Wn. App. 106, 115, 975 P.2d 536 (1999). The PRA does not allow for court discretion in deciding **whether** to award attorney fees to a prevailing party. Progressive Animal Welfare Society v. University of Washington (“PAWS I”), 114 Wn.2d 677, 687-88, 790 P.2d 604 (1990); Amren v. City of Kalama, 131 Wn.2d 25, 35, 929 P.2d 389 (1997). The only discretion the court has is in determining the *amount* of reasonable attorney’s fees. Amren, 131 Wn.2d at 36-37.

The Supreme Court in Limstrom v. Ladenburg, 136 Wn.2d 595, 616, 963 P.2d 869 (1998), remanded back to the trial court to determine whether a violation of the PRA occurred, but awarded attorney fees— “[including] fees on appeal”—to the requester. Should the Media prevail on appeal in any respect, it should be awarded its fees and costs on appeal pursuant to the PRA and RAP 18.1.

Under RCW 42.56.550(4), a public records requestor who prevails against an agency in a PRA claim is entitled to mandatory reasonable attorney’s fees, all costs, and a daily penalty of up to \$100 per day which

can be imposed per page. Wade's Eastside Gun Shop v. Labor and Industries, 185 Wn.2d 270, 372 P.3d 97 (2016). Defendants have failed to perform an adequate search for records in violation of the PRA, silently withheld numerous records in violation of the PRA, and failed to timely cite exemptions and provide an adequate withholding log for these silently withheld records. The parties have stipulated that there are records that exist that would be responsive to the requests if the Defendants are subject to the PRA and that these were not produced, and that no explanation of exemption or withholding was made other than that the records are contended not to be subject to the PRA. This Court should thus further deem the Media the prevailing party on those additional claims in this appeal and rule that they are entitled to an award or reasonable attorney's fees, all costs, and statutory penalties in amounts to be determined by the trial court after subsequent briefing and hearing by the trial court and remand to the trial court for this additional trial court fee, cost and penalty award once all responsive records have been produced.

V. CONCLUSION

For the foregoing reasons, the Court should uphold the trial court's determination that the individual Legislators are agencies under the PRA and have violated the PRA, but reverse the trial court's finding that the Legislature, Senate or House are not agencies under the PRA or subject to

the PRA. The Court should further award the Media its reasonable fees and costs for the work on the appeal and remand to the trial court for a determination of the award of trial court fees, costs and penalties which the Media is thus due and to have the records finally produced.

RESPECTFULLY SUBMITTED this 11th day of January, 2019.

s/Michele Earl-Hubbard

Michele Earl Hubbard, WSBA #26454

Attorney for Media Respondents/Cross-Appellants

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on January 11, 2019, I filed with the State Supreme Court and delivered a copy of the foregoing Brief and this Certificate of Service by email pursuant to agreement to the following:

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